

Signed at Washington, D.C. this 21st day of April 1995.

Katharine G. Abraham,
Commissioner.

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Pension and Welfare Benefits Administration

[Application No. D-09875, et al.]

Proposed Exemptions; Toyota Motor Sales, U.S.A., Inc.

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 restriction of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and request 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. 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.

Toyota Motor Sales, U.S.A., Inc. Money Purchase Pension Plan for Bargaining Unit Employees (the Plan), located in Torrance, CA

[Application No. D-09875]

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) and 406 (b)(1) and (b)(2) 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 proposed cash sale by the Plan (the Sale), of group annuity contract No. GA-4564 (the GAC) issued by Mutual Benefit Life Insurance Company (Mutual Benefit), located in Newark, New Jersey, to Toyota Motor Sales, U.S.A., Inc., a California corporation, (the Employer), a party in interest with respect to the

Plan; provided that (1) the Sale is a one-time transaction for cash; (2) the Plan experiences no loss nor incurs any expense from the Sale; and (3) the Plan receives as consideration from the Sale the greater of either the fair market value of the GAC as determined by the trustee of the Plan on the date of the Sale, or an amount that is equal to the total funds expended by the Plan in acquiring and holding the GAC, plus the amount of interest earned and accrued by the Plan on the GAC to the date of the Sale,¹ less all withdrawals from the Plan to the date of the Sale, and less all advances made to the Plan by the Employer to the date of the Sale.

Summary of Facts and Representations

1. The Employer is a California corporation with its corporate headquarters in Torrance, California and other facilities located throughout the United States, including port facilities, regional sales offices, and parts distribution centers. The Employer is primarily engaged in the wholesale distribution of automobiles, light trucks, industrial equipment and accessories throughout the United States (excluding Hawaii). In addition, the Employer exports automobiles and related replacement parts and accessories to Europe, Asia, and the U.S. Territories. Also the Employer manufactures certain automobiles and trucks through its subsidiaries in the United States.

2. The Plan is a defined contribution plan that is intended to qualify under the provisions of section 401(a) of the Code as a money purchase pension plan with individual accounts for its participants. The sponsor of the Plan and its principal funding source is the Employer; however, eligible employees who are participants of the plan may elect to make additional, voluntary funding contributions. The Plan is maintained pursuant to various collective bargaining agreements between the Employer and the unions representing the employees. As of September 30, 1994, the Plan had 548 active participants and total assets of \$4,468,556.

From April 4, 1986, to October 1, 1987, the named fiduciary of the Plan was Toyota Body, Inc., and from October 1, 1987, to August 19, 1994, the named fiduciary was the Employer. Since August 19, 1994, the named fiduciary for the Plan is the Toyota Employee Benefit Committee (the Benefit Committee), which consists of 4 or more individuals who are appointed

¹ This takes into account the rate of interest guaranteed after December 31, 1991, to the Plan by the Employer.

by the president of the Employer. The Benefit Committee has full authority to control and manage the assets and administration of the Plan. The powers of the Benefit Committee includes, among other things, the authority to appoint legal counsel and other agents for the Plan.

On September 15, 1994, the Eagle Trust Company (the Trustee), a trust company incorporated under the Pennsylvania Bankruptcy Code, was selected by the Benefit Committee to serve as the trustee of the assets of the Plan. The applicant represents the Trustee to be independent and not affiliated with the Employer in any other capacity.

From July 16, 1984, when the Plan acquired the GAC from Mutual Benefit until July 16, 1991, the GAC served as the exclusive investment vehicle for the Plan.² Until July 16, 1991, Mutual Benefit would periodically make a determination of the interest rate used to compute the earnings paid to the Plan by the GAC. This involved the establishment of a separate subfund by Mutual Benefit for each annual deposit period of contributions during the life of the GAC, and the applicable interest rate for such subfund thereafter was reset on an annual basis. From the issuance of the GAC through December 31, 1991, the GAC was earning various interest rates, ranging from 8.35 percent to 14.05 percent. The applicant represents that the GAC had no stated maturity date. The GAC can be discontinued unilaterally by either the Employer or Mutual Benefit, or if certain stipulated conditions arise.

3. On July 16, 1991, Mutual Benefit was placed into rehabilitation proceedings by the New Jersey Commissioner of Insurance.³ As a result of these proceedings the assets of the Plan invested in the GAC were frozen. Following cessation of payments by Mutual Benefit with respect to the GAC, the Employer decided to make periodic advances of funds (the Advances) to the Plan to enable the payment of distributions to terminating and retiring participants and the payment of certain

²The Department notes that the investment in the GAC is governed by the provisions of Part 4, Subtitle B, of Title I of the Act. In this regard, the Department is not proposing herein relief for any violations of Part 4 which may have arisen as a result of not diversifying the investments of the Plan.

³The Department notes that the decision to acquire and hold the GAC are governed by the fiduciary responsibility provisions of Part 4, Subtitle B, of the Title I of the Act. In this regard, the Department is not herein proposing relief for any violations of Part 4 which may have arisen as a result of the acquisition and holding of the GAC by the Plan.

in-service withdrawals to current participants.⁴ The applicant represents that at the same time the Advances commenced, the Employer committed itself to enhance the rate of return the individual accounts of the participants would earn and accrue after December 31, 1991, by guaranteeing a 6 percent per annum return for the calendar year 1992 and a 5 percent per annum return for the subsequent calendar years. The applicant further represents that the periodic Advances made by the Employer to the Plan, as of September 30, 1994, totaled \$460,668.

The applicant represents that it desires to enter into the proposed transaction in order to protect the participants of the Plan from the risks of investment loss associated with the GAC. Further, the applicant represents that the Plan needs to sell its interest in the GAC in order to give the participants of the Plan more investment flexibility to direct the investments of their respective account balances to other investments. The applicant also represents that the Plan will not incur any expense with respect to the proposed transaction.

4. In order to protect the interests of the participants and beneficiaries of the Plan, the Employer proposes to purchase the GAC from the Plan for cash. The proposed purchase price for the GAC is to be the greater of the fair market value of the GAC as determined by the Trustee on the date of the Sale or an amount that is equal to the total funds expended by the Plan in acquiring and holding the GAC, plus the amount of interest earned and accrued by the Plan on the GAC to the date of the Sale,⁵ less all withdrawals from the Plan to the date of the Sale, and less all advances to the Plan made by the Employer to the date of the Sale. As of September 30, 1994, the GAC had a fair market value of \$2,349,840.

The Trustee has reviewed the proposed transaction as an independent fiduciary on behalf of the Plan and its participants and beneficiaries. The Trustee represents that the proposed transaction is in the best interests of the Plan and its participants and beneficiaries.

5. In summary, the applicant represents that the proposed transaction

⁴The applicant represents that the terms of the periodic advances to the Plan satisfied the conditions of the class exemption PTE 80-26 (45 FR 28545, April 29, 1980). The Department express no opinion herein as to whether the periodic advances to the plan satisfied the terms and conditions of PTE 80-26.

⁵This takes into account the rate of interest guaranteed after December 31, 1991, to the Plan by the Employer.

will satisfy the criteria for an exemption under section 408(a) of the Act because (a) the Plan will receive, from the Employer in a one-time transaction, cash in an amount that is the greater of either (1) the fair market value of the GAC; or (2) the total funds expended by the Plan in acquiring and holding the GAC plus the amount of interest earned or accrued by the Plan to the date of the Sale, less withdrawals and less prior advances of funds to the Plan made by the Employer; (b) the proposed transaction will enable the Plan and its participants and beneficiaries to avoid any risk associated with continued holding of the GAC; (c) the Plan will not incur any loss or expense from the proposed transaction; and (d) the Trustee of the Plan has determined that the proposed transaction is in the best interests of the Plan and its participants and beneficiaries, and that the proposed price for the GAC is not less than its fair market value.

FOR FURTHER INFORMATION CONTACT: Mr. C. E. Beaver of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Masik Tool and Die Corporation Profit Sharing Plan (the Plan), located in Cudahy, WI

[Exemption Application No. D-09899]

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)(1) and (b)(2) 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: (1) The past leasing (the Lease) of a lathe (the Lathe) owned by the Plan and certain individually-directed accounts in the Plan (the Accounts) to Masik Tool and Die Corporation (Masik), a party in interest with respect to the Plan; and (2) the proposed cash sale (the Sale) of the Lathe by the Accounts to Masik.

This proposed exemption is conditioned on the following requirements:

(1) With respect to the past Lease—

(a) the terms and conditions of the Lease have been at least as favorable to the Plan and the Accounts as those obtainable in an arm's length transaction with an unrelated party; (b) the value of the Lathe did not exceed

twenty-five percent of the assets of the Plan or of any of the Accounts at any time during the duration of the Lease; (c) an independent, qualified fiduciary approved of the Lease on behalf of the Plan and the Accounts and has monitored the Lease throughout its entirety; (d) the rental amount received by the Plan and the Accounts was based upon the fair market rental value of the Lathe; and (e) within ninety days of the publication in the **Federal Register** of the grant of this exemption, Masik files Forms 5330 with the Internal Revenue Service and pay all applicable excise taxes that are due by reason of the past prohibited transactions, which are not subject to this exemption.

(2) With respect to the prospective Sale—

(a) the terms and conditions of the Sale are at least as favorable to the Accounts as those obtainable in an arm's length transaction with an unrelated party; (b) the Sale is a one-time cash transaction; (c) the Accounts are not required to pay any commissions, costs or other expenses in connection with the Sale; (d) the Sale price for the Lathe is based upon its fair market value on the date of the Sale as determined by an independent, qualified appraiser; and (e) within ninety days of the publication in the **Federal Register** of the grant of this exemption, Masik files Forms 5330 with the Internal Revenue Service and pay all applicable excise taxes that are due by reason of the past prohibited transactions, which are not subject to this exemption.

EFFECTIVE DATE: This exemption, if granted, will be effective as of June 1, 1988 with respect to the Lease. The proposed exemption will be effective as of the date of the grant of the exemption with respect to the Sale.

Summary of Facts and Representations

1. The Plan is a profit sharing plan sponsored by Masik, a closely-held Wisconsin corporation engaged in the business of manufacturing, rebuilding, and repairing tools and dies for industrial manufacturers in Southeastern Wisconsin. Joseph Masik, Jr. and his wife, Patricia Masik, hold 100 percent of Masik's stock and are its only directors. Mr. Masik, Mrs. Masik and David Zirkelbach serve, respectively, as President, Secretary/Treasurer and Vice President of Masik. In addition to being officers of Masik, Mr. Masik, Mrs. Masik and Mr. Zirkelbach have been the trustees for the Plan (the Trustees) from the inception of the Lease until the present time.

On May 31, 1990, the Trustees amended the Plan to provide for participant directed investment. As of May 30, 1992, the Plan had twenty-one participants and \$322,693 in assets. Such assets are primarily invested in life insurance annuity contracts and certificates of deposit.

2. Among the assets of the Plan is the Lathe, which is a seventy-six inch, used Bullard-Dynatrol Vertical Turret Lathe, serial number 31820. The Lathe weighs 130,000 pounds and measures twenty feet in height. Within six months of the Plan's purchase of the Lathe, Masik mounted the Lathe in the concrete floor of Masik's plant and attached a \$20,000 "tracer unit" to the Lathe at no cost to the Plan. As of August 15, 1994, the Lathe remained mounted in the concrete floor.

3. The Trustees acquired the Lathe, on behalf of the Plan, in January of 1987 from the George Meyer Manufacturing Company, an unrelated party, for a purchase price of \$33,250.⁶ The Trustees represent that they purchased the Lathe because, based upon their experience in the industry, they believed that the purchase price of the Lathe was less than one-half of its fair market value.⁷

4. The Trustees represent that the exact date that the Lathe was first placed into the service of Masik is unknown. However upon a review of the Plan's records, partial installation of the Lathe occurred sometime prior to February 4, 1987. Masik formally commenced leasing the Lathe from the Plan under a written lease (the Lease) executed June 2, 1988 with an initial five-year term expiring May 31, 1993. Masik represents that it compensated the Plan for its use of the Lathe which occurred prior to June 2, 1988. As of June 1, 1987, the Plan had in excess of \$200,000 in assets thereby involving sixteen percent of the Plan's assets in the Lathe. Masik represents that from June 2, 1988 until the termination of the Lease on May 31, 1993, the Plan and the Accounts received \$105,540, which represents an annualized rate of return of sixty-three percent.

5. In March of 1989, Masik applied to the Department for exemptive relief with respect to the Lease but withdrew that application in June of 1989. The

⁶The Department is expressing no opinion in this proposed exemption on whether the acquisition and holding of the Lathe by the Plan violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act.

⁷Subsequently, Russ Bottoni (Mr. Bottoni), the owner of Russco Sales, Inc., a company specializing in used equipment, appraised the Lathe. Based upon comparable sales, Mr. Bottoni placed the fair market value of the Lathe as of February 22, 1989 at \$79,500.

Trustees represent that the reason for the withdrawal was the mistaken belief that amending the Plan to allow for participant directed investments (see Representation #1) would result in correction of the past prohibited transaction and would ensure that no future prohibited transactions would occur. Masik represents that in response to this Plan amendment, all of the eligible participants chose to direct their account balances (the Accounts) on September 20, 1990 towards the purchase of the Lathe and the leasing arrangements. Masik and the Trustees amended the Lease to reflect these participant investment elections. The Trustees represent that no participant directed more than twenty-five percent of his or her account balance to the Lease.

6. Roger McManus represents that he served as an independent, qualified fiduciary on behalf of the Plan and the Accounts with respect to the Lease beginning in June of 1988. Mr. McManus' qualifications include twenty-five years of experience practicing law, primarily in the area of small business. Mr. McManus represents that he was unrelated to, and independent of, Masik. Mr. McManus states that he understood and acknowledged his duties, responsibilities, and liabilities in acting as a fiduciary with respect to the Plan based upon his familiarity with the fiduciary responsibility provisions of the Act.

Mr. McManus states that, in 1988, he reviewed the investment portfolio of the Plan and considered the diversification of the Plan's assets as well as its liquidity needs. Mr. McManus represents that the Lease did not represent more than twenty-five percent of the assets of any of the Accounts. Mr. McManus believed that the Lease would be in the best interests of the Plan and its participants and beneficiaries as an investment for the Plan's portfolio based on the Lease's rate of return, the stability of the lessee, the character and diversification of the Plan's other assets, and the projected liquidity needs of the Plan.

Mr. McManus states that, based upon his previous representation of other businesses and involvement in numerous leasing transactions, he believed that the Lease provisions were quite favorable to the Plan participants and were at least comparable to an arm's length transaction. In addition, Mr. McManus represents that he evaluated the term of the Lease to assure that the Lease satisfied the established standards for commercial reasonableness. Mr. McManus represents that the monthly

Lease payments were established at \$1,759 based upon calculations which utilized mortgage-type amortization schedules and the fair market and salvage values of the Lathe, which were determined by the Plan's accountant, Tom Harmann.

Mr. McManus represents that he monitored the Lease from its inception through April 10, 1992. Mr. McManus further represents that from the inception of the Lease in 1988 until April 10, 1992, Masik has abided by all of the terms of the Lease, the Lathe has been kept in good working order and all rental due the Plan has been timely paid.

Jeffrey R. Brodek represents that, as of April 10, 1992, he assumed Mr. McManus' role as the independent, qualified fiduciary on behalf of the Plan and the Accounts with respect to the Lease. Mr. Brodek's qualifications include ten years of experience practicing employee benefits law. Mr. Brodek represents that he is unrelated to, and independent of, Masik. Mr. Brodek states that he understood and acknowledged his duties, responsibilities, and liabilities in acting as a fiduciary with respect to the Plan based upon his familiarity with the fiduciary responsibility provisions of the Act.

Mr. Brodek represents he assumed the same duties that Mr. McManus had previously undertaken which included enforcing the terms of the Lease, making sure that the Lathe was kept in good working order and making sure that payments due under the Lease were timely paid to the Plan. Mr. Brodek represents Masik has abided by all of the terms of the Lease, the Lathe has been kept in good working order and all rentals due the Plan were timely paid through May 31, 1993, the expiration of the original five-year term of the Lease. At this time, the Trustees suspended any future Lease payments pending resolution of the prohibited transaction issues. However, Masik represents that it utilized the Lathe in the course of its operations after the cessation of the Lease payments. Masik represents that it will make payments pursuant to the rental rate specified by the Lease to the Plan for every month between June of 1993 through the present time, plus a reasonable rate of interest.

7. Because of the party in interest relationship and the past leasing arrangement between the Plan and Masik, the Trustees along with Masik (the Applicants) are aware of the fact that prohibited transactions have occurred in violation of the Act as of the date of Masik's first use of the Lathe. The Applicants have requested

retroactive exemptive relief with respect to the Lease as well as prospective exemptive relief for the Sale. In this regard, the Department is not proposing exemptive relief for the prohibited transactions described in this proposed exemption for the periods: (1) Prior to June 1, 1988, the date that Masik began leasing the Lathe from the Plan pursuant to a written lease; and (2) after May 31, 1993, the cessation of the Lease payments. Accordingly, Masik represents that within ninety days of the publication in the **Federal Register** of the grant of this exemption, it will file Forms 5330 with the Internal Revenue Service and pay all applicable excise taxes that are due by reason of the past prohibited transactions, which are not subject to this exemption.

8. Masik represents that the participants whose accounts are invested in the Lathe desire to sell the Lathe so that an alternative investment can be made by the Accounts. The Trustees represent that because the Lathe is presently mounted in the concrete floor of Masik's plant, sale to an unrelated party at fair market value is unlikely due to the cost of removing the Lathe. Therefore, Masik proposes to purchase the Lathe for its fair market value on the date of the Sale. The Plan will not be required to pay any commissions, costs or other expenses in connection with these transactions.

9. The Trustees retained Richard Levo, a sales engineer for L.L. Richards Machinery Co, Inc. to appraise the Lathe. Mr. Levo has dealt in new and used chipmaking and fabricating machine tools for forty-three years. His appraisal, dated June 6, 1994, places the fair market value of the Lathe at \$29,500 based on its age, condition and location. Mr. Levo states that the Lathe has declined in value since its acquisition in 1987 due to recent innovations in technology which have left the Lathe obsolete. The appraisal for the Lathe will be reviewed and updated prior to the Sale pursuant to this exemption. Mr. Levo represents that both he and L.L. Richards Machinery Co, Inc. are independent of and unrelated to Masik.

10. In summary, the Applicants represent that the Lease and the Sale will satisfy the statutory criteria for an exemption under 408(a) of the Act because:

(a) With respect to the past Lease—

(1) the terms and conditions of the Lease have been at least as favorable to the Plan as those obtainable in an arm's-length transaction with an unrelated party; (2) the Lathe did not exceed twenty-five percent of the assets of the Plan or of any individually-directed

accounts within the Plan at any time during the duration of the leasing arrangements; (3) Roger McManus, acting as the Plan's independent, qualified fiduciary, approved of the Lease; (4) Mr. McManus and subsequently, Jeffrey Brodek, acting as the Plan's independent, qualified fiduciary during different periods, monitored the Lease; (5) the rental charged by the Plan was based upon the fair market rental value of the Lathe; and (6) within ninety days of the publication in the **Federal Register** of the grant of this exemption, Masik will file Forms 5330 with the Internal Revenue Service and pay all applicable excise taxes that are due by reason of the past prohibited transactions, which are not subject to this exemption.

(b) With respect to the prospective Sale—

(1) the Sale will be a one-time cash transaction; (2) the Plan will not be required to pay any commissions, costs or other expenses in connection with this transaction; (3) the Lathe will be appraised by Richard Levo, an independent, qualified appraiser; (4) the sales price for the Lathe will reflect its fair market value on the date of the Sale; and (5) within ninety days of the publication in the **Federal Register** of the grant of this exemption, Masik will file Forms 5330 with the Internal Revenue Service and pay all applicable excise taxes that are due by reason of the past prohibited transactions, which are not subject to this exemption.

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

Simplex Time Recorder Co., Employee Savings Plan (the Plan), located in Gardner, Massachusetts

[Application No. D-09935]

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)(1) and (b)(2) 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 (1) the proposed extension of credit (the Loan) to the Plan by Simplex Time Recorder Co. (the Employer), a party in interest with respect to the Plan, with regard to a

group annuity contract (the GAC) issued by Executive Life Insurance Company of California (ELIC), and (2) the Plan's potential repayment of the Loan (the Repayment); provided the following conditions are satisfied:

(A) No interest or expenses are paid by the Plan in connection with the proposed transaction;

(B) The Loan will be repaid only out of amounts paid to the Plan by ELIC, its successors, or any other responsible third party making payment with respect to ELIC's obligations under the GAC (the GAC Proceeds); and

(C) Repayment of the Loan is waived with respect to the amount by which the Loan exceed GAC proceeds.

Summary of Facts and Representations

1. The Employer is a Massachusetts corporation with its principal place of business located in Gardner, Massachusetts. The Plan is a defined contribution plan with approximately 3,500 participants and total assets of approximately \$82.3 million as of December 31, 1994. The Plan provides for individual participant accounts (the Accounts) and participant-directed investment of the Accounts.

2. The terms of the Plan provide that its participants may invest the Accounts among any of several investment funds (the Funds) managed by the Plan's trustee, State Street Bank and Trust Company (the Trustee), including a fixed income fund (the F.I. Fund). The F.I. Fund invests in part in insurance company group annuity contracts under which the issuer guarantees repayment of principal and payment of interest at a fixed annual rate through the date of maturity specified in the contract. Among the contracts held by the Plan in the F.I. Fund is the GAC, identified as follows: Contract number CG0124803A, issued to the Trustee on January 13, 1988 for an initial principal deposit of \$678,987.69, with a principal deposit limit of \$4,440,000. The GAC provides for compound annual interest at the rate of 10 percent (the Contract Rate), and its terms enable withdrawals to fund distributions, participant loans, in-service withdrawals, and participant-directed transfers of Account balances from the F.I. Fund to the other Funds (the Withdrawal Events). The GAC features a maturity date of June 30, 1993, at which time the Plan was due a payment (the Maturity Payment) in the amount of the total principal deposits during the term of the GAC plus interest thereon at the Contract Rate through maturity less previous withdrawals.

3. On April 11, 1991, ELIC was placed into conservatorship (the Conservatorship) by the Insurance

Commissioner of the State of California. The Employer represents that ELIC ceased to honor requests for withdrawals from the GAC upon commencement of the Conservatorship. The effect of the Conservatorship has been to freeze all assets invested in the GAC. This freeze has prevented the Plan from making withdrawals from the GAC to fund Withdrawal Events with respect to Accounts invested in the GAC.⁸

In response to the Conservatorship, the Employer and the Trustee provided for the GAC to be segregated from the other assets in the F.I. Fund and placed in a special fund (the Segregated Fund) on April 30, 1991, in order to confine the risks associated with the GAC to those Accounts which were invested in the F.I. Fund as of the commencement of the Conservatorship. Each Account with an interest in the F.I. Fund as of the date of the Conservatorship obtained a pro-rata interest in the Segregated Fund, from which withdrawals are prohibited for all purposes. As of April 30, 1991, the accumulated book value of the GAC was \$4,173,231, representing total principal deposits plus interest at the Contract Rate less previous withdrawals. This value constituted approximately 10 percent of the assets in the F.I. Fund and approximately 7.6 percent of the Plan's total assets. Upon the maturity of the GAC on June 30, 1993, the Maturity Payment then due was not made. Approximately 2,100 Plan participants have portions of their Accounts invested in the Segregated Fund.

4. A rehabilitation plan for ELIC (the Rehab Plan) was approved in late 1993, which offered to the Plan, as a holder of an ELIC GAC, two options: The Plan could "opt in" to the Rehab Plan by continuing to hold the GAC with modified terms, or the Plan could "opt out" by agreeing to a cancellation of the GAC in exchange for payments (Rehab Payments) over a period of approximately five years. In 1994, the Trustee made the opt-out election on behalf of the Plan. The Trustee represents that under the opt-out election, the exact amount of the Rehab Payments is not determinable. However, the Trustee and the Employer expect a total opt-out recovery of approximately \$3.7 million in Rehab Payments with respect to the GAC. Approximately 65 percent of this total, i.e., \$2.4 million,

⁸The Department notes that the decisions to acquire and hold the GAC are governed by the fiduciary responsibility requirements of Part 4, Subtitle B, Title I of the Act. In this regard, the Department is not herein proposing relief for any violations of Part 4 which may have arisen as a result of the acquisition and holding of the GAC issued by Executive Life.

was received by the Plan shortly after the opt-out election was processed. An additional \$485,000 was received by the Plan in March 1995. The Trustee and the Employer expect approximately \$815,000 more in Rehab Payments over a remaining three-year period.

5. Shortly after the Conservatorship commenced, in order to provide some immediate relief to the Plan with respect to the funding of Withdrawal Events, the Employer structured a loan arrangement (the Initial Agreement) which was intended to utilize Prohibited Transaction Class Exemption 80-26 (PTCE 80-26, 45 FR 35040, May 23, 1980), relating to interest-free loans for, among other things, the funding of plan benefits. In accordance with the terms of the Initial Agreement, the Employer commenced the making of interest-free loans (the Initial Loans) to the Plan solely to fund the cash payment of benefits by the Plan to participants with Account balances in the Segregated Fund, in lieu of the amounts which otherwise would have been withdrawn from the GAC for such payments. The Employer represents that the Initial Loans are exempt from the prohibited transaction provisions of the Act because they satisfy the requirements of PTCE 80-26.⁹ As of December 31, 1994, a total of \$639,967 had been loaned to the Plan by the Employer pursuant to the Initial Agreement.

6. Although the Initial Agreement has enabled former employees to receive full distribution of their Account balances, including portions invested in the Segregated Fund, the Employer represents that the Initial Arrangement is not satisfactory with respect to the participants of the Plan who remain current employees of the Employer. Participants who are current employees remain unable to effect participant loans, in-service withdrawals and transfers with respect to Account balances in the Segregated Fund. Accordingly, the Employer seeks to provide the Plan with the ability to effect the full range of Withdrawal Events with respect to Accounts invested in the Segregated Fund, by lending the Plan an amount of cash equal to the remaining balance of the Segregated Fund. The Employer requests an exemption for such a loan (the Loan), as well as its potential repayment, under the terms and conditions described herein.

⁹The Department expresses no opinion as to whether the loans made pursuant to the Initial Agreement satisfy the requirements of PTCE 80-26, or whether such loans were exempt from the prohibitions of section 406 of the Act.

7. The terms of the Loan and its repayment (the Repayments) will be set forth in a written agreement between the Trustee and the Employer (the New Agreement). Under the New Agreement, the Employer proposes to make the Loan in the amount remaining in the Segregated Fund as of the date of the Loan. The amount remaining in the Segregated Fund as of the date of the Loan will represent the GAC's accumulated book value as of the date of the Conservatorship, i.e., \$4,173,231, reduced by the sum of the total Rehab Payments and Initial Loans made as of the Loan date. Accordingly, the Employer estimates that the Loan will be in the amount of approximately \$600,000. The Employer represents that after the exemption proposed herein is final, if granted, and the New Agreement has been approved by the Internal Revenue Service¹⁰, the Employer will make the Loan to the Plan and will then exercise its powers under the Plan to close the Segregated Fund. Upon closing the Segregated Fund, all Accounts which remained invested in that Fund will be transferred back to the F.I. Fund, and the Employer will announce to Plan participants the availability of the Loan funds to effect all Withdrawal Events with respect to amounts previously frozen in the Segregated Fund. The Employer and the Trustee represent that the Plan's participants will benefit from the proposed Loan because it will ensure that the participants receive 100% of the Conservatorship-date value of their Accounts invested in the GAC and such amounts will be available as soon as approval is received from the Internal Revenue Service and the Department.¹¹

8. The New Agreement provides for repayment of the Loan (the Repayment), but no interest will be paid on the principal amount of the Loan. Under the New Agreement, Repayment is limited to amounts, if any, paid to the Plan by or on behalf of ELIC, or its successor, or any other responsible third parties making payment with respect to ELIC's obligations under the GAC (the GAC Proceeds). No other assets of the Plan will be available for repayment of the Loan. If the GAC Proceeds are not sufficient to fully repay the Loan, the New Agreement provides that the

Employer will have no recourse against the Plan, or against any participants or beneficiaries of the Plan, for the unpaid amount. To the extent the Plan receives GAC proceeds in excess of the total amount of the Loan, such additional amounts will be retained by the Trust and allocated among the accounts of the Plans' participants.

9. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because: (1) The transaction will restore the Plan's ability to fund Withdrawal Events with respect to Accounts invested in the GAC; (2) The Plan will not incur any expenses or pay any interest with respect to the transaction; (3) Repayment of the Loan will be made only from GAC Proceeds paid to the Plan; (4) If the GAC Proceeds are not sufficient to fully repay the Loan, the Employer will have no recourse against the Plan, or against any participants or beneficiaries of the Plan, for the unpaid amount; and (5) Repayment of the Loan will be waived with respect to the amount by which the Loan exceeds the GAC Proceeds.

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

Employees' Thrift Plan of Columbia Gas System (the Plan), Located in Wilmington, DE

[Application No. D-09959]

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, August 10, 1990). If the exemption is granted the restrictions of sections 406(a) and 406(b)(1) and (b)(2) 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 (1) the proposed loan of funds (the Loan) to the Plan by The Columbia Gas System, Inc. (the Employer), the sponsor of the Plan, and its wholly-owned subsidiary, Columbia Gas Transmission Corporation (the Subsidiary), with respect to the Guaranteed Investment Contract No. 61969 (the GIC) issued by Confederation Life Insurance Company of Canada (Confederation); and (2) the potential repayment by the Plan of the Loan upon the receipt by the Plan of payments under the GIC; provided the following conditions are satisfied: (a) No interest and/or expenses are paid by the Plan in

connection with the Loan; (b) all the terms and conditions of the proposed Loan are no less favorable to the Plan than those which the Plan could obtain in an arm's-length transaction with an unrelated party; (c) the Loan will be no less than the accumulated book value of the GIC as of August 12, 1994; (d) the repayment of the Loan will not exceed the total amount of the Loan; (e) the repayment of the Loan by the Plan will be restricted to funds paid to the Plan under the GIC by Confederation, or State Guaranty Funds, or other third-party sources; (f) the repayment of the Loan is waived to the extent the Loan exceeds the proceeds the Plan receives from the GIC; and (g) any proceeds or future interest credited under the GIC after August 12, 1994, in accordance with the Rehabilitation Plan by the State of Michigan, will be allocated and disbursed to the affected participants of the Plan.

Summary of Facts and Representations

1. The Employer is a Delaware corporation with its principal offices located in Wilmington, Delaware. It is a public utility holding company with 15 subsidiaries primarily engaged in the distribution, transmission, and production of natural gas in the Midwest, Southeast, and Mid-Atlantic sections of the country and with production facilities in Texas and West Virginia.

The Employer is also a publicly held corporation with its securities traded on the New York Stock Exchange. For the fiscal year ending September 30, 1994, it had revenues of approximately \$3.1 billion.

The Employer and all its subsidiaries are participating employers in the Plan.

2. The Plan is a defined contribution plan with an employer-matching funding feature. There are provisions in the Plan for individual accounts and participant-directed investments of assets. The Plan has been qualified pursuant to the requirements of sections 401(a) and 401(k) of the Code. There are approximately 9,200 participants in the Plan and \$341.9 million in total assets, as of December 31, 1994.

On October 1, 1989, Bankers Trust Company of New York, New York became trustee of all of the assets of the Plan. On October 17, 1991, the Fidelity Bank, N.A., located in Philadelphia, Pennsylvania became trustee of Plan assets that are invested in common stock issued by the Employer and held in the Columbia Gas System Stock Fund (the Stock Fund) of the Plan. As of December 31, 1994, the Stock Fund had an aggregate fair market value of \$155.4 million and represented approximately

¹⁰ Internal Revenue Procedure 92-16 provides for a temporary closing agreement program to settle certain tax liabilities that arise out of transactions between an employee-sponsor and the trust of a qualified defined contribution plan.

¹¹ The Department notes that the exemption, if granted, will not affect the rights of any participant or beneficiary with respect to any civil action against Plan fiduciaries for breaches of section 404 of ERISA in connection with any aspect of the GAC transactions.

45.5 percent of the total assets of the Plan.

On April 1, 1992, the Fidelity Management Trust Company, a Massachusetts trust company, located in Boston, Massachusetts (the Trustee) became trustee of all the other assets in the Plan and Bankers Trust Company ceased to be a trustee of any Plan assets.

3. The Board of Directors of the Employer establishes the general investment policy for the Plan and has sole authority to appoint and remove any Trustee and any member of the Thrift Plan Committee (the Committee).

The Committee is the named fiduciary of the Plan and consists of officers and directors of the Employer and its subsidiaries. The duties of the Committee include, *inter alia*, the selection of the various investment options offered to the participants by the Plan; and the appointment and removal of investment managers, agents, assistants, legal counsel, and clericals. The Committee also has the duty to interpret the terms and conditions provided in the Plan and to adopt rules and restrictions to implement and administer the Plan and its general investment policy.

The Trustee is the custodian of the assets of the Plan and is responsible for the establishment and maintenance of the investment and disbursement accounts of the Plan. In addition, the Trustee invests Plan assets as directed by the participants into 14 various investment options offered by the Plan. These investment options include 13 diversified mutual funds offered by the Trustee. Initially, all the matching contributions to the Plan by the Employer are invested in the Stock Fund for the respective participants until the participants attain the age of 55 years; and then, the participants may direct the matching contributions by the Employer into any of the 14 investment options offered by the Plan.

4. The Plan acquired the GIC on January 2, 1990, for the consideration of \$6,500,000. The GIC provides for annual guaranteed interest payments of 8.8 percent with a maturity date of January 1, 1995. Since the GIC was acquired by the Plan, there have been withdrawals totalling \$2,272,377, which represents annual interest payments received through January 2, 1994. Interest payments are due January 2 each year. All interest payments through January 2, 1994 have been made. As of August 11, 1994, the GIC had a balance of \$6,838,983.56, including \$338,983.56 in accrued interest.

When the Plan requested payment of the value of the GIC on its maturity date, Confederation was unable to grant the

request because, on August 12, 1994, the Ingham County Circuit Court in Lansing, Michigan had placed Confederation in Conservatorship and Rehabilitation, causing Confederation to suspend payments on all of its contracts including the GIC.¹² At this time, August 12, 1994, a segregated subaccount (the Segregated Account) was established within the Money Market/Investment Contract Fund (MMIC) offered by the Trustee to hold the assets of the Plan represented by the GIC. The Segregated Account represents approximately 17 percent of the funds in the MMIC.

The applicant represents that the Segregated Account, which holds the GIC that is subject to suspension of payments, has prevented participants of the Plan from exercising their rights under the Plan to receive distributions of benefits, withdrawals, and investment transfers with respect to the funds invested in the GIC. The applicant further represents that it is not known whether, when, or under what circumstances Confederation will resume payments on its contracts, including the interest and principal amount of the GIC. Approximately 26 percent of the Plan participants (2,423 individuals) are affected by these restrictions.

5. The Employer proposes to make the Loan to the Plan in order to permit the participants to exercise their rights under the Plan and avoid the administrative problems arising from the restrictions on investment transfers and distributions for terminated, retired, and disabled participants as imposed by the rehabilitation of Confederation. The Loan will be made pursuant to two written agreements by the Employer and the Subsidiary, respectively, with the Plan. The notes issued pursuant to the agreements will be interest-free and unsecured. The amount of the Loan will be no less than the accumulated book value of the GIC (the principal amount, plus interest at the contract rate, and minus withdrawals) as of August 12, 1994.¹³ Any future interest received in accordance with the rehabilitation plan of the Circuit Court will be allocated and disbursed by the Trustee to the

¹² The Department notes that the decisions to acquire and hold the GIC are governed by the fiduciary responsibility provisions of Part 4, Subtitle B, of Title I of the Act. In this regard, the Department is not herein proposing relief for any violations of Part 4 which may have arisen as a result of the acquisition and holding of the GIC by the Plan.

¹³ The Department notes that this exemption, if granted, will not affect the rights of any participant or beneficiary with respect to claims under section 404 of the Act in connection with any aspect of the GIC transactions.

accounts of the participants of the Plan that are affected by the GIC. The purpose of the Loan, as represented by the applicant, is to facilitate distributions and investment transfers from the Plan by the participants and their beneficiaries. The applicant represents that repayments of the Loan by the Plan will be limited to proceeds received from Confederation, or from State Guaranty Funds, or other third-party sources. The repayment of the Loan will be waived to the extent the Loan exceeds the proceeds from the GIC and in no event will the repayment exceed the Loan.

The Trustee in its independent capacity under the Trust Agreement with the Employer of April 1, 1992, represents that it has determined that the proposed transaction is in the best interests of the Plan and its participants and beneficiaries. Furthermore, the Trustee represents that it will determine that the Loan when consummated will be as described herein.

6. In summary, the applicant represents that the proposed transaction will satisfy the criteria for an exemption under section 408(a) of the Act because (a) the proposed transaction will permit investment transfers as well as distributions for terminated, retired, and disabled participants in the Plan; (b) the Plan will not incur interest charges or other expenses with respect to the proposed transaction; (c) the Loan will be no less than the accumulated book value of the GIC as of August 12, 1994; (d) the source of the repayment of the Loan is restricted to the proceeds under the GIC from Confederation, or a State Guaranty Fund, or other third-party sources; (e) the repayment will not exceed the total amount of the Loan; and (f) the repayment of the Loan will be waived to the extent the Loan exceeds the proceeds from the GIC.

FOR FURTHER INFORMATION CONTACT: Mr. C. E. Beaver 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 provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, DC, this 24th day of April, 1995.

Ivan Strasfeld,

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

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[Prohibited Transaction Exemption 95-33;
Exemption Application No. D-09626, et al.]

Grant of Individual Exemptions; Bank South, N.A. 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, DC. 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.

Bank South, N.A. (the Bank) Located in Atlanta, GA

[Prohibited Transaction Exemption 95-33;
Application No. D-09626]

Section I—Exemption for In-kind Transfer of Assets

The restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (F) of the Code, shall not apply as of February 11, 1994, to the in-kind transfer of assets of plans for which the Bank serves as a fiduciary (the Client Plans), other than plans established and maintained by the Bank, that are held in certain collective

investment funds maintained by the Bank (the CIFs), in exchange for shares of the Peachtree Funds (the Funds), an open-end investment company registered under the Investment Company Act of 1940 (the 1940 Act) for which the Bank acts as investment adviser, in connection with the termination of such CIFs, provided that the following conditions and the general conditions of Section III below are met:

(a) No sales commissions or other fees are paid by the Client Plans in connection with the purchase of Fund shares through the in-kind transfer of CIF assets and no redemption fees are paid in connection with the sale of such shares by the Client Plans to the Funds.

(b) Each Client Plan receives shares of a Fund which have a total net asset value that is equal to the value of the Client Plan's pro rata share of the assets of the CIF on the date of the transfer, based on the current market value of the CIF's assets, as determined in a single valuation performed in the same manner at the close of the same business day using independent sources in accordance with Rule 17a-7(b) of the Securities and Exchange Commission under the 1940 Act and the procedures established by the Funds pursuant to Rule 17a-7 for the valuation of such assets. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the Friday preceding the weekend of the CIF transfers, determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of the Bank.

(c) A second fiduciary who is independent of and unrelated to the Bank (the Independent Fiduciary) receives advance written notice of the in-kind transfer of assets of the CIFs and full written disclosure of information concerning the Funds (including a current prospectus for each of the Funds and a statement describing the fee structure) and, on the basis of such information, authorizes in writing the in-kind transfer of the Client Plan's CIF assets to a corresponding Fund in exchange for shares of the Fund.

(d) For all transfers of CIF assets to a Fund following the publication of the proposed exemption in the **Federal Register** (i.e. January 30, 1995), the Bank sends by regular mail to each affected Client Plan the following information: