

permits collectively bargained multiple employer plans to take several types of actions regarding delinquent or uncollectible employer contributions; (2) Part B of PTE 76-1 permits collectively bargained multiple employer plans, under specified conditions, to make construction loans to participating employers; and (3) Part C of PTE 76-1 permits collectively bargained multiple employer plans to share office space and administrative services, and the costs associated with such office space and services, with parties in interest. PTE 77-10 complements Part C of PTE 76-1 by including, with respect to collectively bargained multiple employer plans' sharing office space and administrative services with parties in interest, relief from the prohibitions of subsection 406(b)(2) of ERISA, under specific conditions. PTE 78-6 provides an exemption to collectively bargained multiple employer apprenticeship plans for the purchase or leasing of personal property from a contributing employer (or its wholly owned subsidiary) and for the leasing of real property (other than office space within the contemplation of section 408(b)(2) of ERISA) from a contributing employer (or its wholly owned subsidiary) or an employee organization any of whose members' work results in contributions being made to the plan.

Each of these three PTEs requires, as part of its conditions, either written agreements, recordkeeping, or both. The Department has combined the information collection provisions of the three PTEs into one information collection request (ICR) because it believes that the public benefits from having the opportunity to collectively review these closely related exemptions and their similar information collections. The Department previously submitted an ICR to the Office of Management and Budget (OMB) for approval of the information collections in PTEs 76-1, 77-10, and 78-6 and received OMB approval under the OMB Control No. 1210-0058. The current approval is scheduled to expire on July 31, 2006.

II. Desired Focus of Comments

The Department is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submission of responses.

III. Current Action

This notice requests comments on the proposed extension of the approval of the ICR relating to PTEs 76-1, 77-10, and 78-6. The Department is not proposing or implementing changes to the existing information collection requirements at this time. The following summarizes the ICR and the current burden estimates:

Type of Review: Extension of a currently approved collection of information.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Class Exemptions for Multiple Employer Plans and Multiple Employer Apprenticeship Plans, PTCE 76-1, PTCE 77-10, PTCE 78-6.

OMB Number: 1210-0058.

Affected Public: Business or other for-profit; Not-for-profit institutions.

Respondents: 3,442.

Frequency of Response: On occasion.

Responses: 5,326.

Estimated Total Burden Hours: 1,225.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Dated: April 19, 2006.

Susan G. Lahne,

Office of Policy and Research, Employee Benefits Security Administration.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D-11033, et al.]

Proposed Exemptions; The Southwest Gas Corporation (Southwest Gas)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

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-5700, 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.

**The Southwest Gas Corporation
(Southwest Gas), Located in Las Vegas,
Nevada**

[Application No. D-11033]

Proposed Exemption

The Department is considering granting an exemption under the authority of 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).

Section I—Transactions and Conditions

If the proposed exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (D) of the Code, shall not apply to the direct or indirect purchase, from Southwest Gas, of the common stock of Southwest Gas by an individual retirement account (IRA) that is (i) established for the benefit of a non-employee of Southwest Gas,¹ (ii) operated pursuant to the terms of the Southwest Gas Corporation Dividend Reinvestment and Stock Purchase Plan (the DRIP), and (iii) maintained in part through administrative services provided by Southwest Gas, a disqualified person with respect to the IRA, provided that the following conditions are satisfied:

(a) The IRA that is established by a DRIP participant pursuant to the terms

of the DRIP (the DRIP IRA) is maintained for the exclusive benefit of the individual covered under the IRA (the IRA Owner), his or her spouse, or their beneficiaries;

(b) Southwest Gas complies with all applicable securities laws relating to the Southwest Gas DRIP;

(c) Administrative and recordkeeping services provided by Southwest Gas to the DRIP IRA are rendered pursuant to a written agreement between Southwest Gas and an independent trustee of the DRIP IRA (the IRA Trustee) in which Southwest Gas agrees to act as the IRA Trustee's agent for the provision of such services;

(d) Southwest Gas receives no compensation, fees, or commissions, directly or indirectly, for the provision of such administrative and recordkeeping services, including any portion of the fees that the IRA Trustee may be entitled to receive from the DRIP IRA;

(e) The combined total of all fees and other consideration received, direct or indirect, by any disqualified persons (other than Southwest Gas) for the provision of services to the DRIP IRA is not in excess of "reasonable compensation" within the meaning of section 4975(d)(2) of the Code;

(f) The DRIP IRA and/or IRA Owner does not pay a brokerage fee or commission in connection with the purchase of the common stock of Southwest Gas;

(g) Neither Southwest Gas, the IRA Trustee, nor any affiliate thereof has any discretionary authority or control regarding the determination to acquire, manage, or dispose of the DRIP IRA assets, or renders investment advice (within the meaning of 26 CFR 54.4975-9(c)) respecting those assets;

(h) Cash dividends paid on Southwest Gas common stock held in the DRIP IRA account that are used to purchase Original Issue Shares of Southwest Gas common stock are automatically reinvested in additional shares of Southwest Gas common stock on the earliest date that such dividends can reasonably be segregated;

(i) Cash dividends paid on Southwest Gas common stock held in a DRIP IRA account that will be used to purchase Open Market Shares of Southwest Gas common stock under the DRIP are temporarily invested by the IRA Trustee, on the earliest date that such cash dividends can reasonably be segregated, in a no-load money market mutual fund registered under the Investment Company Act of 1940, and earnings accrued thereon are allocated at the end of each quarter on a pro-rata basis among those IRA Owners who

earned such dividends during that quarter and then applied immediately towards the purchase of additional shares of Southwest Gas common stock for the accounts of such IRA Owners;

(j) Pending the IRA Trustee's investment of the cash contributions of IRA Owners (including rollover contributions), such amounts are temporarily invested by the IRA Trustee, on the earliest date that the IRA Owners' contributions can reasonably be segregated, in a no-load money market mutual fund registered under the Investment Company Act of 1940, and earnings accrued thereon are allocated at the end of each quarter on a pro-rata basis among those IRA Owners who made a contribution during that quarter and then applied immediately towards the purchase of additional shares of Southwest Gas common stock for the accounts of such IRA Owners;

(k) The terms of both the money market mutual fund and of any purchase of Southwest Gas common stock pursuant to the terms of the DRIP (including the purchase price) are at least as favorable to the DRIP IRA as those obtainable in a comparable arm's length transaction with an unrelated party;

(l) Prior to participation in the DRIP IRA, each IRA Owner receives a written disclosure, drafted in a manner calculated to be understood by the average IRA Owner, which contains: (i) The general terms and conditions of the DRIP IRA; (ii) The identity of the no-load money market mutual fund; (iii) Any fees, commissions, or compensation paid to the IRA Trustee and/or its affiliates in connection with the DRIP IRA, including the investment advisory and other fees paid by the mutual fund to the IRA Trustee and/or its affiliates; (iv) A disclosure of the right of IRA Owners to receive written notice of any amendment to the terms of the DRIP or the DRIP IRA at least 30 days in advance of its effective date (and the right of such IRA Owners to refuse consent to any amendment); and (v) Information about the exemption from the prohibited transaction rules applicable to the DRIP IRA and the right of each IRA Owner to request a copy of both this notice of proposed exemption and a copy of the final exemption, if granted;

(m) An IRA Owner participating in the DRIP IRA is furnished periodically with a statement, at least quarterly, containing (i) the date, quantity, and price with respect to each purchase of common stock that occurred during the prior quarter and (ii) information concerning the quarterly, pro rata allocation of money market mutual fund

¹ Pursuant to 29 CFR 2510.3-2(d), the subject IRAs are not "employee benefit plans" covered by Title I of the Act. However, because the IRA is a "plan" for purposes of section 4975 of the Code, the Department has jurisdiction under Title II of the Act over this matter.

earnings attributable to each IRA Owner's account during the period immediately preceding the investment of cash amounts in Southwest Gas stock;

(n) Southwest Gas retains, at least annually and at its own expense, an independent certified public accountant to perform an audit, in accordance with generally accepted auditing standards, of the DRIP IRAs, and provides the IRA Trustee with the current audit report prepared by such accountant, together with any written commentary from the accountant that accompanies the audit; and

(o) The IRA Owner is permitted to terminate his or her participation in the DRIP IRA at any time, without penalty, and transfer his or her IRA account balance to an IRA at another financial institution.

Section II—Definitions

(a) The term "IRA" means an individual retirement account described in Code section 408(a). For purposes of this exemption, the term "IRA" shall not include an individual retirement account that is an employee benefit plan covered by Title I of the Act.

(b) The term "DRIP" (an acronym for Dividend Reinvestment Plan) refers to the "Southwest Gas Corporation Dividend Reinvestment and Stock Purchase Plan", which allows investors to purchase Southwest Gas common stock and to automatically reinvest cash dividends paid on such stock into additional shares of Southwest Gas stock.

(c) The term "Original Issue Shares" refers to authorized but unissued shares of Southwest Gas common stock purchased directly from Southwest Gas.

(d) The term "Open Market Shares" refers to outstanding shares of Southwest Gas common stock purchased on the open market or through negotiated transactions.

Summary of Facts and Representations

1. Southwest Gas is a natural gas utility serving over one million customers in Arizona, California, and Nevada. The common stock of Southwest Gas is publicly traded on both the New York Stock Exchange (NYSE) and the Pacific Stock Exchange.

2. Southwest Gas currently sponsors the DRIP, which allows its shareholders, natural gas customers, employees, and residents of Arizona, California, and Nevada (the states in which Southwest Gas does business) to make purchases of Southwest Gas common stock and to automatically reinvest the dividends received on the stock in additional shares of such stock. The applicant represents that the DRIP is neither an

"employee benefit plan" subject to the Act, nor a "plan" as defined in section 4975(e)(1) of the Code.

The DRIP provides that the shares of Southwest Gas common stock purchased thereunder will be either (i) authorized but unissued shares of common stock purchased directly from Southwest Gas (Original Issue Shares), which is the most common method of purchasing such shares, or (ii) outstanding shares of the common stock purchased on the open market or through negotiated transactions (Open Market Shares).² In the case of the sale of Original Issue Shares, Southwest Gas receives cash that it may use for its construction programs and other corporate purposes.

From the viewpoint of the investor, when additional shares are purchased through a DRIP directly from the issuer, there is no charge for brokerage commissions. Further, DRIPs may be attractive to "small" investors because eligibility for such a program typically is not dependent upon a significant investment in the stock of the company.

3. Southwest Gas wishes to offer an "IRA option" to non-employee participants in its existing DRIP. To this end, Southwest Gas would contract with an independent trustee to authorize the establishment of certain IRAs to be invested exclusively in common stock of Southwest Gas that is acquired through the DRIP. The mechanics concerning the purchase of Southwest Gas common stock through the DRIP IRA (e.g., the purchase price and whether the shares purchased are Original Issue Shares or Open Market Shares) are determined by the terms of the DRIP. Marshall & Ilsley Trust Company N.A. (M & I), a financial institution that is independent of Southwest Gas, has been designated by Southwest Gas to serve as the directed trustee of the DRIP IRAs.³ M & I offers a comprehensive range of trust, investment, recordkeeping, custodial and related services for retirement plans covering more than 370,000 retirement plan participants nationwide, and holds \$82 billion in custodial assets. The applicant represents that the DRIP IRAs would be considered "plans," as

² In this regard, the Department notes that the relief granted herein shall not extend to the DRIP IRA's purchase, through negotiated transactions, of outstanding shares of Southwest Gas common stock.

³ It is represented that, in the event it becomes necessary to appoint a successor trustee (the Successor) to replace M & I, the applicant will notify the Department 60 days in advance of such appointment. Any Successor shall be independent of Southwest Gas and its affiliates, possess experience comparable to M & I, and assume M & I's responsibilities with respect to the DRIP IRAs.

defined in section 4975(e)(1) of the Code. However, because the DRIP IRA option would not be available to any employees of Southwest Gas, and Southwest Gas would not otherwise act as an "employer" (as defined in section 3(5) of the Act) with respect to the DRIP IRAs, the applicant represents that the DRIP IRAs would not be considered "employee benefit plans," as defined in section 3(3) of the Act.⁴

The IRA Owner could add to his or her DRIP IRA's investment in Southwest Gas common stock in the following ways: (i) Through the automatic reinvestment of the dividends paid on the Southwest Gas common stock held by the DRIP IRA in additional shares of such stock; (ii) By making cash contributions to the DRIP IRA for the purchase of additional shares; or (iii) By rolling over retirement assets to be invested in Southwest Gas common stock. The IRA Owner's total annual cash contribution to the DRIP IRA would be subject to the applicable contribution limits established under the Code for IRAs (except in the case of contributions that qualify as rollover contributions, which receive special tax treatment under the Code).

According to the applicant, the DRIP IRAs would also provide two significant tax benefits under current federal law: (i) The dividends paid on the shares of Southwest Gas stock held in the DRIP IRAs generally would not be taxable to the IRA Owner until distribution, or (in the case of a Roth IRA) not at all; and (ii) The IRA Owner may be able to deduct certain contributions to the DRIP IRA on his or her federal income tax return.

4. Although M & I, the IRA Trustee, intends to provide the trustee services associated with the DRIP IRAs for a fee,⁵ Southwest Gas proposes to provide certain administrative and recordkeeping services to the DRIP IRAs at no cost, pursuant to a written agency agreement with M & I. Southwest Gas will receive no compensation, fees, or commissions, directly or indirectly, for such services, including any portion of fees that the trustee may be entitled to receive from the IRA. The administrative and recordkeeping services provided to the DRIP IRAs by

⁴ See also 29 CFR 2510.3-2(d) for conditions relating to circumstances when an "IRA" is not considered an "employee benefit plan" subject to Title I of the Act.

⁵ The Department provides no opinion herein as to whether the fees paid by the DRIP IRAs to M & I for trustee services would meet the conditions required under Code section 4975(d)(2) and the regulations promulgated thereunder (see 26 CFR 54.4975-6), which, among other things, requires that the compensation paid to the disqualified person must be reasonable.

Southwest Gas would be the same type of services provided to non-IRAs under the DRIP.

The DRIP IRAs are “plans” under section 4975(e)(1)(B) of the Code, while Southwest Gas, as a “person providing services” to the DRIP IRAs, is a “disqualified person,” as defined in section 4975(e)(2)(B) of the Code. Thus, Southwest Gas seeks an individual exemption to permit purchases of publicly traded common stock by the DRIP IRAs from Southwest Gas that would otherwise be prohibited under the Code. Southwest Gas wishes to reduce the overall fees charged to the DRIP IRAs for services in order to maximize the amount of money available for investing in the DRIP IRA. The applicant also represents that the requested exemption is in the interests of the DRIP IRAs and their participants and beneficiaries because, absent an exemption, the DRIP IRAs would have to pay a fee to a third party for the same services that Southwest Gas is willing to provide without charge.

5. The IRA Trustee will be responsible for purchasing Southwest Gas stock for the DRIP IRAs in the form of either Original Issue Shares or Open Market Shares. The purchases of Southwest Gas common stock will be Original Issue Shares so long as the market price exceeds 75 percent of the book value of such stock, determined quarterly by Southwest Gas based upon publicly available information contained in its annual and quarterly reports filed with the Securities and Exchange Commission.⁶ However, any switch from Original Issue to Open Market Shares (or vice versa) will not occur more than once in any 12-month period.⁷ The IRA Trustee also will purchase Open Market Shares during periods when Southwest Gas is precluded from selling common stock due to limitations under the securities laws.

Any purchase of Southwest Gas common stock by a DRIP IRA pursuant to the DRIP will be at least as favorable to the DRIP IRA as those obtainable in a comparable arm's length transaction with an unrelated party. In the case of Original Issue Shares, the price per share will be the closing price of Southwest Gas stock, as reported on the

NYSE, on the investment date, or, if there is no trading in such stock, the closing price on the last date on which trading occurred prior to the investment date. In the case of Open Market Shares, the price per share will be the weighted average composite closing price, as reported on the NYSE, of all Southwest Gas common stock acquired by the IRA Trustee during the investment period described in the DRIP. Southwest Gas will pay brokerage commissions charged by an independent broker selected by the IRA Trustee, in connection with the purchase of Open Market Shares.

6. Pursuant to the terms of the DRIP, dividends payable on shares of Southwest Gas common stock that are held in a DRIP IRA account will be automatically reinvested in additional shares of Southwest Gas common stock. In addition, cash contributions or rollover contributions that are directed to the DRIP IRA by an IRA Owner will be invested in Southwest Gas common stock in accordance with the terms of the DRIP.⁸

The applicant represents that the IRA Trustee will invest these amounts in Southwest Gas common stock as soon as practicable after their receipt by the IRA Trustee, but in any event no later than one month after their receipt. The applicant represents that “one month” can be up to 35 days, a maximum period imposed by the Securities and Exchange Commission. As a general matter, the applicant further represents that the IRA Trustee is not restricted from immediately acquiring Southwest Gas common stock with the dividends and cash contributions, as the 35-day investment window is not a hold period; rather, it is intended to ensure that the IRA Trustee has independence in controlling the timing of investments rather than Southwest Gas.

The Applicant represents that, pending the investment in Southwest Gas stock, the IRA Trustee will invest any cash contributions or rollover contributions of IRA Owners in a money market mutual fund, which may be a mutual fund for which the IRA Trustee or its affiliate serves as investment advisor. At the end of each quarter, the IRA Trustee shall allocate the earnings of the money market mutual fund among those IRA Owners who made cash contributions or rollover contributions during that quarter. The allocations will be computed on a pro-rata basis, taking into account the funds contributed by the IRA Owner during the preceding quarter and the number of

days that such contributions were invested in the money market account. The allocated earnings will then be applied towards the immediate purchase of additional shares (or fractional shares) of Southwest Gas common stock for investment in the DRIP IRA of each contributing IRA Owner.

The procedure for the reinvestment of dividends of Southwest Gas common stock is dependent upon whether the shares being purchased are Original Issue Shares or Open Market Shares. If the shares purchased are Original Issue Shares, then the cash dividend is utilized to purchase additional shares of Southwest Gas common stock on the same day that the dividend is paid.⁹ If the shares purchased are Open Market Shares, the cash dividends attributable to IRA Owners would be deposited into a money market account pending investment in Southwest Gas common stock, in the same manner as would govern the deposit of the cash contributions of IRA Owners awaiting investment.

7. The terms of the DRIP IRA will be disclosed in advance of participation in the DRIP IRA pursuant to a written agreement signed by each IRA Owner. According to the applicant, if the IRA Trustee charges fees with respect to the DRIP IRA, the Trustee or Southwest Gas will provide a fee schedule; any such fees will be subtracted from the DRIP IRA, unless paid by the IRA Owner directly. In addition, IRA Owners will receive written notice of any amendment to the DRIP IRA terms at least 30 days in advance of its effective date and have the right to refuse consent to any amendment. Such amendments will not affect the conditions described in Section I of the exemption, if granted.

8. The IRA Owner will be furnished with customary statements, at least quarterly, containing the date, quantity, and price with respect to each purchase of Southwest Gas common stock. Such disclosures should assist IRA Owner in assessing whether continued participation in the DRIP IRA is in accordance with his or her investment objectives for retirement purposes.

Further, under the terms of the trust agreement, Southwest Gas must retain an independent certified public accountant to conduct an annual audit of all the DRIP IRAs to be performed in accordance with generally accepted

⁶ The applicant represents that, historically, the shares purchased in the DRIP have been Original Issue Shares.

⁷ The applicant represents that the book value of Southwest Gas stock is included in the annual report on Form-10K; the number of outstanding shares and total equity are included in each of the quarterly reports on Form-10Q. The determination to switch between Original Issue and Open Market Shares is made at the time these reports are filed with the SEC.

⁸ The applicant represents that the DRIP IRA will also accept rollover contributions in the form of Southwest Gas common stock.

⁹ The condition contained in section I(h) relating to the purchase of Original Issue Shares with cash dividends requires that the purchase occur on the earliest date that the dividends can reasonably be segregated. If this occurs on the day the dividends are paid, then this reasonable segregation period would not extend beyond this date.

auditing procedures. During the course of the audit, selected IRA Owners will be asked to confirm the audit statement regarding their IRA accounts on a basis and using a sample deemed acceptable by such accountants. Southwest Gas has agreed to promptly furnish M&I with a copy of the audit report and any written commentary from the accountants generated by the audit.

9. The applicant represents that IRA Owners may terminate participation in the DRIP IRA, without penalty, at any time. The applicant represents that the terms of the DRIP permit Southwest Gas to impose termination fees (ranging from \$10 to \$75), with proper notice to the DRIP participant, but that Southwest Gas intends to pay any such fees associated with termination of a DRIP IRA. Because the DRIP IRAs are intended to be invested exclusively in the common stock of Southwest Gas, an IRA Owner who wishes to pursue other investment alternatives must terminate his or her DRIP IRA and roll over the proceeds to a different IRA. According to the applicant, the IRA Owner may terminate his or her DRIP IRA by requesting a distribution of all the account assets. The distribution may consist of the issuance of a Southwest Gas common stock certificate (with fractional shares paid in cash),¹⁰ or may consist solely of the payment of cash. In the case of cash distribution requests, the IRA trustee will have responsibility for selecting a broker independent of Southwest Gas to sell the DRIP IRA assets on the open market.¹¹ The IRA Owner will pay associated brokerage commissions for the sale of the Southwest Gas common stock by the IRA; thus, any cash distribution payment will be net of brokerage commissions.

10. In summary, the applicant represents that the proposed transactions satisfy the statutory criteria for an exemption under section 4975(c)(2) of the Code for the following reasons: (a) Administrative and recordkeeping services will be provided to the DRIP IRA pursuant to a written

agreement between Southwest Gas and the Trustee of the DRIP IRA in which Southwest Gas will act as the IRA Trustee's agent for the provision of such services; (b) Southwest Gas will receive no compensation or fees for these services, including any portion of fees that the IRA Trustee may be entitled to receive from the DRIP IRA; (c) The combined total of all fees and other consideration received by the IRA Trustee for the provision of services to the DRIP IRA is not in excess of "reasonable compensation" within the meaning of section 4975(d)(2) of the Code; (d) The IRA or IRA Owner does not pay a brokerage fee or commission in connection with the purchase of the Southwest Gas stock; (e) Neither Southwest Gas, the IRA Trustee, nor any affiliate thereof has any discretionary authority or control regarding the determination to acquire, manage, or dispose of the IRA assets, or renders investment advice (within the meaning of 26 CFR 54.4975-9(c)) respecting those assets; (f) Southwest Gas will, at least annually, and at its own expense, retain an independent certified public accountant to perform an audit of the DRIP IRAs, in accordance with generally accepted auditing standards, and provide the audit report prepared by such accountant to the IRA Trustee; (g) Cash dividends on Southwest Gas common stock held in a DRIP IRA account that are used to purchase Original Issue Shares of Southwest Gas common stock are automatically reinvested in additional shares of Southwest Gas common stock on the earliest date that such dividends can reasonably be segregated; (h) Pending the IRA Trustee's investment of the cash amounts (e.g., cash contributions or rollover contributions by IRA Owners) in Southwest Gas stock, such amounts are deposited in a money market mutual fund on the earliest date that they can reasonably be segregated, and earnings accrued thereon are allocated at the end of each quarter on a pro-rata basis among IRA Owners receiving cash amounts and then applied immediately towards the purchase of additional shares of Southwest Gas common stock for the accounts of such IRA Owners; (i) The terms of any purchase of common stock pursuant to the DRIP, including the purchase price, will be at least as favorable to the DRIP IRA as those obtainable in a comparable arm's length transaction with an unrelated party; (j) Prior to participation in the DRIP IRA, each IRA Owner receives a written disclosure containing, among other things, information concerning the terms and conditions of the DRIP IRA

and any fees paid to the IRA Trustee in connection with the DRIP IRA; (k) The IRA Owner will be furnished with a statement, at least quarterly, containing the date, quantity, and price with respect to each purchase of common stock; and (l) The DRIP IRA may be terminated without penalty by the IRA Owner at any time.

Notice to Interested Persons

The applicant represents that the DRIP IRAs that would be affected by the proposed exemption do not yet exist. Thus, there are currently no IRA Owners who can be identified as interested persons. However, the applicant will provide M&I with a copy of this notice of proposed exemption and of the final exemption, if granted, as published in the **Federal Register**. Comments with respect to the proposed exemption are due within 30 days of the date of publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Judge of the Department, telephone (202) 693-8339. (This is not a toll-free number.)

Massachusetts Mutual Life Insurance Company, Located in Springfield, Massachusetts

[Exemption Application No. D-11228]

Proposed Exemption

Based on the facts and representations set forth in the application, 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 in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).¹²

Section I—Transactions

(a) If the exemption is granted, the restrictions of section 406(a)(1)(B) and (D) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(B) and (D) of the Code, shall not apply to: (1) The extension of credit ("Market Rate Advance or Advances") by Massachusetts Mutual Life Insurance Company ("MassMutual") to a participant-directed individual account plan ("the Plan") if the conditions of Sections II, III and V are met; and (2) the Plan's repayment of a Market Rate Advance or Advances, plus accrued interest; and

(b) If the exemption is granted, the restrictions of section 406(a)(1)(B) and

¹⁰ The applicant represents that the cash amount for fractional shares will be calculated based upon the sales price of whole shares at the time the distribution request is processed.

¹¹ See PTE 86-128 (51 FR 41686, Nov. 18, 1986, as amended on Oct. 17, 2002, 67 FR 64137), which allows certain plan fiduciaries to use certain affiliated broker-dealers to execute securities transactions on behalf of plans, including IRAs. The Department is not opining on the applicability of PTE 86-128 to the sale of the DRIP IRA assets through an affiliated broker-dealer. In any event, no relief is provided under this exemption for the selection, by the IRA Trustee, of an affiliate to execute transactions involving the sale of Southwest Gas common stock on behalf of the DRIP IRAs.

¹² Unless otherwise noted, references to specific provisions of the Act shall refer also to the corresponding provisions of the Code.

(D) and 406(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 (D) of the Code, shall not apply to (1) the interest-free extension of credit ("Interest-free Advance") to a Plan by its respective sponsor ("the Plan Sponsor") and (2) the repayment, by the Plan to the Plan Sponsor, of any Interest-free Advance, if the conditions of Sections II, IV and V are met:

Section II—General Conditions

(a) Each Market Rate Advance and each Interest-free Advance (collectively "the Advance or Advances") is made in connection with the administration of a portion of the plan's assets by MassMutual as a unitized fund ("Unitized Fund") in order to enable daily transactions, such as participant investment transfers, distributions or participant loans, and to facilitate redemptions from the Unitized Fund;

(b) Each Advance is unsecured, uncollateralized, and without recourse;

(c) No commitment fees or commissions are paid by the Plan with respect to the Advances;

(d) The aggregate amount advanced on any business day that an Advance is initiated does not, after the Advance is made, exceed 25% of the total market value of the Unitized Fund;

(e) Each Advance is made in accordance with the terms of a written agreement between MassMutual, the Plan, and, if Interest-free Advances by the Plan Sponsor are being offered, the Plan Sponsor ("the Agreement"). The Agreement describes the terms and procedures for the Advances, including instructions addressing the initiation, amount and repayment. With respect to Market Rate Advances, the Agreement sets forth the formula or method for determining the interest rate payable with respect to each Advance. The Agreement is approved in writing by a fiduciary of the Plan who is independent of, and not an affiliate of, MassMutual ("Independent Plan Fiduciary");

(f) The Agreement may be terminated by the Independent Plan Fiduciary at any time, subject to the Plan's repayment of any outstanding Advances, with no penalty for such termination;

(g) The fair market value of the assets in the Unitized Fund is determined by an objective method specified in the Agreement;

(h) Any employer security in a Unitized Fund is a "publicly traded qualifying employer security" as defined below.

(i) The Plan is required to repay each Advance and any accrued interest in accordance with the terms of the Agreement as soon as possible after the initiation of the advance.

(j) Within one business day after an Advance is initiated, MassMutual notifies the Independent Plan Fiduciary of the amount of the Advance and, if a Market Rate Advance, the actual interest rate to be applied;

(k) Within ten (10) days after a Market Rate Advance is fully repaid, MassMutual provides the Independent Plan Fiduciary with a confirmation statement including the date of repayment, the amount of the Advance, and if a Market Rate Advance, the actual interest rate applied, and the total amount of interest paid by the Plan.

(l) Each Advance is initiated, accounted for and administered by MassMutual, in accordance with the terms of the Agreement and the Act.

(m) Neither MassMutual nor any of its affiliates is: (1) A trustee of the Plan (other than a nondiscretionary trustee who does not render investment advice with respect to the assets of the Unitized Fund); (2) a plan administrator (within the meaning of section 3(16)(A) of the Act and Code section 414(g)); (3) a fiduciary who is expressly authorized in writing to manage, acquire, or dispose of, on a discretionary basis, any assets of the Unitized Fund; or (4) an employer any of whose employees are covered by the Plan;

(n) MassMutual maintains or causes to be maintained for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons described in the next paragraph to determine whether the conditions of this exemption have been met, except that:

(1) If the records necessary to enable the persons described in the next paragraph to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of MassMutual, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than MassMutual which is responsible for record-keeping, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by the next paragraph;

(o)(1) Except as provided below in subparagraph (2) and notwithstanding

any provisions of section 504(a)(2) and (b) of the Act, the records referred to in the above paragraph are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the plan or the duly authorized representative of such participant or beneficiary.

(2) None of the persons described in subparagraph (1)(B)–(D) above shall be authorized to examine trade secrets or commercial or financial information which is privileged or confidential.

Section III—Conditions Specific to Market Rate Advances

The relief provided under Section I (a) is available only if the following conditions are met:

(a) Market Rate Advances are made on terms at least as favorable to the Plan as those the Plan could obtain in an arm's length transaction with an unrelated party;

(b) Neither MassMutual nor its affiliate has or exercises any discretionary authority or control with respect to the initiation of a Market Rate Advance, the amount of a Market Rate Advance, the interest rate payable on a Market Rate Advance, or the repayment of the Market Rate Advance;

(c) Interest payable by the Plan on each Market Rate Advance is determined in accordance with an objective formula or method described in the Agreement;

Section IV—Conditions Specific Interest-Free Advances

The relief provided under Section I (b) is available only if the following conditions are met:

(a) No interest or other fee is charged to the plan, and no discount for payment in cash is relinquished by the plan, in connection with the Interest Free Advance;

(b) The Interest-free Advance is not a loan described in section 408(b)(3) of ERISA and the regulations promulgated there under (29 CFR 2550.408b–3) or section 4975(d)(3) of the Code and the regulations promulgated there under (26 CFR 54.4975–7(b));

(c) The Interest-free Advance is not made directly or indirectly by an employee benefit plan;

(d) Any Interest-free Advance that is entered into for a term of 60 days or longer must be made pursuant to a written loan agreement that contains all of the material terms of such loan.

Section V—Definitions

(a) The term “affiliate” 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, 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.

(b) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) The term “Plan Sponsor” means the employer of the employees covered by the Plan.

(d) The term “publicly traded qualifying employer security,” for purposes of this exemption, means a security that meets the definition of “stock” pursuant to section 407(d)(5)(A) of the Act and the definition of “NMS stock” as defined in SEC Regulation NMS, 17 CFR 242.600(b)(47).

(e) The term “unitized fund” for purposes of the exemption means a fund that, to facilitate trading and/or accounting, has established “units” representing undivided interests in all of the assets of such fund.

Statement of Facts and Representations

1. MassMutual is a mutual life insurance company organized under the laws of the Commonwealth of Massachusetts and subject to supervision and regulation by the Insurance Commissioner of Massachusetts. MassMutual conducts business in all 50 states, as well as in the District of Columbia and Puerto Rico. MassMutual and its family of companies serve the needs of over 10 million clients and offer a broad-based portfolio of financial products and services, including mutual funds, money management, trust services, retirement planning products, life insurance, annuities, disability income insurance, and long-term care insurance.

2. MassMutual represents that it performs a wide variety of services for employee benefit plans subject to the Act, including unitization services. As part of these activities, MassMutual

enters into arrangements with Plan Sponsors for the administration of their Plans and the investment of their Plan assets. As of December 31, 2005, MassMutual had net capital of \$8,787,000,000 and assets under management of \$395,881,000,000.

3. Unitization services facilitate daily trading between investment options offered under a plan by permitting daily trading of plan investment options that would otherwise not be able to be traded or settled within one day. Unitization services permit daily transactions by establishing “units” representing undivided interests in all of the assets of the Unitized Fund. MassMutual represents that it establishes a daily unit value by dividing the market value of the Unitized Fund by the number of units held by participants, and on a daily basis, processes participant contributions to, and withdrawals from, the Unitized Fund as purchases and sales of units at the daily unit value. When cash is required to settle transactions in units resulting from participant withdrawals and exchanges of units from the Unitized Fund, the cash requirements are satisfied first from the liquid investments of the Unitized Fund and then shares of the Unitized Fund investments may be sold to restore the liquidity. MassMutual represents that all employer securities and separately managed accounts it administers are unitized. The unitization services that are the subject of this application are only being offered to individual plans, no transactions covered by this application involve pooled accounts.

4. Under this proposed exemption, MassMutual would offer Plans with unitized funds the opportunity to establish one or both of the following two programs: (a) Market Rate Advances from MassMutual or (b) Interest-free Advances from the plan sponsor or its affiliate.¹³ In either case, Plans would use these Advances only if the cash portion of a Unitized Fund is insufficient to cover unit redemption requests on a particular business day.

5. MassMutual states that it may provide unitization services to Plans where MassMutual is a trustee, custodian, or recordkeeper. In some cases, MassMutual may be engaged by the Plan solely to provide unitization services and MassMutual would have custody of the Plan’s assets only to the

extent required for the administration of the Unitized Fund.

6. MassMutual represents that because participant-directed Plans generally offer MassMutual funds as investment options, procedures for investments, exchanges and redemptions under these Plans accommodate mutual fund trading practices. Participant investment transactions would generally be processed as follows: (a) after the close of business on each trade date, mutual fund transfer agents calculate the daily net asset value (the “NAV”) at which shares may be purchased or redeemed for each mutual fund and recordkeepers receive the daily NAV for each mutual fund; (b) the recordkeeper processes participant instructions for exchanges between investment options and Plan withdrawals that are submitted to the recordkeeper before a cut-off time (e.g., 3 p.m.) on any business day (the “trade date” or “T”), and purchase orders resulting from new Plan contributions received on the trade date, using the daily NAV provided for each mutual fund at the close of business on that trade date; (c) the recordkeeper aggregates participant transaction information to create a single Plan purchase or redemption order for each mutual fund offered as a Plan investment option. The recordkeeper submits these orders to the mutual funds during the night, or possibly, very early on the next business day (T+1); (d) on T+1, the purchase and redemption transactions are settled by the transfer of money from the master contributions account for purchases to the mutual funds and the collection of the redemption proceeds from the mutual funds which are held in the master disbursement account. Redemption proceeds are reinvested on T+1 if the redemption transaction is processed as part of an exchange between Plan investment options, or transferred to the Plan trustee if withdrawn from the Plan; and (e) in the case of an exchange between investment options offered under a Plan, the recordkeeper may process the exchange as a simultaneous redemption and purchase transaction on T, and both transactions are settled on T+1.

7. MassMutual represents that these procedures are successful because mutual funds meet two important requirements: The transfer agent establishes a daily NAV for processing purchases and redemptions; and mutual funds maintain liquidity that permits payment of redemption proceeds on T+1. Interests in collective trust funds also may be traded on a daily basis under these procedures if administered

¹³ The Department notes that PTE 80–26, as amended [71 FR 17917, April 7, 2006] provides relief for interest-free loans by the plan sponsor or its affiliate, if the conditions of the amended exemption are met.

to allow daily contributions and withdrawals. MassMutual explains that some investment options that Plan sponsors may wish to offer participants do not meet requirements for daily trading. For example: (a) Purchase and sale transactions involving employer stock owned by a Plan typically settle on a "T+3" basis, which means that proceeds upon the sale of employer stock may not be received for three business days after the day of a sale transaction. (b) "Stable value funds" typically hold insurance company guaranteed investment contracts (GICs) or other investments that provide a benefit-responsive guarantee (e.g., so-called "alternative" stable value contracts, such as "synthetic GICs"), which may require up to ten (10) days notice for withdrawals; and (c) withdrawals from a Plan account managed by an investment manager, within the meaning of section 3(38) of the Act (managed account), might require sales of securities owned in the managed account. Like employer stock, sales of securities from a managed account generally would settle on a "T+3" basis.

8. Unitization services provided by MassMutual allow participants to engage in daily transactions involving these types of Plan investment options by providing a daily price and liquidity that permits withdrawals on any business day. MassMutual represents that Unitized Fund administration is a ministerial service that MassMutual performs under specific instructions from a Plan fiduciary independent of MassMutual (an "Independent Plan Fiduciary"). The Independent Plan Fiduciary may be the Plan administrator described in section 3(16)(A) of the Act, another Plan fiduciary responsible for determining the Plan's investment options, or an investment manager described in section 3(38) of the Act appointed for a Plan. All of the Independent Plan Fiduciary's instructions are provided in, or in accordance with, a written unitization agreement (the Agreement) made between MassMutual and the Independent Plan Fiduciary. Where Interest-free Advances are being offered, the Plan Sponsor will also be a party to the Agreement. Among other things, MassMutual represents that the Agreement provides standing instructions addressing the initiation, amount, repayment and, with respect to Market Rate Advances by MassMutual, the formula or method for determining the interest rate payable with respect to each Advance. The terms of the

Agreement are approved in writing by the Independent Plan Fiduciary.

9. MassMutual represents that the Independent Plan Fiduciary directs it to establish a Unitized Fund consisting of the assets that are the primary investment under the Plan investment option to be unitized and cash, or cash equivalent investments, that provide liquidity for the Unitized Fund (the "cash portion") in order to facilitate daily trading.¹⁴ For example, a unitized employer stock fund would consist of shares of employer stock¹⁵ and a cash portion; a unitized stable value fund would consist of GICs and/or alternative stable value contracts and a cash portion, and a unitized managed account would consist of investments selected and managed by the Plan's investment manager and a cash portion. In most cases, the Independent Plan Fiduciary directs MassMutual to invest the cash portion directly or indirectly in shares or units of a money market fund, including one managed by MassMutual. In this regard, MassMutual is able to submit redemption orders for shares or units of the Money Market Fund on any business day and receive cash on the Plan's behalf on the same business day, which allows MassMutual to transfer funds to settle redemptions from the Unitized Fund on T+1. The Independent Plan Fiduciary may direct MassMutual to invest the cash portion of a Unitized Fund in investments other than the Money Market Fund, provided that the investment offers similar liquidity.

10. MassMutual's fees for unitization services are also described in the Agreement. Generally, the fees may include an initial set-up charge and an annual administration charge, which may be a fixed amount, a fee based on the value of assets in the unitized account, or a combination of both. MassMutual represents that in no event will it have any discretionary authority or control or provide any investment advice (as described by section 3(21) of

the Act and regulations thereunder) with respect to the selection of the assets of a Unitized Fund. In this regard, the Independent Plan Fiduciary or an investment manager appointed in accordance with Plan terms and independent of MassMutual would be solely responsible for determining the investments of the Unitized Fund and, as further described below, providing MassMutual with specific instructions regarding the operation of the Unitized Fund. In addition, MassMutual does not provide any asset allocation or other services that may affect or influence participant transactions involving a Unitized Fund.

11. MassMutual explains that to establish a Unitized Fund, the Independent Plan Fiduciary directs MassMutual in the Agreement to calculate the market value of assets owned by the Plan in connection with the investment option to be unitized (e.g., the employer stock or other investments and the cash portion) on the first day that the option is unitized (the unitization date) and then establish "units" of the Unitized Fund by dividing the market value by a proposed initial unit value. Typically, an initial number of units are determined by dividing the current market value of the combined assets by \$10.

12. On the unitization date, the recordkeeper allocates the units to participant accounts based on each participant's pro rata interest in the Unitized Fund. Each business day after the unitization date, the Agreement requires MassMutual to establish a daily unit price based on the current market value of the Unitized Fund. Procedures for determining current market value are specified in the Agreement and would require an objective method so that MassMutual does not have any discretion in determining the market value of the unitized Fund or unit price.

For example, in the case of employer stock, the Agreement may require MassMutual to value the stock at the closing price on the New York Stock Exchange. Securities issued by mutual funds would be valued at the daily net asset value published by the mutual fund. In the case of GICs or alternative stable value contracts, the Agreement would generally direct MassMutual to use book value as reported by the contract issuer. In the case of a managed account, the investment manager may value the managed account, or MassMutual may determine the value if MassMutual has custody of the managed account assets. MassMutual provides the daily unit price for each Unitized Fund after the close of each business day. The unit price is made available to

¹⁴ The Department notes that whether or not unitization is appropriate for particular plan is a fiduciary decision. In making this decision, the fiduciary should consider such factors such as plan asset size, number of plan participants, the size of the unitized fund, and the type and nature of the unitized fund and the assets (e.g., whether exchange-traded and readily available, or less liquid.)

¹⁵ The standard unitization agreement submitted by MassMutual did not permit in-kind distributions of employer securities. In response to questions, MassMutual explained that in-kind distributions are an option that may be selected by the plan. The Department notes that offering in-kind distributions of employer securities gives participants the option to elect the special tax treatment available for net unrealized appreciation in employer securities, pursuant to IRC 402(e)(4).

the Plan's recordkeeper for purposes of processing new participant investments in the Unitized Fund, withdrawals from the Unitized Fund, and participant-directed exchanges involving the Unitized Fund.

13. Each business day, according to MassMutual, the Plan's recordkeeper aggregates all participant investment transactions involving the Unitized Fund to create a Plan purchase and redemption order for units of the Unitized Fund. The recordkeeper submits the purchase and redemption orders on the same basis that the recordkeeper submits orders for the mutual fund investment options offered under the Plan. Generally, the Plan's recordkeeper is a party to the Agreement and agrees to process participant investment transactions involving the Unitized Fund in accordance with requirements that accommodate MassMutual's provision of unitization services, as described by the Agreement. In the case of a managed account, the investment manager may also be party to the Agreement and would agree to assist MassMutual in providing unitization services by, e.g., providing daily valuation information and selling assets of the managed account when required for liquidity purposes. Upon receipt of a purchase order, MassMutual increases the total number of units of the Unitized Fund by the number of units purchased and accepts funds transferred to MassMutual to pay for the units purchased. Upon receipt of a unit redemption order, MassMutual reduces the number of units accordingly and forwards funds to settle the unit redemptions.

14. MassMutual represents that the Agreement includes specific instructions for the management of liquidity of a Unitized Fund.

Specifically, the Independent Plan Fiduciary must specify a "target liquidity," which specifies the intended size of the cash portion in comparison with the total assets of a Unitized Fund. The target liquidity would be established at a level that reasonably provides enough cash to accommodate the expected volume of redemption transactions generated by participants in the ordinary course. A typical target liquidity may range from 1% to 10%, depending on factors such as the size of the Unitized Fund, the average trading volume of assets held in the Unitized Fund, the number of participants with an interest in the Unitized Fund, and the relative size of each participant's interest in the Unitized Fund. The Agreement also specifies a "liquidity variance" that defines the range within which the actual value of the cash

portion, as compared to total value of the Unitized Fund, (actual liquidity) may vary from the target liquidity. If the actual liquidity exceeds the target liquidity by more than the liquidity variance, excess amounts must be immediately invested. If the actual liquidity is less than the target liquidity by more than the target variance, then some Unitized Fund investments must be liquidated to increase the cash portion.

15. According to MassMutual, the Agreement always provides MassMutual with specific instructions for making new investments on behalf of the Unitized Fund or liquidating investments of a Unitized Fund. In the case of employer stock, MassMutual is generally directed to place a purchase or sell order to restore the Unitized Fund to target liquidity on the business day that the excess liquidity or liquidity shortfall is identified. For unitized stable value funds, the Independent Plan Fiduciary must provide MassMutual with specific instructions as to which stable value contracts MassMutual should be credited with deposits or withdrawals. In the case of a managed fund, the Agreement generally requires MassMutual to notify the Plan's investment manager of excess liquidity or a liquidity shortfall and the manager is responsible for buying or selling account assets to restore the actual liquidity of the managed account to the permitted range.

16. MassMutual represents that whenever the actual liquidity of a Unitized Fund falls below the target liquidity by more than the liquidity variance, assets of the Unitized Fund must be liquidated to restore the target liquidity. If employer stock or other securities, which settle on a "T+3" basis, are sold, the sale proceeds usually would be received after three business days. Some transactions may take longer to settle, for example, withdrawals from GICs or alternative stable value contracts may require up to ten days. Nevertheless, as long as the cash portion of the Unitized Fund is sufficient to cover unit redemption requests submitted to MassMutual on each business day, unit redemptions can be processed and settled on a daily basis.

17. From time to time, the actual liquidity of a Unitized Fund may not provide sufficient liquidity for the unit redemption requests on a business day. If requests for redemptions exceed the actual liquidity of the Unitized Fund, MassMutual instructs the trustee to (1) fulfill the participant's unit redemption requests and (2) sell assets to return the fund to its requisite liquidity. MassMutual pays the trustee for the

overdraft services: Plans, however, may make their own arrangements with the trustee. The redemptions are processed at the unit price established the business day on which the redemptions are resubmitted. Generally, the Agreement would instruct MassMutual to continue to accept unit purchase orders even if unit redemption orders have been rejected.

18. MassMutual represents that in its experience it is expensive and burdensome to Plans and participants to reject unit redemptions due to insufficient liquidity for several reasons. First, the reversal of a transaction is an exception from typical administrative procedures and, therefore, must be processed and reconciled manually rather than on automated recordkeeping systems; this increases recordkeeping expenses incurred by Plans and participants and increases the opportunity for recordkeeping and reconciliation errors. Second, until the reversed transaction is posted to participant accounts, participant account records (which are available to participants on a daily basis) will be inaccurate. Most important, the unit redemption requests are likely to be requested in connection with a participant's request for an exchange from a Unitized Fund to another Plan investment option. If the Unitized Fund redemption requests cannot be settled, the corresponding purchases of shares or units of the other Plan investment options also must be reversed. As noted, MassMutual does not receive unit redemption orders until T+1, by which time; a corresponding purchase order would also have been received by the mutual fund transfer agent.

In many cases, it is not possible to stop a purchase of mutual fund shares. Instead, the shares must be resold at the then current market price. If there has been a one-day change in share price, the Plan may be liable for the difference.

19. One way to reduce the risk that any unit redemptions may be rejected is to increase the Unitized Fund's target liquidity. In this regard, the Agreement generally requires MassMutual to notify the Independent Plan Fiduciary each time that unit redemptions are rejected so that the Independent Plan Fiduciary can evaluate whether target liquidity is appropriate and increase target liquidity as needed. However, increasing target liquidity affects the risk and return characteristics of the Unitized Fund, which is an undesirable result in the view of many Plan fiduciaries. In many cases, increases in the portion of a fund invested in cash and cash equivalents reduces the fund's investment return over the long-term as compared to the

return that could be obtained by a fund with a smaller cash portion.

20. As a service provider to Plans, MassMutual is a party in interest to such Plans. Therefore, MassMutual represents that Advances by MassMutual to Plans in connection with its unitization services, and the receipt by MassMutual of interest may raise issues under section 406(a) of the Act. Advances by a plan sponsor, also a party in interest, are prohibited under section 406. Therefore MassMutual is requesting an exemption to permit it to make advances and earn interest on these Market Rate Advances and to permit plan sponsors of plans that use MassMutual's unitization services to provide Interest-free Advances to their plans.

21. The proposed exemption for the Advances requires the Plan repay the principal amount of a Market Rate Advance and accrued interest as soon as possible after the initiation of the Advance. No commitment fees or commissions will be paid by the Plan in connection with an Advance. The Advances would be available under procedures reviewed and approved by the Independent Plan Fiduciary and incorporated into the Agreement. The Agreement will describe the terms and procedures for the Advances, including instructions addressing the initiation, amount and repayment.

22. With respect to Market Rate Advances, the Agreement will also describe the formula or method for determining the interest rate payable with respect to each Market Rate Advance. For example, the Agreement might specify a formula for determining the interest on Market Rate Advances based on a published indexed interest rate established by an independent third party (e.g., the London Interbank Offered Rate or the U.S. Federal Reserve's Cost of Funds Index) and provide for daily accrual of interest until the Market Rate Advance is repaid. MassMutual will not have or exercise any discretion with respect to how the rate is determined under the formula or method. Interest on Market Rate Advances will be an operating expense of a Unitized Fund and will be paid from the assets of the Unitized Fund.

23. The Agreement governing the Advances will limit the total amount that MassMutual or the Plan Sponsor may advance to a Plan to 25% of the total market value of the Unitized Fund on the business day that any Advance is made. MassMutual represents that such limits will be imposed because Advances are intended to facilitate the administration of a Unitized Fund in the ordinary course of business. If the

liquidity needed to settle redemption requests on a particular business day exceeds a limit set on Advances, Plan fiduciaries may wish to review whether the Plan should continue "daily trading" in participant interests in the Unitized Fund. The fair market value of the assets of the Unitized Fund is determined by an objective method specified in the Agreement.

24. The Advances will not be secured or collateralized. MassMutual will generally be directed under the Agreement to automatically sell or redeem assets of a Unitized Fund on any business day that the actual liquidity of a Unitized Fund falls below the target liquidity by more than the liquidity variance. Further, MassMutual generally will be directed by the Agreement to automatically collect the amount of an Advance and accrued interest, if any, from proceeds received upon the sale or redemption of those assets.

25. MassMutual represents that the liquidity needs of the Unitized Employer Stock Fund and the market for Employer Stock may necessitate the situation in which an, orderly liquidation of Employer Stock may need to occur over a period of months or a few weeks. For example, (a) if it is known that a 10 percent shareholder is liquidating his or her interest in the Plan Sponsor in the market, large sales of Employer Stock will typically yield a lower price than smaller sales over a period of weeks or a few months; (b) if a large amount of Employer Stock is to be sold by the Plan (e.g., part of the business is sold and a large number of employees become eligible for and elect to receive distributions from the Plan), an orderly sale of Employer Stock by the Plan would normally yield a higher price; or (c) if the Plan Sponsor or the Independent Plan Fiduciary determines that it would be imprudent or unlawful to sell the Employer Stock at a particular time (e.g., it jeopardizes the Plan's qualified tax status or it would violate a securities law), then sales of Employer Stock would be made as prudent and lawful as possible and would be extended over a period of time. MassMutual represents that it will not exercise discretion with respect to the assets in the unitized fund. Where the sale will occur over several days, MassMutual will receive specific instructions regarding the timing of the sales from the Independent Fiduciary.

As discussed above, the employer securities may be sold over a period of months or weeks at the then current market price. In contrast, participant transactions involving purchase or sales of the units in the Unitized Employer Stock Fund will be made after the close

of the market based on the unit value of the Unitized Employer Stock Fund at the closing price of the Employer Stock held by the Unitized Employer Stock Fund. Participants will also receive confirmation of the unit price at which their transactions (e.g., distributions, transfers, etc.) are made.

26. MassMutual will provide notice to the Independent Plan Fiduciary about each Advance at the time the Advance is made and after the Advance is repaid. With respect to Market Rate Advances, no later than one business day after a Market Rate Advance is initiated, MassMutual will notify the Independent Plan Fiduciary of the principal amount of the Market Rate Advance and the interest rate to be applied. Within ten days after a Market Rate Advance is fully repaid, MassMutual will provide the Independent Plan Fiduciary with a confirmation including the date of repayment, the amount of the Market Rate Advance, the actual interest rate applied, and the total amount of interest paid by the Plan.

27. The Agreement may be terminated by the Independent Plan Fiduciary at any time, subject to the Plan's repayment of any outstanding Advances made as required by the terms of the Agreement. The Advances will be made on terms at least as favorable to the Plan as those the Plan could obtain in an arm's-length transaction with an unrelated party.

28. Neither MassMutual nor an affiliate may have, or exercise, any discretionary authority or control with respect to the initiation of an Advance, the amount of an Advance, the interest rate payable on a Market Rate Advance, or the repayment of an Advance. These circumstances are determined by the Independent Plan Fiduciary and are set forth in the Agreement. In addition, MassMutual or an affiliate may not be (a) a trustee of the Plan (other than a nondiscretionary trustee who does not render investment advice with respect to the assets of the Unitized Fund), (b) a Plan administrator, (c) a fiduciary who is expressly authorized in writing to manage, acquire, or dispose of, on a discretionary basis, any assets of the Unitized Fund, or (d) an employer any of whose employees are covered by the Plan.

29. In response to concerns raised by the Department regarding the unitization of employer security funds consisting of that were not sufficiently liquid, MassMutual agreed that this exemption would only apply to those qualifying employer securities that would meet the definition of qualifying employer securities that were stock pursuant to 407(d)(5)(A) of the Act. To

further assure sufficient liquidity, MassMutual agreed that the employer securities must also qualify as "NMS stock" pursuant to the SEC's recently published Regulation NMS, 17 CFR 242.600(b)(46) and (47).¹⁶ The term generally covers securities that are listed on a National Securities Exchange, such as the New York Stock Exchange or The NASDAQ Stock Market, Inc.¹⁷ In order to meet the definition of NMS stock, the stock must be one for which transaction reports are collected and processed, and such reports must be available for review. Therefore, according to MassMutual, limiting application of the proposed exemption to employer securities which meet the definition of NMS stock ensures that only those securities which can be readily valued, based on market quotations, will be covered by the proposed transactions.

30. In summary, MassMutual represents that the subject transactions satisfy the criteria contained in section 408(a) of the Act for the following reasons:

(a) The requested exemption will be administratively feasible because the Advances will be monitored by the Independent Plan Fiduciary of each Plan. Thus the level of oversight required by the Department will be minimal.

(b) The requested exemption will be in the interests of Plan participants and beneficiaries because it will allow Plans to avoid rejections of the Unitized Fund redemption transactions resulting from insufficient liquidity. This will protect Plan participants and beneficiaries from the expense, inconvenience, possible recordkeeping errors, and potential Plan exposure for trading losses on corresponding purchase transactions for other Plan investments, which could result if Unitized Fund liquidity is

insufficient to settle the redemption on a requested business day. The protection will be available where the plan sponsor is willing to provide the liquidity without interest, as well as where the sponsor is not willing to do so, but decides, in the interest of the plan, that liquidity is needed.

(c) The requested exemption will protect participants' and beneficiaries' rights because (i) the terms and conditions of Advances will be clearly disclosed in a written Agreement between MassMutual and an Independent Plan Fiduciary, which will specifically describe the procedures under which Advances will be made and repaid, the amount of each Advance, and, in the case of a Market Rate Advance, the formula or method for determining interest; (ii) the terms on which Advances would be made must be at least as favorable to the Plan as a similar third party arm's length transaction; (iii) the Agreement permitting the Advances can be terminated by the Independent Plan Fiduciary at any time, without penalty; (iv) MassMutual will provide to the Independent Plan Fiduciary on the business day following the day an Advance is made, a notice describing the amount of the Advance and, if it is a Market Rate Advance, the interest rate payable, and within 10 days of the repayment of each Advance, notice confirming the amount of the Advance, the date of repayment and the actual amount of interest, if any, paid by the Plan. These notices provide an Independent Plan Fiduciary the ability to monitor each Advance and ensure the Advances are appropriate and in the interest of the Plan's participants and beneficiaries; (v) MassMutual will not have or exercise any discretionary authority or control over the assets of the Plan invested in a Unitized Fund and will act solely at the direction of an Independent Plan Fiduciary. In addition, MassMutual may not have a relationship to a Plan receiving Advances that might provide MassMutual any discretionary authority or control with respect to the investment of the assets of the Unitized Fund or Market Rate Advances to be made to the Plan; and (vi) the relief requested for interest free loans is protective because no fees will be charged and no recourse will be given.

FOR FURTHER INFORMATION CONTACT:
Andrea W. Selvaggio 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 24th day of April, 2006.

Ivan Strasfeld,
*Director of Exemption Determinations,
Employee Benefits Security Administration,
U.S. Department of Labor.*

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¹⁶ The Securities Exchange Act of 1934 directs the Securities and Exchange Commission (the "SEC") to designate certain securities or classes of securities qualified for trading in the national market system. See 15 U.S.C. 78k-1(a)(2). 17 CFR 242.600 provides:

a. The term national market system security as used in section 11A(a)(2) of the Act shall mean any NMS security as defined in paragraph (b) of this section.

b. For purposes of Regulation NMS (Rules 242.600 through 242.612), the following definitions shall apply:

46. NMS security means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.

47. NMS stock means any NMS security other than an option.

¹⁷ The NASDAQ Stock Market has been authorized by the SEC to become a national securities exchange and is in the process of making that conversion.