

Fund. The Covered Plan retains the right to assert any such claim or defense in a separate action. The later repayment of the Credit Facility by making Capital Calls on the Investors permits the Fund to replace the Credit Facility with Capital Contributions. Thus, the Bank states that the Plan is exposed to the same risk whether or not the Fund enters into the Credit Facility.

10. Credit Facility Will Not Generally Affect Right of Plan to Withdraw From Fund. The Bank states that the Fund's provisions concerning assignment of Capital Commitments and covenants to honor Capital Calls unconditionally will generally not affect the ability of an Investor to withdraw from the Fund. Under the Fund Agreements, Investors generally will not be able to withdraw except in limited circumstances. Such circumstances would relate to changes that would cause adverse outcomes to the Investors under applicable law. Although the Credit Facility will typically require notice of any intent to withdraw, it will not prohibit withdrawals. The Credit Facility will be structured so that, in most cases, an allocable portion of the facility will be repaid at the time of any withdrawal or the Investor's interest will be transferred to an entity that meets certain financial or legal requirements.

Under the Fund Agreements, transfers of interests in the Fund by Investors are usually also restricted. Generally, Investors will have the right to transfer their interests only with the consent of the Fund, or only to entities that meet certain financial or legal requirements that will be specified in the Fund Agreements. The Credit Facility typically requires the Fund to agree that no transfer of an Investor's interest will be made without prior written consent of the Agent, except for transfers permitted by the Fund Agreements. This provision is put in place so that the Agent will know the identity of the transferee, and is typically coupled with a requirement that repayment of an allocable portion of the Credit Facility be made in connection with the effectiveness of any transfer.

11. Benefits of Credit Facility and Investor Consent. The Bank represents that, absent the requested exemption, the economic loss resulting to the Covered Plans and their participants and beneficiaries results from the more onerous and expensive financing terms and conditions that would be required, absent the Investor Consent, for those plans to invest in these types of investment ventures. The Bank states that the types of Funds involved in the covered transactions are an important element of a large diversified

investment portfolio of a qualified plan. The advantages of investments in real estate and other investments provided through such Funds are numerous, including long-term appreciation, hedges against inflation, and cash flow from operations. However, the Bank states that to minimize the risks involved in real estate investments, investment in a large diversified limited partnership or similar entity has many advantages over direct ownership of real estate properties and other securities, including limited liability with respect to such property. Most diversified real estate and other investment programs are carried out through partnerships or limited liability companies that are substantially similar to the Funds. The \$100 million minimum net asset value of a Covered Plan makes it likely the Covered Plans will be sponsored by large businesses and will have relationships with an extensive number of service providers, investment managers, and other entities that are related to financial institutions.

Although the Agent, for the benefit of the Lenders, will receive a pledge of the Capital Commitments of the Investors, the right to make Capital Calls, and the right to collect and enforce the same, in the event of default, the Agent would be required, without the Investor Consent, to foreclose on the collateral in order to effect a Capital Call for repayment of the Credit Facility. The Investor Consent permits the Agent to avoid the delay and expense of foreclosure proceedings, and to make a Capital Call immediately on the Investors for repayment. In addition, when the Fund Agreements themselves do not contain the agreement of the Investors to make Capital Commitments without counterclaim, setoff or defense, the Investor Consent contains such agreement, and permits Lenders to be repaid for amounts that were extended to the Fund prior to the time Capital Contributions are called, without the risk of repayment being challenged or delayed by claims the Investors may have against the Fund. The Bank states that this arrangement keeps the risk of the Fund's investment transactions between the Fund and the Investors.

Thus, if the Credit Facility were not provided, the Investor's Capital Contributions would be required for the Fund to make investments. In such instances, the Investor's capital would be used to make investments, and would be immediately at risk. If the Investor later had a claim based on mismanagement or fraud by the Fund, it could not limit its risk by withholding the Capital Contributions for such investment, since those contributions

would have already been made in response to earlier Capital Calls. The Investors' recourse would be to sue for damages, for recovery of Capital Contributions, or other remedies.

The Fund will draw on the Credit Facility in lieu of making Capital Calls to fund investments. The later repayment of the Credit Facility by making Capital Calls on the Investors permits the Fund to replace the Credit Facility with Capital Contributions. Therefore, the Bank represents that the agreement in the Investor Consent to repay the Lenders without counterclaim, setoff or defense keeps the risk of Fund mismanagement or fraud between the Fund and the Investors, where it would be were the Credit Facility not in place.

The Bank represents further that no more than five (5) percent of the assets of any Covered Plan, measured at the time of the execution of an Investor Consent, may be invested in the Fund. In the case of multiple plans maintained by the same employer, or by members of a controlled group, whose assets are invested on a commingled basis (*e.g.*, through a master trust), this five (5) percent limit will be applied to the aggregate assets of the commingled entity.

12. Lender Will Not Be a Fiduciary of the Plan With Respect to Investment in the Fund. The Bank represents that, with respect to each Credit Facility covered by this proposed exemption, no Lender which will participate, including the Bank, will be a fiduciary for any of the Covered Plans in connection with their investment in the Fund. The fiduciaries for Investors that may become Covered Plans will have to satisfy the conditions set forth in Section II(B), (C), and (D) above. In this regard, this proposed exemption requires that the applicable fiduciaries provide a representation to the Bank that includes a statement that the fiduciary responsible for making the investment decision on behalf of the Covered Plan to invest in the Fund will be independent of the Lenders and their affiliates. In addition, neither the Lenders nor any of their affiliates will have any influence, authority or control over such Investor's investment in the Fund. Such letter will demonstrate that the fiduciaries responsible for investment decisions are completely independent of any Lender. Moreover, the Bank states that the independent decision of the fiduciaries of those plans that may become Covered Plans to enter into the transaction, with full knowledge of the Credit Facility and the Investor Consent, will be protective of