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General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon and Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

The general wage determinations issued under the Davis-Bacon and related Acts are available electronically by subscription to the FedWorld Bulletin Board System of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at (703) 487-4630.

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Signed at Washington, D.C. this 30th day of March, 1995.

Alan L. Moss,

Director, Division of Wage Determinations.

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Pension and Welfare Benefits Administration

[Application No. D-9511, et al.]

Proposed Exemptions; Bank of America Illinois, 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, DC 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, DC 20210.

Notice to Interested Persons

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

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

Bank of America Illinois, Located in Chicago, IL

[Exemption Application Nos. D-9511, D-9512 and D-9513]

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, August 10, 1990).

Section I—Exemption for Purchases and Sales

If the exemption is granted, effective September 1, 1993, the restrictions of section 406(a)(1)(A) through (D) and section 406(b) 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 (F) of the Code, shall not apply to the purchase and sale by employee benefit plans (the Plans), to which the Bank serves as fiduciary, of shares in the Prime Fund, the Government Securities Fund, and the Treasury Fund, three open-end money market mutual fund portfolios (collectively referred to as the Funds), to which the Bank of America Illinois, and its affiliates (the Bank) provide investment advisory and other services, in connection with the Supplemental Sweep Service (as defined in paragraph (a) of section IV below), provided that the conditions of Section III are met.

Section II—Exemption for Receipt of Fees

If the exemption is granted, effective September 1, 1993, the restrictions of section 406(a)(1)(A) through (D) and section 406(b) 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 (F) of the Code, shall not apply to the receipt of fees by the Bank from the Funds for providing investment advisory and other services to the Funds, in connection with the investment of the assets of the Plans in the Funds, for which the Bank provides investment advisory and other services, provided that the conditions of Section III are met.

Section III—Conditions

(a) The Bank does not have investment discretion or render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to the Plan assets invested in the Funds pursuant to this proposed exemption.

(b) No sales commissions or redemption fees are paid by the Plans in connection with the purchase or sale of shares in the Funds.

(c) The Bank does not receive any fees payable pursuant to Rule 12b-1 under the Investment Company Act of 1940 (the 12b-1 Fees) in connection with the transactions.

(d) The price paid or received by a Plan for shares in a Fund is the net asset value per share on the date of the transaction, as defined in section IV(a), and is the same price which would have been paid or received for the shares by any other investor on that date.

(e) Prior to the Bank's receipt of fees paid by each Fund with respect to Plan assets invested therein, each Plan receives a credit of such Plan's proportionate share of all fees charged to the Fund by the Bank.

(f) The Plans are not employee benefit plans sponsored or maintained by the Bank.

(g) A second fiduciary who is independent of and unrelated to the Bank or any of its affiliates (the Second Fiduciary), receives full written disclosure of information concerning the Fund(s), including but not limited to:

(1) A current prospectus for each fund in which a Plan is considering investing;

(2) A statement describing the fees for investment advisory or similar services, and all other fees to be charged to or paid by the Plan or the Funds, including the nature and extent of any differential between the rates of such fees;

(3) The reason why the Bank may consider such investment to be appropriate for the Plan; and

(4) Upon request of the Second fiduciary, a copy of the proposed exemption and/or a copy of the final exemption, if granted once such documents become available.

(h) On the basis of the information described above in paragraph (g) of section III, the Second Fiduciary authorizes in writing the investment of assets of the Plan in each particular Fund, the fees to be paid by the Fund and the Plan to the Bank, and the credit to the Plan of fees received by the Bank from the Funds for investment advisory and other services, consistent with the responsibilities, obligations, and duties imposed on fiduciaries by part 4 of Title I of the Act.

(i) The Second Fiduciary referred to in paragraph (g) of section III, or any successor thereto, is notified of any change in the rates of the fees referred to in paragraph (g) of section III and approves in writing the continued holding of any Fund shares acquired by the Plan prior to such change and still held by the Plan.

(j) The Bank provides annually, written disclosures to the Second Fiduciary which are provided to all shareholders of the Fund(s), which establish the rate of return of the Fund(s) absent the credit paid to the Plans for fees paid by the Funds to the Bank.

(k) The combined total of all fees received by the Bank for the provision of services to the Plans, and in connection with the provision of services to any of the Funds in which the Plans may invest, are not in excess

of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(l) All dealings between the Plans and the Funds are on a basis no less favorable to the Plans than dealings between the Funds and other shareholders of the Funds.

(m) The Bank shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (n) below 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 other than the Bank shall be subject to the civil penalty that may be assessed under section 502(l) of the Act, or the taxes imposed by section 4975(a) and (b) or the code, if the records are not available for examination as required by section (n) below:

(n) (1) Except as provided in section (2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (l) above shall be unconditionally available at their customary location during normal business hours by:

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

(B) Any fiduciary of a Plan who has the authority to acquire or dispose of the interests of the Plan or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any Plan that has an interest in any of the Funds or any duly authorized employee or representative of such employer; and

(D) Any participant or beneficiary of any Plan that has an interest in the Funds or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described in paragraphs (k)(1)(B) through (D) shall be authorized to examine the trade secrets of the Bank's commercial or financial information which is privileged or confidential.

Section IV—Definitions

For purposes of this proposed exemption:

(a) Supplemental Sweep Service means the transfer of shares in the Funds between the Bank and the Plans by means of the Banks's internal accounting procedures at the end of the Supplemental Sweep Period, in

connection with Plan orders to purchase shares in the Funds that the Bank is otherwise unable to settle prior to the Supplemental Sweep Period, and Plan orders to purchase or redeem shares in the Funds that are received by the Bank during the Supplemental Sweep Period. A Plan order to purchase or redeem shares in the Fund(s) pursuant to the Supplemental Sweep Service occurs solely as a result of investment decisions, deposits or withdrawals, directed by an independent Second Fiduciary.

(b) Supplemental Sweep Period means the period of time on each business day after the Funds stop accepting orders for the purchase or redemption of shares in the Funds and before the Bank's close of business.

(c) The term "net asset value" means the amount for purposes of pricing all purchase and sale of shares in the Funds calculated by dividing the value of all securities, determined by a method as set forth in the Fund's prospectus and statement of additional information, and other assets belonging to the Fund or portfolio of the Fund, less the liabilities charged to each such portfolio or fund, by the number of outstanding shares.

(d) An "affiliate" of a person includes:

(1) Any persons directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control, with the person;

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

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

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

(f) The term "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "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 sister.

(g) A fiduciary will not be deemed to be an independent fiduciary with respect to the Bank and its affiliates if:

(1) The fiduciary directly or indirectly controls, is controlled by, or is under common control with the Bank or any affiliate;

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

(3) The 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.

If an officer, director, partner, or employee of the Bank (or a 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 manager/adviser, (ii) the approval of any purchase or sale by the Plan of shares of the Funds, and (iii) the approval of any change of fees charged to or paid by the Plan, in connection with any of the transactions described in sections I and II above, then paragraph (g)(2) of section III above, shall not apply.

The availability of this proposed exemption would be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material facts which are the subject of this exemption.

Summary of Facts and Representations

1. The Bank, which is comprised of Bank of America Illinois, and its wholly owned subsidiary, Continental Trust Company, provides a full range of fiduciary services to qualified employee benefit plans, welfare plans, and governmental retirement plans. Such services include trustee and custodial services, discretionary and directed investment of plan assets, and all related securities processing activities, domestic and foreign. As of December 31, 1994, the Bank provided investment management and custodial services with respect to total assets of approximately \$179 billion.

The Plans are comprised of retirement plans qualified under section 401(a) of the Code, pension plans that meet the definition of pension plan set forth in section 3(2) of the Act and section 4975(e)(1) of the Code, with respect to which the Bank serves as a trustee, or investment fiduciary. In addition, the Bank states that it may offer the Funds, under the arrangement described herein, to welfare plans.

2. The Bank provides the Plans with the opportunity to purchase shares in the Funds, to which the Bank provides investment advisory and other services, in connection with existing and expanded cash management sweep services. The Bank states that it currently invests certain assets of the Plans in a short term collective investment fund (the Collective Fund) maintained by the Bank in connection with the provision of sweep services. In this regard, the Bank represents that the addition of the Funds as short term

investment alternatives will result in greater investment choice, greater diversification and reduced risk for the Plans.¹

3. The Funds are comprised of the Prime Fund, the Government Securities Fund and the Treasury Fund, each of which is a money market mutual fund portfolio of the 231 Funds, an open-end management investment company organized as a Massachusetts business trust (the Trust). The Trust is organized under the Investment Company Act of 1940, as amended. Fund shares offered by the Trust are registered under the Securities Act of 1933.

The assets of the Prime Fund are invested in a diversified portfolio of U.S. Dollar denominated money market instruments, including: Obligations issued or guaranteed by the U.S. Government, its agencies or instrumentalities, bank obligations, including certificates of deposits, time deposits, bankers' acceptances and debt securities issued or supported by domestic banks or domestic branches of foreign banks; short-term corporate obligations including commercial loan participations, commercial paper, corporate bonds, privately placed commercial paper, and participation interests in trusts or special purpose vehicles backed by consumer or commercial credit receivables; and municipal securities including taxable and tax-exempt general obligations, revenue obligations, private activity and industrial development bonds.

The assets of the Government Securities Fund are invested exclusively in obligations issued or guaranteed by the U.S. Government, its agencies or instrumentalities; receipts evidencing separately traded interest and principal components of U.S. Government obligations (including TIGRs and CATS); and repurchase agreements collateralized by government obligations.

The Treasury Fund invests its assets exclusively in obligations issued by the U.S. Treasury, and repurchase agreements relating to such Treasury obligations.

4. The Bank states that the Plans pay a short term cash management fee (Cash Management Fee) of .12 percent of

average daily assets to the Bank in connection with Plan investments in the short term collective investment fund maintained by the Bank. In addition, each Plan pays a trustee fee to the Bank of between .01 percent and .15 percent of all Plan assets under the Bank's custody. The Bank negotiates its trustee fees with each Plan individually. The Bank represents that Plan assets are invested in the Funds as an alternative to the short term collective investment fund.² In order to avoid charging double fees with respect to Plan assets invested in the Funds, the Bank credits all fees attributable to Plan assets invested therein, payable to the Bank by the Funds, to the Plans. In this regard, the Bank states that its crediting to the Plans of all fees to be paid by the Funds to the Bank results in no additional cost to any of the Plans with respect to Plan assets invested in shares in the Funds.

The fees payable to the Bank by the Funds are accrued daily and paid to the Bank on the first day of the following month, in arrears. On the same day, the

Bank credits to the Plans their proportionate shares of all fees to be paid by the Funds to the Bank with respect to Plan assets invested therein.

The Bank states that it discloses annually in writing to the Plans: The total rate of return earned on their shares in the Fund(s) which includes the amounts received by the Plan from the Bank as a credit of the fees paid by the Fund(s) to the Bank in connection with Plan assets invested therein; and the portion of the rate of return which is attributable to the amounts credited by the Bank to the Plans. In addition, the Bank represents that it discloses to the Second Fiduciary annually in writing the rate of return earned on shares in the Fund(s) held by investors other than the Plans.

5. The Bank states that it does not have investment discretion with respect to Plan assets involved in the purchase or sale of shares in the Funds for which relief is requested.³ Purchases and redemptions of shares in the Funds are solely the result of investment directions from a Second Fiduciary. The Bank represents that only liquid Plan assets awaiting distribution, or investment, are used to purchase shares in the Funds. The Bank states that it has no discretion with respect to the amount of liquid assets available for investment in the funds. The liquid assets of the Plans are always the proceeds of other assets which have been liquidated, or new assets transferred to the Bank, at the direction of a Second Fiduciary.

The Bank states that it has no discretion with respect to how liquid assets of the Plans are invested. The Bank represents that the investment of the liquid assets of a Plan in the Funds is either specifically directed by a Second Fiduciary, or pursuant to standing orders by a Second Fiduciary to invest any daily cash balances in the Fund absent the Bank's receipt of any other investment directions.

6. The Bank states that share purchases and redemption requests communicated by the Bank to the Funds are transmitted each business day prior to the time established by the Fund (currently expected to be 2:00 P.M. Central Standard Time) (the Cutoff Time) for same-day processing and payment of transaction requests. If a transaction triggering a purchase or redemption of Fund shares is processed by the Bank prior to the Cutoff Time, the

¹ The Bank represents that it invests the assets of plans covering its employees in the Funds on terms that are identical to the terms of the proposed exemption set forth herein. In this regard, the Bank states that this arrangement meets the terms and conditions of Prohibited Transaction Exemption (PTE) 77-3 (42 FR 18734, April 8, 1977). The Department expresses no opinion as to whether PTE 77-3 provides relief for the purchase or sale of shares in the Funds by plans covering employees of the Bank pursuant to the arrangement described herein.

² The Bank represents that it invests cash collateral provided to the Plans by borrowers of securities in connection with securities lending transactions (the Collateral), in the Funds. The Bank states that it receives a securities lending fee which is part of the Plans' net return from the investment of the Collateral. In this regard, The Bank represents that the securities lending service is separate from the cash management service. According to the Bank, no Cash Management Fee, or investment management fee, is paid by the Plans to the Bank with respect to the management of the Collateral.

The Bank states that it is relying on the relief provided by PTEs 81-6 (46 FR 7527, January 23, 1981) and 82-63 (47 FR 14804, April 6, 1982) for the securities lending transactions and its receipt of fees in connection therewith. In addition, The Bank represents that it is relying on PTE 77-4 (42 FR 18732, April 8, 1977) for relief for the investment of the Collateral in the Funds.

The Bank is not requesting, and the Department is not providing, any relief with regard to the investment of the Collateral in the Funds. In this regard, the Department expresses no opinion as to the availability of the relief provided by PTEs 81-6 and 82-63 for the Plan's securities lending activities and securities lending fees paid by the Plan in connection therewith, nor the availability of PTE 77-4 for the investment of the Collateral in shares of the Funds.

Nevertheless, the Department notes that the relief provided by PTE 77-4 is predicated on, among other things, avoiding the payment of double investment management, investment advisory or similar fees by a plan to a fiduciary of the plan, or any affiliate, which also serves as investment advisor to the mutual fund company. In this regard, it is the Department's view that whether a particular service constitutes the provision of investment advisory services or similar services depends on the particular facts and circumstances of each case. The Department emphasizes that, regardless of whether an administrative exemption may be applicable, it expects the plan fiduciary with investment management responsibility to consider the totality of fees to be paid by the plan directly, and/or indirectly, prior to entering into the arrangement in order to determine that the fees to be paid by the plan do not exceed reasonable compensation for the particular advisory service offered.

³ The Bank represents that it invests plan assets with respect to which it has investment discretion in the Funds. In this regard, the Bank represents that such transactions meet the terms and conditions of PTE 77-4. The Department expresses no opinion as to the availability of the relief provided by PTE 77-4 for such transactions.

Bank, in turn, transmits the purchase or redemption request to the Fund, which executes the request that same day.

The Bank states that additions to customer accounts (including additions made to cover Fund purchase requests placed prior to the Cutoff Time) and withdrawals from customer accounts may occur subsequent to the Cutoff Time but prior to the close of business for the Bank (the Posting Time). The Bank represents that in order to provide additional opportunities for same-day processing of Plan purchase and redemption requests with respect to shares in the Funds, it offers a Supplemental Sweep Service. The Supplemental Sweep Service provides for the settlement of deposits and withdrawals late each business day subsequent to the Cutoff Time but prior to the Posting Time (the Supplemental Sweep Period).

The Bank represents that the Supplemental Sweep Service assures the overnight investment of any Plan assets to which it applies in order to maximize the return to the Plans by providing an additional period during which the Plan's otherwise idle assets would be invested. In addition, the Bank represents that the Supplemental Sweep Service helps to meet the liquidity needs of the Plans by providing an opportunity for the Plans to, in effect, redeem shares in the Funds and withdraw assets during the Supplemental Sweep Period.

The Bank states that the Supplemental Sweep Service is for selected institutional customers, primarily Plans, and is effective for purchase orders which cannot be settled prior to the Supplemental Sweep Period and for purchase and withdrawal orders received during the Supplemental Sweep Period each business day.

7. The Bank represents that shares acquired by the Plans through the Supplemental Sweep Service are, in some cases, first acquired by the Bank and subsequently allocated to customers which have assets available to be swept as of the Posting Time on that same day. In addition, in order to facilitate prompt redemption of customer shares on the same day that the customer wishes to redeem them, the Bank processes the customer redemption requests received during the Supplemental Sweep Period internally by providing immediate credit to the customer for the Fund Shares.

The Bank represents that the price paid, or received by, a Plan for shares in a Fund purchased, or redeemed, pursuant to the Supplemental Sweep Service is the net asset value per share

for all other purchases and redemptions of shares in the Fund on that date.

8. The Bank represents that its acquisition of shares from the Funds through the Supplemental Sweep Service is based on estimates of the prospective purchase and sale of shares in the Funds by the Plans during the Supplemental Sweep Period.

Immediately prior to the Supplemental Sweep Period on each business day, the Bank estimates the approximate number of shares of each fund which its customers will require as of the Posting Time later that same day (in addition to the number of shares needed to cover net customer purchase and sale orders placed prior to the Cutoff Time). The Bank then purchases that number of shares of each Fund prior to the Cutoff time as trustee, nominee or in some other capacity for its customers. The books of the Fund's transfer agent carry only one account for all purchases and redemptions of Fund shares by the Bank, and reflect the Bank as the owner of all Fund shares purchased. The Bank's books, however, reflect its purchase of shares in the Funds as trustee, nominee, or other capacity for its customer accounts, or as principal, on a provisional basis.

Later in the day, at the end of the Supplemental Sweep Period, the Bank determines the precise number of each Fund's shares needed by its customers. Based on its determination, the Bank adjusts the provisional purchase entries previously made on its books to reflect the net purchase or redemption of Fund shares by each customer account (or by the Bank in its own name) in the amount necessary to satisfy the net purchase needs of its customers at the end of the Supplemental Sweep Period. Appropriate final entries are made in the Bank's trust and corporate accounting systems to reflect the previous day's transaction activity and the respective ownership positions of the Bank and its customers as of the previous day's Cutoff Time. The books of the transfer agent of the respective Fund, however reflect no net change (i.e., change in number of shares outstanding) in the record ownership position of the Bank as a result of the Bank's adjustments; all adjustments of Fund shares among the Bank and its various customers would be internal bookkeeping adjustments made by the Bank.

In the event that the Bank, on a given business day, underestimated the number of any Fund's shares which were required by its customers, the Bank allocates any shares the Bank had previously purchased to customer accounts which purchased Fund shares

between the Posting Time and the Cutoff Time on a pro rata basis by reflecting on the Bank's books the redemption of Fund shares owned or purchased by the Bank and the simultaneous purchase by its customers, from the Fund, of the corresponding number of fund shares. The balance of each customer's funds that was intended to be invested in the Funds during the Supplemental Sweep Period which remain uninvested after this adjustment process are temporarily invested in the Bank's deposits paying a rate of interest equivalent to the net return on Fund shares for that day (subject to certain regulatory requirements) and subsequently are invested in Fund shares the next business day.⁴ The Bank represents that each customer including the Plans realizes an equivalent return on its invested funds for the day.

However, if the Bank overestimated the number of Fund shares required by its customers on a given business day, any excess Fund shares are placed in the Bank's investment portfolio or trading account.

The Bank represents that, in any event, customers who redeem Fund Shares during the Supplemental Sweep Period pursuant to the Supplemental Sweep Service are provided with immediate provisional credit for the value of Fund shares. Such redemptions ultimately are reflected on the Bank's books as having occurred as of the Cutoff Time in the manner described above. Accordingly, such shares are allocated to other customer accounts or to the Bank's own investment or trading account, through the netting procedures. The Bank states that all such entries are made on its own internal accounting systems effective as of the previous day's Cutoff Time, and result in no net change in the transfer agent's records reflecting the Bank's record ownership of Fund shares. The Bank represents that in effect, the Bank is acting functionally as a sub-transfer agent to effect post-Cutoff redemptions by the Fund.

9. In summary, the Bank represents that the proposed transactions satisfy the statutory criteria of section 408(a) of the Act and 4975(c)(2) of the Code because: (a) The Funds provide the Plans with a more effective investment vehicle than the Collective Fund

⁴ The Bank represents that it intends to rely on section 408(b)(4) of the Act with regard to the investment of Plan assets in deposits of the Bank. The Department expresses no opinion as to whether the relief provided by section 408(b)(4) of the Act is available for the investment of Plan assets in deposits of the Bank pursuant to the arrangement described herein.

currently maintained by the Banks without any increase in fees paid to the Bank; (b) a Second Fiduciary must authorize in writing the investment of Plan assets in the Funds and the payment of any fees to the Bank by the Plans and the Funds, after receiving full written disclosure, including a prospectus for the Funds and a statement describing the fee structure; (c) no sales fees or redemption fees are paid by the Plans in connection with the acquisition or sale of shares of the Funds; and (d) all dealings between the Plans and the Funds, the Bank, or any affiliated person, are on a basis no less favorable to the Plans than such dealings are with the other shareholders.

FOR FURTHER INFORMATION CONTACT: Eric Berger of the Department, telephone (202) 219-8971. (This is not a toll-free number.)

Mellon Bank, N.A. (Mellon) and Its Affiliates Located in Pittsburgh, Pennsylvania

[Application No. D-9724]

Proposed Exemption

Section I—Exemption for Cross-Trading Between Certain Accounts

The restrictions of sections 406(a)(1)(A) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) of the Code, shall not apply to (1) the purchase and sale of securities (including the stock of Mellon Bank Corporation (MBC)) between Indexed Accounts, as defined in Section IV(a); and (2) the purchase and sale of securities, including the common stock of MBC, between Indexed Accounts and various large accounts (the Large Accounts) pursuant to portfolio restructuring programs of the Large Accounts; provided that the following conditions and the General Conditions of Section III are met:

(a) The Indexed Account is based on an index which represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries. The organization creating and maintaining the index must be (1) engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients, (2) a publisher of financial news or information, or (3) a public stock exchange or association of securities dealers. The index must be created and maintained by an organization independent of Mellon and

its affiliates. The index must be a generally accepted standardized index of securities which is not specifically tailored for the use of Mellon or its affiliates.

(b) The price for the securities is set at the current market value for the securities on the date of the transactions. For equity securities, the price shall be the closing price for the security on the day of trading; unless the security was added to or deleted from an index underlying an Indexed Account after the close of trading, in which case the price shall be the opening price for that security on the next business day after the announcement of the addition or deletion. For debt securities, the price shall be the fair market value determined as of the close of the day of trading pursuant to Rule 17a-7(b) issued by the Securities and Exchange Commission under the Investment Company Act of 1940.

(c) The transaction takes place within three business days of the "triggering event" giving rise to the cross-trade opportunity. A triggering event is defined as:

(1) A change in the composition or weighting of the index underlying an Indexed Account by the organization creating and maintaining the index;

(2) A change in the overall level of investment in an Indexed Account as a result of investments and withdrawals made on the Account's regularly scheduled opening date; provided, however, that Mellon does not change the level of investment in the Indexed Account through investments or withdrawals of assets of any employee benefit plan maintained by Mellon or its affiliates (the Mellon Plans) for which Mellon has investment discretion; or

(3) A declaration by Mellon (recorded on Mellon's records) that a "triggering event" has occurred, which will be made upon an accumulation of cash in an Indexed Account attributable to interest or dividends on, and/or tender offers for, portfolio securities equal to not more than .5 percent of the Indexed Account's total value.

(d) With respect to any Indexed Account that is model-driven, no cross-trades are engaged in by the Account for 10 business days subsequent to any change made by Mellon to the model underlying the Account.

(e) In the event that the amount of a particular security which all of the Indexed Accounts or Large Accounts propose to sell on a given day is less than the amount of such security which all of the Indexed Accounts or Large Accounts propose to buy, or vice versa, the direct cross-trade opportunity must

be allocated by Mellon among potential buyers or sellers of the security on a pro rata basis.

(f) An Indexed Account does not participate in a cross-trade if more than 10 percent of the assets of the Indexed Account at the time of the proposed cross-trade are comprised of assets of Mellon Plans for which Mellon exercises investment discretion.

(g) Prior to any proposed cross-trading by an Indexed Account or a Large Account, Mellon provides to each employee benefit plan invested in the Account information which describes the existence of the cross-trading program, the "triggering events" which will create cross-trade opportunities, the pricing mechanism that will be utilized for securities purchased or sold by the Accounts, and the allocation methods and other procedures which will be implemented by Mellon for its cross-trading practices. Any employee benefit plan which subsequently invests in the Indexed Account or Large Account shall be provided the same information prior to or immediately after the plan's initial investment in the Account.

(h) With respect to cross-trade

transactions involving a Large Account:

(1) Total assets of the Large Account are in excess of \$50 million.

(2) Fiduciaries or other appropriate decisionmakers of the Large Account who are independent of Mellon are, prior to any cross-trade transactions, fully informed of the cross-trade technique and provide advance written approval of the cross-trade transactions.

Such authorization shall be terminable at will by the Large Account upon receipt by Mellon of written notice of termination. A form expressly providing an election to terminate the authorization, with instructions on the use of the form, must be supplied to the authorizing Large Account fiduciary concurrent with the receipt of the written information describing the cross-trading program. The instructions for such form must include the following information:

(i) The authorization is terminable at will by the Large Account, without penalty to the Large Account, upon receipt by Mellon of written notice from the authorizing Large Account fiduciary; and

(ii) Failure to return the termination form will result in the continued authorization of Mellon to engage in cross-trade transactions on behalf of the Large Account.

(3) Within 45 days of the completion of the Large Account's portfolio restructuring program, the Large Account's fiduciaries shall be fully apprised in writing of the transaction

results. However, if the program takes longer than three months to complete, interim reports of the transaction results will be made within 30 days of the end of each three month period.

(4) The Large Account transactions occur only in situations where Mellon has been authorized to restructure all or a portion of the Large Account's portfolio into an Indexed Account (including a separate account based on an index or computer model) or to act as a "trading adviser" in carrying out a Large Account-initiated liquidation or restructuring of its portfolio.

(i) Mellon receives no additional direct or indirect compensation as a result of any cross-trade transactions.

(j) Mellon does not purchase or sell any debt securities issued by Mellon or an affiliate for the Indexed Accounts.

Section II—Exemption for the Acquisition, Holding and Disposition of MBC Stock

The restrictions of sections 406(a)(1)(D), 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)(D) and (E) of the Code, shall not apply to the acquisition, holding or disposition of the common stock of MBC (the MBC Stock) by Indexed Accounts, if the following conditions and the General Conditions of Section III are met:

(a) The acquisition or disposition of the MBC stock is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Indexed Account is based.

(b) In the event that MBC Stock is added to an index on which an Indexed Account is based or is added to the portfolio of the Indexed Account which tracks an index that includes MBC Stock, all acquisitions necessary to bring the Indexed Account's holdings of MBC Stock to its capitalization weighting in the index, other than cross-trade transactions meeting the conditions of Section I, shall comply with Rule 10b-18 of the Securities and Exchange Commission (SEC) under the Securities Exchange Act of 1934, including the limitations regarding the price paid for such stock.

(c) Subsequent to acquisitions necessary to bring the Indexed Account's holdings of MBC Stock to its capitalization weighting in the index pursuant to the restrictions of SEC Rule 10b-18, all aggregate daily purchases of MBC stock, other than cross-trade purchases meeting the conditions of Section I, shall not constitute more than the greater of: (1) 15 percent of the stock's average daily trading volume for

the previous five days; or (2) 15 percent of the stock's trading volume on the date of the transaction.

(d) If the necessary number of shares of MBC stock cannot be acquired within 10 business days from the date of the event which causes the particular Indexed Account to require MBC stock, Mellon shall appoint a fiduciary which is independent of Mellon and its affiliates to design acquisition procedures and monitor Mellon's compliance with such procedures.

(e) All purchases and sales of MBC stock, other than cross-trades meeting the conditions of Section I, shall be executed on the national exchange on which MBC stock is primarily traded.

(f) No transactions shall involve purchases from, or sales to, Mellon or any affiliate, officer, director or employee of Mellon or any party in interest with respect to a plan which has invested in an Indexed Account. This requirement does not preclude purchases and sales of MBC stock in cross-trade transactions meeting the conditions of Section I, provided that the Indexed Accounts are not maintained by Mellon primarily for the investment of assets of Mellon or any affiliate, including officers, directors or employees of Mellon other than in connection with a Mellon Plan.

(g) No more than five (5) percent of the total amount of MBC stock issued and outstanding at any time shall be held in the aggregate by the Indexed Accounts which hold plan assets.

(h) MBC stock shall constitute no more than two (2) percent of the value of any independent third-party index on which the investments of an Indexed Account are based.

(i) A plan fiduciary independent of Mellon authorizes the investment of such plan's assets in an Indexed Account which purchases and/or holds MBC stock.

(j) A fiduciary independent of Mellon and its affiliates shall direct the voting of the MBC stock held by an Indexed Account on any matter in which shareholders of MBC stock are required or permitted to vote.

Section III—General Conditions

(a) Mellon maintains or causes to be maintained for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (b) of this Section to determine whether the conditions of the 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 Mellon, the records are lost or destroyed prior to the

end of the six-year period, and (2) no party in interest other than Mellon 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 (b) below.

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

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

(B) Any fiduciary of a plan participating in an Indexed Account who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer with respect to any plan participating in an Indexed Account or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an Indexed Account, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraph (b)(1)(B) through (D) shall be authorized to examine trade secrets of Mellon, any of its affiliates, or commercial or financial information which is privileged or confidential.

Section IV—Definitions

(a) **Indexed Account**—Any Index Fund or Model-Driven Fund.

(b) **Index Fund**—Any investment fund, account or portfolio sponsored, maintained, trusteeed, or managed by Mellon or an affiliate in which one or more investors invest that is designed to replicate the capitalization-weighted composition of an independently maintained securities index which satisfies the conditions of Section I(a) and Section II(h).

(c) **Model-Driven Fund**—Any investment fund, account or portfolio sponsored, maintained, trusteeed, or managed by Mellon or an affiliate, in which one or more investors invest which is based on computer models using prescribed objective criteria to transform an independently maintained securities index which satisfies the conditions of Section I(a) and Section II(h).

(d) **Opening date**—The regularly-scheduled date on which investments in

or withdrawals from an Indexed Account may be made.

(e) Large Account—An account of an investor that is either: (1) An employee benefit plan within the meaning of section 3(3) of the Act that has \$50 million or more in total assets; or (2) an institutional investor, other than an investment company registered under the Investment Company Act of 1940 (i.e. a mutual fund), such as an insurance company separate account or general account, a governmental plan, a university endowment fund, a charitable foundation fund, or a trust or other fund which is exempt from taxation under section 501(a) of the Code, that has total assets in excess of \$50 million. As noted in Section I(g)(4), a “Large Account” shall only be an account to which Mellon has been authorized to restructure all or a portion of the portfolio for such account into an Indexed Account or to which Mellon has been authorized to act as a “trading adviser” (as defined below) in connection with a specific liquidation or restructuring program for the account.

(f) Trading adviser—A person whose role is limited to arranging a Large Account-initiated liquidation or restructuring of an equity or debt portfolio within a stated period of time so as to minimize transaction costs. The person must not be a fiduciary with investment discretion for any underlying asset allocation, restructuring or liquidation decisions for the account in connection with such transactions.

(g) Affiliate—Any person, directly or indirectly through one or more intermediaries, controlling, controlled by, or is under common control with Mellon (except Mellon/McMahon Real Estate Advisors, Inc.).

Summary of Facts and Representations

1. Mellon is a national bank and a subsidiary of MBC, which is the twenty-third largest bank holding company in the U.S. with assets of approximately \$37 billion. Mellon is licensed to operate a trust department, which is regulated by the Office of the Comptroller of the Currency. Within the trust department, Mellon provides a variety of fiduciary services, including acting as trustee of employee benefit plans subject to the Act. Currently, Mellon acts as fiduciary of institutional accounts, including employee benefit plans, with assets totaling approximately \$481 billion. Additionally, certain affiliates of Mellon provide trust or investment management services to various employee benefit plans. Mellon and its affiliates are, to

the extent of the provision of such services, fiduciaries of these plans. For purposes of this proposed exemption, Mellon does not include Mellon/McMahon Real Estate Advisors, Inc., as an “affiliate” because that entity is being sold.

2. In its capacity as fiduciary of an employee benefit plan, Mellon may be either directed by an independent plan fiduciary or a plan participant that has the ability to direct investments for his/her plan account under the plan document. Alternatively, in those cases in which Mellon manages the investments, Mellon represents that it does not exercise any discretionary authority over whether an employee benefit plan invests in particular Funds, such as the Mellon S&P 500 Index Funds, except for a relatively small number of plans which subscribe to Mellon’s Portfolio Management in Funds (PMF) services (as discussed below in Paragraph 13).

Mellon manages the different collective investment funds in various ways to enable plan assets to be diversified to reduce risk and to be invested in the types of investments that a particular manager for a plan may determine is appropriate at a particular time. Index Funds and Model-Driven Funds (the Funds) are two examples of the Bank’s collective investment funds which include plan investors.

Index and Model-Driven Funds

3. An Index Fund may be an individual or collective investment fund, the objective of which is the replication of the performance of an independently-maintained stock or bond index representing the performance of a specific segment of the public market for equity or debt securities. The Index Funds are passively managed, in that the choice of stocks or bonds purchased and sold, and the volume purchased and sold, are made according to predetermined third party indices rather than according to active evaluation of the investments.

4. A Model-Driven Fund may be an individual or collective investment fund, the performance of which is based on computer models using prescribed objective criteria to transform an independently-maintained stock or bond index representing the performance of a specific segment of the public market for equity or debt securities. The portfolio of a Model-Driven Fund is determined by the details of the computer model, which examines structural aspects of the stock or bond market rather than the underlying values of such securities. An example of a Model-Driven Fund would

include a fund which “transforms” an index, making investments according to a computer model which uses such data as the following: (a) Earnings, dividends and price-earning ratios for common stocks included in the index; (b) current yields on corporate bonds and money market instruments; (c) the duration, maturity structure, yield and sector/quality weights for bonds included in the index; and (d) historical standard deviations and correlations between asset classes.

Mellon represents that the process for the establishment and operation of all Indexed Accounts which are model-driven is very disciplined. Clear-cut rules are established for each model. Since the Model-Driven Funds operate pursuant to pre-specified computer programs, the rules and programs are changed only infrequently. However, to the extent that there is any change made by Mellon to a model underlying an Indexed Account, no cross-trades will be engaged in by the Account for 10 business days subsequent to such change. Thereafter, an Indexed Account that is model-driven will engage in cross-trade transactions if the cross-trade opportunity results from any “triggering event” described herein (see Paragraph 5 below).

Mellon currently offers more than 60 collective investment funds that are invested according to the criteria of various third-party indexes or are model-driven based on such indexes. For example, some Funds track the Russell 2000 Index,⁵ while other Funds track the Standard & Poors 500 Composite Stock Price Index (the S&P 500 Index).⁶ Most of the Funds track stock indexes, although some Funds

⁵The Russell 2000 Index was established and is maintained by the Frank Russell Company, which is not an affiliate of Mellon. The Russell 2000 Index is a subset of the larger Russell 3000 Index. The Russell 3000 Index consists of the largest 3,000 publicly traded stocks of U.S. domiciled corporations, as identified by the Frank Russell Company, and includes large, medium and small stocks. The Russell 3000 Index represents approximately 98% of the total market capitalization of all U.S. stocks that trade on the New York and American Stock Exchanges and in the NASDAQ over-the-counter market. The Russell 2000 Index consists of approximately 2,000 of the smallest stocks within the Russell 3000 Index, and is therefore a broadly diversified index of small capitalization stocks, representing less than 10 percent of the U.S. equity market in total capitalization.

⁶The S&P 500 Index is composed of 500 stocks that are traded on the New York Stock Exchange, American Stock Exchange, and the NASDAQ National Market System. The S&P 500 is a market value-weighted index (i.e. shares outstanding times stock price) in which each company’s influence on the Index’s performance is directly proportional to its market value.

track indexes of debt securities, such as the Lehman Brothers Bond Indices.⁷

In addition to Funds that are collective investment funds, Mellon has investment responsibility for individual investment funds which are separate portfolios for various client accounts, including employee benefit plans, where the portfolio is invested in accordance with a third-party index. Such individual investment funds and collective investment funds are referred to herein as Indexed Accounts (see Paragraph 6 below). Mellon states that the ability of all Indexed Accounts to cross-trade securities with each other, or to invest in MBC Stock when the stock is included in an index, would improve Mellon's tracking of such indexes.

Cross Trades

5. Mellon represents that cross-trades will be made within three business days of the "triggering event" giving rise to the cross-trade opportunity. A "triggering event" is limited to: (i) A change in the composition or weighting of the index underlying an Indexed Account by the organization creating and maintaining the index; (ii) a change in the overall investments in an Indexed Account as a result of a net investment or withdrawal on the Account's regularly-scheduled opening date (provided that Mellon does not change the level of investment in the Indexed Account through investments or withdrawals of assets of any Mellon Plans for which Mellon has investment discretion); and (iii) a declaration by Mellon that a "triggering event" has occurred upon an accumulation in the Indexed Account of cash attributable to interest or dividends on, and/or tender offers for, portfolio securities equal to not more than .5 percent of the value of the Indexed Account.

Mellon states that frequent purchases and sales of securities by the Indexed Accounts are required to accomplish portfolio balances that conform with the particular indexes. In addition, some securities transactions may be prompted by a client plan's request to add funds to, or withdraw funds from, an Indexed Account. Under any of these circumstances, Mellon's disposition of a particular security for one Indexed Account may involve a security which may be needed by another Account, thus presenting an opportunity to save substantial commissions for both the

liquidating Account and the acquiring Account. This saving is enabled by a cross-trade transaction, which involves matching Mellon's sell orders for a particular day with its buy orders for the same day, and the execution of trades between the Accounts in off-market transactions. Under current procedures, all securities transactions, including cross-trades between Indexed Accounts maintained by Mellon, are executed by a broker on behalf of a purchasing or selling Account at the direction of Mellon, dealing with a second broker acting on behalf of the other purchasing or selling party.

6. Mellon proposes to take advantage of opportunities to direct the cross-trading of securities directly between various Indexed Accounts. Such Indexed Accounts will include: (i) Collective investment funds for employee benefit plans, (ii) separate employee benefit plan trust accounts that are not commingled in a collective fund, (iii) other large fiduciary accounts such as governmental plans, university endowment funds, charitable foundation funds and personal trusts, (iv) common or collective trust funds containing assets of governmental plans, university endowments, charitable foundations or personal trusts, and (v) mutual funds and other institutional accounts for which Mellon or an affiliate serves as an investment manager or investment advisor.

Mellon represents that by participating in its cross-trading program, the Accounts will benefit by not incurring the transaction costs involved in dealing with a broker-dealer or "market maker" for the particular securities to effect the transactions. Such transaction costs include brokerage commissions and/or the market-maker's bid/offer spread on prices for such securities. Mellon maintains that transactions involving equity securities on the open market between unrelated parties require brokerage commissions equal to at least two cents per share for each sale or purchase transaction. However, the brokerage commissions that would be paid for each proposed cross trade of equity securities would be equal to approximately .05 cents per share, reflecting only the necessary record-keeping costs for the brokers. For debt securities, Mellon states that cross-trades would produce transactions cost savings by eliminating the bid/offer spread that normally would be paid to a broker-dealer to acquire or sell such securities. Mellon also represents that participation in the cross-trading program may enable the Accounts to obtain earlier opportunities to acquire or

sell certain securities. The applicant represents that all brokers used in cross trade transactions would be unrelated to and independent of Mellon and its affiliates.

Mellon states that the price for the securities involved in any cross-trade will be set at the current market value for the securities on the date of the transactions.

For equity securities, the price will be the closing price for the security on the day of trading; unless the security was added to or deleted from an index underlying an Indexed Account after the close of trading, in which case the price shall be the opening price for that security on the next business day after the announcement of the addition or deletion.

Mellon will use independent pricing services to value all equity securities which are cross-traded by the Indexed Accounts. The primary service currently used by Mellon for pricing domestic equity securities is Interactive Data Corporation, a subsidiary of Dunn & Bradstreet Corporation. For pricing foreign equity securities, Mellon uses Morgan Stanley & Co. or Vestek Systems. The applicable independent pricing service provides the price in local currency rates and, if that currency is other than U.S. dollars, also provides the U.S. Dollar exchange rate. The equity securities are valued at the close of the day, and thus equity security cross-trades would in all cases be executed at the closing price received by Mellon from the relevant independent pricing service. In addition, the same independent pricing service will be employed to value any given equity security for both the buy and sell sides of all cross-trades involving that equity security. The identity of the applicable independent pricing service for each equity security will be recorded on Mellon's records and will be made available to any participant in the cross-trading program upon request. If the independent pricing service for any particular equity security is changed, a single new independent pricing service will be selected for future pricings of that equity security.

For debt securities, the price will be the fair market value determined as of the close of the day of trading pursuant to SEC Rule 17a-7(b) under the Investment Company Act of 1940. SEC Rule 17a-7(b) contains four possible means of determining "current market" value for either debt or equity securities depending on such factors as whether the security is a reported security and whether its principal market is an exchange. Mellon states that all debt securities that are not a reported

⁷ The indexes of debt securities used by Mellon for the Funds, such as the Lehman Brothers Bond Indices, consist primarily of high-quality fixed-income securities representing the U.S. government, corporate, and mortgage-backed securities sectors of the bond market in the U.S. Mellon currently has approximately 14 debt Index Funds.

security or traded on an exchange would 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 day of the cross-trade. Such prices would be determined in accordance with Rule 17a-7(b)(4) on the basis of reasonable inquiry from at least three sources that are broker-dealers or market-makers independent of Mellon, except in those circumstances where fewer than three independent sources exist to price a certain debt security (in which event closing price quotations will be obtained from all available sources).

Mellon intends that the requested exemption for cross-trade transactions would apply, in addition to existing Indexed Accounts currently maintained, to all Indexed Accounts which it may create in the future which satisfy the conditions of the exemption, if granted.

7. Mellon proposes to engage in cross-trade transactions between the Indexed Accounts and various Large Accounts that have total assets in excess of \$50 million. Mellon states that a Large Account could be either: (i) An employee benefit plan within the meaning of section 3(3) of the Act; or (ii) a portfolio of an institutional investor, other than an investment company registered under the Investment Company Act of 1940 (i.e. a mutual fund), such as an insurance company separate account or general account, a governmental plan, a university endowment fund, a charitable foundation fund, or a trust or other fund which is exempt from taxation under section 501(a) of the Code.

Cross-trades between an Indexed Account and a Large Account would occur only when the fiduciary or other appropriate decision-maker for the Large Account, which is independent of Mellon and its affiliates, is fully informed of the cross-trade technique, provides advance written approval of such transactions, and is fully apprised of the transaction results. Further, cross trades involving a Large Account will be limited to those situations where Mellon has been authorized to restructure all or a portion of the Large Account's assets into an Indexed Account, or where Mellon is otherwise acting as a trading adviser for a Large Account portfolio restructuring. Such restructurings generally occur in connection with a Large Account decision to invest in one of Mellon's Index or Model-Driven Funds, but they may also involve requests for Mellon to carry out a restructuring program independent of future investments in any of the Funds. In the latter instance, Mellon's only role is that of a trading adviser, carrying out

a Large Account-initiated liquidation or restructuring. When a Large Account engages Mellon to invest in a collective investment fund that is index or model-driven or to arrange its own passively-managed individual portfolio, the Large Account's assets must be transformed into a portfolio that tracks a third-party index. In implementing the transformation, Mellon is limited to recreating the required portfolio and is not involved in any active investment management decisions. The impetus for the investment comes from the independent fiduciaries or other independent decision-makers for these Large Accounts. By performing cross-trades with existing Index Accounts where possible, Mellon would reduce the overall transaction costs by both parties to the cross-trade. Mellon would have a similar lack of discretion in the case of Large Accounts which request Mellon or an affiliate to restructure a specific portfolio by liquidation. Mellon would act as the trading advisor to the Large Account, arranging for the securities transactions within a stated time so as to minimize transaction costs. The opportunity to engage in cross-trades with Index Accounts occurs only when those Accounts are required to purchase the same securities which the Large Account is selling.

8. Mellon represents that its cross-trading program will be effected pursuant to a proportional allocation system which will ensure that no Indexed Account or Large Account will be favored over any other such Account. In the event that the amount of a particular security which all of the Indexed Accounts or Large Accounts propose to sell on a given day is less than the amount of such security which all such Accounts propose to buy, or vice versa, the direct cross-trade opportunity would be allocated among all potential buyers or sellers of the security on a pro rata basis. Thus, all of the Indexed Accounts or Large Accounts participating in its cross-trade program will have opportunities to participate on a proportional basis in any cross-trade transactions during the operation of the program. This aspect of the proposed cross-trading program would be part of the information disclosed in writing to the fiduciaries or other decisionmakers of the Large Accounts and to all employee benefit plans which invest in the Index or Model-Driven Funds that are collective investment funds maintained by Mellon or to all such plans that invest in any other Indexed Account. In this regard, Mellon states that prior to any cross-trading by an Indexed Account or a Large Account,

each employee benefit plan invested in the Account will be provided information which describes the existence of the cross-trading program, the "triggering events" which will create cross-trade opportunities, the pricing mechanism that will be utilized for securities purchased or sold by the Accounts, and the allocation methods and other procedures which will be implemented by Mellon for its cross-trading practices. Any employee benefit plan which subsequently invests in the Indexed Account or Large Account will also be provided the same information prior to or immediately after the plan's initial investment in the Account.

Acquisition, Holding and Disposition of MBC Stock

9. Mellon is also proposing that each Indexed Account be permitted to invest in the MBC Stock if such stock is included among the securities listed in the index utilized by the Indexed Account.⁸ For example, MBC Stock is one of the stocks included in the S&P 500. Because of the prohibitions of section 406 and 407 of the Act, the Mellon S&P 500 Index Funds and other Indexed Accounts holding plan assets which track the S&P 500 Index currently are not permitted to invest in MBC stock. Mellon states that the exclusion of MBC Stock from such Index Funds or other Indexed Accounts creates tracking error. To correct the tracking error, Mellon proposes to purchase on the open market, and hold, on behalf of all Indexed Accounts which hold plan assets, the number of shares of MBC Stock necessary to replicate correctly the weighting of MBC Stock in the portfolio relative to the S&P 500 Index.⁹

Mellon represents that when MBC Stock is added to an index on which an Indexed Account is based or is added to the portfolio of an Indexed Account which tracks an index that includes MBC Stock, all acquisitions necessary to bring the Indexed Account's holdings of MBC Stock to its capitalization weighting in the index, other than through cross-trade transactions meeting the conditions of Section I, will comply with the SEC Rule 10b-18, including the limitations regarding the price paid for such stock. Such acquisitions of

⁸ While certain of the debt indexes used by Mellon for the Indexed Accounts may include debt securities issued by Mellon or an affiliate (Mellon Debt), Mellon states that it does not acquire Mellon Debt for any of its Indexed Accounts. Therefore, Mellon is not requesting relief for any transactions involving Mellon Debt.

⁹ In this regard, Mellon is not requesting any relief from section 407(a) of the Act in connection with the acquisition and holding of MBC Stock by the Mellon Plans which invest in the Mellon S&P 500 Index Funds.

MBC Stock would occur when an Indexed Account is first able to hold MBC Stock, such as purchases that will occur for all Indexed Accounts that track the S&P 500 Index, or when MBC Stock is added to an Indexed Account's portfolio as a result of the stock being added to another underlying index used by the Account. SEC Rule 10b-18 provides a "safe harbor" for issuers of securities from section 9(a)(2) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 (which generally prohibits persons from manipulating the price of a security and engaging in fraud in connection with the purchase or sale of a security).

Mellon states that the conditions imposed by SEC Rule 10b-18 for purchases of MBC Stock would be as follows: (a) All purchases would be made from or through only one broker on any single day; (b) no purchases would constitute the opening transaction in MBC Stock; (c) purchases would not occur within one-half hour before the scheduled close of trading on the NYSE; (d) the price would not be higher than the current independent bid quotation or the last independent sale price on the exchange, whichever is higher; and (e) if the purchases of MBC Stock are not block purchases as defined by SEC Rule 10b-18(b)(4), the total amount of purchases on any one day would not exceed the higher of one round lot or the number of round lots closest to 25 percent of the trading volume for MBC Stock on that day.

In addition, subsequent to the initial acquisitions necessary to bring an Indexed Account's holdings of MBC Stock to its capitalization weighting in the index pursuant to the restrictions of SEC Rule 10b-18, Mellon states that all aggregate daily purchases of MBC Stock will not constitute more than the greater of either: (i) 15 percent of the stock's average daily trading volume for the previous five days, or (ii) 15 percent of the stock's trading volume on the date of the transaction.

All additional purchases or subsequent sales of MBC Stock by the Indexed Accounts that are made on a daily basis merely to track the S&P 500 Index or other appropriate index would be accomplished either through cross-trade transactions, subject to the conditions of Section I of the proposed exemption, or on the open market, subject to the conditions of Section II of the proposed exemption. However, daily purchases of MBC Stock, which occur after all acquisitions of such stock have been made in order to bring the Indexed Account's holdings to the capitalization weighting of MBC Stock in the index, would not be subject to the

restrictions of Rule 10b-18, but would be subject to the other conditions of Section II of this proposed exemption. In this regard, Mellon believes that the restrictions of Rule 10b-18 are not necessary for the volume of transactions which will be required by the Indexed Accounts for daily tracking of an index in order to respond to changes in the composition or weighting of MBC Stock in the index.

Mellon represents that no more than 5 percent of the total outstanding shares of MBC Stock will be held in the aggregate by the Indexed Accounts which hold plan assets. In addition, Mellon states that the MBC Stock will not constitute more than 2 percent of the value of any independent third-party index on which investments of an Indexed Account are based.

10. Mellon will appoint an independent fiduciary for the purposes of developing trading procedures for the initial acquisition of MBC Stock on the open market by the Indexed Accounts that track the S&P 500 Index. The independent fiduciary will allow the Indexed Accounts to acquire MBC Stock in the amounts necessary to track the S&P 500 Index while minimizing the impact of the acquisitions on the market for MBC Stock during the acquisition period. The independent fiduciary will also monitor Mellon's compliance with the trading procedures for accomplishing this goal.

The independent fiduciary and its principals will be completely independent from Mellon and its affiliates. The independent fiduciary will also be experienced in developing and operating investment strategies for individual and collective investment funds that track third-party indexes, such as the S&P 500 Index. In addition, Mellon will require the independent fiduciary to represent that neither it nor its principals, employees, or affiliates holds or controls any shares of MBC Stock. During the exercise of the trading program by Mellon, no principal employee of the independent fiduciary nor the fiduciary itself will engage in any trading of any kind in MBC Stock. Furthermore, the independent fiduciary will not act as the broker for any purchases or sales of MBC Stock and will not receive any commissions as a result of the trading program.

11. The independent fiduciary will have as its primary goal the development of a trading program that minimizes the market impact of purchases made pursuant to the initial acquisition program by the Indexed Accounts. Thus, price increases that would be detrimental to the interests of any employee benefit plan investors

will be minimized. The trading activities will be conducted in a low-profile, mechanical, non-discretionary manner. In this regard, the independent fiduciary will be required to utilize a computerized trading program that will engage in a number of small purchases over the course of each day, randomly timed. Such a program will allow Mellon to acquire the necessary shares of MBC Stock for the Indexed Accounts that track the S&P 500 Index with minimum impact on the market and in a manner that will be in the best interests of any employee benefit plans that maintain or participate in such Accounts.

12. The independent fiduciary will also be required to monitor Mellon's compliance with the trading program and procedures developed for the initial acquisition of MBC Stock. The independent fiduciary will receive duplicate confirmation slips of all trades as well as the "time and tape" of all NYSE transactions in MBC Stock completed immediately before and after each transaction and a time/price/quantity record of all completed or attempted trades. The independent fiduciary will be required to review the activities weekly to determine compliance with the trading procedures and notify Mellon and the Department should any non-compliance be detected. Should the trading strategy need modifications due to unforeseen events or consequences, the independent fiduciary will be required to consult with Mellon and must approve in advance any alteration of the trading procedures. All purchases of MBC Stock by the Indexed Accounts pursuant to the independent fiduciary's trading program will comply with SEC Rule 10b-18 and the conditions of the proposed exemption.

13. If Mellon provides Portfolio Management in Funds (i.e. PMF) services to a plan, Mellon exercises some discretion in allocating and reallocating the plan's assets among various collective investment funds, including Mellon's S&P 500 Index Funds and other Index or Model-Driven Funds. These allocations are based on a plan's investment objectives, risk profile and market conditions. However, Mellon makes the following representations with respect to the purchase, directly or indirectly, of MBC Stock by plans utilizing PMF (PMF Plans):

(a) Mellon represents that any prohibited transactions (other than cross-trade transactions described herein) which might occur as a result of the discretionary allocation and reallocation of plan assets among collective investment funds will be

exempt from the prohibitions of section 406 of the Act by reason of section 408(b)(8).¹⁰

(b) Before MBC Stock is purchased by an Index or Model-Driven Fund, the appropriate independent fiduciary for each PMF Plan which is currently invested or could be invested in such Funds will be furnished an explanation and a simple form to return on which approval or disapproval of investments in the Fund including MBC Stock could be indicated, together with a postage-paid return envelope. If the form is not received by Mellon within 30 days, Mellon may obtain a verbal response by telephone. If a verbal response is obtained by telephone, Mellon will confirm the fiduciary's decision in writing within five business days. In the event no response is obtained from a PMF Plan fiduciary, the assets of the plan will not be invested in any Index or Model-Driven Fund which invests in MBC Stock and any plan assets currently invested in such Funds at that time would be withdrawn.

(c) Each new management agreement with a PMF Plan will contain language specifically approving or disapproving the investment in any Index or Model-Driven Fund which might hold MBC Stock. The fiduciary for each current PMF Plan will be informed that the existing management agreement could be modified in the same way. However, if the PMF Plan fiduciary does not specifically approve language in the agreement allowing the investment of plan assets in Funds which might hold MBC Stock, then no such investment will be made by Mellon.

(d) Each PMF Plan will be informed on a quarterly basis of any investment in or withdrawal from any Index or Model-Driven Fund holding MBC Stock. The PMF Plan would be granted the election to override Mellon's discretionary decision to invest in or withdraw from such Funds. If the PMF Plan overrides Mellon's decision to invest in or withdraw from the Funds, then Mellon will carry out the plan's election as soon as possible after being notified of such election.

14. In the event a third-party index utilized by Mellon for any Indexed Account (in addition to the S&P 500 Index) adds MBC Stock or if Mellon is otherwise unable to satisfy an Indexed Accounts' needs for MBC Stock through cross-trades with other Indexed Accounts, Mellon will acquire the necessary shares of MBC Stock on the open market. If Mellon is required to purchase MBC Stock in the open market on behalf of any Indexed Account in those circumstances, Mellon will determine whether the stock can be acquired within 10 business days. If the

MBC Stock cannot be acquired within 10 business days, Mellon will appoint an independent fiduciary to establish the procedures to be used to acquire the MBC Stock and monitor Mellon's compliance with those procedures. The fiduciary will be unrelated to and independent of Mellon and will have expertise in the operation of index funds.

15. Mellon will appoint an independent fiduciary which will direct the voting of the MBC Stock held by the Mellon S&P 500 Index Funds or other Indexed Accounts. The independent fiduciary will be a consulting firm specializing in corporate governance issues and proxy voting on behalf of public and private pension funds, banks, trust companies, money managers, insurance companies and other institutional investors with large equity portfolios. The fiduciary will be required to develop, and supply to Mellon, a corporate ownership manual which will act as a guideline to the voting of proxies by institutional fiduciaries, and their current voting guidelines. Mellon will provide the independent fiduciary with all necessary information regarding the Indexed Accounts that hold MBC Stock, the amount of MBC Stock held by the Indexed Accounts on the record date for shareholder meetings of MBC, and all proxy and consent materials with respect to MBC Stock. The independent fiduciary will maintain records with respect to its activities as an independent fiduciary on behalf of the Indexed Accounts, including the number of MBC Stock shares voted, the manner in which they were voted, and the rationale for the vote if the vote was not consistent with the independent fiduciary's corporate ownership manual and the current voting guidelines in effect at the time of the vote. The independent fiduciary will supply Mellon with the information after each shareholder meeting. The independent fiduciary will be required to acknowledge that it will be acting as a fiduciary with respect to the plans which invest in the Mellon S&P 500 Index Funds or other Indexed Accounts which own MBC Stock, when voting such stock.

16. In summary, the applicant represents that the proposed cross-trading transactions will satisfy the criteria of section 408(a) of the Act for the following reasons: (a) An Indexed Account will buy or sell securities only in response to various "triggering events" which are not within Mellon's control or discretion; (b) a Large Account will engage in cross trades only in situations where the investment

decisions relating to a particular portfolio restructuring program for the Large Account are made by a fiduciary or other appropriate decision-maker which is independent of Mellon; (c) all cross trade transactions, including cross-trades involving MBC Stock, will occur within three business days of the "triggering event" necessitating the purchase or sale; (d) no cross-trades will be engaged in by an Indexed Account that is model-driven for 10 business days subsequent to any change made by Mellon to the model underlying the Account; (e) the price for all securities will be the current market value for the securities on the date of the transaction, which for equity securities will be set at the closing (or opening, where appropriate) price for the securities on the day of trading as determined by independent pricing services, and for debt securities will be determined based on quotations received from independent broker-dealers or market-makers as of the close of the day pursuant to the procedures described in SEC Rule 17a-7(b); (f) the Indexed Accounts and the Large Accounts will save significant amounts of money on brokerage commissions; and (g) Mellon will receive no additional compensation as a result of the proposed cross trades nor with respect to the acquisition, holding and disposition of MBC Stock.

The applicant further represents that the proposed MBC Stock transactions will satisfy the criteria of section 408(a) of the Act for the following reasons: (a) The acquisition, holding and disposition of MBC Stock by an Indexed Account will occur solely to maintain strict quantitative conformity with the underlying index; (b) all purchases of MBC Stock by the Mellon S&P 500 Index Funds or other Indexed Accounts which occur as a result of such stock being added to an index on which an Indexed Account is based or being added to the portfolio of the Indexed Account which tracks an index that includes MBC Stock, will be made on the open market and will comply with the restrictions of SEC Rule 10b-18; (c) subsequent to the initial acquisitions necessary to bring an Indexed Account's holdings of MBC Stock to its capitalization weighting in the index pursuant to the restrictions of SEC Rule 10b-18, all aggregate daily purchases of MBC Stock will not constitute more than the greater of either (i) 15 percent of the stock's average daily trading volume for the previous five days, or (ii) 15 percent of the stock's trading volume on the date of the transaction; (d) no more than 5 percent of the total outstanding shares of MBC Stock will be

¹⁰In the absence of regulations, the Department is not prepared at this time to indicate whether section 408(b)(8) applies to transactions described in section 406(b) of the Act. Accordingly, the Department expresses no opinion as to whether Mellon's discretionary allocation and reallocation services for any collective investment funds maintained by Mellon satisfy the requirements of section 408(b)(8) of the Act and is not proposing any exemptive relief beyond that offered by section 408(b)(8).

held in the aggregate by the Indexed Accounts which hold plan assets; (e) the MBC Stock will not constitute more than 2 percent of the value of any independent third-party index on which investments of an Indexed Account are based; (f) the initial acquisitions of MBC Stock by the Mellon S&P 500 Index Funds will be monitored by a fiduciary independent of Mellon in an attempt to minimize market disturbances; and (g) a fiduciary independent of Mellon will direct the voting of any MBC Stock held by the Indexed Accounts.

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

Analex Corporation (Analex), Analex Corporation Retirement Plan (the Plan) Located in Brook Park, OH

[Application No. D-9786]

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 retroactively to the past loan (the Past Loan) made by the Plan to Analex (the Employer) in accordance with the following conditions:

(1) The terms and conditions of the Past Loan were at least as favorable to the Plan as those obtainable by the Plan under similar circumstances in arm's-length transactions with unrelated parties;

(2) The amount of the Plan's assets involved in the Past Loan did not exceed 15% of the Plan's total assets at any time during the transaction;

(3) The Past Loan was at all times secured by collateral which was valued at not less than 200% of the value of the Past Loan;

(4) Prior to the disbursement under the Loan agreement, an independent, qualified fiduciary determined on behalf of the Plan that the Past Loan was in the best interests of the Plan as an investment for the Plan's portfolio, and protective of the Plan and its participants and beneficiaries;

(5) The independent, qualified fiduciary reviewed the terms and conditions of the exemption and the Past Loan, including the applicable interest rate, the sufficiency of the collateral, the financial condition of the Employer and compliance with the 15% of Plan assets maximum loan amount, prior to approving the disbursement under the Loan agreement;

(6) The fiduciary is monitoring the Past Loan to ensure compliance with the terms and conditions of the exemption and the Loan agreement;

(7) The Plan suffers no loss as a result of the Past Loan; and

(8) The Past Loan will be fully repaid by May 31, 1995.

Temporary Nature of Exemption

If granted, this proposed exemption would be effective for the period from July 12, 1994 through May 31, 1995, the date by which the Past Loan will be repaid.

Summary of Facts and Representations

1. The Plan is a profit sharing plan with a salary reduction feature. There were 394 Plan participants and total assets of \$9,222,172 as of December 31, 1993. The Plan provides for participant direction with respect to employee contributions to the Plan, and provides that an Administrative Committee will direct the investment of Employer contributions. Donald M. Zucker of Sorin, Zucker & Warfield, Inc., the independent, qualified fiduciary (the Independent Fiduciary), acted on behalf of the Plan with respect to the Past Loan.

2. The Employer is a Nevada corporation maintaining its principle place of business in Brook Park, Ohio and operating in Florida, Colorado, Texas, California, Virginia and New Mexico. The Employer provides engineering services to commercial and government entities.

3. On July 20, 1993, the Department published a notice of proposed exemption for prospective exemptive relief for a series of loans to the Employer by the Plan (58 FR 38792). The final exemption (PTE 93-65) was published in the **Federal Register** on September 22, 1993 at 58 FR 49325. The exemption was expressly conditioned on compliance with the limitations set forth therein. Among other conditions, PTE 93-65 was subject to the condition that the Independent Fiduciary would monitor the Loans to ensure compliance with the terms and conditions of the exemption and the Loans. Under the terms of PTE 93-65, the Independent Fiduciary was also responsible for reviewing, among other things, the financial condition of the Employer prior to approving each disbursement under the Loan agreement.

Section 6.4 of the written Loan agreement between the Plan and the Employer provides that the Employer must maintain at all times certain net worth requirements. In addition, section 6.5 of the Loan agreement requires that the Employer maintain at all times a certain ratio of current assets to current

liabilities. (The net worth test and the current ratio test are hereinafter referred to as the Covenants.)

The Employer represents that only one loan was made to the Employer pursuant to PTE 93-65. It is represented that a \$1.3 million loan was made on September 29, 1993 and that the outstanding balance on that loan as of December 13, 1994 was \$991,525.41. On July 12, 1994, the Employer entered into a settlement agreement regarding certain claims with respect to activities of Xanalex Corporation, a predecessor corporation to the Employer, which resulted in the Employer's failure to satisfy the Covenants.

4. The Employer now seeks a retroactive exemption for the Past Loan by the Plan to the Employer from the point in time when the Employer failed to satisfy the Covenants. In support of its request for retroactive relief, the Employer and the Independent Fiduciary maintain that the interests of the Plan and its participants and beneficiaries were fully protected throughout the duration of the Past Loan. In this regard, the Independent Fiduciary was engaged to act on behalf of the Plan with respect to the Past Loan. Any disbursement under the Loan agreement required prior approval by the Independent Fiduciary and could not be made unless the Independent Fiduciary found that such disbursement was appropriate and in the interests of the Plan and its participants and beneficiaries.

As further protection for the Plan and its participants and beneficiaries, the Past Loan was collateralized by recorded perfected security interests in accounts receivable (the Accounts Receivable) of the Employer. Upon entering into the Past Loan, the Independent Fiduciary received from the Employer any and all documentation needed to evidence the Plan's security interest in the collateral securing the Past Loan and the Independent Fiduciary ensured that appropriate documentation was recorded to perfect the Plan's security interest. The Independent Fiduciary was also responsible for ensuring that, at no time while the Past Loan was outstanding, was the fair market value of the Accounts Receivable securing such Loan less than 200% of the outstanding face amount of such Past Loan.

5. The Independent Fiduciary maintains that, once apprised of the pending breach of the Covenants, it took appropriate steps to protect the interests of the Plan and its participants and beneficiaries. In this regard, the Independent Fiduciary represents that,

pursuant to its request, the default interest rate was applied to calculate interest payments due after the Covenants were breached.¹¹ In addition, the Independent Fiduciary retained independent counsel in June, 1994 to represent the interests of the Plan in connection with the anticipated breach of the Covenants.

6. The Independent Fiduciary represents that the Plan suffered no loss as a result of the loan program and no term or condition of the Past Loan was inconsistent with the terms and conditions described in PTE 93-65, except for the failure to satisfy the Covenants. In addition, the Independent Fiduciary represents that payments under the Past Loan have remained current. Finally, the Employer will pay off the remaining balance under the Past Loan no later than May 31, 1995.

7. In summary, the applicant represents that the past transaction meets the statutory criteria for an exemption under section 408(a) of the Act because: (a) The terms and conditions of the Past Loan were at least as favorable to the Plan as those obtainable by the Plan under similar circumstances in arm's length transactions with unrelated third parties; (b) the Plan's independent fiduciary reviewed the terms and conditions of the proposed exemption and the Past Loan and determined that the Loan was in the best interest of the Plan's participants and beneficiaries; (c) the independent fiduciary reviewed and approved the Past Loan prior to making the disbursement; (d) the Past Loan was at all times secured by collateral which was valued at not less than 200% of the balance of the Loan; (e) the amount of the Past Loan did not exceed 15% of the fair market value of the Plan's assets; (f) the Employer will pay off the balance on the Past Loan by May 31, 1995; and (g) except for the failure to satisfy the Covenants, the Past Loan satisfied all other conditions of PTE 93-65.

FOR FURTHER INFORMATION CONTACT:
Virginia J. Miller of the Department, telephone (202) 219-8971. (This is not a toll-free number.)

Washington Mortgage Corporation, Inc. (WMC) Located in Seattle, Washington

[Application No. D-9814]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act

¹¹ The interest rate applicable upon breach of the Covenants is the greater of 9% or the Advance Rate plus 2%. The Advance Rate is defined as the greater of 7% or the prime rate as published in the Wall Street Journal.

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) as follows:

I. If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to: 1) the sale, exchange or transfer between WMC and its affiliates and certain employee benefit plans (the Plans) of certain construction loans or participation interests therein to non-party in interest entities; and 2) the sale, exchange or transfer between WMC and its affiliates and the Plans of any construction or permanent loan made by a Plan to a party in interest, and the resulting extension of credit therefrom, provided that:

(a) The terms of the transactions are not less favorable to the Plans than the terms generally available in arm's-length transactions between unrelated parties;

(b) Such sales, exchanges or transfers are expressly approved by a Plan fiduciary independent of WMC and its affiliates who has authority to manage or control those Plan assets being invested in mortgages or participation interests therein;

(c) No investment management, advisory, underwriting fee or sales commission or similar compensation is paid to WMC or any of its affiliates with regard to such sale, exchange or transfer;

(d) The decision to invest in a loan or a participation interest therein is not part of an arrangement under which a fiduciary of a Plan, acting with the knowledge of WMC or its affiliate, causes a transaction to be made with or for the benefit of a party in interest (as defined in section 3(14) of the Act) with respect to the Plan;

(e) At the time of its acquisition of a loan or participation interest therein, no Plan will have more than 25% of its assets invested in construction and permanent mortgages;

(f) WMC and its affiliates do not and will not act as fiduciaries with regard to any Plan investing in permanent and construction loans and interests therein as described in this proposed exemption; and

(g) WMC shall maintain or will cause to be maintained, for the duration of any loan or participation interest therein sold to a Plan pursuant to this exemption, such records as are necessary to determine whether the conditions of this exemption have been met. The records mentioned above must be unconditionally available at their customary location for examination for

purposes reasonably related to protecting rights under the Plans, during normal business hours, by: Any trustee, investment manager, employer of Plan participants, employee organization whose members are covered by a Plan, participant or beneficiary of a Plan.

II. If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to any transactions to which such restrictions would otherwise apply merely because WMC or any of its affiliates is deemed to be a party in interest with respect to a Plan by virtue of providing services to the Plan in connection with the subject loan transactions (or because it has a relationship to such service provider described in section 3(14)(F), (G), (H), or (I) of the Act), solely because of the ownership of a loan or participation interest therein as described in this exemption by such Plan.

III. Definitions. For purposes of this exemption,

(a) An "affiliate" of WMC includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with WMC,

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

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

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

Temporary Nature of Exemption: If the proposed exemption is granted, it will be effective only for those transactions entered into within eight years of the date on which the Final Grant of this proposed exemption is published in the **Federal Register**.

Summary of Facts and Representations

1. WMC has originated income property (commercial and multifamily) loans since 1949 for major institutional buyers, including pension funds, life insurance companies and thrift institutions. In 1988, WMC was acquired by Puget Sound Bancorp as a wholly owned subsidiary.

2. Through the decade of the 1980's and until 1993, WMC and its affiliates engaged in permanent and construction loan origination and servicing activities involving Plans as lenders. These activities were conducted pursuant to the descriptions contained in proposed

and final prohibited transaction exemptions granted by the Department. These exemptions were PTE 85-1 (50 FR 1004, January 8, 1985), and PTE 89-78 (54 FR 35951, August 30, 1989).

These exemptions were obtained to allow WMC and its bank and non-bank affiliates to engage in loan origination, sale and service activity and other (unrelated) banking and non-banking commercial activity with Plans, which would otherwise be prohibited under section 406(a) of the Act and section 4975 of the Code.¹² PTE 85-1 does not provide for any expiration date, and PTE 89-78 expired on August 30, 1994.

3. In 1993, through a series of acquisitions involving national financial institutions, WMC became a subsidiary of KeyCorp, one of the largest bank holding companies in the U.S. KeyCorp owns 21 banks and trust companies and several related financial services companies, with more than 1,300 branch and affiliate offices in 23 states. As of December 31, 1994, KeyCorp had assets of \$64.6 billion.

4. At present, WMC maintains offices in Seattle and Tacoma, Washington, but does not do any loan originations. Following the expiration of PTE 89-78 on August 30, 1994, WMC did not originate any new loans to Plans. Prior loans are now serviced elsewhere except for a loan made by the Carpenters Retirement Trust of Western Washington, which is being serviced by KeyCorp Mortgage, Inc., an affiliate of WMC. The applicant represents that seven other loans were placed with Plans by WMC or its affiliates pursuant to PTE 89-78. The applicant represents that no Plan has suffered any loss or default with respect to any of these loans. To allow WMC and its affiliates to resume loan origination and servicing activities with Plans, as a subsidiary of KeyCorp or on its own following possible acquisition by outsiders, KeyCorp has applied for renewal of PTE 89-78 to augment the relief afforded under PTE 85-1.

5. The proposed activities of WMC and its affiliates may be summarized as follows:

(1) WMC works on behalf of the borrower/developer in putting together construction and permanent financing for commercial and multifamily residential real estate projects. The role of WMC is to provide or arrange for all of the construction financing and to arrange a negotiated permanent

¹² PTE 85-1 exempted transactions involving permanent loans made to non-party in interest entities. PTE 89-78 provided relief for transactions involving construction loans made to non-party in interest entities, and construction and permanent loans made to parties in interest.

commitment, so that construction financing is paid off when the building is completed. In some cases, WMC or its affiliates also participate in funding the construction or permanent loans. WMC works on behalf of the borrower/developer to secure permanent financing alternatively by: (a)

Committing directly to the borrower for permanent financing, with the intention of later securing a permanent lender; (b) committing to the borrower based on a commitment for permanent financing provided by another lending institution to WMC; or (c) securing for the borrower, directly, a commitment from another lending institution for the permanent financing, with such a commitment going directly from the lender to the borrower, but assigned to WMC during the construction phase as additional collateral and security for the construction loan.

(2) Loan servicing might be done by WMC or an affiliate. Fees paid to the servicer would run 1/8% to 1% per annum on the outstanding principal balance of permanent loans. Servicing fees for construction loans are determined as a percentage of the outstanding balance of the loans. The applicant represents that all fees and charges are set in advance in accordance with prevailing market conditions.¹³

(3) In conducting these permanent and construction loan origination, sales and servicing activities, WMC and its affiliates would not act as a fiduciary to any lending Plan. Rather, all decisions to invest in a loan would be made by Plan fiduciaries independent of WMC and its affiliates. In the case of loans made to parties in interest, these fiduciaries will also be independent of the party receiving the loan proceeds.¹⁴ If construction is to be performed by a

¹³ The Department is not proposing any relief herein for the receipt of fees beyond that which is provided by the statutory exemption contained in section 408(b)(2) of the Act.

¹⁴ The applicant represents that no loan acquired by a Plan which is made to a party in interest will be a loan to a fiduciary or an affiliate thereof. In this regard, the Department notes that any such loan would involve violations of section 406(b) of the Act for which no relief is being proposed herein.

The applicant represents that, with respect to the subject loans, construction and other services related to the project may, or may not, be performed by a party in interest. The Department notes, as it did in the proposal to both PTE 85-1 and 89-78, that where the construction on the property which secures the loan is by a contributing employer to the Plan and a principal of such employer exercises fiduciary authority in approving the Plan's investment in the loan, a separate prohibited transaction under section 406(b) of the Act may occur, which transaction would not be covered by this proposed exemption. See also condition (d) of Part I of this proposed exemption which has the effect of precluding relief under section 408(a) of the Act for certain transactions undertaken for the benefit of parties in interest.

contributing employer or other party in interest, WMC would require a written statement executed by the independent fiduciary that its decision to invest was not influenced or controlled by the borrower or any other party in interest.¹⁵

(4) WMC's responsibilities in the administration or servicing of loans sold to Plans will vary depending on the loan type. For example, construction loans will involve: (a) Releasing construction loan draws and hold backs as various conditions of the construction loan are satisfied; (b) adjustment of hard-line cost items in the construction loan budget to reflect actual costs; (c) making certain the borrower corrects any non-monetary defaults; (d) implementing borrower-requested change orders approved by WMC staff or independent inspectors; (e) clearing mechanics' liens placed on the property during the course of construction; and (f) insuring general compliance by all parties with a construction loan agreement and related agreements.

(5) Any loan in default will involve decisions by the independent Plan fiduciary, or by WMC in accordance with pre-approved guidelines set forth in the loan documents. The loan documents, including default guidelines, would be approved by the independent fiduciary. A Plan, acting through its independent fiduciary, would also retain the ability (with WMC's consent) to transfer, assign or otherwise dispose of its interest in any construction loan, without payment of any fee or penalty.

(6) As to purchase of either permanent or construction loans, or interests therein, Plans would not pay WMC an investment management, investment advisory, sales commission or similar fee. In addition, Plans would not pay more for any loan interest than would be paid by an unrelated party in an arm's-length transaction.

6. WMC represents that as a result of being a party in interest with respect to Plans by virtue of servicing by it or affiliates of the subject loans or participations purchased thereby, WMC and its affiliates would be prohibited from engaging in other commercial transactions with these Plans, such as the making of loans, which transactions have nothing to do with the mortgages or participation interests held by the Plans. The Department has considered WMC's request for relief for such transactions and has decided that

¹⁵ The Department is not proposing exemptive relief herein for any violation of section 406(b) of the Act resulting from the provision of such construction services. See footnote above.

because the servicing relationship is established as a necessary result of the purchase of a mortgage or participation interest by a Plan, subsequent transactions between the parties otherwise prohibited by section 406(a) are not likely to present an inherent abuse potential. Accordingly, the Department has determined that it would be appropriate to propose the relief from section 406(a) contained in Part II of the proposed exemption.

7. In summary, the applicant represents that the proposed transactions satisfy the criteria contained in section 408(a) of the Act because: (a) The Plans will pay no more for the mortgages and participation interests therein than would be paid by an unrelated party in an arm's-length transaction; (b) all Plan decisions to invest in mortgages and participation interests will be made by a Plan fiduciary independent of WMC and its affiliates; (c) at the time of its acquisition of a loan or a participation therein, no Plan will have more than 25% of its assets invested in construction or permanent mortgages; (d) the terms of the construction or permanent loans will not be less favorable to the Plans than the terms generally available in arm's-length transactions with unrelated parties; and (e) no investment management, advisory, underwriting fee or sales commission will be paid to WMC or any of its affiliates with regard to such sale, exchange or transfer.

Notice to Interested Persons: The applicant represents that notice will be provided to all trustees of Plans currently holding loan investments originated and/or serviced by WMC and/or its affiliates. In addition, WMC agrees to provide a copy of the notice of proposed exemption and any subsequent grant of such exemption to all employee benefit plans with whom WMC may contract in the future to provide services as described herein. Such notification will be provided prior to WMC entering into a contract to provide such services.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz 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 disqualifying 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 31st day of March, 1995.

Ivan Strasfeld,

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

[FR Doc. 95-8395 Filed 4-6-95; 8:45 am]

BILLING CODE 4510-29-P

Washington, DC, and on Monday, April 24, 1995 from 9 a.m. until 2 p.m. in Room 105 of the National Archives Building.

The agenda for the meeting will address budget and resource issues, and NARA and Presidential library programs in light of Federal government reductions.

The meeting will be open to the public. For additional information, call Richard Jacobs, Acting Assistant Archivist, Office of Presidential Libraries at (202) 501-5700.

Dated: March 29, 1995.

Trudy Huskamp Peterson,

Acting Archivist of the United States.

[FR Doc. 95-8598 Filed 4-6-95; 8:45 am]

BILLING CODE 7515-01-M

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Notice of Meeting

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the International Advisory Panel (International Fellowships and Residencies Prescreening Section) to the National Council on the Arts will be held on April 25-27, 1995 from 9:00 a.m. to 7:00 p.m. on April 25-26 and from 9:00 a.m. to 5:00 p.m. on April 27. This meeting will be held in Room 716, at the Nancy Hanks Center, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506.

Portions of this meeting will be open to the public from 9:00 a.m. to 9:30 a.m. on April 25 and from 3:30 p.m. to 5:00 p.m. on April 27, for a policy discussion.

The remaining portions of this meeting from 9:30 a.m. to 7:00 p.m. on April 25; from 9:00 a.m. to 7:00 p.m. on April 26; and from 9:00 a.m. to 3:30 p.m. on April 27 are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of February 8, 1994 these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Meeting of the Advisory Committee on Presidential Libraries

Notice is hereby given that the National Archives and Records Administration (NARA) Advisory Committee on Presidential Libraries will meet on Sunday, April 23 1995 from 3 p.m. until 6 p.m. in Room 100 of the National Archives Building, 7th Street and Pennsylvania Avenue, NW.,