

## INTERSTATE COMMERCE COMMISSION

[Docket No. AB-43 (Sub-No. 168X)]

### Illinois Central Railroad Co.—Abandonment Exemption—in Hinds County, MS

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of exemption.

**SUMMARY:** Under 49 U.S.C. 10505, the Commission exempts from the regulatory requirements of 49 U.S.C. 10903–04 the abandonment by Illinois Central Railroad Company of 2.7 miles of rail line, between milepost NN-178.50 at Elton and milepost NN-181.21 at Jackson, in Hinds County, MS, subject to a public use condition, a historic preservation condition, and the standard employee protective conditions. The Commission also issues a notice of interim trail use.

**DATES:** Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on July 1, 1995. Formal expressions of intent to file an offer<sup>1</sup> of financial assistance under 49 CFR 1152.27(c)(2) must be filed by June 12, 1995. Petitions to stay must be filed by June 16, 1995. Requests for a public use condition must be filed by June 21, 1995. Petitions to reopen must be filed by June 26, 1995.

**ADDRESSES:** Send pleadings referring to Docket No. AB-43 (Sub-No. 168X) to: (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, 1201 Constitution Avenue, NW, Washington, DC 20423; and (2) Miles L. Tobin, Esq., 455 North Cityfront Plaza Drive, Chicago, IL 60611–5504.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 927–5660. [TDD for the hearing impaired: (202) 927–5721.]

#### SUPPLEMENTARY INFORMATION:

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Interstate Commerce Commission Building, Room 2229, 1201 Constitution Avenue, NW, Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 927–5721].

Decided: May 17, 1995.

<sup>1</sup> See Exempt. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioners Simmons and McDonald.

**Vernon A. Williams,**  
*Secretary.*

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 95–39; Exemption Application No. D–09358, et al.]

### Grant of Individual Exemptions; NCNB Real Estate Fund, et al.

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, 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 proposed to the Secretary of Labor.

## Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

- (a) The exemptions are administratively feasible;
- (b) They are in the interests of the plans and their participants and beneficiaries; and
- (c) They are protective of the rights of the participants and beneficiaries of the plans.

### NCNB Real Estate Fund (the Fund), NationsBank Pension Plan, NationsBank Retirement Savings Plan Located in Charlotte, North Carolina; Exemption

[Prohibited Transaction Exemption 95–39; Exemption Application Nos. D–09358, D–09359 and D–09360, respectively]

Based on the facts and representations set forth in the application, the Department and the Service have determined to grant the following 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) and Revenue Procedure 75–26, 1975–1 C.B. 722.

## Section I: Covered Transactions

1. The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the sale (the Sale) of units in the Fund (Units) by plans participating in the Fund (the Plans) pursuant to an Option election made available by NationsBank, N.A. (Carolinas) (the Bank), to a standby trust (the Standby Trust) established and maintained by NationsBank, Corporation (the Holding Company), a party in interest with respect to the Plans. This exemption is subject to the conditions set forth in Section II.

2. 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 any decision by the Bank to sell a property held by the Fund to a third party, and jointly owned by the Plans and the Holding Company, provided that: each Plan receives no less than fair market value for its interest in the property; and

the Independent Fiduciary approves the reasonableness and propriety of the sale of the property.

## Section II: Conditions

(a) The properties held by the Fund (the Properties) shall be appraised by an independent and qualified appraiser within twelve months and updated within fifteen days before the Settlement Valuation Date.

(b) The Plans selling Units pursuant to the Options will receive a price equal to the value of each Unit sold based on the value of the Fund as of the Settlement Valuation Date (the Unit Purchase Price) plus the Interest Amount which will be calculated by the Bank and reviewed and approved by the Independent Fiduciary who has been retained to represent the interests of the Plans with respect to the Sale and the subsequent activities of the Fund related to the Fund's liquidation.

(c) Plans selling Units pursuant to Options 1 or 2 will receive the Unit Purchase Price plus the Interest Amount for each Unit sold on the settlement date (Settlement Date) which will be no more than 120 days after the Settlement Valuation Date.

(d) If Options 2 or 4 are elected, the Plans involved will receive the final payment, if any, within sixty days after the two year anniversary of the Settlement Valuation date for Option 2, or the date of complete liquidation of the Fund for Option 4.

(e) Prior to the Settlement Valuation Date, the Bank will provide each Plan with written information regarding the terms of the Sale. Such information includes, but is not limited to:

(i) notice that each Plan will be entitled to elect one or more Options which will permit the Plan to sell all or part of its Units to the Stand-by Trust, or to continue to hold all or part of its Units in the Fund until the Fund's liquidation is complete, provided that if multiple Options are elected they must be uniform with respect to the grant, or failure to grant, a Release to the Bank;

(ii) a description of each Option;

(iii) the date by which a Plan must elect an Option (Option Election Date), and

(iv) forms for electing the Options.

(f) Except for Plans with respect to which the Bank or any of its Affiliates is an employer, the decision whether to authorize the Independent Fiduciary to make an Option election on behalf of the Plan will be made by a fiduciary independent of the Bank and its Affiliates and the Independent Fiduciary.

(g) The Bank and any Affiliate which is an employer with respect to a Plan

will authorize the Independent Fiduciary to choose among all of the Options.

(h) A Plan's Option election will be made by a Plan fiduciary who is independent of the Bank and its Affiliates or by the Independent Fiduciary.

(i) The Independent Fiduciary's duties and responsibilities are set forth in the Independent Fiduciary Agreement between the Independent Fiduciary and the Bank dated April 1, 1994 and amended by the First Amendment thereto dated September 1, 1994. These duties and responsibilities include such activities as:

(1) Reviewing and determining whether to rely on the appraisals of the Properties;

(2) Ordering a new appraisal to the extent it deems necessary in cases in which it has determined that an existing appraisal cannot be relied upon;

(3) Reviewing and approving all of the relevant disclosures, written explanations, and forms furnished to the Plans by the Bank;

(4) Furnishing certain information to an independent Plan fiduciary, in advance of any date by which the independent Plan fiduciary is required to respond in order to authorize the Independent Fiduciary to make a decision on behalf of the Plan. Such information includes, but is not limited to:

(i) the Unit Purchase Price;

(ii) a description and explanation of the Options;

(iii) dates by which the Plans must act in order to make Option elections and authorize the Independent Fiduciary to make Option elections on behalf of the Plan;

(iv) information summarizing: the effect of failing to authorize the Independent Fiduciary to make Option elections on behalf of the Plan, the effect of failing to make an Option election after informing the Independent Fiduciary that the independent Plan fiduciary would make the decision to select an Option election, and the availability and effect of the different Option election authorizations which the Plan may provide to the Independent Fiduciary, in language calculated to be reasonably understood by the average independent Plan fiduciary responsible for making decisions on behalf of a Plan with regard to Units of the Fund held by the Plan;

(5) making Option elections on behalf of any Plan if: (a) the Bank or any of its Affiliates is an employer with respect to the Plan; (b) the independent Plan fiduciary authorizes the Independent

Fiduciary to make Option elections on behalf of that Plan; or (c) the independent Plan fiduciary fails to make an option election prior to the Option Election Date;

(6) providing certain assistance regarding the four Options, to those independent Plan fiduciaries who wish to make their own Option elections;

(7) reviewing and determining whether to approve the Unit Purchase Price as of the Settlement Valuation Date, and the value of a Unit in the Fund as of two years from the Sale of the Units by the Plans to the Standby Trust (for purposes of determining the amount which is due to those Plans electing Option 2);

(8) reviewing and determining whether to approve the Interest Amount payable to any Plan which elected either Option 1 or 2;

(9) exercising its veto authority with regard to the proposed Unit Purchase Price, Interest Amount, or value of Fund Units pursuant to Option 2, which it has determined not to approve;

(10) monitoring, by attending the Bank's Trust Real Estate Investment Committee's quarterly meetings, the Bank's efforts to dispose of the Properties during the liquidation of the Fund;

(11) approving the reasonableness and propriety of sales of the Properties during the period in which the Standby Trust owns units in the Fund.

(j) The Independent Fiduciary may be removed by a majority vote of the Plans "for cause."

(i) The term "for cause" shall mean that there must be sufficient and reasonable grounds for removal and the grounds must be related to the ability and fitness of the Independent Fiduciary to perform his required duties.

(ii) Each Plan's vote for or against removal will be proportionate to its ownership interest in the Fund exclusive of Units owned by the Standby Trust.

(k) The Bank and the Holding Company will be bound by the decisions and determinations made by the Independent Fiduciary.

(l) The Bank will continue its efforts, with due diligence to liquidate the Fund.

(m) Any distributions made by the Fund will be made pro rata, in cash.

(n) Any payment made pursuant to any of the Options will be made in cash.

(o) The Independent Fiduciary is responsible for taking reasonable steps consistent with its duties and responsibilities hereunder to monitor compliance with the terms and conditions of the exemption at all times.

### Section III: Definitions

For purposes of this exemption:

(a) Affiliate of the Bank includes:

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

- (2) Any officer, director or employee of the Bank, or of a person described in paragraph (a)(1) of Section II; and

- (3) Any partnership in which the Bank is a partner;

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

(c) Affiliate of the Independent Fiduciary includes:

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

- (2) Any officer or director of the Independent Fiduciary (where the Independent Fiduciary is other than a partnership);

- (3) Any partner in the Independent Fiduciary with the authority to make, or who actually makes, fiduciary decisions which are within the scope of the Independent Fiduciary's duties and responsibilities under this exemption, or who holds a five percent (5%) or greater interest in the Independent Fiduciary;

- (d) Independent Fiduciary means a person who:

- (1) Is not an Affiliate of the Bank as defined in Section III(a);

- (2) does not have an ownership interest in the Bank or its Affiliates;

- (3) is not a corporation or partnership in which the Bank or any of its Affiliates has an ownership interest;

- (4) is not a fiduciary with respect to any of the Plans other than in connection with the transactions described in this exemption;

- (5) has acknowledged in writing acceptance of fiduciary responsibility;

- (6) is either:

- (i) A business organization which has at least (5) years of experience with respect to commercial real estate investments or other relevant experience;

- (ii) a committee comprised of three to five individuals who each have at least five (5) years of experience with respect to commercial real estate investments or other relevant experience; or

- (iii) a committee comprised both of a business organization or organizations and individuals having the qualifications described in paragraphs (d)(1) through (6)(ii) above.

- (7) An individual acting in a fiduciary capacity with respect to the Fund on

behalf of, and at the direction of, an Independent Fiduciary meeting the conditions of paragraphs (d)(1) through (6)(iii) above shall be considered an Independent Fiduciary.

For purposes of this definition, no organization or individual may serve as an Independent Fiduciary for the Fund for any fiscal year, if the gross income received by such organization or individual (or by any partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder) from the Bank, or any Affiliate, for that fiscal year exceeds five percent (5%) of its or his annual gross income from all sources for the prior fiscal year. If such organization or individual has no income for the prior fiscal year, the 5% limitation shall be applied with reference to the fiscal year in which such organization or individual serves as an independent fiduciary. The income limitation will include income received for services rendered to the Plans and the Fund as Independent Fiduciary, as described in this exemption.

In addition, no organization or individual who is an Independent Fiduciary or an Affiliate of such Independent Fiduciary, and no partnership or corporation of which such Independent Fiduciary is an officer, director, or ten percent (10%) or more partner or shareholder with the authority to cause such corporation or partnership to engage in the following transactions, or who exercises such authority in conjunction with others, may:

- (1) Acquire any property from, sell any property to, or borrow any funds from, the Bank, its Affiliates, or any collective investment vehicle or separate trust maintained or advised by the Bank or its Affiliates, during the period that such organization or individual serves as an Independent Fiduciary and continuing for a period of six (6) months after such organization or individual ceases to be an Independent Fiduciary; or

- (2) Negotiate any such transaction, described above in paragraph (1) above during the period that such organization or individual serves as Independent Fiduciary.

No Plan fiduciary or sponsor of a Plan or a designee of such Plan fiduciary, sponsor or Plan may serve as the Independent Fiduciary with respect to the Fund.

(e) Option(s) means the following:

Option 1: A Plan will accelerate the liquidation of its investment in the Fund by selling each of its Units subject to this Option to the Standby Trust for

an amount equal to the Unit Purchase Price plus the Interest Amount. A Plan electing this Option will reserve all rights it may have with respect to the Fund, the Bank and other appropriate persons. However, with respect to a participant directed account Plan, the Plan sponsor and an authorized independent Plan fiduciary will provide a Release to the Fund, the Bank and other appropriate persons without any affect on the rights of the participants or beneficiaries regarding the matters covered by the Release.

Option 2: A Plan will accelerate the liquidation of its investment in the Fund by selling each of its Units subject to this Option to the Standby Trust for an amount equal to the Unit Purchase Price plus the Interest Amount. In addition, the Bank will pay promptly following the second anniversary of the Settlement Valuation Date, an amount equal to the excess, if any, of (A) the sum of (1) the value that the Unit would have had at the Valuation Date two years after the Settlement Valuation Date if such Unit had not been sold, plus (2) the amount of any distributions made with respect to such Unit during such two year period, over (B) the Unit Purchase Price plus the Interest Amount. The Bank will pay Litigation Expenses to the Plan, if any. Under this Option, a Plan will release the Fund, the Bank and other appropriate persons with respect to all matters relating to the investment in the Fund occurring prior to the Sale.

Option 3: A Plan will continue its investment in the Fund through the end of the liquidation process. Under this Option, a Plan reserves all rights with respect to the Fund, the Bank and all other appropriate persons. However, with respect to a participant directed account Plan, the Plan sponsor and an authorized independent Plan fiduciary will provide a Release to the Fund, the Bank and other appropriate persons without any affect on the rights of the participants or beneficiaries regarding the matters covered by the Release.

Option 4: A Plan will continue its investment in the Fund through the end of the liquidation process. For a Plan electing this Option, the Bank will agree to pay promptly following the completion of the liquidation of the Fund, with respect to each Unit subject to this Option, an amount equal to the excess, if any, of (i) the value of a Unit on September 28, 1990 over (ii) the value of all distributions made to the Plan with respect to such Unit since September 29, 1990 and during the liquidation of the Fund. The Bank will also pay Litigation Expenses to the Plan, if any. Plans electing this Option will

release the Fund, the Bank and other appropriate persons with respect to all matters related to the investment in the Fund occurring prior to the Sale.

(f) Unit Purchase Price means the amount which is calculated by dividing the value of all of the assets of the Fund, as reviewed and approved by the Independent Fiduciary, by the total number of units in the Fund.

(g) Interest Amount means the amount approved by the Independent Fiduciary, equal to the net income earned on a Fund unit during the period commencing on the Settlement Valuation Date and ending on the day immediately preceding the Settlement Date, exclusive of realized or unrealized appreciation or depreciation.

(h) Settlement Valuation Date means the date on which the value of the Fund will be determined by the Bank in order to establish the Unit Purchase Price in connection with the Sale. The Settlement Valuation Date will be the last business day of the calendar month following the calendar month in which final prospective approval will be granted by the Office of the Comptroller of the Currency subsequent to the final grant of this exemption and approval of the transaction which is the subject of this exemption by the Federal Reserve Board.

(i) Litigation Expenses means the out-of-pocket expenses of litigation instituted before November 24, 1992 by or on behalf of a Plan against the Bank or the Fund with respect to the Plan's investment in the Fund exclusive of any expense of litigation with respect to a case which has proceeded to trial, or with respect to which there is a judgment against the Bank or the Fund, prior to the Option Election Date, plus interest. The total amount of Litigation Expenses, the rate of interest and the period for which interest is paid must be agreed to in writing between the Bank and the Plan prior to the Plan's election of Options 2 or 4. However, in the event there has never been a written settlement agreement specifying the amount of Litigation Expenses, prior to the date on which the Plan elects Option 2 or 4, Litigation Expenses will be the amounts requested by the Plan, unless such expenses are unreasonable.

(j) Option Election Date means the date as communicated to the Plans, at least Ninety (90) days subsequent to the Settlement Valuation Date and at least sixty (60) days subsequent to the completion of the mailing of the general post Settlement Valuation Date disclosure to all of the Plans by the Independent Fiduciary, on or prior to which a Plan must submit its Option election forms to the Bank.

(k) Settlement Date means the date, no more than 120 days after the Settlement Valuation Date, on which the transfer of the Units to the Standby Trust and delivery of Releases to the Bank will be effected pursuant to the Options.

(l) Release means a release covering activities and transactions in connection with the Fund prior to, and during, the Fund's liquidation, but in no case shall be effective on or after the Settlement Date. In this regard, the Release does not cover activities and transactions necessary to comply with the exemption, the conditions of the exemption, and the material representations made in connection therewith, which form the basis for the Department's decision to grant the exemption for the Sale and subsequent dispositions of properties owned by the Fund.

#### Written Comments

In the Notice of Proposed Exemption (the Notice), the Department invited all interested persons to submit written comments and requests for a hearing on the proposed exemption within 30 days of the date of publication of the Notice in the **Federal Register** on March 20, 1995.

During the comment period, the Department received no requests for a hearing. However, the Department received four comment letters; one from a person who appears to represent an employee benefit plan invested in the Fund, one from the Bank, and two from Arthur Andersen, the Independent Fiduciary.

The comment on behalf of Drs. Auman, Anderson & Munt, who appear to represent an employee benefit plan invested in the Fund, favored the liquidation of the plan's interest in the Fund.

The comment from the Bank dated March 30, 1995, states that the name of the applicant has been changed from "Nations Bank of North Carolina, N.A." to NationsBank, N.A. (Carolinas). The Department concurs.

The comment letter from Arthur Andersen dated, May 1, 1995, as well as a second letter clarifying certain comments in the first letter, requested certain modifications and clarifications of the conditions of the exemption and certain revisions of the language of the Summary of Facts and Representations in the Notice (SFR). Arthur Andersen's comments are as follows:

First, Arthur Andersen requests modification of the condition contained in Section II(i) on page 14781 of the Notice. A list of activities follows the language, "[t]he Independent Fiduciary's duties and responsibilities

include, but are not limited to," which appears at the beginning of paragraph (i). Arthur Andersen suggests replacing the quoted language with the following language: "[t]he Independent Fiduciary's duties and responsibilities are set forth in the Independent Fiduciary Agreement between the Independent Fiduciary and the Bank dated April 1, 1994, and amended by the First Amendment thereto dated September 1, 1994. These duties and responsibilities include such activities as." Arthur Andersen states that this change would clarify that Section II(i) is meant to describe the terms of the Agreement which the parties should look to in order to determine the specific scope of Arthur Andersen's responsibilities. The Department concurs.

Second, the condition contained in Section II(i)(1) on page 14781 of the Notice states that the Independent Fiduciary's duties include "reviewing and determining whether to approve appraisals of the Properties." Arthur Andersen suggests replacing the word, "approve," with the words, "rely on." Arthur Andersen explains that its role is limited to reviewing the appraisals to determine whether they can reasonably be relied upon as the basis for establishing the Unit Purchase Price. The Department concurs.

Further, the third sentence of item 9 of the SFR on page 14785 of the Notice states that "[t]he Independent Fiduciary will review and approve the qualifications of the appraisers and their technical analyses and methodologies employed." Arthur Andersen states that it will not approve the professional qualifications of the appraisers, but rather will evaluate and consider their qualifications in the course of its review of the appraisals. The Department concurs.

Moreover, the fourth sentence of item 9 of the SFR on page 14785 states that "[a]s part of this approval process, the Independent Fiduciary will determine whether such appraisals are reasonable and adequate to establish the fair market value of the Properties." Arthur Andersen states that it would be more accurate to say that the Independent Fiduciary will determine to what extent such appraisals provide a reasonable basis for such purpose. Arthur Andersen explains that its role will be limited to reviewing the appraisals to determine whether they can reasonably be relied upon as a basis for establishing the Unit Purchase Price, rather than approval of the underlying appraisals. The Department concurs.

In addition, the fourth sentence of the second paragraph of item 9 of the SFR

on page 14785 states that “[f]urther, if the Independent Fiduciary believes that the Unit Purchase Price proposed by the Bank is not accurate, the Independent Fiduciary has the authority to order the Bank to recalculate the Unit Purchase Price.” Arthur Andersen suggests that the quoted language above should be replaced with the following language: “[f]urther, if the Independent Fiduciary cannot approve the Unit Purchase Price proposed by the Bank, the Independent Fiduciary has the authority to order the Bank to recalculate the Unit Purchase Price.” Arthur Andersen explains that the word, “accurate,” is not the appropriate term to use, because the property values will be based on a range of reasonableness. The Department concurs.

Third, the condition contained in Section II(i)(2) on page 14781 of the Notice states that the Independent Fiduciary is responsible for “[o]rdering a new appraisal in cases in which it has determined not to approve an existing appraisal.” Arthur Andersen suggests that the quoted language above be replaced with the following language: “[o]rdering a new appraisal to the extent it deems necessary in cases in which it has determined that an existing appraisal cannot be relied upon.” Arthur Andersen explains that this revision would make this condition consistent with the above described revision it proposes for the first sentence in Section II(i) of the conditions. The Department concurs.

Fourth, the condition contained in Section II(i)(3) on page 14781 of the Notice states that the Independent Fiduciary is responsible for “[r]eviewing and approving all of the disclosures, written explanations, and forms furnished to the Plans by the Bank.” Arthur Andersen states that the word, “relevant,” should be inserted before the word, “disclosures.” In this regard, Arthur Andersen explains that it will review and approve materials only insofar as they are relevant to Arthur Andersen’s duties and responsibilities in connection with the Option election process. Other communications by the Bank to the Plans would be outside the scope of Arthur Andersen’s role under the exemption. Arthur Andersen believes this is particularly appropriate since the Bank may engage in a number of communications to the Plans during the liquidation period which are unrelated to the exemption or the Independent Fiduciary’s role. The Department concurs.

Fifth, the condition contained in Section II(i)(4) on page 14781 of the Notice states that the Independent Fiduciary is responsible for

“[f]urnishing information to an independent Plan fiduciary, in advance of any date by which the independent Plan fiduciary is required to respond in order to authorize the Independent Fiduciary to make a decision on behalf of the Plan.” Arthur Andersen suggests inserting the word, “certain,” between the word, “furnishing,” and the word, “information.” Arthur Andersen explains that the change would clarify that it is responsible for providing certain types of information relevant to its role as Independent Fiduciary. The Department concurs.

Sixth, the condition contained in paragraph (i)(4) (renumbered in the final exemption as (i)(5)) on page 14782 of the Notice states that the Independent Fiduciary is responsible for—

Making Option elections on behalf of any Plan if: (a) the Bank or any of its Affiliates is an employer with respect to the Plan; (b) the independent Plan fiduciary authorizes the Independent Fiduciary to make an Option elections on behalf of that Plan; or (c) the independent Plan fiduciary does not reserve the right to make an Option election and fails to make an Option election prior to the Option Election Date.

Arthur Andersen suggests that the language in item (c) quoted above, should be replaced with the following language: “the independent Plan fiduciary fails to make Option election prior to the Option Election Date.” Arthur Andersen states that Independent Plan fiduciaries that reserve the right to make an Option election but fail to do so within the prescribed time frames are not described in the current language quoted above.

Because Arthur Andersen will make Option elections for such Plans, the language in item (c) should include this omitted category, which can be accomplished by eliminating the distinction between Plan fiduciaries that do or do not reserve the right to make option elections. The Department concurs.

Further, the second paragraph of item 12 of the SFR on page 14786 states that—

[I]f the Plan reserves the right to make its own Option election and subsequently fails to make an Option election by the Option Election Date, the Plan will be deemed to have elected Option 3. If the Plan does not reserve the right to make its own Option election and the Plan fails to make: a sufficiently broad authorization; any authorization at all; or fails to complete the profile survey, Arthur Andersen will elect only between Options 1 and 3 for the Plan. However, Arthur Andersen will choose among all four Options if the independent Plan fiduciary completes and returns timely all required parts of the profile/survey and the related authorization form expressly

authorizing Arthur Andersen to choose among all four Options. The Bank represents that it will authorize Arthur Andersen to choose among all four Options for Plans with respect to which the Bank or any of its Affiliates is an employer.

Arthur Andersen states that the above quoted language should be clarified to indicate that “where the Plan fails to make its own Option election by the Option Election Date, Andersen will make an election for the Plan between Options 1 and 3, unless otherwise expressly authorized in writing by an independent Plan fiduciary to elect from among all four options. The Option election will not automatically default in certain cases to Option 3.” Arthur Andersen explains that in each case, an Option election will be made either by a Plan’s independent fiduciary, a plan participant or beneficiary in a participant-directed plan (where applicable), or by Arthur Anderson as Independent Fiduciary, as described in the Notice, and in no case will an Option election automatically default to any particular Option. The Department concurs.

Seventh, the condition contained in Section II(i)(5) (renumbered in the final exemption as (i)(6)) on page 14782 of the Notice states that the Independent Fiduciary is responsible for “providing guidance regarding the four Options, to those independent Plan fiduciaries who wish to make their own Option elections.” Arthur Andersen states that the words, “certain assistance,” should replace the word, “guidance.” Arthur Andersen explains that where independent Plan fiduciaries have decided to make their own Option elections, they will not be depending on Arthur Andersen in making their decisions. Consequently, the word, “guidance,” would overstate the interaction between Arthur Andersen and such fiduciaries regarding Option elections, whereas “certain assistance” more accurately describes this interaction. The Department concurs.

Further, the first sentence of the fourth paragraph of item 12 of the SFR on page 14786 states that “[w]ith respect to those independent Plan fiduciaries who notify Arthur Andersen that they will be making their own Option elections, Arthur Andersen is prepared to counsel any Plan fiduciary regarding the election process.” Arthur Andersen suggests substituting the word, “assist,” for the word, “counsel.” Arthur Andersen wishes to clarify that with respect to those independent Plan fiduciaries who notify Arthur Andersen that they will be making their own Option elections, Arthur Andersen is prepared to assist any Plan fiduciary

regarding the election process. Arthur Andersen explains that in this context, the word, "assist," is more accurate. The Department concurs.

Eighth, the condition contained in Section II(i)(9) (renumbered in the final exemption as (i)(10)) on page 14782 of the Notice states that the Independent Fiduciary is responsible for "monitoring the Bank's efforts to dispose of the Properties during the liquidation of the Fund." Arthur Andersen suggests modifying this phrase to read: "monitoring, by attending the Bank's Trust Real Estate Investment Committee's quarterly meetings, the Bank's efforts to dispose of the Properties during the liquidation of the Fund." Arthur Andersen states that the additional language more accurately reflects its duties under the Agreement, as amended. The Department concurs.

In addition, the condition contained in Section II(o) on page 14782 of Notice states that "[t]he Independent Fiduciary is responsible for monitoring compliance with the terms and conditions of the exemption at all times." Arthur Andersen suggests deleting the word, "monitoring," and inserting after the words, "responsible for," the following language: "taking reasonable steps consistent with its duties and responsibilities hereunder to monitor." In this regard, Arthur Andersen explains that it would not have an affirmative obligation to engage in additional activities to determine compliance beyond participation in the quarterly meetings of NationsBank's Trust Real Estate Investment Committee. Arthur Andersen believes that it must act reasonably within the scope of its defined role, and to the extent it determines there is non-compliance, it must take appropriate action.

Arthur Andersen represents that notwithstanding its comments regarding its responsibilities under the conditions contained in Sections II(i)(9) and (o) of the Notice, Arthur Andersen will be responsible for obtaining the information necessary to execute its duties as follows: (a) To approve, in advance of any sales of the Properties during the period in which the Standby Trust owns Units in the Fund, the reasonableness and propriety of such sales; and (b) to approve, in advance of the payments to Plans under Option 2 following the second anniversary of the Settlement Valuation Date, the reasonableness and propriety of the value of the Fund Units pursuant to Option 2, using procedures parallel to those used in reviewing and approving the reasonableness of the Unit Purchase Price. The Department concurs.

Ninth, the definition in Section II(c)(2) (renumbered in the final exemption as Section III(c)(2)) on page 14782 of the Notice states that "[a]ny officer or director of the Independent Fiduciary" is defined as an Affiliate of the Independent Fiduciary. Arthur Andersen requests that the parenthetical "(where the Independent Fiduciary is other than a partnership)" be appended to the end of the language quoted above. Arthur Andersen explains that the change would clarify that Section III(c)(2) is not intended to apply to a partnership. The Department concurs.

Tenth, the definition in Section II(c)(3) (renumbered in the final exemption as Section III(c)(3)) on page 14782 of the Notice defines Affiliate of the Independent Fiduciary to include "[a]ny partner in the Independent Fiduciary, or any other related individual, with the authority to make, or who actually makes, fiduciary decisions which are within the scope of the Independent Fiduciary's duties and responsibilities under this exemption, or who holds a five percent (5%) or greater interest in the Independent Fiduciary." Arthur Andersen suggests that the italicized phrase above be deleted. Arthur Andersen explains that section (d)(7) of the definitions, already reaches persons who are not partners in the Independent Fiduciary but nevertheless act in a fiduciary capacity. The Department concurs.

After giving full consideration to the record, including the comments by commentators, the Department has determined to grant the exemption as described herein. In this regard, the comments submitted to the Department have been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department is made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5507, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption published refer to the notice of proposed exemption published Monday March 20, 1995, at 60 FR 14781.

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

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 25th day of May 1995.

**Ivan Strasfeld,**

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

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BILLING CODE 4510-29-P

#### NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

##### Notice of Submission of Proposed Information Collections to OMB

**AGENCY:** National Archives and Records Administration.

**ACTION:** Notice of proposed information collections submitted to OMB for approval.

**SUMMARY:** The National Archives and Records Administration (NARA) is giving notice that the proposed collections of information described in this notice have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act and 5 CFR part 1320.