

Justice Office of Research and Evaluation 2000 Solicitation for Investigator-Initiated Research.

**DATES:** Proposals must be received by close of business Tuesday, January 18, 2000.

**ADDRESSES:** National Institute of Justice, 810 Seventh Street, NW, Washington, DC 20531.

**FOR FURTHER INFORMATION CONTACT:** For a copy of the solicitation, please call NCJRS 1-800-851-3420. For general information about application procedures for solicitations, please call the U.S. Department of Justice Response Center 1-800-421-6770.

**SUPPLEMENTARY INFORMATION:**

**Authority**

This action is authorized under the Omnibus Crime Control and Safe Streets Act of 1968, Sections 201-203, as amended, 42 U.S.C. 3721-23 (1994).

**Background**

In this solicitation, NIJ invites applicants to submit proposals that will help the Institute address five general themes related to the NIJ mission. This solicitation specifically requests proposals in topical areas that are not covered by other NIJ solicitations. Wherever possible, applicants interested in conducting research on such topics as violence against women or science and technology development should apply to directed solicitations targeting these particular areas of research.

Under this investigator-initiated program, applicants may submit proposals to explore a wide range of research and evaluation topics relevant to criminal justice policy or practice, supporting NIJ's broad portfolio of both basic and applied studies. While the Institute's specific research and development interests are constantly evolving in response to the needs of the field, the following five broad criminal justice areas are current NIJ priorities: rethinking justice and the processes that create just communities; understanding the nexus between crime and its social context; breaking the cycle of crime by testing research-based interventions; creating the tools, evaluating new and transferable techniques and procedures for improving the effectiveness and efficiency of the criminal justice system; and expanding the horizons, moving beyond traditional definitions of crime and criminal relationships.

Interested organizations should call the National Criminal Justice Reference Service (NCJRS) at 1-800-851-3420 to obtain a copy of "Office of Research and Evaluation 2000 Solicitation for Investigator-Initiated Research" (refer to

document no. SL000385). For World Wide Web access, connect to either NIJ at <http://www.ojp.usdoj.gov/nij/funding.htm>, or the NCJRS Justice Information Center at <http://www.ncjrs.org/fedgrant.htm#nij>.

Dated: September 29, 1999.

**Jeremy Travis,**

*Director, National Institute of Justice.*

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**DEPARTMENT OF LABOR**

**Pension and Welfare Benefits Administration**

[Prohibited Transaction Exemption 99-38; Exemption Application No. D-10621, et al.]

**Grant of Individual Exemptions; MICO, Inc. (MICO), et al.**

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

**ACTION:** Grant of individual exemptions.

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

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

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

exemptions of the type proposed to the Secretary of Labor.

**Statutory Findings**

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

(a) The exemptions are administratively feasible;

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

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

**MICO, Inc. (MICO) Located in North Mankato, Minnesota**

[Prohibited Transaction Exemption 99-38; Exemption Application Number D-10621]

**Exemption**

The restrictions of sections 406(a), 406(b)(1) and (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 sale (the Sale) of a certain parcel of unimproved real property (the Property) from the MICO, Inc. Profit Sharing Plan (the Plan) to MICO, a party in interest and disqualified person with respect to the Plan, provided that the following conditions are met:

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

(b) MICO purchases the Property for \$362,000, which represents the Property's current fair market value as determined by a qualified, independent appraiser;

(c) MICO additionally pays to the Plan a premium of \$36,200, as determined by a qualified, independent appraiser, due to MICO's ownership of improved real property which is located adjacent to the Property;

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

(e) The Plan pays no fees or commissions in connection with the Sale.

For a more complete statement of the facts and representations supporting this exemption, refer to the notice of proposed exemption published on May 27, 1999 at 64 FR 28835.

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

**Fleet Bank (RI), National Association (Fleet)****Located in Providence, Rhode Island**

[Prohibited Transaction Exemption 99-39; Exemption Application No. D-10643]

*Exemption*

## Section I—Transactions

A. Effective August 11, 1999, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the trust, the sponsor or an underwriter and an employee benefit plan subject to the Act or section 4975 of the Code (a plan) when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

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

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

Notwithstanding the foregoing, Section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan, as defined in Section III.K. below, by any person who has discretionary authority or renders investment advice with respect to the assets of the Excluded Plan that are invested in certificates.<sup>1</sup>

B. Effective August 11, 1999, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(E) of the Code, shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the trust, the sponsor or an underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the

certificates is (a) an obligor with respect to receivables contained in the trust constituting 0.5 percent or less of the fair market value of the aggregate undivided interest in the trust allocated to the certificates of the relevant series, or (b) an affiliate of a person described in (a); if

(i) The plan is not an Excluded Plan;

(ii) Solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group, as defined in Section III.L., and at least 50 percent of the aggregate undivided interest in the trust allocated to the certificates of a series is acquired by persons independent of the Restricted Group;

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

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice is invested in certificates representing the aggregate undivided interest in a trust allocated to the certificates of a series and containing receivables sold or serviced by the same entity;<sup>2</sup> and

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

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

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

<sup>2</sup>For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

C. Effective August 11, 1999, the restrictions of sections 406(a), 406(b) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust, including reassigning receivables to the sponsor, removing from the trust receivables in accounts previously designated to the trust, changing the underlying terms of accounts designated to the trust, adding new receivables to the trust, designating new accounts to the trust, the retention of a retained interest by the sponsor in the receivables, the exercise of the right to cause the commencement of amortization of the principal amount of the certificates, or the use of any eligible swap transactions, provided that:

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

(2) The pooling and servicing agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust;<sup>3</sup>

(3) The addition of new receivables or designation of new accounts, or the removal of receivables in previously-designated accounts, meets the terms and conditions for such additions, designations or removals as are described in the prospectus or private placement memorandum for such certificates, which terms and conditions have been approved by Standard & Poor's Ratings Services, Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co., or Fitch IBCA, Inc., or their successors (collectively, the Rating Agencies), and does not result in the certificates receiving a lower credit rating from the Rating Agencies than the then current rating of the certificates; and

(4) The series of which the certificates are a part will be subject to an "Economic Pay Out Event" (as defined in Section III.BB.), which is set forth in

<sup>3</sup> In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions. For purposes of this exemption, all references to "prospectus" include any related supplement thereto, and any documents incorporated by reference therein, pursuant to which certificates are offered to investors.

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

the pooling and servicing agreement and described in the prospectus or private placement memorandum associated with the series, the occurrence of which will cause any revolving period, scheduled amortization period or scheduled accumulation period applicable to the certificates to end, and principal collections to be applied to monthly payments of principal to, or the accumulation of principal for the benefit of, the certificateholders of such series until the earlier of payment in full of the outstanding principal amount of the certificates of such series or the series termination date specified in the prospectus or private placement memorandum.

Notwithstanding the foregoing, Section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act, or from the taxes imposed under section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(E) or (F) of the Code, for the receipt of a fee by the servicer of the trust, in connection with the servicing of the receivables and the operation of the trust, from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in Section III.U. below.

D. Effective August 11, 1999, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by sections 4975(a) and (b) of the Code, by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transaction to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider as described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

## Section II—General Conditions

A. The relief provided under Section I will be available only if the following conditions are met:

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

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

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is either: (i) In

one of the two highest generic rating categories from any one of the Rating Agencies; or (ii) for certificates with a duration of one year or less, the highest short-term generic rating category from any one of the Rating Agencies; provided that, notwithstanding such ratings, this exemption shall apply to a particular class of certificates only if such class (an Exempt Class) is at the time of such acquisition part of a series in which credit support is provided to the Exempt Class through a senior-subordinated series structure or other form of third-party credit support which, at a minimum, represents five (5) percent of the outstanding principal balance of certificates issued for the Exempt Class, so that an investor in the Exempt Class will not bear the initial risk of loss;

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

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the consideration received by the sponsor as a consequence of the assignment of receivables (or interests therein) to the trust, to the extent allocable to the class of certificates purchased by a plan, represents not more than the fair market value of such receivables (or interests); and the sum of all payments made to and retained by the servicer, to the extent allocable to the class of certificates purchased by a plan, represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith;

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

(7) The trustee of the trust is a substantial financial institution or trust company experienced in trust activities and is familiar with its duties, responsibilities, and liabilities as a fiduciary under the Act (i.e. ERISA). The trustee, as the legal owner of, or

holder of a perfected security interest in, the receivables in the trust, enforces all the rights created in favor of certificateholders of such trust, including plans;

(8) Prior to the issuance by the trust of any new series, confirmation is received from the Rating Agencies that such issuance will not result in the reduction or withdrawal of the then current rating of the certificates held by any plan pursuant to this exemption;

(9) To protect against fraud, chargebacks or other dilution of the receivables in the trust, the pooling and servicing agreement and the Rating Agencies require the sponsor to maintain a seller interest of not less than two (2) percent of the principal balance of the receivables contained in the trust;

(10) Each receivable added to a trust is an eligible receivable, based on criteria of the relevant Rating Agency(ies) and as specified in the pooling and servicing agreement. The pooling and servicing agreement requires that any change in the terms of the cardholder agreements must be made applicable to the comparable segment of accounts owned or serviced by the sponsor which are part of the same program or have the same or substantially similar characteristics;

(11) The pooling and servicing agreement limits the number of the sponsor's newly originated accounts to be designated to the trust, unless the Rating Agencies otherwise consent in writing, to the following: (i) with respect to any consecutive three-month period commencing in January, April, July and October of each calendar year, 15 percent of the number of existing accounts designated to the trust as of the first day of the calendar year during which such monthly period commenced, and (ii) with respect to any calendar year, 20 percent of the number of existing accounts designated to the trust as of the first day of such calendar year;

(12) The pooling and servicing agreement requires the sponsor to deliver an opinion of counsel confirming the validity and perfection of each transfer of receivables in newly originated accounts to the trust for each interim addition;

(13) The pooling and servicing agreement requires the sponsor and the trustee to receive confirmation from a Rating Agency that no Ratings Effect will result from (i) a Required Addition (as defined in Section III.MM.) in excess of the limits in paragraph B.(11) above, or (ii) any Restricted Additions (as defined in Section III.NN.);

(14) If a particular class of certificates held by any plan involves a Ratings

Dependent or Non-Ratings Dependent Swap entered into by the trust, then each particular swap transaction relating to such certificates:

(a) shall be an Eligible Swap;

(b) shall be with an Eligible Swap Counterparty;

(c) in the case of a Ratings Dependent Swap, shall include as an early payout event, as specified in the pooling and servicing agreement, the withdrawal or reduction by any Rating Agency of the swap counterparty's credit rating below a level specified by the Rating Agency where the servicer (as agent for the trustee) has failed, for a specified period after such rating withdrawal or reduction, to meet its obligation under the pooling and servicing agreement to:

(i) obtain a replacement swap agreement with an Eligible Swap Counterparty which is acceptable to the Rating Agency and the terms of which are substantially the same as the current swap agreement (at which time the earlier swap agreement shall terminate); or

(ii) cause the swap counterparty to establish any collateralization or other arrangement satisfactory to the Rating Agency such that the then current rating by the Rating Agency of the particular class of certificates will not be withdrawn or reduced;

(d) in the case of a Non-Ratings Dependent Swap, shall provide that, if the credit rating of the swap counterparty is withdrawn or reduced below the lowest level specified in Section III.II. hereof, the servicer, as agent for the trustee, shall within a specified period after such rating withdrawal or reduction:

(i) obtain a replacement swap agreement with an Eligible Swap Counterparty, the terms of which are substantially the same as the current swap agreement (at which time the earlier swap agreement shall terminate); or

(ii) cause the swap counterparty to post collateral with the trustee of the trust in an amount equal to all payments owed by the counterparty if the swap transaction were terminated; or

(iii) terminate the swap agreement in accordance with its terms; and

(e) shall not require the trust to make any termination payments to the swap counterparty (other than a currently scheduled payment under the swap agreement) except from "Excess Finance Charge Collections" (as defined below in Section III.LL.) or other amounts that would otherwise be payable to the servicer or the sponsor;

(15) Any class of certificates, to which one or more swap agreements entered into by the trust applies, may be

acquired or held in reliance upon this exemption only by Qualified Plan Investors.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, nor any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Section I, if the provision in Section II.A.(6) above is not satisfied for the acquisition or holding by a plan of such certificates, provided that:

(1) Such condition is disclosed in the prospectus or private placement memorandum; and

(2) In the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees shall be required to make a written representation regarding compliance with the condition set forth in Section II.A.(6).

### Section III—Definitions

For purposes of this exemption:

A. "Certificate" means a certificate:

(1) That (i) represents a beneficial ownership interest in the assets of a trust and entitles the holder to payments denominated as principal, interest and/or other payments made as described in the applicable prospectus or private placement memorandum and in accordance with the pooling and servicing agreement in connection with the assets of such trust, to the extent allocable to the series of certificates purchased by a plan, either currently or after a revolving period during which principal payments on assets of the trust are reinvested in new assets, or (ii) is denominated as a debt instrument that represents a regular interest in a financial asset securitization investment trust (FASIT), within the meaning of section 860L(a) of the Code, and is issued by and is an obligation of the trust.

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

(2) With respect to which (a) Fleet or any of its affiliates is the sponsor, and (b) Fleet, any of its affiliates, or an "underwriter" (as defined in Section

III.C.) is the sole underwriter or the manager or co-manager of the underwriting syndicate or a selling or placement agent.

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

(1) Either:

(a) Receivables (as defined in Section III.V.); or

(b) Participations in a pool of receivables (as defined in Section III.V.) where such beneficial ownership interests are not subordinated to any other interest in the same pool of receivables;<sup>4</sup>

(2) Property which has secured any of the assets described in paragraph B.(1) above;<sup>5</sup>

(3) Undistributed cash or permitted investments made therewith maturing no later than the next date on which distributions are to be made to certificateholders, except during a Revolving Period (as defined herein) when permitted investments are made until such cash can be reinvested in additional receivables described in paragraph B.(1)(a) above;

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any cash collateral accounts, insurance policies, third-party guarantees, contracts of suretyship and other credit support arrangements for any certificates, swap transactions, or under any yield supplement agreements,<sup>6</sup> yield maintenance agreements or similar arrangements; and

(5) Rights to receive interchange fees received by the sponsor as partial compensation for the sponsor's taking credit risk, absorbing fraud losses and funding receivables for a limited period prior to initial billing with respect to accounts designated to the trust.

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) the investment pool consists only of receivables of the type which have been included in other investment pools; (ii) certificates evidencing interests in such other investment pools have been rated

<sup>4</sup> The Department notes that no relief would be available under the exemption if the participation interests held by the trust were subordinated to the rights and interests evidenced by other participation interests in the same pool of receivables.

<sup>5</sup> Fleet states that it is possible for credit card receivables to be secured by bank account balances or security interests in merchandise purchased with credit cards. Thus, the exemption should permit foreclosed property to be an eligible trust asset.

<sup>6</sup> In a series involving an accumulation period (as defined in Section III.Z.), a yield supplement agreement may be used by the Trust to make up the difference between (i) the reinvestment yield on permitted investments, and (ii) the interest rate on the certificates of that series.

in one of the two highest generic rating categories by at least one of the Rating Agencies for at least one year prior to the plan's acquisition of certificates pursuant to this exemption; and (iii) certificates evidencing an interest in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. "Underwriter" means an entity which has received from the Department an individual prohibited transaction exemption which provides relief for the operation of asset pool investment trusts that issue asset-backed pass-through securities to plans that is similar in format and substance to this exemption (each, an Underwriter Exemption);<sup>7</sup> any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such entity; and any member of an underwriting syndicate or selling group of which such firm or affiliated person described above is a manager or co-manager with respect to the certificates.

D. "Sponsor" means Fleet, or an affiliate of Fleet that organizes a trust by transferring credit card receivables or interests therein to the trust in exchange for certificates.

E. "Master Servicer" means Fleet or an affiliate that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the receivables in the trust pursuant to the pooling and servicing agreement.

F. "Subservicer" means Fleet or an affiliate of Fleet, or an entity unaffiliated with Fleet which, under the supervision of and on behalf of the master servicer, services receivables contained in the trust, but is not a party to the pooling and servicing agreement.

G. "Servicer" means Fleet or an affiliate which services receivables contained in the trust, including the master servicer and any subservicer or their successors pursuant to the pooling and servicing agreement.

H. "Trustee" means an entity which is independent of Fleet and its affiliates and is the trustee of the trust. In the case of certificates which are denominated as debt instruments, "trustee" also means the trustee of the indenture trust.

I. "Insurer" means the insurer or guarantor of, provider of other credit support for, or other contractual

counterparty of, a trust. Notwithstanding the foregoing, a swap counterparty is not an insurer, and a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. "Obligor" means any person, other than the insurer, that is obligated to make payments with respect to any receivable included in the trust.

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

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

- (1) Each underwriter;
- (2) Each insurer;
- (3) The sponsor;
- (4) The trustee;
- (5) Each servicer;
- (6) Each swap counterparty;
- (7) Any obligor with respect to

receivables contained in the trust constituting more than 0.5 percent of the fair market value of the aggregate undivided interest in the trust allocated to the certificates of a series, determined on the date of the initial issuance of such series of certificates by the trust; or

- (8) Any affiliate of a person described in paragraphs L.(1) through (7) above.

M. "Affiliate" of another person includes:

- (1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;
- (2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and
- (3) Any corporation or partnership of which such other person is an officer, director or partner.

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

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

- (1) Such person is not an affiliate of that other person; and
- (2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

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

- (1) The terms of the forward delivery commitment (including any fee paid to

the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

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

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

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

R. "Reasonable Compensation" has the same meaning as that term is defined in 29 CFR section 2550.408c-2.

S. "Pooling and Servicing Agreement" means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust and any supplement thereto pertaining to a particular series of certificates. In the case of certificates which are denominated as debt instruments, "pooling and servicing agreement" also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

T. "Series" means an issuance of a class or various classes of certificates by the trust all on the same date pursuant to the same pooling and servicing agreement, and any supplement thereto and restrictions therein.

U. "Qualified Administrative Fee" means a fee which meets the following criteria:

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

(2) The servicer may not charge the fee absent the act or failure to act referred to in paragraph U.(1) above;

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement or described in all material respects in the prospectus or private placement memorandum provided to the plan before it purchases certificates issued by the trust; and

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

<sup>7</sup> For a listing of Underwriter Exemptions, see the description provided in the text of the operative language of Prohibited Transaction Exemption (PTE) 97-34 (62 FR 39021, July 21, 1997).

V. "Receivables" means secured or unsecured obligations of credit card holders which have arisen or arise in Accounts designated to a trust. Such obligations represent amounts charged by cardholders for merchandise and services and amounts advanced as cash advances, as well as periodic finance charges, annual membership fees, cash advance fees, late charges on amounts charged for merchandise and services and certain other fees (such as bad check fees, cash advance fees, and other fees specified in the cardholder agreements) designated by card issuers (other than a qualified administrative fee as defined in Section III.U.).

W. "Accounts" are revolving credit card accounts serviced by Fleet or an affiliate, which were originated or purchased by Fleet or an affiliate, and are designated to a trust such that receivables arising in such accounts become assets of the trust.

X. "Revolving Period" means a period of time, as specified in the pooling and servicing agreement, during which principal collections allocated to a series are reinvested in newly generated receivables arising in the accounts.

Y. "Amortization Period" means a period of time specified in the pooling and servicing agreement during which a portion of the principal collections allocated to a series will commence to be paid to the certificateholders of such series in installments.

Z. "Accumulation Period" means a period of time specified in the pooling and servicing agreement during which a portion of the principal collections allocated to a series will be deposited in an account to be distributed to certificateholders in a lump sum on the expected maturity date.

AA. "Pay Out Event" means any of the events specified in the pooling and servicing agreement or supplement thereto that results (in some instances without further affirmative action by any party) in the early commencement of either an amortization period or an accumulation period, including (1) the failure of the sponsor or the servicer, whichever is subject to the relevant obligation under the pooling and servicing agreement, (i) to make any payment or deposit required under the pooling and servicing agreement within five (5) business days after such payment or deposit was required to be made, or (ii) to observe or perform any of its other covenants or agreements set forth in the pooling and servicing agreement, which failure has a material adverse effect on holders of investor certificates of the relevant series and continues unremedied for 60 days; (2) a breach of any representation or warranty

made by the sponsor or the servicer in the pooling and servicing agreement that continues to be incorrect in any material respect for 60 days; (3) the occurrence of certain bankruptcy events relating to the sponsor or the servicer; (4) the failure by the sponsor to convey to the trust additional receivables to maintain the minimum seller interest that is required by the pooling and servicing agreement and the Rating Agencies; (5) the failure to pay in full amounts owing to investors on the expected maturity date; and (6) the Economic Pay Out Event.

BB. An "Economic Pay Out Event" occurs automatically when the portfolio yield for any series of certificates, averaged over three consecutive months (or such other period approved by one of the Rating Agencies) is less than the base rate of the series averaged over the same period. Portfolio yield for a series of certificates for any period is equal to the sum of the finance charge collections and other amounts treated as finance charge collections less total defaults for the series divided by the outstanding principal balance of the investor certificates of the series, or such other measure approved by one of the Rating Agencies. The base rate for a series of certificates for any period is the sum of (i) amounts payable to certificateholders of the series with respect to interest, (ii) servicing fees allocable to the series payable to the servicer, and (iii) any credit enhancement fee allocable to the series payable to a third party credit enhancer, divided by the outstanding principal balance of the investor certificates of the series, or such other measure approved by one of the Rating Agencies.

CC. "CCA" or "Cash Collateral Account" means that certain account established in the name of the trustee that serves as credit enhancement with respect to the investor certificates and holds cash and/or permitted investments (as defined below in Section III.KK.) which conform to applicable provisions of the pooling and servicing agreement.

DD. "Group" means a group of any number of series offered by the trust that share finance charge and/or principal collections in the manner described in the applicable prospectus or private placement memorandum.

EE. "Ratings Effect" means the reduction or withdrawal by a Rating Agency of its then current rating of the certificates held by any plan pursuant to this exemption.

FF. "Principal Receivables Discount" means, with respect to any account designated by the sponsor, the portion of the related principal receivables that

represents a discount from the face value thereof and that is treated under the pooling and servicing agreement as finance charge receivables.

GG. "Ratings Dependent Swap" means an interest rate swap, or (if purchased by or on behalf of the trust) an interest rate cap contract, that is part of the structure of a series of certificates where the rating assigned by the Rating Agency to any senior class of certificates held by any plan is dependent on the terms and conditions of the swap and the rating of the swap counterparty, and if such certificate rating is not dependent on the existence of the swap and rating of the swap counterparty, such swap or cap shall be referred to as a "Non-Ratings Dependent Swap". With respect to a Non-Ratings Dependent Swap, each Rating Agency rating the certificates must confirm, as of the date of issuance of the certificates by the trust, that entering into an Eligible Swap with such counterparty will not affect the rating of the certificates.

HH. "Eligible Swap" means a Ratings Dependent or Non-Ratings Dependent Swap:

(1) which is denominated in U.S. Dollars;

(2) pursuant to which the trust pays or receives, on or immediately prior to the respective payment or distribution date for the senior class of certificates, a fixed rate of interest, or a floating rate of interest based on a publicly available index (e.g. LIBOR or the U.S. Federal Reserve's Cost of Funds Index (COFI)), with the trust receiving such payments on at least a quarterly basis and obligated to make separate payments no more frequently than the swap counterparty, with all simultaneous payments being netted;

(3) which has a notional amount that does not exceed either (i) the certificate balance of the class of certificates to which the swap relates, or (ii) the portion of the certificate balance of such class represented by receivables;

(4) which is not leveraged (i.e., payments are based on the applicable notional amount, the day count fractions, the fixed or floating rates designated in paragraph HH.(2) above, and the difference between the products thereof, calculated on a one to one ratio and not on a multiplier of such difference);

(5) which has a final termination date that is the earlier of the date on which the trust terminates or the related class of certificates is fully repaid; and

(6) which does not incorporate any provision which could cause a unilateral alteration in any provision described in paragraphs HH.(1) through

(4) above without the consent of the trustee.

II. "Eligible Swap Counterparty" means a bank or other financial institution which has a rating, at the date of issuance of the certificates by the trust, which is in one of the three highest long-term credit rating categories, or one of the two highest short-term credit rating categories, utilized by at least one of the Rating Agencies rating the certificates; provided that, if a swap counterparty is relying on its short-term rating to establish eligibility hereunder, such counterparty must either have a long-term rating in one of the three highest long-term rating categories or not have a long-term rating from the applicable Rating Agency, and provided further that if the senior class of certificates with which the swap is associated has a final maturity date of more than one year from the date of issuance of the certificates, and such swap is a Ratings Dependent Swap, the swap counterparty is required by the terms of the swap agreement to establish any collateralization or other arrangement satisfactory to the Rating Agencies in the event of a ratings downgrade of the swap counterparty.

JJ. "Qualified Plan Investor" means a plan investor or group of plan investors on whose behalf the decision to purchase certificates is made by an appropriate independent fiduciary that is qualified to analyze and understand the terms and conditions of any swap transaction used by the trust and the effect such swap would have upon the credit ratings of the certificates. For purposes of the exemption, such a fiduciary is either:

(1) A "qualified professional asset manager" (QPAM),<sup>8</sup> as defined under Part V(a) of PTE 84-14 (49 FR 9494, 9506, March 13, 1984);

(2) an "in-house asset manager" (INHAM),<sup>9</sup> as defined under Part IV(a)

<sup>8</sup>PTE 84-14 provides a class exemption for transactions between a party in interest with respect to an employee benefit plan and an investment fund (including either a single customer or pooled separate account) in which the plan has an interest, and which is managed by a QPAM, provided certain conditions are met. QPAMs (e.g., banks, insurance companies, registered investment advisers with total client assets under management in excess of \$50 million) are considered to be experienced investment managers for plan investors that are aware of their fiduciary duties under ERISA.

<sup>9</sup>PTE 96-23 permits various transactions involving employee benefit plans whose assets are managed by an INHAM, an entity which is generally a subsidiary of an employer sponsoring the plan which is a registered investment adviser with management and control of total assets attributable to plans maintained by the employer and its affiliates which are in excess of \$50 million.

of PTE 96-23 (61 FR 15975, 15982, April 10, 1996); or

(3) a plan fiduciary with total assets under management of at least \$100 million at the time of the acquisition of such certificates.

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

LL. "Excess Finance Charge Collections" means, as of any day funds are distributed from the trust, the amount by which the finance charge collections allocated to certificates of a series exceed the amount necessary to pay certificate interest, servicing fees and expenses, to satisfy cardholder defaults or charge-offs, and to reinstate credit support.

MM. "Required Additions" means accounts which are required to be added to the trust when either the seller amount is less than the minimum required seller amount or the principal amount is less than the required principal amount.

NN. "Restricted Additions" means accounts which may be added to the trust at the discretion of the sponsor only upon confirmation from a Rating Agency that no Ratings Effect will result from the addition.

The Department notes that this exemption is included within the meaning of the term "Underwriter Exemption" as it is defined in Section V(h) of the Grant of the Class Exemption for Certain Transactions Involving Insurance Company General Accounts, which was published in the **Federal Register** on July 12, 1995 (see PTE 95-60, 60 FR 35925).

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 on August 11, 1999 at 64 FR 43742.

**Effective Date:** This exemption is effective August 11, 1999.

**For Further Information Contact:** Mr. Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

### **UNOVA, Inc. (UNOVA), Located in Beverly Hills, California**

[Prohibited Transaction Exemption No. 99-40; Exemption Application Nos. D-10663 and D-10664]

#### *Exemption*

The restrictions of section 406(a), 406(b)(1) and (b)(2), and section 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, as of December 17, 1998, to: (1) the acquisition by the UNOVA, Inc. Pension Plan and the Landis Tool Pension Plan (collectively, the Plans) of certain improved real property (the Property) from an unrelated party for a sales price of \$15,250,000 (the Purchase); and (2) the leasing of a portion of the Property (the Lease) by the Plans to UNOVA, a party in interest with respect to the Plans, provided that the following conditions are satisfied:

(a) The Plans paid an amount for the Property which was no more than the fair market value of the Property at the time of the transaction;

(b) The interest in the Property owned by each Plan represented no more than 10% of the value of either Plan's total assets at the time of the Purchase;

(c) The Property, including the amount of space in the Property leased to UNOVA under the Lease (the Leased Space), represents no more than 10% of the value of either Plan's total assets throughout the duration of the Lease;

(d) The terms and conditions of the Lease are at least as favorable to the Plans as those obtainable in an arm's-length transaction with an unrelated party;

(e) The fair market rental value of the Leased Space has been, and every three years during the Lease will continue to be, determined by a qualified, independent appraiser;

(f) The amount of rent paid by UNOVA to the Plans for the Leased Space throughout the duration of the Lease will be no less than the greater of the initial rent paid by UNOVA or the current fair market value of the Leased Space, as determined every three years by a qualified independent appraiser;

(g) The Plans' independent fiduciary has determined that the Purchase and Lease are appropriate for the Plans and in the best interests of the Plans' participants and beneficiaries; and

(h) The Plans' independent fiduciary will monitor the Lease, as well as the conditions of this exemption, and will take whatever actions are necessary to safeguard the interests of the Plans throughout the duration of the Lease.



*Effective Date:* This exemption is effective as of December 17, 1998.

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 on May 13, 1999 at 64 FR 25921.

#### Written Comments

The Department received approximately 69 comment letters from interested persons regarding the notice of proposed exemption (the Notice). The Department also received three comment letters from the applicant (*i.e.*, UNOVA), one letter in response to the 69 comments submitted by interested persons, another letter requesting certain clarifications and modifications to the Notice, and a final letter which provides a further statement regarding an appropriate limitation on the percentage of each Plan's assets that the Property may represent.

With respect to the 69 comments received by the Department from interested persons, approximately 58 of the letters were similar or identical in nature. One such letter had 22 different signatures endorsing the comments made therein. All of these letters expressed general opposition " \* \* \* to any plan that would allow unova inc. [sic] to use any funds that have been accumulated by its employees for retirement, for company related expenditures." Some of these letters also expressed concerns regarding " \* \* \* a potential conflict of interest" and that " \* \* \* any money set aside for future retirement should only be used to enhance that retirement fund to the fullest extent possible." The remaining comment letters were not similar or identical in nature and raised more specific issues. For example, one comment stated that " \* \* \* the purchase of land from 'arms length' parties is suspect and not in the best interest of plan participants \* \* \*" and that " \* \* \* investment in real property in Los Angeles [sic] is speculative at best \* \* \*" Other comments suggested that it would have been more appropriate for UNOVA to buy the Property rather than the Plans. Some of these comments also suggested that the rent being paid by UNOVA for the Leased Space, and UNOVA's reimbursement of leasing expenses to the Plans, is inadequate. Finally, most of these comments raised concerns about the " \* \* \* security of the retirement funds" and the need for adequate protections from any investment losses.

In response to these comments, the applicant states that the Investment Committee of the Plans (the Committee) determined in 1998 that real estate

should be part of the investments in the Plans' portfolios in order to diversify the assets of the Plans. The applicant notes that asset diversity can reduce risk to an investment portfolio and can contribute to the growth of the Plans' assets. With respect to the Plans' investment in the Property, the applicant represents that the Committee determined that the Property would be an appropriate real estate investment for the Plans in meeting the stated goal of diversifying the Plans' assets into real estate. The applicant states that the Lease adds to the value of the Property because it adds to the income enjoyed by the Plans from the investment. Further, the requested exemption contains safeguards, such as independent fiduciary review of the fair market rental value of the Leased Space every three years, adjustment of the rent to reflect cost of living increases, and continued monitoring of the Lease's terms to ensure that the Lease does not become disadvantageous to the Plans.

The applicant notes that the safeguards agreed to by UNOVA for the Lease are similar to those required in other lease transactions for which the Department has granted an exemption. In this regard, UNOVA hired an independent fiduciary for the Plans to review the terms of proposed transactions and to take whatever actions may be necessary to safeguard the best interests of the Plans and its participants and beneficiaries. In addition, an independent qualified real estate appraiser was hired to review and appraise the Property (the Appraisal) to determine its fair market value prior to its acquisition by the Plans. The appraiser that produced the Appraisal also analyzed the rental rate to be paid by UNOVA for the Leased Space and concluded that an initial rental rate of \$25.20 per square foot annually represented the current fair market value of the Leased Space. The Appraisal was also reviewed by certified real estate appraisers (the Reviewers) who were independent of the parties involved in the transactions. The Reviewers determined that the rental rate to be paid by UNOVA for the Leased Space was at the high end of the range of rents being paid for similar properties in the local real estate market.

Therefore, the applicant believes that given the goal of diversification of plan assets and the independent safeguards discussed above, the transactions are in the best interests of the Plans and their participants and beneficiaries.

The Department agrees with the applicant that the conditions of the proposed exemption contain adequate independent safeguards to protect the interests of the Plans. The Department

notes further that the total value of the Property allocated to each of the Plans represented less than 5% of each Plan's total assets at the time of the Purchase. Therefore, based on the current facts and representations, the Department is satisfied that the Plans' purchase of the Property and subsequent leasing of part of the Property to UNOVA was consistent with the Plans' investment objectives, and that the terms and conditions of the Lease (as agreed to by the parties and approved by an independent fiduciary) are in the interests of the Plans. Upon consideration of the concerns raised by the comments, the applicant has agreed by letter dated September 21, 1999 to further limit the percentage of each Plan's total assets that the Property will represent throughout the duration of the Lease to no more than 10%. As noted below, the Department has modified conditions (b) and (c) of the exemption accordingly. In addition, the applicant has also represented that no major expenditures or renovations are contemplated for the Property except for certain expenses associated with tenant installation.<sup>10</sup>

The following is a discussion of the applicant's additional comments regarding the Notice. These comments requested that:

(1) relief from the restrictions of section 407(a) of the Act be provided in the exemption;

(2) condition (c), which imposes a limitation on the total Plan assets that can be represented by the Property, be clarified; and

(3) certain clarifications be made to the information contained in Paragraph 3 of the Summary of Facts and Representations in the Notice (the Summary).

With respect to item (1) above, the applicant states that relief from section 407(a) of the Act is necessary because the Property represents a single parcel of "employer real property" (as defined in section 407(d)(2) of the Act) and would not be considered "qualifying employer real property" within the meaning of section 407(d)(4) of the Act, since such a property would not meet

<sup>10</sup>The Department notes that any expenses for tenant installation, or other expenditures relating to the Property, made by the Plans must be consistent with the fiduciary responsibility provisions contained in Part 4 of Title I of the Act. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that plan fiduciaries act prudently and solely in the interest of the plan and its participants and beneficiaries when making investment decisions for a plan, including any decisions for reasonable expenditures that are necessary to enhance the value of such investments.



the requirement contained therein that such properties be "geographically dispersed." Thus, in order to ensure that adequate relief is provided by the final exemption, the applicant requests that the Department clarify that the exemption provides relief from section 407(a).

The Department agrees with the applicant's analysis and has modified the exemption to provide relief from the restrictions of section 407(a) of the Act.

With respect to item (2) above, the applicant states that condition (c) of the Notice states that:

The Property, and the amount of space in the Property leased to UNOVA under the Lease (the Leased Space), represents no more than 15% of the value of either Plans's total assets throughout the duration of the Lease. [emphasis added]

In this regard, the applicant asks the Department to confirm that this condition does not double count the value of the Property and the value of the Leased Space, but merely looks to the value of the Property (including the value of the Leased Space) when determining whether this condition is met.

The Department acknowledges the applicant's comment and, in order to clarify the meaning of this condition in the final exemption, has deleted the word "and" and substituted the word "including" in the reference to the Leased Space contained in condition (c). In addition, as noted above, the Department has modified conditions (b) and (c) of the exemption by reducing the percentage limitation required therein from 15% to 10%.

With respect to item (3) above, the applicant notes that the first sentence in Paragraph 3 of the Summary states that:

After the Purchase, the Plans leased a portion of the Property to UNOVA, effective as of December 17, 1998 (i.e., the Lease). [emphasis added]

The applicant states that this sentence should state that the Plans leased a portion of the Property to UNOVA, effective as of February 1, 1999.

The Department acknowledges this clarification to the information contained in the Summary.

Accordingly, based on the entire record, the Department has determined to grant the proposed exemption as modified herein.

*For Further Information Contact:* Christopher J. Motta of the Department, telephone (202) 219-8194. (This is not a toll-free number.)

### **The Manufacturers Life Insurance Company (Manulife) Located in Toronto, Canada**

[Prohibited Transaction Exemption 99-41; Exemption Application No. D-10738]

#### *Exemption*

##### Section I. Covered Transactions

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, to (1) the receipt of common stock (the Common Shares) of Manulife Financial Corporation, a newly-formed company that will be the holding company (the Holding Company) for Manulife; or (2) the receipt of cash or policy credits, by any plan policyholder (the Eligible Policyholder) that is an employee benefit plan (the Plan), other than a policyholder which is a Plan established by Manulife or an affiliate for its own employees, in exchange for such Eligible Policyholder's membership interest in Manulife, in accordance with a plan of reorganization (the Plan of Demutualization) adopted by Manulife and implemented under the insurance laws of Canada and the State of Michigan.

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

##### Section II. General Conditions

(a) The Plan of Demutualization is implemented in accordance with procedural and substantive safeguards that are imposed under the insurance laws of Canada and the State of Michigan and is subject to review and/or approval in Canada by the Office of the Superintendent of Financial Institutions (OSFI) and the Minister of Finance (the Canadian Finance Minister) and, in the State of Michigan, by the Commissioner of Insurance (the Michigan Insurance Commissioner).

(b) OSFI, the Canadian Finance Minister and the Michigan Insurance Commissioner review the terms of the options that are provided to Eligible Policyholders of Manulife as part of their separate reviews of the Plan of Demutualization. In this regard,

(1) OSFI (i) authorizes the release of the Plan of Demutualization and all information to be sent to Eligible Policyholders; (ii) oversees each step of the demutualization process; and (iii) makes a final recommendation to the Canadian Finance Minister on the Plan of Demutualization.

(2) The Canadian Finance Minister may consider such factors as whether (i) the Plan of Demutualization is fair and equitable to Eligible Policyholders; (ii)

the Plan of Demutualization is in the best interests of the financial system in Canada; and (iii) sufficient steps had been taken to inform Eligible Policyholders of the Plan of Demutualization and of the special meeting on demutualization.

(3) The Michigan Insurance Commissioner makes a determination that the Plan of Demutualization is (i) fair and equitable to all Eligible Policyholders and (ii) consistent with the requirements of Michigan law.

(4) Both the Canadian Finance Minister and the Michigan Insurance Commissioner concur on the terms of the Plan of Demutualization.

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

(d) One or more independent fiduciaries of a Plan that is an Eligible Policyholder receives Holding Company Common Shares, cash or policy credits pursuant to the terms of the Plan of Demutualization and neither Manulife nor any of its affiliates exercises any discretion or provides investment advice with respect to such acquisition.

(e) After each Eligible Policyholder is allocated 186 Common Shares, additional consideration is allocated to Eligible Policyholders who own eligible policies based on an actuarial formula that takes into account the cash value, the death benefit (in the case of life insurance policies and certain annuity policies) and the duration of each such eligible policy. The actuarial formula has been reviewed by the Canadian Finance Minister and the Michigan Insurance Commissioner.

(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 the receipt of Common Shares.

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

##### Section III. Definitions

For purposes of this exemption:

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

(b) An "affiliate" of Manulife includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Manulife. (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 at the special meeting on demutualization and to receive consideration under Manulife's Plan of Demutualization. More specifically, an Eligible Policyholder is a policyholder of the mutual insurer that had a voting policy on the day Manulife announced its intention to prepare a plan of demutualization (the Eligibility Date) or any policyholder that applied for a voting policy on or prior to that day. Policyholders will also be deemed Eligible Policyholders if they are holders of a voting policy that lapsed before the insurer's Eligibility Date but was reinstated on or before 90 days prior to the special meeting to consider demutualization. These policyholders will be eligible to receive benefits upon demutualization.

(d) The term "policy credit" means whichever of the following is applicable: (1) with respect to an individual life or individual deferred annuity policy, and for a group policy (other than a group annuity), where the owner has elected a paid-up addition option, an increase in the paid-up addition value; (2) with respect to all other individual life or individual deferred annuity policies, and for all other group policies (other than group annuities), an increase in the dividend accumulation account; (3) with respect to a settlement annuity, a vested annuity or a group annuity, an increase in the periodic income payment.

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 (the Notice) that was published July 22, 1999 at 64 FR 39539.

#### Written Comments

The Department received two written comments with respect to the Notice. One comment was submitted by a Manulife policyholder. The other comment was submitted by Manulife. Following is a discussion of these comments.

#### *Policyholder's Comment*

The commenter expressed concern over the tax implications of the cash

distribution that would be made by Manulife to the policyholder's Plan account as a result of the demutualization. The commenter explained that he had not sought the demutualization nor was he taking the distribution in his own name. Rather, he said he would reinvest the cash consideration received with other assets held by his Plan account. The commenter argued that to tax him would be unfair since the money he would be receiving as a result of Manulife's demutualization would not be in his actual possession and the tax would have to be paid to the taxing authorities from his present income. The commenter further explained that while he fully expected to pay taxes on the cash consideration when he took distributions from his Plan account, to tax him prematurely would be unfair and constitute unjust enrichment to the taxing authorities.

In response to the commenter, Manulife indicated that it was unaware of how the commenter acquired erroneous information that the payment of the demutualization benefits to the commenter's Plan account would constitute a taxable event. Manulife explained that under current U.S. tax law, the payment of the demutualization benefits to a qualified plan would not result in current taxation to a Plan participant, such as the commenter, nor of the Plan, itself. To emphasize this point, Manulife indicated that in the Information Circular it mailed to policyholders on or before May 31, 1999, pages 51 and 52 of the document specifically state that the "[r]eceipt of Common Shares or cash by a pension or profit sharing trust (a plan covered by section 401(a) of the U.S. Tax Code) will be tax-free to the trust (assuming the trust is not otherwise subject to tax)."

#### *Manulife's Comment*

In its comment, Manulife recommended modifications or clarifications to the operative language and the Summary of Facts and Representations (the Summary) of the Notice in a number of areas. Manulife explained that its comment was generated primarily because the exemption application reflected a draft version of the Plan of Demutualization rather than the final version that was approved by OSFI and the Michigan Insurance Commissioner.

Discussed below are Manulife's concerns and the Department's responses with respect to these areas of concern. Also included is a discussion of the Department's revisions of certain typographical errors appearing in the

Summary and the Notice to Interested Persons.

1. *Canadian Finance Minister Considerations.* On page 39539 of the Notice, Section II(b)(2) describes the various factors the Canadian Finance Minister may take into account in deciding whether to approve a plan of demutualization. Manulife represents that the first subclause of Section II(b)(2) should be revised to read "The Canadian Finance Minister may consider such factors as whether (i) the Plan of Demutualization is fair and equitable to policyholders." As for subclauses (ii) and (iii) of Section II(b)(2), Manulife states that no changes should be made.

The Department concurs with this modification to Section II(b)(2) of the Notice.

2. *Fixed and Variable Allocations of Demutualization Benefits.* On page 39539 of the Notice, Section II(e) states that the fixed allocation of demutualization benefits will equal 184 Common Shares. However, Manulife wishes to clarify that the fixed allocation is actually equal to 186 Common Shares and, in response to this comment, the Department has made the requested change. The Department has also made a corresponding revision on page 39543 of the Notice in the second paragraph of Representation 10 of the Summary.

In addition, Section II(e) of the Notice describes the variable component of the demutualization benefits, in part, as follows: "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 Manulife \* \* \*" Manulife represents that while some other insurance companies have calculated the variable component of their demutualization benefit in this manner, Manulife's variable allocation will be calculated on a different basis. In this regard, Manulife explains that under its Plan of Demutualization, the variable allocation to eligible policies that are life insurance policies will be calculated on the basis of the cash value, the death benefit and the duration of each such eligible policy. Manulife further explains that the variable allocation to eligible policies that are annuities will be calculated using the same formula that will be used for life insurance policies, except that the share allocation with respect to the death benefit will generally be zero. According to Manulife, these allocation formulas have been reviewed by the Canadian Finance Minister and the Michigan Insurance Commissioner. In

light of the above, Manulife suggests that Section II(e) be revised to read as follows:

After each Eligible Policyholder is allocated 186 Common Shares, additional consideration is allocated to Eligible Policyholders who own eligible policies based on an actuarial formula that takes into account the cash value, the death benefit (in the case of life insurance policies and certain annuity policies) and the duration of each such eligible policy. The actuarial formula has been reviewed by the Canadian Finance Minister and the Michigan Insurance Commissioner.

The Department acknowledges Manulife's requested change and has modified Section II(e) of the Notice.

3. *Eligible Policyholder Definition.* On page 39539 of the Notice, Section III(c) defines the term "Eligible Policyholder" as—

A policyholder who is eligible to vote at annual meetings of the mutual insurer and to receive consideration under Manulife's Plan of Demutualization. More specifically, an Eligible Policyholder is a policyholder of the mutual insurer that had a voting policy before Manulife announced its intention to demutualize or any policyholder that applied for a voting policy prior to that day. Policyholders will also be deemed Eligible Policyholders if they are holders of a voting policy that lapsed before the insurer's announcement date but was reinstated on or before 90 days prior to the special meeting to consider demutualization. These policyholders will be eligible to receive benefits upon demutualization.

To reflect current revisions in its Plan of Demutualization, Manulife requests that the definition of "Eligible Policyholder" as set forth in Section III(c) of the Notice be revised to read as follows:

The term "Eligible Policyholder" means a policyholder who is eligible to vote at the special meeting on demutualization and to receive consideration under Manulife's Plan of Demutualization. More specifically, an Eligible Policyholder is a policyholder of the mutual insurer that had a voting policy on the day Manulife announced its intention to prepare a plan of demutualization (the Eligibility Date) or any policyholder that applied for a voting policy on or prior to that day. Policyholders will also be deemed Eligible Policyholders if they are holders of a voting policy that lapsed before the insurer's Eligibility Date but was reinstated on or before 90 days prior to the special meeting to consider demutualization. These policyholders will be eligible to receive benefits upon demutualization.

In response to this comment, the Department has made the requested changes to Section III(c) of the Notice.

4. *Policy Credit Definition.* On page 39540 of the Notice Section II(d) contains the following definition of the term "policy credit":

The term "policy credit" means whichever of the following is applicable: (1) with respect to an individual life insurance policy, an increase in the dividend accumulation amount; (2) with respect to an individual deferred annuity policy where the owner has elected a dividend accumulation option, an increase in the dividend accumulation amount; (3) with respect to all other individual deferred annuity policies, an increase in the dividend addition value; and (4) with respect to a settlement annuity, an increase in the contract reserve which shall provide for an increase in the monthly income payment equal to the ratio of the reserve increase to the then current contract reserve.

To reflect current revisions to its Plan of Demutualization, Manulife suggests that the definition of the term "policy credit" be revised to read as follows:

The term "policy credit" means whichever of the following is applicable: (1) with respect to an individual life or individual deferred annuity policy, and for a group policy (other than a group annuity), where the owner has elected a paid-up addition option, an increase in the paid-up addition value; (2) with respect to all other individual life or individual deferred annuity policies, and for all other group policies (other than group annuities), an increase in the dividend accumulation account; (3) with respect to a settlement annuity, a vested annuity or a group annuity, an increase in the periodic income payment.

The Department concurs with this clarification and has modified Section III(d) accordingly.

5. *Subsidiary Ownership.* On page 39540 of the Notice, Representation 1 of the Summary states, in pertinent part, that Manulife indirectly owns approximately 85 percent of The Manufacturers Life Insurance Company of North America (Manulife/North America). Manulife wishes to clarify however, that as a result of ManUSA's recent acquisition of the 15 percent minority interest in Manulife/North America, Manulife now indirectly owns 100 percent of that entity.

The Department notes this clarification to the Summary.

6. *Stock Ownership Listings.* On page 39541 of the Notice, Representation 4 of the Summary states that Common Shares of the Holding Company will be listed on the Montreal, Toronto or New York Stock Exchanges. However, for purposes of clarification, Manulife represents that Common Shares will be listed on each of the "Montreal, Toronto, Hong Kong, Philippines and New York Stock Exchanges."

The Department acknowledges this clarification.

7. *Holding Company Shares.* On page 39541 of the Notice, Representation 6 of the Summary describes the steps that will occur in connection with

Manulife's demutualization. Specifically, the third sentence of Representation 6 states the following: "Then, all of the Holding Company's Common Shares held by Manulife immediately prior to the effective date will be canceled." Manulife requests that this sentence be revised by deleting the reference to the term "Common Shares" and replacing it with the term "shares." Therefore, the revised sentence would read as follows: "Then, all of the Holding Company's shares held by Manulife immediately prior to the effective date will be canceled." The Department does not object to this change and has made the requested revision.

8. *Footnote 13.* On page 39542 of the Notice, Footnote 13 of the Summary describes the treatment of the underwriters' discount under Canadian law if Common Shares are sold by non-Canadian policyholders of Manulife in a secondary offering by the Holding Company's underwriters as part of the initial public offering. To clarify the language of the footnote, Manulife suggests that the second and third sentences be deleted and replaced with the following language:

Because the payment of the underwriters' discount is treated as dividend in Canada, a withholding tax of 15 percent of the amount of the dividend will be imposed. Manulife has concluded that there is an applicable withholding tax exemption under the Canada/U.S. tax treaty and, accordingly, it will not withhold any taxes from amounts remitted to the Plans. Manulife has represented that even if its conclusion is incorrect, it will not seek reimbursement from any Plan policyholder under such circumstances.

The Department concurs with these revisions and has made the requested changes.

9. *Footnote 19.* On page 39542 of the Notice, Footnote 19 of the Summary discusses, in pertinent part, special rules applicable to an insurance policy that is issued to a trust established by Manulife. Because the last sentence of the second paragraph of Footnote 19 is in error, Manulife suggests that the sentence be revised to read as follows: "The trustee of any such trust established by Manulife will not be considered an Eligible Policyholder or owner and will not be eligible to vote or receive consideration."

The Department acknowledges this revision and has made the requested change.

10. *Eligible Policyholder.* On page 39543 of the Notice, Representation 10 of the Summary describes the criteria for an Eligible Policyholder under Manulife's Plan of Demutualization. To

clarify the second parenthetical in the first paragraph of Representation 10, which relates to certain status and time requirements for the insurance policies, Manulife suggests that the parenthetical be revised to read as follows:

(or applied for on or before that date or which are in lapse status on that date and reinstated at least 90 days prior to the special meeting of the Eligible Policyholders to vote on the Plan of Demutualization).

The Department acknowledges this revision and has modified the parenthetical.

**11. Cash Elections/Non-Trusteed Policies.** On page 39543 of the Summary, the second sentence in the fourth paragraph of Representation 10 states that the cash election that is made by an Eligible Policyholder who is entitled to receive Common Shares may be reduced if the Board of Directors of the Holding Company determines that such reduction is in Manulife's best interests. However, for purposes of clarification, Manulife suggests that this sentence be deleted and the following new sentence be inserted in lieu thereof:

If, in the judgment of the Board of Directors of the Holding Company, it would not be in the best interests of Manulife to conduct a public offering that fully funds cash elections, then the Board of Directors shall determine the number of Common Shares by which the aggregate cash elections shall be reduced, and such reductions shall be prorated among all Eligible Policyholders who have made a cash election.

In response to this comment, the Department has made the suggested modification.

In addition, the fifth paragraph of Representation 10 refers to Plans intending to qualify under section 403(a) of the Code as the recipients of policy credits. Manulife requests that the sentence should also make reference to Plans intending to qualify under section 401(a) of the Code. Accordingly, Manulife suggests that the sentence should read as follows:

Other Eligible Policyholders, namely owners of individual retirement annuities, tax sheltered annuities, certain other policies issued directly to Plan participants in qualified pension or profit sharing plans, or group policies issued in connection with Plans intending to qualify under section 401(a) or 403(a) of the Code that are not held in trust, will receive policy credits equal in value to the shares allocated to such Eligible Policyholders.

The Department notes this change and has made the requested revision.

**12. Escrow Arrangement.** On page 39543 of the Notice, Representation 12 of the Summary describes an escrow arrangement that Manulife will implement in the event the exemption

is not granted before the effective date of the demutualization. Specifically, the first sentence of Representation 12 provides that the escrow arrangement is subject to terms and conditions approved by the Superintendent of OSFI. Manulife wishes to clarify, however, that such terms and conditions will be subject to approval by the Michigan Insurance Commissioner rather than the Superintendent of OSFI.

In response, the Department notes this clarification and has made the requested change.

Finally, the Department has revised certain typographical errors appearing in the Summary and the Notice to Interested Persons. In this regard, on page 39543 of the Notice, references to the citation "29 CFR 2510.3-2(c)" in the fifth paragraph of Representation 10 and in paragraph (d) of Representation 12 should be revised to read "29 CFR 2510.3-21(c)." Also, the reference to "20 CFR 2570.43(b)(2)" in the Notice to Interested Persons should be revised to read "29 CFR 2570.43(b)(2)."

For further information regarding the comments or other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10738) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Accordingly, after giving full consideration to the entire record, including the written comments received, the Department has decided to grant the exemption subject to the modifications and clarifications described above.

*For Further Information Contact:* Ms. Jan D. Broady 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 or disqualified person from certain other provisions to which the exemptions 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 29th day of September, 1999.

**Ivan Strasfeld,**

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

[FR Doc. 99-25709 Filed 10-1-99; 8:45 am]

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## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[99-128]

### Agency Information Collection: Submission for OMB Review, Comment Request

**AGENCY:** National Aeronautics and Space Administration (NASA).

**SUMMARY:** The National Aeronautics and Space Administration has submitted to the Office of Management and Budget (OMB) the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).