

Neither First City, Texas Commerce, Ameritrust, Texas Commerce Trust, nor any of their affiliates have ever had any relationship to the Pension Plan other than as a result of the lease and the services provided by Ameritrust and its successors, Texas Commerce Trust and Texas Commerce.

15. Currently, Texas Commerce provides the same custodial, investment management and securities lending services to the Pension Plan, the Welfare Plan, the Vacation Plan and certain miscellaneous accounts (the Accounts) that were provided by Ameritrust and Texas Commerce Trust. The fees associated with custodial services totaled \$126,100 for the Plans and the Miscellaneous Accounts for the year ending December 31, 1994. Also for the year ending December 31, 1994, the fees associated with investment management services totaled \$106,660, excluding the Building. Further, the fees associated with securities lending services provided the Plans and the Miscellaneous Accounts by Texas Commerce and its predecessors totaled \$48,000 for the period, October 1, 1993 through July 31, 1994.

16. Since the inception of the lease, Texas Commerce has continued to pay rent to the Pension Plan in a timely manner without default or rental delinquencies. However, the applicant is aware of the fact that a prohibited transaction occurred in violation of the Act on September 15, 1993. Therefore, the applicant has requested exemptive relief with respect to the past and continued leasing of office space in the Building by the Pension Plan to Texas Commerce. If granted, the proposed exemption will be retroactive to September 15, 1993.⁴

17. Mr. O'Connell notes that the space presently leased to Texas Commerce was originally leased to First City. In the course of time, he states that Texas Commerce acquired most of the assets of First City which resulted in a duplication or overlap of banking facilities in many areas of Harris County including the area in which the

Building is situated. Mr. O'Connell further notes that he, the Pension Plan Trustees and Mr. Davis, determined that Texas Commerce was the most attractive lessee given the failure of First City, the relative proximity of Texas Commerce and the substantial cost that would be incurred to renovate the space to a non-bank lessee since the space had been originally configured for a bank tenant. Mr. O'Connell also represents that the Texas Commerce lease has required no improvements or alterations by the lessee and has provided immediate income to the Pension Plan with no out-of-pocket costs. Moreover, he states that the presence of the city's largest bank has been a valuable enhancement to the Building. Given these factors, Mr. O'Connell represents that the rental charged for the subject space is above fair market value and that the lease continues to be a valuable asset of the Pension Plan.

Mr. O'Connell also confirms that his firm has continuously monitored rental rates for other properties comparable to the Building over the past five years. Further, during this period, he represents that his firm has continuously monitored the terms and conditions of all leases involving the Building. Without qualification, he represents that the terms and conditions of the lease between the Plan and Texas Commerce have, at all times, been at arm's length and have provided the Plan with fair market value rent since the inception of the subject lease to present, including September 15, 1993 when the lease became a prohibited transaction.

18. In addition to Mr. O'Connell's review of the lease, the Trustees of the Pension Plan have reviewed the investment needs of the Pension Plan and the terms and conditions of the Texas Commerce lease. Based upon their consideration of such matters, the Trustees believe the lease is in the best interest of the Pension Plan. The Trustees, in conjunction with Mr. O'Connell, are monitoring the lease on behalf of the Pension Plan, enforcing the payment of rent and the proper performance of all other obligations of Texas Commerce thereunder. In addition, the Trustees have the obligation to assess the prudence of the continued ownership by the Pension Plan of the Building and to negotiate, when appropriate, favorable terms with respect to the sale, lease or other disposition of the Building. Further, the Trustees are also responsible for ensuring that all terms and conditions of the exemption are, at all times, satisfied.

19. In summary, it is represented that the transactions satisfy the criteria for

an administrative exemption under section 408(a) of the Act because:

(a) The Trustees believe that the leasing of office space in the Building by the Plan to Texas Commerce is and will continue to be in the best interest of the Pension Plan and its participants and beneficiaries.

(b) The decision by the Pension Plan to enter into and continue leasing office space in the Building to Texas Commerce has been made and will continue to be made by the Trustees in consultation with an independent property manager and an independent fiduciary.

(c) The terms of the lease have remained and will remain at least as favorable to the Pension Plan as those obtainable in an arm's length transaction with an unrelated party.

(d) The rental charged by the Pension Plan under the lease has been based and will continue to be based upon arm's length negotiations with unrelated parties.

(e) The Trustees, in conjunction with the independent fiduciary, have and will continue to (i) monitor the terms and conditions of the lease as well as the terms and conditions of the exemption and (ii) take all actions that are necessary and proper to safeguard the interests of the Pension Plan and its participants and beneficiaries.

(f) The subject lease has involved and will continue to involve less than 125 percent of the Pension Plan's total assets.

For Further Information Contact: Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Retirement Plan for Employees of Automobile Club of New York, Inc. (the Plan) Located in Garden City, New York

[Application No. D-09882]

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 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990.) If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to: (1) the purchase (the Purchase) by the Plan of a certain office building (the Building) from Automobile Club of New York, Inc. (the Club), a sponsor of the Plan and a party

section 4975 of the Code until the merger of Texas Commerce Trust into Texas Commerce in December 1993. At that time, Texas Commerce became a service provider to the Plan by reason of section 4975(e)(2)(B) of the Code.

⁴ It is represented that once the Trustees and Texas Commerce realized that a prohibited transaction had occurred, the parties caused an exemption application to be prepared in January 1994 and subsequently finalized in July 18, 1994. It is also represented that the Trustees and Texas Commerce did not initially realize that the acquisition by Texas Commerce of Ameritrust made the lease a prohibited transaction. Further, the applicant notes that the exemption request was not filed as a result of an investigation by either the Department or the Internal Revenue Service.