



4510-29-P

**DEPARTMENT OF LABOR**

Employee Benefits Security Administration  
Proposed Exemptions from Certain Prohibited Transaction  
Restrictions

**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 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following proposed exemptions: **D-11637 HSBC-North America (U.S.) Tax Reduction Investment Plan; D-11679 Sammons Enterprises, Inc. Employee Stock Ownership ESOP; and D-11683 First Federal Bancshares of Arkansas, Inc. Employees' Savings and Profit Sharing Plan.**

**DATES:** 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.

**ADDRESSES:** 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. 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, N.W., Washington, D.C. 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](mailto: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, N.W., Washington, D.C. 20210.

**WARNING:** If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

**SUPPLEMENTARY INFORMATION:**

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).

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.

HSBC-North America (U.S.) Tax Reduction Investment Plan (the Plan)

Located in Mettawa, Illinois

[Application No. D-11637]

#### 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).

#### Section I: Transactions

If the proposed exemption is granted, effective March 2, 2009, the restrictions of sections 406(a)(1)(A) and 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and 4975(c)(1)(E) of the Code,<sup>1</sup> shall not apply:

(1) to the acquisition of certain rights (the ADS Rights) by the Plan in connection with an offering (the Offering) of shares

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<sup>1</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

of stock (the Stock) in HSBC Holding, plc (Holdings) by Holdings, a party in interest with respect to the Plan,

(2) to the holding of the ADS Rights received by the Plan during the subscription period of the Offering; provided that the conditions as set forth in section II of this proposed exemption were satisfied;

#### Section II: Conditions

The relief provided in this exemption is conditioned upon adherence to the material facts and representations described, herein, and as set forth in the application file and upon compliance with the conditions, as set forth in this proposed exemption.

(1) The receipt by the Plan of the ADS Rights occurred in connection with the Offering made available by Holdings on the same terms to all shareholders, such as the Plan, of American Depository Shares<sup>2</sup> (the HSBC ADS) which represent the Stock of Holdings;

(2) The acquisition of the ADS Rights by the Plan resulted

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<sup>2</sup> American Depository Shares permit investment in foreign securities to trade on markets in the United States without many of the complications that would otherwise arise from such cross-border and cross-currency transactions.

from an independent act of Holdings, as a corporate entity, and all holders of the ADS Rights, including the Plan, were treated in the same manner with respect to the acquisition of such rights;

(3) All holders of the ADS Rights, such as the Plan, received the same proportionate number of such rights based on the number of HSBC ADS held; and

(4) All decisions regarding the ADS Rights made by the Plan were made by an independent, qualified fiduciary (the I/F) which:

(a) conducted a due diligence review of the Offering;

(b) determined whether or not to direct the Plan to vote in favor of the Offering; and

(c) evaluated a prudent strategy for disposition of the ADS Rights under the Offering that were allocated to the Plan.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective, on March 2, 2009, the date of the announcement of the Offering.

#### SUMMARY OF FACTS AND REPRESENTATIONS

1. The Plan is a defined contribution profit sharing plan, for eligible employees of HSBC North America Holdings, Inc. (the Employer) and its subsidiaries.

The Plan is qualified under section 401(a) of the Code. In addition, the Plan contains a cash or deferred arrangement intended to qualify under section 401(k) of the Code.

The Plan received a favorable determination letter, dated November 14, 2008, from the Internal Revenue Service. Although the Plan has been amended since applying for the determination letter, the Plan administrator and counsel for the Plan believe that the Plan is designed and is currently being operated in compliance with the applicable requirements of the Code.

As of September 30, 2009, the Plan had approximately 44,000 participants. The fair market value of the total assets of the Plan, as of September 30, 2009, was \$2.4 billion.

2. The Plan provides for participant directed investment of contributions made to the Plan. Participants in the Plan may choose among investment options, including mutual funds managed by subsidiaries of the Employer and managed by Vanguard Fiduciary Trust Co. (Vanguard). Vanguard is the trustee of HSBC-North American (U.S.) Tax Reduction Investment Trust (the Trust) which holds the assets of the Plan. In addition, the Vanguard Group of Investment Companies is the record-keeper of the Plan.

3. The application was filed on behalf of the Employer, a financial services company, which sponsors the Plan. The Employer, as an employer any of whose employees are covered by



the Plan, is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act.

It is represented that the Employer neither had nor exercised discretionary authority with respect to the ADS Rights acquired by the Plan pursuant to the Offering, and therefore, was not acting as fiduciary, as defined in section 3(21) of the Act.

An administrative committee (the Committee) is the named fiduciary of the Plan with respect to daily administration of the Plan. The Committee, as a fiduciary of the Plan, is a party in interest with respect to the Plan, pursuant to section (3)(14)(A) of the Act.

4. The Employer is a subsidiary of Holdings, a public limited liability company incorporated in England and Wales with operations worldwide. The Employer comprises all of the business interests of Holdings in the United States. As the parent of the Employer which sponsors the Plan, Holdings is a party in interest with respect to the Plan, pursuant to section 3(14)(E) of the Act.

5. Holdings is the ultimate parent of the HSBC Group. The HSBC Group is not a separate legal entity, but rather the term, HSBC Group, is an informal collective reference to the legal entities wholly or partially owned by Holdings in Europe, Hong Kong, Asia Pacific, the Middle East, North America, and Latin America. The HSBC Group is not publicly traded on the

London Stock Exchange (LSE) or any other stock exchange.

6. The Stock of Holdings is traded on the LSE under the symbol HSBA. The Stock of Holdings is also traded on stock exchanges in Hong Kong, Paris, and Bermuda.

In the United States, shares of HSBC ADS (each representing five (5) shares of the Stock of Holdings) are traded on the New York Stock Exchange (NYSE) under the symbol HBS. BNY Mellon, Inc. (BNY Mellon) is the depository bank that holds the Stock of Holdings in a custodial account and issues shares of HSBC ADS to investors in the United States.

7. The shares of HSBC ADS are a permitted investment option under the terms of the Plan. In this regard, although employee contributions, as of March 28, 2003, may no longer be directed into the acquisition of shares of HSBC ADS, any shares of HSBC ADS acquired prior to March 28, 2003, may continue to be held in participant accounts in the Plan.

The aggregate fair market value of the assets of the Plan invested in shares of HSBC ADS, as reflected in the Plan's most recent annual report dated, December 31, 2008, is \$98,679,000. The approximate percentage of the fair market value of the Plan's total assets, as of December 31, 2008, that is represented by investments in shares of HSBC ADS is 4.9 percent (4.9%).

8. On March 2, 2009, Holdings announced its decision, as a

corporate entity and issuer of securities, to issue, in connection with the Offering, up to 5,060,239,065 shares of Stock in the form of new ordinary shares, representing approximately 41.7 percent (41.7%) of the existing issued ordinary shares of Stock of Holdings, as of February 27, 2009, the last business day prior to the announcement of the Offering. It is represented that Holdings made this decision for the sole purpose of raising additional capital. An aggregate of 4,887,538,091 new ordinary shares of the Stock of Holdings were subscribed for in connection with the Offering. The gross proceeds from such subscriptions in connection with the Offering totaled £12,072,952,215.50.

Completion of the Offering was conditional upon approval from the shareholders of the Stock of Holdings and upon approval from the shareholders of the HSBC ADS, such as the Plan. The Offering was approved in a meeting (the General Meeting) held in London on March 19, 2009.

9. Under the terms of the Offering, all shareholders of the Stock of Holdings received certain rights (the Share Rights) to purchase, through the exercise of such Share Rights, the new ordinary shares of the Stock of Holdings being issued by Holdings in connection with the Offering. With respect to the Share Rights, under the terms of the Offering, five (5) Share Rights were issued for every twelve (12) shares of the Stock of

Holdings, rounded down to the nearest whole number, held by each shareholder on March 13, 2009, (the Record Date). Each of the Share Rights permitted a shareholder of the Stock of Holdings to purchase one (1) additional share of such stock at 254 pence per share.

In addition, under the terms of the Offering, all shareholders of the HSBC ADS, such as the Plan, received ADS Rights to purchase HSBC ADS. With respect to the ADS Rights, under the terms of the Offering, five (5) ADS Rights were issued for every twelve (12) shares of the HSBC ADS, rounded down to nearest whole number, held by each holder of such shares, including the Plan, on the Record Date. Each of the ADS Rights permitted a holder, such as the Plan, to purchase one (1) additional share of the HSBC ADS for an estimated price of \$17.75 per each share.

As of March 13, 2009, the Record Date, the Plan held 2,067,667 shares of the HSBC ADS<sup>3</sup> on behalf of 10,562 participants and beneficiaries. Accordingly, based on a ratio of five (5) ADS Rights issued for every twelve (12) shares of the HSBC ADS held, rounded down to nearest whole number, on March 20,

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<sup>3</sup> Based on the conversion of one HSBC ADS to five (5) shares of Stock of Holdings, the Plan held the equivalent of 10.3 million shares of the Stock of Holdings or less than 0.1% of the outstanding shares of Stock of Holdings.

2009, the Plan acquired 861,527 ADS Rights.

10. It is represented that there was no market for the ADS Rights acquired by the Plan, because the terms of the Offering stipulated that the ADS Rights were not transferrable and would not be admitted to trading on the NYSE or any other stock exchange. In order to sell the ADS Rights, holders of the ADS Rights, such as the Plan, had to convert their ADS Rights into Share Rights. The conversion ratio between the ADS Rights and the Share Rights was one to five (1:5). Therefore, it is represented that underlying the 861,527 ADS Rights acquired by the Plan in the Offering that there were 4,307,639 Share Rights.

11. A market for the Share Rights did develop, and the Share Rights were listed on the LSE. In this regard, the Shares Rights began trading on the LSE on March 20, 2009, at 8:00 A.M. GMT.

12. The Offering closed on March 31, 2009, at 5:00 P.M. EST with respect to the ADS Rights. The Offering closed on April 3, 2009, at 11:00 A.M. BST with respect to the Share Rights. Pursuant to the terms of the Offering all unexercised rights expired and became worthless after the closing of the Offering.

13. To avoid engaging in a prohibited transaction, it is

represented that the Plan considered whether or not to accept the ADS Rights. In this regard, the ADS Rights were accepted, because refusing to accept such rights might constitute a breach of the Employer's fiduciary duties to the Plan and to its participants and beneficiaries.

14. Although the Plan provides for participant directed investment, the applicant represents that it was not practicable to initiate and implement a participant level "pass through" voting during the proxy vote for the General Meeting, relating to the approval of the Offering, nor was it practicable to initiate and implement a participant level "pass through" of the exercise or sale of the ADS Rights, due to the short duration of time between when such rights were acquired by the Plan and when such rights expired under the terms of the Offering.

On March 12, 2009, the Employer first contacted U.S. Trust, Bank of America Private Wealth Management, acting on behalf of Bank of America, National Association (BANA),<sup>4</sup> to discuss BANA serving as the I/F for the Plan with respect to the Offering. On March 13, 2009, BANA issued an engagement agreement to the

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It is represented that Evercore Trust subsequently acquired the business within BANA that performed the services as I/F with respect to the subject transactions. Norman Goldberg, the individual who supervised BANA's work in connection with this matter and who signed the April 9, 2009, letter from BANA, is currently employed with Evercore Trust, as Managing Director.

Employer to be retained as the I/F for the Plan with respect to the Offering. The Employer, as sponsor of the Plan and settlor of the Trust, amended section 6.5(i) of the Trust agreement, effective March 16, 2009, to retain BANA, to act as investment manager and I/F on behalf of the Plan.

15. BANA had sole authority to vote the shares of the HSBC ADS held under the Plan and to direct Vanguard to exercise or otherwise dispose of the ADS Rights acquired and held by the Trust, pursuant to the Offering. Specifically, BANA was responsible for: (i) conducting a due diligence review of the Offering; (ii) determining whether or not to direct the Committee to vote in favor of the Offering at the General Meeting; and (iii) if the Offering were approved at the General Meeting to prudently evaluate a disposition strategy under the Offering for the ADS Rights that were allocated to the Plan.

With regard to the responsibility of BANA to instruct Vanguard, the Trustee of the Trust, on how to vote at the General Meeting held on March 19, 2009, it is represented that BANA performed an independent financial analysis of Holdings to determine the need for additional capital and the potential benefits of additional capital. BANA determined that Holdings appeared to be adequately capitalized, and that Holdings had taken steps to restructure its operations to better position

itself for the future, in light of recent turmoil across a wide range of markets and industries, and in particular the financial services industry. Accordingly, it is represented that on March 16, 2009, BANA instructed Vanguard to vote the Plan's shares of the HSBC ADS in favor of the Offering at the General Meeting.

It is represented that on March 20, 2009, the participants and beneficiaries in the Plan whose accounts held shares of the HSBC ADS received their pro rata share of the ADS Rights. In this regard, BANA was responsible for analyzing and recommending a course of action for such rights received by such accounts.

As stated in the HSBC Rights Issue Prospectus (the Prospectus), issued by Holdings on March 17, 2009, shareholders of the HSBC ADS, including the Plan, were permitted to elect among the following three (3) options: (a) exercise all or part of the ADS Rights for the purchase of shares of the HSBC ADS; (b) direct BNY Mellon to sell the Share Rights underlying the ADS Rights; (c) surrender the ADS Rights and receive Share Rights.

**Option (A) Exercise All or Part of the ADS Rights**

Under this option, a holder of the ADS Rights, including the Plan, could exercise all or only a part of the ADS Rights acquired in conjunction with the Offering and could purchase



shares of HSBC ADS. In order to exercise the ADS Rights, a holder, such as the Plan, would have to deposit 110% of the subscription price for the HSBC ADS upon the exercise of each of the ADS Rights. The additional amount over and above the subscription price for the HSBC ADS was to increase the likelihood that the agent would have sufficient funds to pay the final subscription price for the HSBC ADS in light of a possible appreciation of Pounds Sterling against the U.S. dollar between the instruction date and the end of the subscription period, and to pay applicable United Kingdom stamp duty reserve taxes, and to pay any currency conversion expenses. It is represented that BANA understood that the Plan lacked available unallocated funds needed to exercise all of the ADS Rights.

The Plan could surrender a portion of the ADS Rights to BNY Mellon and direct BNY Mellon to sell the Share Rights underlying such ADS Rights, in order for the Plan to raise sufficient funds to exercise its remaining ADS Rights. According to BANA, this transaction would have resulted in the Plan receiving Pounds Sterling from the sale of the Share Rights, which would then have had to be converted back into U.S. dollars in order for the Plan to purchase shares of the HSBC ADS through the exercise of the remaining ADS Rights. The conversion from Pounds Sterling to U.S. dollars would have had to have been executed at the

then-prevailing exchange rate. In the opinion of BANA, given the volatility in the foreign exchange markets and the uncertainty in future exchange rates, there was no guarantee that the Plan would have been able to convert the proceeds from the sale of the Share Rights into sufficient funds to exercise the remaining ADS Rights. If the Plan had received insufficient funds to exercise the remaining ADS Rights, such rights would have been deemed to have been declined and would have lapsed. Accordingly, for the reasons summarized above, BANA determined that the Plan would not select Option (A).

**Option (B) Direct BNY Mellon to Sell the Share Rights underlying the ADS Rights**

Under this option, HSBC established a process by which a holder of ADS Rights, including the Plan, could elect to liquidate such ADS Rights by directing BNY Mellon to attempt to sell the underlying Share Rights on the LSE. Unlike Option (A) above, under Option (B), the Plan was not required to deposit any funds in order for BNY Mellon to liquidate the Plan's ADS Rights.

Further, it is represented that BNY Mellon, as depository and as a premier trading firm that was familiar with the transaction, had appropriate trading accounts already in place to facilitate the trading, had the expertise and the processes in place to sell the Share Rights underlying the ADS Rights within the permitted

time period. Notwithstanding the fact that there was some currency risk from the conversion of Pounds Sterling into U.S. dollars, according to the I/F, Option (B), offered the Plan an expedited, low cost, frictionless way to liquidate the Plan's interests in the ADS Rights. In this regard, it is represented that under Option (B), the Plan did not have to pay any brokerage commissions in connection with the liquidation of its holding in ADS Rights.

**Option (C) Surrender ADS Rights and Receive Share Rights**

Under this option, a holder of ADS Rights, including the Plan, could elect to exchange such rights for the underlying Share Rights and to sell such Share Rights or exercise such Share Rights to purchase the Stock of Holdings on the LSE. To do so, the Plan would have had to direct BNY Mellon to cancel the ADS Rights and to deliver the underlying Share Rights to a brokerage account set up by the Plan at a firm in the United Kingdom that trades on the LSE. To surrender the ADS Rights and receive the underlying Share Rights, the Plan would have had to pay a 1.5% stamp tax. Finally, the Plan would have had to direct the broker to sell all of the Share Rights, or to exercise all of the Share Rights, or to sell sufficient Share Rights to generate the funds needed to exercise the Plan's remaining Share Rights. To sell and/or exercise the Share Rights through a broker selected by

BANA on behalf of the Plan, BANA would have had to negotiate the brokerage fees and other expenses that the Plan would have had to pay such broker for the sale and/or exercise of the Share Rights.

Additionally, the Plan would have had to assume the risks and responsibilities attendant to the Share Rights, including effecting the exercise or sale of such rights.

According to BANA, Option (C) presented a number of issues to the Plan that could have resulted in higher trading costs. As there was no market for the ADS Rights, the sale of such rights required conversion into the underlying Share Rights. The conversion of the ADS Rights and receipt of Share Rights would have required the Plan, rather than BNY Mellon, to sell the Share Rights and to receive the proceeds denominated in Pounds Sterling. In addition, the Plan would have had to effect a foreign exchange conversion at the then-prevailing exchange rate, repatriate the funds back into the U.S. (possibly paying any applicable taxes), and then either deposit the proceeds in participant accounts or use the proceeds to purchase shares of HSBC ADS on the NYSE. Furthermore, the Plan would have had to pay wire fees to move the proceeds back to the U.S. BANA points out that during this process, the share price of both the Stock of Holdings on the LSE and the share price of the HSBC ADS on the NYSE would be fluctuating and could possibly have moved against

the Plan. Accordingly, BANA determined that the uncertainty of the stock markets and the foreign exchange markets, along with the costs associated with executing the different trades and repatriating the funds back to the U.S. and the uncertainty related to trade settlement and execution, might have resulted in higher trading costs to the Plan, and therefore, lower proceeds to Plan participants. For the foregoing reasons, BANA determined that Option (C) was not in the interest of the Plan.

The applicant provided the following chart which compares the three (3) options, discussed above, and assesses the risks associated with each of the three (3) options:

<b><u>Risks</u></b>	<b><u>Option (A)</u></b> Exercise All or Part of the ADS Rights	<b><u>Option (B)</u></b> Direct BNY Mellon to Sell the Share Rights Underlying the ADS Rights	<b><u>Option (C)</u></b> Surrender ADS Rights and Receive Share Rights
<p><b><u>Plan Funding</u></b></p> <p>In order to exercise the ADS Rights, the Plan needed to deposit 110% of the 254 pence per share subscription price with BNY Mellon.</p>	<p><b><u>Risk: High</u></b></p> <p>The Plan lacked available unallocated funds needed to exercise the ADS Rights. To generate the necessary funds, the Plan would have had to direct BNY Mellon to sell a portion of the Plan's ADS Rights (technically to sell the Share Rights underlying the ADS Rights) to raise sufficient cash to exercise its remaining ADS Rights.</p>	<p><b><u>Risk: Low</u></b></p> <p>No funds were required for BNY Mellon to sell the ADS Rights (technically to sell the Share Rights underlying the ADS Rights) on the public market.</p>	<p><b><u>Risk: High</u></b></p> <p>The Plan lacked available unallocated funds needed to exercise the Share Rights it would receive after surrendering the ADS Rights, meaning the Plan's most viable alternative would have been to sell the Share Rights it received. In order to exercise the Share Rights, the Plan would have had to first sell a portion of the Share Rights to raise sufficient cash to exercise the remaining rights. This would raise other risks as outlined herein.</p>
<p><b><u>Operational Risks</u></b></p>	<p><b><u>Risk: High</u></b></p> <p>In order to exercise the ADS Rights, the Plan would have had to first sell a portion of the ADS Rights (technically to sell the Share Rights underlying the ADS Rights) to raise sufficient funds to exercise its remaining ADS Rights. The uncertainty of the proceeds from this sale (due to constantly changing foreign exchange rates, a fluctuating price for the Share Rights, and uncertainty as to the timing of any such sale) made it</p>	<p><b><u>Risk: Low</u></b></p> <p>HSEC had established a process to liquidate ADS Rights through BNY Mellon. BNY Mellon is a premier trading firm that was familiar with the transaction, was well-suited to execute all options available to shareholders, and offered competitive fees. BNY Mellon also had appropriate trading accounts already in place to facilitate the trading.</p>	<p><b><u>Risk: High</u></b></p> <p>The Plan would have been responsible for selecting a broker to sell the Share Rights on the open market. To do so, the Plan would have had to set up a brokerage account at a firm in London that trades on the LSE. This would have entailed a number of risks, including the time to set up and verify an account and the lesser familiarity by the broker (compared with BNY Mellon) with the transaction. In addition, no other broker selected on</p>

	<p>impossible to accurately calculate the number of Share Rights to sell in order to raise sufficient proceeds to exercise the remaining ADS Rights. The Plan could have either raised insufficient funds, leaving it holding unexercised (and possibly unsellable) ADS Rights which would have lapsed; or would have ended up with excess cash.</p>		<p>behalf of the Plan was likely to have had the market access and the trading volume enjoyed by BNY Mellon.</p>
<p><b><u>Timing Risks</u></b>  The Plan received the ADS Rights on March 20, 2009. Under the terms of the Offering, the ADS Rights expired on March 31, 2009 and the Share Rights expired on April 3, 2009. BANA had only 10 business days from the date on which the Prospectus describing the terms of the Offering was issued to evaluate the options available to the Plan, decide which of the options was in the best interest of the Plan's participant and beneficiaries, and carry out its decision.</p>	<p><b><u>Risk: Moderate-High</u></b>  It was understood that the Plan did not have cash available to exercise the ADS Rights and the Plan was not intending to sell other investments to raise sufficient cash. Because of the timing of the Offering, the Plan would have had to instruct BNY Mellon at the same time with respect to both the sale and the exercise of the ADS Rights; cash also had to be deposited at this time for the exercise of the ADS Rights. Even assuming the Plan could have immediately monetized (for deposit with BNY Mellon) its expected proceeds from the sale of the ADS Rights, Option (A) nonetheless presented moderate timing risk, because if insufficient funds were generated from the sale, there was not enough time to supplement the cash to ensure the remaining ADS Rights could be exercised. If the necessary funds were not</p>	<p><b><u>Risk: Low</u></b>  The Plan needed to direct BNY Mellon to sell the ADS Rights (technically, the Share Rights underlying the ADS Rights) before such rights expired. As the depository and a premier trading firm, BNY Mellon already had the expertise and processes in place to sell the ADS Rights within the permitted period.</p>	<p><b><u>Risk: High</u></b>  The Plan needed to convert the ADS Rights into Share Rights, set up brokerage accounts at a firm in London that trades on the LSE, and either sell all of the Share Rights or sell sufficient Share Rights to generate the funds needed to exercise the remaining rights. This option presented the greatest timing risks because any delay in setting up the brokerage accounts or executing the sales could have resulted in the ADS Rights expiring and becoming worthless.</p>

	generated in time the ADS Rights would have expired and likely become worthless.		
<b><u>Trading Costs</u></b>	<p><b><u>Risk: Low</u></b> This option presented low risk since the Plan would have incurred the same costs described in Option (B) in order to sell a portion of the ADS Rights (technically, the Share Rights underlying the ADS Rights) through BNY Mellon to raise sufficient cash to exercise its remaining ADS Rights.</p> <p>In order to exercise the remaining ADS Rights, the Plan needed to deposit 110% of the 254 pence per share subscription price with BNY Mellon. 110% of the subscription price needed to be deposited in order to cover possible exchange rate fluctuations, applicable United Kingdom stamp duty reserve taxes, and any currency conversion expenses.</p>	<p><b><u>Risk: Low</u></b> This option presented low risk since the Plan would not have had to pay brokerage commissions for the sale of the ADS Rights (technically, the Share Rights underlying the ADS Rights) through BNY Mellon. The Plan would have had to have paid an ADS depository fee of \$0.02 per ADS Right, any applicable taxes, and any other applicable fees and expenses of BNY Mellon, as provided under the deposit agreement, <b><u>pro rata</u></b> to the holders of the ADS Rights who directed BNY Mellon to sell the ADS Rights.</p>	<p><b><u>Risk: High</u></b> The Plan would have incurred an estimated 1.5% stamp tax to surrender the ADS Rights and receive the underlying Share Rights. In addition, BANA would have had to negotiate and the Plan would have had to pay brokerage fees for the sale or exercise of the Share Rights. Furthermore, the Plan would have had to pay wire fees to move the proceeds back to the U.S. This option presented the highest risk since it could have resulted in higher trading costs to the Plan with uncertainty related to trade settlement and execution, as well as requiring additional trades to convert any shares of Stock of Holdings acquired into HSBC ADS.</p>
<b><u>Foreign Exchange Rates</u></b>	<p><b><u>Risk: High</u></b> Although certain foreign exchange rate risks were involved in all three options, this option presented the highest risk to the Plan since foreign exchange rate fluctuations could have prevented the Plan's ability to exercise all of the ADS Rights. The Plan would have needed to sell a portion of the ADS</p>	<p><b><u>Risk: Low</u></b> BNY Mellon would need to convert the proceeds from the sale of the ADS Rights (technically, the Shares Rights underlying the ADS Rights) into U.S. dollars at the prevailing rate. The risk is low since the same conversion is needed to convert the proceeds under any of the three options into U.S. dollars.</p>	<p><b><u>Risk: Moderate</u></b> The extent of this risk varied depending on whether BANA decided to sell all of the Share Rights or sell a portion of the Share Rights to raise sufficient proceeds to execute the remaining Share Rights. The risk would have been similar to Option (A) had BANA</p>



	Rights (technically, the Shares Rights underlying the ADS Rights) in order to generate the funds needed to exercise the remaining ADS Rights. If the funds generated were insufficient due to a change in foreign exchange rates, the Plan likely would not have had time to sell additional ADS Rights in order to generate the additional funds needed to exercise the remaining ADS Rights.		decided to sell some of the Share Rights to exercise the remaining Share Rights. The risk would have been similar too or less than that in Option (B) had BANA decided to sell all of the Share Rights, as BANA would have controlled the timing of the sale.
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Accordingly, it is represented that for the reasons cited above, on March 23, 2009, BANA chose Option (B), above, and instructed Vanguard, as Trustee, in turn to instruct BNY Mellon, as depository agent, to liquidate the entire position of ADS Rights<sup>5</sup> from the Plan and to convert the proceeds<sup>6</sup> received from such sale in Pounds Sterling into U.S. dollars.<sup>7</sup> It is

<sup>5</sup> The applicant has not requested, nor is the Department, herein, providing any relief from section 406 of the Act with respect to decision to liquidate the Plan's entire position of ADS Rights.

<sup>6</sup> The applicant has not requested, nor is the Department, herein, providing any relief from section 406 of the Act with respect to the foreign exchange transaction in connection with the conversion from Pounds Sterling into U.S. dollars.

<sup>7</sup> The responsible plan fiduciary must determine, consistent with its responsibilities under section 404 of the Act, whether the Plan suffered any losses with respect to the liquidation of the ADS Rights and the conversion of the proceeds into US Dollars by BNY Mellon and takes appropriate action in light of the potential magnitude of the recovery and the risks and costs of pursuing legal action on behalf of the Plan.

represented that the Share Rights underlying the Plan's ADS Rights that BNY Mellon was directed to sell were aggregated by BNY Mellon with the Share Rights underlying other ADS Rights that BNY Mellon was directed to sell by other holders of ADS Rights. Based on information provided by BNY Mellon, the aggregated Share Rights underlying the ADS Rights were sold throughout the period beginning on March 27, 2009 and ending on April 3, 2009, at an average price of 147 pence, after expenses.<sup>8</sup> Accordingly, it is represented that the Plan received total net proceeds of \$7,291,066.81, on April 7, 2009, from the liquidation of the Plan's ADS Rights. It is represented that the proceeds represented less than .5% of the fair market value of the total assets of the Plan determined, as of September 30, 2009.

It is represented that the proceeds from the transactions were distributed, after accounting for the ADS depository's fees paid to BNY Mellon of up to \$0.02 per each share of HSBC ADS and expenses, pro rata to the shareholders of the ADS Rights,

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<sup>8</sup> It is represented that on March 27, 2009, the Share Rights traded in a range of 132 pence to 162 pence. On the same date, the HSBC ADS traded in a range of \$28.26 to \$29.02. At the close of trading on March 27, 2009, the Share Rights closed on the LSE at 147 pence, and the HSBC ADS closed on the NYSE at \$28.47.

including the Plan.<sup>9</sup>

With regard to expenses, in addition to the ADS depository fees, the Plan paid foreign exchange charges incurred by BNY Mellon with respect to the conversion of Pounds Sterling to U.S. dollars. It is represented that on March 27, 2009, 1.4554 was the foreign exchange rate for converting Pounds Sterling to U. S. dollars. It is represented that this rate was obtained from OANDA<sup>10</sup> Corporation and reflects the average rate for converting Pounds Sterling into U.S. dollars on March 27, 2009. The foreign exchange charges were allocated pro rata to all holders of ADS Rights who directed BNY Mellon to sell the Share Rights underlying the ADS Rights, and the Plan's pro rata share of such foreign exchange charges were deducted from the final amount that the Plan received from the sale of such rights. It is represented that BANA does not have information as to the amount

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<sup>9</sup> The applicant has not requested, nor is the Department, herein, providing any relief from section 406 of the Act for the receipt of depository's fees by BNY Mellon in connection with the sale of the Share Rights underlying the ADS Rights.

<sup>10</sup> OANDA uses innovative computer and financial technology to provide Internet-based forex trading and currency information services to everyone, from individuals to large corporations, from portfolio managers to financial institutions. OANDA is a market maker and a source for currency data. It has access to one of the world's largest historical, high frequency, filtered currency databases.

of such charges.<sup>11</sup> Further, the Prospectus also indicated that holders of ADS Rights who directed BNY Mellon to sell the Share Rights underlying their ADS Rights would have to pay any applicable taxes, and any other applicable fees and expenses of BNY Mellon, as provided under the deposit agreement,<sup>12</sup> with such fees and expenses allocated pro rata to all holders of ADS Rights who directed BNY Mellon to sell the Share Rights underlying their ADS Rights. It is represented that BANA does not have information on whether any such fees or expenses were applicable to the Share Rights underlying the ADS Rights sold by BNY Mellon on behalf of the Plan.

16. The Employer has requested an exemption with respect to the transactions which are the subject of this proposed exemption. In this regard, relief has been requested: (a) for the acquisition of the ADS Rights by the Plan in connection with the Offering by Holdings, and (b) for the holding of the ADS Rights by the Plan during the subscription period of the

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<sup>11</sup> The applicant has not requested, nor is the Department providing any relief for the receipt of fees by BNY Mellon with respect to the foreign exchange transaction in connection with the conversion from Pounds Sterling into U.S. dollars.

<sup>12</sup> The applicant has not requested, nor is the Department, herein, providing any relief from section 406 of the Act with respect to receipt of any other applicable fees and expenses by BNY Mellon, as provided under the deposit agreement.

Offering. It is represented that the ADS Rights acquired by the Plan satisfy the definition of "employer securities," pursuant to section 407(d)(1) of the Act, but do not meet the definition of "qualifying employer securities," as set forth in section 407(d)(5) of the Act. Accordingly, the subject transactions constitute an acquisition and holding on behalf of a plan, of an employer security in violation of section 407(a) of the Act, for which the applicant has requested relief from sections 406(a)(1)(A) and 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A). The subject transactions also raise conflict of interest issues by fiduciaries of the Plan for which relief from the prohibitions of 406(b)(1) and 406(b)(2) of the Act is needed.

17. It is represented that the subject transactions have already been consummated. In this regard, the Plan acquired the ADS Rights pursuant to the Offering on March 20, 2009, and held such rights pending the liquidation of such rights. It is represented that there was insufficient time between the date the Plan acquired the ADS Rights and the date such rights expired, to apply for and be granted an exemption. Accordingly, the Employer is seeking a retroactive exemption to be granted, effective as of March 2, 2009, the date that Holdings announced the Offering.

18. The applicant represents that the proposed exemption is feasible. In this regard, it is represented that the subject

transactions are customary for the industry involved, as evidenced by the fact that the Department has granted individual administrative exemptions under similar circumstances. Further, the Employer bore the costs of the application for exemption, and the cost of the fee payable to BANA, and will bear the cost of notifying interested persons of the publication of the proposed exemption.

19. The applicant represents that the transactions which are the subject of this proposed exemption are in the interest of the Plan, because if the Plan had not participated in the Offering, those participants and beneficiaries whose accounts were invested in shares of HSBC ADS on the Record Date would not have received the benefit receive by all other shareholders of the Stock of Holdings and shareholders of HSBC ADS.

20. The applicant represents that the proposed exemption provides sufficient safeguards for the protection of the Plan and its participants and beneficiaries. In this regard, the interests of the participants and beneficiaries of the Plan were independently represented at all times during the subject transactions by BANA. Further, BANA concluded that the most prudent course of action that the Plan could take with respect to the disposition of the ADS Rights and the course of action that was in the best interest of the affected participants and

beneficiaries was to liquidate the ADS Rights under Option (B). Further, it is represented that the report prepared by BANA confirms that the subject transactions were administrative feasible, in the interest of, and protective of the rights of the Plan and its participants and beneficiaries.

21. In summary, the applicant represents that the subject transactions satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The receipt by the Plan of the ADS Rights occurred in connection with the Offering made available by Holdings on the same terms to all shareholders of the HSBC ADS, including the Plan;

(b) The acquisition of the ADS Rights by the Plan resulted from an independent act of Holdings as a corporate entity, and all holders of the ADS Rights, including the Plan, were treated in the same manner with respect to the acquisition of such rights;

(c) All shareholders of HSBC ADS, such as the Plan, received the same proportionate number of ADS Rights based on the number of shares of HSBC ADS held; and

(d) All decisions regarding the disposition of the ADS Rights made on behalf of the Plan were made by BANA, acting as the I/F.

## NOTICE TO INTERESTED PERSONS

The persons who may be interested in the publication in the FEDERAL REGISTER of the Notice of Proposed Exemption (the Notice) include participants and beneficiaries of the Plan whose accounts in the Plan held Stock.

It is represented that each of these classes of interested persons will be notified of the publication of the Notice by first class mail, within fifteen (15) days of publication of the Notice in the FEDERAL REGISTER. Such mailing will contain a copy of the Notice, as it appears in the FEDERAL REGISTER on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise all interested persons of their right to comment and to request a hearing.

All written comments and/or requests for a hearing must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the FEDERAL REGISTER.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693-8540. (This is not a toll-free number.)



Sammons Enterprises, Inc. Employee Stock Ownership ESOP

(the ESOP)

Located in Dallas, Texas

Application No. D-11679]

#### PROPOSED EXEMPTION

The Department of Labor (the Department) is considering granting an exemption under the authority of section 408(a) of the Act in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) and (D), 406(b)(1), 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), (D) and (E) of the Code, shall not apply to the personal holding company consent dividend election (the Consent) with respect to Sammons Enterprises, Inc. (Sammons), by the trustee of the ESOP, provided that the following conditions are satisfied:

(a) The trustee of the ESOP is an independent, qualified fiduciary (the I/F), acting on behalf of the ESOP, which determines prior to entering into the transaction that the transaction is feasible, in the interest of, and protective of the ESOP and the participants and beneficiaries of the ESOP;

(b) Before the ESOP enters into the proposed transaction, the I/F reviews the transaction, and determines whether or not to approve the transaction, in accordance with the fiduciary provisions of the Act;

(c) The I/F monitors compliance with the terms and conditions of this proposed exemption, as described herein, and ensures that such terms and conditions are at all times satisfied;

(d) Sammons provides to the I/F, in a timely fashion, all information reasonably requested by the I/F to assist it in making its decision whether or not to approve the transaction;

(e) The consent dividend will represent no more than two percent (2%) of the ESOP's assets in any taxable year within the timeframe of the exemption proposed herein;

(f) Shares of Sammons stock are held in an ESOP suspense account, and are allocated each year to each eligible ESOP participant at the maximum level permitted under the Code;

(g) All of the requirements of section 565 of the Code are met with respect to the Consent; and

(h) All shareholders of Sammons are requested to consent to the dividend in the manner prescribed under section 565 of the Code.

TEMPORARY NATURE OF EXEMPTION: This exemption, if granted, will expire at the earlier of (i) the first day of the first fiscal year of Sammons next following the fiscal year in which falls the fifth anniversary of the date of grant of the exemption; and (ii) the first day upon which the ESOP fails to own at least 99% of the issued and outstanding shares of Sammons.

#### SUMMARY OF FACTS AND REPRESENTATIONS

1. Sammons Enterprises, Inc. (Sammons) is a multi-faceted, global holding corporation headquartered in Dallas, Texas that owns and operates businesses and manages an investment portfolio across a diverse range of industries. Sammons was founded by Charles A. Sammons in 1962. Its roots originate in Dallas, Texas, where Mr. Sammons began Reserve Life Insurance Company in 1938, providing the foundation for what has grown into Sammons. Beginning in the early 1950's, Mr. Sammons began to diversify Sammons' operations, purchasing interests in the communications, industrial products distribution, insurance, travel and hospitality industries. Sammons has now concentrated its investments into three sectors - life insurance/annuities, equipment distribution, and hospitality and real estate.

2. The Sammons Enterprises, Inc. Employee Stock Ownership ESOP (the ESOP) was originally established in 1978 and, prior to

2010, had acquired approximately 4% of Sammons' outstanding shares. Prior to his death in 1988, almost all of Sammons' outstanding shares, other than those owned by the ESOP, were owned by Charles A. Sammons. At the time of his death, Mr. Sammons' shares passed to a charitable remainder trust with his widow Elaine D. Simmons as lifetime beneficiary. In 1997, Congress amended the Internal Revenue Code of 1986, as amended (the Code) to permit an ESOP and its related trust to be a beneficiary of a charitable remainder trust. This change in law allowed the ESOP to be named remainder beneficiary of the charitable trust established by Mr. Sammons. In January 2010, following the death of Mrs. Sammons, all of the Sammons shares held in the charitable remainder trust were transferred to the ESOP. The ESOP made no payment for the shares received from the charitable remainder trust.

3. As a result of the transfer to the ESOP, it presently owns 99.997% of Sammons' outstanding shares. The remaining 258 shares (representing .003% of Sammons' outstanding shares) are owned by 12 individuals who are former Sammons employees and ESOP participants who received their shares as part of their ESOP distributions.

4. As of December 31, 2010, the Sammons stock was valued by the ESOP's independent appraiser at \$512 per share. The

aggregate fair market value of the ESOP's Sammons share holdings is \$4,099,394,048.<sup>13</sup> The ESOP had approximately 1,064 participants as of the end of the 2010 plan year.

5. Although the ESOP is not leveraged, under a special structure established pursuant to section 664(g) of the Code, the shares acquired from the charitable remainder trust are held in an ESOP suspense account, and are currently allocated each year to each eligible ESOP participant at the maximum level permitted under Code section 664(g)(7), *i.e.*, 25% of compensation (up to a maximum allocation of \$45,000).<sup>14</sup>

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<sup>13</sup> The applicant represents that, consistent with the requirements of the Act, including definitions of "adequate consideration and "current value" found in Act sections 3(18) and 3(26), the value of the Sammons stock held by the ESOP is determined in good faith by the Plan's trustee, GreatBanc Trust Company, based upon valuations by the Plan's independent appraiser as required under Code section 401(a)(28)(C), and taking into account those factors determined to be relevant under Revenue Procedure 59-60 and the Department's Proposed Regulation section 2510.3-18. The applicant represents that, consistent with its fiduciary responsibilities under ERISA, it will, as the ESOP's independent trustee, continue to value the Sammons stock held by the ESOP in good faith based upon valuations performed by a qualified independent appraiser engaged by the Plan to ensure that all transactions are conducted at fair market value. The applicant further represents that Sammons regularly evaluates the performance of the qualified independent fiduciary under the terms of the ESOP Trust, and, as part of that evaluation, Sammons also regularly evaluates the performance of the ESOP's independent appraiser which is engaged on behalf of the ESOP by the qualified independent fiduciary.

<sup>14</sup> The Code provides for a maximum allocation of \$30,000, adjusted annually for cost-of-living. For 2011, the maximum allocation is \$45,000.

6. The trustee of the ESOP trust is the applicant, GreatBanc Trust Company (GreatBanc). GreatBanc is nationally recognized as a highly skilled independent ERISA trustee specializing in ESOPs and ESOP transactions. GreatBanc's management team and staff have an average of over 20 years' experience in the financial services industry, and include legal and regulatory experts and investment management professionals who hold the Chartered Financial Analyst designation. GreatBanc serves as trustee or independent fiduciary for over 200 ESOPs and other qualified plans sponsored by both public and private companies, and has fiduciary responsibility for over \$18 billion in plan assets. Fees received by GreatBanc for fiduciary services to the Sammons ESOP currently represent approximately 3% of GreatBanc's annual revenue.

7. As a result of its closely held nature and the types of revenue generated by certain of its lines of business, Sammons is potentially subject each year to a set of federal tax rules referred to as "personal holding company taxes" (PHCT). Although Sammons is a subchapter "C" corporation and pays its full share of corporate income taxes, the applicant represents that these PHCT rules can subject Sammons to a significant federal tax burden over and above that applied to most other companies. Given the ESOP's almost complete ownership of Sammons, these

additional taxes would operate to the direct detriment of the ESOP and its participants.

8. The applicant represents that the pertinent sections of the Code were first adopted in 1934 at a time when federal corporate tax rules were substantially lower than individual tax rates. This rate differential prompted wealthy individuals to place their passive investments in controlled corporations, with the idea that ongoing investment earnings could grow and be reinvested in substantially greater amounts than if held directly by the individual investor. The PHCT rules seek to thwart this strategy by imposing an additional tax, at the highest individual tax rate, on the corporation's "undistributed personal holding company income." By thus equalizing corporate and individual tax rates, the incentive to place the individual's investment portfolio in a corporate structure is removed. Currently, the PHCT rate is 15%, which equates to the top individual rate on capital gains and qualifying dividends.<sup>15</sup> Because this special tax regime is designed to preclude tax arbitrage by the controlled corporations of individual investors, it only applies if 50% or more of a company's stock is owned by five or fewer individuals. For this purpose, the ESOP is considered to be a

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<sup>15</sup> Over the years since its enactment, the PHCT rate has ranged as high as 85%.

single individual, notwithstanding its 1,604 participants, and thus the 50% ownership threshold is exceeded.

9. According to the applicant, the PHCT only applies if the corporation earns over 60% of what is referred to as its "adjusted ordinary gross income" from sources such as interest, dividends, rents and royalties. Although these particular forms of income may be suggestive of purely passive investments, they are defined under the Code in such a way that income from actively conducted trades or businesses can fall within their purview. For example, one Sammons subsidiary actively rents and sells industrial equipment to businesses in various states. The subsidiary employs approximately 450 workers who service and maintain this equipment. Although this business is an active, operating venture, it generates rental income which is subject to being characterized as personal holding company income. According to the applicant, these tax rules not only potentially subject Sammons, and, indirectly, the ESOP, to a tax burden which has nothing to do with the original purpose for which the tax rules were enacted, they also distort the ways in which Sammons must operate its businesses, to the detriment of the ESOP and its participants.

10. Sammons' business planning is thus significantly influenced by the potential application of the PHCT, and



otherwise desirable business activities are avoided or structured in a less efficient manner so that Sammons may maintain its tax obligations at the same level as that applicable to its competitors.

11. Because the PHCT is applied to the company's *undistributed* personal holding company income, it is possible to avoid the tax by paying to the company's shareholders dividends equivalent to the amount of the company's personal holding company taxable income. The applicant represents that while the payment of such a dividend would resolve the PHCT problem, it is not an attractive alternative for (a) investors who would prefer to have the dividend amount remain invested in the company in order to fund future growth, or (b) companies that lack the liquidity to pay the required dividend.

12. In response to these concerns, section 565 of the Code allows companies to pay what is called a "consent dividend." In the case of a consent dividend, the shareholder agrees to recognize current income on a "deemed dividend" that is not actually distributed to the shareholder in cash. Rather, the shareholder is treated, for tax purposes, as if it had received the dividend (on which it will be taxed), and then made a capital contribution to the company in equivalent amount. The amount of the consent dividend remains within the company to be utilized in

furtherance of the company's objectives and shareholders' interests.

13. The applicant has requested an exemption to permit the Plan, based upon the discretionary determination of GreatBanc as trustee and independent fiduciary, to utilize the consent dividend process available to shareholders under Code section 565. If, in a year in which Sammons would otherwise be subject to the PHCT, the ESOP were able to elect to "receive" a consent dividend in an amount sufficient to represent a complete distribution of Sammons' personal holding company income, Sammons would be able to achieve significant tax savings at virtually no cost to the ESOP. This is because the ESOP, being a tax-exempt entity, would have no tax liability as a result of "receiving" the consent dividend. The applicant states that this represents a legitimate and appropriate use of the consent dividend process under Code section 565, and is entirely consistent with the language and purpose of that Code section, as well as the provisions of sections 401(a) and 501(a) of the Code.

14. For example, if a \$5 million distribution were required in order to avoid imposition of the PHCT upon Sammons, a \$5 million consent dividend would save Sammons, at the current

surtax rates, \$750,000. Virtually<sup>16</sup> the entire amount of this savings would inure to the benefit of the ESOP and its participants (because the ESOP presently owns 99.997% of the outstanding shares of Sammons). Importantly, this approach would also allow the consent dividend amount (and not just the tax savings) to continue to build share values within a successful and growing business.

15. The applicant represents that the ESOP's participation in the consent dividend process will permit Sammons to manage its businesses and conduct long-range business planning without the need to structure its operations, or to forego potentially profitable opportunities and initiatives, so as to avoid the generation of personal holding company income. This will create greater opportunities for corporate growth and the enhancement of shareholder value, which will inure directly to the benefit of the ESOP and its participants and beneficiaries. The ESOP will incur no economic detriment by participating in the consent dividend process, because Sammons does not otherwise pay

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<sup>16</sup> The use of the term "virtually" both here and in representation 13, above, acknowledges the fact that the non-ESOP shareholders of Sammons might elect not to participate in the consent dividend process. These individuals currently hold .003% of Sammons' outstanding shares, and would receive a de minimis dividend payment if they elect not to participate in the consent dividend process.

dividends.<sup>17</sup> Thus, the ESOP would not be foregoing the option of receiving current cash dividends by consenting to receive the undistributed personal holding company income as a deemed dividend. Rather, the proposed transaction would permit Sammons to deploy its capital on a tax efficient basis in accordance with the provisions of the Code. Nevertheless, if GreatBanc determines in any year that it is not prudent and in the best interests of the ESOP and its participants and beneficiaries to participate in the consent dividend process, the Plan will be under no obligation to provide its consent. In such case, it will be up to Sammons' board and management to determine how best to address Sammons' tax position and obligations.

16. In summary, the applicant represents that the subject transaction satisfies the criteria contained in section 408(a) of the Act because: (a) The trustee of the ESOP, GreatBanc, is an independent, qualified fiduciary, acting on behalf of the ESOP, which determines prior to entering into the transaction that the transaction is feasible, in the interest of, and protective of the ESOP and the participants and beneficiaries of the ESOP; (b) Before the ESOP enters into the proposed

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<sup>17</sup> Sammons paid a relatively small dividend while Mrs. Sammons was alive. No dividends have been paid since her death, and Sammons does not anticipate paying dividends in the future.

transaction, GreatBanc will review the transaction, and determine whether or not to approve the transaction, in accordance with the fiduciary provisions of the Act; (c) GreatBanc will monitor compliance with the terms and conditions of this proposed exemption, as described herein, and ensure that such terms and conditions are at all times satisfied; (d) Sammons will provide to GreatBanc, in a timely fashion, all information reasonably requested by the GreatBanc to assist it in making its decision to consent (the Consent) to treat as a dividend from Sammons the amount specified in the Consent; (e) The consent dividend will represent no more than two percent (2%) of the ESOP's assets in any taxable year within the timeframe of the exemption proposed herein; (f) Shares of Sammons stock are held in an ESOP suspense account, and are allocated each year to each eligible ESOP participant at the maximum level permitted under the Code; (g) The dividend meets all of the requirements of section 565 of the Code to be treated as a consent dividend; (h) All shareholders of Sammons are requested to Consent to the dividend in the manner prescribed under section 565 of the Code; and (i) Because the ESOP owns 99.997% of Sammons' outstanding stock, the tax savings realized by Sammons from the subject transaction would inure directly to the benefit of the ESOP and its participants and beneficiaries.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the  
Department, telephone (202) 693-8546. (This is not a toll-free  
number.)

First Federal Bancshares of Arkansas, Inc. Employees'  
Savings and Profit Sharing Plan (the Plan)  
Located in Harrison, Arkansas  
[Application No. D-11683]

#### 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).

#### Section I: Transactions

If the proposed exemption is granted, effective May 10, 2011, the restrictions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and 4975(c)(1)(E) of the Code,<sup>18</sup> shall not apply:

(1) to the acquisition of certain rights (the Rights) by the

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<sup>18</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Plan in connection with an offering (the Offering) of shares of the common stock (the Stock) of First Federal Bancshares of Arkansas, Inc. (Bancshares) by Bancshares, a party in interest with respect to the Plan, and

(2) to the holding of the Rights received by the Plan during the subscription period of the Offering; provided that the conditions as set forth in section II of this proposed exemption were satisfied for the duration of the acquisition and holding.

#### Section II: Conditions

The relief provided in this exemption is conditioned upon adherence to the material facts and representations described, herein, and as set forth in the application file and upon compliance with the conditions, as set forth in this proposed exemption.

(1) The receipt of the Rights by the Plan occurred in connection with the Offering and was made available by Bancshares on the same terms to all shareholders of the Stock of Bancshares;

(2) The acquisition of the Rights by the Plan resulted from an independent act of Bancshares, as a corporate entity, and all holders of the Rights, including the Plan, were treated in the same manner with respect to the acquisition of such Rights;

(3) Each shareholder of the Stock, including the Plan,



received the same proportionate number of Rights based on the number of shares of Stock of Bancshares held by such shareholder;

(4) The Rights were acquired pursuant to provisions under the Plan for individually directed investments of the accounts of the individual participants (the Invested Participants), all or a portion of whose accounts in the Plan hold the Stock;

(5) The decisions with regard to the holding and disposition of the Rights by the Plan were made by each of the Invested Participants in accordance with the provisions under the Plan for individually-directed accounts; and

(6) No brokerage fees, no commissions, no subscription fees, and no other charges were paid by the Plan with respect to the Offering, and no brokerage fees, no commissions, and no other monies were paid by the Plan to any broker in connection with the exercise of the Rights.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective, May 10, 2011, the commencement date of the Offering.

#### SUMMARY OF FACTS AND REPRESENTATIONS

1. The Plan is defined contribution profit sharing plan

adopted effective June 1, 2006.<sup>19</sup> The Plan provides for a cash and deferred arrangement, i.e. a 401(k) plan. The Plan is a participant directed account plan designed and operated to comply with the requirements of section 404(c) of the Act. The fair market value of the total assets of the Plan, as of May 10, 2011, was \$3.579 million.

2. Bancshares is the sponsor of the Plan for its subsidiaries. Bancshares is also the administrator for the Plan and the fiduciary responsible for Plan matters. As a fiduciary with respect to the Plan, Bancshares is a party in interest to the Plan, pursuant to section 3(14)(A) of the Act.

3. Since June 5, 2009, Reliance Trust Company (RTC) has served as the directed trustee and custodian for the Plan. As directed trustee and custodian, RTC is a party in interest to the Plan, pursuant to section 3(14)(A) of the Act. As service providers to the Plan, both Bancshares and RTC are parties in interest to the Plan, pursuant to section 3(14)(B) of the Act.

4. The Plan offers to participants a wide variety of institutionally managed collective trust index funds from which the Plan participants may choose to invest. One of the

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<sup>19</sup> Bancshares also maintained a qualified Employee Stock Ownership Plan which was merged into the Plan, effective June 1, 2006.

investment options under the Plan is the First Federal Employer Stock Fund (the Stock Fund). As of May 10, 2011, the Plan had approximately 231 participants of which 180 participant held shares in the Stock Fund.

5. The Stock Fund allows participants in the Plan to invest in the Stock of Bancshares. The Stock is a "qualifying employer security," as defined under section 407(d)(5) of the Act and 4975(e) of the Code. The Stock (\$0.01 par value) is listed for quotation on the NASDAQ Global Select Market (NASDAQ) under the symbol, FFBH. It is represented that the Stock is the same class of shares available to other investors.

Investment in the Stock Fund is entirely voluntary. Plan participants may invest in the Stock Fund up to 25 percent (25%) of any contributions remitted to the Plan.

Features of the Stock Fund include:

(a) Neither Bancshares nor its subsidiaries contribute any capital Stock to the Plan. Instead all employer contributions are made in cash, and the Stock is acquired for the Plan only as a result of participant-directed investment decisions;

(b) Upon direction from a Plan participant to invest in the Stock Fund, RTC, acting as directed trustee, purchases the Stock on the open market at the prevailing market price;

(c) Bancshares, as the administrator of the Plan, has the

responsibility of coordinating with RTC, regarding the administrative procedures to implement participant investment decisions regarding the Stock, but otherwise has no authority with respect to the Stock Fund;

(d) Upon the settlement of a trade implementing a participant's direction to invest in the Stock Fund, RTC becomes the shareholder of record and the Plan participant becomes the beneficial owner; and

(e) The Plan provides that participants are entitled to direct Bancshares, as the administrator of the Plan, regarding the voting of shares of the Stock held in their accounts, and that RTC shall follow such directions.

6. The application was filed on behalf of Bancshares, a unitary savings and loan holding company established in January 1996. Bancshares is a Texas corporation.<sup>20</sup> However, the shareholders approved the reincorporation of Bancshares from Texas to Arkansas during the annual meeting of shareholders held on June 22, 2011. Bancshares is in the process of making the requisite filings to complete the reincorporation. Bancshares has its principal place of business in Harrison, Arkansas.

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<sup>20</sup> The shareholders have approved the reincorporation of Bancshares from Texas to Arkansas during the annual meeting of shareholders held on June 22, 2011. Bancshares is in the process of making the requisite filings to complete the reincorporation.

Bancshares does not employ any persons other than officers of First Federal Bank (the Bank), and Bancshares uses the support staff of the Bank from time to time. Substantially all of the activities of Bancshares are conducted through the Bank. As of March 31, 2011, Bancshares had \$577.7 million in total assets, \$542.9 million in total liabilities and \$34.8 million in stockholders' equity.

7. The Bank is a wholly-owned subsidiary of Bancshares. Bancshares, as the parent of the Bank, is a party in interest with respect to the Plan, pursuant to section 3(14)(E) of the Act. The Bank is a community bank and a federally chartered saving and loan association formed in 1934 with a main office and full service branches in North central and Northwest Arkansas. As of March 31, 2011, the Bank had \$577.7 million in assets. The Bank, as an employer any of whose employees are covered by the plan, is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act.

8. As part of its recapitalization plan, Bancshares and the Bank, on January 26, 2011, entered into an investment agreement with Bear State Financial Holdings, LLC (Bear State), a private equity investment group. The investment agreement set forth the terms and conditions of the recapitalization plan which consisted of the following:

(a) As a condition of the investment agreement with Bear State, Bancshares agreed to commence the Offering which is the subject of this proposed exemption, whereby shareholders of record would receive the Rights. In a press release, dated January 28, 2011, Bancshares, as a corporate entity, announced the Offering, and on the same date, in connection with the Offering, announced the issuance of up to 2,908,071 shares of Stock;

(b) On May 3, 2011, Bear State purchased from the United States Department of the Treasury (the Treasury) for \$6 million aggregate consideration: (i) 16,500 shares of Bancshares' Fixed Rate Cumulative Perpetual Preferred Stock, Series A (the Preferred Stock), including accrued but unpaid dividends thereon; and (ii) a related warrant (the TARP Warrant), dated March 6, 2009, which provided for the purchase of 321,847 shares of the Stock at an exercise price of \$7.69 per share. Both the TARP Warrant and the Preferred Stock were previously issued to the Treasury through the Troubled Asset Relief Program—Capital Purchase Program;

(c) Bancshares amended its Articles of Incorporation to cause a one-for-five stock split (the Reverse Stock Split) that occurred on May 3, 2011, in which the outstanding shares of the Stock decreased from 4,846,785 to approximately 969,357;

(d) On May 3, 2011, Bancshares sold to Bear State:

(i) 15,425,262 post-Reverse Stock Split shares (the First Closing Shares) of the Stock at \$3.00 per share in a private placement, and (ii) a warrant (the Investor Warrant) which provided for the purchase of 2 million post-Reverse Stock Split shares of the Stock at an exercise price of \$3.00 per share;

(e) On May 3, 2011, Bear State paid Bancshares aggregate consideration of approximately \$46.3 million for the First Closing Shares and the Investor Warrant, consisting of:

(i) \$40.3 million in cash, and (ii) Bear State's surrender of the Preferred Stock and the TARP Warrant to Bancshares for a \$6 million credit against the purchase price of the First Closing Shares; and

(f) Pursuant to the investment agreement, Bear State agreed to backstop the Offering by purchasing in a second private placement for a purchase price of \$3.00 per share, any Stock not subscribed for in the Offering, subject to an overall limitation on Bear State's ownership of 94.9 percent (94.9%) of the Stock.<sup>21</sup> In this regard, the backstop commitment would ensure that Bancshares would raise net proceeds after expenses of

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<sup>21</sup> It is represented that because the Offering was fully subscribed, Bear State was not required to purchase any shares of Stock in a second private placement to backstop the Offering.

approximately \$8.5 million through the Offering. It is represented that Bancshares used the net proceeds from the Offering for general corporate purposes, including capital contributions to the Bank.

8. In addition to providing Bancshares with an opportunity to raise equity capital, the Offering also provided existing shareholders with the opportunity to purchase the Stock at the same price per share paid by Bear State for the 15,425,262 post-Reverse Split shares of Stock Bear State acquired on May 3, 2011.

9. The total number of shares of Stock outstanding, as of the commencement date of the Offering on May 10, 2011, was 16,394,619. At the close of business on May 10, 2011, the Stock was trading on the NASDAQ at \$9.07 per share. After giving effect to the 2,908,071 shares of Stock issued in connection with the Offering, the issued and outstanding shares of Stock totaled 19,302,690. The closing price of the Stock on the ending date of the Offering on June 21, 2011, was \$7.77.

10. Under the terms of the Offering, all shareholders of the Stock, including the Invested Participants in the Plan, automatically received at no charge the Rights to purchase, through the exercise of such Rights, the Stock being issued by Bancshares in connection with the Offering. All shareholders of



the Stock, including the Invested Participants, held the Rights until such Rights were either exercised, or such Rights expired. With respect to the Rights, under the terms of the Offering, one (1) Right was issued for every share of the Stock held by each shareholder, including the Invested Participants, on March 23, 2011, 5:00 PM Eastern time (the Record Date), as adjusted to take account of the Reverse Stock Split that occurred on May 3, 2011. All Rights were rounded down to the nearest whole number for each shareholder, including the Invested Participants.

11. It is represented that the Rights were not listed, traded or quoted on NASDAQ or on any other stock exchange or trading market. Further, the terms of the Offering stipulated that the Rights could not be sold, assigned or transferred.

12. The Rights could only be exercised in whole numbers. Upon exercise, each of the Rights permitted a shareholder of the Stock, including the Invested Participants, to purchase three (3) additional shares of Stock at a subscription price of \$3.00 per share. A shareholder, including each Invested Participant, had the right to choose to exercise some, all, or none of his Rights. The exercise of any of the Rights was irrevocable.

13. It is represented that to the extent shareholders did not exercise in full all of their Rights, each shareholder who

did timely and fully exercise his basic Rights would have an oversubscription privilege to subscribe for a portion of the Stock in the Offering, subject to availability and allocation. However, a shareholder's ability to purchase Stock in the Offering (though the exercise of his basic Rights and any oversubscription privilege) was subject to an overall beneficial ownership limitation of 4.9 percent (4.9%) of Bancshares outstanding Stock. If oversubscription requests exceed the number of shares available, Bancshares allocated the available shares pro rata among the holders of Rights who exercised the oversubscription privilege.

14. The Rights could be exercised beginning May 10, 2011, the date of the issuance of the prospectus describing the Offering. The Offering was to have closed with respect to the exercise of the Rights on June 7, 2011, but due to delays in the delivery of subscription materials, the closing of the Offering was extended to June 21, 2011. Pursuant to the terms of the Offering all unexercised Rights expired and became worthless after the closing of the Offering.

15. It is represented that on May 10, 2011, the commencement date of the Offering, the Plan was the record owner of 106,964 shares of Stock which were allocated to the individual accounts of 180 Invested Participants. The aggregate fair market

value of the assets of the Plan invested in shares of the Stock, on May 10, 2011, based on a closing price of such Stock of \$9.07 on NASDAQ on that date was \$970,167. As of May 10, 2011, the approximate percentage of the fair market value of the total assets of the Plan invested in the Stock was 27 percent (27%). As of the same date, 106,964 shares of Stock constituted approximately .65 percent (.65%) of the 16,394,619 shares of Stock outstanding.

16. Based on the ratio of one (1) Right for each share of Stock held, the Plan acquired 106,964 Rights, as a result of the Offering. It is represented that the Plan subscribed for 276,579 shares of Stock in the exercise of the basic Rights and the oversubscription privilege. Of the Rights received by the Plan on behalf of accounts of the Invested Participants all Rights were either exercised or expired.

17. The Plan and RTC were notified of the issuance of the Rights in a press release from Bancshares, dated May 10, 2011. Enclosed with a form letter mailed, on May 10, 2011, to each Invested Participant in the Plan Bancshares also provided a copy of the prospectus which described the Offering, a document providing frequently asked questions and answers regarding the Offering, an election form for Invested Participants in the Plan, a return envelope addressed to Bancshares, and a statement

indicating the number of shares of Stock each Invested Participant held, as of the Record Date.

18. In order to exercise some or all of the Rights, an Invested Participant had to complete an election form and to submit such election form to Bancshares by the close of business on the fifth (5<sup>th</sup>) business day (June 14, 2011 at 5 PM EST), prior to the expiration of the Offering on June 21, 2011.<sup>22</sup> Each Invested Participant who submitted an election form was required to indicate on such election form a sufficient amount of current investments in such Invested Participant's account in the Plan to be liquidated in order to generate the full subscription price in cash based on the number of basic Rights and any oversubscription privileges to be exercised.<sup>23</sup> It is represented that the

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<sup>22</sup> It is represented that the extra five (5) business days were required to provide RTC, the Registrar and Transfer Company (the Subscription Agent), the Plan's record keeper, the custodian for the First Federal Bancshares of Arkansas, Inc. Rights Fund (the Rights Fund), and the clearing agent for the Offering sufficient time to process all such elections by the Invested Participants to exercise their Rights, tabulate and confirm the results, liquidate each such Invested Participant's funds, confirm the orders and the availability of such funds, and remit payment to purchase the shares.

<sup>23</sup> It is represented that if the value of investments liquidated did not equal or exceed the purchase price of the Stock that an Invested Participant had elected to purchase in the Offering, none of the Rights held in such Invested Participant's account

selected investments were liquidated consistent with such Invested Participant's direction on the election form and transferred to the Rights Fund at RTC which was established in anticipation of the Offering. RTC placed the order to purchase the shares with the Subscription Agent. It is represented that the Rights Fund was liquidated on June 21, 2011, and cash equal to the necessary subscription payment was transferred to the Subscription Agent. Following the closing of the Offering, the acquired shares of Stock were then credited to the applicable Invested Participant's account in the Plan. In the event the Invested Participants over-subscribed for more shares of Stock than were available under the Offering, the money resulting from the liquidation of investments to buy those oversubscribed shares was re-deposited into the Plan based on the Investment Participant's investment allocation election.

It is represented that although 5,576,216 total shares were subscribed for by all shareholders, including the Invested Participants, under the basic Rights and under the oversubscription privilege, only a total of 2,908,071 shares of

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were exercised. In that situation, such Invested Participant was deemed not to have exercised his Rights and all subscription payments received on that Invested Participant's behalf were returned to the Plan and deposited based upon such Participant's investment allocation election.

Stock were issued.

It is represented that 102 Invested Participants out of 180 decided to exercise the Rights. In this regard, the Rights of such Invested Participants were executed on or about May 10, 2011, until the Offering closed at 5:00 PM EST on June 14, 2011.<sup>24</sup> The Invested Participants exercised 64,677 basic Rights.

As a result of this exercise, the Invested Participants received 194,031 shares of Stock from the exercise of their basic Rights and 55,014 shares of Stock from the exercise of their oversubscription privilege.

19. It is represented that no brokerage fees, commissions, subscription fees, or any other charges were paid by the Plan with respect to the Offering, and no brokerage fees, commissions, or other monies were paid by the Plan to any broker in connection with the exercise of the Rights. It is further represented that Bancshares did not charge any fees or sales commissions to issue the Rights and did not charge any fees to issue the Stock upon

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<sup>24</sup> It is represented that the Invested Participants rely on the relief provide by the statutory exemption, pursuant to section 408(e) of the Act for the exercise of the Rights. The Department is offering no view, as to whether the requirements of the statutory exemption provided in section 408(e) of the Act have been satisfied. Further, the Department, herein, is not providing any relief with respect to the exercise of the Rights.

the exercise of the Rights.

20. It is represented that on June 30, 2011, the Invested Participants received the Stock purchased as a result of the exercise of the Rights. It is further represented that the Stock purchased in connection with the Offering was eligible for trading on NASDAQ by the Invested Participants on June 30, 2011.

21. Bancshares has requested an exemption with respect to the transactions which are the subject of this proposed exemption. In this regard, relief has been requested: (a) for the acquisition of the Rights by the Plan in connection with the Offering by Bancshares, and (b) for the holding of the Rights by the Plan during the subscription period of the Offering.

It is represented that the Rights acquired by the Plan satisfy the definition of "employer securities," pursuant to section 407(d)(1) of the Act. As the Rights were not stock or a marketable obligation, such Rights do not meet the definition of "qualifying employer securities," as set forth in section 407(d)(5) of the Act. Accordingly, the subject transactions constitute an acquisition and holding on behalf of a plan, of an employer security which is not a qualifying employer security, in violation of section 407(a) of the Act, for which the applicant has requested relief from sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act. The

subject transactions also raise conflict of interest issues by fiduciaries of the Plan for which relief from the prohibitions of section 406(b)(1) and 406(b)(2) of the Act has been requested.

22. It is represented that the subject transactions have already been consummated. In this regard, the Plan acquired the Rights pursuant to the Offering on May 10, 2011, and held such Rights pending the closing of the Offering on June 21, 2011. As there was insufficient time between the dates when the Plan acquired the Rights and when such Rights expired, to apply for and be granted an exemption, Bancshares is seeking a retroactive exemption to be granted, effective as of May 10, 2011, the date that the Plan acquired the Rights.

23. Bancshares represents that the proposed exemption is administratively feasible. In this regard, the acquisition and holding of the Rights by the Plan were one-time transactions that involved an automatic distribution of the Rights to all shareholders at no cost. It is represented that it is customary for the industry involved to make a rights offering available to all shareholders.

24. Bancshares represents that the transactions which are the subject of this proposed exemption are in the interest of the Plan, because the subject transactions represented a valuable opportunity to the accounts of the Invested Participants in the



Plan to buy the Stock at a discount. It is represented that this discount could be realized by selling the Stock immediately after the exercise of the Rights and investing the proceeds from such sale of the Stock in other investment options under the Plan.

25. Bancshares represents that the proposed exemption provides sufficient safeguards for the protection of the Plan and its participants and beneficiaries. In this regard, participation in the Offering protected the accounts of the Invested Participants in the Plan from having their interests in the Stock diluted as a result of the Offering.

It is further represented that the interests of the accounts of Invested Participants in the Plan were adequately protected in that the Plan acquired and held the Rights automatically as a result of the Offering.

The accounts of Invested Participants in the Plan were protected against economic loss from the exercise of the Rights.

In this regard, it is represented that RTC was instructed to note the public trading price of the Stock on June 20, 2011, (one business day before the close of the Offering), and was instructed not to exercise any Rights held by the Plan, if the per share public trading price of the Stock at the close of trading was less than or equal to the subscription price of \$3.00 per share on that date. It is represented that the closing price

of the Stock on June 20, 2011, was \$8.01 per share. If on June 20, 2011 the public trading price per share of the Stock had not been greater than the exercise price under the Rights, the election to exercise would not have been honored and the payments received on behalf of Invested Participants would have been returned to the Plan and deposited based on such Invested Participants investment allocation election.

26. In summary, Bancshares represents that the subject transactions satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The receipt by the Plan of the Rights occurred in connection with the Offering made available by Bancshares on the same terms to all shareholders of the Stock of Bancshares;

(b) The acquisition of the Rights by the Plan resulted from an independent act of Bancshares, as a corporate entity, and all holders of the Rights, including the Plan, were treated in the same manner with respect to the acquisition of such Rights;

(c) Each shareholder of the Stock, including the Plan, received the same proportionate number of Rights based on the number of shares of Stock of Bancshares held by such shareholder;

(d) The Rights were acquired pursuant to provisions under the Plan for individually directed investments of the accounts of the Invested Participants, all or a portion of whose accounts in

the Plan hold the Stock;

(e) The decision to exercise the Rights or to refrain from exercising the Rights was made by each of the Invested Participants in accordance with the provision under the Plan for individually-directed accounts; and

(f) No brokerage fees, no commissions, no subscription fees, and no other charges were paid by the Plan with respect to the Offering, and no brokerage fees, no commissions, and no other monies were paid by the Plan to any broker in connection with the exercise of the Rights.

#### NOTICE TO INTERESTED PERSONS

The persons who may be interested in the publication in the FEDERAL REGISTER of the Notice of Proposed Exemption (the Notice) include all individuals who are participants in the Plan who received the Rights.

It is represented that all such interested persons will be notified of the publication of the Notice by first class mail, to each such interested person's last known address within fifteen (15) days of publication of the Notice in the FEDERAL REGISTER. Such mailing will contain a copy of the Notice, as it appears in the FEDERAL REGISTER on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to

29 CFR 2570.43(b)(2), which will advise all interested persons of their right to comment and to request a hearing.

All written comments and/or requests for a hearing must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the FEDERAL REGISTER.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

## GENERAL INFORMATION

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

and protective of the rights of participants and beneficiaries of the plan;

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

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

Signed at Washington, DC, this 7th day of  
November, 2011.

Ivan Strasfeld  
Director of Exemption  
Determinations  
Employee Benefits Security  
Administration  
U.S. DEPARTMENT OF LABOR

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