[Application No. D–09500, et al.]

Proposed Exemptions; Fidelity Management Trust Company (FMTC) and its Affiliates, 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

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing 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, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

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

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Fidelity Management Trust Company (FMTC) and its Affiliates (collectively, Fidelity) Located in Boston, Massachusetts; Proposed Exemption

[Application No. D–09500]

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).

Section I—Exemption for Payment of Certain Fees to Fidelity

The restrictions of section 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code, shall not apply to the payment of certain performance fees (the Performance Fee) to Fidelity by employee benefit plans for which Fidelity provides investment management or discretionary trustee services (the Client Plans) pursuant to an investment management or trust agreement (the Agreement) entered into between Fidelity and the Client Plans either individually, through the establishment of a single client separate account (Single Client Account), or collectively as participants in a multiple client commingled account (Multiple Client Account), provided that the conditions set forth below in Section III are satisfied. (Single Client Accounts and Multiple Client Accounts are collectively referred to herein as Accounts.)

Section II—Exemption for Investments in a Multiple Client Account

The restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any investment by a Client Plan in a Multiple Client Account managed by Fidelity, provided that the conditions set forth below in Section III are satisfied.

Section III—General Conditions

(a) The investment of plan assets in a Single or Multiple Client Account, including the terms and payment of any Performance Fee, shall be approved in writing by a fiduciary of a Client Plan which is independent of Fidelity (the Independent Fiduciary). Notwithstanding the foregoing, Fidelity may authorize the transfer of cash from a Single Client Account to a Multiple Client Account provided that: (1) The Multiple Client Account has similar investment objectives and the identical fee structure as the Single Client Account; (2) the Agreement governing the Single Client Account authorizes Fidelity to invest in a Multiple Client Account; (3) Fidelity receives no additional fees from the Single Client Account for cash invested in the Multiple Client Account; (4) a binding commitment to make the transfer to the Multiple Client Account occurs within six months of the Independent Fiduciary's decision to allocate assets to the Single Client Account or, in the event Fidelity's binding commitment to make the transfer occurs more than six months after such fiduciary's decision, Fidelity obtains an additional authorization from the Independent Fiduciary; and (5) each transfer of assets from the Single Client Account to the Multiple Client Account occurs within sixty (60) days of the actual transfer of such assets to the Single Client Account.

(b) The terms of any investment in an Account and of any Performance Fee shall be at least as favorable to the Client Plans as those obtainable in arm's-length transactions between unrelated parties.

(c) At the time any Account is established and at the time of any subsequent investment of assets (including the reinvestment of assets) in such Account:

(1) Each Client Plan shall have total net assets with a value in excess of $50 million; and

(2) No Client Plan shall invest, in the aggregate, more than five percent (5%) of its total assets in any Account or more than ten percent (10%) of its assets in all Accounts established by Fidelity.

(d) Prior to making an investment in any Account, the Independent Fiduciary of each Client Plan investing in an Account shall receive offering materials from Fidelity which disclose all material facts concerning the purpose, structure, and operation of the Account, including any fee arrangements.

(e) With respect to its ongoing participation in an Account, the Independent Fiduciary of each Client Plan shall receive the following written information from Fidelity:

(1) Audited financial statements of the Account prepared by independent public accountants selected by Fidelity no later than ninety (90) days after the end of the fiscal year of the Account;

(2) Quarterly and annual reports prepared by Fidelity relating to the overall financial position of the Account and, in the case of a Multiple Client Account, the value of such Client Plan's interest in the Account. Each such report shall include a statement regarding the amount of fees paid to Fidelity during the period covered by such report;

(3) Annual reports indicating the fair market value of the Account's assets determined using market sources and valuation methodologies acceptable to the Independent Fiduciary of the Client Plan for a Single Client Account or the responsible independent fiduciaries of Client Plans and other authorized persons acting for investors in a Multiple Client Account (the Responsible Independent Fiduciaries, as defined in Section IV(c) below), or if market sources are not available, values determined by a qualified appraiser independent of Fidelity which has been approved by the Independent Fiduciary or Responsible Independent Fiduciaries. However, no independent appraisals shall be required for assets acquired for the Account within the twelve (12) months preceding the end of the period covered by the report, unless such appraisals are necessary for purposes of determining any compensation due to Fidelity based on the value of the assets in the Account for that period; and

(4) In the case of any Multiple Client Account, a list of all other investors in the Account.

(f) The total fees paid to Fidelity shall constitute no more than reasonable compensation.

(g) The Performance Fee shall be payable after the Client Plan has received distributions from the Account in excess of an amount equal to 100% of its invested capital plus a pre-specified annual compounded cumulative rate of return (the Threshold Amount), except that in the case of Fidelity's removal or resignation, Fidelity shall be entitled to receive a Performance Fee payable either at the time of removal, or in the event of Fidelity's resignation, on the scheduled termination date of the Account, subject to the requirements of paragraph (j) below, as determined by a deemed distribution of the assets of the Account based on an assumed sale of such assets at their fair market value (in accordance with market sources or independent appraisals as described in paragraph (k) below), only to the extent that the Client Plan would receive distributions from the Account in excess of an amount equal to the Threshold Amount at the time of Fidelity's removal or resignation. Both the Threshold Amount and the amount of the Performance Fee, expressed as a percentage of the amount distributed (or deemed distributed) from the Account in excess of the Threshold Amount, shall be established by the Agreement and agreed to by the Independent Fiduciary of the Client Plan.

(h) The Threshold Amount for any Performance Fee shall include at least a minimum rate of return to the Client Plan, as defined below in Section IV(d). The Independent Fiduciary acting for a Client Plan shall specifically agree in writing with Fidelity, prior to any investment in the Account, that it would be appropriate for the minimum rate of return applicable to the Account to be based upon the rate of change in the consumer price index (CPI) during the period specified in the Agreement, as described in Section IV(d).

(i) For any sale of an asset in an Account which shall give rise to the payment of a Performance Fee to Fidelity prior to the termination of the Account, the sale price of the asset shall be at least equal to a target amount (the Target Amount), as defined in Section IV(e), in order for Fidelity to sell the asset and receive its Performance Fee without further approvals. If the proposed sale price of the asset is less than the Target Amount, the proposed sale shall be disclosed to and approved by the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account, in which event Fidelity will be entitled to sell the asset and receive its Performance Fee. If the proposed sale price is less than the Target Amount and the Independent Fiduciary's or Responsible Independent Fiduciaries' approval is not obtained, Fidelity shall still have the authority to sell the asset, if the Agreement provides Fidelity with complete investment discretion for the Account, provided that the Performance Fee that would have been payable to Fidelity by reason of the sale of the asset is paid only at the termination of the Account.

(j) In the event Fidelity resigns as investment manager or trustee of an Account, the Performance Fee shall be calculated at the time of resignation based upon a deemed distribution of the assets of the Account at their fair market value (determined using market sources or independent appraisals as described in paragraph (k) below). The amount arrived at by this calculation shall be multiplied by a fraction, the numerator of which shall be the sum of the disposition proceeds of all assets in the Account received prior to the termination date plus the fair market value of the assets remaining in the Account on the termination date and the denominator of which shall be the aggregate value of the assets in the Account used in determining the amount of the Performance Fee as of the date of resignation, provided that this fraction shall never exceed 1.0. The resulting amount shall be the Performance Fee payable to Fidelity on the scheduled termination date of the Account.

(k) With respect to the valuation of the assets in an Account for purposes of determining any Performance Fee based on a deemed distribution of such assets, Fidelity shall establish the fair market value for the assets using market sources and valuation methodologies disclosed to, and approved in writing by, the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account. In the event market sources are not available for the valuation of assets in the Account, the fair market value of such assets shall be determined by an independent qualified appraiser approved by either the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account prior to any valuation of the assets. If a new appraiser for an asset is chosen by Fidelity, the appraiser shall be approved by such Fiduciaries prior to any valuation of the asset. In any event, the fair market value of all assets involved in any deemed distribution shall be based on the current market value of such assets as of the date of the transactions giving rise to the payment of the Performance Fee.

(l) Fidelity shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (m) of this Section III 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 Fidelity, the records are lost or destroyed prior to the end of the six year period, and (2) no party in interest, other than Fidelity, 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 (m) below.

(m)(1) Except as provided in paragraph (m)(2) and notwithstanding any provisions of sections 504(a)(2) and (b) of the Act, the records referred to in paragraph (l) of this Section III shall be unconditionally available at their customary location for examination during normal business by:

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

(ii) Any fiduciary of a Client Plan or any duly authorized employee or representative of such fiduciary;

(iii) Any contributing employer to any Client Plan or any duly authorized employee or representative of such employer; and

(iv) Any participant or beneficiary of any Client Plan, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described above in paragraph (m)(1)(ii)–(iv) shall be authorized to examine the trade secrets of Fidelity or any commercial or financial information which is privileged or confidential.

Section IV—Definitions

(a) An ''affiliate'' of a person includes:

(1) Any person 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 of 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.

(c) The term ''Responsible Independent Fiduciaries'' means with respect to a Multiple Client Account the Independent Fiduciary of Client Plans invested in the Account and other authorized persons acting for investors in the Account which are not employee benefit plans as defined under section 3(3) of the Act (such as governmental plans, university endowment funds, etc.) that are independent of Fidelity and that collectively hold at least 50% of the interests in the Account.

(d) The term ''Threshold Amount'' means with respect to any Performance Fee an amount which equals all of a Client Plan's capital invested in an Account plus a pre-specified annual compounded cumulative rate of return that is at least a minimum rate of return determined as follows:

(1) A non-fixed rate which is at least equal to the rate of change in the CPI during the period from the deposit of the Client Plan's assets in the Account until distributions of the Client Plan's assets from the Account equal or exceed the Threshold Amount; or

(2) A fixed rate which is at least equal to the average annual rate of change in the CPI over some period of time specified in the Agreement, which shall not exceed 10 years.

(e) The term ''Target Amount'' means a value assigned to each asset in the Account established by Fidelity either (1) at the time the asset is acquired, by mutual agreement between Fidelity and the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account, or (2) pursuant to an objective formula approved by such fiduciaries at the time the Account is established. However, in no event will such value be less than the acquisition price of the asset.

(f) The term ''Account'' means any Single Client Account or Multiple Client Account established with Fidelity, under a written investment management or trust agreement, that is invested primarily (i.e. more than 50%) in securities or other assets which are not publicly-traded equity securities or publicly-traded, investment grade debt securities, pursuant to written instructions and guidelines established and approved by an Independent Fiduciary for the Client Plan prior to any investment by the Client Plan in the Account. For purposes of an ''Account'' meeting the 50% test for assets which are *not* ''publicly-traded equity securities'' or ''publicly-traded, investment grade debt securities'', any private market securities held by the Account that become publicly-traded securities shall not be considered as such for a period of thirty (30) months following the date such securities become publicly-traded so as to allow Fidelity sufficient time to dispose of such securities in order for the Account to remain primarily invested in assets which are not publicly-traded securities, including for such purposes any publicly-traded debt securities which are not investment grade.[1]

The availability of this exemption, if granted, will 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 terms of the transactions which are the subject of this exemption.

Summary of Facts and Representations

1. FMTC is a Massachusetts trust company with its principal office located in Boston, Massachusetts, and is a ''bank'' as defined under the Investment Advisers Act of 1940. FMTC manages approximately $24 billion worth of assets for a variety of clients, virtually all of which are employee benefit plans. FMTC's client accounts consist of either separate accounts for a single client or commingled accounts for multiple clients.

2. Fidelity will offer the investment arrangement described below involving the payment of a Performance Fee to Client Plans that seek to invest primarily in securities and have aggregate net plan assets with a fair market value in excess of $50 million.[2] Fidelity will serve such Client Plans as the investment manager or discretionary trustee of either a Single Client Account or a Multiple Client Account. In general, Fidelity will have complete discretion for identifying appropriate investments, making investment decisions, and managing and disposing of the securities or other assets acquired for the Accounts. However, with respect to certain Single Client Accounts, Fidelity will not exercise absolute investment discretion and will be required to obtain approval for certain investment

[1] As noted above in Section III(f), an Independent Fiduciary must specifically agree in writing with Fidelity that it would be appropriate for the minimum rate of return applicable to the Account to be based upon the rate of change in the CPI during the period specified in the Agreement. However, with respect to any Account with an investment strategy designed to invest in distressed, defaulted or other non-performing debt instruments that may be publicly-traded securities at the time they are acquired by the Account, the Department encourages Client Plan fiduciaries to determine whether or not any of the published indices for publicly- traded debt securities would be a more appropriate performance benchmark to measure a minimum rate of return for such securities.

[2] In the case of multiple plans maintained by a single employer or a single controlled group of employers, the assets of which are invested on a commingled basis (e.g. through a master trust), this $50 million threshold will be applied to the aggregate assets of all such plans.

decisions from the Independent Fiduciary of the Client Plan. Such approvals will typically be obtained from the Client Plan sponsor or an investment committee appointed by the Client Plan sponsor.

3. Single Client Accounts will be established pursuant to Agreements negotiated with the Independent Fiduciaries of the Client Plans. The terms of Fidelity's compensation will be established in the Agreements governing the Single Client Account and will be fully disclosed to the Independent Fiduciary prior to the investment of assets of the Client Plan in the Single Client Account. If agreed to by the Independent Fiduciary, the compensation arrangement involving the payment of the Performance Fee (as described in Item 5 below) will be included in the Agreement.[3] The term of each Account will be predetermined in the Agreement and approved by the Independent Fiduciary of the Client Plan (see Item 8 below).

A Multiple Client Account typically will be organized either as a common law trust or a group trust as defined in IRS Revenue Ruling 81–100 (as to which Fidelity would serve as discretionary trustee), or as a limited partnership (as to which Fidelity would be general partner).[4] For any Multiple Client Account, various decisions regarding the Account other than investment management decisions for the Account (such as the initial decision to allocate Client Plan assets to the Account, decisions with respect to the removal of Fidelity or the termination of the Account) will be made by the Responsible Independent Fiduciaries. Fidelity represents that in all instances the Responsible Independent Fiduciaries will be acting for Account investors that collectively hold at least 50% of the interests in the Account. The exact percentage required for such decisions will be specified in the governing documents of the Account.

The decision to invest assets of a Client Plan in any Multiple Client Account will be made by the Independent Fiduciary of such Client Plan, based upon full written disclosure of the Performance Fee prior to such investment. Notwithstanding the foregoing, Fidelity may authorize the transfer of cash from a Single Client Account to a Multiple Client Account where: (i) The Multiple Client Account has similar investment objectives and the identical fee structure as the Single Client Account; (ii) the Agreement governing the Single Client Account authorizes Fidelity to invest in a Multiple Client Account; (iii) Fidelity receives no additional fees from the Single Client Account for cash invested in the Multiple Client Account; (iv) a binding commitment to make the transfer to the Multiple Client Account is made within six months of the Independent Fiduciary's decision to allocate assets to the Single Client Account or, in the event Fidelity's binding commitment to make the transfer occurs more than six months after such fiduciary's decision, Fidelity obtains an additional authorization from the Independent Fiduciary; and (v) each transfer of assets from the Single Client Account to the Multiple Client Account occurs within sixty (60) days of the actual transfer of such assets to the Single Client Account. Fidelity represents that its commitment to invest the cash would normally occur within six months of the Independent Fiduciary's decision to allocate assets to the Single Client Account. However, if more than six months has transpired since the Independent Fiduciary's decision to invest the assets in the Single Client Account, Fidelity will obtain an additional authorization from such fiduciary. Such authorization will occur following written disclosure to the Independent Fiduciary of Fidelity's binding commitment to make a cash transfer to the Multiple Client Account which will be deemed approved unless such fiduciary objects within a reasonable time.

After a transfer of cash, the fee structure for the Multiple Client Account will govern all fees received by Fidelity for such Client Plan assets. The precise terms of Fidelity's compensation arrangement will be established as part of the documents pursuant to which the Multiple Client Account is organized and can be amended only with the affirmative approval of the Responsible Independent Fiduciaries.

4. The applicant represents that, in general, the investment objectives of each Account will be to obtain current income and/or capital appreciation through investments primarily in various types of private market securities and real estate related investments. Fidelity represents that it offers a wide range of investment services and utilizes a wide variety of investment approaches. While the bulk of Fidelity's business entails investing Client Plan assets in publicly-traded securities which are readily valued or easily liquidated, other aspects of its investment business entail, at least in part, investing Client Plan assets in non-publicly-traded securities and other property.

Fidelity's objective with respect to the requested exemption is to achieve sufficient flexibility to respond to client demands and preferences for utilization of a Performance Fee arrangement of the type described below. Fidelity believes that such a fee arrangement may be attractive to Client Plans in situations involving Accounts which are to be invested primarily (i.e. more than 50%) in certain types of assets other than publicly-traded equity securities or publicly-traded, investment grade debt securities. For purposes of an Account meeting the 50% test for assets which are *not* ''publicly-traded equity securities'' or ''publicly-traded, investment grade debt securities'', any private market securities held by the Account that become publicly-traded securities shall not be considered as such for a period of thirty (30) months following the date such securities become publicly-traded so as to allow Fidelity sufficient time to dispose of such securities in order for the Account to remain primarily invested in assets which are not publicly-traded securities, including for such purposes any publicly-traded debt securities which are not investment grade.[5]

An Account could entail a wide range of types of investments, including privately placed debt and equity securities, high-yield fixed income securities, publicly-traded debt securities issued by distressed companies, partnership interests in venture capital operating companies, various real estate or real estate-related interests, and other ''alternative investments'' which have greater risk but potentially greater returns than traditional classes of equity or debt

[3] Section 404 of the Act requires, among other things, that a plan fiduciary act prudently and solely in the interest of the plan's participants and beneficiaries. Thus, the Department expects a plan fiduciary, prior to entering into any performance-based compensation arrangement with an investment manager, to fully understand the risks and benefits associated with the compensation formula following disclosure by the investment manager of all relevant information pertaining to the proposed arrangement. In addition, a plan fiduciary must be capable of periodically monitoring the actions taken by the investment manager in the performance of its duties and must consider, prior to entering into the arrangement, whether such plan fiduciary is able to provide oversight of the investment manager during the course of the arrangement.

[4] With respect to any Multiple Client Account organized by Fidelity as a limited partnership, Fidelity represents that its interest as a general partner will not exceed 1% of the aggregate outstanding partnership interests of such limited partnership at any time.

[5] The Department notes that a ''publicly-traded security'' would include any security that is a ''publicly-offered security'' as described in the Department's regulations relating to the definition of ''plan assets'' in the context of certain plan investments (see 29 CFR 2510.3–101(b) (2)–(4)).

securities.[6] Fidelity states that it would not necessarily enter into a Performance Fee arrangement for all Accounts which are invested in the these types of assets. However, Fidelity wishes to have the opportunity to do so in circumstances where an Independent Fiduciary has specifically approved the particular investment objectives and fee arrangements for the Account, as being appropriate for the payment of such a Performance Fee. The Accounts may be designed as either ''blind'' accounts for which Fidelity will select the investments after the Client Plans have invested therein or ''pre-identified asset'' accounts for which Fidelity identifies particular securities or other assets for investment prior to the Client Plans' investments in the Accounts.

5. Fidelity proposes to have the Client Plans pay for investment management or discretionary trustee services rendered to the Accounts based upon a two-part fee structure which will be approved in advance by the Independent Fiduciaries of the Client Plans. In addition to an on-going investment management or trustee fee (the Base Fee) paid to Fidelity by the Client Plan, the fee structure may include the Performance Fee, a fee payable upon a distribution (or deemed distribution) of the assets from the Account after the Client Plan has received (or would receive) a return of all its invested capital plus a certain pre-specified rate of return on its investments in the Account. Fidelity requests an exemption for the payment by Client Plans of the Performance Fee under circumstances described below.

With respect to the Base Fee, such fee will be paid throughout the term of the Account on a pre-specified periodic basis. The amount of the Base Fee will be based on either (i) a percentage of the net fair market value of the Client Plan assets in the Account (i.e. without regard to any leveraged amounts) as of the last day of each period or (ii) a percentage of the assets allocated to the Account (i.e. the invested capital) less any amounts thereof which have been distributed from the Account. In either event, the Base Fee will be pro-rated for any partial periods. The exact percentage to be used in determining the Base Fee will be negotiated between Fidelity and the Independent Fiduciary of the Client Plan prior to the initial investment of any Plan assets in the Account.

If the Base Fee is calculated based upon the fair market value of the assets in the Account as of a specified determination date, the fee will be based upon values determined using market sources approved in writing by the Independent Fiduciary of the Client Plan (or specified in the documents establishing the Account, in the case of a Multiple Client Account).[7] If market sources are not available, the fee will be based upon values determined immediately prior to the payment of such fee by an appraiser independent of Fidelity. For any appraisal used to determine the Base Fee, Fidelity will initially notify in writing the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account regarding the identity of the appraiser whom Fidelity proposes to retain to value the asset. The Independent Fiduciary or the Responsible Independent Fiduciaries will have an opportunity to approve or disapprove the suggested appraiser with an approval being deemed to have occurred unless such fiduciaries object to the appraiser within a reasonable time. Once approved, the appraiser could perform all future valuations of the particular asset unless either (i) the Independent Fiduciary or Responsible Independent Fiduciaries affirmatively withdraw the prior approval of the appraiser, or (ii) Fidelity suggests a different appraiser, in which case an approval by such fiduciaries would again be required.

In lieu of the Base Fee described above, Fidelity and the Independent Fiduciaries of the Client Plans may agree to an alternative fee arrangement for an Account (the Alternative Fee) which is based upon either a fixed amount or amounts or an objective formula to be negotiated (in either case) between Fidelity and the Independent Fiduciary of the Client Plan prior to the initial investment of any Client Plan assets in the Account. Neither the Base Fee nor any such Alternative Fees will be covered by the requested exemption.[8]

The Performance Fee will be payable either (i) after the Client Plan has actually received distributions from the Account, or (ii) in the case of the removal or resignation of Fidelity, based on deemed distributions from the Account (as discussed in Item 7 below), which in each case must be at least equal to such Plan's invested capital plus a pre-specified annual compounded cumulative rate of return (i.e. the Threshold Amount). The Performance Fee will be equal to a fixed percentage (or several fixed percentages) of all amounts distributed from an Account in excess of the Threshold Amount (or several Threshold Amounts). In this regard, Fidelity represents that there is a possibility that several Threshold Amounts may be established with different percentages being utilized to determine the Performance Fee depending upon which Threshold Amount has been exceeded.[9] Fidelity states that this structure will allow a Client Plan to negotiate an arrangement pursuant to which the

[6] In this regard, Fidelity represents that an Account will not invest in or use any swap transactions (including caps, floors, collars, or options relating thereto), forward contracts, exchanged-traded futures transactions, or options (other than covered call options). The Department notes that no relief is being provided in this proposed exemption for any underlying investments made by an Account which may involve parties in interest with respect to the Client Plans invested in the Account.

In addition, the Department is expressing no opinion as to whether the investment of ''plan assets'' by an Account in any particular type of asset would violate any provision of Part 4 of Title I of the Act. Thus, the Department is not providing an opinion regarding whether any particular category of investments or investment strategy would be considered prudent or in the best interests of a Client Plan as required by section 404 of the Act.

However, the Department notes that in order to act prudently in making investment decisions, plan fiduciaries must consider, among other factors, the availability, risks and potential return of alternative investments for the plan. A particular investment by a plan, which is selected in preference to other available investments, would generally not be prudent if such investment involves a greater risk to the security of ''plan assets'' than other comparable investments offering a similar return.

The Department notes further that Client Plan fiduciaries must thoroughly understand the risks involved with any investment course of action and must be capable of monitoring at appropriate intervals the investment course of action taken by Fidelity, particularly with respect to any period when the payment of a Performance Fee to Fidelity would be applicable. In this regard, section 405(a) of the Act states, among other things, that a plan fiduciary shall be liable for a breach of fiduciary responsibility of another fiduciary for the same plan if, by his failure to comply with section 404(a)(1) in the administration of his specific duties which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach.

[7] Fidelity states that in instances where the Base Fee is determined based on the amount of capital invested in the Account, rather than on the value of the assets in the Account, no such market valuations will be utilized to determine the Base Fee. Thus, the independent valuation requirements discussed herein, including any independent appraisal of assets in an Account, will be limited to situations where such valuations are used to calculate either the Base Fee or the Performance Fee.

[8] Fidelity represents that both the Base Fee and the Alternative Fee would be covered by section 408(b)(2) of the Act and the regulations thereunder (see 29 CFR 2550.408b–2). However, the Department expresses no opinion as to whether the payment of such fees, as described herein, would meet the conditions of section 408(b)(2) of the Act.

[9] For example, a Client Plan could negotiate a Performance Fee whereby Fidelity would receive 10% of all distributions from the Account once an initial Threshold Amount (e.g. return of all invested capital plus an 8% annual return) has been achieved and 20% of all distributions once a second Threshold Amount (e.g. return of all invested capital plus a 12% annual return) has been achieved.

amount of the Performance Fee will increase as the level of investment performance increases. Both the annual rate(s) of return used in determining the Threshold Amount(s) and the percentage(s) used to determine the amount of the Performance Fee will be negotiated between, and agreed to by, Fidelity and the Independent Fiduciary of the Client Plan prior to the Client Plan's initial investment in the Account.

With respect to the determination of the Threshold Amount, Fidelity represents that all amounts invested by a Client Plan in an Account will have to earn a pre-specified rate of return, which is at least equal to the minimum rate of return specified in Section IV(d) above,[10] for the entire period such assets are in the Account and must actually be distributed (or deemed distributed) back to the Client Plan in order for the Threshold Amount to be reached. Fidelity states that a bookkeeping account will be maintained for each Client Plan which will show the amount required to be distributed from the Account to satisfy the Threshold Amount. When a certain amount is invested in the Account on a particular date, this bookkeeping account will be reduced by the full amount of the distribution. Thereafter, the required return will be added to this reduced amount until the next distribution is made when the bookkeeping account will be reduced to reflect the amount of that distribution. Only when this bookkeeping account is reduced to zero will the Threshold Amount be satisfied. At this time, the Performance Fee will be payable to Fidelity on all further distributions (or any deemed distribution) from the Account.

Fidelity states that for any sale of an asset in an Account which causes the payment of a Performance Fee and which occurs prior to the termination of the Account, the sale price for the asset must be at least equal to a Target Amount (as defined in Section IV(e) above), in order for Fidelity to be able to sell the asset and receive its Performance Fee without any further approvals. The Target Amount will be established by Fidelity either at the time the asset is acquired, by mutual agreement between Fidelity and the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account, or pursuant to a formula approved by such fiduciaries at the time the Account is established. If the proposed sale price of the asset is less than the Target Amount, the proposed sale will be disclosed to the Independent Fiduciary or Responsible Independent Fiduciaries for approval in order for Fidelity to receive its Performance Fee as a result of the sale. Such approval will be deemed to have occurred unless the Independent Fiduciary or Responsible Independent Fiduciaries object to the sale within a reasonable time after notice of the proposed transaction. If the proposed sale price is less than the Target Amount and the Independent Fiduciary's or Responsible Independent Fiduciaries' approval is not obtained, Fidelity will still have the authority to sell the asset in situations where the Agreement provides Fidelity with complete investment discretion for the Account. However, in such instances and in all other circumstances where the sale price is less than the Target Amount and the Independent Fiduciary's or Responsible Independent Fiduciaries' approval is not obtained, the Performance Fee which would have been payable to Fidelity by reason of the sale of such asset will be paid only at the termination of the Account. In this regard, Fidelity states that any Performance Fee which is not paid currently to Fidelity because of the Target Amount rule will be segregated within the Account and invested until the termination of the Account with Fidelity to receive any income (or loss) earned by such investment.

6. All realized income, and proceeds from the sale of the assets of the Account, net of expenses (including reasonable reserves), will be either (i) distributed from the Account to the applicable investors in such Account, including Client Plan(s), or (ii) if the documents pursuant to which the Account is maintained so provide, reinvested until a specified date, with any income and proceeds (net of expenses, including reasonable reserves) of the Account after such date to be distributed to the applicable investors. All distributions from the Account shall be included in calculating whether the Threshold Amount has been reached. Only actual distributions from an Account, and not any amounts reinvested as described above, will be included in calculating whether the Threshold Amount has been reached for purposes of the payment of the Performance Fee.

7. Fidelity may be removed as investment manager or trustee for an Account at any time, without cause, upon the delivery of a notice of removal to Fidelity by the Independent Fiduciary for a Single Client Account or by the Responsible Independent Fiduciaries of a Multiple Client Account. Fidelity may resign as investment manager or trustee of an Account at any time, without cause, upon written notice to the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account.

With respect to a Single Client Account, such removal or resignation will not become effective until a successor investment manager or trustee is appointed by the Independent Fiduciary for the Account.

With respect to a Multiple Client Account, the removal of Fidelity will become effective when either: (i) A successor investment manager or trustee is appointed by the Responsible Independent Fiduciaries; or (ii) sixty (60) days (or such greater number of days as may be specified by the Responsible Independent Fiduciaries) elapse, whichever is sooner. Any resignation by Fidelity for a Multiple Client Account will become effective when either: (i) A successor investment manager or trustee is appointed by the Responsible Independent Fiduciaries; or (ii) 180 days elapse, whichever is sooner.

Upon removal of Fidelity as investment manager or trustee, Fidelity will be entitled to receive a Performance Fee if the Client Plans would receive distributions from the Account in excess of an amount equal to the Threshold Amount at the time of Fidelity's removal. Such Performance Fee will be determined by a deemed distribution of the assets of the Account based on an assumed sale of such assets at their fair market value using market sources approved by the Independent Fiduciary of the Client Plan (or specified in the documents establishing the Account, in the case of a Multiple Client Account). If market sources are not available, the fair market value of the assets will be determined by an independent appraiser mutually agreed upon by Fidelity and the Independent Fiduciary of each Client Plan in the case of a Single Client Account or the

[10] Fidelity represents that the Independent Fiduciary acting for a Client Plan shall specifically agree in writing with Fidelity, prior to any investment in the Account, that it would be appropriate for the performance benchmark used to measure the minimum rate of return applicable to the Account to be based upon the rate of change in the CPI over the period specified in the Agreement. However, the Department notes that a Client Plan fiduciary should thoroughly scrutinize the performance objectives for the Account prior to agreeing with Fidelity that such a performance benchmark is appropriate to measure the required minimum rate of return. In this regard, the Department encourages Client Plan fiduciaries to analyze whether any performance benchmarks other than a minimum rate of return based on changes in the CPI, such as an index of publicly-traded equity or debt securities, would be more appropriate to measure the Account's performance.

Responsible Independent Fiduciaries in the case of a Multiple Client Account. If Fidelity and such fiduciaries cannot agree on an appraiser, then the fair market value of such assets will be equal to the average of the two closest appraisals generated by three independent appraisers—one selected by Fidelity, one selected by such fiduciaries, and the third selected by the two appraisers chosen by the parties.

Upon Fidelity's resignation as investment manager or trustee, Fidelity will not receive a Performance Fee until the scheduled termination date for the Account. The amount of the Performance Fee will be based upon a deemed distribution of the assets of the Account at their fair market value at the time of Fidelity's resignation, as determined using market sources approved by the Independent Fiduciary of the Client Plan (or specified in the documents establishing the Account, in the case of a Multiple Client Account). If such market sources are not available, the fair market value of the assets will be determined by an independent appraiser mutually agreed to by Fidelity and the Independent Fiduciary of the Client Plan in the case of a Single Client Account or the Responsible Independent Fiduciaries in the case of a Multiple Client Account. However, if Fidelity and such fiduciaries cannot agree on an appraiser, the procedure described above will be followed.

The Performance Fee will be calculated at the time of resignation based upon the total value of the assets in the Account. The amount of the Performance Fee for such assets will be multiplied by a fraction, the numerator of which will be the sum of the disposition proceeds of all assets in the Account received prior to the termination date plus the fair market value of the assets remaining in the Account on the termination date and the denominator of which will be the aggregate value of the assets in the Account used in determining the amount of the Performance Fee as of the date of resignation, provided that this fraction will never exceed 1.0. The resulting amount will be the Performance Fee payable to Fidelity on the scheduled termination date of the Account. Thus, even if the value of the assets declines after Fidelity's resignation, Fidelity will still receive the Performance Fee for the period of time that it acted as an investment manager or discretionary trustee for the Account if the Client Plans would have received distributions from the Account in excess of an amount equal to the Threshold Amount at the time of Fidelity's resignation, subject to the operation of the fraction discussed above. The fraction ensures that an appropriate reduction in the Performance Fee will be made upon termination of the Account if the value of the assets in the Account declines after Fidelity resigns as the investment manager or discretionary trustee of the Account, based on the valuation of such assets at the time of resignation.

8. A Single Client Account will terminate upon expiration of the period of years specified as the term for the Account in the Agreement or upon the removal or resignation of Fidelity. However, the period of years specified in the Agreement may be extended by the Independent Fiduciary of the Client Plan. In addition, a Single Client Account may be terminated at any time by the Independent Fiduciary upon ninety (90) days written notice to Fidelity.

A Multiple Client Account will terminate upon the occurrence of any of the following events: (i) The affirmative decision of the Responsible Independent Fiduciaries; (ii) the failure of the Responsible Independent Fiduciaries to appoint a successor investment manager or trustee; (iii) expiration of the period of years specified as the term of the Account in the Agreement, provided that the period of years is not extended by the Responsible Independent Fiduciaries; (iv) the distribution of all assets of the Account; or (v) such other circumstances as may be specified in the documents governing the Accounts.

Upon termination of a Single Client Account, the assets in the Account will be distributed to the Client Plan in cash or in kind as agreed to by Fidelity and the Independent Fiduciary. In case of a Multiple Client Account, such distributions (i.e., cash or in-kind) will be agreed to by Fidelity and the Responsible Independent Fiduciaries for the Account.

Fidelity will be entitled to the Performance Fee upon termination of the Account for all remaining distributions made from the Account if the Threshold Amount has been or would be reached at such time. In the case of an in kind distribution of assets of the Account, the Performance Fee will be based on the fair market value of the assets of the Account as determined using market sources approved by the Independent Fiduciary of the Client Plan (or specified in the documents establishing the Account, in the case of a Multiple Client Account). If market sources are unavailable, the fair market value of the assets will be determined by an independent appraiser mutually agreed to by Fidelity and the Independent Fiduciary of the Client Plan in the case of a Single Client Account or the Responsible Independent Fiduciaries in the case of a Multiple Client Account. If Fidelity and such fiduciaries cannot agree on an appraiser, then the same procedure described in Item 7 above will be followed.

9. Each Client Plan will receive throughout the term of an Account the following information:

(a) Quarterly and annual reports prepared by Fidelity relating to the overall financial position of the Account and, in the case of a Multiple Client Account, the balance of such Client Plan's interest in the Account. In addition, such reports will include a statement regarding the amount of all fees paid to Fidelity during the period covered by the report.

(b) Annual reports indicating the current fair market value of all assets in the Account as established by using market sources or independent appraisals (provided that no such appraisals will be required for assets acquired for the Account within twelve (12) months preceding the end of the period covered by the report unless such appraisals are necessary for purposes of determining any compensation due to Fidelity based on the value of the assets in the Account for that period).

(c) In the case of a Multiple Client Account, a list of the investors in the Multiple Client Account.

(d) Audited financial statements prepared by independent public accountants selected by Fidelity, within ninety (90) days of the end of the Account fiscal year.

The Independent Fiduciary for the Client Plan, as well as other authorized persons described above in paragraph (m)(1) of Section III, will have access during normal business hours to Fidelity's records for the Accounts in which the Client Plan has an interest.

10. In summary, the applicant represents that the proposed transactions satisfy the statutory criteria of section 408(a) of the Act because, among other things:

(a) Each investment in any Account will be authorized in writing by an Independent Fiduciary of a Client Plan;

(b) No Client Plan may establish a Single Client Account or invest in a Multiple Client Account unless the Client Plan has total net assets with a value in excess of $50 million. In addition, a Client Plan may not invest, in the aggregate, more than five percent (5%) of its total assets in any one Account or more than ten percent (10%)

of its total assets in all Accounts established by Fidelity;

(c) Prior to making an investment in any Account, an Independent Fiduciary for each Client Plan will receive offering materials disclosing all material facts concerning the purpose, structure and operation of the Account, including any fee arrangements;

(d) Fidelity will provide each Independent Fiduciary of a Client Plan with periodic written disclosures with respect to the financial condition of the Account, the fees paid to Fidelity, the balance of each Client Plan's interest in the Account, the fair market value of the Account's assets using market sources or independent appraisals approved by the Independent Fiduciary where the value of such assets was used to calculate Fidelity's compensation and, in the case of a Multiple Client Account, a list of other investors in the Account;

(e) The total fees paid to Fidelity will constitute no more than reasonable compensation; and

(f) The timing and formula for determining the Performance Fee will be established and agreed to by the Independent Fiduciary for each Client Plan prior to the Client Plan's investment in the Account and will be based on pre-specified percentages of the Client Plan's assets distributed (or deemed distributed) from the Account in excess of an agreed upon Threshold Amount.

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

Bankers Trust Company (Bankers Trust) Located in New York, NY; Proposed Exemption

[Application No. D–09869]

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 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) through (E) of the Code, shall not apply as of October 28, 1994, to the cash sale of certain structured notes (the Notes) for $432,131,250 by three collective investment funds for which Bankers Trust acts as trustee (the Funds) to Bankers Trust New York Corporation (BTNY), a party in interest with respect to employee benefit plans invested in the Funds, provided that the following conditions were met:

(a) Each sale was a one-time transaction for cash;

(b) Each Fund received an amount which was equal to the greater of either (i) the par value of the Notes owned by the Fund at the time of sale, (ii) the purchase price paid by the Fund for its interest in each of the Notes, or (iii) the fair market value of the Notes owned by the Fund, as determined by bid quotations for the Notes obtained from independent broker-dealers at the time of sale;

(c) The Funds did not pay any commissions or other expenses with respect to the sale;

(d) Bankers Trust, as trustee of the Funds, determined that the sale of the Notes was in the best interests of each Fund, and the employee benefit plans invested in the Fund, at the time of the transactions;

(e) Bankers Trust took all appropriate actions necessary to safeguard the interests of the Funds, and the employee benefit plans invested in the Funds, in connection with the transactions; and

(f) The Funds received a reasonable rate of return during the period of time that the Funds held the Notes.

EFFECTIVE DATE: The proposed exemption, if granted, will be effective as of October 28, 1994.

Summary of Facts and Representations

1. Bankers Trust, a New York banking corporation, is a leading commercial bank which provides a wide range of banking, fiduciary, recordkeeping, custodial and investment services to corporations, institutions, governments, employee benefit plans, governmental retirement plans and private investors worldwide. Bankers Trust is wholly owned by BTNY, which is a bank holding company established in 1965 under the laws of the State of New York. As of December 31, 1993, BTNY and its affiliates had consolidated assets in excess of $92 billion and capital of approximately $4.5 billion.

2. Bankers Trust is one of the largest providers of trust and other services to employee benefit plans. Many of these plans also engage BTNY or an affiliate to provide investment advice or to be the plan's investment manager, within the meaning of the Act. Bankers Trust maintains more than 80 collective investment funds for employee benefit plan investment.

3. The Funds are the Bankers Trust Pyramid Aggressive Cash Fund (the BT Aggressive STIF), the Bankers Trust Pyramid Cash Plus Fund (the BT Cash Plus Fund), and the Bankers Trust Pyramid Super Cash Fund (the BT Super Cash Fund).

These three Funds are actively managed, market valued money market vehicles which endeavor to provide a rate of return in excess of traditional par valued short-term money market funds by extending eligible maturities, modifying credit restrictions, and taking advantage of trading opportunities in the money markets. The applicant represents that there are certain differences in the investment strategies used by each Fund, including the duration of average maturities and, in the case of the BT Aggressive STIF, the permitted use of equities and equity equivalents. Bankers Trust states that the Notes were permissible investments under the investment guidelines for each Fund and initially paid above market returns. However, unexpected increases in interest rates during 1994 adversely affected the market value of the Notes. Therefore, the Funds sold the Notes to BTNY on October 28, 1994, for an amount equal to the par value of the Notes owned by each Fund. The Funds had purchased the Notes for an amount which equalled the par value of the Notes, except for Note #2 which was purchased at a slight discount (see Paragraph 5 below).

4. The Notes consisted of U.S. Government Constant Maturity Treasury (CMT) Notes issued by various U.S. Government agencies, and Index Amortizing Notes (IANs) issued by various private sector corporations (as described in Paragraph 5 below). All of the issuers were parties unrelated to the Funds and employee benefit plans invested in the Funds (the Plans) as well as BTNY or any affiliate. In addition, the Notes were purchased by the Funds from broker-dealers that were independent of the Funds, the Plans, BTNY and its affiliates.

The CMT Notes were debt instruments which initially paid a premium rate of interest monthly based on changes in a specified index, such as the London Interbank Offered Rate (LIBOR), the U.S. Treasury Bill Rate or the U.S. Federal Reserve's Cost of Funds Index (COFI). However, under the terms of CMT Notes at the time of issuance, the formula for interest rate payments, and the index upon which such payments were based, was scheduled to change on a specified future date to a different formula based on the U.S. Treasury CMT Rate. Bankers Trust states that the formulas for the interest rate payments made the market value of CMT Notes particularly sensitive to certain changes in the U.S. Treasury CMT Rate. In this regard, Bankers Trust represents that the CMT Notes paid a rate of return that was higher than the existing rates for U.S. Treasury securities of comparable maturity as long as the yield curve for such securities was ''steep''—with interest rates falling based on the specified index. However, Bankers Trust states that once the yield curve became ''flat'' (i.e. with short-term interest rates rising faster than long-term interest rates) or ''climbed'' (i.e. with a general rise in both short-term and long-term rates), the relative yield on the CMT Notes fell and their market value was below par.

The IANs were debt instruments which initially paid a premium rate of interest monthly based on LIBOR, pursuant to certain formulas used to calculate such rates at various specified times. However, the IANs risked a maturity extension if short-term interest rates, as measured by LIBOR, rose above a certain level. Under such circumstances, once the maturity on the IANs was extended, the IANs would stop paying interest and the outstanding principal balance would be paid down over the remaining term pursuant to certain specified schedules.

5. The terms of the Notes, and the circumstances relating to their yield as investments for the Funds, are described as follows:

Note #1 was a five-year CMT note issued by the Federal National Mortgage Association (FNMA or ''Fannie Mae''), which was purchased by the Funds on February 15, 1994 from McDonald & Company for $95 million, with final maturity on March 2, 1999. Note #1 paid interest monthly at a rate equal to one-month LIBOR plus 20 basis points for the first and second years, .65 times the two-year CMT rate plus 129 basis points for the third through fifth years. At the time of the sale of Note #1 by the Funds to BTNY, the note was paying a coupon of LIBOR plus 20 basis points. Bankers Trust states that at the time of sale, the forward curve (i.e. a measurement of future interest rates based on yields for U.S. Treasury securities of comparable duration) suggested that the performance of Note #1 would be significantly impaired once the LIBOR-based coupon payment period ended. According to the forward curve determined by Bankers Trust on October 28, 1994, the comparable investment rate for the time horizon of February 15, 1996 through March 15, 1999 was 7.55%. Bankers Trust represents that Note #1 would have had a market value greater than par if the ''time weighted average'' of the expected coupons had been greater than or equal to 7.55%. However, at the time of sale, Bankers Trust did not expect that the coupons to be received on Note #1 would be greater than the comparable investment rate for the duration of Note #1. Therefore, Bankers Trust determined that it was appropriate to sell the security.

Note #2 was a three-year CMT note issued by the Federal Home Loan Bank (FHLB), which was purchased by the BT Cash Plus Fund on October 27, 1993 from McDonald & Company for $26,831,250, with a final maturity on November 12, 1996. The par value of Note #2 was $27 million. Thus, the BT Cash Plus Fund purchased Note #2 at a discounted price. Note #2 paid interest quarterly at a rate equal to the three-month U.S. Treasury Bill Rate plus 25 basis points for the first year and .4 times the two-year CMT rate plus 205 basis points for the second and third years. At the time of the sale of Note #2 by the BT Cash Plus Fund to BTNY, the period for the note to pay the three-month U.S. Treasury Bill Rate plus 25 basis points had ended. Bankers Trust states that once this payment period ended, the forward curve suggested that the performance of Note #2 would be significantly impaired. According to the forward curve determined by Bankers Trust on October 28, 1994, since the remaining life of Note #2 was two years, the comparable investment rate was equal to the then current two-year CMT rate which was 6.82%. Bankers Trust represents that Note #2 would have had a market value greater than par if the ''time weighted average'' of the expected coupons had been greater than 6.82%. However, at the time of sale, Bankers Trust did not expect that the coupons to be received on Note #2 would be greater than the comparable investment rate for the duration of Note #2. Therefore, Bankers Trust determined that it was appropriate to sell the security.

Note #3 was a five-year CMT note issued by Fannie Mae, which was purchased by the BT Cash Plus Fund on February 7, 1994 from McDonald & Company for $95 million, with final maturity on February 17, 1999. Note #3 paid interest monthly at a rate equal to the COFI rate plus 10 basis points for the first and second years, .4 times the two-year CMT rate plus 245 basis points for the third through fifth years. At the time of the sale of Note #3 by the BT Cash Plus Fund to BTNY, the note was paying the COFI rate plus 10 basis points. However, Bankers Trust states that once this COFI-based coupon payment ended, the forward curve suggested that the performance of the note would be significantly impaired. According to the forward curve determined by Bankers Trust on October 28, 1994, the comparable investment rate for the period February 17, 1996 to February 1, 1999 was 7.53%. Bankers Trust represents that Note #3 would have had a market value greater than par if the ''time weighted average'' of the expected coupons had been greater than 7.53%. At the time of sale, Bankers Trust did not expect that the coupons to be received on Note #3 would be greater than the comparable investment rate for the duration of Note #3. Therefore, Bankers Trust determined that it was appropriate to sell the security.

Note #4 was a five-year CMT note issued by the Federal Home Loan Mortgage Corporation (FHLMC or ''Freddie Mac''), which was purchased by the BT Cash Plus Fund and the BT Super Cash Fund on February 16, 1994 from Nikko Securities for $71 million, with final maturity on March 2, 1999. Note #4 paid interest monthly at a rate equal to .5 times the two-year CMT rate plus 209 basis points. According to the forward curve determined by Bankers Trust on October 28, 1994, the comparable investment rate for the period October 28, 1994 through March 2, 1999 was 7.4%. Bankers Trust represents that Note #4 would have had a market value greater than par if the ''time weighted average'' of the expected coupons had been greater than 7.4%. However, at the time of sale, Bankers Trust did not expect that the coupons to be received on Note #4 would be greater than the comparable investment rate for the duration of Note #4. Therefore, Bankers Trust determined that it was appropriate to sell the security.

Note #5 was a three-year CMT note issued by the Student Loan Marketing Association (SLMA or ''Sallie Mae''), which was purchased on February 10, 1994 from Nikko Securities for $95 million, with final maturity on February 24, 1997. Note #5 paid interest monthly at a rate equal to one-month LIBOR plus 20 basis points for the first year and .65 times the two-year CMT rate plus 75 basis points for the second and third years. At the time of the sale of Note #5 by the Funds to BTNY, the note was paying LIBOR plus 20 basis points. However, Bankers Trust states that once this LIBOR-based coupon payment ended, the forward curve suggested that the performance of the note would be significantly impaired. According to the forward curve determined by Bankers Trust on October 28, 1994, the comparable investment rate was equal to the then current two-year CMT rate which was 6.82%. Bankers Trust represents that Note #5 would have had a market value greater than par if the ''time weighted average'' of the expected coupons had been greater than 6.82%. At the time of sale, Bankers Trust did not expect that the coupons to be received on Note #5 would be greater than the comparable investment rate for the duration of Note #5. Therefore, Bankers Trust determined that it was appropriate to sell the security.

Note #6 was an IAN issued by Rabobank, which was purchased by the Funds on November 9, 1993 from Lehman Brothers for $14 million, with initial maturity on November 17, 1994. Note #6 paid interest quarterly at a rate equal to three-month LIBOR plus 50 basis points until November 17, 1994 and paid 4.33% thereafter. Bankers Trust states that Note #6 was subject to the risk of a maturity extension if short-term rates rose above a certain level on a specified date. Under the terms of Note #6, if three-month LIBOR was less than 4.9% on November 15, 1994, the note would mature and the principal would be repaid in full on November 17, 1994. However, if three-month LIBOR was above 4.9% on November 15, 1994, the term of Note #6 would be extended for three years with a fixed coupon rate of 4.33% and principal would be repaid according to a pre-set amortization schedule. On October 28, 1994, three-month LIBOR was 5.69%, approximately 79 basis points above Note #6's trigger rate of 4.9%. Thus, it appeared highly probable that the note's maturity would be extended until November 1997. Bankers Trust considered the fixed coupon rate of 4.33% on Note #6 to be significantly below the comparable investment rate for the duration of the note, which was calculated to be 7.14%. Therefore, Bankers Trust determined that the security should be sold.

Note #7 was an IAN issued by Prudential Funding, which was purchased by the Funds on September 24, 1993 from Lehman Brothers for $34 million, with initial maturity on October 18, 1994. Note #7 paid interest quarterly at a fixed rate of 4.75% until October 18, 1994. Like Note #6 described above, Bankers Trust states that Note #7 was subject to the risk of a maturity extension if short-term rates rose above a certain level on a specified date. Under the terms of Note #7, if three-month LIBOR was above 5.04% on October 16, 1994, the maturity of the note extended for three years at a 0% coupon rate with quarterly payments of principal in amounts based on a pre-set amortization schedule. If three-month LIBOR was below 5.04% on October 16, 1994, Note #7 would mature in full on that date. However, Bankers Trust states that three-month LIBOR was above 5.04% on October 16, 1994. At the time of sale, Note #7 was scheduled to pay a 0% coupon and its maturity had been extended. Thus, Bankers Trust determined that the security should be sold.

Note #8 was an IAN issued by E.I. du Pont, which was purchased by the BT Super Cash Fund on September 24, 1993 from Morgan Stanley for $1.3 million, with initial maturity on October 14, 1994. Note #8 paid interest quarterly at a fixed rate of 4.75%. Like Note #7 described above, Bankers Trust states that Note #8 was subject to the risk of a maturity extension if short-term rates rose above a certain level on a specified date. Under the terms of Note #8, if three-month LIBOR was above 5.04% on October 12, 1994, the maturity of the note extended for three years at a 0% coupon rate with quarterly payments of principal in amounts based on a pre-set amortization schedule. If three-month LIBOR was below 5.04% on October 12, 1994, Note #8 would mature in full on October 14, 1994. Since three-month LIBOR was above 5.04% on October 12, 1994, the maturity of Note #8 extended for three years paying a 0% coupon. Thus, Bankers Trust determined that the security should be sold.

6. Bankers Trust had the Funds sell their respective interests in the Notes to BTNY on October 28, 1994, for the par value of the Notes, which in each case was greater than the fair market value of the Notes owned by the Fund (see table below). At the time of the transaction, the par value of the Notes was equal in each case to the outstanding principal balance of the Notes because no principal payments had been made on any of the Notes (see charts in Paragraph 7 below). In addition, Bankers Trust states that the par value of the Notes was either greater than or equal to the initial purchase price paid by the Fund for its interest in the Notes.

Bankers Trust obtained bids from independent broker-dealers to establish the fair market value of the Notes at the time of the transaction. The most recent bids obtained by Bankers Trust prior to the sale of the Notes were as of October 21, 1994. Bankers Trust states that bids for the Notes obtained on October 31, 1994 showed no significant change had occurred over the ten-day period, thereby confirming that the fair market value of the Notes was significantly less than the par value of the Notes on the transaction date of October 28, 1994. Bankers Trust represents that on both October 21, 1994 and October 31, 1994, the bids for Note #1 through Note #5 were quoted by Nikko Securities, for Note #6 and Note #7 by Lehman Brothers, and for Note #8 by Morgan Stanley. The bids for the Notes were quoted by the broker-dealers as a percentage of the outstanding principal balance of each Note. These bids, in comparison with the par value of the Notes, were as follows:

Note	Price quoted		Price received (par value)
	10/21/94	10/31/94	
#1	[11] 96.06	96.00	100 ($95,000,000)
#2	96.10	96.05	100 (27,000,000)
#3	91.15	91.08	100 (95,000,000)
#4	94.08	94.00	100 (71,000,000)
#5	96.00	95.27	100 (95,000,000)
#6	90.29	90.25	100 (14,000,000)
#7	79.25	80.21	100 (34,000,000)
#8	80.38	80.50	100 (1,300,000)

[11] Bankers Trust states that the prices quoted are per $100 of principal. To determine the total price quoted, the face value of each Note is multiplied by the quote, expressed as a percentage of 100. Thus, for example, since the par value of Note #1 is $95,000,000, the quoted price on October 21, 1994 would have been $91,257,000 since $95,000,000 × .9606 = $91,257,000.

In addition, Duff & Phelps Capital Markets Co. (D&P) in Chicago, Illinois, provided an opinion letter to Bankers Trust on October 27, 1994, which stated that the fair market value of each Note was less than its par value at that time. In providing this opinion, D&P used a valuation methodology which was based on a predicted stream of cash flows for each Note, discounted at a rate that reflected each Note's credit risk and average life. D&P established the predicted stream of cash flows based on implied forward interest rates for each Note adjusted according to the terms of the Note. In doing this analysis, D&P states that it attempted to apply conservative assumptions whenever possible such that the analysis would tend to overvalue rather than undervalue the Notes. Bankers Trust states that D&P's opinion letter helped confirm that the market value of the Notes was less than par at the time of sale because D&P's conclusions were consistent with the bid quotations received by Bankers Trust for each Note as well as Bankers Trust's own analysis of the Notes.

7. The Funds' holdings regarding each Note, including the percentage of the Fund that the Note represented and the interest earnings on the Note as of October 28, 1994, are shown on the tables below: [12]

BT AGGRESSIVE STIF

Note	Purchase price/basis	Outstanding balance	Approx. % of fund	Interest earnings
#1	$10,000,000	$10,000,000	19.95	$295,965
#2	0	0	0.00	0
#3	0	0	0.00	0
#4	0	0	0.00	0
#5	5,000,000	5,000,000	9.97	120,617
#6	2,500,000	2,500,000	4.99	162,556
#7	3,000,000	3,000,000	5.98	146,458
#8	0	0	0.00	0
	20,500,000	20,500,000	40.89	725,596

BT CASH PLUS FUND

Note	Purchase price/basis	Outstanding balance	Approx. % of fund	Interest earnings
#1	$70,000,000	$70,000,000	5.44	$2,071,758
#2	26,831,250	27,000,000	2.08	383,229
#3	95,000,000	95,000,000	7.38	2,572,424
#4	55,000,000	55,000,000	4.27	1,803,636
#5	70,000,000	70,000,000	5.44	1,688,635
#6	5,500,000	5,500,000	0.43	939,705
#7	26,000,000	26,000,000	2.02	960,555
#8	0	0	0.00	0
	348,331,250	348,500,000	27.06	10,419,942

BT SUPER CASH FUND

Note	Purchase price/basis	Outstanding balance	Approx. % of fund	Interest earnings
#1	$15,000,000	$15,000,000	5.32	$295,376
#2	0	0	0.00	0
#3	0	0	0.00	0
#4	16,000,000	16,000,000	5.67	524,694
#5	20,000,000	20,000,000	7.09	482,467
#6	6,000,000	6,000,000	2.13	369,828
#7	5,000,000	5,000,000	1.77	244,097
#8	1,300,000	1,300,000	0.46	46,313
	63,300,000	63,300,000	22.43	1,962,775

Bankers Trust represents that the Notes paid the Funds a reasonable rate of interest during the period of time that the Funds held the Notes. For example, Bankers Trust states that the annualized rate of interest for each Note at the time of the transaction was as follows: (i) 5.2% for Note #1; (ii) 5.34% for Note #2; (iii) 4.05% for Note #3; (iv) 5.39% for Note #4; (v) 5.26% for Note #5; (vi) 5.44% for Note #6; (vii) 4.75% for Note #7; and (viii) 4.75% for Note #8.

8. Bankers Trust, as trustee of the Funds, believed that the sale of the Notes to BTNY was in the best interests of each Fund, and the employee benefit plans invested in the Fund, at the time of the transaction. Bankers Trust states

[12] With respect to the figures shown for each Note in the tables, if a Fund did not own an interest in the particular Note a zero dollar amount is shown.

that any sale of the Notes on the open market would have produced significant losses for the Funds and for the individual employee benefit plan investors involved.[13]

9. Bankers Trust represents that it took all appropriate actions necessary to safeguard the interests of the Funds, and the employee benefit plans invested therein, in connection with the transactions. Bankers Trust ensured that each Fund received the appropriate amount of cash from BTNY in exchange for such Fund's interests in the Notes at the time of the transactions. Bankers Trust reviewed the latest information regarding the fair market value of the Notes, based on bid quotations received from independent broker-dealers. Bankers Trust also ensured that the Funds did not pay any commissions or other expenses for the sale of the Notes to BTNY.

10. In summary, the applicant represents that the transactions satisfied the statutory criteria of section 408(a) of the Act and section 4975 of the Code because: (a) Each sale of the Notes by the Funds was a one-time transaction for cash; (b) each Fund received an amount which was equal to the greater of either (i) the par value of the Notes owned by the Fund at the time of sale, (ii) the purchase price paid by the Fund for its interest in each of the Notes, or (iii) the fair market value of the Notes owned by the Fund as determined by bid quotations for the Notes obtained by Bankers Trust from independent broker-dealers at the time of sale; (c) the Funds did not pay any commissions or other expenses with respect to the sale; (d) Bankers Trust, as trustee of the Funds, determined that the sale of the Notes was in the best interests of each Fund, and the employee benefit plans invested in the Fund, at the time of the transaction; (e) Bankers Trust took all appropriate actions necessary to safeguard the interests of the Funds in connection with the transactions; and (f) the Funds received a reasonable rate of return during the period of time that the Funds held the Notes.

[13] The Department is expressing no opinion in this proposed exemption regarding whether the acquisition and holding of the Notes by the Funds violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act.

The Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan. Section 404(a) of the Act also states that a plan fiduciary should diversify the investments of a plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

In this regard, the Department is not providing any opinion as to whether a particular category of investments or investment strategy would be considered prudent or in the best interests of a plan as required by section 404 of the Act. The determination of the prudence of a particular investment or investment course of action must be made by a plan fiduciary after appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including a plan's potential exposure to losses and the role the investment or investment course of action plays in that portion of the plan's portfolio with respect to which the fiduciary has investment duties (see 29 CFR 2550.404a–1). The Department also notes that in order to act prudently in making investment decisions, a plan fiduciary must consider, among other factors, the availability, risks and potential return of alternative investments for the plan. Thus, a particular investment by a plan, which is selected in preference to other alternative investments, would generally not be prudent if such investment involves a greater risk to the security of a plan's assets than other comparable investments offering a similar return or result.

Notice to Interested Persons

The applicant states that notice of the proposed exemption shall be made by first class mail to the appropriate Plan fiduciaries for each employee benefit plan participating in the Funds at the time of the transactions. Notice to the plan fiduciaries shall be made within fifteen (15) days following the publication of the proposed exemption in the **Federal Register**. This notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and a supplemental statement (see 29 CFR 2570.43(b)(2)) which informs interested persons of their right to comment on and/or request a hearing with respect to the proposed exemption. Comments and requests for a public hearing are due within forty-five (45) days following the publication of the proposed exemption in the **Federal Register**.

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

General Electric Pension Trust (the Trust) Located in Fairfield, Connecticut; Proposed Exemption

[Application No. D–09880]

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 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) through (E) of the Code, shall not apply effective August 3, 1994, to the past and continued lease (the Lease) by the Trust of office space in a commercial office building located at 201 Mission Street in San Francisco, California (the Property), to GE Capital Aviation Services, Inc. (GE Aviation), a party in interest with respect to employee benefit plans participating in the Trust, provided the following conditions are met:

(a) All terms and conditions of the Lease are at least as favorable to the Trust as those which the Trust could have obtained in an arm's-length transaction with an unrelated party at the time the Lease was executed;

(b) The rent paid by GE Aviation to the Trust under the Lease is not less than the fair market rental value of the office space, as established by an independent qualified real estate appraiser;

(c) David P. Rhoades (Mr. Rhoades), acting as a qualified, independent fiduciary for the Trust reviewed all terms and conditions of the Lease prior to the transaction, as well as any subsequent modifications to the Lease, and determined that such terms and conditions would be in the best interests of the Trust at the time of the transaction; and

(d) Mr. Rhoades represents the interests of the Trust for all purposes under the Lease as a qualified, independent fiduciary for the Trust, monitors the performance of the parties under the terms and conditions of the Lease and the exemption, and takes whatever action is necessary to safeguard the interests of the Trust throughout the duration of the Lease.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective for the period from August 3, 1994, until the scheduled termination date of the Lease (i.e. September 16, 1999) or, if earlier, the date the Lease is actually terminated by the parties.

Summary of Facts and Representations

1. The Trust holds assets of the General Electric Company Pension Plan (the GE Pension Plan), the Knolls Atomic Laboratories Pension Plan, ERC Retirement Plan, GE Components Pension Plan For Puerto Rico, and Neutron Devices Department Pension Plan (collectively, the Plans). The Plans are all defined benefit plans that cover employees of General Electric Company (GE) and various GE subsidiaries. There are a total of over 488,000 participants and beneficiaries under the Plans. As of December 31, 1993, the Trust held approximately $27.3 billion in assets.

The trustees of the Trust are five individuals (the Trustees) who are officers of GE and its subsidiaries. The Trustees are appointed by the GE Benefit Plans Investment Committee, an oversight committee that determines the investment policies of the Trust. The Trustees maintain overall responsibility for investment of the Trust's assets. The Trustees have delegated specific responsibility for investment management of most of the Trust's assets to the General Electric Investment Corporation (GEIC).

GEIC, a Delaware corporation and a wholly-owned subsidiary of GE, is a registered investment adviser under the Investment Advisers Act of 1940. GEIC provides investment management services to a variety of GE-affiliated entities. As of January 1, 1994, GEIC managed approximately $40.4 billion in assets.

2. GE Aviation, a Delaware corporation formerly known as the Polaris Corporation, is a wholly-owned subsidiary of General Electric Capital Corporation. The primary business of GE Aviation is airplane equipment leasing. GE Aviation's employees are participants in the GE Pension Plan.

3. The transaction for which an exemption is requested involves the leasing of office space between the Trust, as landlord, and GE Aviation, as tenant, in the office building located at 201 Mission Street in San Francisco, California (the Property).

The Property is a 30-story office building located in the southern financial district of San Francisco. The Property is part of a series of high-rise buildings developed during the 1980s on the fringes of the city's traditional financial district. The ground floor is leased to retail businesses and the other floors are leased as office space. The rentable area of the Property is approximately 475,675 square feet. The current value of the Property is approximately $40 million.

Construction of the Property was completed in 1981. The Trust financed the acquisition of the Property by an unrelated party that subsequently went into receivership. The Trust acquired the Property by deed in lieu of foreclosure in April 1993. The Trust currently owns the Property through a real estate title holding company, Pacific Gateway Realty Corporation.

Most of the office space in the Property was originally rented by Bank of America. Bank of America subsequently decided to relocate and consolidate its offices, and vacated one-half of the office space it occupied in the Property in 1991. At that time, the vacated area was leased on a short-term basis to Pacific Gas & Electric (PG&E), which was making repairs to its existing offices as a consequence of earthquake damage. While there were negotiations in 1993 for PG&E to extend its existing lease and to lease additional space, PG&E's board of directors ultimately decided against remaining in the Property. PG&E intends to vacate the Property in January 1996, when the repairs to its original offices are expected to be completed.

Bank of America vacated the other half of the office space it occupied in the Property in late 1993 upon completing its relocation. As a result, about 34 percent (i.e. 160,014 square feet) of the rentable area in the Property was vacant as of early 1994, compared to a general vacancy rate in San Francisco-area office buildings of around 12 percent at that time.

In the months after Bank of America vacated, the managers of the Property actively searched for tenants, in an effort to lease the vacant space as quickly as possible before PG&E leaves. As of June 1994, tenants had been found for approximately 77,000 square feet of space, or about 16 percent of rentable area, leaving around 18 percent of the Property vacant. One of the tenants was GE Aviation.

4. The applicant represents that in early 1994 GE Aviation had its offices at Four Embarcadero Center in San Francisco's main business district. However, GE Aviation was in the process of downsizing its operations and was looking for smaller space in a less expensive part of San Francisco. In the course of its search for office space, GE Aviation contacted Sentre Partners (Sentre), the independent property manager retained by the Trust to manage the Property. GE Aviation decided that it was interested in leasing space in the Property and entered into negotiations with Sentre.

The Lease was executed by GE Aviation in July 1994, after which the documents were sent to Sentre. The Lease was executed by Pacific Gateway Realty Corporation as landlord on August 3, 1994, following receipt of the report by Mr. Rhoades, the independent fiduciary acting for the Trust in connection with the subject transaction. The applicant states that once the Lease was signed by all of the parties, the landlord began making extensive improvements to the space in order to accommodate a planned occupancy date for GE Aviation of September 1, 1994.

5. Under the Lease, GE Aviation has leased approximately 9,376 square feet of space located on the eastern and southern portions of the 27th floor of the Property. This space constitutes approximately two percent of the rentable square footage in the Property. The term of the Lease is five years, which commenced on September 16, 1994, the date that work on the premises was substantially completed. The annual rent is $20 per square foot of rentable area, or $187,520, for the first three years of the Lease, and $21 per square foot of rentable area, or $196,896, for the fourth and fifth years, payable monthly. The Lease requires that GE Aviation pay its proportionate share of the Trust's real estate taxes and expenses relating to the Property for years after 1995, to the extent these taxes and expenses exceed those for 1995 (the ''base'' year) or to the extent any additional taxes or expenses are properly chargeable solely to GE Aviation in connection with its activities with the leased space.

Late payments are subject to a 5% late payment charge after written notice is given. If the late payment becomes an event of default, or in the event of any failure by GE Aviation to perform its obligations under the Lease, GE Aviation will be obligated for interest charges and other amounts necessary to compensate the Trust for damages caused by GE Aviations' failure to perform.

GE Aviation does not have any options or rights to expand or extend the Lease, nor has it received any period of free rent. Any assignments or subleases by GE Aviation are void unless the Trust has provided prior written consent and, if consented to, are subject to additional charges.

6. The Trust has provided agreed-upon improvements to the space which, prior to the Lease, contained only nominal improvements. The total cost of the improvements shall not exceed $42.50 per rentable square foot ($398,480), with any additional costs to be paid by GE Aviation.[14] The Trust is responsible to repair any defects in this work of which it is notified by GE Aviation within one year, other than defects resulting from compliance with the specifications provided by GE Aviation's architect or engineer. GE Aviation is responsible at its expense for any additional work it needs or desires that is not part of the agreed-upon

[14] The Department expresses no opinion in this proposed exemption as to whether the expenses incurred by the Trust relating to the tenant improvements provided for GE Aviation would violate any provision of Part 4 of Title I of the Act. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that plan fiduciaries act prudently and solely in the interest of the plan's participants and beneficiaries when making investment decisions on behalf of a plan. In addition, section 404(a) of the Act requires that plan fiduciaries act for the exclusive purpose of providing benefits to participants and beneficiaries and to defray reasonable expenses of administering the plan.

improvements. Any alterations to be made during the term of the Lease are subject to the Trust's written consent. Alterations generally become the property of the Trust and remain at the expiration of the Lease, except that the Trust may require the alterations to be removed at GE Aviation's expense.

7. Mr. Rhoades was retained by GEIC to act as an independent fiduciary for the Trust in connection with the Lease. Mr. Rhoades is president of the real estate appraisal and consulting firm of David P. Rhoades & Associates, Inc., of San Francisco, California. Mr. Rhoades represents that he and his firm are independent of, and unrelated to, GE and its affiliates. Mr. Rhoades states that he is a Member of the Appraisal Institute (MAI) and has 22 years experience as a real estate appraiser dealing with the valuation and analysis of all types of property, including urban office buildings similar to the Property. Mr. Rhoades has acknowledged in writing that he is a fiduciary for the Trust and that he understands his duties, responsibilities, and liabilities as a fiduciary under the Act.

8. Mr. Rhoades reviewed the Lease and inspected the Property prior to the transaction. In an appraisal dated July 6, 1994, Mr. Rhoades concluded that the market rent for the space covered by the Lease would be in the range of $19.00 to $21.00 per square foot. Thus, Mr. Rhoades determined that the proposed average rental rate under the Lease of $20.22 per square foot would be at the upper end of the range of rents for comparable leases in the San Francisco area and would not be less than the fair market rental value for the space. Mr. Rhoades states that the terms of the Lease are comparable to the terms that would have been negotiated in arm's-length transactions between unrelated parties. Mr. Rhoades concluded that the Lease would be in the best interest of the Trust because it would yield the Trust a market rate of return, would avoid additional leasing efforts, and would avoid the lost revenue and associated costs of having the space remain vacant.

Mr. Rhoades represents that the tenant improvement allowance for the Lease of $42.50 per square foot was necessary because of the unimproved condition of the particular space. Mr. Rhoades states that the space on the 27th floor leased by GE Aviation was previously demolished in connection with work that was done for another tenant, who currently occupies part of the 27th floor and the two floors above the 27th floor. In this regard, the applicant represents that the 27th floor space previously was occupied by Bank of America, which had been a major tenant in the Building from 1981 through 1991. The entire 27th floor, when occupied by the Bank of America, was primarily open space with movable partitions. At the time the Bank of America vacated the 27th floor space, substantial work on the space was needed to satisfy applicable legal requirements, such as current fire and safety codes. In addition, the Bank of America's use of the space was not readily adaptable to a new tenant desiring up-to-date conventional office space and was functionally obsolete. Consequently, the applicant states that it was cost effective to demolish the entire floor when work was being done for a new tenant that would occupy half of the 27th floor and to re-build sufficiently to meet the minimum requirements for the entire floor, including the part that was not yet being leased. As a result, when the other half of the floor was leased to GE Aviation, it was in unimproved condition. Thus, prior to the Lease, the space was effectively ''first generation'' or unimproved space which required relatively high outlays for tenant improvements.

Mr. Rhoades states that the improvements made to the space leased by GE Aviation are functional and reusable by a wide range of tenants without major costs, and are typical of the types of improvements landlords usually build for such tenants. Mr. Rhoades maintains that the residual value of the tenant improvements at the end of the Lease (i.e. 5 years) will be about 50 percent of the original cost of the tenant improvements, or approximately $21.25 per square foot.

9. With respect to the overall rate of return to the Trust under the terms of the Lease, Mr. Rhoades conducted an analysis of both the ''internal rate of return'' (IRR) and the ''net present value'' (NPV) to the Trust from the Lease.

Mr. Rhoades represents that the ''rate of return'' on a real estate investment is the ratio of income to the original investment and the ''IRR'' is the *annualized* rate of return on capital that is generated within an investment over a period of ownership.[15] Thus, the IRR measures the returns from an investment in relation to the original capital outlay. In this case, Mr. Rhoades states that the ''returns'' consist of the rental income over the Lease term and the pass-through of certain expenses after the first year, as well as the residual value of the tenant improvements at the end of the Lease. The ''original capital outlay'' consists of expenses relating to the leased space, including the tenant improvements, operating expenses, brokerage fees, parking, and taxes. This ''original capital outlay'' was approximately $421,920.

In addition, Mr. Rhoades states that the ''NPV'' is the difference between the present value of all expected investment benefits, or positive cash flows, and the present value of capital outlays, or negative cash flows, over the entire period of the investment. The present value calculation involved in determining NPV requires the use of a specific discount rate, which operates as the annual rate of return objective. In this regard, Mr. Rhoades used the standard real estate industry rate of 9 percent for the NPV calculation, which provided a basis for comparing the rate of return on the Lease to different leasing arrangements in the Property.

Mr. Rhoades states that his approach to evaluating leases and leasing costs is customary in the real estate industry. Mr. Rhoades states further that he was consistent in using this approach to evaluate the comparable leases in the Building and other comparable properties for purposes of determining the fair market rental value of the space under the Lease as well as the IRR and NPV of the Lease to the Trust. However, Mr. Rhoades notes that his approach did not consider the original cost or value of the Building in evaluating the specific leases. In this regard, Mr. Rhoades has confirmed that it is not customary to consider the cost or value of a building for this purpose because the focus in valuing a lease is on the incremental costs and income of the lease and the ongoing costs relating to the space.

Based on an extensive analysis and comparison of the terms of the Lease to all other leases in the Property at the time of the transaction, Mr. Rhoades concluded that the Lease had a greater NPV and would yield a higher IRR than any other lease of a comparable term in the Property. Mr. Rhoades represents that the Lease will yield an IRR to the Trust of approximately 10.83 percent on an annual basis and has a NPV of $4.87 per square foot based on a discount rate of 9 percent, when taking into account the residual value of the tenant improvements. Therefore, Mr. Rhoades states that it is unlikely that the Trust would have obtained a lease for the space on more favorable terms from

[15] Mr. Rhoades cites *The Dictionary of Real Estate Appraisal* (3rd edition) as his source for the definition of these terms.

other tenants in the market at the time of the transaction.[16]

10. Mr. Rhoades, as independent fiduciary for the Trust, will monitor the Lease on an ongoing basis. Mr. Rhoades will determine GE Aviation's compliance with the terms of the Lease and has the authority to take any action necessary to enforce the rights of the Trust under the Lease, including the termination of the Lease. Any renewals of the Lease will be subject to the oversight, review and approval of Mr. Rhoades. Such a renewal will not be executed in the absence of Mr. Rhoades' opinion that the proposed renewal would be in the best interests of the Trust.

11. In summary, the applicant states that the transaction meets the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) the terms of the Lease are at least as favorable to the Trust as the terms which would exist in an arm's-length transaction with an unrelated party; (b) the Trust will receive rental amounts under the Lease equal to the fair market rental value for the space, as determined by a qualified, independent appraiser; (c) an independent fiduciary (i.e. Mr. Rhoades) acting for the Trust reviewed the terms and conditions of the Lease and determined that the transaction would be in the best interests of the Trust; (d) Mr. Rhoades, as the independent fiduciary, will monitor the Lease on behalf of the Trust and take whatever actions are necessary to protect the interests of the Trust; and (e) the Lease only involves a small percentage of the Trust's total assets.

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

The Amended and Restated Profit Sharing Retirement Plan for Employees of 84 Lumber Company (the Profit Sharing Plan) and The Amended and Restated Savings Fund Plan for Employees of 84 Lumber Company (the Savings Plan; together, the Plans) Located in Eighty Four, Pennsylvania; Proposed Exemption

[Application Nos. D–09945 and D–09946]

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to (1) The proposed extension of credit by 84 Lumber Company (Lumber) to the Plans in the form of loans (the Loans) with respect to Guaranteed Investment Contract, Number CG0124601A issued by Executive Life Insurance Company (ELIC) to the Profit Sharing Plan and Guaranteed Investment Contract No. CG0124701A (both Contracts together, the GICs) issued by ELIC to the Savings Plan; and (2) the Plans' potential repayment of the Loans (the Repayments), provided: (a) all terms of such transactions are no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with an unrelated party; (b) no interest and/or expenses are paid by the Plans; (c) the Loans are made with respect to amounts invested by the Plans in the GICs; (d) the Repayments are restricted to the amounts, if any, paid to the Plans after the date of the Loans by ELIC or other responsible third parties with respect to the GICs (the GIC Proceeds); (e) the Repayments under each Loan will not exceed the total amount of the Loan; and (f) the Repayments are waived with respect to the amount by which any Loan exceeds the GIC Proceeds.

Summary of Facts and Representations

1. Lumber is a Pennsylvania general partnership engaged in the retail lumber and building products business. As of January 1, 1995, Lumber operated 374 individual store locations in 31 states. The headquarters of Lumber are in Eighty Four, Pennsylvania. The managing general partner of Lumber is Pierce-Hardy Real Estate, Inc., a Pennsylvania business trust. Lumber is the sponsor of both Plans, each of which covers the employees of Lumber. The Profit Sharing Plan also covers employees of the Trusty Building Components Company, an affiliate of Lumber.

2. Each of the Plans is a defined contribution plan that is qualified under section 401(a) of the Code. The Savings Plan is intended to constitute a qualified cash or deferred arrangement in accordance with section 401(k) of the Code. The Savings Plan is a participant-directed individual account plan under which the participants may direct the investment of their accounts in one or more investment funds. As of December 31, 1994, (i) the Profit Sharing Plan had 3,018 active and terminated vested participants and total assets of approximately $24,718,415; and (ii) the Savings Plan had 2,080 active and terminated vested participants and total assets of approximately $17,187,503.

3. On September 25, 1987, ELIC issued the GICs to the Plans. The Profit Sharing Plan's GIC was in the principal amount of $2 million, and the Savings Plan's GIC was in the principal amount of $1 million. Each GIC guaranteed an annual interest rate of 9.92% from the issue date to the September 25, 1992 maturity date. Interest accrued under the GICs was payable yearly, and each Plan received interest payments for 1988, 1989 and 1990. The final interest payments made by ELIC were received by the Plans on September 25, 1990. No interest accrued under the GICs was paid in 1991.

4. On April 11, 1991 (the Conservation Date), ELIC was placed in conservatorship by the Commissioner of Insurance for the State of California. As of that date, payments under the GICs were suspended, and no payments were made to the Plans.[17] As of the Conservation Date, the accumulated book values of the GICs (Accumulated Book Value), defined as the amount of deposits, plus interest at the contract rate, less interest paid, were $2,051,440 for the Profit Sharing Plan and $1,049,923 for the Savings Plan. Effective June 30, 1991, the Plans' Administrative Committees (the Committees) froze the GICs and a proportionate share of the accounts of participants with account balances invested in the GICs. The Plans have not permitted distributions or withdrawals from the respective plans with respect to the frozen portion of a participant's account. Moreover, the Savings Plan has not allowed participants to receive a loan from or reallocate the frozen portion of their accounts to any other investment option under the Savings Plan.

5. On August 13, 1993, the Los Angeles Superior Court approved the terms of the Rehabilitation/Liquidation Plan for ELIC effective September 3,

[16] Mr. Rhoades states in his letter dated August 12, 1994, that the NPV of leaving the space vacant for the five year term of the Lease would have been a negative $19.45 per square foot due to the operational and tax expenses related to the space. Mr. Rhoades notes that while it is unlikely that the space would have remained vacant for the entire five year period, it would have taken about six months for the Trust to have obtained a lease on terms at least as favorable to the Trust, with the same IRR and NPV values, as the terms of the Lease.

[17] The Department notes that the decisions to acquire and hold the GICs are governed by the fiduciary responsibility provisions of Part 4, Subtitle B, of Title I of the Act. In this regard, the Department is not herein proposing relief for any violations of Part 4 which may have arisen as a result of the acquisition and holding of the GICs by the Plans.

1993 (the Rehab Plan). On or about December 1, 1993, each ELIC contract holder was provided with an election form and a summary of the Rehab Plan. Under the Rehab Plan, ELIC guaranteed investment contracts were reduced in value to approximately 79% of the Accumulated Book Value as of the Conservation Date and each holder of such contracts was paid an amount for accumulated interest and fees for the period between the Conservation Date and September 3, 1993 (the Interim Payments). Each contract holder, including the Plans, was informed that it could elect by February 12, 1994 to ''opt in'' or ''opt out'' of the Rehab Plan. By opting in, a contract holder would have been issued a new 5-year guaranteed investment contract issued by Aurora National Life Assurance Company (Aurora), the successor to ELIC, in an amount equal to the restructured percentage of the Accumulated Book Value as of the Conservation Date, plus the right to receive possible distributions from certain trusts and settlements that may occur in the liquidation of ELIC. Opting out of the Rehab Plan would have resulted in a cash settlement, payment of which would be made by immediate payments and future payments from an Allocation Holdback Trust, plus the right to receive possible distributions from certain trusts and settlements that may occur in the liquidation of ELIC.

6. After reviewing the Rehab Plan materials supplied by ELIC, Lumber elected to ''opt in'' with respect to the GICs. As a result, the Plans' GICs were replaced, effective February 27, 1994, with the Aurora GICs in accordance with the approved Rehab Plan. A comparison of the terms of the ELIC GICs and the Aurora GICs is set forth below:

	ELIC GIC	Aurora GIC
1. Profit sharing plan:		
Contract number	CG0214601A	CG01246A1A
Maturity date	9/25/92	9/3/98
Account value	$2,000,000	$1,280,487
Guaranteed interest rate	9.92%	5.61%
2. Savings Plan:		
Contract number	CG0214701A	CG01247A1A
Maturity date	9/25/92	9/3/98
Account value	$1,000,000	$640,243
Guaranteed interest rate	19.92%	5.61%

7. As the chart indicates, the present account value of the Aurora GICs is substantially less than the pre-conservatorship book values of the ELIC GICs. In addition, the interest rate on the Aurora GICs is substantially less than the stated interest under the ELIC GICs. Interest received by the Plans during ELIC's conservatorship and prior to the consummation of the Rehab Plan was also substantially less than the ELIC contract rate. The foregoing factors have resulted in a significant reduction in value and yield of the contracts held by the Plans.

8. The extended maturity date of the Aurora GICs has also had a significant impact on participants in the Plans and their beneficiaries. Under the terms of the Aurora GICs, the only payments that may be made prior to maturity are semi-annual interest payments. The only other benefit withdrawals permitted are the annuitization of benefits under the contract, which is not permitted under the Plans (which provide only a lump sum form of benefit).[18] As a result, participants who terminate their employment with Lumber are not able to have their lump sum distributions paid out of the respective Aurora GICs at this time.

9. In order to permit the Plans to resume full funding of all Plan events, including distributions, withdrawals, loans, interfund transfers and fund investments, Lumber proposes to make the Loans to each of the Plans and has requested an exemption to permit the Loans under the terms and conditions described herein. The Loans will be made (i) pursuant to written agreements and (ii) as a single lump sum cash payment to each Plan (the Loan Amount).[19] It is contemplated that the Loan Amount to the Profit Sharing Plan will be $1,378,000, representing the original $2,000,000 principal amount of that Plan's ELIC GIC, less an Interim Payment received by the Profit Sharing Plan of $405,852, and less payments of $93,416 under the Aurora Replacement GIC characterized as return of principal, and certain Rehab Plan adjustments attributable to distributions from various trusts (see rep. 5, above) in the amount of $123,033. It is contemplated that the Loan Amount to the Savings Plan will be $689,000, representing the original principal amount of that Plan's ELIC GIC, less an Interim Payment received by the Savings Plan of $202,925, and less payments of $46,708 under the Aurora Replacement GIC characterized as return of principal, and certain Rehab Plan adjustments attributable to distributions from various trusts (see rep. 5, above) in the amount of $61,516.[20] The Loans will be made as soon as practicable after the granting of the exemption proposed herein, and a closing agreement with respect thereto has been entered into between Lumber and the Internal Revenue Service. The Repayments will be limited to the cash proceeds of any payments received by the respective Plans as GIC Proceeds after the date of the Loans. Repayments are due only when GIC Proceeds are received by the Plans. No interest will be paid on the Loans. Under no circumstances will Repayments exceed the Loan Amounts, even if GIC Proceeds should exceed such amounts. At such time that Lumber learns that no further GIC Proceeds will be received, Repayments of any outstanding Loan Amounts will be waived by Lumber.

10. If the exemption proposed herein is granted, the Committees intend to value the Aurora GICs at the original principal amount of the ELIC GICs. Each frozen account would then be adjusted to reflect this new value, and the freeze placed on each participant's account would be removed. The Plans would then resume distributions and withdrawals under the Plans with

[18] The applicant represents that pursuant to section 401(a)(11) of the Code, the Plans are not required to provide joint and survivor annuities. The Department expresses no opinion with respect to the applicant's representation.

[19] The Department notes that this exemption, if granted, will not affect the rights of any participant or beneficiary with respect to any civil action against Plan fiduciaries for breaches of section 404 of the Act in connection with any aspect of the GIC transactions.

[20] The Loan Amounts have been rounded to $1,378,000 and $689,000 for the Profit Sharing Plan and the Savings Plan, respectively.

respect to frozen account balances. Loans and interfund transfers under the Savings Plan would also resume with respect to amounts that had been frozen.

11. In summary, the applicant represents that the proposed transactions satisfy the criteria contained in section 408(a) of the Act because: (a) All terms of the transactions will be no less favorable to the Plans than those obtainable in arm's-length transactions with unrelated parties; (b) the Loans will enable the Plans to resume normal operations with respect to distributions, withdrawals, loans, interfund transfers and fund investments; (c) the Plans will pay no interest or other expenses in connection with the Loans; (d) Repayments will be made only out of any cash proceeds of any amounts received by the Plans as GIC Proceeds after the date of the Loans; (e) the Repayments will not exceed the principal amount of the Loans; and (f) the Repayments will be waived to the extent the Loan Amounts exceed the GIC Proceeds.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Warburg Investment Management International Ltd. (Warburg International) Located in London, England; Proposed Exemption

[Application No. D–09998]

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)(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 the proposed cross-trading of securities between various accounts managed by Warburg International or its Affiliates (the Accounts) where at least one Account involved in any cross-trade is an employee benefit plan account (Plan Account) for which Warburg International acts as a fiduciary; provided that both the General Conditions of Section I and the Specific Conditions of Section II below are met.

Section I—General Conditions

(a) Each employee benefit plan comprising a Plan Account participating in Warburg International's cross-trading program has total assets equal to at least $25 million. In the case of multiple employee benefit plans maintained by a single employer or controlled group of employers, the $25 million requirement may be met by aggregating the assets of such plans if the assets are commingled for investment purposes in a single master trust.

(b) A Plan's participation in the cross-trade program is subject to a written authorization executed in advance by a qualified Plan Fiduciary which is independent of Warburg International and its Affiliates (the Independent Fiduciary).

(c) The authorization referred to in paragraph (b) above is terminable at will without penalty to the Plan Account, upon receipt by Warburg International of written notice of termination.

(d) Before an authorization is made for any Plan Account, the Independent Fiduciary is furnished with any reasonably available information necessary for the Independent Fiduciary to determine whether the authorization should be made, including (but not limited to) a copy of the final exemption (if granted), an explanation of how the authorization may be terminated, a description of Warburg International's cross-trade practices, and any other reasonably available information regarding the matter that the Independent Fiduciary requests.

(e) Each cross-trade transaction involves only equity or debt securities for which there is a generally recognized market. With respect to any non-U.S. securities, only those securities traded on a recognized foreign securities exchange for which market quotations are readily available shall be covered by the exemption.[21]

(f) Each cross-trade transaction is effected at the current market value for the security on the date of the transactions. For equity securities, this shall be the closing price for the security on the date of the transaction. The ''closing price'' shall be the last trade price on exchanges where dealing is order-driven and the closing mid-market price (i.e. the average of the closing bid and offer prices) where dealing is quote-driven. For debt securities, the current market value shall be the fair market value determined in accordance with paragraph (b) of Rule 17a-7 issued by the Securities and Exchange Commission (SEC) under the Investment Company Act of 1940.

(g) Neither Warburg International nor its Affiliates charges a Plan Account affected by a cross-trade transaction any fee or commission for such transaction.

(h) At least every three months, and not later than 45 days following the period to which it relates, Warburg International furnishes the Independent Fiduciary with a report disclosing: (1) a list of all cross-trade transactions engaged in on behalf of the Plan Account, and (2) with respect to each cross-trade transaction, the prices at which the securities involved in the transaction were traded on the date of such transaction.

(i) The Independent Fiduciary is furnished with a summary of certain additional information at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following: (1) A description of the total amount of the Plan Account's assets involved in cross-trade transactions during the period, (2) a description of Warburg International's cross-trade practices, if such practices have changed materially during the period covered by the summary, (3) a statement that the Independent Fiduciary's authorization of cross-trade transactions may be terminated upon receipt by Warburg International of written notice to that effect, and (4) a statement that the Independent Fiduciary's authorization of the Plan Account's participation in the cross-trade program will continue in effect unless it is terminated.

(j) For all Accounts participating in the cross-trading program, if the number of shares of a particular security which any Accounts need to sell on a given day is less than the number of shares of such security which any Accounts need to buy, or vice versa, the direct cross-trade opportunity is allocated among the buying or selling Accounts on a pro rata basis.

(k) The Accounts involved in cross-trade transactions do not include assets of any Plan established or maintained by Warburg International or its Affiliates.

Section II—Specific Conditions

(a) An Independent Fiduciary of each Plan specifically authorizes each cross-trade transaction in accordance with the following procedure:

(1) No more than three business days prior to the execution of any cross-trade transaction, Warburg International shall inform an Independent Fiduciary of each Plan Account involved in the

[21] With respect to all non-U.S. securities that are ''plan assets'' managed by Warburg or an Affiliate, the applicant represents that the requirements of section 404(b) of the Act and the regulations thereunder will be met (see 29 CFR 2550.404b-1). In this regard, section 404(b) of the Act states that no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States, except as authorized by regulation by the Secretary of Labor. The Department is providing no opinion herein as to whether such requirements will be met.

cross-trade transaction that Warburg International proposes to buy or sell specified securities in a cross-trade transaction if an appropriate opportunity is available, the current trading price for such securities, and the total number of shares to be acquired or sold by each such Plan Account;

(2) Prior to each cross-trade transaction, the transaction shall be authorized either orally or in writing by the Independent Fiduciary of each Plan Account involved in the cross-trade transaction;

(3) If a cross-trade transaction is authorized orally by an Independent Fiduciary, Warburg International shall provide written confirmation of such authorization in a manner reasonably calculated to be received by such Independent Fiduciary within one business day from the date of such authorization;

(4) The authorization referred to in this Section II shall be effective for a period of three business days; and

(5) No more than ten days after the completion of a cross-trade transaction, the Independent Fiduciary shall be provided with a written confirmation of the transaction and the price at which the transaction was executed.

(b) A cross-trade transaction is effected only where the transaction involves less than five (5) percent of the aggregate average daily trading volume for the securities involved in the transaction for the week immediately preceding the authorization of the transaction. A cross-trade transaction may exceed this limit only by express authorization of Independent Fiduciaries on behalf of Plan Accounts affected by the transaction, prior to the execution of the cross-trade.

(c) The cross-trade transaction is effected at a price which is within ten (10) percent of the closing price of the security on the day before the date on which Warburg International received authorization by the Independent Fiduciary to engage in the cross-trade transaction.

Section III—Definitions

For purposes of this proposed exemption:

(a) ''Account'' means a Plan Account or Non-Plan Account;

(b) ''Affiliate'' means any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Warburg International;

(c) ''Buying Account'' means the Account which seeks to purchase securities in a cross-trade transaction;

(d) ''Cross-trade transaction'' means a purchase and sale of securities between Accounts for which Warburg International or an Affiliate is acting as investment manager;

(e) ''Plan Account'' means an Account managed by Warburg International consisting of assets of one or more employee benefit plans which are subject to the Act;

(f) ''Non-Plan Account'' means an Account managed by Warburg International consisting of assets of clients which are not employee benefit plans subject to the Act; and

(g) ''Selling Account'' means the Account which seeks to sell its securities in a cross-trade transaction.

Summary of Facts and Representations

1. Warburg International is a wholly-owned subsidiary of Mercury Asset Management plc (MAM), a public limited company organized under the laws of the United Kingdom. As of September 30, 1994, MAM and its subsidiaries had over $90 billion of assets under management. Warburg International is registered as an investment adviser under the U.S. Investment Advisers Act of 1940 (the 1940 Act) and is a member of the Investment Management Regulatory Organization Limited (IMRO) in the United Kingdom. Warburg International's clients are primarily U.S. institutional investors, such as qualified pension funds and registered investment companies. As of December 31, 1994, Warburg International had more than $3 billion in assets under management, of which approximately $2 billion consisted of assets of Plan Accounts and governmental plan accounts for which it had agreed to act as a fiduciary.

2. The Accounts for which an exemption is requested are those Plan Accounts for which Warburg International provides active portfolio management. Investment decisions are generally subject to the investment manager's discretion, subject to general written guidelines as to which types of securities to acquire or sell for the Accounts. For some Accounts, investment selections are based in part on the corresponding decisions made for registered investment companies or other institutional accounts for which Warburg International or an Affiliate serves as the investment adviser. Thus, Accounts with the same or similar investment guidelines or objectives often will be acquiring or selling the same securities on the same day.

3. Warburg International states that the acquisition or disposition of any particular security for an Account would be unrelated to the fact that an opportunity for a cross-trade transaction may be available. Under the cross-trade program, if Warburg International or an Affiliate sells securities to another Account it manages, or acquires such securities from another Account it manages, it would have an opportunity to save commissions for both the selling or acquiring Account. Under current procedures, all securities transactions are effected by an independent broker which may be dealing with a second broker acting for the party on the other side of the transaction. If Warburg International effects a transaction through a broker on the open market, the client would ordinarily be charged a commission at the market rate (normally about 0.2 percent, but commissions vary according to the country where the transaction is effected). However, under the cross-trade program, Warburg International states that no commission would be charged where the transaction is effected by Warburg International or an Affiliate, and in certain markets, transfer or registration taxes would also not be charged. Warburg International states that even if a broker is involved, matching the buy and sell orders for a particular day through a single broker in an off-market transaction would still result in lower commission charges for the Accounts.

4. Warburg International represents that the Plan Accounts would also benefit under the cross-trade program by not incurring the cost (in terms of price) of dealing with a person or a firm acting as ''market-maker'' for the specific security involved in the transaction. This cost is generally measured by the spread between the asking and the bidding price for the securities. In normal trading by Warburg International, the Selling Account receives a lower ''bid'' price, while the Buying Account pays a higher ''ask'' price. By contrast, in a direct cross-trade, the price received by the Selling Account would be the same as the price paid by the Buying Account, based on an average of the ''bid'' and ''ask'' prices, without any dealer mark-ups. In addition, if permitted to direct a cross-trading of securities from one Account to another, Warburg International would be able to implement its investment strategies at the earliest possible point in time. Finally, the trading of some securities may be ''thin'', that is there are limited numbers of shares available. In such cases, the spread may be particularly wide. Matched sales would essentially provide the Accounts with early opportunities to acquire or sell such thinly-traded securities without paying the spread.

5. Participation by Plan Accounts in Warburg International's cross-trade program will be subject to several conditions. Each cross-trade transaction will involve only securities for which there is a generally recognized market. With respect to any non-U.S. securities, only those securities traded on a recognized foreign securities exchange for which market quotations are readily available will be involved in the cross-trade program. Each cross-trade transaction will be effected at the current market value for the security on the date of the direct cross-trade. For equity securities, the current market value will be the closing price for the security on the date of the transaction. The ''closing price'' will be the last trade price on exchanges where dealing is order-driven and the closing mid-market price (i.e. the average of the closing bid and offer prices) where dealing is quote-driven. For all domestic or foreign debt securities, the current market value will be the fair market value of the security as determined pursuant to paragraph (b) of SEC Rule 17a–7 under the 1940 Act. In this regard, SEC Rule 17a–7(b) contains four possible means of determining ''current market value'' depending on such factors as whether the security is a reported security and whether its principal market is an exchange. This Rule is also applicable to registered investment companies for which Warburg International or an Affiliate acts as an investment advisor.

Warburg International will receive no fees or other incremental compensation (other than its previously agreed upon investment management fee) with respect to any direct cross-trade transaction.

6. A fiduciary of a Plan Account independent of Warburg International and its Affiliates (i.e. the Independent Fiduciary) will provide written authorization allowing for the Plan Account's participation in Warburg International's cross-trading program, before any specific cross-trades for such Account are effected. This authorization will be terminable at will without penalty to the Plan Account upon written notice to Warburg International of such termination. In addition, before any such general authorization is granted, Warburg International will provide the Independent Fiduciary with all materials necessary to permit an evaluation of the cross-trade program. These materials will include (but not be limited to) a copy of the proposed and final exemptions, an explanation of how the authorization may be terminated, a description of Warburg International's cross-trade practices, and any other reasonably available information regarding the matter which the Independent Fiduciary may request.

7. After a Plan Account's participation in Warburg International's cross-trading program is authorized, Warburg International will furnish periodic reports to the Independent Fiduciary, at least once every three months, and no later than 45 days following the period to which it relates, disclosing: (a) A list of all cross-trade transactions engaged in on behalf of the Plan Account; and (b) with respect to each cross-trade transaction, the prices at which the securities involved in the transaction were traded on the date of such transaction. The Independent Fiduciary will also be furnished with a summary of certain additional information at least once per year. The summary will be furnished within 45 days after the end of the period to which it relates, and will contain the following: (a) A description of the total amount of the Plan Account's assets involved in cross-trade transactions during the period, (b) a description of Warburg International's cross-trade practices, if such practices have changed materially during the period covered by the summary, (c) a statement that the Independent Fiduciary's authorization of cross-trade transactions may be terminated upon receipt by Warburg International of written notice to that effect, and (d) a statement that the Independent Fiduciary's authorization of the Plan Account's participation in the cross-trade program will continue in effect unless it is terminated.

8. The Accounts involved in cross-trade transactions will not include assets of any Plan established or maintained by Warburg International or its Affiliates to provide income to its employees or to result in a deferral of income by employees for periods extending to the termination of covered employment or beyond.

Each employee benefit plan comprising a Plan Account participating in Warburg International's cross-trading program will have total assets equal to at least $25 million. In the case of multiple employee benefit plans maintained by a single employer or controlled group of employers, the $25 million requirement may be met by aggregating the assets of such plans if the assets are commingled for investment purposes in a single master trust.

9. Warburg International states that a Plan Account's participation in its cross-trade program will also be subject to certain special conditions. In addition to requiring a general authorization of a Plan Account's participation in the cross-trade program, an Independent Fiduciary will specifically authorize each cross-trade transaction. Any such authorization will be effective only for a period of three business days and will be subject to certain pricing and volume limitations (as discussed in Paragraph 10 below). The authorization to proceed with the cross-trade transaction will be either oral or written. If a cross-trade transaction is authorized orally by an Independent Fiduciary, Warburg International will provide a written confirmation of the authorization in a manner reasonably calculated to be received by the Independent Fiduciary within one business day from the date of such authorization. The Independent Fiduciary will be sent a written confirmation of the cross-trade transaction, including the price at which it was executed, within ten days of the completion of the transaction.

10. Warburg International states that a cross-trade transaction will be effected only where the trade involves less than five (5) percent of the aggregate average daily trading volume for the securities involved in the transaction for the week immediately preceding the authorization of the transaction. A cross-trade will exceed this limit only by express written or oral authorization of an Independent Fiduciary for each Plan Account involved, prior to the execution of the cross-trade. With respect to pricing, a cross-trade transaction will not be made at a price which differs by more than ten (10) percent from the price at the close on the day before specific authorization was provided by the Independent Fiduciary.

11. Warburg International represents that it is conceivable that situations will arise in which it will be necessary to allocate cross-trade opportunities among several Accounts. Warburg International will make these decisions pursuant to a non-discretionary pro-rata allocation system. For example, in the event that the number of shares of a particular security which a Selling Account needs to sell on a given day is less than the number of shares of such security which other Buying Accounts need to buy on that date, the cross-trade opportunity will be allocated among potential Buying Accounts on a pro-rata basis. A similar procedure would apply where the number of shares of a particular security to be sold by Selling Accounts is more than the number of such shares which any Buying Accounts need to buy on that date. Thus, the Accounts participating in Warburg International's cross-trade program will have the opportunity to participate on a proportional basis in cross-trade

transactions during the operation of the program. Warburg International states that this aspect of the cross-trading program will be part of the information disclosed in writing to the fiduciaries of the Plan Accounts prior to their authorization for participation in the program.

12. In summary, Warburg International represents that the proposed transactions will satisfy the statutory criteria of section 408(a) of the Act because, among other things: (a) An Independent Fiduciary will provide written authorization, which will be terminable at will, to Warburg International to permit the Plan Account to participate in the cross-trading program; (b) cross-trades will always be executed at the current market price of the security on the date of the transaction, as determined by an independent, third party source; (c) specific oral or written authorization will be provided by the Independent Fiduciary to Warburg International prior to each cross-trade transaction; (d) all securities involved in cross-trades will be securities for which there is a generally recognized market; (e) Warburg International will provide periodic reporting of the cross-trade transactions to the Independent Fiduciary; (f) the Plan Accounts will realize significant cost savings due to reduced brokerage commissions and avoidance of the bid and offer spread and will benefit from more efficient implementation of investment strategies; (g) each employee benefit plan comprising a Plan Account participating in the cross-trade will have total assets of at least $25 million or must be part of a master trust of plans maintained by a single employer or controlled group of employers which has at least $25 million in assets; (h) the cross-trade transactions will not include any assets of a Plan established or maintained by Warburg International or its Affiliates; and (i) neither Warburg International nor its Affiliates will receive any additional fees or other compensation as a result of the proposed cross-trade transactions.

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

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 9th day of June, 1995.

Ivan Strasfeld,

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

[FR Doc. 95–14576 Filed 6–14–95; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 95–040]

NASA Advisory Council (NAC), Life and Microgravity Sciences Advisory Committee, Space Station Utilization and Applications Advisory Subcommittee; Meeting.

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Life and Microgravity Science and Applications Advisory Committee, Space Station Science Utilization Advisory Subcommittee.

DATES: July 10, 1995, 8 a.m. to 9 p.m.; July 11, 1995, 8 a.m. to 9 p.m.; July 12, 1995, 8 a.m. to 6 p.m.; July 13, 1995, 8 a.m. to 10 p.m.; July 14, 1995, 8 a.m. to 3:00 p.m.

ADDRESSES: US Air Force Academy, Colorado Springs, CO 80914.

FOR FURTHER INFORMATION CONTACT:

Dr. Edmond M. Reeves, Code US, National Aeronautics and Space Administration, Washington, DC 20546, 202/358–2560.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—Other Topics Related to the Scientific Technologies and Commercial Utilization of the Space Station may be included in the Meeting Discussions

—Station Capabilities Program Update

—Science Utilization Plans

—Institute Concepts for Space Station

—International Utilization Coordination

—Operations Scheduling

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dennis C. Bridge,

Chief, Budget Office.

[FR Doc. 95–14713 Filed 6–14–95; 8:45 am]

BILLING CODE 7510–01–M