

NAFTA-TAA-02602; NAFTA-TAA-02667, NAFTA-TAA-02626; Russell Corp., Midland, GA, Marianna, FL and Slocomb, AL: September 8, 1997.

NAFTA-TAA-02670; Beloit Corp., Dalton, MA: October 5, 1997.

NAFTA-TAA-02723; Romart, Inc., Scranton, PA: November 4, 1997.

NAFTA-TAA-02683; Georgia Pacific, Lebonite Hardboard Div., Lebanon, OR: October 13, 1997.

NAFTA-TAA-02621; Marcelle's Fashions, Inc., El Paso, TX: September 1, 1997.

NAFTA-TAA-02707; Detroit Steel Products Co., Inc., Morristown, IN: October 26, 1997.

I hereby certify that the aforementioned determinations were issued during the month of December, 1998. Copies of these determinations are available for inspection in Room C-4318, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: December 7, 1998.

**Grant D. Beale,**

*Acting Director, Office of Trade Adjustment Assistance.*

[FR Doc. 98-33312 Filed 12-15-98; 8:45 am]

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Application No. D-10661, et al.]

### Proposed Exemptions; MONY Life Insurance Company

**AGENCY:** Pension and Welfare Benefits Administration, Labor

**ACTION:** Notice of Proposed Exemptions.

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

### Written Comments and Hearing Requests

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 requests for a hearing should state: (1)

the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

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

### Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

### MONY Life Insurance Company (MONY), Located in New York, NY

[Application No. D-10661]

### Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).<sup>1</sup>

### Section I.—Covered Transactions

If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective November 16, 1998, to the (1) receipt of common stock of the MONY Group, Inc. (the Holding Company), a subsidiary of MONY, or (2) the receipt of cash or policy credits, by or on behalf of any eligible policyholder (the Eligible Policyholder) of MONY which is an employee benefit plan (the Plan), other than an Eligible Policyholder which is a Plan maintained by MONY or an affiliate for its employees, in exchange for such Eligible Policyholder's membership interest in MONY, in accordance with the terms of a plan of reorganization (the Plan of Reorganization) adopted by MONY and implemented pursuant to section 7312 of the New York Insurance Law.

This proposed exemption is subject to the conditions set forth below in Section II.

### Section II. General Conditions

(a) The Plan of Reorganization is implemented in accordance with procedural and substantive safeguards that are imposed under New York Insurance Law and is subject to review and supervision by the Superintendent of Insurance of the State of New York (the Superintendent).

(b) The Superintendent reviews the terms of the options that are provided to Eligible Policyholders of MONY as part of such Superintendent's review of the Plan of Reorganization, and the Superintendent only approves the Plan of Reorganization following a determination that such Plan of Reorganization is fair and equitable to all Eligible Policyholders and is not detrimental to the public.

<sup>1</sup> For purposes of this exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(c) Each Eligible Policyholder has an opportunity to vote to approve the Plan of Reorganization after full written disclosure is given to the Eligible Policyholder by MONY.

(d) Any election by an Eligible Policyholder that is a Plan to receive Holding Company stock, cash or policy credits, pursuant to the terms of the Plan of Reorganization is made by one or more independent fiduciaries of such Plan and neither MONY nor any of its affiliates exercises any discretion or provides investment advice with respect to such election.

(e) After each Eligible Policyholder entitled to receive stock is allocated at least 7 shares of Holding Company stock, additional consideration is allocated to Eligible Policyholders who own participating policies based on actuarial formulas that take into account each participating policy's contribution to the surplus of MONY which formulas have been approved by the Superintendent.

(f) All Eligible Policyholders that are Plans participate in the transactions on the same basis within their class groupings as other Eligible Policyholders that are not Plans.

(g) No Eligible Policyholder pays any brokerage commissions or fees in connection with their receipt of Holding Company stock or in connection with the implementation of the commission-free sales and purchase programs.

(h) All of MONY's policyholder obligations remain in force and are not affected by the Plan of Reorganization.

### Section III. Definitions

For purposes of this proposed exemption:

(a) The term "MONY" means "MONY Life Insurance Company" and any affiliate of MONY as defined in paragraph (b) of this Section III.

(b) An "affiliate" of MONY includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with MONY. (For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(2) Any officer, director or partner in such person, and

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

(c) The term "Eligible Policyholder" means a policyholder who is eligible to vote and to receive consideration under MONY's Plan of Reorganization. Such Eligible Policyholder is a policyholder of the mutual insurer on the date the

Plan of Reorganization is adopted by the Board of Trustees of MONY and on the effective date of the reorganization.

(d) The term "policy credit" means an increase in the accumulation account value<sup>2</sup> (to which no surrender or similar charges are applied) in the general account or an increase in a dividend accumulation on a policy.

Effective date: If granted, this proposed exemption will be effective as of November 16, 1998, the date of MONY's Plan of Reorganization.

### Summary of Facts and Representations

1. MONY, which was formerly structured under the laws of the State of New York as a mutual life insurance company called "The Mutual Life Insurance Company of New York," is one of the oldest insurance companies in the United States, having been organized in 1842. In 1867, MONY became the first mutual company to declare annual policyholder dividends. Its principal place of business is located at 1740 Broadway, New York, New York.

MONY is licensed to conduct insurance business in all 50 states including the District of Columbia. As of December 31, 1997, MONY had total assets of \$16.6 billion, total liabilities of \$15.7 billion (including liabilities for policyholder benefits of \$9.3 billion) and surplus of about \$835 million.

MONY's principal products include life insurance, annuities (including tax deferred annuities described in section 403(b) of the Code (TDAs) and individual retirement annuities (IRAs) described in section 408(b) of the Code) and pension products. With its affiliates and subsidiaries, MONY provides fiduciary and other services to Plan policyholders which are covered under the Act and the Code. Such services may include plan administration, investment management, securities brokerage and related services. As a result of providing these services to Plan policyholders, MONY and its affiliates would become parties in interest with respect to the Plans.

2. Because it was formerly organized as a mutual life insurance company,

<sup>2</sup> In general, a policy's accumulation account value is expressed in dollar terms and reflects contributions and interest credited under the policy, less expenses and withdrawals. Accumulation values may be applied for the purchase of annuity benefits, or depending on the provisions of the contract, withdrawn by the policyholder in a lump sum or installments. Under MONY's Plan of Demutualization, where a policy eligible for distributions under such Plan has an accumulation value, the policy's accumulation value will be increased by an amount equal to the distribution the policyholder is entitled to under the Plan.

MONY had no authorized, issued or outstanding stock. Instead, policyholders were both customers and owners of the company. Specifically, the life insurance, endowment, annuity and certain other insurance and pension contracts issued by MONY combined both insurance coverage and proprietary rights, i.e., membership rights. In this regard, MONY policyholders were entitled to vote on the conversion of the company from a mutual life insurance company to a stock company. In addition, some owners of MONY insurance contracts had rights to the equity or surplus of the company in certain circumstances and some policyholders had rights to share in the divisible surplus as annually determined by MONY (policyholder dividends). MONY's Board of Trustees annually determined the divisible surplus of the company that would be distributed as policyholder dividends.

3. MONY represents that stock life companies have many advantages over mutual companies. Unlike stock life companies, mutual life insurance companies do not have ready access to outside capital resources because they may not enhance their capital base by issuing equity securities to the public or institutional investors. Therefore, access to equity, or for that matter, debt capital markets is significantly limited. In addition, MONY notes that since mutual life insurance companies may not use stock for acquisitions or for executive compensation, they have less flexibility in corporate structure. Because these restrictions have hampered the growth of mutual life insurance companies, MONY explains that the total market share of mutual life insurance companies has declined significantly in the past twenty years.

For these reasons, MONY proposed to reorganize into a stock life insurance company to enhance its long-term strength and allow it to obtain the equity and debt capital it would need in the competitive markets in which it and its subsidiaries operate. As part of its Plan of Reorganization, MONY will distribute to Eligible Policyholders 100 percent of the value of the company in the form of stock, cash or policy credits in exchange for their membership interests. It is anticipated that all of MONY's policyholders will benefit from a stronger balance sheet and the likelihood of a higher credit rating.

Therefore, MONY requests an individual exemption from the Department that would cover the receipt of Holding Company stock, cash or policy credits by Eligible Policyholders that are Plans in exchange for their existing membership interests in

MONEY.<sup>3</sup> MONEY is not requesting an exemption for distributions of Holding Company stock for the Plans it and its affiliates maintain for their own employees because it believes such stock would constitute "qualifying employer securities" within the meaning of section 407(d)(5) of the Act and that section 408(e) of the Act would apply to such distributions.<sup>4</sup> If granted, the exemption will be effective as of November 16, 1998, which is the date of MONEY's Plan of Reorganization.

4. To become a stock insurance company, MONEY proposed to reorganize under section 7312 of the New York Insurance Law. In this regard, MONEY's Board of Trustees adopted a Plan of Reorganization on August 14, 1998 under which MONEY would, subject to the approval of its policyholders and the Superintendent, be organized as a stock life insurance company subsidiary of a holding company (i.e., the Holding Company). The stock of the Holding Company would then be distributed to the policyholders.

Section 7312 establishes a rigorous approval process for the reorganization of a life insurance company. The demutualization must be initiated by the board of trustees of the insurance company which must approve the reorganization plan by a vote of at least three-fourths of the entire board. The board of trustees must also make an express finding that the plan is "fair and equitable" to all affected policyholders.

Once approved by the board of trustees, the reorganization plan must be submitted to the Superintendent for review and approval. To become effective, the Superintendent must determine that the reorganization plan meets the requirements imposed by section 7312, including the requirements that the plan be fair and equitable to the policyholders, not be detrimental to the public and following the reorganization, the insurer must have an amount of surplus which the Superintendent deems to be reasonably necessary for its future solvency.

To assist the Superintendent in performing his or her duties, section 7312(h)(1) permits the Superintendent to appoint independent consultants. Specifically, section 7312(h)(2) requires the Superintendent to appoint an

independent actuary to advise him or her on matters relating to the reorganization. The actuary will provide a memorandum describing his review. In the case of its Plan of Reorganization, MONEY has hired the actuarial firm of Tillinghast Towers-Perrin (TT-P) to conduct an actuarial review and the investment banking firm of Chase Securities, Inc. as investment banking consultant.

Under New York Insurance Law, the Superintendent is also required to hold a public hearing on the plan of reorganization at which time policyholders and other interested persons are invited to express their views on the plan. The purpose of the public hearing is to determine whether the reorganization plan is fair and equitable to policyholders and is not detrimental to the public. During the hearing, interested persons may comment on the fairness of the terms of the plan. Notice of the hearing, a copy of the plan, a summary of the plan and other materials approved by the Superintendent must be provided to each policyholder of the insurance company whose policy or contract is in force on the date of adoption of the plan of reorganization. The notice must also be published in three newspapers of general circulation.

Once the reorganization plan has been approved by the insurer's board of trustees and after the public hearing, the Superintendent is required to approve such plan if he or she finds that (a) the plan does not violate New York Insurance Law; (b) the plan is fair and equitable to all policyholders and is not detrimental to the public; and (c) after giving effect to the reorganization, the reorganized insurer will have an amount of capital and surplus the Superintendent deems to be reasonably necessary for its future solvency. The Superintendent must also determine that the reorganization plan does not fail to meet the following requirements of section 7312(c). In other words, (a) the plan must demonstrate a purpose and specific reasons for the proposed reorganization; (b) the plan must be fair and equitable to the policyholders; (c) the plan must provide for the enhancement of the operations of the reorganized insurer; and (d) the plan must not substantially lessen competition in any line of insurance business. A decision by the Superintendent to approve a plan of reorganization is subject to judicial review in the New York courts.

The policyholders of the mutual life insurance company must also approve the plan of reorganization. Each policyholder is entitled to one vote and

the plan must be approved by a vote of at least two-thirds of all votes cast by policyholders entitled to vote.

5. MONEY completed the development of its Plan of Reorganization and received approval from its Board of Trustees of the proposed conversion on August 14, 1998. On October 19, 1998, the New York State Insurance Department (the New York Insurance Department) held a public hearing with respect to MONEY's Plan of Reorganization. On November 2, 1998, the vote by MONEY policyholders approving the Plan was completed. Formal approval of the Plan by the New York Insurance Department occurred on November 10, 1998.

6. MONEY has established a subsidiary (i.e., the Holding Company) whose stock it exclusively owns. On November 16, 1998, the effective date of the Plan of Reorganization, MONEY, itself, issued common stock to the Holding Company. In addition, MONEY surrendered to the Holding Company and the Holding Company cancelled all of the Holding Company common stock held by MONEY. MONEY then became a subsidiary of the Holding Company.

As a result of the reorganization, MONEY became, by operation of New York Insurance Law, a stock life insurance company. MONEY's charter and by-laws were extinguished in accordance with New York Insurance Law. Further, MONEY's name was changed from "The Mutual Life Insurance Company of New York" to "MONEY Life Insurance Company." However, all of MONEY's insurance policies would remain in force and all policyholders would be entitled to receive all of the benefits under their policies and contracts to which they would have been entitled if the Plan of Reorganization had not been adopted.

7. MONEY's Plan of Reorganization provides for Eligible Policyholders to receive consideration in exchange for the surrender of their membership interests as soon as practicable after the reorganization date. Eligible Policyholders are those policyholders whose MONEY policies were both in force on the date of adoption of the Plan of Reorganization by MONEY's Board of Trustees and were still in force on the effective date of the Plan.

Under the Plan of Reorganization, certain Eligible Policyholders will receive common stock of the Holding Company as consideration for their membership interest in the mutual insurance company. Said interest will be extinguished as a result of the reorganization (Stock Eligible Policyholders).

<sup>3</sup> MONEY estimates that approximately 30,000 of its policyholders are Plans whose contracts are supported by several hundred million dollars in assets.

<sup>4</sup> The Department expresses no opinion herein on whether the Holding Company stock will constitute qualifying employer securities and whether such distributions will satisfy the terms and conditions of section 408(e) of the Act.

Aside from requiring the Holding Company to issue shares of Holding Company stock to Stock Eligible Policyholders, the Holding Company was permitted to sell shares of such stock, for cash, in an initial public offering (the IPO) on the date of the reorganization. The Holding Company also arranged for listing the Holding Company stock on the New York Stock Exchange (NYSE). Such stock is currently traded on the NYSE.

Also under MONY's Plan of Reorganization, certain Eligible Policyholders will receive cash or policy credits in lieu of Holding Company stock. In this regard, if there were an IPO, Eligible Policyholders who affirmatively indicated a preference to receive cash instead of Holding Company stock, and who were allocated 75 shares or less, as determined by MONY's Board of Trustees and approved by the Superintendent prior to the reorganization, would receive cash instead of Holding Company stock.<sup>5</sup> Assuming there were no IPO, such Eligible Policyholders would receive Holding Company stock, regardless of having expressed an interest for cash.

In addition, Eligible Policyholders whose mailing address is outside the United States or Canada will receive cash unless the Plan of Reorganization requires them to receive policy credits. Eligible Policyholders who hold TDA or IRA contracts will receive policy credits in the form of enhanced policy values in exchange for their membership interests.<sup>6</sup> Such Eligible Policyholders are generally not able to hold stock under applicable tax laws. Further, individuals, who are covered by Plans that are qualified under sections 401(a) or 403(a) of the Code, and who hold life insurance or annuity contracts will receive policy credits. All other Eligible Policyholders, who are not entitled to receive Holding Company stock, will receive cash in exchange for their membership interests.<sup>7</sup>

<sup>5</sup>With respect to these policyholders, MONY represents that it will not provide "investment advice" on the form of consideration elected.

<sup>6</sup>However, TDA or IRA policyholders who are in "payout status" will receive shares of Holding Company Stock instead of policy credits.

<sup>7</sup>Consistent with sections 7312(a)(2), 7312(e) and 4210 of New York Insurance Law, the Plan of Reorganization generally provides that the policyholder eligible to participate in the distribution of stock, cash or policy credits resulting from the Plan of Reorganization is "the person whose name appears \* \* \* on the insurer's records as owner" of the policy. MONY further represents that an insurance or annuity policy that provides benefits under an employee benefit plan, typically designates the employer that sponsors the plan, or a trustee acting on behalf of the plan, as the owner of the policy. In regard to insurance or annuity policies that designate the employer or trustee as

The cash or policy credits distributed to Eligible Policyholders, who are not entitled to receive Holding Company stock, will have a value equal to the stock such policyholders would otherwise have received based on the price per share of the Holding Company stock in the IPO or, if there were no IPO, a number equal to a percentage of the book value of the Holding Company stock on November 16, 1998, the effective date of the Plan of Reorganization as determined by MONY's actuarial consultant, PricewaterhouseCoopers, LLP, (PwC) and approved by the Superintendent, in consultation with its actuary, TT-P.<sup>8</sup> In total, MONY expects to distribute approximately \$1 billion in value to Eligible Policyholders. Said amount represents the entire value of MONY's enterprise. MONY proposes to distribute the consideration to Eligible Policyholders on December 24, 1998.

8. The Holding Company stock will be allocated to Stock Eligible Policyholders as follows: (a) each Stock Eligible Policyholder will receive at least 7 shares; and (b) the remainder of the shares will be allocated to Stock Eligible Policyholders who own participating

owner of the policy. MONY represents that it is required under the foregoing provisions of New York Insurance Law and the Plan of Reorganization to make distributions resulting from such Plan to the employer or trustee as owner of the policy, except as provided below.

Notwithstanding the foregoing, MONY's Plan of Reorganization provides a special rule applicable to an insurance policy issued to a trust established by MONY. This rule applies whether or not the trust, or any arrangement established by any employer participating in the trust, constitutes an employee benefit plan subject to the Act. Under this special rule, the holder of each individual "certificate" issued in connection with the insurance policy is treated as the policyholder and owner for all purposes under the Plan of Reorganization, including voting rights and the distribution of consideration. The trustee of any such trust established by MONY will not be considered a policyholder or owner and will not be eligible to vote or receive consideration.

In general, it is the Department's view that, if an insurance policy (including an annuity contract) is purchased with assets of an employee benefit plan, including participant contributions, and if there exist any participants covered under the plan (as defined at 29 CFR 2510.3-3) at the time when MONY incurs the obligation to distribute Holding Company stock, cash or policy credits, then such consideration would constitute an asset of such plan. Under these circumstances, the appropriate plan fiduciaries must take all necessary steps to safeguard the assets of the plan in order to avoid engaging in a violation of the fiduciary responsibility provisions of the Act.

<sup>8</sup>MONY wishes to clarify that the Superintendent was empowered to approve the Plan of Reorganization and, in connection with such Plan, the methodology utilized to determine the book value of the Holding Company. However, the Superintendent is not specifically authorized to review and approve the actual calculation of the book value of the Holding Company at the time the distribution occurs.

policies based on the estimated contributions to surplus made by each Eligible Policyholder.<sup>9</sup> As stated above, the allocation methodology must be fair and equitable. Therefore, MONY has retained PwC to assist it in developing an equitable allocation methodology, and the Superintendent has retained TT-P to evaluate the allocation methodology. Further, no Stock Eligible Policyholder will pay any brokerage commissions or other transaction costs in connection with such policyholder's receipt of stock.

9. The Plan of Reorganization states that amounts to be distributed to Eligible Policyholders that are Plans will be held in an escrow or similar arrangement in the event that the Department does not provide exemptive relief prior to the date of the reorganization. Under the escrow arrangement, Plan policyholders will not receive their distribution until such time as the exemption is granted, but no later than the third anniversary of the effective date of the reorganization. The escrow arrangement is subject to the terms and conditions of the New York Insurance Department. Although it is currently contemplated that the New York Insurance Department may require MONY to adopt the escrow arrangement, MONY notes that this arrangement may be determined to be unnecessary if the proposed exemption specifies the date of reorganization as the effective date of the exemption.

10. In addition, the Plan of Reorganization provides for the establishment of a commission-free sales program whereby Stock Eligible Policyholders who receive between 25 and 99 shares of Holding Company stock will be given the opportunity to sell their Holding Company stock on the open market at least 60 days prior to the commencement date of the program. Further, the Plan of Reorganization provides for a commission-free purchase program whereby Stock Eligible Policyholders who receive 99 or fewer shares of Holding Eligible Company stock will be permitted to purchase the number of shares necessary to bring their respective total number of shares up to 100. Stock Eligible Policyholders who participate in the commission-free sales and purchase programs will do so without the payment of any brokerage commissions or similar fees. Moreover, MONY and its affiliates will not provide "investment advice" as described in section 3(21) of the Act with regard to

<sup>9</sup>MONY notes that both the fixed and variable components of an insurance policy will be provided in exchange for the policyholder's membership interests.

the program. The commission-free sales and purchase programs will commence on the first business day after the nine month anniversary of the effective date of the reorganization and will continue for three months. The programs may be extended with the approval of the Superintendent if the Board of Directors of MONY determines such extension would be appropriate and in the best interest of MONY and its stockholders.

11. Although policyholder membership interests in MONY were extinguished as a result of the reorganization, MONY's insurance policies will remain in force. Eligible Policyholders will be entitled to receive all benefits under their policies to which they would have been entitled if the Plan of Reorganization had not been adopted. In effect, no actual exchange of contracts will take place. The contractual terms and benefits of MONY's life insurance, endowment, annuity, pension plan, and other insurance contracts, including the face values, insurance in force, borrowing terms, amount or pattern of death benefit, premium pattern, interest rate or rates guaranteed on issuance of the contract, and the guaranteed mortality and expense charges, will remain unchanged.

12. As part of its long-term strategic plan to convert to a stock life insurance company, MONY, the Holding Company and a group of investment funds (the Investors)<sup>10</sup> affiliated with Goldman, Sachs & Co. (Goldman Sachs) have entered into an investment agreement (the Investment Agreement). Under the Investment Agreement, MONY issued \$115 million of 15 year, 9.5 percent surplus notes (the Surplus Notes) to the Investors on December 30, 1997. The Surplus Notes are direct and unsecured obligations of MONY. In accordance

<sup>10</sup>The Investors consist of GS Mezzanine Partners, L.P.; GS Mezzanine Partners Offshore, L.P.; Stone Street Fund 1997, L.P.; and Bridge Street Fund 1997, L.P. At the time of the investment, it is represented that one member of MONY's Board of Trustees was a limited partner in Goldman Sachs. However, no other affiliation between MONY and the other Investors existed at the time of the Investment Agreement.

In addition, the Investors have specifically represented to MONY that their investment in the aforementioned limited partnerships will either not involve plan assets or will not constitute a prohibited transaction. In this regard, section 3.2(d) of the Investment Agreement provides that—

Each Investor represents that either (a) it is not (i) an employee benefit plan (as defined in section 3(3) of ERISA) which is subject to the provisions of Title I of ERISA, (ii) a plan described in section 4975(e)(1) of the Code or, (iii) an entity whose underlying assets are deemed to be assets of a plan described in (i) or (ii) above by reason of such plan's investment in the entity, or (b) the Investor's purchase and holding of [the Surplus] Notes will be exempt under a prohibited transaction class exemption issued by the U.S. Department of Labor.

with section 1307 of the New York Insurance Law, each payment of principal and interest on the Surplus Notes may only be made with the prior approval of the New York Insurance Department. The Surplus Notes are subordinate to all existing and future indebtedness, policy claims and other creditors of MONY. Proceeds from the Surplus Notes issuance are being added to MONY's capital base.

Also under the Investment Agreement, MONY sold warrants (the Warrants) providing the Investors with the opportunity to purchase a minority interest of 7 percent or less of the Holding Company stock upon MONY's conversion to a stock company. The Warrants were sold to the Investors on December 30, 1997 at an aggregate purchase price of \$10 million. The exercise price for the Warrants will be the IPO share price.

Further, the Investment Agreement provides that following the reorganization, MONY has an option to draw upon an additional \$100 million from the Investors through the issuance of non-voting convertible preferred stock. Although MONY does not currently expect that it will exercise the option, the contingent capital commitment would allow it to have additional capital access, particularly in the event it does not complete the IPO.

Finally, under the Investment Agreement, the Investors have been granted board representation rights. Under the Agreement, MONY and the Holding Company have agreed to use their best efforts to cause one of the persons proposed by the Investors to be elected to its board. The Investors' right to board representation will terminate when the Investors no longer own Holding Company stock and/or the right to acquire such stock (through the ownership of Warrants and/or convertible preferred stock) equal to 5 percent of the voting power of the Holding Company stock.

It is represented that Goldman Sachs's investment will add significantly to MONY's financial strength and in no way affect MONY's policy commitments or other obligations.

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

(a) The Plan of Reorganization, which is being implemented pursuant to stringent procedural and substantive safeguards imposed under New York law and supervised by the Superintendent, will not require any ongoing involvement by the Department.

(b) One or more independent Plan fiduciaries had an opportunity to determine whether to vote to approve the terms of the Plan of Reorganization and was solely responsible for all such decisions.

(c) The proposed exemption will allow Eligible Policyholders that are Plans to acquire Holding Company stock, cash or policy credits in exchange for their membership interests in MONY and neither MONY nor its affiliates will exercise any discretion or provide investment advice with respect to such acquisition.

(d) No Eligible Policyholder will pay any brokerage commissions or fees in connection with such Eligible Policyholder's receipt of Holding Company stock or with respect to the implementation of the commission-free sales and purchase programs.

(e) As a result of the Plan of Reorganization, all Eligible Policyholders will receive approximately \$1 billion from MONY which represents MONY's full equity value and have the opportunity to participate in MONY's future earnings.

(f) Each Eligible Policyholder that is a Plan had an opportunity to comment on the Plan of Reorganization and to vote to approve such Plan of Reorganization after receiving full and complete disclosure of its terms.

(g) The Superintendent made an independent determination that the Plan of Reorganization was in the interest of all MONY policyholders including Plans.

(h) All of MONY's policyholder obligations will remain in force and will not be affected by the Plan of Reorganization.

#### Notice to Interested Persons

MONY will provide notice of the proposed exemption to Eligible Policyholders which are Plans within 30 days of the publication of the notice of pendency in the **Federal Register**. Such notice will be provided to interested persons by first class mail and will include a copy of the notice of proposed exemption as published in the **Federal Register** as well as a supplemental statement, as required pursuant to 20 CFR 2570.43(b)(2) which shall inform interested persons of their right to comment on the proposed exemption. Comments with respect to the notice of proposed exemption are due within 60 days after the date of publication of this pendency notice in the **Federal Register**.

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

**Individual Retirement Accounts (the IRAs) for Sharilyn Brune, Richard C. Glowacki, Carl B. Mockensturm, Arthur T. Parrish, W. Alan Robertson, David A. Snavely and Duane Stranahan, Jr. (collectively, the IRA Participants); Located in Holland, OH**

[Application Nos. D-10636-D-10642, respectively]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of 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 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, effective December 1, 1998 to (1) the cash sale by the IRAs<sup>11</sup> to TTC Holdings, Inc. (TTC), the parent of The Trust Company of Toledo, N.A. (TTCOT), the trustee of the IRAs and a disqualified person, of certain preferred stock (the Preferred Stock) issued by TTC; and (2) the arrangement for the subsequent purchase by the IRA Participants in their individual capacities, from TTC, pursuant to an agreement with TTC, of an equal number of shares of common stock (the Common Stock) issued by TTC, provided the following conditions are met:

(a) The terms and conditions of the sale and purchase transactions were at least as favorable to each IRA as the terms obtainable in an arm's length transaction with an unrelated party.

(b) The sale by the IRAs of the Preferred Stock and the purchase by the IRA Participants of the Common Stock, in their individual capacities, were one-time transactions for cash which occurred on the same business day;

(c) Each IRA received from TTC, as the sales price for the Preferred Stock, cash consideration reflecting the fair market value of such stock as determined by a qualified, independent appraiser;

(d) Each IRA Participant purchased, in his or her individual capacity, shares of the Common Stock which were equal in number to the shares of Preferred Stock sold by TTC;

(e) No IRA was required to pay any commissions, fees or other expenses in connection with each sale transaction; and

(f) An independent fiduciary (the Independent Fiduciary) determined that the transactions described herein were in the best interest and protective of the IRAs at the time of the transactions; supervised and monitored such transactions on their behalf; assured that the conditions of the proposed exemption were met; and took whatever actions were necessary and proper to protect the interests of the IRAs, including reviewing amounts paid by TTC for the Preferred Stock.

*Effective date:* If granted, this proposed exemption will be effective as of December 1, 1998.

**Summary of Facts and Representations**

1. TTC of 6135 Trust Drive, Holland, Ohio was incorporated in April 1990 as an Ohio "for profit" corporation. TTC is the holding company of TTCOT, a nondeposit trust company. TTCOT, also located in Holland, Ohio, is a wholly owned subsidiary of TTC.

2. TTCOT is a bank as that term is defined in section 202(a)(2) of the Investment Advisers Act of 1940, as amended (the Advisers Act).<sup>12</sup> TTCOT has been approved by the Office of the Comptroller of the Currency to operate as a trust company. For the past 8 years, it has engaged in the business of a freestanding trust-only business. TTCOT provides a range of trust, investment management and custodial services for employee benefit trusts and various personal trusts throughout northwestern Ohio and southwestern Michigan. However, TTCOT does not have the power to accept deposits, make loans or provide other services characteristic of a commercial bank. TTCOT is regulated by the Office of the Comptroller of the Currency. As a member of the Federal Reserve System, TTCOT is also subject to the regulations of the Federal Reserve Board. The trust powers of TTCOT are limited to the laws of the State of Ohio.

3. The IRAs are individual retirement accounts established under section 408(a) of the Code.<sup>13</sup> At present, TTCOT

<sup>12</sup> The Advisers Act defines the term "bank" to include "(A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) any other banking institution or trust company, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency, and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this subchapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph."

<sup>13</sup> Section 408(a) of the Code defines the term "individual retirement account" as a trust created

or organized in the United States for the exclusive benefit of an individual or his beneficiaries but only if the written governing instrument creating the trust meets the following requirements: (a) except in the case of a rollover contribution described in subsection (d)(3) in Code sections 402(c), 403(a)(4) or 403(b)(8), no contribution will be accepted unless it is in cash and contribution will be accepted unless it is in cash and contributions will not be accepted for the taxable year in excess of \$2,000 on behalf of the individual; (b) the trustee is a bank or such other person who demonstrates to the satisfaction of the Secretary [of the Treasury] that the manner in which such other person will administer the trust will be consistent with the requirements of this section; (c) no part of the trust funds will be invested in life insurance contracts; (d) the interest of an individual in the balance in his account is nonforfeitable; (e) the assets of the trust will not be commingled with other property except in a common trust fund or common investment fund; and (f) under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

serves as a directed trustee for the IRAs which are further described as follows: (a) *The Sharilyn Brune IRA.* This IRA was originally established by Sharilyn Z. Brune with The Ohio Company. However, on October 30, 1997, TTCOT was appointed as the successor, directed trustee of the IRA. Ms. Brune, the only participant in the IRA, is not an officer, director, principal or employee of either TTC or TTCOT. As of August 26, 1998, Ms. Brune's IRA had total assets having a fair market value of \$112,808.

(b) *The Richard Glowacki IRA.* This IRA was originally established by Richard C. Glowacki with the former Society Bank and Trust (Society Bank), which is currently known as KeyBank. However, on June 29, 1992, TTCOT was appointed as the successor, directed trustee of the IRA. Mr. Glowacki, the only participant in the IRA, is not an officer, director, principal or employee of either TTC or TTCOT. As of July 31, 1998, Mr. Glowacki's IRA had total assets having a fair market value of \$1,274,017.

(c) *The Carl B. Mockensturm IRA.* This IRA was originally created by Carl B. Mockensturm with the former Shearson Lehman Bros., which is currently known as Lehman Bros. However, on April 1, 1997, TTCOT was appointed as the successor, directed trustee of the IRA. Mr. Mockensturm, the only participant in the IRA, is not an officer, director, principal or employee of either TTC or TTCOT. As of July 31, 1998, Mr. Mockensturm's IRA had total assets having a fair market value of \$535,766.

(d) *The Arthur T. Parrish IRA.* This IRA was originally established by Arthur T. Parrish and Scudder Investment. However, on January 3, 1991, TTCOT was appointed as the

<sup>11</sup> Pursuant to 29 CFR 2510.3-2(d), the IRAs are not within the jurisdiction of Title I of the Employee Retirement Income Security Act of 1974 (the Act). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

successor, directed trustee of the IRA. Mr. Parrish, the only participant in the IRA, is not an officer, director, principal or employee of either TTC or TTCOT. As of July 31, 1998, Mr. Parrish's IRA had total assets having a fair market value of \$438,924.

(e) *The W. Alan Robertson IRA.* This IRA was originally created by W. Alan Robertson and the former Society Bank. However, on October 4, 1997, TTCOT was appointed as the successor, directed trustee of the IRA. Mr. Robertson, the only participant in the IRA, is not an officer, director, principal or employee of either TTC or TTCOT. As of July 31, 1998, Mr. Robertson's IRA had total assets having a fair market value of \$383,997.

(f) *The David A. Snavelly IRA.* This IRA was originally created by David A. Snavelly and The Ohio Company. However, on October 4, 1997, TTCOT was appointed as the successor, directed trustee of the IRA. Mr. Snavelly, the only participant in the IRA, is not an officer, director, principal or employee of either TTC or TTCOT. As of July 31, 1998, Mr. Snavelly's IRA had total assets having a fair market value of \$244,229.

(g) *The Duane Stranahan, Jr. IRA.* This IRA was originally created by Duane Stranahan, Jr. and the former Society Bank. However, on January 25, 1991, TTCOT was appointed as the successor, directed trustee of the IRA. Mr. Stranahan, the only participant in the IRA, is the Chairman of the Board and a director TTCOT. As of July 31,

1998, Mr. Stranahan's IRA had total assets having a fair market value of \$412,661.

4. TTC was formerly capitalized with two classes of stock—one class of common stock (i.e., the Common Stock) and one class of preferred stock (i.e., the Preferred Stock). Both classes of stock had equal voting rights and were without par value. There were 3,531 shares of Common Stock outstanding which were divided evenly among Theodore T. Hahn, Julie B. Higgins and David Snavelly, the founders, principals and partners of TTC.

The Preferred Stock was initially issued in units of 200 shares, each in combination with a \$10,000, 9 percent debenture (the Debenture) subordinated to the secured debt of TTC. The Debenture has a maturity date of December 31, 2000.<sup>14</sup> The Preferred Stock and the Debentures were both constituent parts of a single offering unit which could not be severed by the purchaser. The price for each unit was \$30,000. Of this amount, \$20,000 was allocated to the Preferred Stock and \$10,000 to the Debenture. Thus, the total subscription price was \$3 million.

There were 20,000 shares of Preferred Stock that were issued and outstanding. These shares were held by approximately 65 shareholders. Among the shareholders were 19 employee benefit plans and IRAs holding a total of 4,400 shares of Preferred Stock or 18.7 percent of the 23,531 aggregate

shares of Preferred and Common Stock that were issued and outstanding.

The Preferred Stock gave each shareholder a \$100 per share liquidation preference but it did not pay any dividends. Each share of Preferred Stock was convertible into one share of Common Stock at the option of the shareholder. In addition, the Preferred Stock entitled the holder to voting privileges that were identical to those given to shareholders of the Common Stock.

5. Through a Confidential Offering Memorandum dated May 31, 1990 (the principal terms of which are described above in Representation 4), each IRA Participant was given the opportunity, by the founders of TTC, to acquire shares of Preferred Stock and Debentures in a direct, limited private placement at the time of the initial offering. In this regard, each IRA Participant could direct their respective IRA to purchase shares of Preferred Stock and a Debenture. Based on the financial projections provided in the Confidential Offering Memorandum, it was TTCOT's belief that the investors might recognize the opportunity for equity appreciation through such an investment.

Therefore, on October 8, 1990, each IRA acquired shares of the Preferred Stock from TTC along with the Debentures. The IRAs paid cash for the Preferred Stock and the attendant Debentures in the following amounts:

IRA	Shares of preferred stock acquired	Amount paid for preferred stock	Amount paid for debentures	Percentage of IRA's assets represented by preferred stock and debentures (percent)
Brune .....	200	\$20,000	\$10,000	75
Glowacki .....	200	20,000	10,000	9
Mockensturm .....	200	20,000	10,000	15
Parrish .....	200	20,000	10,000	17
Robertson .....	200	20,000	10,000	30
Snavelly .....	200	20,000	10,000	45
Stranahan .....	800	80,000	40,000	90

<sup>14</sup>The original Debenture debt represents a ten year note totaling \$1 million that was issued in October 1990. Interest has accrued on the unpaid principal amount of the note from the date of issuance at the rate of 9 percent per annum based upon the actual number of days elapsed. Interest was initially paid commencing January 1, 1991 and semiannually on each July 1 and January 1, thereafter.

The principal amount of the Debentures has been payable in five, equal, consecutive, annual

installments (20 percent of the original principal amount of each Debenture), each due on December 31, 1996 through 2000, unless prepaid. In other words, the terms of the Debentures have provided for installment repayments of debt of \$200,000 each, beginning on December 31, 1996. As noted, the scheduled \$200,000 installment was made in December 1996. A scheduled \$200,000 installment and a \$200,000 prepayment were made in December 1997 and a scheduled \$200,000

installment and a final prepayment will be paid by December 31, 1998.

The terms of the Debentures also permit any portion of the unpaid principal balance to be prepaid at any time, provided, however, that the prepayments are concurrently made on a *pro rata* basis to all holders. Prepayments credited to the unpaid principal amount of the Debentures will be used to reduce the amount thereof due and payable at the next succeeding payment date.

The IRAs incurred no fees or commissions in connection with the acquisition transaction. However, at the time of the acquisition, Mr. David Snavely was the President of TTCOT and Mr. Duane Stranahan was a director of TTC.<sup>15</sup>

6. While owning the Preferred Stock, each IRA Participant became a minority shareholder of TTC. However, no IRA Participant owned shares of Preferred Stock in an individual capacity. In addition, none of the IRAs acquired additional shares of Preferred Stock or Debentures nor did they incur any servicing fees in connection with their holding of these investments.

Also during its time of ownership by the IRAs, the value of the Preferred Stock increased from \$100 per share in 1990 to \$291.70 per share as of December 31, 1997. As for the Debentures, which are being redeemed in annual installments of \$200,000, the outstanding principal amount was \$400,000 as of March 31, 1998.

<sup>15</sup> The Department notes that the Internal Revenue Service has taken the position that a lack of diversification of investments may raise questions with respect to the exclusive benefit rule under section 401(a) of the Code. (See Rev. Rul. 73-532, 1973-2 C.B. 128.) The Department further notes that section 408(a) of the Code, which describes the tax qualification provisions for IRAs, mandates that the trust be created for the exclusive benefit of an individual or his or her beneficiaries. However, the Department is not expressing an opinion herein on whether violations of section 408(a) have taken place with respect to the purchase and retention of TTC Preferred Stock and the Debentures by certain of the IRA Participants.

Further, the Department notes that although TTC owns 100 percent of the outstanding stock of TTCOT, under section 4975(e)(2)(H) of the Code, TTC would not be considered a disqualified person with respect to the IRAs because TTCOT, a fiduciary as well as a service provider to the IRAs, is not a "person" described in subparagraph (C), (D), (E) or (G) of that section. To the extent that TTC is not a disqualified person with respect to the IRAs, the purchase of the Preferred Stock and the Debentures at the direction of the IRA Participants would not involve a transaction described in section 4975(c)(1)(A) or (B) of the Code. While TTC may not be a disqualified person with respect to the IRAs, the purchase and holding of the Preferred Stock and the Debentures by certain IRA Participants may raise questions under section 4975(c)(1)(D) and (E) of the Code depending on the degree (if any) of the IRA Participant's interest in the transaction. Section 4975(c)(1)(D) and (E) of the Code prohibits the use by or for the benefit of a disqualified person of the assets of a plan and prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. Mr. Snavely, as an officer of TTCOT, and Mr. Stranahan, as a director of TTC, may have had interests in the acquisition transaction which affected their best judgment as fiduciaries of their IRAs. In such circumstances, the transactions may have violated section 4975(c)(1)(D) and (E) of the Code. See ERISA Advisory Opinion 90-20A (June 15, 1990). Accordingly, to the extent there were violations of section 4975(c)(1)(D) and (E) of the Code with respect to the purchase and holding of the Preferred Stock and the Debentures by the IRAs of Messrs. Snavely and Stranahan, the Department is not extending exemptive relief with respect to such transactions.

7. TTC recently obtained authority from its shareholders to amend, by total restatement, its Amended and Restated Articles of Incorporation. The primary purpose for the adoption of the Amended and Restated Articles of Incorporation is to enable TTC to change its corporate tax status, in accordance with section 1362 of the Code,<sup>16</sup> from a "Subchapter-C corporation" to a "Subchapter-S corporation" for the taxable years commencing January 1, 1999. The amendment would also provide for the full conversion of the Preferred Stock into Common Stock. In addition, the Board of Directors of TTC has determined that it would be valid to assume that TTC would continue to generate significant pre-tax income and that by eliminating its "Subchapter-C corporation" tax status, TTC could substantially increase its return to its shareholders.

8. As a result of TTC's proposal to change its corporate tax status, an entity such as an employee pension benefit plan would be considered an "eligible shareholder" (i.e., an entity identified in the Code as being eligible to own and hold shares in a Subchapter-S corporation). However, an entity such as an IRA would be considered an ineligible shareholder (i.e., an entity identified in the Code as being ineligible to own and hold shares in a Subchapter-S corporation). Therefore, on or about May 4, 1998, TTC sent documentation to all of its shareholders including the IRA Participants of the above referenced IRAs. Specifically, TTCOT indicated that it wished to redeem, by cancellation and at the current market value,<sup>17</sup> all shares of the Preferred Stock currently held by the ineligible shareholders, including the IRAs, as well as eligible shareholders who might suffer adverse tax consequences from continued ownership of shares in a Subchapter-S corporation. The Board of Directors and the management of TTC believed that the shares of stock would continue to appreciate in value as well as allow each shareholder to receive a

distributable share of the income of TTC.

In addition to the sale transaction, TTC provided a mechanism whereby each ineligible shareholder could designate a related party who would purchase, simultaneously with or immediately after the sale, the number of shares of Common Stock equal to the number of shares of Preferred Stock sold by the designating former shareholder. The purchase transaction would be a cash transaction at the same price per share as that paid by TTC to the IRA as the sales price for the Preferred Stock.

Accordingly, TTCOT requests an administrative exemption from the Department to permit, effective December 1, 1998, the sale by the subject IRAs of their respective shares of Preferred Stock to TTC for a cash price that was based upon the fair market value of such stock. The proposed exemption would also permit, effective December 1, 1998, the purchase, by the IRA Participants, in their individual capacities, of shares of Common Stock from TTC. Neither the IRAs nor the IRA Participants were required to pay any commissions, fees or incur any other expenses in connection with the sale and purchase transactions. As noted above, the Debentures will be repaid in full before December 31, 1998 and, therefore, are not subject to this exemption.

9. The sales price for the Preferred Stock was determined based upon a written valuation of the shares dated May 6, 1998 and prepared by Austin Financial Services, Inc. (AFSI), a qualified, independent consulting firm with substantial experience in the financial services industry. AFSI, a Toledo, Ohio-based investment banking firm, was retained by TTC to value TTC and determine the fair market value of the outstanding shares of Common Stock from a fully-diluted standpoint. The valuation, which was performed by Dr. Douglas V. Austin, President and CEO of AFSI and Mr. Steven A. Bires, Vice President of AFSI, also included an appraisal of the Preferred Stock.

In conducting its valuation of TTC, AFSI reviewed relevant financial information of TTC in order to derive its opinion of the fair market value of the Common and Preferred Stock. In its evaluation, AFSI considered a number of valuation methodologies for valuing closely-held companies but it ultimately selected the discounted cash flow and capitalization of earnings approaches. After an appropriate weighting of these approaches, AFSI placed the fair market value of TTC at \$7,263,035 or 324.82 percent of TTC's total equity. This equated to a fair market value of \$308.66

<sup>16</sup> Section 1362 of the Code contains provisions which allow a small business corporation to elect and terminate Subchapter-S corporate status.

<sup>17</sup> These shareholders would include the following employee benefit plans for which exemptive relief has also been requested from the Department: (D-10630) Genito-Urinary Surgeons, Inc. Profit Sharing Plan; (D-10631) Michael J. Rosenberg Money Purchase Pension Plan; (D-10632) Robert Savage Qualified Retirement Plan; (D-10633) Toledo Clinic Inc. Employees 401(k) Profit Sharing Plan; (D-10634) Hart Associates, Inc. Profit Sharing Plan; and (D-10635) Midwest Fluid Power Company Savings & Profit Sharing Plan.



per share on the total 23,351 shares of outstanding Preferred and Common Stock as of March 31, 1998 (or an aggregate value of \$61,732 each for the Brune, Glowacki, Mockensturm, Parrish, Robertson and Snavely IRAs and \$246,928 for the Stranahan IRA).<sup>18</sup> The appraisal was updated prior to the consummation of the sale and purchase transactions.

10. Each of the IRA Participants made a determination that the subject transactions would be in the interests of their IRAs. Upon arriving at this conclusion, TTC made a decision to retain, at the expense of TTCOT, the law firm of Callister Nebeker & McCullough (CNM) of Salt Lake City, Utah, to serve as the Independent Fiduciary with respect to the sale and purchase transactions. Specifically, the Independent Fiduciary was appointed to review and opine on the prudence and terms of the subject transactions, supervise and monitor such transactions on behalf of the IRAs, assure that the conditions of the proposed exemption were met, and take whatever actions were necessary and proper to enforce and protect the interests of the IRAs, including reviewing amounts paid by TTC for the Preferred Stock. The duties of the Independent Fiduciary were to be performed by Messrs. Jeffrey N. Clayton and W. Waldan Lloyd, both of whom are attorneys with the CNM.

The Independent Fiduciary represented that CNM has, from time to time, acted as an independent fiduciary for employee benefit plans subject to the provisions of the Act. The Independent Fiduciary noted that CNM has an employee benefits section which routinely advises plan fiduciaries regarding compliance with fiduciary standards under the Act and that members of CNM have substantial experience in this area. The Independent Fiduciary also represented that neither CNM, nor Messrs. Clayton and Lloyd had any relationship with any of the IRAs, TTC or TTCOT. Further, the Independent Fiduciary stated that it understood and accepted the duties, responsibilities and liabilities in acting as a fiduciary with respect to the subject IRAs.

The Independent Fiduciary was authorized to approve the disposal of the Preferred Stock, including the

authority to determine whether or not the IRAs should be permitted to enter into the transactions and to negotiate the terms of such transactions on behalf of the IRAs. When rendering services to the subject IRAs, the Independent Fiduciary stated that it would rely on data supplied by TTCOT and the IRAs. However, the Independent Fiduciary was permitted to hire experts, consultants and other advisors and assistants.

Based upon its assumptions, a review of listed documents and certain limitations, the Independent Fiduciary believed that the sale and purchase transactions were in the best interest of the IRAs and the IRA Participants because (a) the Preferred Stock lacked liquidity since it was not traded on the open market; (b) the sales price for the Preferred Stock would give the IRAs cash that could be reinvested in more liquid investments; and (c) the subject IRAs would be compelled to liquidate their shares of Preferred Stock in order to comply with the prohibitions on Subchapter-S corporation stock ownership if TTC and TTCOT change their corporate tax status. Therefore, the Independent Fiduciary believed the price to be received by the IRAs for their shares of TTC Preferred Stock would constitute "adequate consideration" within the meaning of section 3(18) of the Act.

12. The Independent Fiduciary appointed Houlihan Valuation Advisors (HVA), an independent appraisal firm maintaining offices in Salt Lake City, Utah, to provide an opinion as to the fairness (the Fairness Opinion) of the sale transaction from a financial point of view. Because the IRAs were to receive "adequate consideration" for their shares of Preferred Stock, the sole purpose of the Fairness Opinion was to determine whether the proposed acquisition price would constitute adequate consideration for the IRAs. HVA's Fairness Opinion, which was dated June 16, 1998, was prepared by Mr. David Dorton, CFA, ASA. Mr. Dorton is a member of HVA.

While noting that the Preferred Stock had a \$100 per share liquidation preference, HVA stated that the fair market value of TTC was significantly higher than its liquidation value. Therefore, HVA believed the liquidation preference was virtually meaningless. Thus, for purposes of its analysis, HVA deemed the Preferred Stock to be equivalent to the Common Stock due to its convertibility features, identical voting privileges and non-payment of dividends.

In preparing the Fairness Opinion, HVA stated that it reviewed a number

of documents, including but not limited to, (a) TTC's audited financial statements for the years ended December 31, 1992 through 1997; (b) AFSI's appraisal report; (c) various information furnished by TTC pertaining to the company, its operational structure, shareholder listings, compensation paid to key personnel, etc.; (d) a summary of transactions involving the Preferred Stock; and (e) operating projections for TTC. After reviewing these documents, HVA represented that it undertook generally recognized financial analysis and valuation procedures to ascertain the financial condition of TTC as well as to estimate the fair market value of the Preferred Stock to be sold to TTC. To this end, HVA explained that it utilized four valuation methodologies: (a) book value (including liquidation value), (b) transaction value, (c) market value (derived from market value ratios of publicly-traded "comparable" firms); and (d) income value (based on the present value of future benefits).

Based upon its analysis, HVA concluded that the proposed sale transaction would be fair to the IRAs and that the IRAs would be receiving adequate consideration for the Preferred Stock. HVA also reserved the right to supplement or withdraw the Fairness Opinion prior to the closing of the sale transaction if material changes occurred which might impact on the value of TTC or the value of the Preferred Stock. Further, HVA proposed to update the Fairness Opinion prior to the sale and purchase transactions.

13. In summary, it is represented that the transactions satisfied the statutory criteria for an exemption under section 4975(c)(2) of the Code because: (a) the terms and conditions of the sale and purchase transactions were at least as favorable to each IRA as the terms obtainable in an arm's length transaction with an unrelated party; (b) the sale by the IRAs of the Preferred Stock and the purchase by the IRA Participants of the Common Stock were one-time transactions for cash which occurred on the same business day; (c) each IRA received from TTC, as the sale price for the Preferred Stock, cash consideration reflecting the fair market value of such stock as determined by a qualified, independent appraiser; (d) each IRA Participant purchased, in his or her individual capacity, shares of the Common Stock which were equal in number to the shares of Preferred Stock sold by TTC; (e) no IRA was required to pay any commissions, fees or other expenses in connection with each sale transaction; and (f) the transactions described herein were approved by an

<sup>18</sup> AFSI notes that a minority discount could have been applied to the sales price for the Preferred Stock since the proposed transactions do not involve controlling interests in such stock. However, based on instructions from TTC, the sales price has been computed without taking into consideration a minority discount to ensure that each IRA will receive a higher fair market value for the Preferred Stock.

Independent Fiduciary which determined that the transactions described herein were in the best interest and protective of the IRAs at the time of the transactions; supervised and monitored such transactions on their behalf; assured that the conditions of the proposed exemption were met; and took whatever actions were necessary and proper to protect the interests of the IRAs, including reviewing amounts paid by TTC for the Preferred Stock.

#### Notice to Interested Persons

Because Sharilyn Brune, Richard C. Glowacki, Carl B. Mockensturm, Arthur T. Parrish, W. Alan Robertson, David A. Snavelly and Duane Stranahan, Jr. are the sole participants of their respective IRAs, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons. Therefore, comments and request for a public hearing are due 30 days from the date of publication of this proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department at (202)219-8881. (This is not a toll-free number.)

**Individual Retirement Accounts (the IRAs) for Robert C. Hummel, Garth L. Gibson, Hugh B. Force, Lynn Morgan Ruyle, Robb A. Ruyle, Ellen K. Davidson and Michael Davidson (Collectively; the Participants); Located respectively in Greeley, Colorado; Montrose, Colorado; Fort Collins, Colorado; Montrose, Colorado; Montrose, Colorado; Green River, Wyoming; and Green River, Wyoming**

[Application Nos. D-10683, D-10684, D-10685, D-10686, D-10687, D-10697 and D-10698]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, 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 cash sales (the Sales) of certain shares of closely-held common stock of First Mountain Company (the Stock) by the IRAs<sup>19</sup> to the Participants, disqualified persons with respect to the

IRAs, provided that the following conditions are met:

1. The terms and conditions of the Sales are at least as favorable to each IRA as those obtainable in an arm's-length transaction with an unrelated party;
2. The Sale of the Stock by each IRA is a one-time transaction for cash;
3. Each IRA receives the fair market of the Stock, as established by a qualified, independent appraiser, at the time of the Sale; and
4. The IRAs do not pay any commissions, costs or other expenses in connection with the Sales.

*Effective date:* The proposed exemption, if granted, will be effective as of December 15, 1998.

#### Summary of Facts and Representations

1. The IRAs are individual retirement accounts, as described in Section 408(a) of the Code. The IRAs are self-directed. Among the assets of each IRA were shares of the common Stock of First Mountain Company (the Company),<sup>20</sup> a one-bank holding company domiciled in the State of Colorado and registered with the Board of Governors of the Federal Reserve System. The only asset of the Company is Montrosebank (the Bank), located in Montrose, Colorado. As of November 1998, the Company was a Subchapter "C" corporation. However, the Company plans to change its status and be taxed as a Subchapter "S" corporation under the Code effective January 1, 1999.

The applicant describes the Participants, the IRAs, and their former holdings in the Stock as follows:

(a) The IRA of Robert C. Hummel currently holds assets of approximately \$624,520, which include 8,000 shares of the Stock. The IRA of Robert C. Hummel acquired shares of the Stock on May 24, 1995 at a price of \$10 per share, for a total investment of \$80,000.

(b) The IRA of Garth L. Gibson, the Secretary and the President of the Bank and a member of the Board of Directors of the Company and the Bank, currently holds assets of approximately \$58,866.60, which include 3,940 shares of the Stock. The IRA of Garth L. Gibson acquired shares of the Stock on May 24, 1995 at a price of \$10 per share, for a total investment of \$39,400.

(c) The IRA of Hugh B. Force currently holds assets of approximately \$31,012.44, which include 1,626 shares of the Stock. The IRA of Hugh B. Force acquired the shares of the Stock on May 24, 1995 at a price of \$10 per share, for a total investment of \$16,260.

(d) The IRA of Lynn Morgan Ruyle currently holds assets of approximately \$77,016.11, which include 5,155 shares of the Stock. The IRA of Lynn Morgan Ruyle acquired 4,740 shares of the Stock on May 24, 1995 at a price of \$10 per share. Subsequently, this IRA acquired 415 additional shares of the Stock on May 2, 1997, also at a price of \$10 per share, for a total investment of \$51,550.

(e) The IRA of Robb A. Ruyle, a member of the Board of Directors of the Company and the Bank, currently holds assets of approximately \$57,190.73, which include 3,828 shares of the Stock. The IRA of Robb A. Ruyle acquired 3,120 shares of the Stock on May 24, 1995 at a price of \$10 per share. Subsequently, this IRA acquired 708 additional shares of the Stock on May 2, 1997, also at a price of \$10 per share, for a total investment of \$38,280.

(f) The IRA of Ellen K. Davidson, currently holds assets of approximately \$19,356.84, which include 1,286 shares of the Stock. The IRA of Ellen K. Davidson acquired the shares of the Stock on May 24, 1995 at a price of \$10 per share, for a total investment of \$12,860.

(g) The IRA of Michael Davidson currently holds assets of approximately \$22,400.36, which include 1,494 shares of the Stock. The IRA of Michael Davidson acquired the shares of the Stock on May 24, 1995 at a price of \$10 per share, for a total investment of \$14,940.

The applicant also represents that Union Colony Bank is the custodian for all of the IRAs, except for the Robb A. Ruyle and Lynne Morgan Ruyle IRAs. The custodian for the Ruyle IRAs is Edward Jones & Company, a national brokerage firm.

2. The applicant requests an exemption for the Sale of the Stock by each individual IRA to its respective Participant. As noted above, business and income tax considerations have recently caused the Company to elect to be taxed as a Subchapter "S" corporation pursuant to the Code, effective January 1, 1999. However, section 1361 of the Code only permits eligible shareholders to hold stock in a Subchapter "S" corporation. Because the IRAs are not eligible shareholders for purposes of the Code, the Participants wish to purchase the Stock from their IRAs. It is represented that each IRA acquired shares of the Stock for investment purposes and that each IRA made a profit on its original investment. The applicant states that the IRAs acquired the Stock directly from the issuer (i.e., the Company). The applicant also states that the Stock held collectively by the IRAs did not

<sup>19</sup> Because each IRA has only one Participant, there is no jurisdiction under 29 CFR 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

<sup>20</sup> The applicant represents that the Company has only common Stock, and no preferred Stock.

represent a significant portion of the outstanding shares of the Stock (see Table in Paragraph 3 below).

Four of the seven IRAs (i.e., the IRAs of Garth L. Gibson, Lynn Morgan Ruyle, Robb A. Ruyle, and Ellen K. Davidson) have 99.99% of their total assets invested in the Stock.<sup>21</sup> In addition, the IRAs of Michael Davidson and of Hugh B. Force have 99.64% and 78.33% of their total assets, respectively, invested in the Stock. The IRA of Robert C. Hummel has only 19.14% of its total assets invested in the Stock.

3. The applicant further represents that no IRA held a majority interest in the Company at any time. The following table sets forth each IRA's percentage ownership in the Company at the time of the Sale.

IRA	Percent of Stock held
Robert C. Hummel .....	4.46
Garth L. Gibson .....	2.20
Hugh B. Force .....	0.91
Lynn Morgan Ruyle .....	2.87
Robb A. Ruyle .....	2.14
Ellen K. Davidson .....	0.70
Michael Davidson .....	0.83

Certain of the Participants hold shares of the Stock in their individual

<sup>21</sup> The Department notes that the Internal Revenue Service has taken the position that a lack of diversification of investments may raise questions in regard to the exclusive benefit rule under section 401(a) of the Code. See, e.g., Rev. Rul. 73-532, 1973-2 C.B. 128. The Department further notes that section 408(a) of the Code, which describes the tax qualification provisions for the IRAs, mandates that the trust be created for the exclusive benefit of an individual or his beneficiaries. However, the Department is expressing no opinion in this proposed exemption regarding whether violations of the Code have taken place with respect to the purchase and subsequent holding of the Stock by the IRAs.

Further, to the extent that the Company (or the other sellers) were not disqualified persons with respect to the IRAs under section 4975(e)(2) of the Code, the purchase of the Stock would not have constituted a prohibited transaction under section 4975(c)(1)(A) of the Code. However, the purchase and holding of the Stock by the IRAs whose Participants are officers and directors of the Company and/or the Bank raises questions under section 4975(c)(1)(D) and (E) of the Code depending on the degree (if any) of the IRA Participant's interest in the transaction. Section 4975(c)(1)(D) and (E) of the Code prohibits the use by or for the benefit of a disqualified person of the income or assets of a plan and prohibits a fiduciary from dealing with the income or assets of a plan in his own interest or for his own account. Those IRA Participants who are officers and/or directors of the Company or the Bank, may have had interests in the transactions which affected their best judgement as fiduciaries of their IRAs. In such circumstances, the transactions may have violated section 4975(c)(1)(D) and (E) of the Code. See Advisory Opinion 90-20A (June 15, 1990). Accordingly, to the extent there were violations of section 4975(c)(1)(D) and (E) of the Code with respect to the purchases and holdings of the Stock by the IRAs, the Department is extending no relief for these transactions.

capacities. Specifically, Michael Davidson and Ellen K. Davidson hold 3,220 shares of the Stock as joint tenants. Hugh B. Force holds 3,374 shares of the Stock in his individual capacity. Garth L. Gibson and Cynthia A. Gibson hold 6,641 shares of the Stock as joint tenants. In addition, Robb A. Ruyle and Lynne Morgan Ruyle hold 3,017 shares of Company Stock as joint tenants. However, the applicant states that purchasing the Stock from their respective IRAs will not make any of the Participants a majority shareholder in the Company.

4. The Stock was appraised on October 9, 1998 by Van Dorn & Bossi Certified Public Accountants (the Appraisal), an independent, qualified appraiser located in Broomfield and Boulder, Colorado. In determining the fair market value of the Stock, the Appraisal relied on information regarding the valuation of two other banks in Colorado with closely-held stocks. The Appraisal valued all outstanding shares of the Stock held by the IRAs, considering factors such as the lack of marketability for the Stock and the valuation of shares which represented less than a controlling interest in the Company. The Company has a total of 179,240 shares of the Stock outstanding at the time of the Sale. The shares of the Stock owned by the Participants through their IRAs represent approximately 14.13% of the total outstanding shares of the Company. The Appraisal stated that the aggregate shares of the Stock owned by the IRAs is so small when compared to the total outstanding shares of the Company, that no controlling interest would be gained by any potential purchaser of the shares of the Stock. Thus, the Appraisal stated that a discount of 35% for the lack of control is appropriate, and applied that discount when valuing the shares of Stock involved in the subject transactions.

The Appraisal concluded that the fair market value of the Stock would be \$14.94 per share at the time of the Sale. Therefore, the aggregate value of the shares of the Stock to be sold by the IRAs to the Participants was determined to be \$378,415. Specifically, each IRA will receive the following amount at the Sale:

IRA	Number of Shares	Rec'd at Sale
Robert C. Hummel .....	8,000	\$119,520
Garth L. Gibson .....	3,940	58,863.60
Hugh B. Force ...	1,626	24,292.44
Lynn Morgan Ruyle .....	5,155	77,015.70

IRA	Number of Shares	Rec'd at Sale
Robb A. Ruyle ...	3,828	57,190.32
Ellen K. Davidson .....	1,286	19,212.84
Michael Davidson .....	1,494	22,320.36

5. The applicant represents that the transactions are administratively feasible because each Sale will be a one-time transaction for cash. The transactions are also in the best interest of the IRAs because each IRA will dispose itself of all of its shares of the Stock at a price which equals the Stock's fair market value at the time of the Sale. As a result, greater diversification of the IRAs' assets will be achieved by reinvesting the proceeds of the Sales in other assets. Furthermore, it is represented that the transactions are protective of the rights of the Participants and beneficiaries of the IRAs because each IRA will receive the fair market value of the Stock owned by the IRA, as determined by a qualified, independent appraiser. Finally, the IRAs will not incur any commissions, costs, or other expenses as a result of each Sale.

6. In summary, the applicant represents that the transactions will satisfy the statutory criteria of section 4975(c)(2) of the Code because:

A. The terms and conditions of the Sales are at least as favorable to each IRA as those terms which are obtainable in an arm's-length transaction with an unrelated party;

B. The Sale of the Stock by each IRA will be a one-time transaction for cash;

C. Each IRA will receive the fair market value of the Stock, as established by a qualified, independent appraiser; and

D. The IRAs will not pay any commissions, costs or other expenses in connection with the Sales.

**Notice to Interested Persons**

Because the Participants are the sole participants of their respective IRAs, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons.

Comments and requests for a hearing are due 30 days from the date of publication of this notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ekaterina A. Uzlyan of the Department at (202) 219-8883. (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 11th day of December, 1998.

**Ivan Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 98-57; Exemption Application No. L-10595, et al.]

#### Grant of Individual Exemptions; Service Employees International Union Local 252 Welfare Fund

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of Individual Exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

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

#### Statutory Findings

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

(a) The exemptions are administratively feasible;

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

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

#### Service Employees International Union Local 252 Welfare Fund (the Fund)

Located in Wynnewood, Pennsylvania  
[Prohibited Exemption Application Number 98-57;  
Exemption Application Number L-10595]

#### Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act shall not apply to the sale (the Sale) of certain improved real property located in Wynnewood, Pennsylvania (the Property) to the Service Employees International Union Local 252 (Local 252), a party in interest with respect to the Fund, provided the parties adhere to the following conditions:

(a) The Sale is a one-time transaction for cash;

(b) The terms and conditions of the Sale are at least as favorable to the Fund as those obtainable in an arm's length transaction with an unrelated party;

(c) The Sales price is an amount which represents the greater of: (1) the total cost to the Fund of acquiring the Property; or (2) the fair market value of the Property on the date of Sale as determined by a qualified, independent appraiser; and

(d) The Fund does not incur any expenses with respect to the Sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published in the **Federal Register** on Friday, June 19, 1998, at 63 FR 33726.

*Written Comments and Hearing Requests:* The Department received one written comment with respect to the proposed exemption. The comment letter was submitted on behalf of the Brandywine Nursing and Rehabilitation Center, Inc. (Brandywine), a party to a series of collective bargaining agreements with the Service Employees International Union Local 252 (Local 252). In the letter, Brandywine raised several concerns regarding the proposed exemption.

First, Brandywine represented that the notice of proposed exemption was not provided in a timely manner. Although this representation was disputed by the applicant, the Department decided to provide Brandywine with 30 days additional time to supplement its comments so as to avoid any potential prejudice.