

## II. Conditions

This exemption is conditioned upon the adherence to the material facts and representations described herein and upon the satisfaction of the following requirements:

(a) An independent, qualified fiduciary (the I/F), acting on behalf of the Plan, determines that each of the proposed transactions is feasible, in the interest of, and protective of the Plan and the participants and beneficiaries of such Plan;

(b) The I/F manages the Property on an on-going basis and is empowered to take whatever action it deems appropriate to serve the best interest of the Plan and its participants and beneficiaries, including but not limited to the retention, leasing, or sale of the Property;

(c) The fair market value of the Property does not now and will at no time exceed twenty-five percent (25%) of the fair market value of the total assets of the Plan;

(d) The I/F negotiates, reviews, and approves the terms of the subject transactions;

(e) The terms and conditions of the subject transactions are, and will at all times be, no less favorable to the Plan than terms obtainable by the Plan under similar circumstances when negotiated at arm's length with an unrelated third party;

(f) An independent, qualified appraiser determines the fair market value of the rental of the Property, as of August 1, 2003, and annually thereafter;

(g) The I/F monitors compliance with the terms of the New Lease throughout the duration of such lease and is responsible for legally enforcing the payment of the rent and the proper performance by the Employer and/or the Owners of the Employer of all other obligations of the Employer under the terms of such lease;

(h) The Plan incurs no fees, costs, commissions, or other charges or expenses as a result of its participation in the transactions which are the subject of this exemption, other than the fee payable to the I/F for services rendered to the Plan and the fee payable to the independent, qualified appraiser for the annual appraisal of the fair market value of the Property;

(i) The I/F ensures that the terms and conditions described herein are at all time satisfied;

(j) The I/F will place the Property on the market for sale or lease to unrelated third parties, within fifteen (15) calendar days of the date of the publication of the grant of this proposed exemption in the **Federal Register**, and

subject to the termination of the New Lease, as provided in section II(k), below, of this exemption, will proceed to sell or lease such Property to any such unrelated third party who presents a *bona fide* sale or lease offer which the I/F determines to be prudent and in the best interest of the Plan and its participants and beneficiaries; and

(k) Notwithstanding anything to the contrary in the New Lease, the Plan may at any time upon six (6) month prior written notice to the Employer terminate the New Lease and the Employer's occupancy of the Property, effective as of the date specified in such notice, which date shall be at least six (6) months after the date such written notice is given to the Employer (but in no event extending the New Lease beyond the then current lease term.

Effective Date: If the proposed exemption is granted, the exemption will be effective August 1, 2003.

### *Summary of Facts and Representations*

1. The Plan is a tax-qualified defined benefit pension plan covering 860 participants and beneficiaries, as of June 20, 2003. The total fair market value of the Plan's assets, as reflected in the FORM 5500 annual report for 2001 was \$37,143,730.

2. The current trustee of the Plan is Wells Fargo Bank, N.A. (Wells Fargo), which is solely responsible for the investment of Plan assets. In addition, Wells Fargo has acknowledged and represented that it has accepted the appointment to serve as the I/F, acting on behalf of the Plan for purposes of the subject exemption. It is represented that the Plan is responsible for the payment of Wells Fargo's fees.

It is represented that on April 1, 1996, Wells Fargo acquired First Interstate Bank, the former trustee of the Plan and the I/F under terms of a prior exemption,<sup>10</sup> and concurrently assumed the responsibilities and obligations of First Interstate Bank. In this regard, it is represented that there was no period of time when the Plan did not have a bank, acting as trustee and an I/F on its behalf.

It is represented that Wells Fargo is independent in that there are no common officers or directors with the Employer or the Owners of the Employer. Substantially less than one percent (1%) of Wells Fargo's total deposits and substantially less than 1% of its outstanding loans (both in dollar amounts) are attributable, respectively, to deposits and loans of the Employer and its affiliates.

<sup>10</sup> Prohibited Transaction Exemption 85-37 (PTE 85-37) was published at 50 FR 7008 (February 19, 1985). The proposed exemption (D-5540) was published at 49 FR 47452 (December 4, 1984).

It is represented that Wells Fargo is qualified to serve as the I/F on behalf of the Plan in that Wells Fargo is knowledgeable as to its duties and responsibilities as a fiduciary under the Act and is knowledgeable as to the subject transactions. In addition, Wells Fargo represents that it has many years experience managing assets and is currently responsible for managing approximately \$183,000,000,000 in assets of its customers.

3. The Property consists of a parcel of real estate (1.208 acres) improved by a one-story masonry warehouse building, constructed in 1968, and estimated to contain 52,635 square feet of space. The Property is located south of the downtown central business district of Salt Lake City, Utah. This neighborhood is primarily a general business area with some commercial and light industrial uses.

The Property is situated on a railroad spur. However, it is represented that the Salt Lake City Mayor's office has verbally expressed possible plans which may lead to the elimination of such railroad spur.

The Plan owns the Property, unencumbered by any outstanding mortgage or any other indebtedness. As of December 31, 2001, the fair market value of the Property constituted 4.361% of the total assets of the Plan.

The Plan purchased the Property in July of 1971, from Wycoff Warehouse, Inc., an unrelated third party, for a purchase price of \$259,000. The Plan began leasing the Property to the Employer, pursuant to the terms of a lease (the Original Lease) entered into on July 21, 1971. The applicant represents that the Original Lease satisfied the conditions provided by section 414(c) of the Act, because: (1) The Original Lease was entered into before July 1, 1974, when such a lease was not a prohibited transaction within the meaning of section 503(b) of the Code; and (2) the terms of the Original Lease were as favorable to the Plan as those of an arm's length transaction with an unrelated party.<sup>11</sup>

On August 1, 1983, the Plan and the Employer entered into another lease (the Old Lease) which superseded the Original Lease. With regard to the Old Lease between the Plan and the Employer, the Department issued, in 1985, a retroactive prohibited

<sup>11</sup> Section 414(c)(2) of the Act provided a statutory exemption for a transitional period ending June 30, 1984, for certain leases meeting specified conditions. The Department expresses no opinion, herein, as to the applicability of section 414(c)(2) of the Act to the past leasing of the Property by the Plan to the Employer under the terms of the Original Lease.