

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffitt.betty@dol.gov", or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

#### Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

#### **Bangs, McCullen, Butler, Foye & Simmons, L.L.P. Employees Profit Sharing Plan (the Plan) Located in Rapid City, South Dakota**

[Application No. D-11198]

#### *Proposed Exemption*

The Department is considering granting an exemption 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 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(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, effective January 1, 2004, to the proposed lease by the Plan (the New Lease) of certain improved real property (the Property) located in Rapid City, South Dakota, to Bangs, McCullen, Butler, Foye & Simmons, L.L.P. (the Employer), the sponsor of the Plan, and a party in interest with respect to the Plan; provided that the following conditions are satisfied:

(A) All terms and conditions of the New Lease are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(B) The New Lease is a triple net lease under which the Employer is obligated to pay for all costs of maintenance, repair, and taxes related to the Property;

(C) The interests of the Plan for all purposes under the New Lease are represented by an independent fiduciary, Wells Fargo Bank, N.A., Rapid City, South Dakota (the Trustee);

(D) The rent paid by the Employer under the New Lease is no less than the fair market rental value of the Property; and

(E) If the summary appraisal of the Property (the Summary Appraisal), due in mid-December 2003, contains a fair market rental value that is higher than the current fair market rental value set forth in the New Lease, the Employer will amend the New Lease to pay the Plan the higher amount, retroactive to January 1, 2004.

*Effective Date:* This exemption, if granted, will be effective as of January 1, 2004.

#### *Summary of Facts and Representations*

1. The Plan is a profit sharing retirement plan which was established December 31, 1964. As of July 31, 2003, the Plan had 42 participants and \$9,693,762.89 in assets. The Plan is maintained by the Employer, which is a

South Dakota general partnership engaged in the practice of law. Investment discretion over the Plan's assets is exercised by Thomas H. Foye, Charles Riter and John H. Raford. Mr. Riter and Mr. Raford are partners of the Employer, and Mr. Foye is an employee of the Employer. The Plan's assets are held in trust by Wells Fargo Bank, N.A., Rapid City, South Dakota (*i.e.*, the Trustee), which will also be serving as the independent fiduciary for purposes of the New Lease. The Trustee was formerly named Norwest Bank South Dakota, N.A. (Norwest Bank). Norwest Bank was acquired by Wells Fargo Bank, N.A., effective November 2, 1998. The Trustee represents that it is independent of the Employer and its affiliates. In this regard, the applicant represents that while the Employer has deposits with the Trustee, those deposits constitute less than one percent (1%) of the Trustee's total deposits. It is represented that the Trustee does not have common officers or directors with the Employer. While the Employer may have occasional loans with the Trustee, such loans would be less than 1% of the Trustee's total outstanding loans. The Trustee and its predecessors have served as trustees for the Plan since the time it was adopted in 1964.

2. Among the assets of the Plan is the Property, a parcel of improved real estate which constitutes the Employer's principal place of business. The Property is located in downtown Rapid City, South Dakota, and is a two-story brick office building containing approximately 9,600 square feet of office space. The Employer has leased the Property from the Plan under a triple net lease (the Prior Lease) with a ten year term commencing January 1, 1994 and ending December 31, 2003. The Prior Lease was exempt from the prohibitions of section 406 of the Act and section 4975(c) of the Code by virtue of an individual administrative exemption, Prohibited Transaction Exemption 94-25 (PTE 94-25, 59 FR 12355, March 16, 1994), granted by the Department. The interests of the Plan under the Prior Lease were represented by the Trustee's predecessor, Norwest Bank.

Under PTE 94-25, Norwest Bank monitored the Employer's performance and represented the Plan in enforcing the terms and the conditions of the Prior Lease. The Trustee represents that the Employer occupied the Property in compliance with all terms and conditions of the Prior Lease for its duration. The Prior Lease expires on December 31, 2003.

3. The Trustee states that the Plan's lease of the Property to the Employer