Shares to assessment under certain circumstances and potential forfeiture.

The common stock of the Bank was appraised on January 21, 1994, and February 11, 1994, by an independent appraiser, Mr. Glenn Garlick, Principal of Houlihan Valuation Appraisers located in Costa Mesa, California. When making the appraisals Mr. Garlick understood that the Applicant intended to purchase the Shares from the Plan at the greater of either \$40 per share or the fair market value based upon an independent appraisal. In the February 11, 1994, appraisal, Mr. Garlick concluded that without consideration of the intent of the applicant to purchase the Shares, the fair market value of the Shares is not greater than \$27 per share.

The Applicant further represents that another indication of the continued decline in the fair market value of the Shares was manifested in the private placement offering of Units in March 1995 by the Bank to individual subscribers for \$10 per Unit. Each Unit consists of one share of common stock of the Bank plus one five-year warrant convertible into one share common stock for the additional consideration of \$10.

4. In order to eliminate the ever increasing risk associated with the continued investment in the Shares by the Plan and to permit the Plan to distribute or otherwise invest the original value of the assets in the Plan, the Applicant on March 24, 1994, made a \$300,000 cash purchase of the Shares from the Plan. The Plan incurred no expenses or commissions from the Sale. Furthermore, the Applicant represents that the Plan was able to invest the proceeds from the Sale into more liquid and income producing investments; such as, U.S. Treasury Bills, money market accounts, and publicly traded common stock.

The Applicant represents that the Plan's elimination of the risks inherent in the continued investment in the Shares by the Sale to the Applicant was in the best interests of the Plan and its participants and beneficiaries, and also served to protect the rights of the participants and beneficiaries. The Trustees of the Plan made these determinations based on their knowledge that the Bank was subject to the FRB and State examinations and resulting enforcement actions described above that presented significant risks to the Plan if it continued to hold the Shares. In addition, the Trustees were motivated to act because the Shares were providing little or no income for the Plan, plus there was little or no likelihood that there would be income

received in the foreseen future by the Plan.

5. In summary, the applicant represents that the transaction satisfies the criteria for an exemption under section 408(a) of the Act because (a) the Plan received from the Applicant in a one-time transaction cash in an amount that was no less than the fair market value of the Shares on the date of the Sale: (b) the transaction enabled the Plan and its participants and beneficiaries to avoid the continuing risks associated with holding the Shares; (c) the Plan incurred no loss or expense from the Sale; (d) the Trustees have determined that the transaction was in the best interests of the Plan and its participants and beneficiaries and was protective of their rights under the Plan.

FOR FURTHER INFORMATION CONTACT: Mr. C. E. Beaver of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

## Banc One Capital Corporation (Banc One) Located in Columbus, OH

[Application No. D-10046]

Proposed Exemption

Section I. Transactions

A. Effective June 2, 1995, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to Subsection I.A. (1) or (2).

Notwithstanding the foregoing, Section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.<sup>11</sup>

- B. Effective June 2, 1995, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:
- (1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:
  - (i) The plan is not an Excluded Plan;
- (ii) Solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;
- (iii) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and
- (iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity. 12 For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;
- (2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that the conditions

 $<sup>^{11}</sup>$  Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(a)(ii) and regulation 29 CFR 2510.3–21(c).

<sup>&</sup>lt;sup>12</sup> For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.