

Pension and Welfare Benefit Programs

[Prohibited Transaction Exemption 83-1; Application Nos. D-2789 and D-3060]

**Amendments to Prohibited Transaction Exemption 81-7 for Certain Transactions Involving Mortgage Pool Investment Trusts**

AGENCY: Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This document contains amendments to Prohibited Transaction Exemption 81-7 (PTE 81-7). Prohibited Transaction Exemption 81-7 exempts from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from certain taxes imposed by the Internal Revenue Code of 1954 (the Code) certain transactions related to the origination, maintenance and termination of mortgage pool investment trusts (mortgage pools), and the acquisition and holding of certain mortgage-backed pass-through certificates (certificates) of mortgage pools under prescribed conditions by employee benefit plans (investing plans). The amendments adopted today expand the coverage of PTE 81-7 to include: (1) pools containing loans secured by mortgages or deeds of trust which are other than first lien loans; and (2) forward delivery commitments by investing plans to purchase pool certificates under certain circumstances.

EFFECTIVE DATE: January 1, 1975.

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SUPPLEMENTARY INFORMATION: On May 18, 1982, notice was published in the **Federal Register** (47 FR 21325) of the pendency before the Department of Labor (the Department) of a proposal to amend PTE 81-7 (46 FR 7520, January 23, 1981) for certain transactions involving mortgage pool investments trusts. The proposal was based in part on two individual applications filed on behalf of Transamerica Financial Corporation (D-2789) and Merrill Lynch MBS Inc. (D- 3060). The notice set forth a summary of facts and representations contained in these applications and in other materials submitted to the Department. This information has been available for public inspection at the Department in Washington, D.C.

Public comments with regard to the proposal were received pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). Upon consideration of these comments, the Department has determined to adopt the proposed amendments to PTE 81-7, subject to certain modifications. These comments and modifications are discussed below.

In the interest of clarity, the Department has determined that the exemption as modified should be redesignated and supersede the existing prohibited transaction numbered PTE 81-7.

**I. Description of the Proposal**

The Department proposed to amend PTE 81-7 in two ways. First, the Department proposed to expand the coverage of the class exemption to include pools containing either first or second lien loans. As originally granted, the term "mortgage pool" was defined in the exemption as an investment pool the corpus of which consisted of "interest bearing obligations secured by first mortgages or deeds of trust on single-family residential property." The Department proposed to amend this definitional section to include interest bearing obligations secured by either first or second mortgages or deeds of trust. The Department took this action because the applications demonstrated substantial similarities in the operation of pools of first and second mortgages and deeds of trust.

Second, the proposal contained two new sections to be added to PTE 81-7 to provide relief for the making of forward delivery commitments by an investing plan for the purchase of mortgage pool certificates. Under the proposal, a forward delivery commitment would be defined as a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date which is more than thirty days after the contract's trade date. This definition was based upon the use of this term in the mortgage pool industry, and includes both mandatory and optional delivery

contacts. Relief for such commitments would be provided by defining the term “sale” for the purposes of the class exemption to include a forward delivery commitment provided that certain conditions are met. The first condition relates to section I(A) of the class exemption, which provides relief from the prohibitions of section 406(a) of the Act for the direct or indirect sale of certificates between a plan and a pool sponsor when the pool sponsor, trustee or insurer is a party in interest with respect to the plan. This proposed condition provides that such relief will be available only if the terms of the forward delivery commitment are no less favorable to the plan than they would be in an arm’s length transaction with an unrelated party. The second condition relates to section I(B) of the class exemption, which provides relief from the prohibitions of section 406(b)(1) and (2) for the direct or indirect sale of certificates between a plan and a pool sponsor when the pool sponsor, trustee or insurer is a fiduciary with respect to the plan assets being invested in the certificates. The proposal provides that such relief will be available for forward delivery commitments if: (1) the forward delivery commitment is approved by a fiduciary independent of the pool sponsor, trustee or insurer who has authority to manage and control those plan assets being committed for investment in the certificates; (2) the forward delivery commitment is not an optional or standby commitment unless performance is optional on the part of the investing plan; and (3) at the time the plan is called upon to perform pursuant to its commitments; and the sale of certificates is executed, all of the conditions of section I(B) of the exemption (relating to sales of certificates) are met.

## II. Discussion of the Comments

The Department received six comments regarding this proposal. These comments, and the Department’s actions with regard to them, are discussed below.

*A. Pools of Junior Lien Loans.* The Department received three comments regarding the proposal to amend section III(B)(2)(a) to include pools of loans secured by second mortgages or second deeds of trust. Two of these comments supported the adoption of this amendment as proposed. The third comment, while supporting the Department’s intentions, stated that the Department should not seek to establish a minimum lien priority requirement for mortgage pools to qualify for relief under PTE 81-7. This commentator argued that insurance provided by private pool sponsors, as well as market forces affecting the investment quality of certificates, would provide sufficient security for potential investors.

In proposing to expand the coverage of PTE 81-7 to include pools of second mortgages or deeds of trust, the Department relied on the applicants’ facts and representations that second lien loans closely resembled first lien loans with respect to form, default rate, and loan to value ratio, and that pools of second lien loans would operate in the same way as pools of first lien loans. These similarities are important because PTE 81-7 was designed to reflect industry practices with regard to first lien loan pools. In particular, the Department might require different safeguards for junior lien loan pools which vary markedly in form or content from the model upon which PTE 81-7 is based. In the absence of any detailed information with regard to loans junior to second lien loans, or the structure of or market for pools of such junior loans, the Department is not prepared, at this time, to expand the exemption in this regard. However, the Department is adopting amended section III(B)(2)(a) as proposed, so that the relief provided by PTE 81-7 will apply to pools of interest bearing obligations secured by either first or second mortgages or deeds of trust on single-family, residential property.

*B. Forward Delivery Commitments.* The Department received four comments relating to proposed sections III(G) and III(H), which would have the effect of extending the relief provided in PTE 81-7 to forward delivery commitments made by plans for the purchase of mortgage pool certificates. None of the commentators objected to proposed section III(H), which defines the term “forward delivery commitment” and “forward delivery commitment contract.” As a result, the Department is adopting that provision as proposed.

One commentator addressed the Department’s inclusion of forward delivery commitments within the definition of the term “sale” in proposed section III(G). This commentator noted that such commitments could be viewed in a number of different ways, such as, for example, an indirect extension of credit between the investing plan and an originator of loans included in the pool. However, the information received by the Department indicates that forward delivery commitments are an integral part of the process by which mortgage pools are formed and their certificates marketed. As a result, the Department extended exemptive relief to such commitments in that context. In any event, the amendments to PTE 81-7 are designed to give full relief for forward delivery commitments and for transactions involving certificates purchased pursuant to such commitments if all of the conditions of the exemption are met.

One commentator, while strongly supporting the Department’s effort to bring relief to this area, questioned the condition in section III(G)(2)(a), which states that the relief contained in section I(B) of PTE 81-7 is available for a forward delivery commitment only if that commitment has been expressly approved by a fiduciary independent of the pool sponsor, trustee or insurer who has authority to manage and control those plan assets being committed for investment in pool

certificates. The commentator stated that this condition should be applied only when the pool sponsor is also a fiduciary with respect to plan assets being committed to the purchase of pool certificates. The condition in proposed section III(G)(2)(a) is already limited to precisely the situation outlined by this commentator. Proposed section III(G)(2) contains conditions applicable to relief for forward commitments under section 406(b)(1) and (2) of the Act when the pool sponsor, trustee or insurer is a fiduciary with respect to the plan assets being invested in pool certificates. Thus, the independent fiduciary requirement in section III(G)(2)(a) applies only in such situations of fiduciary conflict of interest. As a result, it is not necessary to change this provision in order to accommodate this commentator's concerns.

Three commentators expressed concern with regard to the condition in proposed section III(G)(2)(b), which states that the relief in section I(B) of PTE 81-7 will apply to an optional or standby commitment only if performance is optional on the part of the investing plan. These commentators noted that in periods of fluctuating interest rates, pool sponsors need an optional delivery vehicle to guard against situations in which mortgage lenders fail to make loans for inclusion in a pool due to changes in the interest rate. The commentators further indicated that the fee typically paid for a stand-by commitment is given in consideration for the plan's promise to accept delivery if the terms of the commitment are met. In the event that the pool sponsor cannot deliver certificates meeting these criteria, this fee often acts as liquidated damages for the investing plan. For these reasons, the commentators asked that this condition be eliminated.

It should be noted that the Department originally proposed this condition to apply only to stand-by commitments made by plans when the pool sponsor, trustee or insurer is a fiduciary with respect to the plan assets being committed for investment in pool certificates. Absent such fiduciary involvement, a plan would be free to make such stand-by commitments as are consistent with the other conditions and requirements of the Act, and of PTE 81-7 and the amendments thereto. It was this concern about the possibility of fiduciary conflict of interest which caused the Department to include all of the conditions in section III(G)(2).

However, upon consideration of the comments discussed above, the Department has decided to modify proposed section III(G)(2)(b). The other conditions in section III(G)(2)(a) and (c) are designed to provide extra protection for plans when dealing with fiduciaries. The payment of a fee in such transactions adds to these protections. As a result, the Department has decided to drop section III(G)(2)(b) as originally proposed. In its place, and at the suggestion of one of the commentators, the Department will adopt an arm's length standard similar to the one contained in section III(G)(1). Thus, final section III(G)(2)(b) states that the terms of the forward delivery commitment contract (including any fee paid to the investing plan) must be no less favorable to the plan than they would be in an arm's length transaction with an unrelated party. Section III(G)(2)(c), which elicited no comments, is adopted as proposed.

*C. Other Comments.* A number of the commentators raised issues not germane to the proposed amendments. Many of these comments request changes in portions of PTE 81-7 not opened for public comment in the notice of May 18, 1982. In addition, some of these comments requested changes in the relief given from the prohibitions of section 406(b) of the Act. Because section 408(a) of the Act states that the Department may not grant relief from section 406(b) without an opportunity for a hearing, the Department cannot adopt these requested changes at this time. However, since these comments relate generally to PTE 81-7, and, in many cases, reflect misunderstandings of that class exemption, the Department believes that these comments bear discussion.

The first set of such non-germane comments deal with the limitation of PTE 81-7 to pools of loans secured by mortgage or deeds of trust on single-family residential housing. Three commentators requested the deletion of this restriction so that PTE 81-7 could provide relief to pools of loans on multi-family dwellings. None of the commentators offered any information with regard to such loans. Indeed, as noted by the Department when originally granting PTE 81-7, the restriction to single-family residential property reflected the request of the applicants and was defined to follow the industry definition of that term. 46 FR 7520, 7525. This provision was not opposed by any commentator when it was properly presented for public comment. Therefore, the Department is not amending the exemption in this regard. However, the commentators may apply for exemptive relief within the terms of section 408(a) of the Act and ERISA Procedure 75-1 (40 FR 18471).<sup>1</sup>

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<sup>1</sup> It should be noted that, in Prohibited Transaction Exemption 82-87 (47 FR 21331, May 18, 1982), which provides relief for transactions involving certain residential mortgage financing arrangements, the Department, after consideration of public comments, decided not to expand that class exemption to include mortgage loans on multiple unit rental structures because

The second area raised by the commentators relates to the conditions in section I(B) (1) of PTE 81-7, which apply to the sale of certificates when the pool sponsor, trustee or insurer is a fiduciary with respect to the plan assets invested in the certificates. One commentator requested the deletion of the requirement in section I(B)(1)(a) that such a sale be approved by an independent fiduciary. This commentator stated that such a condition should be limited to cases of possible fiduciary conflict of interest. This condition is already limited to such situations, and thus no changes are necessary.

In addition, two commentators requested deletion of the percentage limitations in sections I(B)(1)(d) and (e), stating that existing market safeguards were sufficient. Those limitations were adopted at the suggestion of commentators to the original proposal of PTE 81-7 (46 FR 7520, 7522), and are based on the definition of the term “marketable obligation” in section 407(e)(2) of the Act. These conditions are designed, therefore, to assure that the market forces relied upon by the commentators are free to work with regard to pool certificates sold to a plan when the pool sponsor, trustee or insurer is a fiduciary with respect to the plan assets invested in the certificates.

The third area raised in the comments concerns the extent of the coverage of PTE 81-7. One commentator questioned whether the class exemption would apply to pools of loans made to employees of an employer whose employees are covered by the investing plan. The commentator noted that PTE 81-7 does not specifically address the issue. While it is true that the class exemption does not contain a detailed list of exempted transactions, the Department adopted this generalized approach in response to comments elicited by its original proposal. 46 FR 7520, 7521. In particular, section I(c) of PTE 81-7 was designed to apply to all transactions in connection with the servicing and operation of a mortgage pool, and was not limited to those transactions listed specifically in the proposal. *Id.* at 7523. With regard to the commentator’s particular concern, the Department, in the preamble to the original proposal of class relief, discussed the issues raised when a mortgage pool contains employee loans. 45 FR 29937, 29942 (May 6, 1980). It was, therefore, the Department’s intention that the relief in PTE 81-7 apply to pools comprised of employee loans provided the conditions of the exemption are met.

Another commentator asked if PTE 81-7 covered pools of shared appreciation mortgages. PTE 81-7, as amended, requires only that the mortgage loans comprising a pool be interest bearing obligations secured by either first or second mortgages or deeds of trust on single-family, residential property. This provision is intentionally general in order to provide coverage to a variety of so-called “creative financing” loans. Indeed, the Department noted in the preamble to its adoption of PTE 81-7 that variable rate mortgages were included within the exemption’s coverage. 46 FR 7520, 7523 n.1. The Department believes that the provisions of PTE 81-7 are broad enough to deal with specific issues raised by shared appreciation mortgages.

The final area raised by the commentators was the relationship between PTE 81-7 and the so-called “plan asset” regulation. On May 18, 1982, the Department adopted regulation 29 CFR 2550.401b-1 which describes the assets that an employee benefit plan is considered to acquire when it invests in certain governmental mortgage pools. 47 FR 21241. The Department described the mortgage pool programs of the Government National Mortgage Association (GNMA), the Federal National Mortgage Association (FNMA), and the Federal Home Loan Mortgage Corporation (FHLMC). Based on an analysis of these descriptions, the Department determined that when a plan purchases a GNMA certificate, the plan actually looks to the GNMA guarantee, rather than the mortgages comprising the pool, for assurance that the amounts due on its investment will be paid. In the case of a FNMA or FHLMC certificate, a plan will rely on the creditworthiness of the issuing governmental or quasi-governmental corporation. As a result, the final regulation states that when a plan invests in a governmental mortgage pool, the plan’s assets include its investment, but do not, solely by reason of such investment, include any of the underlying mortgages. This would be true irrespective of the type of mortgage or the nature of the property secured by a mortgage contained in a governmental mortgage pool.

In the case of a plan investing in a governmental mortgage pool such as those discussed above, regulation 29 CFR 2550.401b-1 operates to obviate the need for much of the relief provided in PTE 81-7. Specifically, the relief in section I(C) for transactions in connection with the servicing and operation of the pool would be unnecessary since the pooled mortgages are not plan assets. Similarly unnecessary is the relief in section I(D) for transactions prohibited merely because a person is deemed to be a party in interest solely due to a plan’s investment in a mortgage pool. Under 29 CFR 2550.401b-1, the plan’s only asset would be the certificate and the rights embodied therein. Where a plan purchases

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such loans differ, both in magnitude and complexity, from loans on one to four unit structures included within the definition of “single-family residential property.” *Id.* at. 21336.

a mortgage pool certificate which the Department interprets as conveying no interest in assets of such pool, the fact that a person provides services in connection with such pool will not, in and of itself, render such person a party in interest with respect to the investing plan.

Regulation 29 CFR 2550.401b-1 also affects the application of section I(A) and I(B) of PTE 81-7. Section I (A) provides relief from the prohibitions of sections 406(a) and 407 of the Act for the sale of certificates between a plan and the pool sponsor when the pool sponsor, trustee or insurer is a party in interest with respect to the plan. Section I (B) provides relief from the prohibitions of section 406(b)(1) and (2) of the Act for the sale of certificates between a plan and the pool sponsor when the pool sponsor, trustee or insurer is a fiduciary with respect to the plan assets invested in such certificates. Since none of the governmental mortgage pool programs utilize separate pool trustees or pool insurers, those provisions are irrelevant here. In the case of FNMA and FHLMC, the governmental corporation is itself the pool sponsor since it purchases loans, organizes the pool, and issues certificates for marketing. Because of regulation 29 CFR 2550.401b-1, FNMA and FHLMC will never become parties in interest (including fiduciaries) with respect to plans solely as a result of plan investments in their pools. Since FNMA and FHLMC are unlikely to deal with plans except through their mortgage pool programs, the relief in sections I(A) and I(B) of PTE 81-7 is unnecessary with respect to plan investments in FNMA and FHLMC pools.<sup>2</sup>

The situation of GNMA is somewhat different, GNMA is not the pool sponsor since it does not organize the mortgage pool. Rather, other entities, called issuers, gather loans into a pool and present the pool to GNMA. If the pool meets GNMA standards, GNMA will guarantee payments to holders of the certificates backed by the pool. Upon issuance of the GNMA-guaranteed certificates, GNMA succeeds to ownership of the pooled loans while the issuer's interest is reduced to the right to receive a fee for continuing to service the loans. As noted above, GNMA will not become a party in interest (including a fiduciary) with respect to a plan solely because the plan has purchased a GNMA certificate. Because of this, and because GNMA is not a pool sponsor, sections I(A) and I(B) are irrelevant to GNMA as a result of the purchase by a plan of a GNMA certificate.

However, the issuer of GNMA certificates may be deemed to be a pool sponsor under section III(A) of PTE 81-7 since the issuer organizes the pool and continues to service the mortgages therein. Because of the effect of regulation 29 CFR 2550.401b-1, an issuer of certificates from a GNMA pool will not become a party in interest (including a fiduciary) with respect to a plan solely by reason of the plan's investment in such pool. However, an issuer may be a party in interest (including a fiduciary) with respect to one or more plans for reasons independent of the GNMA pool. If such an issuer sells GNMA certificates to a plan with respect to which the issuer is a party in interest, the issuer would have to look to sections I(A) and I(B) of PTE 81-7 for exemptive relief.<sup>3</sup>

Despite this need for relief in a limited category of cases, GNMA, in its comment to the Department's May 18, 1982 proposal, noted the possibility that PTE 81-7 may not apply to GNMA certificates because section III(C) of the class exemption defines the term "certificate" to include only those certificates representing a beneficial individual fractional interest in a mortgage pool. Unlike FNMA and FHLMC, GNMA maintains that its certificates convey no such beneficial interest in the underlying pool of mortgages. As a result, issuers may be foreclosed from relief under sections I(A) and I(B) of PTE 81-7. GNMA suggested that some clarification of this area was necessary in light of the Department's adoption of regulation 29 CFR 2550.401b-1.

By adopting regulation 29 CFR 2550.401b-1, the Department indicated that, with regard to certificates issued for governmental mortgage pools, the Department was concerned not with the beneficial interest, if any, conveyed by such certificates, but rather with the government guarantee (or creditworthiness of the governmental corporation) to which a plan would look to assure payments on its investment. The Department's effort in that regulation was directed only

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<sup>2</sup> It appears that FNMA and FHLMC certificates are often marketed through brokers, dealers, banks, and other marketmakers. In situations where such an entity is a party in interest with respect to an investing plan. Prohibited Transaction Exemption 75-1(PTE 75-1) may provide relief from the prohibitions of section 406 of the Act for the sale of such government securities. 40 FR 50845 (October 21, 1975).

<sup>3</sup> As in the case of FNMA and FHLMC certificates, if the issuer of GNMA certificates markets such certificates through brokers, dealers, or similar entities, PTE 75-1 *supra* is available to provide relief from the prohibitions of section 406 of the Act.

toward identifying, for the purposes of the Act, the plan asset in such situations. The Department was not then and is not now in a position to define, as a general matter, the legal status of the rights conferred by a GNMA certificate.

The Department is, however, concerned with providing comprehensive relief in this area. At the same time, the Department wishes to avoid making significant changes in section III (C) of PTE 81-7 since the definition contained therein was based on the suggestions of applicants and elicited no adverse response when properly open for public comment. Therefore, the Department has decided to add a sentence to section III(C) stating that the terms “mortgage pool pass-through certificate,” or “certificate” shall also include certificates guaranteed by the Government National Mortgage Association. The sole purpose of the modification is to assure relief to GNMA issuers in the limited circumstances outlined above.

## **General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his duties respecting the plan solely in the interests 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) This exemption is supplemental to, and not in derogation of, any other provision of the Act and the Code, including statutory 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;

(3) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

## **Exemption**

In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, including the written comments submitted in response to the notice of May 18, 1982, the Department makes the following determinations:

- (a) The amended class exemption as set forth herein is administratively feasible;
- (b) it is in the interests of plans and of their participants and beneficiaries; and
- (c) it is protective of the rights of participants and beneficiaries of plans.

Accordingly, the following amended exemption is hereby granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in ERISA Procedure 75-1.

### **I. Transactions**

A. Effective January 1, 1975, the restrictions of sections 406(a) and 407 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the following transactions involving mortgage pool investment trusts (mortgage pools) and pass-through certificates evidencing interests therein (certificates):

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor of a mortgage pool and an employee benefit plan when the sponsor, trustee or insurer of such pool is a party in interest with respect to such plan, provided that the plan pays no more than fair market value for such certificates, and provided further that the rights and interests evidenced by such certificates are not subordinated to the rights and interests evidenced by other certificates of the same mortgage pool:

(2) The continued holding of certificates acquired pursuant to subparagraph (1), above, by an employee benefit plan.

B. Effective January 1, 1975, the restrictions of sections 406(b)(1) and (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 the following transactions involving mortgage pools and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor of a mortgage pool and an employee benefit plan when the sponsor, trustee or insurer of such pool is a fiduciary with respect to the plan assets invested in such certificates provided:

(a) Such sale, exchange or transfer is expressly approved by a fiduciary independent of the pool sponsor, trustee or insurer who has authority to manage and control those plan assets being invested in such certificates;

(b) The plan pays no more for certificates than would be paid in an arm's length transaction with an unrelated party;

(c) No investment management, advisory, or underwriting fee or sales commission or similar compensation is paid to the pool sponsor with regard to such sale, exchange or transfer;

(d) The total value of certificates purchased by a plan does not exceed 25% of the amount of the issue; and

(e) At least 50% of the aggregate amount of the issue is acquired by persons independent of the pool sponsor, trustee or insurer.

C. Effective January 1, 1975, the restrictions of section 406(a) and (b) 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 and operation of the mortgage pool provided that:

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

(2) such pooling and servicing agreement is made available to investors before they purchase certificates issued by the pool.

D. Effective January 1, 1975, the restrictions or sections 406(a) and 407 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 any transactions to which such restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or who has a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act), solely because of the ownership of a certificate evidencing an interest in a mortgage pool by such plan.

## **II. General Conditions**

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

(1) The sponsor and trustee for each mortgage pool must maintain a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifying certificate-holders against reductions in pass-through payments due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount not less than the greater of one percent of the aggregate principal balance of all covered pooled mortgage, or the principal balance of the largest covered mortgage;

(2) Except in the case of a governmental or quasi-governmental entity such as the Federal National Mortgage Association, the trustee for each mortgage pool must not be an affiliate of the sponsor of such pool, provided, however, that the trustees shall not be considered to be an affiliate of the pool sponsor solely because the trustee has succeeded to the rights and responsibilities of the pool sponsor pursuant to the terms of the pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the pool sponsor; and

(3) The sum of all payments made to and retained by the pool sponsor in connection with a mortgage pool, and all funds inuring to the benefit of the pool sponsor as a result of the administration of the mortgage pool, must represent not more than adequate consideration for selling the mortgage loans plus reasonable compensation for services provided by the pool sponsor to the pool.

### III. Definitions

A. For the purpose of this exemption the term “sponsor” or “pool sponsor” means:

(1) the entity which organizes, and either continues to service or supervises the provision of services to, a mortgage pool comprised of mortgage loans either made or purchased by such entity; and

(2) any successor thereto.

B. For the purposes of this exemption, the term “mortgage pool” means an investment pool the corpus of which:

(1) Is held in trust; and

(2) Consists solely of

(a) Interest bearing obligations secured by either first or second mortgages or deeds of trust on single-family, residential property;

(b) Property which had secured such obligations and which has been acquired by foreclosure; and

(c) Undistributed cash.

C. For the purpose of this exemption, the terms “mortgage pool pass-through certificate” or “certificate” mean a certificate representing a beneficial undivided fractional interest in a mortgage pool and entitling the holder of such certificate to pass-through payment of principal and interest from the pooled mortgage loans, less any fees retained by the pool sponsor. Also for the purposes of this exemption, these terms shall include certificates guaranteed by the Government National Mortgage Association.

D. For the purposes of this exemption, the term “affiliate” of another person means:

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

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

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

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.

E. For the purposes of this exemption, the term “single-family, residential property” means non-farm property comprising one to four dwelling units, and also includes condominiums.

F. For the purposes of this exemption, a person will be “independent of the pool sponsor, trustee, or insurer” only if:

(1) Such person is not an affiliate (as defined in paragraph III(D) of this exemption) of the pool sponsor, trustee, or insurer; and

(2) neither the pool sponsor, trustee, insurer, nor any affiliate thereof, is a fiduciary who has investment management authority or renders investment advice with respect to any of the assets of such person.



G. For the purposes of this exemption, the term “sale” includes a forward delivery commitment (as defined in paragraph H, below) by an investing plan, provided:

(1) For the purposes of section I(A), the terms of the forward delivery commitment contract are no less favorable to the plan than they would be in an arm’s length transaction with an unrelated party; and

(2) For the purpose of section I(B)

(a) The forward delivery commitment has been expressly approved by a fiduciary independent of the pool sponsor, trustee or insurer who has authority to manage and control those plan assets being committed for investment in such certificates;

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

(c) At the time of the delivery, all of the conditions of section I(B) of this exemption are met.

H. For the purposes of this exemption, the terms “forward delivery commitment” and “forward delivery commitment contract” means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date, which is more than thirty calendar days after the contract’s trade date. The terms include 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).

Signed at Washington, D.C. this 3<sup>rd</sup> day of January 1983.

Jeffrey N. Clayton

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