[Prohibited Transaction Exemption 95–18; Application No. D–09893]

Transaction Between Employee Profit Sharing-Savings Plan and Trust Agreement of Modern Globe, Inc. and VF Corporation, the Sponsoring Employer

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Correction.

SUMMARY: In 60 FR published at page 10879 on Tuesday, February 28, 1995, make the following correction: On page 10879, in the first column under the section designated ''Exemption'' on the sixth line insert the word ''not'' between the words ''shall apply'', so as to read ''shall not apply'' (Emphasis added).

Signed at Washington, D.C., this 8th day of March 1995.

Ivan Strasfeld,

Director of Exemption Determinations Pension and Welfare Benefits Administration, Department of Labor.

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[Application No. D–09595, et al.]

Proposed Exemptions; Norwest Bank Minnesota, N.A., et al.

AGENCY: Pension and Welfare Benefits 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 restriction of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and request 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. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, NW., Washington, D.C. 20210.

Notice to Interested Persons

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

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) 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.

Norwest Bank Minnesota, N.A. Located in Minneapolis, MN

[Application No. D–09595]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).[1]

Section I. Exemption for the In-Kind Transfer of Assets

If the exemption is granted, the restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c) of the Code, shall not apply, as of September 30, 1994, to the in-kind transfer of assets of plans for which Norwest Bank Minnesota, N.A. or any of its affiliates (collectively, the Bank) serves as a fiduciary (the Client Plans), including plans established or maintained by the Bank (the Bank Plans; collectively, the Plans), that are held in certain collective investment funds (the CIFs) maintained by the Bank, in exchange for shares of the Norwest Funds (the Funds), an open-end investment company registered under the Investment Company Act of 1940 (the '40 Act), as amended, for which the Bank acts as investment adviser, custodian, and shareholder servicing agent, in connection with the termination of such CIFs provided that the following conditions are met:

(a) No sales commissions or other fees are paid by a Bank Plan or a Client Plan in connection with the purchase of shares of the Funds through the in-kind transfer of CIF assets and no redemption fees are paid in connection with the sale of such shares of the Funds.

(b) All of the assets of a Bank Plan or a Client Plan that are held in the CIFs are transferred in-kind to the Funds in exchange for shares of such Funds. A Plan not electing to participate in the Funds receives a cash payment representing a pro rata portion of the assets of the terminating CIF before the final liquidation takes place.

(c) Each Bank Plan and each Client Plan receives shares of the Funds which have a total net asset value that is equal to the value of such Plan's pro rata share of the assets of the CIF on the date of the transfer, based on the current market value of the CIF's assets, as determined in a single valuation performed in the same manner at the close of the same business day, using independent sources in accordance with the procedures set forth in Rule 17a–7(b) (Rule 17a–7) under the Investment Company Act of 1940 (the '40 Act), as

[1] For purposes of this exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

amended, and the procedures established by the Funds pursuant to Rule 17a–7 for the valuation of such assets. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the Friday preceding the weekend of the CIF transfers, determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of the Bank.

(d) A second fiduciary who is independent of and unrelated to the Bank (the Second Fiduciary) receives advance written notice of the in-kind transfer of assets of the CIFs and full written disclosure, which includes but is not limited to, the following information concerning the Funds:

(1) A current prospectus for each portfolio of the Funds in which a Bank Plan or a Client Plan is considering investing;

(2) A statement describing (i) the fees for investment advisory or similar services that are to be credited back to a Client Plan, (ii) the fees retained by the Bank for Secondary Services, as defined in paragraph (g) of Section III below, and (iii) all other fees to be charged to or paid by the Bank Plan or the Client Plan and by such Funds to the Bank or to unrelated third parties. Such statement also includes the nature and extent of any differential between the rates of the fees;

(3) The reasons why the Bank considers such investment to be appropriate for the Bank Plan or the Client Plan;

(4) A statement describing whether there are any limitations applicable to the Bank with respect to which assets of a Bank Plan or a Client Plan may be invested in the relevant Funds, and, if so, the nature of such limitations; and

(5) Upon request of the Second Fiduciary, a copy of the proposed exemption and/or a copy of the final exemption, if granted.

(e) On the basis of the foregoing information, the Second Fiduciary authorizes in writing the in-kind transfer of the Bank Plan's or the Client Plan's CIF assets to a Fund in exchange for shares of the Funds, the investment of such assets in corresponding portfolios of the Funds, the fees received by the Bank in connection with its services to the Funds and, in the case of a Client Plan only, the purchase by such Client Plan of additional shares of the corresponding Funds with the fees credited back to the Client Plan by the Bank. Such authorization by the Second Fiduciary will be consistent with the responsibilities, obligations and duties imposed on fiduciaries under Part 4 of Title I of the Act.

(f) For all subsequent transfers of CIF assets to a Fund following the publication of the proposed exemption in the **Federal Register**, the Bank sends by regular mail to each affected Bank Plan and Client Plan a written confirmation, not later than 30 days after the completion of the transaction, containing the following information:

(1) The identity of each security that was valued for purposes of the transaction in accordance with Rule 17a–7(b)(4) of the '40 Act;

(2) The price of each such security involved in the transaction; and

(3) The identity of each pricing service or market maker consulted in determining the value of such securities.

(g) For all subsequent transfers of CIF assets to a Fund following the publication of the proposed exemption in the **Federal Register**, the Bank sends by regular mail, no later than 90 days after completion of each transfer, a written confirmation that contains the following information:

(1) The number of CIF units held by the Plan immediately before the transfer, the related per unit value and the total dollar amount of such CIF units;

(2) The number of shares in the Funds that are held by the Plan following the conversion, the related per share net asset value and the total dollar amount of such shares.

(h) The conditions set forth in paragraphs (c), (d), (e), (o) and (p) of Section II below as they would relate to all Plans are satisfied.

Section II. Exemption for the Receipt of Fees

If the exemption is granted, the restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c) of the Code, shall not apply, as of November 11, 1994, to (1) the receipt of fees by the Bank from the Funds for acting as an investment adviser to the Funds; and (2) the receipt and proposed retention of fees by the Bank from the Funds for acting as custodian or shareholder servicing agent to the Funds, as well as for any other services provided to the Funds which are not investment advisory services (i.e., the Secondary Services), in connection with the investment in shares of the Funds by the Client Plans, other than the Bank Plans, for which the Bank serves as fiduciary.

The aforementioned transactions are subject to the following conditions:

(a) No sales commissions are paid by the Client Plans in connection with the purchase or sale of shares of the Funds and no redemption fees are paid in connection with the sale of shares by the Client Plans to the Funds.

(b) The price paid or received by the Client Plans for shares in the Funds is the net asset value per share, as defined in paragraph (d) of Section III, at the time of the transaction and is the same price which would have been paid or received for the shares by any other investor at that time.

(c) Neither the Bank nor an affiliate, including any officer or director, purchases from or sells to any of the Client Plans shares of any of the Funds.

(d) The combined total of all fees received by the Bank for the provision of services to the Client Plans, and in connection with the provision of services to any of the Funds in which the Client Plans invest, are not in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

(e) The Bank does not receive any fees payable, pursuant to Rule 12b–1 of the '40 Act (the 12b–1 Fees) in connection with the transactions involving the Funds.

(f) Each Client Plan receives a credit, either through cash or, if applicable, the purchase of additional shares of the Funds, pursuant to an annual election, which may be revoked at any time, made by the Client Plan, of such Plan's proportionate share of all investment advisory fees charged to the Funds by the Bank, including any investment advisory fees paid by the Bank to third party sub-advisers, within not more than one business day after the receipt of such fees by the Bank.

(g) The Second Fiduciary receives, in advance of investment by a Client Plan in the Funds, full and detailed written disclosure of information concerning the relevant Funds as set forth above in Section I(d).

(h) On the basis of the information described in paragraph (d) of Section I, the Second Fiduciary authorizes in writing:

(1) The ongoing investment of assets of the Client Plans in shares of the Funds, in connection with the transactions set forth in Section II;

(2) The investment portfolios of the Funds in which the assets of the Client Plans may be invested; and

(3) The fees to be paid by the Funds in which Client Plans invest to the Bank

and the purchase of additional shares of the Funds by the Client Plan with the fees credited to the Client Plan by the Bank.

(i) The authorization referred to in paragraph (h) is terminable at will by the Client Plan, without penalty to the Client Plan. Such termination will be effected by the Bank selling the shares of the Funds held by the affected Client Plan within the period of time specified by the Client Plan but not more than one business day following receipt by the Bank from the Second Fiduciary, of the termination form (the Termination Form), as defined in paragraph (h) of Section III below, or any other written notice of termination; provided that, if due to circumstances beyond the control of the Bank, the sale cannot be executed within one business day, the Bank shall have one additional business day to complete such sale.

(j) In the event of an increase in the contractual rate of any fees paid by the Funds to the Bank regarding investment advisory services or fees for similar services that had been authorized by the Second Fiduciary in accordance with paragraph (h) of this Section II, the Bank provides written notice to the Second Fiduciary in a prospectus for the Funds or otherwise, of any increases in the contractual rate of fees charged by the Bank to the Funds for investment advisory services even though such fees will be credited to the Client Plans as required by paragraph (f) of Section II.

(k) In the event of an additional Secondary Service, as defined in paragraph (g) of Section III below, provided by the Bank to the Funds for which a fee is charged or an increase in the contractual rate of any fee due from the Funds to the Bank for any Secondary Service, as defined in paragraph (g) of Section III below, that results from an increase in the rate of such fee or from the decrease in the number or kind of services performed by the Bank for such fee over an existing rate for such Secondary Service which had been authorized by the Second Fiduciary of a Client Plan in accordance with paragraph (h) of this Section II, the Bank will, at least 30 days in advance of the implementation of such additional service for which a fee is charged or fee increased, provide written notice to the Second Fiduciary explaining the nature and amount of the additional service for which a fee is charged or the nature and amount of the increase in fees of the affected Fund. Such notice will be accompanied by the Termination Form, as defined in paragraph (h) of Section III below.

(l) The Second Fiduciary is supplied with a Termination Form at the times specified in paragraphs (k) and (m) of this Section II, which expressly provides an election to terminate the authorization, described above in paragraph (h) of this Section II, with instructions regarding the use of such Termination Form including statements that:

(1) The authorization is terminable at will by any of the Client Plans, without penalty to such Plans. The termination will be effected by the Bank selling the shares of the Funds held by the Client Plans requesting termination within the period of time specified by the Client Plan, but not later than one business day following receipt by the Bank from the Second Fiduciary of the Termination Form or any written notice of termination; provided that if, due to circumstances beyond the control of the Bank, the sale of shares of such Client Plans cannot be executed within one business day, the Bank shall have one additional business day to complete such sale; and

(2) Failure by the Second Fiduciary to return the form on behalf of the Plan will be deemed to be an approval of the additional Secondary Service for which a fee is charged or increase in the rate of any fees and will result in the continuation of the authorization, as described in paragraph (h) of this Section II, of the Bank to engage in the transactions on behalf of the Client Plan.

(m) The Second Fiduciary is supplied with a Termination Form, at least once in each calendar year, beginning with the calendar year that begins after the date of the grant of this proposed exemption is published in the **Federal Register** and continuing for each calendar year thereafter; provided that the Termination Form need not be supplied to the Second Fiduciary, pursuant to paragraph (m) of this Section II, sooner than six months after such Termination Form is supplied pursuant to paragraph (k) of this Section II, except to the extent required by said paragraph (k) of this Section II to disclose an increase in fees.

(n) On an annual basis, the Bank will provide the Second Fiduciary of a Client Plan investing in the Funds with:

(1) A copy of the current prospectus for the Funds and upon such fiduciary's request, a copy of the Statement of Additional Information which contains a description of all fees paid by the Funds to the Bank.

(2) A copy of the annual financial disclosure report prepared by the Bank which contains information about the portfolios of the Funds and includes audit findings of an independent auditor (the Auditor) within 60 days of the preparation of the report.

In addition, the Bank will respond to oral or written responses to inquiries of the Second Fiduciary as they arise.

(o) All dealings between the Client Plans and the Funds are on a basis no less favorable to the Client Plans than dealings between the Funds and other shareholders holding the same class of shares as the Client Plans.

(p) The Bank maintains for a period of six years the records necessary to enable the persons described below in paragraph (q) to determine whether the conditions of this exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Bank, the records are lost or destroyed prior to the end of the six year period, and

(2) No party in interest shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (q) of Section II below; and

(q)(1) Except as provided in paragraph (p)(2) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (p) are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department, the Internal Revenue Service or the Securities and Exchange Commission (the SEC);

(ii) Any fiduciary of a Client Plan who has authority to acquire or dispose of shares of the Funds owned by the Client Plan, or any duly authorized employee or representative of such fiduciary, and

(iii) Any participant or beneficiary of a Client Plan or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described in paragraphs (q)(1) (ii) and (iii) shall be authorized to examine trade secrets of the Bank, or commercial or financial information which is privileged or confidential.

Section III. Definitions

For purposes of this proposed exemption:

(a) The term ''Bank'' means Norwest Bank Minnesota, N.A. and any affiliate of the Bank, as defined in paragraph (b) of this Section III.

(b) An ''affiliate'' of the Bank includes—

(1) Any person directly or indirectly through one or more intermediaries,

controlling, controlled by, or under common control with the Bank. (For purposes of this paragraph, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(2) Any officer, director, employee, relative or partner in such person, and

(3) Any corporation or partnership of which such person is an officer, director, partner or employee.

(c) The term ''Fund'' or ''Funds'' refers to the Norwest Funds or to any diversified open-end investment company or companies registered under the '40 Act for which the Bank serves as an investment adviser and may also serve as a custodian, shareholder servicing agent, transfer agent or provide some other ''Secondary Service'' (as defined below in paragraph (g) of this Section IV) which as been approved by such Funds.

(d) The term ''net asset value'' means the amount for purposes of pricing all purchases and sales calculated by dividing the value of all securities, determined by a method as set forth in a Fund's prospectus and statement of additional information, and other assets belonging to each of the portfolios in such Fund, less the liabilities chargeable to each portfolio, by the number of outstanding shares.

(e) The term ''relative'' means a ''relative'' as that term is defined in section 3(15) of the Act (or member of the family'' as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(f) The term ''Second Fiduciary'' means a fiduciary of a plan who is independent of and unrelated to the Bank. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to the Bank if:

(1) Such Second Fiduciary directly or indirectly controls, is controlled by, or is under common control with the Bank;

(2) Such Second Fiduciary, or any officer, director, partner, affiliate, employee, or relative of such Second Fiduciary is an officer, director, partner or employee of the Bank or is a relative of such persons);

(3) Such Second Fiduciary directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this proposed exemption; provided, however that with respect to Bank Plans, the Second Fiduciary may receive compensation from the Bank in connection with the transactions contemplated herein, but the amount or payment of such compensation may not be contingent upon or be in any way affected by the Second Fiduciary's ultimate decision regarding whether the Bank Plans participate in such transactions.

With the exception of the Bank Plans, if an officer, director, partner, affiliate or employee of the Bank (or relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of the Plan's investment adviser, (ii) the approval of any such purchase or sale between the Client Plan and the Funds, and (iii) the approval of any change of fees charged to or paid by the Client Plan, any of the transactions described in Sections I and II above, then paragraph (f)(2) of this Section IV, shall not apply.

(g) The term ''Secondary Service'' means a service, other than investment advisory or similar services which is provided by the Bank to the Funds, including, but not limited to, custodial or shareholder services. However, the term ''Secondary Service'' does not include any brokerage services provided by the Bank to the Funds.

(h) The term ''Termination Form'' means the form supplied to the Second Fiduciary at the times specified in paragraphs (i), (k), (l), and (m) of Section II which expressly provides an election to the Second Fiduciary to terminate on behalf of a Plan the authorization described in paragraph (h) of Section II. Such Termination Form is to be used at will by the Second Fiduciary to terminate such authorization without penalty to the Plan and to notify the Bank in writing to effect such termination by selling the shares of the Fund held by the Plan requesting termination not later than one business day following receipt by the Bank of written notice of such request for termination; provided that if, due to circumstances beyond the control of the Bank, the shares of such Client Plans cannot be executed within one business day, the Bank shall have one additional business day to complete such sale.

EFFECTIVE DATE: If granted, this proposed exemption will be effective as of September 30, 1994 with respect to the transactions described in Section I and as of November 11, 1994 with respect to the transactions described in Section II.

Summary of Facts and Representations

1. The parties or entities involved in the subject transactions are described as follows:

a. *The Bank* and its affiliates are direct or indirect wholly owned subsidiaries of Norwest Corporation, a bank holding company. The Bank is a national bank that is principally located in Minneapolis, Minnesota. It serves as trustee, directed trustee, investment manager or custodian to approximately 7,500 employee benefit plans. As custodian or directed trustee of a plan, the Bank has custody of a Client Plan's assets but it has no duty to review investments or make investment recommendations with respect to such assets. Instead, it must act only as directed by an authorized third party. When the Bank serves as a discretionary trustee or investment manager of a Client Plan, it generally invests, with the sponsor's approval, the assets of a Client Plan account in a series of CIFs it manages. The Bank may also provide investment advice to other fiduciaries who have investment discretion over a Client Plan's assets or manage an individual investment portfolio for a Client Plan.

As of December 31, 1992, the Bank had discretionary and nondiscretionary pension and welfare plan assets under management totaling $16.25 billion. Of this total, $3.2 billion of pension and welfare plan assets were held in 30 CIFs maintained by the Bank. Also as of December 31, 1992, the Bank had total discretionary assets under management for all trust clients, CIFs and investment advisory clients of approximately $22.35 billion and total trust assets (both discretionary and nondiscretionary) of approximately $90.75 billion.

With respect to the CIFs discussed herein, the Bank receives a single, Plan-level management fee negotiated with each Client Plan. The typical annualized fee range for the management fee is from .25 percent to 1.50 percent of invested Client Plan assets. The management fee is dependent upon such factors as asset class and negotiation. The Bank charges a minimum fee of $500 to $1,000 for small accounts but it charges no fee for Secondary Services (e.g., shareholder and custodial services) provided to a Client Plan.

b. *The Funds* individually constitute a separate investment portfolio or a series of portfolios having a separate prospectus and representing a distinct investment vehicle. In the aggregate, the Funds comprise a Delaware business trust currently registered as an open-end investment company under the '40 Act. The Funds include seventeen new portfolios ranging from money market funds to bond funds. In some situations, the shares of a Fund will be divided into different classes and charge different levels of expenses. Except for these differences, the shares of each Fund will

represent the same proportionate interest in the assets of that Fund.

c. *The Board of Trustees (the Trustees)* manages the Funds, negotiates the investment advisory contracts and contracts for Secondary Services described below. A majority of the Trustees are independent of the Bank. The Trustees are elected by the shareholders of the Funds, except that in certain cases following a vacancy on the Board of Trustees, the Trustees can appoint a new Trustee without advance shareholder approval.

The Bank serves as the investment adviser to each Fund and receives investment advisory fees from the Funds. The Bank also serves as custodian, shareholder servicing agent and transfer agent to the Funds and is compensated by the Funds for the Secondary Services it renders to such Funds in these capacities.

d. *Forum Financial Services (FFS)*, a Delaware corporation which is wholly independent of the Bank, serves as distributor of the shares of the Funds and provides administrative and accounting services to the Funds. FFS is compensated and reimbursed by the Funds for certain expenses it incurs in performing these functions.

e. *The Bank Plans* consist of the Norwest Corporation Master Savings Trust (the Savings Trust) and the Norwest Corporation Master Pension Trust (the Pension Trust). As of June 30, 1994, the Savings Trust had total assets of $747,976,484 and two participating Bank Plans, the Norwest Corporation Savings-Investment Plan (the Norwest Savings Plan) and the Ford Bank Group, Inc. Savings Plan (the Ford Savings Plan). Also, as of June 30, 1994, the Norwest Savings Plan and the Ford Savings Plan had 32,259 participants and 616 participants, respectively.

The Pension Trust holds the assets of the Norwest Corporation Pension Plan (the Norwest Plan), the First Minnesota Employee's Pension Plan (the First Minnesota Plan) and the United Bank of Colorado, Inc. Retirement Income Plan (the United Bank Plan). As of June 30, 1994, the Pension Trust had total assets of $625,781,748. As of January 1, 1994, the Norwest Pension Plan had 27,725 participants, the First Minnesota Plan had 868 participants and the United Bank Plan had 3,437 participants.

f. *The Client Plans* include various pension, profit sharing, and stock bonus plans as well as voluntary employees' beneficiary associations, supplemental unemployment benefit plans, simplified employee benefit plans, Keogh Plans and IRAs for which the Bank presently serves (or will serve in the future) as a fiduciary (including those plans whose assets are currently invested in the Bank's CIFs).

g. *Wilmington Trust Company (WTC)* of Wilmington, Delaware, has been retained by the Bank to serve as the Second Fiduciary for the Bank Plans proposing to invest in the Funds. WTC, the primary subsidiary of Wilmington Trust Corporation, was established in 1903. WTC is wholly independent of the Bank and its affiliates.

As of December 31, 1993, WTC exercised discretionary investment authority over approximately $25.7 billion of fiduciary assets, including approximately $14.5 billion of assets of plans covered by the Act and non-qualified employee benefit plans. As of December 31, 1993, WTC also served as directed trustee, agent or custodian with respect to more than $2.5 billion of assets of plans covered by the Act and non-qualified employee benefit plans.

Description of the Transactions

2. The Bank maintains CIFs in which both Bank Plans and Client Plans have invested. To better serve the interests of these Plans, the Bank has decided, subject to approval of such Plans, to terminate twelve of its CIFs and transfer the assets currently invested in the CIFs to the corresponding Funds. The Bank notes that mutual funds are subject to supervision by the SEC, place greater emphasis on participant disclosure than do bank CIFs and provide an effective mechanism for disclosure. Moreover, the Bank represents that Plan sponsors and participants will be able to monitor more easily the performance of their investments in the Funds on a daily basis since information concerning investment performance of the Funds will be available in daily newspapers of general circulation.

Accordingly, the Bank requests retroactive exemptive relief with respect to the transfer of a Bank Plan's or a Client Plan's assets from certain terminating CIFs to the Funds. In addition, the Bank requests prospective exemptive relief for the receipt of fees from the Funds in connection with the investment of assets of Client Plans for which the Bank acts as a trustee, directed trustee, investment manager, or custodian, in shares of the Funds in instances where the Bank is an investment adviser, custodian, and shareholder servicing agent for the Funds.[2] The exemptive relief provided for the receipt of fees would cover Client Plans only, specifically those Plans for which the Bank exercises investment discretion as well as Client Plans where investment decisions are participant-directed by a Second Fiduciary.

In-Kind Transfers to the Funds by Bank Plans and Client Plans

3. During the weekends of September 30, 1994–October 2, 1994 and November 11–13, 1994, the Bank began transferring the assets of 12 terminated CIFs to the Funds. Specifically, during the weekend beginning September 30, 1994, the Bank transferred the assets of two CIFs, namely, ''Stock Fund S'' and ''Bond Fund R'' to the ''Contrarian Stock Fund'' and the ''Total Return Bond Fund.'' Then, during the weekend of November 11–13, 1994, the Bank terminated the assets of the ten remaining CIFs. Once terminated, the assets from these CIFs were transferred to fifteen ''Advantage Funds'' portfolios which also comprise the Funds. Following the transfers, the Bank commenced offering shares in the Funds to the Bank Plans and the Client Plans.[3]

To the extent legally permissible, all transfers were effected in-kind. However, because certain CIFs had already invested in other mutual funds and transfers of those mutual fund investments to the Funds would violate federal securities laws applicable to the

[2] The Bank is not requesting an exemption for investments in the Funds by the Bank Plans. The Bank represents that Bank Plans may acquire or sell shares of the Funds pursuant to Prohibited Transaction Exemption (PTE) 77–3 (42 FR 18734, April 8, 1977). PTE 77–3 permits the acquisition or sale of shares of a registered, open-end investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter, provided certain conditions are met. The Department expresses no opinion on whether any transactions with the Funds by the Bank Plans would be covered by PTE 77–3.

[3] At present, the Bank does not intend to terminate or convert two other CIFs, the ''Short Term Investment Fund'' and the ''Stable Return Fund.'' Nevertheless, if at some future date the Bank were to decide to terminate and convert these two CIFs as well, the Bank represents that it will comply with the conditions of the final exemption and it will value the assets of both the CIFs and the transferee Funds in accordance with Rule 17a–7 of the '40 Act, as amended, and the procedures established by the Funds pursuant to Rule 17a–7 for the valuation of such assets. (See Representation 3.)

Although the Bank does not currently anticipate that either of these CIFs will invest in the Funds, if such an investment were to be made, the fee arrangements will be structured to comply with Prohibited Transaction Exemption (PTE) 77–4 (42 FR 18732, April 8, 1977). In pertinent part, PTE 77–4 permits the purchase and sale by an employee benefit plan of shares of a registered, open-end investment company when a fiduciary with respect to the plan is also the investment adviser of the investment company.

The Bank also represents that it will continue to comply with PTE 77–4 in connection with the crediting of fees paid to it or its affiliates by the Total Return Bond Fund and the Contrarian Stock Fund.

mutual funds, the Bank decided to liquidate those investments on the date of the transfer. The Funds then purchased substantially the same securities held by the mutual funds in whose shares the CIFs had previously been invested.

The Bank represents that the transfers of assets were conducted in accordance with Rule 17a–7 of the '40 Act and the procedures established by the Funds pursuant to Rule 17a–7 for the valuation of such assets so as to make the transactions ministerial and as nondiscretionary in nature as possible.[4] In this regard, the asset transfers to the funds occurred over one or more weekends selected by the Trustees using market values as of the close of business on the preceding Friday. Thus, the transfers of the securities were completed on Friday prior to the opening of business on Monday, the next business day. As of that day, a Bank Plan or a Client Plan whose assets were transferred from a CIF would hold shares in the corresponding Fund. The value of the Plan's assets in the Fund would be at the same aggregate value as the units held in the CIF as of the close of trading on the preceding Friday. The value of a CIF's portfolio was determined by FFS in coordination with the Bank. In this regard, it is represented that the current market price for specific types of CIF securities involved in the in-kind transfers was determined as follows:

a. If the security was a ''reported security'' as the term is defined in Rule 11Aa3–1 under the Securities Exchange Act of 1934 (the '34 Act), the last sale price with respect to such security reported in the consolidated transaction reporting system (the Consolidated System); or if there were no reported transactions in the Consolidated System that day, the average of the highest independent bid and the lowest independent offer for such security (reported pursuant to Rule 11Ac1–1 under the '34 Act), as of the close of business; or

b. If the security was not a reported security, and the principal market for such security was an exchange, then the last sale on such exchange; or if there were no reported transactions on such exchange that day, the average of the highest independent bid and lowest independent offer on such exchange as of the close of business; or

c. If the security was not a reported security and was quoted in the NASDAQ system, then the average of the highest independent bid and lowest independent offer reported on Level 1 of NASDAQ as of the close of business; or

d. For all other securities (i.e., securities not listed on an exchange and for which no bid and ask quotations are readily available), valuation determined by (1) averaging prices obtained from at least three independent matrix pricing services[5] or (2) averaging bid and ask quotations as of the close of trading on the Friday preceding the in-kind transfers from three independent brokers.

In essence, the Bank represents that the transfer transactions were ministerial, performed in accordance with procedures prescribed by Rule 17a–7 and previously approved by the disinterested members of the Fund's Board of Trustees. The Bank also represents that the pricing of the securities was accomplished by reference to independent sources such that the transaction would result in an affected Bank Plan or Client Plan holding mutual fund shares of equal aggregate value to the previously-held CIF units. No sales commissions or redemption fees were or would be paid by a Bank Plan or a Client Plan in connection with investments of shares in the Funds. In addition, no fees for distribution expenses pursuant to Rule 12b–1 under the '40 Act were or would be paid to FFS or the Bank by a Bank Plan or a Client Plan with respect to transactions involving the Funds. Any fees charged by the independent brokers for bid and ask prices were the responsibility of the Bank. Further, the Bank represents that neither it nor its affiliates, including any officer or director of the Bank, had purchased or would purchase from or sell to any Bank Plan or Client Plan shares of any of the Funds.[6]

4. As stated above, prior to investing a Plan's assets in the Funds, the Bank was required to obtain the affirmative written approval of an independent Second Fiduciary who is typically, in the case of a Client Plan, the named fiduciary, trustee or sponsoring employer. In the case of a Bank Plan, the Bank retained the services of WTC to approve the in-kind transfer of assets of such Plan to the Funds.

The Bank provided advance written notice of the in-kind transfer of assets of the CIFs and full written disclosure of information concerning the Funds to the Second Fiduciary of a Bank or Client Plan. In this regard, the Bank provided the Second Fiduciary with a current prospectus for each portfolio of the Funds in which a Bank or Client Plan is investing. The disclosure statement described the fees for investment advisory or similar services to be credited back to the Client Plan, including any fees for Secondary Services and all other fees to be charged to or paid by a Bank Plan, a Client Plan or by the Funds to the Bank. Such disclosure included the nature and extent of any differential between the rates of fees. The disclosure statement also explained why the Bank believed that the investment in the Funds by a Bank Plan or a Client Plan was appropriate. As applicable, the disclosure statement further described any limitations on the Bank regarding which Plan assets may be invested in shares of the Funds and, if so, the nature of such limitations.[7] Upon request of the Second Fiduciary, the Bank is required to provide a copy of the proposed exemption and/or a copy of the final exemption, if granted.

On the basis of information noted above, the Second Fiduciary could authorize, in writing, that the Bank transfer a Bank Plan's or a Client Plan's CIF assets to a Fund in exchange for shares of the Funds and invest the Plan's assets in corresponding portfolios of the Funds. For Client Plans, the written authorization also allowed the Bank to receive fees from the Funds and to purchase additional shares of the Funds with the fees credited back to the Client Plan by the Bank.

5. The Bank anticipated that the transfer of assets from the CIFs to the Funds would be accomplished in stages as sufficient numbers of approvals were received from Second Fiduciaries.[8] If

[4] In pertinent part, Rule 17a–7 mandates that such transactions be effected at the ''independent current market price'' for such security, involve no brokerage commissions or other remuneration, and comply with valuation procedures adopted by the board of directors of the investment company to ensure that all requirements of the Rule are satisfied.

[5] According to the applicant, the SEC has permitted securities not listed on an exchange and for which no bid and ask quotations are readily available to be valued by a matrix pricing methodology. The applicant explains that matrix pricing methodology is intended to approximate what the actual market values of securities would be if an active secondary market for those securities exists and takes into account a variety of factors such as the most recent market activity with respect to a subject security, liquidity, yield, rating, type of industry, coupon rate, maturity and economic conditions. If a matrix pricing service is used, the applicant explains that the pricing entity will not be affiliated with the Bank or the Funds.

[6] The Department notes that this representation is not intended to limit the ability of Client Plans to deal with the Bank's account representatives on matters involving the funds and is not meant to prohibit purchases or sales of shares of the Funds that are placed through personnel of the Bank when such personnel are acting as agents for the Client Plans.

[7] Section II(d) of PTE 77–4 requires, among other things, that an independent plan fiduciary receive a current prospectus issued by the investment company and a full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company, including a discussion of whether there are any limitations on the fiduciary/investment adviser with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations.

[8] According to the applicant, the conversion of the CIFs into the Funds could be accomplished in stages for reasons of efficiency and economy. Given

the Second Fiduciary had not provided the Bank with approval of investment in the Funds by the time the last transfer of assets from a terminating CIF to a Fund was to occur, a pro rata portion of the assets of the terminating CIF was distributed in cash to the trust account of a Bank Plan or a Client Plan before the final liquidation of the CIF took place.

6. Following each in-kind transfer, the Bank provided each affected Plan with a written confirmation statement. This statement set forth the number of CIF units held by the Plan immediately before the conversion, the related per unit value and the total dollar amount of the CIF units. The confirmation statement also included the number of shares in the Funds that were held by the Bank Plan or the Client Plan following the conversion, the related per share net asset value and the total dollar amount of the shares. The confirmation statement further disclosed (a) the identity of each security that was valued for purposes of the transaction in accordance with Rule 17a–7(b)(4); (b) the price of each such security for purposes of the transaction; and (c) the identity of each pricing service or market maker consulted in determining the value of such securities.

For all subsequent transfers of CIF assets to a Fund following the publication of the proposed exemption in the **Federal Register**, the Bank will send by regular mail to each affected Bank Plan and Client Plan a written confirmation, not later than 30 days after the completion of the transaction, containing the following information: (a) The identity of each security that was valued for purposes of the transaction in accordance with Rule 17a–7(b)(4) of the '40 Act; (b) the price of each such security involved in the transaction; and (c) the identity of each pricing service or market maker consulted in determining the value of such securities. In addition, for all subsequent transfers of CIF assets to a Fund following the publication of the proposed exemption in the **Federal Register**, the Bank will send by regular mail, no later than 90 days after completion of each transfer, a written confirmation that contains the following information: (a) The number of CIF units held by the Plan immediately before the transfer, the related per unit value and the total dollar amount of such CIF units; and (b) the number of shares in the Funds that are held by the Plan following the conversion, the related per share net asset value and the total dollar amount of such shares.

Representations of the Second Fiduciary for the Bank Plans Regarding the In-Kind Transfers

7. As stated above, the Bank retained WTC as the Second Fiduciary to oversee the in-kind transfers of CIF assets to the Funds as such transactions affect the Bank Plans. In such capacity, WTC represented that it understood and would accept the duties, responsibilities and liabilities in acting as a fiduciary for the Bank Plans, including those imposed on fiduciaries under the Act.

WTC stated that it considered the effect of the in-kind transfer transactions on the Bank Plans and noted that this investment opportunity was being offered to Client Plans on the same terms and conditions as the Bank Plans. Based on the foregoing, WTC believed that the terms of the in-kind transfers were fair to participants of the Bank Plans and comparable to and no less favorable than the terms that would have been reached among unrelated third parties. Accordingly, WTC represented that the in-kind transfer transactions were in the best interest of the Bank Plans and their participants and beneficiaries for the following reasons: (a) The impact of the in-kind transfers on the Bank Plans was de minimus because the Funds substantially replicate the CIFs in terms of the investment policies and objectives; (b) the Funds would probably continue to experience relative performance similar in nature to the CIFs given the continuity of investment objectives and policies, management oversight and portfolio management personnel; (c) the in-kind transfers would not adversely affect the cash flows, liquidity or investment diversification of the Bank Plans; and (d) the benefits to be derived by the Bank Plans and their participants by investing in the Funds (e.g., broader distribution permitted of the Funds to different types of plans impacting positively on asset size of the Funds and resulting in cost savings to shareholders) would more than offset the impact of minimum additional expenses that may be borne by the Bank Plans.

In opining on the appropriateness of the in-kind transfers, WTC represented that it conducted an overall review of the Bank Plans, including the Bank Plan documents. WTC stated that it also examined the total investment portfolios of the Bank Plans to ascertain whether or not the Bank Plans were in compliance with their investment objectives and policies. Further, WTC stated that it examined the liquidity requirements of the Bank Plans and reviewed the concentration of the Bank Plans' assets invested in the CIFs as well as the portion of the CIFs comprised of the assets of the Bank Plans. Finally, WTC stated that it reviewed the diversification provided by the investment portfolios of the Bank Plans. Based on its review and analysis of the foregoing, WTC represented that the in-kind transfer transactions would not adversely affect the total investment portfolios of the Bank Plans, compliance by such Plans with their stated investment objectives and policies, or the cash flows, liquidity or diversification requirements of the Bank Plans.

As Second Fiduciary, WTC represented that it was provided by the Bank with the confirmation statements described in Representation 6. In addition, WTC stated that it supplemented its findings following review of the post-transfer account information to confirm whether or not the in-kind transfer transaction had resulted in the Bank Plans' receipt of shares in the Funds equal in value to the Plans' pro rata share of assets of the CIFs on the conversion date. WTC further represented that it would take such action as it deemed necessary to safeguard the interests of the Bank Plans in the event the confirmation statements did not confirm the foregoing.

Other Opportunities Available for a Client Plan to Invest in the Funds

8. Besides the one-time, in-kind transfer of assets from the CIFs to a comparable Fund, a Client Plan's assets may be invested in the Funds in three other ways. First, a Client Plan may purchase shares in the Funds directly through the Bank. Second, the Bank may transfer a Client Plan's assets from one Fund to another Fund. Third, the Bank may effect a daily automated sweep of uninvested cash of a Client Plan into one or more Funds designated by the Bank.[9] However, all investments

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the large number of Plans that had interests in the CIFs, the applicant anticipated that it would take an extended period of time to gather all of the necessary consents from Second Fiduciaries. If consent was given promptly, the applicant saw no reason to delay a Plan's investing in the Funds since a Second Fiduciary would desire the timely investment of the Plan's assets.

Further, the applicant did not believe a staggered conversion would operate to the detriment of a Plan. This was because all asset transfers would be effected at fair market value and proratably among the Plans. Therefore, Plans would have the same asset value immediately before and after the conversion.

[9] The Bank represents that shares of the Funds may also be purchased through CIFs that are not being terminated particularly if the relevant CIF seeks to invest in cash equivalents such as those being held in money market funds. The Bank

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for Client Plans in the Funds must be made pursuant to the Second Fiduciary's written authorization.

With respect to sweep services, where the Bank has investment discretion over a Client Plan, it will not charge separately for the provision of sweep services for uninvested cash balances. Instead, the Bank will charge a single, Plan-level fee, which covers both the sweep service and the management of assets in the sweep vehicle (generally, a short-term investment fund). Such single fee is determined as a percentage of the assets so invested. If the Bank does not have investment discretion with respect to a Client Plan's assets invested in the Funds, it may charge a separate fee for sweep services.[10]

Receipt of Fees by Bank

9. To avoid charging its existing Client Plans any additional Fund-level fees in connection with investment in the Funds and to accommodate the specific needs of certain new Client Plans, the Bank is implementing a fee structure under which, depending on each Client Plan's provisions and the fee arrangements negotiated with the Second Fiduciary, the Plan will not be required to bear any part of the investment advisory fees charged to the Funds by the Bank.[11] This fee structure is an alternative to the crediting mechanisms provided under PTE 77–4, which is also available if (a) negotiated by the Second Fiduciary (provided the conditions contained in PTE 77–4 are met) or (b) investments in the Total Return Bond Fund and Contrarian Stock Fund are involved.[12]

For providing custody and shareholder services to the Funds, the Bank is retaining fees for Secondary Services.[13] With respect to fees for Secondary Services, the Funds are paying the Bank monthly transfer agency fees ranging from .10 percent to .30 percent of the daily net asset value of the Funds.[14] In some instances, fees for Secondary Services may be determined on a per item or a per account basis subject to a cap based on the Funds' daily net asset value.

10. Under the fee structure, the Bank is charging its previously agreed upon Plan-level fees to each Client Plan for services rendered to such Plans as a trustee, directed trustee, investment manager or custodian.[15] All such fees are billed on a quarterly basis and may be paid by the Client Plan sponsor rather than the Client Plan.

The Bank is entitled to receive Fund-level investment advisory fees at a different rate for each Fund that is based on the average net assets for the respective Fund. The investment advisory fees range from .10 percent to .85 percent for the Advantage Funds. With respect to the Ready Cash Investment Fund, the investment advisory fees are tiered. For example, Client Plans investing in the Ready Cash Investment Fund will pay the Bank .40 percent for the first $300 million of average daily net assets of the Fund, .36 percent of the next $400 million and .32 percent for any additional average daily net assets. (At present, the Bank has agreed to waive any fees in excess of .30 percent of average daily net assets until further notice.)

The investment advisory agreements and any changes in the fees will be approved by a majority of the independent members of the Trust's Board of Trustees. The investment advisory fees paid by each of the Funds will be accrued on a daily basis and billed by the Bank to the Funds at the beginning of the month following the month in which the fees have accrued.

11. For most Client Plans,[16] at the beginning of each month and on the same business day as the receipt of such fees by the Bank, the Bank will credit to each Plan such Plan's pro rata share of all investment advisory fees charged by the Bank to the Funds[17] (including investment advisory fees paid by the Bank to third party subadvisers[18]) pursuant to a credit procedure (the Credit Method). The Bank represents that the credited fees will be paid to the Client Plan in cash, except that the credit may be effectuated through the purchase of additional shares of the Funds if the Client Plan makes an election. The purchase of additional shares will occur in lieu of the cash credit on the same day that such credit would have been paid to the Client

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explains that CIFs that are not being terminated may invest in shares of mutual funds with similar objectives or in money market funds. The Bank further explains that the authorizations of Second Fiduciaries will be contained in adoption agreements for these CIFs and purchases of shares of the Funds for the CIFs will be effected in accordance with PTE 77–4. The Department, however, offers no opinion on whether PTE 77–4 would apply to investments in the Funds by the non-terminating CIFs.

[10] The Department in a letter, dated August 1, 1986, to Robert S. Plotkin, Assistant Director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, addressed the application of section 408(b)(2) of the Act to arrangements involving ''sweep services.'' In that letter, the Department set forth several examples to illustrate various circumstances under which violations of section 406(b) of the Act would arise with respect to such arrangements. Conversely, the letter provided that, if a bank provides ''sweep'' services without the receipt of additional compensation or other consideration (other than reimbursement of direct expenses properly and actually incurred in the performance of such services), then the provision of ''sweep'' services by the bank would not, in itself, constitute a violation of section 406(b) of the Act. Moreover, including ''sweep'' services under a single fee arrangement for investment management services which is calculated as a percentage of the market value of the total assets under management would not, in itself, constitute an act described in section 406(b)(1), because the bank would not be exercising its fiduciary authority or control to cause a plan to pay an additional fee.

In addition, the letter also discusses the applicability of the statutory exemptions under section 408(b)(6) of the Act (fees for ''ancillary services'') and under section 408(b)(8) of the Act (investments in collective trust funds maintained by such bank) to such ''sweep'' service arrangements.

[11] The fact that certain transactions and fee arrangements are the subject of an administrative exemption does not relieve the fiduciaries of the Client Plans from the general fiduciary responsibility provisions of section 404 of the Act. Thus, the Department cautions the fiduciaries of Client Plans investing in the Funds that they have an ongoing duty under section 404 of the Act to monitor the services provided to the Client Plans to assure that the fees paid by the Client Plans for such services are reasonable in relation to the value of the services provided. Such responsibilities would include determinations that the services provided are not duplicative and that the fees are reasonable in light of the level of services provided.

[12] PTE 77–4 conditions exemptive relief on a plan not paying an investment management, investment advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment. Section II(c) of PTE 77–4 states that this condition does not preclude the payment of investment advisory fees by the investment company under the terms of an investment advisory agreement adopted in accordance with section 15 of the '40 Act. Section II(c) states further that this condition does not preclude the payment of an investment advisory fee by the plan based on total plan assets from which a credit has been subtracted representing the plan's pro rata share of investment advisory fees paid by the investment company.

[13] As stated above, the term ''Secondary Service'' does not include brokerage services. In this regard, the applicant anticipates that neither it nor its affiliates will provide brokerage services to the Funds.

[14] The Bank represents that it will continue its practice of waiving secondary fees for the Contrarian Stock Fund and the Total Return Bond Fund. As mentioned previously, the Bank states that PTE 77–4 will apply to transactions involving these Funds.

[15] The applicant represents that all fees paid by the Client Plans directly to the Bank for services performed by the Bank are exempt from the prohibited transaction provisions of the Act by reason of section 408(b)(2) of the Act. The Department notes that to the extent there are prohibited transactions under the Act as a result of any services provided by the Bank directly to the Client Plans which are not covered by section 408(b)(2) and the regulations thereunder, no relief is being proposed herein for such transactions.

[16] As stated in Representation 9, a Second Fiduciary of a Client Plan who is not interested in using the rebate mechanism discussed in this proposed exemption will invest in the Funds pursuant to PTE 77–4.

[17] As stated above, investments in the Total Return Bond Fund and the Contrarian Stock Fund will be made in conformance with PTE 77–4 and not in accordance with the rebate mechanism described herein.

[18] The Bank notes that if the fee it credits to a Client Plan already includes a third party sub-adviser's fee, no additional credits will be required with respect to the portion of such fee actually paid by the Bank to the sub-adviser.

Plan. Again, all decisions regarding the use of the Credit Method will be made by the Second Fiduciary at the time such fiduciary provides its original written approval of the investment of a Plan's assets in the Funds.

12. The Bank notes that Section II(c) of PTE 77–4 (*id.* at 18733) prohibits the payment of double fees to the fiduciary/investment adviser, by requiring that the plan not pay the investment adviser a plan-level investment management or advisory-type fee with respect to plan assets that are invested in mutual fund shares. The Bank also explains that the condition against duplicate fees can be complied with either by excluding the affected plan assets in determining the plan-level investment management/advisory fee (the Offset Method) or by subtracting a credit representing the plan's pro rata share of the mutual fund-level advisory fee from the plan-level fee (the Subtraction Method).

The Bank represents that the Credit Method satisfies the objective of the double fee prohibition by netting out any additional fees generated for the Bank by investment in the Funds. However, instead of reducing the fees charged at the Plan-level, as is done by the Offset and Subtraction Methods, the Bank states that the Credit Method assesses full fees at both levels and then credits back the Fund-level fees (with the exception of fees for Secondary Services) directly to the Client Plan. Thus, on an ongoing basis, the Bank indicates that Client Plans would pay only the fees previously agreed upon between the Bank and the Second Fiduciary for investment management services without regard to the conversions.

The Bank explains that the Subtraction Method would accomplish essentially the same economic result as the Credit Method. However, under the Subtraction Method, the Bank notes that its fees from the Funds would be deducted from the amounts billed to the Client Plan by the Bank for services, rather than being credited directly to the Client Plan. The Bank states that the Credit Method will restore a Client Plan's investment in the Funds (or overall investment position if it receives the credit in cash) to the level it would have been if the Client Plan had not been charged the Bank's Fund-level fees. The Bank represents that the Credit Method will allow the Bank to maintain its fiduciary fee schedules for its services to Client Plans which is more efficient and less costly than a system employing credits against fiduciary fees. Finally, the Bank explains that use of the Credit Method will permit the Client Plans to retain their fiduciary fee structures despite the change to a new investment vehicle.

Authorization Requirements for Client Plans

13. As stated in Representation 4, the transfer of a Bank Plan's or a Client Plan's assets in exchange for shares of the Funds must be preceded by the prior written authorization of the Second Fiduciary. The Second Fiduciary must also approve the fees to be paid by the Funds to the Bank and, in the case of a Client Plan, the purchase of additional shares of such Funds by the Client Plan with fees credited to the Client Plan by the Bank. In the case of the Bank Plans, the Bank has represented that it intends to use PTE 77–3 with respect to the purchase or sale of shares of the Funds by the Bank Plans and for the receipt of compensation by the Bank.[19] Accordingly, the following authorization requirements would apply to Client Plans only.

For a Client Plan, the authorization is terminable at will by the Second Fiduciary without penalty to the Client Plan upon receipt by the Bank of written notice of termination. A Termination Form expressly providing an election to terminate the authorization with instructions on the use of the form will be supplied to the Second Fiduciary. In general, the Termination Form will be furnished by the Bank to the Second Fiduciary at least once every twelve months or whenever there are increases in the contractual rates of fees due from the Funds to the Bank, for Secondary Services. (See Representation 14.) Termination will be effected by the Bank selling the shares of the Funds held by the affected Client Plan within the period of time specified by the Client Plan but not more than one business day following receipt by the Bank from the Second Fiduciary, of the Termination Form or any other written notice of termination; provided that, if due to circumstances beyond the control of the Bank, the sale cannot be executed within one business day, the Bank will have one additional business day to complete such sale.

The Termination Form will instruct the Second Fiduciary of a Client Plan that the authorization is terminable at will by the Plan, without penalty to the Plan, upon receipt by the Bank of written notice from the Second Fiduciary, and that failure to return the form will result in the continued authorization of the Bank to engage in the subject transactions on behalf of the Client Plan.

14. In the event of an increase in the contractual rate of any fees paid by the Funds to the Bank regarding investment advisory services or fees for similar services that had been authorized by the Second Fiduciary, the Bank will provide written notice to the Second Fiduciary in a prospectus for the Funds or otherwise, of any increases in the rate of such fees even though these fees will be rebated by the Bank to the Client Plans. Although the notice will explain the nature and amount of the fee increase of the affected Fund or Funds, it will not be accompanied by the Termination Form. This is because all increases in investment advisory or similar fees will be subject to the annual reauthorizations described in Representation 16.

15. In the event of an addition of a Secondary Service provided by the Bank to the Funds for which a fee is charged or an increase in the contractual rate of any fee due from the Funds to the Bank for any Secondary Service that results from an increase in the rate of such fee or from the decrease in the number or kind of services performed by the Bank for such fee over an existing rate for such Secondary Service which had been authorized by the Second Fiduciary of a Client Plan, the Bank will provide, to the Second Fiduciary, at least 30 days in advance of the implementation of such increase, written notice explaining the nature and amount of the additional service for which a fee is charged or fee increased for the affected Fund.[20] Under these circumstances, the notices will be accompanied by the Termination Form with instructions on the use of such form. The instructions will expressly provide an election to the Second Fiduciary to terminate at will any prior authorizations without penalty to the Client Plan and stipulate that failure to return the form will result in the continuation of all authorizations

[19] The Department is not expressing an opinion herein on the applicability of PTE 77–3 with respect to ongoing investments by the Bank Plans in shares of the Funds or to the receipt of fees from the Funds by the Bank.

[20] An increase in the amount of a fee for an existing Secondary Service (other than through an increase in the value of the underlying assets in the Funds) or the imposition of a fee for a newly-established Secondary Service shall be considered an increase in the rate of such Secondary Fee. However, in the event a Secondary Fee has already been described in writing to the Second Fiduciary and the Second Fiduciary has provided authorization for the amount of such Secondary Fee, and such fee was waived, no further action by the Bank would be required in order for the Bank to receive such fee at a later time. Thus, for example, no further disclosure would be necessary if the Bank had received authorization for a fee for custodial services from Client Plan investors and subsequently determined to waive the fee for a period of time in order to attract new investors but later charged the fee. However, reinstituting the fee at an amount greater than previously disclosed would necessitate the Bank providing notice of the fee increase and a Termination Form.

previously given to the Second Fiduciary. Termination of the authorization by a Client Plan to invest in the Funds will be effected by the Bank selling the shares of the Funds held by the affected Client Plan within the period of time specified by the Client Plan, but not later than one business day following receipt by the Bank of the Termination Form or any other written notice of termination. If, due to circumstances beyond the control of the Bank the sale cannot be executed within one business day, the Bank will have one additional day to complete such sale.

16. The Second Fiduciary will be supplied with a Termination Form at least once each year beginning with the calendar year that begins after the date of the notice granting this proposed exemption is published in the **Federal Register** and continuing for each calendar year thereafter, regardless of whether there have been any changes in the fees payable to the Bank or changes in other matters in connection with the services rendered to the Funds. However, if the Termination Form has been provided to the Second Fiduciary in the event of an addition of a Secondary Service for which a fee is charged or an increase in any fees for Secondary Services paid by the Funds to the Bank, then such Termination Form need not be provided again to the Second Fiduciary until at least six months have elapsed, unless such Termination Form is required to be sent sooner as a result of an addition of a Secondary Service for which a fee is charged or any increase in any fees for Secondary Services.

Audit Requirements

17. The Bank is responsible for establishing and maintaining a system of internal accounting controls for the crediting of the fees. In this regard, the Bank has retained the services of KPMG Peat Marwick, an independent accounting firm, to audit annually the crediting of fees to Client Plans under this program. Such audits will provide independent verification of the proper crediting to the Client Plans. Information regarding fees may be used in the preparation of required financial disclosure reports of the Funds for the benefit of the Client Plans.

By letter dated November 11, 1993, the Auditor has described the procedures that will be utilized in the annual audit of the Credit Method program. Specifically, in performing its audit, the Auditor will: (a) Review and test compliance with the specific operational controls and procedures established by the Bank for making credits; (b) verify, on a test basis, the daily credit factors transmitted to the Bank (or its affiliates) by the Funds; (c) verify, on a test basis, the proper assignment of credit identification fields to the Client Plans; (d) verify, on a test basis, the credits paid in total to the sum of all credits paid to each Client Plan; (e) recompute, on a test basis, the amount of the credit determined for selected Client Plans and verify that the proper credit was made to the proper Client Plan. The Bank and FFS will be the sources of the factual information upon which the Auditor will rely.

In the event that either the internal audit by the Bank or the independent audit by the Auditor identifies an error made in the crediting of fees to the Client Plans, the Bank will correct the error. With respect to any shortfall in credited fees to a Client Plan involving cash credits, the Bank will make a cash payment to the Client Plan equal to the amount of the error plus interest paid at money market rates offered by the Bank for the period involved. With respect to any shortfall in credited fees involving a Client Plan where the Second Fiduciary's prior election was to have credited fees invested in shares of a particular Fund, the Bank will make a cash payment to the Client Plan equal to the amount of the error plus interest based on the greater of either (a) the money market rate offered by the Bank for the period involved or (b) the total rate of return for shares of the Funds, including dividends, that would have been acquired during such period. Any excess credits made to a Client Plan will be corrected by an appropriate deduction and reallocation of cash during the next payment period to reflect accurately the amount of total credits due to the Plan for the period involved.

Ongoing Disclosures to Client Plans

18. On an annual basis, the Bank will provide the Second Fiduciary of a Client Plan with a copy of the current prospectus for the Funds and upon such fiduciary's request, a copy of the Statement of Additional Information which contains a description of all fees paid by the funds to the Bank. In addition, the Bank will provide the Second Fiduciary with a copy of a financial disclosure report prepared by the Bank which contains information about the portfolios of the Funds and includes the Auditor's findings within 60 days of the preparation of the report. Further, the Bank will respond to oral or written responses to inquiries of the Second Fiduciary as they may arise.

19. In summary, the Bank represents that the transactions described herein will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Funds will provide the Bank Plans and Client Plans with a more effective investment vehicle than the CIFs maintained by the Bank without any increase in investment advisory or similar fees paid to the Bank.

(b) With respect to the transfer of a Bank Plan's or a Client Plan's CIF assets into a Fund in exchange for Fund shares, a Second Fiduciary has or will authorize in writing, such transfer prior to the transaction only after full written disclosure of information concerning the Fund.

(c) Each Bank Plan or Client Plan has or will receive shares of the Funds in connection with the transfer of assets of a terminating CIF which have a total net asset value that is equal to the value of such Plan's pro rata share of the CIF assets on the date of the transfer as determined in a single valuation performed in the same manner and at the close of the business day, using independent sources in accordance with procedures established by the Funds which comply with Rule 17a-7 of the '40 Act, as amended, and the procedures established by the Funds pursuant to Rule 17a-7 for the valuation of such assets.

(d) For all subsequent transfers of CIF assets to a Fund following the publication of the proposed exemption in the **Federal Register**, the Bank will send by regular mail to each affected Bank Plan and Client Plan a written confirmation, not later than 30 days after the completion of the transaction, containing the following information: (1) The identity of each security that was valued for purposes of the transaction in accordance with Rule 17a-7(b)(4) of the '40 Act; (2) the price of each such security involved in the transaction; and (3) the identity of each pricing service or market maker consulted in determining the value of such securities.

(e) For all subsequent transfers of CIF assets to a Fund following the publication of the proposed exemption in the **Federal Register**, the Bank will sends by regular mail, no later than 90 days after completion of each transfer, a written confirmation that contains the following information: (1) The number of CIF units held by the Plan immediately before the transfer, the related per unit value and the total dollar amount of such CIF units; and (2) the number of shares in the Funds that are held by the Plan following the conversion, the related per share net asset value and the total dollar amount of such shares.

(f) The price that has been or will be paid or received by a Bank Plan or a Client Plan for shares of the Funds is the net asset value per share at the time of the transaction and is the same price for the shares which was or would have been paid or received by any other investor at that time.

(g) No sales commissions or redemption fees have or will be paid by a Bank Plan or a Client Plan in connection with the purchase of shares of the Funds.

(h) The Bank has not and will not receive any 12b-1 fees in connection with the transactions.

(i) Any authorizations made by a Client Plan regarding investments in a Funds and fees paid to the Bank (including increases in the contractual rates of fees for Secondary Services that are retained by the Bank) will be terminable at will by the Client Plan, without penalty to the Client Plan and will be effected within one business day following receipt by the Bank, from the Second Fiduciary, of the Termination Form or any other written notice of termination, unless circumstances beyond the control of the Bank delay execution for no more than one additional business day.

(j) The Second Fiduciary has received or will receive written notice accompanied by the Termination Form with instructions on the use of the form at least 30 days in advance of the implementation of any increase in the rate of any fees for Secondary Services that the Bank provides to the Funds.

(k) All dealings by or between the Client Plans, the Funds and the Bank will be on a basis which is at least as favorable to the Client Plans as such dealings are with other shareholders of the Funds.

Notice to Interested Persons

Notice of the proposed exemption will be given to interested persons who have investments in the terminating CIFs and from whom approval is being sought for the transfer of Plan assets to the Funds. In this regard, interested persons will include WTC, the Second Fiduciary of the Bank Plans; active participants in the Bank Plans; and Second Fiduciaries of the Client Plans. Notice will be provided to each Second Fiduciary by first class mail and to active particpants in the Bank Plans by posting at major job sites. Such notice will be given to interested persons within 14 days following the publication of the notice of pendency in the **Federal Register**. The notice will include a copy of the notice of proposed exemption as published in the **Federal Register** and give interested persons the right to comment on and/or to request a hearing with respect to the proposed exemption. Comments and requests for a public hearing are due within 44 days of the publication of the notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Motors Hourly-Rate Employees Pension Plan; General Motors Retirement Program for Salaried Employees; Saturn Individual Retirement Plan for Represented Team Members; and Saturn Personal Choices Retirement Plan for Non-Represented Team Members (Collectively, the Plans) Located in New York, New York

[Application Nos. D–09694 thru D–09697]

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 in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the restrictions of section 406(b)(2) of the Act shall not apply to the stock index ''exchange of futures for physicals'' (EFP) transaction between the General Motors Retirement Program for Salaried Employees (the Salaried Plan) and the General Motors Hourly-Rate Employees Pension Plan, Saturn Individual Retirement Plan for Represented Team Members, and Saturn Personal Choices Retirement Plan for Non-Represented Team Members (together, the Hourly Plan) which occurred on November 30, 1993 in the amount of approximately $730 million, provided the following conditions were met:

(a) The terms of the EFP transaction were at least as favorable to the Plans as the terms which would have been available in an arm's-length EFP transaction involving unrelated parties;

(b) Each Plan received a price in the EFP transaction which was equal to the midpoint between the highest independent bid and lowest independent offer for buying and selling the futures involved on November 30, 1993, based on EFP quotations obtained from at least six independent broker-dealers capable of engaging in such an EFP at the time of the transaction;

(c) Wells Fargo Institutional Trust Company, N.A. (WFITC), as an independent fiduciary for the Salaried Plan, determined that the EFP transaction was prudent and in the best interests of the Salaried Plan and its participants and beneficiaries at the time of the transaction;

(d) WFITC monitored the EFP transaction on behalf of the Salaried Plan and took whatever action was necessary to safeguard the interests of the Salaried Plan at the time of the transaction;

(e) General Motors Investment Management Corporation (GMIMCo), as the fiduciary for the Hourly Plan, determined that the EFP transaction was prudent and in the best interests of the Hourly Plan and its participants and beneficiaries at the time of the transaction; and

(f) GMIMCo monitored the EFP transaction on behalf of the Hourly Plan and took whatever action was necessary to safeguard the interests of the Hourly Plan at the time of the transaction.

EFFECTIVE DATE: If the proposed exemption is granted, the exemption will be effective November 30, 1993.

Summary of Facts and Representations

1. The Plans were established by General Motors Corporation (GMC) to provide retirement benefits for eligible hourly and salaried employees of GMC and its affiliates. The aggregate fair market value of the assets of the Plans was approximately $40.5 billion as of September 30, 1993. The Plans covered a total of approximately 831,532 active and retired participants or their beneficiaries as of October 1, 1993.

The assets of the Plans involved in the transaction described herein were held by: (i) Mellon Bank, N.A., acting as directed master trustee and custodian; (ii) Bankers Trust Company, acting as directed master trustee and custodian; (iii) WFITC, acting as custodian for assets its manages; and (iv) Chemical Bank, acting as custodian for certain assets managed by other investment managers.

2. The Pension Investment Committee of GMC (the PIC) is a committee established by the Finance Committee of the Board of Directors of GMC (the Finance Committee). The Finance Committee is the ''named fiduciary'' for the Plans. Certain fiduciary responsibilities have been delegated by the Finance Committee to the PIC, including the responsibility for allocating funds among asset classes within broad investment guidelines, recommending changes in broad investment guidelines to the Finance Committee, and monitoring the investment performance of the assets of the Plans. The PIC is comprised of officers of GMC and its affiliates.

The PIC carries out its in-house investment oversight responsibility through GMIMCo, a separately-

incorporated, wholly-owned subsidiary of GMC. Certain members of the PIC serve on the Board of Directors of GMIMCo. All GMIMCo activities are subject to the general direction of the PIC.

The Finance Committee, as the ''named fiduciary'' for the Plans, reviews the actions of the PIC to evaluate performance and to assure that the Finance Committee's delegation of authority continues to be prudent.

3. On November 30, 1993, the Plans entered into an EFP with each other in the amount of approximately $730 million. An EFP is an integrated transaction where one party buys the underlying (or ''physical'') commodity/security and simultaneously sells a related futures contract while the other party sells the underlying commodity/security and simultaneously buys a futures contract.[21] However, unlike an exchange-traded futures contract, an EFP is privately negotiated and is not required to be competitively executed in an exchange trading pit.[22] The parties to an EFP typically negotiate a private contract outside the trading pit covering the terms of the exchange of the underlying commodity/security and the futures position. The price, quantity and characteristics of the underlying commodity/security that is bought or sold will affect the final price and quantity of the futures position exchanged.

In a typical stock-index EFP, a customer (such as an employee benefit plan) will sell a portfolio of common stocks which generally replicates the Standard & Poors 500 Composite Stock Price Index (the S&P 500 Index). In exchange for the stocks, the customer will receive cash in an amount equal to the current value of the stock portfolio and a corresponding long S&P 500 futures position.[23] To effect the transaction, the customer will contact its various broker-dealer/futures commission merchants (''broker-dealers''), and will offer the stocks in return for (1) a cash payment equal to the market price of the stocks at the close of the New York equities market (e.g. the New York Stock Exchange or American Stock Exchange) on that date and (2) a corresponding long S&P 500 futures position established through that broker-dealer and priced at a ''basis'' between the index and the futures such that the cash plus futures is roughly equivalent in both value and market exposure to the stocks.[24]

However, the applicant states that two customers may negotiate such an EFP transaction between themselves and use the broker-dealer merely to facilitate the trade's execution by reporting and documenting the stock and futures trades, as required by exchange rules.

4. On November 30, 1993, the Hourly Plan sold approximately $730 million of stock and simultaneously purchased approximately $730 million of S&P 500 futures contracts in an EFP transaction with the Salaried Plan.[25] Thus, the Salaried Plan purchased approximately $730 million of stocks and sold approximately $730 million of S&P 500 futures in the transaction. WFITC acted as an independent fiduciary for the Salaried Plan in the EFP transaction (as discussed further below).

The Hourly Plan

5. With respect to the Hourly Plan, the applicant states that in November 1993 the Plan needed to raise cash for upcoming benefit payments to the participants and beneficiaries. In addition, the PIC had modified the Hourly Plan's asset allocation strategy by increasing the allocation for investments in asset classes other than the Canadian and U.S. large capitalization equity securities.

GMIMCo was responsible for implementing the PIC's asset allocation strategy in the most cost-effective manner. GMIMCo analyzed the Hourly Plan's equity holdings, futures positions, overall asset mix, allocation of assets among equity investment managers, and upcoming liquidity needs. Based on this review, GMIMCo determined that approximately $730 million of equity holdings, managed by twelve equity managers, eleven of whom were external investment advisers, should be liquidated to raise cash to meet benefit payments and to fund investments in other asset classes to meet the PIC's asset allocation guidelines.

GMIMCo also determined that, simultaneous with the sale of stocks, the Hourly Plan should purchase approximately $730 million of S&P 500 futures contracts so that the designated funds would continue to be exposed to the equity markets until the cash was either used to pay benefits or placed with managers in other investment areas. The PIC had previously authorized the use of futures to facilitate the Hourly Plan's asset allocation objectives.

6. GMIMCo evaluated the following alternatives for selling stocks and purchasing equity futures for the Hourly Plan:

(a) Direct each of the twelve investment managers to independently liquidate securities in the open market and GMIMCo would independently purchase futures;

(b) Direct each of the twelve investment managers to transfer stocks to a central account and GMIMCo would sell the stocks via portfolio trades in the open market with simultaneous futures purchases;

(c) Engage in an EFP with a broker-dealer; or

(d) Engage in an EFP with the Salaried Plan.

7. GMIMCo states that separate open market trades through the investment managers under alternative (a) would have involved the greatest risks and potentially the highest costs. Under this alternative, as each manager sold stocks, the manager would have advised GMIMCo of its actions and GMIMCo would have then purchased futures to maintain the overall equity exposure. Since each individual stock could have moved in a different direction and by a different amount relative to the broader equity index (i.e. ''tracking error''),[26] the Hourly Plan could have incurred significant costs. Since the futures purchases would not have been simultaneous with the stock sales, the

[21] A futures contract is an agreement in which one party agrees to sell and another party agrees to buy a specific quantity of a commodity at a future date. Upon entering into a futures contract, the parties establish the price for the future sale or purchase. The Commodity Futures Trading Commission (CFTC) is the federal agency responsible for regulating futures trading in all tangible and intangible ''commodities'' including securities. Unless exempted by the CFTC, all futures contracts must be traded on CFTC-designated exchanges called contract markets.

[22] See Section 4c(a) of the Commodity Exchange Act and CFTC Rule 1.38 (17 CFR 1.38(a)) which require that all futures transactions be executed openly and competitively except for transactions which are executed noncompetitively in accordance with written rules of the exchange which have been submitted to and approved by the CFTC, specifically providing for the noncompetitive execution of such transactions. The applicant states that this exception applies to EFPs and that all futures exchanges have CFTC-approved rules permitting EFPs to be consummated.

[23] The futures contract ''bought'' by the customer represents a commitment to pay the cash value of the portfolio of S&P 500 securities at a specified time in the future.

[24] The applicant states that the market price of an S&P 500 futures contract will normally exceed the market price of the underlying portfolio of stocks comprising the index (the ''cash price'') by a certain amount (i.e. the ''basis'') primarily due to the ''cost of carry.'' The ''cost of carry'' relates to the difference between the U.S. Treasury Bill rate and the dividend yield on the stock portfolio. In addition, the ''basis'' reflects the deliverable supply of the underlying stocks and the expectations of market participants.

[25] The applicant represents that GMIMCo consulted with the Chicago Mercantile Exchange (CME) and the CFTC, both of which advised that an EFP between the Plans would be consistent with their applicable rules.

[26] Tracking error is the mismatch of price movement on the individual stock versus the index.

Hourly Plan would have also experienced ''timing mismatches'' which could have resulted in significant costs. GMIMCo states that tracking error and timing mismatches could have resulted in costs in excess of $4 million and concluded that there was no incentive to undertake these risks when lower cost alternatives were available.

In addition, under alternative (a), the market impact cost associated with the stock transactions could have been approximately $7 million. GMIMCo calculated this cost by considering such factors as: (i) The managers in the aggregate held over 1500 stocks, and over 600 were stocks common to more than one manager, which would have caused the managers to compete with each other in selling the stocks; (ii) for over 50% of the individual stocks in the portfolio, the amount of the stock held represented more than 10% of the average daily trading volume for such stock; (iii) for about 25% of the individual stocks in the portfolio, the amount of the stock held exceeded 50% of the average daily trading volume for such stock; and (iv) for over 10% of the individual stocks in the portfolio, the amount of the stock held represented more than one day's trading volume for such stock. The market impact costs associated with the futures transactions, which would have represented about 10% of the daily volume on the CME, were estimated to be at least $1 million.

Under alternative (a), GMIMCo estimated that the commission costs at approximately $.06/share on 21.1 million shares would have been approximately $1.3 million. With twelve managers with over 1500 stock names, GMIMCo estimated that the master trustee recordkeeping fees would have been approximately $30,000.

In total, GMIMCo estimated that alternative (a) would have cost the Hourly Plan approximately $13 million.

8. With respect to separate open market trades through GMIMCo under alternative (b), GMIMCo states that such transactions would have resulted in lower costs resulting from tracking error (approximately $2 million). In addition, the timing mismatches would have been eliminated because GMIMCo could have simultaneously executed both the sale of the stocks and the purchase of the futures. GMIMCo states that alternative (b) would have resulted in lower market impact cost (approximately $3.5 million) since the time period for execution would have been more effectively controlled and one manager would not be selling in competition with another manager. However, the market impact cost for the futures would still have been approximately $1 million.

GMIMCo states that the commission costs on equity portfolio trades versus individual stock trades would have been lower (approximately $.5 million) under alternative (b), but master trustee fees would have been higher at about $50,000.

In total, GMIMCo estimated that alternative (b) would have cost the Hourly Plan approximately $7 million.

9. With respect to an EFP with a broker-dealer under alternative (c), GMIMCo states that such a transaction would have eliminated the timing mismatch risk and incorporated the market impact, tracking error and commission costs into the pricing of the EFP quoted by the broker-dealer. Therefore, on November 30, 1993, the date of the proposed EFP, GMIMCo sought EFP bids and offers from eight broker-dealers—First Boston, Goldman Sachs, J.P. Morgan, Lehman Bros., Merrill Lynch, Morgan Stanley, Paine Webber, and Salomon Brothers. GMIMCo requested bid and offer quotes from each broker-dealer on the proposed transaction. GMIMCo provided the broker-dealers with the characteristics of the portfolio, for example, how many stocks traded on exchanges such as the NYSE and AMEX and on the NASDAQ. The broker-dealers were advised that the portfolio was valued at approximately $730 million, based on the prior day's closing value, and involved approximately 21,147,800 shares. The broker-dealers also were advised regarding the tracking error of the portfolio versus the S&P 500 Index. The broker-dealers were provided with the general liquidity characteristics of the portfolio, including the fact that: (i) For over 50% of the individual stocks in the portfolio, the amount of stock held represented more than 10% of the average daily trading volume for such stock, (ii) for about 25% of the individual stocks in the portfolio, the amount of the stock held exceeded 50% of the average daily trading volume for such stock, and (iii) for over 10% of the individual stocks in the portfolio, the amount of the stock held represented more than one day's trading volume for such stock.

Based on these characteristics, two broker-dealers declined to participate. The remaining six broker-dealers provided the following EFP quotations, with a bid to buy the futures and an offer to sell the futures expressed as a discount or premium on the S&P 500 Index closing price on the date of the transaction, as noted in the table below. In each case, the broker-dealers agreed to buy or sell the stocks involved at the S&P 500 Index closing price as of the date of the transaction.

Broker-dealer (B–D)	B–D's bid to buy futures	EFP quotes	B–D's offer to sell futures
A	−2.37	.....	1.86
B	−2.39	.....	3.29
C	−3.15	.....	3.85
D	−3.95	.....	4.55
E	−5.50	.....	5.90
F	−5.37	.....	6.07
Best Prices	−2.37	.....	1.86
Midpoint Between Best Prices	.....	−0.255	
S&P 500 Index Close (11–30–93)	.....	461.79	
EFP Futures Price (agreed to by parties based on midpoint)	.....	461.535	

Of all of the broker-dealers providing quotes, Broker-Dealer A offered the best price for the Hourly Plan to buy futures—i.e. 1.86, the lowest premium above the S&P 500 Index closing price.

GMIMCo determined that an EFP with the Salaried Plan under alternative (d) would be the least costly alternative. Under this alternative, the Hourly Plan would engage in the EFP with the Salaried Plan at the midpoint of the best EFP bid quoted by the broker-dealers to sell stocks and buy futures (i.e. −2.37) versus the best EFP offer quoted by the broker-dealers to buy stocks and sell futures (i.e. 1.86). Thus, alternative (d) provided the Hourly Plan with a better price to buy the futures because the price of the futures based on the −0.255 midpoint (i.e. 461.79 − 0.255 = 461.535) would be more favorable to the

Hourly Plan than the price offered by Broker-Dealer A based on the 1.86 premium above the closing price of the index (i.e. 461.79 + 1.86 = 463.65).

GMIMCo states that alternative (d) saved the Hourly Plan approximately $3.4 million, which otherwise would have been paid to Broker-Dealer A. This cost savings resulted from the fact that the difference between 463.65 (the best price at which the Hourly Plan could have bought futures in an EFP with Broker-Dealer A) and 461.535 (the price at which the Hourly Plan bought futures in the EFP with the Salaried Plan) was 2.115 index points or approximately 46 basis points.[27]

GMIMCo states that the transaction eliminated the tracking error, timing mismatch risk and market impact costs. The Hourly Plan also reduced costs under alternative (d) since the stock transfers were directly between the respective investment managers via master trustee bookkeeping entries, which reduced one layer of stock transfers and resulted in savings of approximately $30,000.

GMIMCo determined that it was in the best interests of the Hourly Plan and its participants and beneficiaries to sell the stocks and purchase the futures through an EFP with the Salaried Plan. Accordingly, on November 30, 1993, the Hourly Plan purchased from the Salaried Plan 948 December S&P 500 futures contracts at a price of 461.50 and 2216 December S&P 500 futures contracts at a price of 461.55 or 3164 total contracts for an average price of 461.535.

The Salaried Plan

10. On November 19, 1993, GMIMCo appointed WFITC to act as an independent fiduciary for the Salaried Plan for the proposed EFP with the Hourly Plan. GMIMCo granted WFITC complete discretion to act on behalf of the Salaried Plan for the proposed transaction and to take any appropriate action necessary to safeguard the interests of the Salaried Plan. WFITC was engaged as independent fiduciary prior to the transaction with the understanding that it would determine whether it was in the best interests of the Salaried Plan and its participants and beneficiaries: (i) To purchase stocks and sell futures in the amount of approximately $730 million; (ii) to engage in an EFP for the purchase of stock and the sale of futures; and (iii) to engage in the EFP with the Hourly Plan.

11. With respect to the determination for the Salaried Plan to purchase stocks and sell futures, WFITC represents that the Salaried Plan's holdings in equities and equity futures were approximately equal to the PIC's designated asset allocation to the U.S. and Canadian equity markets. The policy structure for the Salaried Plan established by the PIC had allocated a specified percentage of the Plan's assets to large capitalization U.S. and Canadian equity securities. This fact coupled with the fact that the Plan held futures in an amount valued well in excess of the value of the proposed transaction led WFITC to conclude that the sale of long futures and their replacement by purchasing U.S. and Canadian equity securities would be consistent with the asset allocation policy of the PIC. In this regard, WFITC believed that the PIC's asset allocation strategy for the Salaried Plan was reasonable. Thus, WFITC concluded that the proposed sale of the futures by the Salaried Plan would be appropriate for and in the best interest of the Salaried Plan. This conclusion was based upon WFITC's view that while financial futures are a legitimate method of achieving temporary exposures to markets, there are differences in holding financial futures as opposed to securities for the long term. These differences include ''tracking error risk'' and ''basis risk.''

WFITC states that ''tracking error risk'' is defined in this instance as the variance in performance of a given portfolio of securities as compared to the index underlying a particular stock index futures contract. In the case of the proposed transaction, WFITC determined that such tracking error risk existed between the stock index futures contracts held temporarily by the Salaried Plan and the portfolio of cash securities that it had determined by policy to hold for the long term. Therefore, WFITC concluded that the best interests of the Salaried Plan would be served by replacing the stock index futures contracts with stocks reflecting the strategies of the selected investment managers.

WFITC states further that ''basis risk'' is defined in this instance as the variance in value between an index and a fully collateralized position in stock index futures contracts that is based on the return of the same index. Such variance in value arises because, while stock index futures are priced to equal the underlying index at expiration, prior to expiration they are priced in an auction market that is partially independent of the auction markets in which the securities in the underlying index are priced. Therefore, WFITC concluded that the interests of the Salaried Plan would be served by eliminating the basis risk of the Salaried Plan by replacing the stock index futures contracts with stocks in an amount up to $730 million reflecting the strategies of the selected investment managers.

12. With respect to the determination for the Salaried Plan to engage in an EFP, WFITC evaluated the various methods the Plan could use in selling futures and purchasing equity securities. WFITC began its analysis with the premise that the Salaried Plan should reduce or eliminate transaction costs, including brokerage commissions, dealer bid/offer spreads, market impact and opportunity costs. Based on WFITC's experience in the futures and equity markets, WFITC believed that EFP transactions are often the most cost effective method for simultaneously selling index futures and buying equity securities. WFITC states that because in an EFP both the sale of futures and the purchase of securities is achieved in a single simultaneous transaction with a single counterparty, all sources of transaction costs are subsumed in a single negotiated price, reflected in the price at which the futures in the EFP are traded.

WFITC represents that the negotiated price of an EFP can be readily compared for cost-effectiveness against an ideal hypothetical transaction with no transaction costs whatsoever. Such an ideal transaction would consist of simultaneously (1) buying stocks at the last reported sale price for each stock as of the moment of the transaction, and (2) selling the stock index futures position such that the futures are priced at or above a ''fair economic value'' with no brokerage commissions, dealer bid/offer spread, market impact, or opportunity cost.

WFITC determined the fair economic value of the futures by calculating the difference between (1) the interest income foregone through the expiration date of the futures by having to liquidate positions in money-market instruments in order to provide cash required to settle the stock purchases, and (2) the dividend income estimated to be earned by holding stocks rather than futures contracts through the expiration date of the futures. On November 30, 1993, the date of the transaction, there were 20 days remaining until the expiration of the futures contracts held by the Salaried Plan. WFITC states that the prevailing money market interest rates at the time were 3.10%. Therefore, the amount of interest that would have been earned for 20 days on the cash required to settle the stock purchases, expressed

[27] Note: 2.115/461.79 = .00458 = .458% or 45.8 basis points, since .01% equals one basis point. Thus, the Hourly Plan would have paid Broker-Dealer A approximately $3.4 million ($730 million × .0046).

in S&P 500 Index points based on the closing price of 461.79, was equal to a premium of approximately 0.78 index points.[28] In addition, WFITC represents that the dividend income that was expected to be earned on the stocks through the expiration date of the futures, expressed in S&P 500 Index points based on the closing price of 461.79, was equal to a premium of approximately 0.59 index points.[29] Given these factors, WFITC calculated that the fair economic value of the futures contracts to be equal to a premium of 0.19 S&P 500 Index points above the quoted price of the index.[30] Thus, with the S&P 500 Index published at 461.79 at the close of trading, the fair economic value of the futures contracts as of November 30, 1993 was calculated by WFITC to be 461.98 (i.e. 461.79 + 0.19 = 461.98). The applicant states that the actual closing price for the December futures contracts on November 30, 1993 was 461.85, as traded on the CME.

WFITC also represents that the negotiated price of an EFP can be readily compared for cost-effectiveness against the estimated transaction costs of selling the futures in the open futures market and purchasing stock in the open stock market. For purposes of this analysis, WFITC assumed that the transaction would be approximately $730 million of stocks reflecting the then current value of the securities held by the selected investment managers. WFITC estimated commissions by assuming a rate of $.01 per share. At this rate, the Salaried Plan would have paid brokerage commissions for purchasing listed securities of approximately $186,286 or 2 basis points (expressed as a percentage of the total value of the stocks).[31] WFITC estimated the dealer bid/offer spread by measuring the difference between the last reported sale for each security and its quoted offered price. Using this technique, the Salaried Plan would have paid a total dealer bid/offer spread of approximately $2,050,384 or 28 basis points.[32] WFITC states that it did not estimate any savings to the Salaried Plan for brokerage commissions on the sale of the futures contracts because such commissions would have been paid regardless of whether the transaction was made in the open market or through an EFP.[33] WFITC states further that it made no estimate of market impact or opportunity costs. Thus, WFITC estimated that the total costs to execute the transactions in the open market would have been at least $2,236,670 or approximately 30 basis points.

Using the pricing methodology described below, WFITC determined that the total cost to the Salaried Plan of transacting the EFP with the Hourly Plan would be approximately $701,225 or 9.6 basis points (expressed as a percentage of the total value of the stocks). This cost figure was calculated by comparing the price of the futures contracts negotiated in the EFP based on the midpoint between the best EFP quotations (461.535) to the fair economic value of the futures as calculated by WFITC based on a premium of 0.19 S&P 500 Index points above the closing price of the index (461.98), resulting in a difference of 0.445 S&P 500 Index points (461.98 − 461.535 = 0.445). The difference of 0.445 index points represented approximately 9.6 basis points based on the S&P 500 Index closing price of 461.79.[34]

WFITC compared the cost of 9.6 basis points to transact the EFP with the Hourly Plan to the estimate of approximately 30 basis points to execute the proposed transaction in the open market, and concluded that there was an advantage of 20.4 basis points to transacting the EFP with the Hourly Plan (or approximately $1,535,445). WFITC believed that a projected savings of 20.4 basis points for the EFP transaction was a conservative estimate of the advantages for the Salaried Plan because, in establishing the cost estimates for the open market alternative, WFITC had assumed a low commission rate of $.01 per share and had assumed no market impact or opportunity costs for open market trading. Thus, WFITC believed that 20.4 basis points would be the minimum advantage to transacting the EFP with the Hourly Plan.

13. WFITC determined that it would permit the Salaried Plan to engage in an EFP only if the price determination methodology was fair to the Salaried Plan, was in the best interests of the Salaried Plan and was consistent with general market standards. In this regard, WFITC represents that it was involved in the EFP transaction, including the pricing determinations that would be made, throughout the proceedings. For example, prior to the consummation of the transaction, WFITC determined along with GMIMCo the broker-dealers from which bids should be solicited.

WFITC reviewed the information that was delivered to these brokers as to the nature of the securities portfolios to be transacted as part of the EFP. Additionally, WFITC performed an analysis of the portfolio, using analytic software provided by BARRA, an independent investment technology firm. This analysis provided WFITC with the correlation between the securities in the portfolio and the S&P 500 futures contracts.

WFITC and GMIMCo each determined independently that a single broker—Broker-Dealer A—had quoted both the highest bid and the lowest offer of any of the brokers who provided EFP quotations. Specifically, Broker-Dealer A bid to sell the stocks at the closing price of the S&P 500 Index and buy the futures at a discount of 2.37 S&P 500 Index points below the closing value of the S&P 500 Index. Since the other brokers had bid larger discounts to buy the futures, Broker-Dealer A's bid was the best price from the prospective of the Salaried Plan. As noted above in the discussion involving GMIMCo, Broker-Dealer A had also offered to buy the stocks at the S&P 500 Index closing price and sell the futures at a premium of 1.86 S&P 500 Index points, or approximately 40 basis points above the closing price of the S&P 500 Index. Since no other broker had offered to sell futures at a lower premium relative to the index, Broker-Dealer A's offer price was also best from the perspective of the Hourly Plan.

WFITC determined that the Salaried Plan's transacting the EFP with the Hourly Plan at the midpoint between Broker-Dealer A's bid price and offered price was better than trading in an EFP directly with Broker-Dealer A at its bid price. Specifically, by trading with the Hourly Plan, the Salaried Plan bought stocks at the closing price of the S&P 500 Index and sold futures at a discount of 0.255 S&P 500 Index points, or approximately 5 basis points below the

[28] Note: 0.78/461.79 = .00168 = .168% or approximately 16.8 basis points. The interest income expected through expiration would have been calculated in dollars as follows: $730 million × .00168 = 1,226,400.

[29] Note: 0.59/461.79 = .00127 = .127% or approximately 12.7 basis points. The dividend income expected through expiration would have been calculated in dollars as follows: $730 million × .00127 = $927,100.

[30] Note: 0.19/461.79 = .00041 = .041% or approximately 4.1 basis points. The fair economic value of the futures contracts would have been calculated in dollars as follows: $730 million × .00041 = $299,300.

[31] Note: $186,286/$730 million = .0002 or .02%.

[32] Note: $2,050,384/$730 million = .0028 or .28%.

[33] With respect to the futures portion of the EFP, WFITC and GMIMCo mutually agreed upon an independent CME clearing member broker-dealer that presented the EFP to the CME, and conducted the necessary reporting and documentation, ensuring that the EFP was accepted by the CME and that the futures positions were properly recorded. The broker-dealer received the customary commission for such services from each Plan. Neither WFITC nor GMIMCo received any of this compensation.

[34] Note: 0.445/461.79 = .00096 or .096%, which is 9.6 basis points.

closing price of the S&P 500 Index.[35] If the Salaried Plan had traded with Broker-Dealer A directly, it would have bought stocks at the identical price that was transacted via the EFP (i.e. the closing price of the S&P 500 Index). However, the Salaried Plan would have sold futures to Broker-Dealer A at a discount of 2.37 S&P 500 Index points, or approximately 51 basis points below the value of the S&P 500 Index.[36] Thus, the price for selling the futures would have been 46 basis points lower than the price the Salaried Plan received in the EFP transaction with the Hourly Plan.

WFITC determined that the price determination methodology was fair to the Salaried Plan, was in the best interests of the Salaried Plan, and was consistent with general market standards, because the methodology included a thorough exploration of EFP prices in the marketplace. WFITC states that the EFP price achieved for the Salaried Plan was at least as favorable as any price the Plan could have received from an independent broker-dealer capable of executing the transaction on November 30, 1993.

14. In summary, the applicant represents that the transaction met the statutory criteria contained in section 408(a) of the Act because: (a) The terms of the EFP were at least as favorable to both the Salaried Plan and the Hourly Plan as the terms which either Plan could have received in an arm's-length transaction involving an unrelated party; (b) each Plan received a price in the EFP transaction which was equal to the midpoint between the highest independent bid and lowest independent offer for buying and selling the futures involved, based on EFP quotations obtained from independent broker-dealers capable of engaging in such an EFP at the time of the transaction; (c) WFITC, as an independent fiduciary for the Salaried Plan, determined that an EFP with the Hourly Plan was in the best interests of the Salaried Plan and its participants and beneficiaries; (d) WFITC monitored the EFP transaction and took appropriate actions necessary to safeguard the interests of the Salaried Plan; (e) GMIMCo, as fiduciary for the Hourly Plan, determined that an EFP with the Salaried Plan was in the best interests of the Hourly Plan and its participants and beneficiaries; and (f) GMIMCo monitored the EFP transaction and took appropriate actions necessary to safeguard the interests of the Hourly Plan.

[35] Note: 0.255/461.79 = .0005 or .05%.

[36] Note: 2.37/461.79 = .0051 or .51%.

Notice to Interested Persons

The applicant states that notice to interested persons shall be made within twenty (20) business days following the publication of the proposed exemption in the **Federal Register**. This notice shall include a copy of the notice of proposed exemption (the Proposal) as published in the **Federal register** and a supplemental statement (see 29 CFR 2570.43(b)(2)) which informs interested persons of their right to comment on and/or request a hearing with respect to the proposed exemption. The applicant will post a copy of the Proposal and the supplemental statement in areas customarily used for notices to employees regarding employee benefit and labor relations matters at GMC locations where employees covered by the Plans are employed. The applicant will send to each of the unions representing such employees a copy of the Proposal and will request that each union post these materials at local union halls within twenty (20) business days of the publication of the Proposal in the **Federal Register**. Finally, the applicant will send a copy of the Proposal and supplemental statement to the presidents (or comparable officers) of the approximately 230 GMC retiree organizations and clubs as a reasonable means of providing notice to Plan participants who are retirees of GMC or an affiliate.

Comments or requests for a public hearing must be received by the Department within sixty (60) days following the publication of the Proposal in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department at (202) 219–8194. (This is not a toll-free number.)

Law Offices of Bryson and Berman, P.A. Employees' Pension Plan and Trust (Pension Plan) and Law Offices of Bryson and Berman, P. A. Employees' Profit Sharing Plan and Trust (P/S Plan, Collectively; the Plans) Located in Miami, Florida

[Application Nos. D–09884 and D–09885]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990.) If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by the two individual accounts in the Plans of Rodney W. Bryson of two adjacent parcels of vacant land (Lots 3 and 4, collectively; the Lots) to Mr. Rodney Bryson (Mr. Bryson), a trustee of the Plans and a party in interest with respect to the Plans; provided that the following conditions are satisfied:

(a) the proposed sale will be a one-time cash transaction;

(b) the Accounts in this transaction will receive the current fair market value of the Lots established at the time of the sale by an independent qualified appraiser; and

(c) the Accounts will pay no expenses associated with the sale.

Summary of Facts and Representations

1. The Plans were established in 1976 and have a total of three participants, including Mr. Bryson and Mark S. Berman (Mr. Berman). Mr. Bryson and Mr. Berman are the trustees of the Plans and are also the sole stockholders of Law Offices of Bryson and Berman, P.A. (the Employer). The Plans are a money purchase pension plan and a profit sharing plan. The Plans provide for individually directed accounts. As of June 30, 1994, the Pension Plan and the P/S Plan had $386,380 and $487,419 in net assets, respectively. As of the same date, Mr. Bryson's account in the Pension Plan (P/P Account) and the P/S Plan (P/S Account, collectively; the Accounts) had $175,201 and $214,134 in net assets, respectively. The Employer is a professional association incorporated in the State of Florida, which specializes in trial law.

2. The Lots were originally acquired as follows. Pursuant to the direction of Mr. Bryson, on December 14, 1989, the Accounts purchased twenty acres of vacant land located in Broward County, Ft. Lauderdale, Florida, from Suzanne F. Sinaiko, an unrelated third party for a total consideration of $375,000. On the same day, the Accounts sold one half of the twenty acres to Richard French and Mrs. Claudia French (the Frenchs), unrelated third parties, for $187,500. As a result, at the close of business on December 14, 1989, the Accounts owned ten acres of vacant unimproved land (the Land) in Broward County, Ft. Lauderdale, Florida. The applicant represents that at the time of acquisition, the Lots represented 38% of the P/P Account and 38% of the P/S Account.[37]

[37] The Department expresses no opinion as to whether the Plans' acquisition and holding of the Lots in the Accounts violated any provision of part 4 of title I of the Act.

3. Consequently, the Accounts, in conjunction with the Frenchs, made certain improvements to the Land. These improvements were made by independent third party companies, and consisted of platting the Land, constructing an access road, providing fill and landscaping. In this regard, it is represented that the P/P Account paid $16,628 in capital improvement costs, and the P/S Account paid $20,322 in capital improvement costs. The Land was platted into two residential lots of approximately 5 acres each (Lots 3 and 4). The Lots were allocated among the Accounts as follows. The P/P Account owned 45% of Lot 3 and Lot 4 (two 45% Interests), and the P/S Account owned 55% of Lot 3 and Lot 4 (two 55% Interests, collectively; Four Interests).

4. Lot 3 was appraised on April 19, 1994 (the Appraisal), by Thomas R. Wachtstetter A.S.A, I.F.A., an independent general appraiser certified in the State of Florida (Mr. Wachtstetter). In the Appraisal, Mr. Wachtstetter stated that Lot 3 contains 4.98 acres and is vacant land. In establishing the fair market value of Lot 3, Mr. Wachtstetter relied on the sales comparison approach to value and determined that the fair market value of Lot 3 was $135,000. On October 26, 1994, Mr. Wachtstetter submitted an addendum to the Appraisal (the Addendum), which addressed the fair market value of Lot 4. In the Addendum he stated that all information contained in the Appraisal of Lot 3 is also applicable in estimating the value of Lot 4. Specifically, Mr. Wachtstetter represented that Lot 3 and Lot 4 are adjacent, nearly the same size, and neither Lot has any apparent easements, encroachments or environmental concerns which would adversely affect the value of that Lot. Mr. Wachtstetter concluded that the estimated value of each Lot is $135,000 each, for an aggregate fair market value of $270,000. Mr. Wachtstetter also addressed the assemblage value of Lots 3 and 4 as a ten acre parcel, and concluded that the aggregate fair market value of the Lots does not exceed the fair market value of five acre Lot 3 or Lot 4, if purchased separately. The applicant represents that the Lots are currently not encumbered by any debt, and that the Lots were never used by any related persons, and are not adjacent to other real property owned by Mr. Bryson or other parties in interest or related persons. Since original acquisition, the Lots have remained vacant and unutilized by any person, and have yielded no income to the Accounts.

5. Mr. Bryson now desires to purchase the Lots from the Accounts in a one time cash transaction for their current aggregate fair market value in order to build a personal residence. Once the transaction is consummated, the P/S Account will receive fifty five percent (55%) of the sale proceeds and the P/P Account will receive forty five percent (45%) of the sale proceeds. It is represented that the proposed transaction is in the best interest of the Accounts because the transaction will enable the Accounts to divest of a non-income producing asset which constitutes a relatively high percentage of the Accounts' assets, and will provide the Accounts with liquidity. The transaction is protective of the Accounts because as a result of the sale the Accounts will receive the current fair market value of the Lots, and the Accounts will incur no expenses as a result of the proposed transaction. The applicant maintains that a real estate broker has been attempting to sell the Lots since the summer of 1993, but the Accounts received no reasonable offers.

6. In summary, the applicant represents that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The proposed sale will be a one-time cash transaction;

(b) The Accounts will receive the current fair market value of the Lots established at the time of the sale by an independent qualified appraiser;

(c) The Accounts will pay no expenses associated with the sale; and

(d) The sale will enable the Accounts to diversify its investment portfolio and will provide the Accounts with liquidity.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department, telephone (202) 219–8883. (This is not a toll-free number.)

Welborn Clinic Employees' Retirement Plan (the Plan) Located in Evansville, Indiana

[Application No. D–09890]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by the Plan of certain improved real property (the Property) located in Evansville, Indiana, to WANC Leasing Company (WANC), a party in interest with respect to the Plan; provided the following conditions are satisfied:

(A) All terms and conditions of the transaction are no less favorable to the Plan than those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(B) The Plan receives a cash purchase price of no less than the greater of (1) $8,555,000, or (2) the Property's fair market value as of the sale date; and

(C) The Plan does not incur any expenses with respect to the transaction.

Summary of Facts and Representations

Introduction: The Plan owns the Property, which is improved real property leased to and occupied by the Plan sponsor, Welborn Clinic (the Employer), as its principal place of business. The Employer requires substantial improvements of the Property to accommodate updated and modernized operations, but the Plan trustee has determined that it is not in the best interests of the Plan to finance such improvements. Instead, WANC (a partnership owned by principals of the Employer) proposes to purchase the Property from the Plan, complete the necessary improvements, and lease the Property to the Employer. The exemption proposed herein would enable the Plan's sale of the Property to WANC as described below.

1. The Plan is a defined contribution plan with 643 participants and total net assets of $55,721,511 as of December 31, 1993. The Employer is a multi-specialty group medical practice with its principal place of business situated in the Property, located at 421 Chestnut Street in the downtown sector of Evansville, Indiana. The Employer is an Indiana business trust which is controlled by the physicians who hold staff memberships with the Employer. The trustee of the Plan is the Citizens National Bank of Evansville (the Trustee), which represents itself to be independent of and unrelated to the Employer, except as Plan Trustee. WANC is an Indiana general partnership in which all of the 65 general partners are staff member physicians of the Employer.

2. The Property is owned by the Plan and leased to the Employer (the Employer Lease) pursuant to an individual administrative exemption, PTE 89–4 (54 FR 2241, January 19, 1989). The rights of the Plan with respect to the Property, including the Employer Lease and PTE 89–4, are represented for all purposes by the Trustee. The Property is a 4.437 acre

parcel of land located in downtown Evansville, Indiana, and is improved with a three-level, 99,500 square foot medical office building (the Main Building) which constitutes the main facility for the Employer's medical clinic (the Clinic). The entire Clinic consists of three components: (1) the Main Building, (2) a nearby medical facility building owned by WANC (the WANC Building) and leased to the Employer, and (3) a two-story structure (the Connector Building), owned by WANC and leased to the Employer, connecting the Main Building with the WANC Building. Pursuant to an additional administrative exemption, PTE 93–24 (58 FR 8991, February 18, 1993), the Employer Lease was modified in 1993 to enable an exchange of land parcels between the Plan and WANC in connection with WANC's construction of the Connector Building. As a result of the property exchange covered by PTE 93–24, the Plan acquired a parking lot (the New Parking Lot) adjacent to the Main Building, and WANC acquired a parcel of property abutting both the Main Building and the WANC Building, on which it constructed the Connector Building. The Connector Building and the land underlying it are owned by WANC, leased to the Employer, and utilized between the Main Building and the WANC Building as the main entrance and reception area for the Clinic. Only the Main Building is located on the Property owned by the Plan, which includes the New Parking Lot.

The Trustee represents that the Employer has complied with, and continues in compliance with, all terms and conditions of the Employer Lease and the individual exemptions, PTE 89–4 and PTE 93–24.

3. The Employer represents that with the aid of consultants, it has determined that the Main Clinic is in need of at least $3,000,000 of expansion and renovation work in order to satisfy the Employer's needs. As a result of WANC's 1993 construction of the Connector Building and a recent renovation of the WANC Building, those two components of the Clinic are new, updated medical facilities. However, the Employer represents that the Main Building remains in need of substantial refurbishing and refitting to provide updated, modernized workspace for surgery, urology, oncology, hematology, dermatology, allergy, ear/nose/throat, eyecare, the Employer's health maintenance organization, and administrative/business offices. The Trustee is unwilling to commit Plan assets to finance the necessary renovations of the Main Building because the Trustee considers such expenses to be the obligation of the Employer, and because the Trustee finds that the participants and beneficiaries would receive very little short-term or intermediate-term benefit from such additional investment of capital in the Clinic. The Employer, as tenant and occupant of the Main Building, is unwilling to bear the expense of the renovations because the improvements to the Main Building would eventually increase the Employer's rent under the Employer Lease, assuming such improvements would increase the Property's fair market value. The Employer represents that even if it were willing to finance renovations currently required, it is likely a similar problem would arise again in the future, whereby the Main Building would require renovations and the Trustee, on behalf of the Plan, and the Employer would each be unwilling to finance the improvements. The principals of WANC, however, have expressed a willingness to finance the necessary renovations of the Main Building pursuant to a proposed purchase of the Property from the Plan and its lease to the Employer.

4. Accordingly, the Trustee, the Employer and WANC propose that the Plan sell the Property to WANC, and are requesting an exemption for the sale transaction. The proposed sale transaction will proceed in accordance with a written agreement (the Agreement) executed between the Trustee, on behalf of the Plan, and WANC after the exemption proposed herein, if granted, is published in the **Federal Register**.

Under the Agreement, the Plan will sell the Property, consisting of the Main Building, the underlying land, and the New Parking Lot, for a cash purchase price of no less than $8,555,000 (the Minimum Purchase Price). In an appraisal of the Property effective June 24, 1994, Brian D. Shelton and William R Bartlett II, MAI, SRA (Shelton and Bartlett), determined that the fair market value of the Property, inclusive of the Employer Lease, was $8,250,000. Shelton and Bartlett are professional real estate appraisers with Appraisal Company, Inc. in Evansville, Indiana. In another appraisal of the Property, inclusive of the Property, C. David Matthews (Matthews) determined that the Property had a fair market value of $8,860,000 as of December 31, 1993. The Minimum Purchase Price represents the mean of the two appraisals. Pursuant to the Agreement, the Property will be reappraised by Matthews and Bartlett (the Reappraisals) no earlier than the date of the Agreement and no later than 30 days after the date of the Agreement. If the mean of the Reappraisals is higher than $8,555,000, then the purchase price of the Property shall be the mean of the Reappraisals. In no event will the purchase price be lower than the Minimum Purchase Price.

5. The Trustee represents that the agreement to set the purchase price for the Property at no less than the Minimum Purchase Price resulted from arm's-length negotiations between the Trustee and WANC over a two-month period. The Trustee initially proposed a sale of the Property to WANC for a purchase price of $8,860,000, consistent with Matthews' 1993 appraisal. The Trustee states that WANC considered this price to be excessive, in light of the more recent appraisal by Shelton and Bartlett, and WANC counter-proposed a purchase price of $8,250,000. The Trustee represents that the two appraisals were reviewed and analyzed by the Trustee's appraisal expert, Darrell Woehler (Woehler), who noted differences in the approach of the two appraisers and determined that substantial subjectivity could be expected among such appraisals. Woehler noted that Matthews had considered the current rent under the Employer Lease to be in excess of fair market rent, whereas Shelton and Bartlett had found the current rent to be equivalent to fair market rent. After Woehler's review, the Trustee continued discussions with representatives of WANC, until both parties agreed on the Minimum Purchase Price and the Reappraisals. The Trustee represents that the Plan's depreciated net cost basis of the Property was $3,751,070.42 as of December 31, 1993.

6. The Trustee represents that after careful consideration of all facts and circumstances surrounding the proposed sale of the Property to WANC, it has determined that it will be in the best interests and protective of the participants and beneficiaries of the Plan. The Trustee states that it has determined that the proposed purchase price of at least $8,555,000 is not less than the fair market value of the Property, and the Reappraisals ensure that the Plan will benefit from any increase in fair market value as of the date of the sale. The Trustee states that although the Plan has benefitted from favorable returns on the Property, it is time for the Plan to dispose of the Property and invest in other assets, in light of the pressing need for renovations and modernization of the Property's improvements.

The Trustee notes that due to the nature of the Property as a component

in a three-part medical facility, the other two parts of which are owned by WANC, it would be very difficult to find a buyer other than WANC willing to offer a purchase price as favorable to the Plan as that offered by WANC.

7. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (1) The Plan will receive a cash purchase price of no less than the Minimum Purchase Price, subject to possible upward adjustment pursuant to the Reappraisals, which the Trustee has determined to be no less than the fair market value of the Property; (2) The Plan will incur no costs or expenses relating to the transaction; (3) The Trustee has determined that retention of the Property would not be in the best interests of the Plan due to the necessity of renovation expenses; and (4) The Trustee has determined that the Plan is unlikely to secure an unrelated buyer willing to pay a purchase price for the Property as favorable to the Plan as the proposed purchase price under the Agreement.

FOR FURTHER INFORMATION CONTACT: Ronald Willett of the Department, telephone (202) 219–8881. (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 of 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 8th day of March, 1995.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration Department of Labor.

[FR Doc. 95–6118 Filed 3–10–95; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of the Humanities Panel will be held at the Old Post Office, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506.

FOR FURTHER INFORMATION CONTACT: David C. Fisher, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, D.C. 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose: (1) Trade secrets and commercial or financial information obtained from a person and privileged or confidential; or (2) information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c) (4) and (6) of section 552b of Title 5, United States Code.

1. *Date:* April 3, 1995.
Time: 9:00 a.m. to 5:00 p.m.
Room: 315.
*Program:*This meeting will review Subventions Program applications in Classics, the Renaissance and Early Modern Studies, submitted to the Division of Research Programs, for projects after September 1, 1995.

2. *Date:* April 10, 1995.
Time: 9:00 a.m. to 5:00 p.m.
Room: 315.
Program: This meeting will review Subventions Program applications in History and American Studies, submitted to the Division of Research Programs, for projects beginning after September 1, 1995.

3. *Date:* April 12, 1995.
Time: 9:00 a.m. to 5:00 p.m.
Room: 315.
Program: This meeting will review Subventions Program applications in Literature and Cultural Studies, submitted to the Division of Research Programs, for projects beginning after September 1, 1995.

4. *Date:* April 17–18, 1995.
Time: 9:00 a.m. to 5:30 p.m.
Room: 430.
Program: This meeting will review applications submitted to Humanities Projects in Libraries and Archives during the March 10, 1995 deadline, submitted to Division of Public Programs, for projects beginning after June 1, 1995.

David C. Fisher,

Advisory Committee Management Officer.

[FR Doc. 95–6144 Filed 3–10–95; 8:45 am]

BILLING CODE 7536–01–M

NUCLEAR REGULATORY COMMISSION

Call for Nominations for Nuclear Safety Research Review Committee

AGENCY: Nuclear Regulatory Commission.

ACTION: Call for nominations.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is inviting nominations of qualified candidates to consider for appointment to its Nuclear Safety Research Review Committee (NSRRC). Nominations will be accepted until April 20, 1995.