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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 97-34; Applications Nos. D-10245 and D-10246]

Amendment to Prohibited Transaction Exemptions (PTEs) 90-30 Involving Bear, Stearns & Co. Inc., 90-32 Involving Prudential Securities Incorporated, et al.

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Grant of an amendment to the Underwriter Exemptions.¹

SUMMARY: This document contains a final exemption issued by the

¹ The term Underwriter Exemptions refers to the following individual Prohibited Transaction Exemptions (PTEs): PTE 89-88, 54 FR 42582 (October 17, 1989); PTE 89-89, 54 FR 42569 (October 17, 1989); PTE 89-90, 54 FR 42597 (October 17, 1989); PTE 90-22, 55 FR 20542 (May 17, 1990); PTE 90-23, 55 FR 20545 (May 17, 1990); PTE 90-24, 55 FR 20548 (May 17, 1990); PTE 90-28, 55 FR 21456 (May 24, 1990); PTE 90-29, 55 FR 21459 (May 24, 1990); PTE 90-30, 55 FR 21461 (May 24, 1990); PTE 90-31, 55 FR 23144 (June 6, 1990); PTE 90-32, 55 FR 23147 (June 6, 1990); PTE 90-33, 55 FR 23151 (June 6, 1990); PTE 90-36, 55 FR 25903 (June 25, 1990); PTE 90-39, 55 FR 27713 (July 5, 1990); PTE 90-59, 55 FR 36724 (September 6, 1990); PTE 90-83, 55 FR 50250 (December 5, 1990); PTE 90-84, 55 FR 50252 (December 5, 1990); PTE 90-88, 55 FR 52899 (December 24, 1990); PTE 91-14, 55 FR 48178 (February 22, 1991); PTE 91-22, 56 FR 03277 (April 18, 1991); PTE 91-23, 56 FR 15936 (April 18, 1991); PTE 91-30, 56 FR 22452 (May 15, 1991); PTE 91-62, 56 FR 51406 (October 11, 1991); PTE 93-31, 58 FR 28620 (May 5, 1993); PTE 93-32, 58 FR 28623 (May 14, 1993); PTE 94-29, 59 FR 14675 (March 29, 1994); PTE 94-64, 59 FR 42312 (August 17, 1994); PTE 94-70, 59 FR 50014 (September 30, 1994); PTE 94-73, 59 FR 51213 (October 7, 1994); PTE 94-84, 59 FR 65400 (December 19, 1994); PTE 95-26, 60 FR 17586 (April 6, 1995); PTE 95-59, 60 FR 35938 (July 12, 1995); PTE 95-89, 60 FR 49011 (September 21, 1995); PTE 96-11, 61 FR 3490 (January 31, 1996); PTE 96-22, 61 FR 14828 (April 3, 1996); PTE 96-84, 61 FR 58234 (November 13, 1996); PTE 96-92, 61 FR 66334 (December 17, 1996); PTE 96-94, 61 FR 68787 (December 30, 1996); PTE 97-05, 62 FR 1926 (January 14, 1997); and PTE 97-28, 62 FR 28515 (May 23, 1997).

In addition, the Department notes that it is also granting individual exemptive relief for Ironwood Capital Partners Ltd., Final Authorization Number (FAN) 97-02E (November 25, 1996) and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc., FAN 97-03E (December

Department of Labor (the Department) which amends the Underwriter Exemptions. The Underwriter Exemptions are individual exemptions that provide relief for the origination and operation of certain asset pool investment trusts and the acquisition, holding and disposition of certain asset backed pass-through certificates representing undivided interests in those investment trusts. The amendment: (1) Modifies the definition of "Trust" to include a pre-funding account (the Pre-Funding Account) and a capitalized interest account (the Capitalized Interest Account) as part of the corpus of the Trust; (2) provides retroactive relief for transactions involving asset pool investment trusts containing pre-funding accounts which have occurred on or after January 1, 1992; (3) includes in the definition of "Certificate" a debt instrument that represents an interest in a Financial Asset Securitization Investment Trust (FASIT); and (4) makes certain changes to the Underwriter Exemptions that reflect the Department's current interpretation of the Underwriter Exemptions.

EFFECTIVE DATE: This amendment to the Underwriter Exemptions is effective for transactions occurring on or after January 1, 1992, except as otherwise provided in subsection II.A.(7) and section III.AA. of the exemption.

FOR FURTHER INFORMATION CONTACT: Wendy McColough of the Department, telephone (202) 219-8971. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On May 23, 1997, notice was published in the **Federal Register** (62 FR 28502) of the pendency before the Department of a proposed exemption to amend PTEs 90-30, 55 FR 21461 (May 24, 1990) and 90-32, 55 FR 23147 (June 6, 1990), two of the Underwriter Exemptions. The Underwriter Exemptions are a group of individual exemptions that provide substantially identical relief for the operation of certain asset pool investment trusts and the acquisition and holding by plans of certain asset-backed pass-through certificates representing interests in those trusts. These exemptions provide relief from certain of the restrictions of sections 406(a), 406(b) and 407(a) of the Act and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of certain provisions of section 4975(c)(1) of the Code.

9, 1996), which received the approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96-62.

The amendment to PTEs 90-30 and 90-32 was requested by application dated March 25, 1996, and as restated in a later submission dated February 26, 1997, on behalf of Bear, Stearns & Co. Inc.² and Prudential Securities Inc.³ (the Applicants). In preparing the application, the Applicants received input from members of the PSA The Bond Market Trade Association (formerly the Public Securities Association) (PSA).

The Department proposed the amendment to these individual exemptions pursuant to 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).⁴ In addition, the Department proposed to provide the same relief on its own motion pursuant to the authority described above for many of the other Underwriter Exemptions which have substantially similar terms and conditions.⁵ The Department also proposed to provide the same relief to Ironwood Capital Partners Ltd. (D-10424) and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc. (D-10433), which received the approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96-62.

The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, D.C.

The notice also invited interested persons to submit comments on the

² PTE 90-30, 55 FR 21461 (May 24, 1990). Bear, Stearns & Co. Inc. (Bear, Stearns) is an international investment banking firm which engages in securities transactions as both a principal and agent and which provides a broad range of underwriting, research and financial services to its clients.

³ PTE 90-32, 55 FR 23147 (June 6, 1990). PTE 90-32 was granted to Prudential-Bache Securities, Inc. which subsequently changed its corporate name to Prudential Securities Incorporated (Prudential). Prudential is a full service securities broker-dealer and investment banking firm.

⁴ Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, 5 U.S.C. App. 1 [1995]) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. In the discussion of the exemption, references to section 406 and 408 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

⁵ In this regard, the entities who received the other Underwriter Exemptions were contacted concerning their participation in this amendment process.

requested exemption to the Department. In addition, the notice stated that any interested person might submit a written request that a public hearing be held. The Department received one written comment submitted by PSA. The comment indicated complete support for the proposed amendment to the Underwriter Exemptions. No requests for a hearing were received by the Department in regard to the proposed amendment.

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 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 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 require, among other things, a fiduciary to discharge his or her 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 requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) In accordance with section 408(a) of the Act and 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 finds that the exemption is administratively feasible, in the interests of the plans and their participants and beneficiaries and protective of the rights of the participants and beneficiaries;

(3) This exemption is supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and 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 availability of this exemption is 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 transactions which are the subjects of the exemption.

Exemption

Under section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR 2570, subpart B (55 FR 32836, August 10, 1990), the Department amends the following individual Prohibited Transaction Exemptions (PTEs): PTE 89-88, 54 FR 42582 (October 17, 1989); PTE 89-89, 54 FR 42569 (October 17, 1989); PTE 89-90, 54 FR 42597 (October 17, 1989); PTE 90-22, 55 FR 20542 (May 17, 1990); PTE 90-23, 55 FR 20545 (May 17, 1990); PTE 90-24, 55 FR 20548 (May 17, 1990); PTE 90-28, 55 FR 21456 (May 24, 1990); PTE 90-29, 55 FR 21459 (May 24, 1990); PTE 90-30, 55 FR 21461 (May 24, 1990); PTE 90-31, 55 FR 23144 (June 6, 1990); PTE 90-32, 55 FR 23147 (June 6, 1990); PTE 90-33, 55 FR 23151 (June 6, 1990); PTE 90-36, 55 FR 25903 (June 25, 1990); PTE 90-39, 55 FR 27713 (July 5, 1990); PTE 90-59, 55 FR 36724 (September 6, 1990); PTE 90-83, 55 FR 50250 (December 5, 1990); PTE 90-84, 55 FR 50252 (December 5, 1990); PTE 90-88, 55 FR 52899 (December 24, 1990); PTE 91-14, 55 FR 48178 (February 22, 1991); PTE 91-22, 56 FR 03277 (April 18, 1991); PTE 91-23, 56 FR 15936 (April 18, 1991); PTE 91-30, 56 FR 22452 (May 15, 1991); PTE 91-62, 56 FR 51406 (October 11, 1991); PTE 93-31, 58 FR 28620 (May 5, 1993); PTE 93-32, 58 FR 28623 (May 14, 1993); PTE 94-29, 59 FR 14675 (March 29, 1994); PTE 94-64, 59 FR 42312 (August 17, 1994); PTE 94-70, 59 FR 50014 (September 30, 1994); PTE 94-73, 59 FR 51213 (October 7, 1994); PTE 94-84, 59 FR 65400 (December 19, 1994); PTE 95-26, 60 FR 17586 (April 6, 1995); PTE 95-59, 60 FR 35938 (July 12, 1995); PTE 95-89, 60 FR 49011 (September 21, 1995); PTE 96-11, 61 FR 3490 (January 31, 1996); PTE 96-22, 61 FR 14828 (April 3, 1996); PTE 96-84, 61 FR 58234 (November 13, 1996); PTE 96-92, 61 FR 66334 (December 17, 1996); PTE 96-94, 61 FR 68787 (December 30, 1996); PTE 97-05, 62 FR 1926 (January 14, 1997); and PTE 97-28, 62 FR 28515 (May 23, 1997) (collectively, the Underwriter Exemptions).

In addition, the Department is also granting individual exemptions to Ironwood Capital Partners Ltd., Final Authorization Number (FAN) 97-02E (November 25, 1996) and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc., FAN 97-03E (December 9, 1996), which received the approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96-62.

I. Transactions

A. Effective January 1, 1992, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

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

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

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 of the Act for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.⁶

B. Effective January 1, 1992, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

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

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

⁶Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 of the Act for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) of the Act, and regulation 29 CFR 2510.3-21(c).

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

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

(iv) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold serviced by the same entity.⁷ For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

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

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

C. Effective January 1, 1992, the restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust, provided:

(1) such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) the pooling and servicing agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust.⁸

⁷For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

⁸In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions. For purposes of this

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in section III.S.

D. Effective January 1, 1992, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975 (a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14) (F), (G), (H) or (I) of the Act or section 4975(e)(2) (F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

II. General Conditions

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

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

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating from a rating agency (as defined in section III.W) at the time of such acquisition that is in one of the three highest generic rating categories;

(4) The trustee is not an affiliate of any other member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in

Amendment, references to "prospectus" include any related prospectus supplement thereto, pursuant to which certificates are offered to investors.

connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith;

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933; and

(7) In the event that the obligations used to fund a trust have not all been transferred to the trust on the closing date, additional obligations as specified in subsection III.B.(1) may be transferred to the trust during the pre-funding period (as defined in Section III.BB.) in exchange for amounts credited to the pre-funding account (as defined in Section III.Z.), provided that:

(a) The pre-funding limit (as defined in Section III.AA.), is not exceeded;

(b) All such additional obligations meet the same terms and conditions for eligibility as those of the original obligations used to create the trust corpus (as described in the prospectus or private placement memorandum and/or pooling and servicing agreement for such certificates), which terms and conditions have been approved by a rating agency. Notwithstanding the foregoing, the terms and conditions for determining the eligibility of an obligation may be changed if such changes receive prior approval either by a majority vote of the outstanding certificateholders or by a rating agency;

(c) The transfer of such additional obligations to the trust during the pre-funding period does not result in the certificates receiving a lower credit rating from a rating agency upon termination of the pre-funding period than the rating that was obtained at the time of the initial issuance of the certificates by the trust;

(d) The weighted average annual percentage interest rate (the average interest rate) for all of the obligations in the trust at the end of the pre-funding period will not be more than 100 basis points lower than the average interest rate for the obligations which were

transferred to the trust on the closing date;

(e) Effective for transactions occurring on or after May 23, 1997, in order to ensure that the characteristics of the receivables actually acquired during the pre-funding period are substantially similar to those which were acquired as of the closing date, the characteristics of the additional obligations will either be monitored by a credit support provider or other insurance provider which is independent of the sponsor or an independent accountant retained by the sponsor will provide the sponsor with a letter (with copies provided to the rating agency, the underwriter and the trustees) stating whether or not the characteristics of the additional obligations conform to the characteristics of such obligations described in the prospectus, private placement memorandum and/or pooling and servicing agreement. In preparing such letter, the independent accountant will use the same type of procedures as were applicable to the obligations which were transferred as of the closing date;

(f) The pre-funding period shall be described in the prospectus or private placement memorandum provided to investing plans; and

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

B. Neither any underwriter, sponsor, trustee, servicer, insurer, nor any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) Such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a

representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

III. Definitions

For purposes of this exemption:

A. *Certificate* means:

(1) A certificate—

(a) That represents a beneficial ownership interest in the assets of a trust; and

(b) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) A certificate denominated as a debt instrument—

(a) That represents an interest in either a Real Estate Mortgage Investment Conduit (REMIC) or a Financial Asset Securitization Investment Trust (FASIT) within the meaning of section 860D(a) or Section 860L, respectively, of the Internal Revenue Code of 1986, as amended; and

(b) That is issued by and is an obligation of a trust; with respect to certificates defined in (1) and (2) above for which the Underwriter is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this exemption, references to "certificates representing an interest in a trust" include certificates denominated as debt which are issued by a trust.

B. *Trust* means an investment pool, the corpus of which is held in trust and consists solely of:

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

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T.); and/or

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

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle

leases (as defined in section III.U.); and/or

(e) Guaranteed governmental mortgage pool certificates, as defined in 29 CFR 2510.3-101(i)(2); and/or

(f) Fractional undivided interests in any of the obligations described in clauses (a)–(e) of this subsection B.(1);⁹

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

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

(b) Cash or investments made therewith which are credited to an account to provide payments to certificateholders pursuant to any yield supplement agreement or similar yield maintenance arrangement to supplement the interest rates otherwise payable on obligations described in subsection III.B.(1) held in the trust, provided that such arrangements do not involve swap agreements or other notional principal contracts; and/or¹⁰

(c) Cash transferred to the trust on the closing date and permitted investments made therewith which:

(i) are credited to a pre-funding account established to purchase additional obligations with respect to which the conditions set forth in clauses (a)–(g) of subsection II.A.(7) are met and/or

(ii) are credited to a capitalized interest account (as defined in Section III.X.); and

(iii) are held in the trust for a period ending no later than the first distribution date to certificateholders occurring after the end of the pre-funding period.

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

⁹ It is the Department's view that the definition of "Trust" contained in subsection III.B. includes a two-tier trust structure under which certificates issued by the first trust, which contains a pool of receivables described above, are transferred to a second trust which issues certificates that are sold to plans. However, the Department is of the further view that, since the exemption provides relief for the direct or indirect acquisition or disposition of certificates that are not subordinated, no relief would be available if the certificates held by the second trust were subordinated to the rights and interests evidenced by other certificates issued by the first trust.

¹⁰ The Department notes that the definition of "Trust" contained in Section III.B. includes cash or investments credited to an account to provide payments to certificateholders pursuant to a yield supplement agreement or similar yield maintenance arrangement to supplement the interest rates otherwise payable on obligations described in section B.(1) held in the trust, provided that such arrangements do not involve swap agreements or other notional principal contracts.

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

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any insurance policies, third-party guarantees, contracts of suretyship, yield supplement agreements described in clause (b) of subsection III.B.(3) and other credit support arrangements with respect to any obligations described in subsection III.B.(1).

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) the obligations contained in the investment pool consist only of assets of the type described in clauses (a)–(f) of subsection III.B.(1) which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by a rating agency for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. *Underwriter* means:

(1) An entity defined as an Underwriter in subsection III.C.(1) of each of the Underwriter Exemptions that are being amended by this exemption. In addition, the term Underwriter includes Ironwood Capital Partners Ltd. and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc. (which received the approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96–62);

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

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

D. *Sponsor* means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. *Master Servicer* means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. *Subservicer* means an entity which, under the supervision of and on behalf of the master servicer, services loans contained in the trust, but is not a party to the pooling and servicing agreement.

G. *Servicer* means any entity which services loans contained in the trust, including the master servicer and any subservicer.

H. *Trustee* means the trustee of the trust, and in the case of certificates which are denominated as debt instruments, also means the trustee of the indenture trust.

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

J. *Obligor* means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

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

L. *Restricted Group* with respect to a class of certificates means:

- (1) each underwriter;
- (2) each insurer;
- (3) the sponsor;
- (4) the trustee;
- (5) each servicer;
- (6) any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or
- (7) any affiliate of a person described in (1)–(6) above.

M. *Affiliate* of another person includes:

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

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

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

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

O. A person will be "independent" of another person only if:

(1) such person is not an affiliate of that other person; and

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

P. *Sale* includes the entrance into a forward delivery commitment (as defined in section III.Q. below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

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

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

R. *Reasonable compensation* has the same meaning as that term is defined in 29 CFR 2550.408c–2.

S. *Qualified Administrative Fee* means a fee which meets the following criteria:

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

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

(3) the ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

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

T. *Qualified Equipment Note Secured By A Lease* means an equipment note:

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

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

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

U. *Qualified Motor Vehicle Lease* means a lease of a motor vehicle where:

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

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

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

V. *Pooling and Servicing Agreement* means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, "Pooling and Servicing Agreement" also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

W. *Rating Agency* means Standard & Poor's Structured Rating Group, Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co. or Fitch Investors Service, L.P.

X. *Capitalized Interest Account* means a trust account: (i) which is established to compensate certificateholders for shortfalls, if any, between investment earnings on the pre-funding account and the pass-through rate payable under the certificates; and (ii) which meets the requirements of clause (c) of subsection III.B.(3).

Y. *Closing Date* means the date the trust is formed, the certificates are first issued and the trust's assets (other than those additional obligations which are to be funded from the pre-funding account pursuant to subsection II.A.(7)) are transferred to the trust.

Z. *Pre-Funding Account*— means a trust account: (i) which is established to purchase additional obligations, which obligations meet the conditions set forth in clauses (a)–(g) of subsection II.A.(7);

and (ii) which meets the requirements of clause (c) of subsection III.B.(3).

AA. *Pre-Funding Limit* means a percentage or ratio of the amount allocated to the pre-funding account, as compared to the total principal amount of the certificates being offered which is less than or equal to: (i) 40 percent, effective for transactions occurring on or after January 1, 1992, but prior to May 23, 1997; and (ii) 25 percent, for transactions occurring on or after May 23, 1997.

BB. *Pre-Funding Period* means the period commencing on the closing date and ending no later than the earliest to occur of: (i) the date the amount on deposit in the pre-funding account is less than the minimum dollar amount specified in the pooling and servicing agreement; (ii) the date on which an event of default occurs under the pooling and servicing agreement; or (iii) the date which is the later of three months or 90 days after the closing date.

IV. Modifications

For the Underwriter Exemptions provided to Residential Funding Corporation, Residential Funding Mortgage Securities, Inc., et. al. and GE Capital Mortgage Services, Inc. and GECC Capital Markets (the Applicants) (PTEs 94–29 and 94–73, respectively);

A. Section III.A. of this amendment is modified to read as follows:

A. *Certificate* means:

(1) A certificate—

(a) That represents a beneficial ownership interest in the assets of a trust; and

(b) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(c) With respect to which (i) one of the Applicants or any of its affiliates is the sponsor, and an entity which has received from the Department an individual prohibited transaction exemption relating to certificates which is similar to this exemption is the sole underwriter or the manager or co-manager of the underwriting syndicate or a selling or placement agent; or (ii) one of the Applicants or any of its affiliates is the sole underwriter or the manager or co-manager of the underwriting syndicate or a selling or placement agent; or

(2) A certificate denominated as a debt instrument—

(a) That represents an interest in either a Real Estate Mortgage Investment Conduit (REMIC) or a Financial Asset Securitization Investment Trust (FASIT) within the meaning of section 860D(a) or section 860L, respectively, of the

Internal Revenue Code of 1986, as amended; and

(b) That is issued by and is an obligation of a trust with respect to which (i) one of the Applicants or any of its affiliates is the sponsor, and an entity which has received from the Department an individual prohibited transaction exemption relating to certificates which is similar to this exemption is the sole underwriter or the manager or co-manager of the underwriting syndicate or a selling or placement agent or (ii) one of the Applicants or any of its affiliates is the sole underwriter or the manager or co-manager of the underwriting syndicate, or a selling or placement agent.

For purposes of this exemption, references to "certificates representing an interest in a trust" include certificates denominated as debt which are issued by a trust.

B. Section III.C. of this amendment is modified to read as follows:

C. *Underwriter* means:

(1) An entity defined as an Underwriter in subsection III.C.(1) of each of the Underwriter Exemptions that are being amended by this exemption. In addition, the term Underwriter includes Ironwood Capital Partners Ltd. and Deutsche Bank AG, New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc. (which received the approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96–62);

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

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

(4) an entity which has received from the Department an individual prohibited transaction exemption relating to certificates which is similar to this exemption.

EFFECTIVE DATE: This exemption is effective for transactions occurring on or after January 1, 1992 except as otherwise provided in subsection II.A.(7) and section III.AA.

Signed at Washington, D.C., this 16 day of July, 1997.

Ivan L. Strasfeld,

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