person or by mail from the Consent Decree Library. Such requests should be accompanied by a check in the amount of $5.50 (25 cents per page reproduction charge) payable to ''Consent Decree Library''. When requesting copies, please refer to *United States* v. *Why Wastewater?, Inc.*, DOJ #90–11–2–1029.

Joel Gross,

Acting Chief Environmental Enforcement Section Environment and Natural Resources Division.

[FR Doc. 95–22661 Filed 9–12–95; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF LABOR

Office of the Secretary

President's Committee on the International Labor Organization; Notice of Postponement of Closed Meeting

This document postpones the September 14, 1995 closed meeting of the President's Committee on the ILO. Notice of this closed meeting was previously published in the **Federal Register** on September 6, 1995, 60 FR 46308. The meeting is being postponed because of the scheduling difficulties of certain participants.

We anticipate that the meeting will be rescheduled in the future, and the Committee will publish such notice in the **Federal Register**.

For Further Information Contact: Mr. Joaquin F. Otero, President's Committee on the International Labor Organization, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–2235, Washington, DC 20210, Telephone (202) 219–6043.

Signed at Washington, DC this 8th day of September, 1995.

Joaquin F. Otero,

Deputy Under Secretary, International Affairs.

[FR Doc. 95–22726 Filed 9–8–95; 8:45 am]

BILLING CODE 4510–28–M

Pension and Welfare Benefits Administration

[Application No. D–09845 and D–09846, et al.]

Proposed Exemptions; Prudential Property Investment Separate Account (PRISA) and Prudential Property Investment Separate Account II (PRISA II)

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.

Prudential Property Investment Separate Account (PRISA) and Prudential Property Investment Separate Account II (PRISA II) Located in Newark, NJ

[Application Nos. D–09845 and D–09846]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 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,[1] shall not apply, effective December 31, 1995, to the advanced commitment to provide an enhanced return and the payment of such return by the Prudential Insurance Company of America (Prudential) to various employee benefit plans (the Plan or Plans) on the assets of such Plans which are invested either in PRISA and/or PRISA II (the Account or Accounts), as of April 1, 1994, and which remain invested for all or any portion of a twenty-one (21) month period, beginning April 1, 1994, and ending December 31, 1995, (the Investment Period), provided that the following conditions are met:

(1) The decision to invest funds in either or both of the Accounts for all or a portion of the Investment Period has

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

been and will be made by fiduciaries of the Plans independent of Prudential;

(2) The amount of the enhanced return payment with respect to the assets of the Plans that are invested in either or both of the Accounts for only a portion of the Investment Period will be calculated in the same manner as the amount of the enhanced return payment with respect to the assets of the Plans that remain invested in either or both of the Accounts for the entire Investment Period;

(3) The enhanced return will be derived by comparing the cumulative total return for the Investment Period reported by the expanded Russell-NCREIF Property Index (the Index) with the cumulative total return of PRISA or PRISA II for the same period;

(4) The Plans will obtain an enhanced rate of return (but not more than 200 basis points) for amounts invested in one or both of the Accounts during all or any portion of the Investment Period, if the cumulative total investment return of such Account for such Investment Period is less than that reported for the Index;

(5) The payments, if any, of enhanced return will be made by Prudential to investors in the Accounts not later than thirty (30) days following the final determination of the amounts owed;

(6) Every property held by the Accounts is individually valued at least once during the Investment Period and thereafter will be valued at least once in each calendar year by an independent qualified appraiser;

(7) A valuation policy committee (the Valuation Policy Committee), consisting of representatives from an valuation management firm (the Valuation Management Firm), Prudential Real Estate Investors (PREI), the interim and permanent advisory councils (the Advisory Council or Advisory Councils) composed of investors in PRISA and PRISA II and their consultants, and other clients of PREI, will meet at least quarterly and set valuation policy for the Accounts;

(8) The Valuation Management Firm, an independent third party, will be responsible for retaining (and terminating) all appraisal firms which value the properties in the Accounts; reviewing all appraisals generated by such appraisal firms; and collecting, reviewing, and distributing any information needed by such appraisal firms to appraise the properties in the Accounts;

(9) The Plans invested in the Accounts who receive the enhanced return will incur no additional cost or risk in connection with the transaction;

(10) In connection with the determination of enhanced return payments, no upward adjustment will be made by Prudential to the value reported by an external independent appraiser of any Property in PRISA and PRISA II without the concurrence of the Valuation Management Firm;

(11) Any required state insurance regulatory approvals are obtained for the transaction; and

(12) The Plans will receive the same treatment and proportional payment under the enhanced return as any other investor in PRISA and PRISA II.

Summary of Facts and Representations

1. Prudential is a mutual life insurance company organized under the laws of the State of New Jersey and subject to the supervision and examination by the Insurance Commissioner of the State of New Jersey. It is represented that Prudential is the largest life insurance company in the United States, with total consolidated assets, as of December 31, 1993, of approximately $218 billion.

Among the variety of insurance products and services it offers, Prudential provides funding, asset management and other services for thousands of employee benefit plans subject to the provisions of Title I of the Act. In this regard, Prudential maintains separate accounts in which pension, profit-sharing, and thrift plans participate. Prudential also manages the assets of such plans held in single customer separate accounts and advisory accounts.

2. PRISA and PRISA II are both open-end pooled separate accounts created by Prudential in 1970 and 1980, respectively. The Accounts were designed as funding vehicles for tax-qualified employee pension benefit plans to invest in real estate on a commingled basis. It is represented that the establishment and operation of PRISA and PRISA II have been approved by the New Jersey Insurance Commissioner.

As of June 30, 1994, PRISA had total net assets of approximately $2.25 billion, including interests in 124 properties located in 22 states and the District of Columbia. The investors in PRISA, as of June 30, 1994, consisted of 190 employee pension benefit plans, including 171 plans covered under the Act and 19 governmental plans that are exempt from coverage under the Act.

As of June 30, 1994, PRISA II had total net assets of approximately $575.6 million, including interests in 18 properties located in 12 states and the District of Columbia. The 38 investors in PRISA II, as of June 30, 1994, consisted of 28 plans covered under the Act and 10 governmental plans that are exempt from coverage under the Act.

The assets of the Accounts consist primarily of real property, and may also include mortgage loans, interests in companies, including partnerships, which acquire, develop or manage real property, and cash or cash equivalents. Interests in the Accounts are expressed in terms of units of participation, the value of which is determined periodically, based upon the net value of each of the Accounts (i.e. the market value of the real property and other assets held in an Account, less the amount of liability for indebtedness and expenses). It is represented that every property held by the Accounts is valued at least once in each calendar year by an independent qualified appraiser.

As separate accounts, PRISA and PRISA II hold assets which are segregated from all other assets held or managed by Prudential. In this regard, it is represented that the assets of each of the Accounts may be charged only with liabilities arising from the operation of that Account and may not be charged with liabilities arising from other business conducted by Prudential.

3. The assets of PRISA and PRISA II are managed by PREI. PREI is a division of the Prudential Investment Corporation which is a direct subsidiary of Prudential. It is represented that PREI is a full-service real estate investment advisor whose sole function is to provide real estate investment advisory and portfolio and asset management services to institutional investors. In addition to PRISA and PRISA II, PREI manages several other pooled separate accounts maintained by Prudential and also manages various single customer separate accounts and advisory accounts. It is represented that PREI currently manages real estate assets of approximately $4.6 billion.

4. The Plans which invest in PRISA and PRISA II consist of defined benefit plans and defined contribution plans. Investment in PRISA by defined contribution plans, where a unit value account is maintained for each individual plan participant, is limited to no more than 33 percent (33%) of the investment fund for which such unit value is determined. It is represented that PRISA II does not have this restriction on the extent of participation by defined contribution plans. The Retirement System for U.S. Employees and Special Agents, a defined benefit plan sponsored by Prudential has invested in PRISA and PRISA II since 1970 and 1980, respectively. It is represented that, as of June 30, 1994, approximately 4 percent (4%) of the

assets of this plan were in the aggregate invested in the Accounts.

The Plans participate in the Accounts, in accordance with the provisions of group pension annuity contracts offered by Prudential. Pursuant to the terms of such group pension annuity contracts, Prudential is appointed as an investment manager to each of the Plans, with discretion to delegate to one or more of its direct or indirect wholly-owned subsidiaries all or part of its authority under such contract. It is represented that for the performance of its duties as investment manager of each of the Accounts, Prudential charges a quarterly fee of a percentage of the value of the assets in each Account.[2] In this regard, Prudential acknowledges that it is a fiduciary and party in interest, pursuant to section 3(14) of the Act, with respect to each Plan, to the extent of the assets of such Plans which are invested in either or both Accounts, pursuant to the terms of such group pension annuity contracts.

5. It is represented that allegations of improprieties by Prudential in connection with the overvaluation of properties in the PRISA and PRISA II portfolios arose in November 1993, as part of a suit brought against Prudential by a former employee. In addition, such allegations were the subject of an investigation by the Department of Labor.[3] It is represented that Prudential hired an outside counsel, Sonnenschein Nath & Rosenthal (Sonnenschein), and an independent accounting firm, Kenneth Leventhal & Company (Leventhal), to conduct independent reviews of various aspects of these allegations. In this regard, Prudential made available to investors in PRISA and PRISA II on April 27, 1994, and to the Department on April 25 and June 26, 1994, the results of such independent reviews conducted by Sonnenschein and Leventhal.

As a result of these investigations and conclusions made by Sonnenschein and Leventhal, Prudential determined to taken certain steps to improve the operation and management of the Accounts. These efforts include: (a) Changing certain of the personnel responsible for the management of the Accounts; (b) establishing the Advisory Councils for each of the Accounts; (c) transferring responsibility for the valuation of properties from PREI to Prudential's Department of the Comptroller (the Comptroller); (d) retaining the services of the independent Valuation Management Firm; (e) creating the Valuation Policy Committee; (e) implementing a fiduciary education program for associates of Prudential; and (f) making financial remediation to investors in PRISA and PRISA II in order to restore each investor to his financial position, absent any overvaluation of PRISA and PRISA II properties.

6. In order to make the Accounts more attractive investments for the Plans and in addition to the other efforts taken by Prudential, as described above, Prudential proposes to provide an enhanced return and to pay such return to the Plans on the assets of such Plans which are invested in either or both Accounts, as of April 1, 1994, and which remain invested for all or any portion of the twenty-one (21) month Investment Period; provided any required state insurance regulatory approvals are obtained and the proposed exemption is granted.[4] In this regard, Prudential has requested exemptive relief from the prohibited transaction provision, set forth in section 406(a) of the Act, because it believes that its obligation to make the enhanced return payments could be viewed as an implicit or indirect extension of credit by the Plans to Prudential which will remain outstanding until such time as Prudential satisfies its obligation by payment of the enhanced return.

Further, in Prudential's view, the proposed enhanced return could give rise to a conflict of interest between Prudential and the Plans that invest in the Accounts in violation of section 406(b)(1) and (b)(2) of the Act. In this regard, the amount of each Account's cumulative total return for the Investment Period will be affected in part by Prudential's exercise of its fiduciary authority, control, and responsibility with respect to the operation and management of the Accounts, including the valuation of assets of the Accounts. Accordingly, it could appear that Prudential has an interest in maximizing the cumulative total return of the Accounts, as determined for the Investment Period, April 1, 1994 through December 31, 1995, thereby reducing the amount of, or entirely eliminating, Prudential's obligation to make the enhanced return payment.

7. With certain limitations, as more fully described below, the amount of enhanced return Prudential proposes to pay to the Plans invested in one or both of the Accounts will be derived by comparing the cumulative total return for the Investment Period reported by a preselected Index with the cumulative total return of PRISA or PRISA II for the same period.

The Index is an index of returns (before deduction of management fees) on real property investments in the United States. The Index is produced in partnership between Russell Real Estate Consulting (a division of the Frank Russell Company, an investment consulting firm) and the National Council of Real Estate Investment Fiduciaries (NCREIF). NCREIF is a non-profit association of institutional real estate investment professionals, including investment managers, plan sponsors, academicians, consultants, appraisers, CPAs, and other service providers who have significant involvement in pension fund real estate investments.

It is represented that all events giving rise to Prudential's payment obligation on the enhanced return will have occurred by December 31, 1995. However, Prudential expects that the information necessary to compare the cumulative total returns of PRISA and PRISA II to that of the Index for the Investment Period, April 1, 1994, through December 31, 1995, will not be available before the end of the second quarter of 1996. It is contemplated that the payments, if any, of enhanced return will be made by Prudential to investors in the Accounts not later than thirty (30) days following the final determination of the amounts owed.

Specifically, the maximum enhanced return shall be equal to the product of (i) one-seventh (1/7th), multiplied by (ii) the difference (but not more than 200 basis points) between the cumulative total return for the entire Investment Period reported by the Index and the cumulative total return of PRISA or PRISA II, prior to reduction for Prudential's management fees, for such entire period, multiplied by (iii) the number of complete calendar quarters that the amounts remain invested in PRISA or PRISA II during the Investment Period.

For example, in the case of an amount that is invested in an Account as of April 1, 1994, and is withdrawn on June 30, 1995, the enhanced return will be

[2] It is represented that Prudential and its affiliates rely upon the statutory exemption, as set forth in section 408(b)(2) of the Act, for the receipt of fees for investment management services provided with respect to PRISA and PRISA II. The Department, herein, expresses no opinion as to whether the provision of services by Prudential and its affiliates to PRISA and PRISA II and the compensation received therefore satisfy the terms and conditions, as set forth in section 408(b)(2) of the Act.

[3] Prudential represents that, by letter dated March 21, 1995, it was advised that the Department had concluded its investigation, and that no further action was contemplated at that time.

[4] By letter dated April 11, 1995, Prudential was advised that the New Jersey Insurance Department has approved the proposed enhanced return payment, as described herein.

equal to the difference between the cumulative total return for such period reported by the Index and the cumulative total return of the Account, prior to reduction for Prudential's management fees, for the same period, but not more than the enhanced return (not in excess of 200 basis points) determined with respect to the entire period April 1, 1994 through December 31, 1995, multiplied by five-sevenths (5/7ths).

9. Prudential represents that the exemption is administratively feasible in that the proposed transaction is narrowly circumscribed and of limited duration. In this regard, the proposed transaction involves a one-time determination of comparative investment returns based upon a recognized real estate industry index that can be readily reviewed and monitored for compliance in all applicable requirements. In addition, it is represented that the comparative return calculation involves a relatively simple and objective comparison of readily available return information, which can be easily confirmed by the fiduciaries of the Plans invested in the Accounts and by the Department. Further, it is represented that the Plans invested in the Accounts who receive the enhanced return will incur no additional cost or risk in connection with the proposed payment, and that Prudential will bear the cost of the exemption application and of notifying interested persons.

10. It is represented that the exemption is in the interest of the Plans and their participants and beneficiaries in that the Plan will obtain an enhanced rate of return (but not more than 200 basis points) for amounts invested in one or both of the Accounts during all or any portion of the Investment Period, if the cumulative total investment return of such Account for such Investment Period is less than that reported for the Index. In addition, Prudential expects that its commitment to provide the enhanced return will reduce requests from investors in one or both Accounts for withdrawal, and will thereby avoid the negative impact on the performance of such Accounts that would likely result from forced liquidation of the properties in the Accounts in order to obtain the cash necessary to satisfy withdrawal requests.

11. It is represented that the proposed exemption contains safeguards which protect the interests of the Plans and the rights of participants and beneficiaries. In this regard, the decision to invest funds in either or both of the Accounts for all or a portion of the Investment Period has been and will be made by fiduciaries of Plans independent of Prudential. In this regard, disclosure of Prudential's proposal to make enhanced return payments was first made to investors in the Accounts by correspondence, dated April 27, 1994. In addition, it is represented that the investors in the Accounts have been kept apprised of related developments in the Accounts, such as state insurance regulatory approvals and the filing of the exemption application. Further, it is represented that an additional level of independent oversight of the proposed transaction will occur through the review of the operations and returns of the Accounts conducted by interim and permanent Advisory Councils for PRISA and PRISA II.

It is represented that the interim Advisory Councils were created by Prudential to be in place through year-end 1994 or until the transition to the permanent Advisory Councils. The responsibilities of the interim Advisory Councils were: (a) To review and comment upon the composition, structure, responsibilities, frequency of meetings, selection of members, and other procedures to be followed by the permanent Advisory Councils; (b) to review and comment on suggested structural changes to the Accounts, including valuation and appraisal policy, dividend policy, and fees; and (c) prior to appointment of the permanent Advisory Councils, to satisfy all the responsibilities pertaining to the duties of such permanent Advisory Councils, as listed in the paragraph below.

The permanent Advisory Council for each Account will be composed of from seven to eleven (preferably nine) investors in the Accounts or their consultants or other representatives who have in-depth knowledge of real estate investment and management. Members of the Advisory Councils will be elected by investors on an investment weighted basis and will serve for a minimum of two (2) years. It is represented that formal meetings of the Advisory Councils will be held quarterly approximately thirty (30) days following the end of each quarter, with additional meetings to be held at the discretion of the Advisory Councils. It is represented that the Advisory Councils do not have veto authority. The role of the Advisory Councils is to monitor, review, comment, and advise. For each of the Accounts, the responsibilities of the permanent Advisory Council are: (a) To review Account investment strategy and philosophy, including diversification strategy; (b) to review the annual business plan for each Account, including the criteria for acquisitions, dispositions, capital expenditures and budgets, and to review quarterly variations to the business plan; (c) to review property and portfolio leverage strategy; (d) to review PREI's plans for paying out redemption requests; (e) to review data and reports sent to all clients; (f) to review and comment on acquisitions and dispositions; and (g) to make suggestions and to comment on all information presented at quarterly meetings.

It is represented that Prudential will calculate the enhanced return payments and will disclose such calculations in the open forum of the Advisory Councils with full disclosure (through distribution of the minutes of Advisory Council meetings) to all investors in the Accounts. Further, PREI will review the returns for each Account with the Advisory Councils for each Account. It is represented that the comparative return calculation for determining the amount of the enhanced return payments involves a relatively simple and objective comparison of readily available information, which can easily be confirmed by the Advisory Council and the account investors.

With respect to the valuation process, it is represented that all the properties in the Accounts will be individually valued at least once during the Investment Period and thereafter will be appraised by external, independent, qualified MAI appraisers at least annually. In this regard, it is represented that external appraisals are performed as of the last day of a calendar quarter. The current Prudential policy is for properties with market values in excess of $50 million to be externally appraised twice each year and properties with values below such amount to be externally appraised once each calendar year. In addition, it is represented that certain events (e.g., significant property or market changes, or internal adjustment of value over a certain threshold) can trigger additional external valuations.

Prudential proposes to strengthen the independence of the valuation process through the appointment of the Valuation Management Firm and the creation of the Valuation Policy Committee. In addition, Prudential has limited the role of PREI in the valuation process to the provision of property, tenant, and market information and participation on the Valuation Policy Committee.

The Valuation Policy Committee will consist of representatives from the Valuation Management Firm, PREI, the PRISA Advisory Council, and other clients of PREI. The Valuation Policy Committee will be chaired by an MAI

appraiser employed by Prudential (the Prudential Valuation Reviewer). It is represented that Phyllis A. Cummins (Ms. Cummins), Vice President and Chief Appraiser of Prudential and a member of the Comptroller's Department, is currently serving as the Prudential Valuation Reviewer.

It is represented that Ms. Cummins is qualified to serve as the Prudential Valuation Reviewer in that she has been employed by Prudential for over twenty (20) years and in that time has had significant experience in valuations, development, assets management, acquisitions, sales, and mortgages of all property types. In addition to being an MAI appraiser since 1983, Ms. Cummins holds the Counselor of Real Estate (CRE), the Certified Property Manager (CPM), and the Certified Shopping Center Manager (CSM) designations. Further, Ms. Cummins is certified in New Jersey as a General Appraiser and licensed as a Broker-Salesperson. Ms. Cummins is a graduate of The Ohio State University and received her MBA from the University of North Florida.

It is represented that the Valuation Policy Committee will meet at least quarterly and set valuation policy, including such items as the minimum qualifications for appraisal firms, fee schedules for such firms, rotation of appraisal firms, and valuation methodology. Prudential represents that it will bear the costs of the Valuation Policy Committee.

Prudential represents that, pursuant to guidelines established by the Valuation Policy Committee, it will retain for a non-renewable fixed term an experienced and qualified, independent third party to serve as the Valuation Management Firm. It is represented that the Valuation Management Firm will report to the Valuation Policy Committee. The Valuation Management Firm will be responsible for: (a) Retaining (and terminating) all appraisal firms which value the properties in the Accounts; (b) reviewing all appraisals generated by such appraisal firms for conformance to certain standards, including those established by the Valuation Policy Committee; and (c) collecting, reviewing, and distributing any information from PREI portfolio managers, asset managers, market intelligence coordinators, and third party property managers needed by such appraisal firms to appraise the properties in the Accounts. It is represented that Price Waterhouse is currently serving as the Valuation Management Firm.

It is represented that the costs of the appraisal firms and the Valuation Management Firm are currently paid by Prudential. However, after significant discussions with the PRISA and PRISA II Advisory Councils and investors in the Accounts, Prudential has proposed a revised fee schedule which includes passing on the costs of third party appraisers and the Valuation Management Firm to the Accounts. Prudential believes that this practice is customary in the industry. A proposal to revise the fee schedule is currently being reviewed by the appropriate state insurance departments. Subject to the necessary regulatory approval, Prudential has notified the investors in the Accounts (as required by contract) that it intends to implement this new fee schedule on March 31, 1997.[5] In the interim, it is represented that investors in the Accounts will be charged the lower of the two schedules until the new schedule goes into effect.

The Prudential Valuation Reviewer will serve as the Valuation Management Firm's contact at Prudential. In this regard, it is anticipated that the Valuation Management Firm will report the values of the properties in the Accounts to the Prudential Valuation Reviewer who will have final approval authority. In addition, the Prudential Valuation Reviewer may order additional external appraisals; or, as necessary, may adjust property values, based on tenant, property, or market information provided by PREI or otherwise made available, in calendar quarters when no independent appraisals have been performed. Prudential anticipates that the Prudential Valuation Reviewer will adjust a value estimate provided by an external appraisal only in rare circumstances and extremely infrequently. In this regard, since April 1, 1994, the Prudential Valuation Reviewer has modified the estimate of value of a property in an Account provided by an external appraiser in only one circumstance and where both the Prudential Valuation Reviewer and the Valuation Management Firm believed the external appraiser's estimate of value was overstated. It is represented that this adjustment in the value of a property was disclosed to the investors in the Account in the PRISA Quarter 1995 Report and in minutes of the May 3, 1995 Advisory Council meeting. It is represented that any such similar occurrences in the future will be disclosed in a like manner. Further, it is represented that no upward adjustment will be made to the value reported by an external appraiser of any property in the Accounts without the Valuation Management Firm's concurrence to such increase in value. It is represented that the Prudential Valuation Reviewer will document any such changes and will report all property values to Prudential's Comptroller, rather than to the PREI business unit.

It is represented that Prudential's Comptroller will be responsible for presenting values on financial statements (after adjusting any property not held in fee for the Account's applicable ownership interest). In addition, Prudential's Comptroller will calculate and present the unit values and returns for the Accounts.

12. In summary, the applicant represents that the proposed transaction meets the statutory criteria of section 408(a) of the Act because:

(1) The decision to leave funds invested in either or both of the Accounts for all or a portion of the Investment Period has been and will be made by fiduciaries of the Plans independent of Prudential;

(2) The amount of the enhanced return payment with respect to the assets of the Plans that are invested in either or both of the Accounts for only a portion of the Investment Period will be calculated in the same manner as the amount of the enhanced return payment with respect to the assets of the Plans that remain invested in either or both of the Accounts for the entire Investment Period;

(3) The enhanced return will be derived by comparing the cumulative total return for the Investment Period reported by the Index with the cumulative total return of PRISA or PRISA II for the same period;

(4) The Plans will obtain an enhanced rate of return (but not more than 200 basis points) for amounts invested in one or both of the Accounts during all or any portion of the Investment Period, if the cumulative total investment return of such Account for such Investment Period is less than that reported for the Index;

(5) The payments, if any, of enhanced return will be made by Prudential to investors in the Accounts not later than thirty (30) days following the final determination of the amounts owed;

(6) Every property held by the Accounts is individually valued at least once during the Investment Period and thereafter will be valued at least once in each calendar year by an independent qualified appraiser;

(7) Independent oversight of the proposed transaction will occur through

[5] Prudential has not requested relief for the institution of the revised fee schedule which proposes to pass on the costs of third party appraisers and the Valuation Management Firm to the Accounts.

the review of the operations and returns of the Accounts conducted by interim and permanent Advisory Councils for PRISA and PRISA II;

(8) The Valuation Policy Committee will meet at least quarterly and set valuation policy for the Accounts;

(9) The Valuation Management Firm will be responsible for retaining (and terminating) all appraisal firms which value the properties in the Accounts; reviewing all appraisals generated by such appraisal firms; and collecting, reviewing, and distributing any information needed by such appraisal firms to appraise the properties in the Accounts;

(10) In connection with the determination of enhanced return payments, no upward adjustment will be made by Prudential to the value reported by an external independent appraiser of any Property in PRISA and PRISA II without the concurrence of the Valuation Management Firm;

(11) The Plans invested in the Accounts who receive the enhanced return will incur no additional cost or risk in connection with the transaction;

(12) The transaction is subject to state insurance regulatory approvals;

(13) The calculation of the enhanced return involves a one-time determination of comparative investment returns based upon a recognized real estate industry index that can be readily reviewed and monitored for compliance in all applicable requirements;

(14) The comparative return calculation involves a relatively simple and objective comparison of readily available return information, which can be easily confirmed by the fiduciaries of the Plans invested in the Accounts and by the Department; and

(15) The Plans will receive the same treatment and proportional payment under the enhanced return as any other investor in PRISA and PRISA II.

Notice to Interested Persons

Those persons who may be interested in the pendency of the proposed exemption include fiduciaries, participants and beneficiaries of the Plans that are invested in one or both of the Accounts. However, it is represented that there are hundreds of thousands of participants in the Plans that invest in one or both of the Accounts. Because of the impracticality of providing notice to all such persons, Prudential proposes to give notice to interested persons by distributing the Notice of Proposed Exemption, as published in the **Federal Register**, together with a supplemental statement in the form set forth in the Department's regulations under 29 C.F.R. 2570.43(b)(2), to the contractholder on behalf of each of the Plans that was invested in PRISA or PRISA II, as of April 1, 1994. It is represented that these contractholders are generally the sponsors of the Plans or the trustees or administrators of the Plans. Distribution of notice will be effected by first-class mail, postage pre-paid, within fifteen (15) days of the date of publication of the Notice of Proposed Exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department, telephone (202) 219–8883 (This is not a toll-free number.)

First Hawaiian Bank Located Honolulu, HI

[Application No. D–09877]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[6]

Section I. Exemption for In-Kind Transfer of Assets

If the exemption is granted, the restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the in-kind transfer to any open-end investment company (the Fund or Funds) registered under the Investment Company Act of 1940 (the '40 Act) to which First Hawaiian Bank or any of its affiliates (collectively, the Bank) serves as investment adviser and may provide other services, of the assets of various employee benefit plans (the Plan or Plans) that are held in certain collective investment funds (the CIF or CIFs) maintained by the Bank or otherwise held by the Bank as trustee, investment manager, or in any other capacity as fiduciary on behalf of the Plans, in exchange for shares of such Funds, provided the following conditions are met:

(a) A fiduciary (the Second Fiduciary) who is acting on behalf of each affected Plan and who is independent of and unrelated to the Bank, as defined in paragraph (g) of Section III below, receives advance written notice of the in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Fund and the disclosures described in paragraph (g) of Section II below.

(b) On the basis of the information described in paragraph (g) of Section II below, the Second Fiduciary authorizes in writing the in-kind transfer of assets of the Plans in exchange for shares of the Funds, the investment of such assets in corresponding portfolios of the Funds, and the fees received by the Bank in connection with its services to the Fund. Such authorization by the Second Fiduciary to be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(c) No sales commissions are paid by the Plans in connection with the in-kind transfers of asset of the Plans or the CIFs in exchange for shares of the Funds.

(d) All or a pro rata portion of the assets of the Plans held in the CIFs or all or a pro rata portion of the assets of the Plans held by the Bank in any capacities as fiduciary on behalf of such Plans are transferred in-kind to the Funds in exchange for shares of such Funds.

(e) The Plans or the CIFs receive shares of the Funds that have a total net asset value equal in value to the assets of the Plans or the CIFs exchanged for such shares on the date of transfer.

(f) The current market value of the assets of the Plans or the CIFs to be transferred in-kind in exchange for shares is determined in a single valuation performed in the same manner and at the close of business on the same day, using independent sources in accordance with the procedures set forth in Rule 17a–7b (Rule 17a–7) under the '40 Act, as amended from time to time or any successor rule, regulation, or similar pronouncement and the procedures established by the Funds pursuant to Rule 17a–7 for the valuation of such assets. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the last business day preceding the date of the Plan or CIF transfers determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of the Bank.

(g) Not later than 30 business days after completion of each in-kind transfer of assets of the Plans or the CIFs in

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

exchange for shares of the Funds, the Bank sends by regular mail to the Second Fiduciary, who is acting on behalf of each affected Plan and who is independent of and unrelated to the Bank, as defined in paragraph (g) of Section III below, a written confirmation that contains the following information:

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

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

(3) The identity of each pricing service or market maker consulted in determining the value of such assets; and

(h) No later than 90 days after completion of each in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Funds, the Bank sends by regular mail to the Second Fiduciary, who is acting on behalf of each affected Plan and who is independent of and unrelated to the Bank, as defined in paragraph (g) of Section III below, a written confirmation that contains the following information:

(1) The number of CIF units held by each affected Plan immediately before the conversion (and the related per unit value and the aggregate dollar value of the units transferred); and

(2) The number of shares in the Funds that are held by each affected Plan following the conversion (and the related per share net asset value and the aggregate dollar value of the shares received).

(i) The conditions set forth in paragraphs (d), (e), (f), (o), (p), (q) and (r) of Section II below are satisfied.

Section II. Exemption for Receipt of Fees From Funds

If the exemption is granted, the restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(D) through (F) of the Code shall not apply to the proposed receipt of fees by the Bank from the Funds for acting as the investment adviser, custodian, sub-administrator, and other service provider for the Funds in connection with the investment in the Funds by the Plans for which the Bank acts as a fiduciary provided that:

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

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

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

(d) As to each individual Plan, the combined total of all fees received by the Bank for the provision of services to the Plan, and in connection with the provision of services to any of the Funds in which the Plan may invest, is not in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

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

(f) The Plans are not sponsored by the Bank.

(g) A Second Fiduciary who is acting on behalf of each Plan and who is independent of and unrelated to the Bank, as defined in paragraph (g) of Section III below, receives in advance of the investment by the Plan in any of the Funds a full and detailed written disclosure of information concerning such Fund (including, but not limited to, a current prospectus for each portfolio of each of the Funds in which such Plan is considering investing and a statement describing the fee structure).

(h) On the basis of the information described in paragraph (g) of this Section II, the Second Fiduciary authorizes in writing the investment of assets of the Plans in shares of the Funds and the fees received by the Bank in connection with its services to the Funds. Such authorization by the Second Fiduciary is consistent with the responsibilities obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(i) The authorization, described in paragraph (h) of this Section II, is terminable at will by the Second Fiduciary of a Plan, without penalty to such Plan. Such termination will be effected by the Bank selling the shares of the Fund held by the affected Plan within one business day following receipt by the Bank, either by mail, hand delivery, facsimile, or other available means at the option of the Second Fiduciary, of the termination form (the Termination Form), as defined in paragraph (i) of Section III below, or any other written notice of termination; provided that if, due to circumstances beyond the control of the Bank, the sale cannot be executed within one business day, the Bank shall have one additional business day to complete such redemption.

(j) Plans do not pay any Plan-level investment management fees, investment advisory fees, or similar fees to the Bank with respect to any of the assets of such Plans which are invested in shares of any of the Funds. This condition does not preclude the payment of investment advisory fees or similar fees by the Funds to the Bank under the terms of an investment advisory agreement adopted in accordance with section 15 of the '40 Act or other agreement between the Bank and the Funds.

(k) In the event of an increase in the rate of any fees paid by the Funds to the Bank regarding any investment management services, investment advisory services, or fees for similar services that the Bank provides to the Funds over an existing rate for such services that had been authorized by a Second Fiduciary, in accordance with paragraph (h) of this Section II, the Bank will, at least 30 days in advance of the implementation of such increase, provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of the Fund and which explains the nature and amount of the increase in fees) to the Second Fiduciary of each of the Plans invested in a Fund which is increasing such fees. Such notice shall be accompanied by the Termination Form, as defined in paragraph (i) of Section III below.

(l) In the event of an addition of a Secondary Service, as defined in paragraph (h) of Section III below, provided by the Bank to the Fund for which a fee is charged or an increase in the rate of any fee paid by the Funds to the Bank for any Secondary Service, as defined in paragraph (h) of Section III below, that results either from an increase in the rate of such fee or from the decrease in the number or kind of services performed by the Bank for such fee over an existing rate for such Secondary Service which had been authorized by the Second Fiduciary of a Plan, in accordance with paragraph (h) of this Section II, the Bank will at least 30 days in advance of the implementation of such additional service for which a fee is charged or fee increase, provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of the Fund and which explains the nature and amount of the additional service for which a fee is charged or the nature and amount of the increase in fees) to the Second Fiduciary

of each of the Plans invested in a Fund which is adding a service or increasing fees. Such notice shall be accompanied by the Termination Form, as defined in paragraph (i) of Section III below.

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

(1) The authorization is terminable at will by any of the Plans, without penalty to such Plans. Such termination will be effected by the Bank redeeming shares of the Fund held by the Plans requesting termination within one business day following receipt by the Bank, either by mail, hand delivery, facsimile, or other available means at the option of the Second Fiduciary, of the Termination Form or any other written notice of termination; provided that if, due to circumstances beyond the control of the Bank, the redemption of shares of such Plans cannot be executed within one business day, the Bank shall have one additional business day to complete such redemption; and

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

(n) The Second Fiduciary is supplied with a Termination Form, annually during the first quarter of each calendar year, beginning with the first quarter of the calendar year that begins after the date the grant of this proposed exemption is published in the **Federal Register** and continuing for each calendar year thereafter; provided that the Termination Form need not be supplied to the Second Fiduciary, pursuant to paragraph (n) of this Section II, sooner than six months after such Termination Form is supplied pursuant to paragraphs (k) and (l) of this Section II, except to the extent required by said paragraphs (k) and (l) of this Section II to disclose an additional Secondary Service for which a fee is charged or an increase in fees.

(o)(1) With respect to each of the Funds in which a Plan invests, the Bank will provide the Second Fiduciary of such Plan:

(A) At least annually with a copy of an updated prospectus of such Fund;

(B) Upon the request of such Second Fiduciary, with a report or statement (which may take the form of the most recent financial report, the current statement of additional information, or some other written statement) which contains a description of all fees paid by the Fund to the Bank; and

(2) With respect to each of the Funds in which a Plan invests, in the event such Fund places brokerage transactions with the Bank, the Bank will provide the Second Fiduciary of such Plan at least annually with a statement specifying:

(A) The total, expressed in dollars, brokerage commissions of each Fund's investment portfolio that are paid to the Bank by such Fund;

(B) The total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to the Bank;

(C) The average brokerage commissions per share, expressed as cents per share, paid to the Bank by each portfolio of a Fund; and

(D) The average brokerage commissions per share, expressed as cents per share, paid by each portfolio of a Fund to brokerage firms unrelated to the Bank.

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

(q) The Bank maintains for a period of 6 years the records necessary to enable the persons, as described in paragraph (r) of Section II below, to determine whether the conditions of this proposed exemption have been met, except that:

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Bank, the records are lost or destroyed prior to the end of the 6 year period; and

(2) No party in interest, other than the Bank, shall be subject to the civil penalty that may be assessed under section 502(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 (r) of Section II below;

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

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

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

(iii) Any participant or beneficiary of the Plans or duly authorized employee or representative of such participant or beneficiary;

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

Section III. Definitions

For purposes of this proposed exemption,

(a) The term ''Bank'' means First Hawaiian Bank and any affiliate of the Bank, as defined in paragraph (b) of this Section III.

(b) 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, or partner in any such person; and

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

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

(d) The term ''Fund or Funds'' means any diversified open-end investment company or companies registered under the '40 Act for which the Bank serves as investment adviser, and may also provide custodial or other services as approved by such Funds.

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

(f) The term ''relative'' means a ''relative'' as that term is defined in

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

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

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

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

(3) Such Second Fiduciary directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this proposed exemption.

If an officer, director, partner, or employee of the Bank (or a relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of the Plan's investment manager/adviser, (ii) the approval of any purchase or redemption by the Plan of shares of the Funds, and (iii) the approval of any change of fees charged to or paid by the Plan, in connection with any of the transactions described in Sections I and II above, then paragraph (g)(2) of Section III above, shall not apply.

(h) The term ''Secondary Service'' means a service, other than an investment management, investment advisory, or similar service, which is provided by the Bank to the Funds, including but not limited to custodial, accounting, brokerage, administrative, or any other service.

(i) The term ''Termination Form'' means the form supplied to the Second Fiduciary, at the times specified in paragraphs (k), (l), and (n) of Section II above, which expressly provides an election to the Second Fiduciary to terminate on behalf of the Plans the authorization, described in paragraph (h) of Section II. Such Termination Form may be used at will by the Second Fiduciary to terminate such authorization without penalty to the Plans and to notify the Bank in writing to effect such termination by redeeming the shares of the Fund held by the Plans requesting termination within one business day following receipt by the Bank, either by mail, hand delivery, facsimile, or other available means at the option of the Second Fiduciary, of written notice of such request for termination; provided that if, due to circumstances beyond the control of the Bank, the redemption cannot be executed within one business day, the Bank shall have one additional business day to complete such redemption.

Summary of Facts and Representations

Description of the Parties

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

a. *The Bank* is state-chartered bank that is incorporated under the laws of Hawaii and maintains its principal office at 1132 Bishop Street, Honolulu, Hawaii. The Bank is a wholly-owned subsidiary of First Hawaiian, Inc., a Delaware holding company.

Over the past seventy years, the Bank and its corporate predecessors have provided asset management services to several types of accounts including personal trusts, guardianship and probate accounts, corporate assets portfolio accounts and employee benefit plans including HR–10 Plans. As of May 1, 1994, the Bank had total assets under management of approximately $1.5 billion. The Bank serves as trustee with respect to the CIFs and as an investment adviser to the Fund portfolios described herein.

b. *The Plans* consist of retirement plans qualified under section 401(a) of the Code with respect to which the Bank serves or will serve as a trustee or investment fiduciary and that constitute ''pension plans'' as defined in section 3(2) of the Act and section 4975(e)(1) of the Code. The Plans do not include any plans that are sponsored by the Bank.[7]

c. *The CIFs* consist of separate investment portfolios of the First Hawaiian Bank Collective Investment Trust for Employee Benefit Trusts (the Collective Investment Trust) or similar investment trusts that may be established and maintained by the Bank. The Bank serves as trustee of the Collective Investment Trust.

As of June 30, 1993, the aggregate fair market value of the current CIFs maintained by the Bank was approximately $165.3 million. Participation in the CIFs is limited to Plans and public retirement funds for which the Bank acts as trustee or co-trustee or agent for the trustee or trustees of such Plan or CIF.

The CIFs that will be involved initially in the subject transactions are the Equity Fund, the HR–10 Equity Fund and the Pooled Fixed Income Fund.[8] These CIFs will be terminated immediately following the in-kind transfers.[9]

d. *The Funds* are separate portfolios of open-end investment companies registered under the '40 Act. The Funds currently consist of the Bishop Street Funds, a Massachusetts business trust that was established on May 25, 1994. The Bishop Street Funds constitute a no-load, open-end management investment company with four portfolios in existence. The existing Funds include the Equity Fund (corresponding to the Pooled Equity Fund and the HR–10 Equity Fund of the Collective Investment Trust) and the High-Grade Income Fund (corresponding to the Fixed Income Fund of the Collective Investment Trust).

The Bishop Street Funds will issue two classes of shares. Institutional Class A shares will be offered primarily to agency, fiduciary, custodial and advisory clients of the Bank. Retail Class B shares will be offered primarily to individuals. The Bishop Street Funds will be offered and sold exclusively through the use of prospectuses and other materials and will be offered and sold in full compliance with regulations of the SEC.

The Bank will serve as the investment adviser to each of the Bishop Street Funds. As the investment adviser, the Bank will make investment decisions with respect to the assets of each Fund and continuously review, supervise and administer each Fund's investment program. For investment advisory services rendered to the Funds, the Bank will receive an investment advisory fee. The Bishop Street Funds will pay separate fees for services provided to the Funds by the transfer agent, administrator and custodian, all of whom will not be affiliated with the Bank. Neither the Bank nor its affiliates will receive any 12b–1 fees from the Funds.

Description of the Transactions

2. Because the Bank recognizes that (a) in-kind transfers to Funds that the Bank services or advises of all or a *pro rata* portion of Plan assets in the CIFs or all or a *pro rata portion of Plan assets*

[7] The Department herein is not proposing relief for transactions afforded relief by Section 404(c) of the Act.

[8] The Pooled Equity Fund and the HR–10 Equity Fund principally invest in equity securities. The Pooled Fixed Income Fund invests primarily in fixed income securities or other tangible or intangible property or interests in either real or personal property.

[9] A fourth CIF, the Pooled Short-Term Fixed Income Fund, will be terminated at or prior to the time that the other CIFs are converted. At present, the only investor in this CIF is the Pooled Fixed Income Fund.

that the Bank otherwise manages, and (b) the approval process for additional services for which a fee is charged and fee increases by the Bank for these services may be outside the scope of Prohibited Transaction Exemption 77–4 (42 FR 18732, April 8, 1977), the Bank has requested relief for the transactions described in Sections I and II. Each of these transactions is discussed more fully herein. The proposed exemption is conditioned on the satisfaction of certain requirements and compliance with various general conditions which are also discussed below. It is the Bank's express intention that the description of these transactions and the conditions of the requested exemption with respect to such transactions will be applicable uniformly to the current Funds and to any of the other Funds for which the Bank serves as the investment advisor and in which the Plans invest.

In-Kind Transfers to Funds

3. The Bank has maintained CIFs in which the Plans have invested in accordance with requirements under Hawaiian banking law that apply to CIFs. The Bank has decided to terminate all current CIFs and to offer to the Plans participating in such CIFs appropriate interests in certain Funds as alternative investments. Because interests in CIFs generally must be liquidated or withdrawn to effect distributions, the Bank believes that the interests of the Plans invested in CIFs would be better served by investment in shares of the Funds which can be distributed in-kind. Also, the Bank believes that the Funds offer the Plans numerous advantages as pooled investment vehicles. In this regard, the Plans, as shareholders of a Fund, have the opportunity to exercise voting and other shareholder rights.

The Plans, as shareholders of the Funds, as mandated by the SEC, periodically receive certain disclosures concerning the Funds: (a) A copy of the prospectus which is updated annually; (b) an annual report containing audited financial statements of the Funds and information regarding such Funds' performance (unless such performance information is included in the prospectus of such Funds); and (c) a semi-annual report containing unaudited financial statements. In addition, at the option of the Funds, the Plans may receive other pertinent information.

With respect to the Plans, the Bank reports all transactions in shares of the Funds in periodic account statements provided the Second Fiduciary of each of the Plans. Further, the Bank maintains that the net asset value of the portfolios of the Funds can be monitored daily from information available in newspapers of general circulation.

In order to avoid the potentially large brokerage expenses that would otherwise be incurred, the Bank proposes that from time to time it may be appropriate for an individual Plan for which the Bank serves as a fiduciary to transfer all or a *pro rata* share of its in-kind assets to any of the Funds in exchange for shares of such Funds. In this regard, for example, in the case of an in-kind exchange between an individual Plan whose portfolio consists of common stock, money market securities and real estate, and a Fund that, under its investment policy, invests only in common stock and money market securities, the exchange would involve all or a *pro rata* share of the common stock and money market securities held by the Plan, if such stock and securities are eligible for purchase by the Fund, and would not involve the transfer or exchange of the real estate holdings of such Plan. A Fund's eligible investments are set forth in its prospectus. No brokerage commission or other fees or expenses (other than customary transfer charges paid to parties other than the Bank or its affiliates) will be charged to the Plans or the CIFs in connection with the in-kind transfers of assets into the Funds and the acquisition of shares of the Funds by the Plans or the CIFs. Thus, the Bank has requested prospective relief for transactions which would involve: (a) The in-kind transfer by the CIFs of all or a *pro rata* portion of the assets of any of the Plans held in such CIFs to the Funds in exchange for shares of the Fund which subsequently are distributed to the Plans; or (b) the in-kind transfer of all or a *pro rata* portion of the assets of any of the Plans held by the Bank in any capacity as fiduciary on behalf of such Plans to the Funds in exchange for shares of such Funds; provided that conditions described in Section I above are satisfied.

The Bank maintains that the in-kind transfers of assets in exchange for shares of the Funds are ministerial transactions performed in accordance with pre-established objective procedures which are approved by the board of trustees of each Fund. Such procedures require that assets transferred to a Fund: (a) Are consistent with the investment objectives, policies, and restrictions of the corresponding portfolios of such Fund, (b) satisfy the applicable requirements of the '40 Act and the Code, and (c) have a readily ascertainable market value. In addition, any assets that are transferred will be liquid and will not be subject to restrictions on resale. Assets which do not meet these requirements will be sold in the open market through an unaffiliated brokerage firm prior to any transfer in-kind. Further, prior to entering into an in-kind transfer, each affected Plan receives certain disclosures from the Bank and approves such transaction in writing.

Valuation of assets transferred in-kind to the Funds will be established by reference to independent sources. In this regard, for purposes of the transaction, it is represented that all assets transferred in-kind are valued in accordance with the valuation procedures described in Rule 17a–7 under the '40 Act, as amended from time to time or any successor rule, regulation, or similar pronouncement and the procedures established by the Funds pursuant to Rule 17a–7 for the valuation of such assets. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the last business day preceding the date of the Plan or CIF transfers determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of the Bank.

Further, the Bank represents that within 30 days of the completion of a transfer in-kind, it will provide to Plans written confirmation of the identity of each security valued under Rule 17a–7(b)(4), the price of each security, and the identity of each pricing service or market maker consulted in determining the value of the assets transferred. The securities subject to valuation under Rule 17(a)–7(b)(4) include all securities other than ''reported securities,'' as the term is defined in Rule 11Aa3–1 under the Securities Exchange Act of 1934 (the '34 Act), or those quoted on the NASDAQ system or for which the principal market is an exchange.

The value of the assets transferred in-kind will be equal to the aggregate value of the corresponding portfolios shares of the Fund at the close of business on the date of the transaction. In this regard, it is represented that for all conversion transactions that occur after the date of this proposed exemption, the Bank, no later than 90 days after completion of each in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Funds, will mail to the Second Fiduciary a written confirmation of the

number of CIF units held by each affected Plan immediately before the conversion (and the related per unit value and the aggregate dollar value of the units transferred), and the number of shares in the Funds that are held by each affected Plan following the conversion (and the related per share net asset value and the aggregate dollar value of the shares received).

The Initial Exemption Transactions

4. The Bank has requested prospective exemptive relief, for the in-kind transfer to the Bishop Street Funds. At the time of such in-kind transfer, all of the assets of the three CIFs described above, which are maintained by the Bank and in which the Plans hold interests, will be transferred to the Bishop Street Funds which have investment objectives and policies substantially identical to those of the CIFs. At the same time, the three CIFs will be terminated and the assets of each, then consisting of shares in portfolios of the Bishop Street Funds, will be distributed in-kind to the Plans participating in such CIFs based on each Plan's *pro rata* share of the assets of the CIFs on the date of the transaction.

The Bank will provide to each affected Plan disclosures that announce the termination of the CIFs, summarize the transaction and otherwise comply with provisions of Section I of the exemption. Based on these disclosures, the Second Fiduciary from each affected Plan will approve in writing the transfer of the CIFs' assets to the corresponding portfolios of the Bishop Street Funds in exchange for shares of the Bishop Street Funds, and the receipt by the Bank of fees for services to the Bishop Street Funds. The assets of Plans that do not approve investment in the Bishop Street Funds will be withdrawn from the CIFs and held or invested in appropriate alternative investments in accordance with the terms of such Plans.

Prior to the transaction, the assets of the three CIFs will be reviewed to confirm that such are appropriate investments for the corresponding portfolios of the Bishop Street Funds into which such assets will be transferred. If any of the assets of the three CIFs are not appropriate for the Bishop Street Funds, the Bank intends to sell such assets in the open market through an unaffiliated brokerage firm prior to the transfer.

The assets transferred by the three CIFs to the Bishop Street Funds will consist entirely of cash and marketable securities. For purposes of the transfer in-kind, the value of the securities in each of the three CIFs will be determined based on market values as of the close of business on the last business date prior to the transfer (the CIF Valuation Date). The values will be determined in a single valuation using the valuation procedures described in Rule 17a–7 under the '40 Act. In this regard, the ''current market price'' for specific types of CIF securities involved in the transaction will be determined as follows:

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

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

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

d. For all other securities, the average of the highest independent bid and lowest independent offer as of the close of business on the CIF Valuation Date, determined on the basis of reasonable inquiry. For securities in this category, the Bank intends to obtain quotations from at least three sources that are either broker-dealers or pricing services independent of and unrelated to the Bank and, where more than one valid quotation is available, use the average of the quotations to value the securities, in conformance with interpretations by the SEC and practice under Rule 17a–7.

The securities received by the corresponding portfolios of the Bishop Street Funds will be valued by such portfolio for purposes of the transfer in the same manner and on the same day as such securities will be valued by the CIFs. The per share value of the shares of each portfolio of the Bishop Street Funds issued to the CIFs will be based on the corresponding portfolio's then current net asset value. As a result of the proposed procedure, the Bank expects that the aggregate value of the shares of the corresponding portfolio of the Bishop Street Funds issued to the CIFs to be equal to the value of the assets (cash and marketable securities) transferred to such portfolio as of the opening of business on next business day following the CIF Valuation Date. The Bank also expects the value of a Plan's investment in shares of a corresponding portfolio of the Bishop Street Funds as of the opening of business on the date of the transaction will be equal to the value of such Plan's investment in the CIF as of the close of business on the last business day prior to the transaction.

Not later than 30 business days after completion of the transaction, the Bank will send by regular mail a written confirmation of the transaction to each affected Plan. Such confirmation will contain: (a) The identity of each security that is valued in accordance with Rule 17a7(b)(4), as described above; (b) the price of each such security for purposes of the transaction; and (c) the identity of each pricing service or market maker consulted in determining the value of such securities. In accordance with the conditions under Section I of the proposed exemption, similar procedures will occur upon any future in-kind exchanges between CIFs maintained by the Bank or Plans, and the Funds.

Receipt of Fees From Funds

5. Under certain conditions, PTE 77–4 permits the Bank to receive fees from the Funds under either of two circumstances: (a) Where a Plan does not pay any investment management, investment advisory, or similar fees with respect to the assets of such Plan invested in shares of a Fund for the entire period of such investment; or (b) where a Plan pays investment management, investment advisory, or similar fees to the Bank based on the total assets of such Plan from which a credit has been subtracted representing such Plan's *pro rata* share of such investment advisory fees paid to the Bank by the Fund. As such, it is represented that there are two levels of fees—those fees which the Bank charges to the Plans for serving as trustee with investment discretion or as investment manager (the Plan-level fees); and those fees the Bank charges to the Funds (the Fund-level fees) for serving as investment advisor, custodian, or service provider.

Plan-level investment management, investment advisory, or fees for similar services provided by the Bank are currently charged in the form of a single asset-based investment management fee. There is also a Plan-level trustee fee for basic administrative services provided by the Bank as well as other specific service fees, such as a cash ''sweep'' fee. Currently, the annual investment management fee for assets invested in the Pooled Equity Fund and the HR–10 Equity Fund is 0.60 percent of assets under management, based on the daily net asset value of the fund. The fee for

assets invested in the Pooled Fixed Income Fund is 0.40 percent of assets under management, based on the daily net asset value of the fund. Plan-level fees are subject to annual minimums for administration and management expressed as flat dollar amounts and administrative fees are subject to the application of certain ''break points.'' In addition to the Plan-level fees for investment management, investment advisory, or similar services, a one-time fee (also a flat dollar amount) may be charged in connection with the establishment of an account for a Plan, and separate transaction fees may be charged for various administrative transactions, such as for example, a participant loan. Depending on the terms governing documents of the Plan, Plan-level fees are paid to the Bank either by the sponsor of the Plan or from the assets of the Plan. Plan-level fees for investment management, investment advisory or similar investment services will terminate immediately after the execution of the subject transactions described herein.

As mentioned above, the Bank may receive Fund-level fees. Such Fund-level fees can be divided into: (a) Fees paid to the Bank by a Fund for investment management, investment advisory, or similar services provided to such Fund, and (b) fees paid to the Bank for administrative, custodial, transfer, accounting, and other Secondary Services provided either to such Fund or to the distributor of shares of such Funds and its affiliates. The Bank is currently not paid any fees in this category from the Bishop Street Funds. The current fee arrangements between the Bank and the Bishop Street Funds provide for the Bank to receive fees from the Bishop Street Funds only for acting as investment adviser. This compensation paid to the Bank for investment advisory services is in accordance with agreements between the Bishop Street Funds and the Bank. In this regard, it is represented that the Bishop Street Funds' Trustees and the shareholders of the Bishop Street Funds approve the compensation that the Bank receives from the Bishop Street Funds. Also, the Bishop Street Funds' Trustees approve any changes in the compensation paid to the Bank for services rendered to the Bishop Street Funds.

With respect to Plans managed by the Bank that are invested in the Funds, although such Plans will no longer pay a Plan-level investment management fee to the Bank, a Plan-level fee will continue to be charged to the Plans for basic administrative services not including investment management.[10] Such administrative services would include, among others, the Bank's acting as custodian of the assets of a Plan, maintaining the records of a Plan, preparing periodic reports concerning the status of the Plan and its assets, and accounting for contributions, benefit distributions, and other receipts and disbursements. These functions performed by the Bank on the Plan-level are separate and distinct from those performed on the Fund-level by the Bank.

The Bank will continue to receive Plan-level compensation from the Plans for investment management services provided with respect to assets of the Plans *not* invested in shares of any of the Funds. Since the Plan-level investment management fee for Plans investing in the Funds will terminate, there will be no credit to the Plans their *pro rata* share of the investment advisory fees paid at the Fund-level. Instead, the only compensation received by the Bank for investment advisory services will be that which is paid by the Funds to the Bank for such services rendered to such Funds. In addition, the Bank will retain fees for providing Secondary Services to the Funds.

The Bank believes that this proposed fee arrangement complies with PTE 77–4. However, there is one difference from PTE 77–4 requested by the Bank for which an exemption is required. In this regard, one of the requirements of PTE 77–4 has been that any change in any of the rates of fees would require prior written approval by the Second Fiduciary of the Plans participating in the Funds. The applicant maintains that where many Plans participate in a Fund, the addition of a service or any good faith increase in fees could not be implemented until written approval of such change is obtained from every Second Fiduciary. The Bank proposes an alternative which the Bank believes provides the basic safeguards for the Plans and is more efficient, cost effective, and administratively feasible than those contained in PTE 77–4.

In the event of an increase in the rate of any investment management fees, investment advisory fees, or similar fees, the addition of a Secondary Service for which a fee is charged, or an increase in the fees for Secondary Services paid by the Funds to the Bank over an existing rate that had been authorized by the Second Fiduciary, the Bank will provide, at least 30 days in advance of the implementation of such additional service or fee increase, to the Second Fiduciary of the Plans invested in such Fund a written notice of such additional service or fee increase, (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of the Fund and which explains the nature and amount of the additional service or the nature and amount of the increase in fees). In this regard, such increase in fees for Secondary Services can result either from an increase in the rate of such fee or from the decrease in the number or kind of services performed by the Bank for such fee over that which had been authorized by the Second Fiduciary of a Plan. The Bank believes that notice provided in this way will give the Second Fiduciary of each of the Plans adequate opportunity to decide whether or not to continue the authorization of a Plan's investment in any of the portfolios of the Funds in light of the increase in investment management fees, investment advisory fees, or similar fees, the addition of a Secondary Service for which a fee is charged, or the increase in fees for any Secondary Services. In addition, the Bank represents that such fee increase will be disclosed to the Second Fiduciaries in an amendment of or supplement to the Funds' prospectus or in the Funds' statement of additional information, to the extent necessary to comply with SEC disclosure requirements.[11]

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

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

Authorization Requirements for the Second Fiduciary

6. The written notice of an additional service for which a fee is charged or a fee increase, as described in Representation 5, will be accompanied by a Termination Form, as defined in paragraph (i) of Section III, and by instructions on the use of such form, as described in paragraph (l) of Section II, which expressly provide an election to the Second Fiduciaries to terminate at will any prior authorizations without penalty to the Plans. The Second Fiduciary will be supplied with a Termination Form annually during the first quarter of each calendar year, beginning with the first quarter of the calendar year that begins after the date the grant of this proposed exemption is published in the **Federal Register** and continuing for each calendar year thereafter, regardless of whether there have been any changes in the fees payable to the Bank or changes in other matters in connection with services rendered to the Funds. However, if the Termination Form has been provided to the Second Fiduciary in the event of an increase in the rate of any investment management fees, investment advisory fees, or similar fees, an addition of a Secondary Service for which a fee is charged, or an increase in any fees for Secondary Services paid by the Fund to the Bank, then such Termination Form need not be provided again to the Second Fiduciary until at least six months have elapsed, unless such Termination Form is required to be sent sooner as a result of another increase in any investment management fees, investment advisory fees, or similar fees, the addition of a Secondary Service for which a fee is charged, or an increase in any fees for Secondary Services.

The Termination Form will contain instructions regarding its use which will state expressly that the authorization is terminable at will by a Second Fiduciary, without penalty to any Plan, and that failure to return the form will be deemed to be an approval of the additional Secondary Service or the increase in the rate of any fees and will result in the continuation of all authorizations previously given by such Second Fiduciary. Termination by any Plan of authorization to invest in the Funds will be effected by the Bank redeeming the shares of the Fund held by the affected Plan by the close of business on the day following receipt by the Bank, either by mail, hand delivery, facsimile, or other available means at the option of the Second Fiduciary, of the Termination Form or any other written notice of termination. If, due to circumstances beyond the control of the Bank, the redemption cannot be executed within one business day, the Bank shall have one additional business day to complete such redemption.

The rates paid by each of the portfolios of the Funds to the Bank for services rendered may differ depending on the fee schedule for each portfolio and on the daily net assets in each portfolio. The investment advisory fees paid to the Bank by the Funds will be based on the different fee rates of each of the portfolios into which the assets of the Plans are allocated. For example, for services provided to the Equity Fund, the Bank receives from the Bishop Street Funds an annual fee of 0.40 percent based on the Fund's average daily net assets. For services provided to the High-Grade Income Fund, the Bank receives from the Bishop Street Funds an annual fee of 0.25 percent, based on the Fund's average daily net assets. The Bank proposes to allocate the assets of the Plans among the portfolios offered of the Bishop Street Funds and/or among any of the Funds under the terms of this proposed exemption.

The impact of the change in fee structures resulting from the exemptive transactions on the aggregate fees received by the Bank is difficult to determine, according to the applicant, because various factors and variables are unique to each Plan. These factors include the size of the Plan, the extent to which Plan assets are invested in the Funds, usage by the Plans of separate services provided by the Bank and the application of certain ''break points'' in the schedule of Plan-level fees. Further, the Bank notes that Fund size, the identity of the particular investment portfolio of the Fund into which the Plan assets are allocated and voluntary waivers by the Bank of Fund-level fees are likely to be different in each situation and may affect the aggregate amount of fees received by the Bank. In this regard, the Bank believes that, as to each individual Plan, the combined total of all Plan-level and Fund-level fees received by it for the provision of services to the Plans and to the Funds, respectively, is not in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

Conditions for Exemption

7. If granted, this proposed exemption will be subject to the satisfaction of certain general conditions that will further protect the interests of the Plans. For example, the proposed transactions are subject to the prior authorization of a Second Fiduciary, acting on behalf of each of the Plans, who has been provided with full written disclosure by the Bank. The Second Fiduciary will generally be the administrator, sponsor, or a committee appointed by the sponsor to act as a named fiduciary for a Plan.

With respect to disclosure, the Second Fiduciary of such Plan will receive advance written notice of the in-kind transfer of assets of the CIFs and full written disclosure of information concerning the Funds (including a current prospectus for each of the Funds and a statement describing the fee structure).

On the basis of the information disclosed, the Second Fiduciary will authorize in writing the investment of assets of a Plan in shares of the Funds in connection with the transactions set forth herein and the compensation received by the Bank in connection with its services to the Funds. Written authorization will extend to only those investment portfolios of the Funds with respect to which the Plan has received the written disclosures referred to above and which are specifically mentioned in such disclosure described above. Having obtained the authorization of the Second Fiduciary, the Bank will invest the assets of a Plan among the portfolios and in the manner covered by the authorization, subject to satisfaction of the other terms and conditions of this proposed exemption. However, the Bank will not invest assets of a Plan in any portfolio not specifically mentioned in the written disclosure and authorization described above. For example, if the written authorization of the Second Fiduciary covered only one of the portfolios then existing, the Bank could only invest the assets of such Plans in that one portfolio specifically authorized. Further, if a new portfolio were established under any of the Funds, the Bank could invest assets of a Plan in such new portfolio only after providing the required disclosures and obtaining from the Second Fiduciary a separate written authorization which specifically mentions the new portfolio.

In addition to the disclosures provided to the Plan prior to investment in any of the Funds, the Bank represents that it will routinely provide at least annually to the Second Fiduciary updated prospectuses of the Funds in accordance with the requirements of the '40 Act and the SEC rules promulgated thereunder. Further, the Second Fiduciary will be supplied, upon request, with a report or statement (which may take the form of the most recent financial report of such Funds, the current statement of additional information, or some other written

statement) which contains a description of all fees paid by the Fund.

The Bank does not now execute nor in the future intend to execute securities brokerage transactions for the investment portfolios of any of the Funds, except as and to the extent permitted by the '40 Act and applicable rules of the SEC. However, in the event the Bank ever performs brokerage services for which a fee is paid to the Bank by the investment portfolio of any of the Funds, the Bank represents that it will at least 30 days in advance of the implementation of such additional service provide a written notice which explains the nature of such additional brokerage service and the amount of the fees. Further, the Bank represents that it will provide at least annually to the Second fiduciary of any Plan that invests in such Funds with a written disclosure indicating (a) the total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid to the Bank by such Fund; (b) the total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to the Bank; (c) the average brokerage commissions per share, expressed as cents per share, paid to the Bank by each portfolio of a Fund; and (d) the average brokerage commissions per share, expressed as cents per share, paid by each portfolio of a Fund to brokerage firms unrelated to the Bank.

The receipt of fees, as described above, is generated in connection with the investment in the Funds by the Plans. These investments are the result of purchases of shares in the Funds and exchanges of assets of the Plans, including those in CIFs, for shares in the Funds.

With respect to such purchases, (a) the Plans and other investors will purchase or redeem shares in the Funds in accordance with standard procedures described in the prospectus for each portfolio of the Funds; (b) the Plans will pay no sales commissions or redemption fees in connection with purchase or redemption of shares in the Funds by the Plans; (c) the Bank will not purchase from or sell to any of the Plans shares of any of the Funds; and (d) the price paid or received by the Plans for shares of the Funds will be the net asset value per share at the time of such purchase or redemption and will be the same price as any other investor would have paid or received at that time. The value of the Bishop Street Funds' shares and the value of each Bishop Street Funds' portfolios are determined on a daily basis. In the case of the non-money market portfolios, assets are valued at fair or market value, as required by Rule 2a–4 under the '40 Act. In the case of any money market portfolio, the assets are valued based on the amortized cost method authorized by SEC Rule 2a–7, in order to maintain a net asset value of $1.00 per share. Both the money market portfolios and the non-money market portfolios determine the net asset value per share for purposes of pricing purchases and redemptions by dividing the value of all securities, determined by a method as set forth in the prospectus for each Bishop Street Fund portfolio, and other assets belonging to each of the portfolios, less the liabilities charged to each portfolio, by the number of each portfolio's outstanding shares.

Purchases and redemptions of shares in any of the Funds by the Plans may also occur in connection with daily automated cash ''sweep'' arrangements. However, agreement to such arrangement is not a condition for the Plan otherwise choosing to invest in shares of the Fund, nor will the reverse be required.

Under the automated cash ''sweep'' arrangement, a Plan may participate in the ''sweep'' program only with the initial written approval of the Second Fiduciary and only after certain disclosures have been provided by the Bank. If such approval is given, cash balances of the Plan held from time to time thereafter pending other investment or distribution are invested automatically in shares of the Bishop Street Funds Money Market Fund or other short-term investment vehicle selected by the Second Fiduciary on behalf of a Plan. The automated cash ''sweep'' arrangement would not involve shares of any non-money market portfolios.

After the Money Market Fund of the Bishop Street Funds has been selected by the Second Fiduciary on behalf of the Plan, otherwise uninvested cash down to the last $1.00 balance of the Plans may be invested automatically on a nightly basis. The Bank has no discretion with respect to the timing of the ''sweep'' either into or out of the Bishop Street Funds. Under the automated ''sweep'' arrangement, the Bank's computerized cash management system automatically scans the accounts of the Plans, as of the end of each business day to determine whether such accounts have positive or negative net cash balances. Based on this information, the system automatically invests the case of the Plans having positive balances in shares of the Money Market Fund. In the case of a Plan having a negative cash balance, the system automatically liquidates the Bishop Street Fund shares as necessary to eliminate such negative balance.

Plans may terminate their participation in the automated cash ''sweep'' arrangement and withdraw at any time by notifying the Bank. Such termination will be effected by the Bank redeeming the shares of the Bishop Street Funds held by the Plan requesting termination by the close of the business day following the date of receipt by the Bank, either by mail, hand delivery, facsimile, or other available means of written communication at the option of the Second Fiduciary, of the Termination Form or any other written notice of termination. However, if due to circumstances beyond the control of the Bank, the redemption of shares of such Plan cannot be executed within one business day, the Bank would complete the redemption within one additional business day.

No fee, charge or penalty of any kind is charged in connection with a termination by a Plan of participation in the automated cash ''sweep arrangement'' in the Bishop Street Funds or in any of the Funds. The Bank currently charges a Plan-level cash sweep fee for sweep services in connection with the investment of cash balances in short-term investment vehicles managed by unaffiliated entities. This fee will be terminated for Plans that elect to use the Money Market Fund as their cash management vehicle. The Bank does not charge separate or additional fees to Plans in order to participate in the daily automated cash ''sweep'' arrangement through the Bishop Street Funds, nor is such additional compensation contemplated by the proposed exemption.[12]

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

In addition, the letter also discusses the applicability of the statutory exemptions under

8. In summary, it is represented that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) Neither the Plans nor the CIFs will pay sales commissions or redemption fees in connection with the in-kind transfer of assets to the Funds in exchange for shares of the Funds or in connection with purchases or redemptions by the Plans of shares of the Funds, including purchases and redemptions handled through daily automated cash ''sweep'' arrangements.

(b) The Plans or the CIFs will receive shares of the Funds that are equal in value to the assets of the Plans or the CIFs exchanged for such shares, as determined in a single valuation performed in the same manner and as of the close of business on the same day in accordance with the procedures set forth in Rule 17a–7 under the '40 Act, as amended from time to time or any successor rule, regulation or similar pronouncement.

(c) Not later than 30 business days after completion of each in-kind transfer of assets in exchange for shares of the Funds, the Plans will receive written confirmation of the assets involved in the exchange which were valued in accordance with Rule 17a–7(b)(4), the price of such assets and the identity of the pricing service or market maker consulted.

(d) No later than 90 days after completion of each in-kind transfer of assets of the plans or the CIFs in exchange for shares of the Funds, the Bank will mail to the Second Fiduciary of each Plan, a written confirmation of the number of CIF units held by each affected Plan immediately before the conversion (and the related per unit value and the aggregate dollar value of the units transferred), and the number of shares in the Funds that are held by each affected Plan following the conversion (and the related per share net asset value and the aggregate dollar value of the shares received).

(e) The price that will be paid or received by the Plans for shares in the Funds is the net asset value per share at the time of the transaction and is the same price for the shares which would have been paid or received by any other investor for shares of the same class at that time.

(f) Neither the Bank nor an affiliate, including any officer or director will purchase from or sell to any of the Plans shares of any of the Funds.

(g) As to each individual Plan, the combined total of all fees received by the Bank for the provision of services to the Plan, and in connection with the provision of services to any of the Funds in which the Plan may invest, will not be in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

(h) The Bank will not receive any 12b–1 Fees in connection with the proposed transactions.

(i) Prior to investment by a Plan in any of the Funds, in connection with transactions, the Second Fiduciary will receive a full and detailed written disclosure of information concerning such Fund.

(j) Subsequent to the investment by a Plan in any of the Funds, the Bank will provide the Plan, among other information, at least annually with an updated copy of the prospectus for each of the Funds in which the Plan invests.

(k) In the event such Fund places brokerage transactions with the Bank, the Bank will provide the Second Fiduciary of such Plan at least annually with a statement specifying the total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to the Bank and to unrelated brokerage firms and the average brokerage commissions per share, expressed as cents per share, by each portfolio of a Fund paid to the Bank and to brokerage firms unrelated to the Bank.

(l) On the basis of the disclosures, the Second Fiduciary will authorize the transactions.

(m) The authorization by the Second Fiduciary will be terminable at will without penalty to such Plans, and any such termination will be effected by the close of the business day following the date of receipt by the Bank, either by mail, hand delivery, facsimile or other available means of written communication at the option of the Second Fiduciary, of the Termination Form or any other written notice of termination, unless due to circumstances beyond the control of the Bank delay execution for no more than one additional business day.

(n) The Plans do not pay investment management, investment advisory or similar fees to the Bank with respect to any of the assets of such Plans which are invested in shares of any of the Funds.

(o) The Second Fiduciary will receive a written notice accompanied by the Termination Form with instructions regarding the use of such form, at least 30 days in advance of the implementation of any increase in the rate of any fees for investment management, investment advisory or similar fees, any addition of a Secondary Service for which a fee is charged, or any increase in fees for Secondary Services that the Bank provides to the Funds.

(p) All dealings between the Plans and any of the Funds will be on a basis no less favorable to such Plans than dealings between the Funds and other shareholders holding the same shares of the same class as the Plans.

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

General Information

The attention of interested persons is directed to the following:

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

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

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

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of

section 408(b)(6) of the Act (fees for ''ancillary services'') and under section 408(b)(8) of the Act (investments in collective trust funds maintained by such bank) to such ''sweep'' service arrangements.

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 8th day of September, 1995.

Ivan Strasfeld,

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

[FR Doc. 95–22753 Filed 9–12–95; 8:45 am]

BILLING CODE 4510–29–P

[Prohibited Transaction Exemption 95–81; Exemption Application Nos. D–09511, D–09512 and D–09513, et al.]

Grant of Individual Exemptions; Bank of America Illinois, et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

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

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

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

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

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

Bank of America Illinois, Located in Chicago, IL

[Prohibited Transaction Exemption 95–81 Exemption Application Nos. D–09511, D–09512 and D–09513]

Exemption

Section I—Exemption for Purchases and Sales

Effective September 1, 1993, the restrictions of section 406(a)(1)(A) through (D) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the purchase and sale by employee benefit plans (the Plans), to which the Bank serves as fiduciary, of shares in the Prime Fund, the Government Securities Fund, and the Treasury Fund, or each of their Pacific Horizon Fund successors, three open-end money market mutual fund portfolios (collectively referred to as the Funds), to which the Bank of America Illinois, and its affiliates (the Bank) provide investment advisory and other services, in connection with the Supplemental Sweep Service (as defined in paragraph (b) of section IV below), provided that the conditions of Section III are met.

Section II—Exemption for Receipt of Fees

Effective September 1, 1993, the restrictions of section 406(a)(1)(A) through (D) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the receipt of fees by the Bank from the Funds for providing investment advisory and other services to the Funds, in connection with the investment of the assets of the Plans in the Funds, for which the Bank provides investment advisory and other services, provided that the conditions of Section III are met.

Section III—Conditions

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

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

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

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

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

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

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

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

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

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

(4) Upon request of the Second fiduciary, a copy of the proposed exemption and/or a copy of the final exemption;

(h) On the basis of the information described above in paragraph (g) of section III, the Second Fiduciary authorizes in writing the investment of assets of the Plan in each particular Fund, the fees to be paid by the Fund and the Plan to the Bank, and the credit to the Plan of fees received by the Bank