

objectives and policies. In this regard, of the total assets of the Plan an estimated 4.361 percent (4.361%) will be involved in the leasing of the Property between the Plan and the Employer. By diversifying a small percentage of the total Plan assets into real estate, Wells Fargo asserts that it is taking steps to protect the Plan and its participants and beneficiaries from fluctuations in the stock and bond markets.

10. The exemption contains additional protections for the Plan and its participants and beneficiaries. In this regard, the exemption contains a condition that the Plan may at any time upon six (6) months prior written notice to the Employer terminate the New Lease and the Employer's occupancy of the Property. Further, the exemption contains a requirement that Wells Fargo, acting as the I/F on behalf of the Plan, place the Property on the market for sale or lease to an unrelated third party, within fifteen (15) calendar days of the date of the publication of the grant of this proposed exemption in the **Federal Register**, and proceed to sell or lease such Property to any such unrelated third party who presents a *bona fide* sale or lease offer which Wells Fargo determines to be prudent and in the best interest of the Plan and its participants and beneficiaries. It is represented that the Employer may build a new facility within the next two (2) years, and at the conclusion of the initial term of the New Lease, may not exercise an option to renew the lease on the Property. Accordingly, the conditions and requirements of the exemption assure that the Plan will have sufficient time to search for a replacement tenant or a purchaser, and will have the ability to terminate the New Lease within a reasonable period.

11. Wells Fargo has stated that it believes the proposed leasing is in the best interest of the Plan and its participants and beneficiaries. In this regard, according to Wells Fargo, the estimated average annual total rate of return to the Plan from the Property over the past seven (7) years, based on both unrealized gain and income has been 13.31 percent (13.31%). Wells Fargo believes that rental payments to the Plan will be maximized by continuing to lease the Property to the Employer at a fair market rental amount (adjusted annually). In this regard, Wells Fargo estimates an annual rate of return for the Property in the coming year of approximately 11.61 percent (11.61%), even assuming that there is no increase in the fair market value of the Property. Accordingly, Wells Fargo has

concluded that by leasing the Property to the Employer, the Plan will gain uninterrupted occupancy of the Property for an extended period of time and continued maintenance of the Property by a responsible and financially viable tenant. Further, the Plan will avoid additional expenses for modifications to the Property, and will avoid lost profits.

12. In summary, the applicant represents that the proposed transactions satisfy the criteria for exemption, as set forth in section 408(a) of the Act, because: (a) The Employer will pay the fair market rental rate, as determined by a independent, qualified appraiser; (b) the rental rate under the terms of the New Lease will be adjusted every year to reflect the fair rental value of the Property at the beginning of each such period, as determined by an independent, qualified appraiser, but will never be less than \$16,448 a month; (c) the New Lease does not require the Plan to pay any costs relating to the Property and requires the Employer to indemnify the Plan for certain liabilities relating to the Property; (d) the Employer will maintain both liability and casualty insurance, naming the Plan as an additional insured, with respect to the Property; (e) Wells Fargo, acting as the trustee and I/F with respect to the Plan, represents that the proposed transactions are in the best interests of the Plan and its participants and beneficiaries; (f) Wells Fargo will monitor the New Lease throughout its duration on behalf of the Plan, taking any appropriate actions to safeguard the interests of the Plan; (g) Wells Fargo 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 six (6) months prior written notice to the Employer, will proceed to sell or lease such Property to any such unrelated third party who presents a *bona fide* sale or lease offer which Wells Fargo determines to be prudent and in the best interest of the Plan and its participants and beneficiaries; and (h) the Plan may at any time upon six (6) months prior written notice to the Employer terminate the New Lease and the Employer's occupancy of the Property.

FOR FURTHER INFORMATION CONTACT:

Angelena C. Le Blanc, of the Department, telephone (202) 693-8540. (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 of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, DC, this 2nd day of September, 2003.

Ivan Strasfeld,

*Director of Exemption Determinations,
Employee Benefits Security Administration,
Department of Labor.*

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