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 James S. Milford,
Acting Deputy Administrator.
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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-10227 and 10232, et al.]

Proposed Exemptions; Real Estate Equity Trust No. 1 (the Trust)

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.

Real Estate Equity Trust No. 1 (the Trust), et al. Located in Cincinnati, OH
 [Exemption Application Nos. D-10227 and D-10232]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the purchase of units in the Trust by certain multiemployer pension plans (the Plans) that will enable State Street Global Advisors, Inc. (SSGA), the independent fiduciary for the Plans investing in the Trust, to make initial

and subsequent equity investments on behalf of the Trust, in the Cincinnati Development Group Limited Partnership (the Partnership), which may result in a benefit inuring to Fifth Third Bank (Fifth Third), the trustee of the Trust and a party in interest with respect to the Plans.

This proposed exemption is subject to the following conditions:

(a) Each Plan investing in the Trust has total assets that are in excess of \$50 million.

(b) No Plan that purchases units in the Trust that will permit the Partnership investment has, immediately following the acquisition of such units, more than 5 percent of its assets invested therein.

(c) The decision to purchase units in the Trust that will allow SSGA to make the initial and any subsequent equity contributions to the Partnership is made by a Plan fiduciary (the Second Fiduciary) which is independent of Fifth Third and its affiliates and which is not SSGA.

(d) As independent fiduciary for the Trust, SSGA determines whether—

(1) It is in the best interests of the Trust and the Plans participating therein to make the initial and subsequent investments in the Partnership;

(2) It is appropriate for the Trust to assign, transfer, pledge or otherwise encumber its interest in the Partnership provided the Trust obtains written consent from Cincinnati Development Group, LLC (CDG);

(3) It is appropriate for the Trust to withdraw as a limited partner from the Partnership or to withdraw its capital from such Partnership provided the Trust obtains the written consent of CDG;

(4) It is appropriate for the Trust to consent to the sale by CDG of substantially all of the assets of the Partnership or the transfer by CDG of its interest in the Partnership to a third party;

(5) It is appropriate for the Trust to contribute to the Partnership the amount necessary to complete construction of the Fountain Square West Project and to require that CDG release control of the Partnership to an entity designated by the Trust, if CDG fails to provide for construction cost overruns;

(6) It is appropriate for the Trust to elect to continue the Partnership by appointing a successor general partner.

(7) An entity designated by the Trust to serve as general partner is appropriate upon the occurrence of (d)(5) or (d)(6).

(e) At the time the Partnership investment is made, the terms of the transaction are at least as favorable to each Plan participating in the Trust as

those obtainable in an arm's length transaction with an unrelated party.

(f) Prior to investing in the Partnership, Fifth Third provides SSGA and the Second Fiduciary of each Plan participating in the Trust with offering materials disclosing all material facts concerning the purpose, structure and operation of the Partnership.

(g) Subsequent to investing in the Partnership, the Trust and SSGA receive the following ongoing information from CDG:

(1) Within 120 days after the end of the Partnership's fiscal year, an unaudited annual report containing—

(A) A balance sheet and statements of income, Partners' equity, changes in financial position and cash flow for the year then ended;

(B) A report of the activities of the Partnership during the period covered by the report; and

(C) An itemization of any fees or payments made to CDG or any related party or affiliate.

(2) Within 60 days of the end of each year, an appraisal report, prepared by a qualified, independent appraiser, of each property held in the Partnership.

(3) Periodically (but not less frequently than quarterly), operating and development budgets of the Partnership as well as unaudited operations and financial reports. (Information with respect to the Partnership is disseminated by Fifth Third to the Second Fiduciaries of Plans investing in the Trust through annual audited financial statements of the Trust, prepared by independent, certified public accountants and in quarterly communications setting forth Partnership financial data. SSGA will also be given copies of this information.)

(h) As to each Plan participating in the Trust, the total fees paid to Fifth Third will constitute no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(i) Fifth Third maintains, for a period of six years, the records necessary to enable the persons described in paragraph (j) to determine whether the conditions of this exemption have been met, except that—

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

(2) No party in interest other than Fifth Third 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 below by paragraph (j).

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

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

(B) Any fiduciary of a participating Plan or any duly authorized representative of such fiduciary;

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

(D) Any participant or beneficiary of any participating Plan, or any duly authorized representative of such participant or beneficiary.

(j)(2) None of the persons described above in paragraphs (j)(1)(B)–(j)(1)(D) of this paragraph (j) are authorized to examine the trade secrets of Fifth Third or commercial or financial information which is privileged or confidential.

Summary of Facts and Representations

1. The Trust was originally established on December 1, 1987 by a trust agreement between Fifth Third, as trustee, and the International Brotherhood of Electrical Workers Local 212 Pension Fund (the IBEW Pension Plan), as beneficiary. The purpose of the Trust is to make equity investments in real estate development projects that are located within a 100 mile radius of Greater Cincinnati. As a condition precedent to any investment by the Trust, all project work must be performed by union labor.¹

The Trust is a group trust, exempt from taxation under section 501(a) of the Code pursuant to the principles of Revenue Ruling 81-100, 1981-1 C.B. 326. Under the terms of the Trust, the initial investment by a Plan must be at least \$500,000.²

Thereafter, a Plan may make additional contributions in increments of \$100,000. Although there are no minimum or maximum limits imposed by the Trust on the portion of the total assets of any Plan that may be invested therein, such investment must be

¹ This proposed exemption provides no relief with respect to any violations of section 404 of the Act.

² It is represented that the purchase or redemption of units in the Trust by the investing Plans would be statutorily exempt under section 408(b)(8) of the Act. In this regard, the Department expresses no opinion herein on whether such transactions would satisfy the terms and conditions of section 408(b)(8) of the Act.

approved initially by a Second Fiduciary.

The Trust has been established for an indefinite duration. However, it may be terminated upon (a) the resignation or termination of Fifth Third, (b) the adoption by the Board of Directors (or the Executive Committee) of Fifth Third of a resolution directing the termination and liquidation of the Trust or (c) a vote of 75 percent of the beneficial interests in the Trust to remove Fifth Third.

2. Fifth Third, the trustee of the Trust, is a regional bank headquartered in Cincinnati, Ohio. As of August 3, 1995, Fifth Third had over \$14 billion in assets and its trust department had over \$7 billion in assets under management. Fifth Third has legal title and sole investment discretion over all of the assets of the Trust and is permitted under the terms of the Trust Agreement to acquire new equity real estate investments, distribute income received to investing Plans and to maintain Trust records. Fifth Third represents that before investing Trust assets in a specific equity investment, it must determine whether the investment is expected to have a rate of return at least equal to or greater than comparable investments which do not use union labor.

For services rendered to the Trust, Fifth Third will receive the following annual compensation: \$15 per \$1,000 on the first \$5 million invested; \$10 per \$1,000 on the next \$10 million invested; \$5 per \$1,000 on the next \$15 million invested; and \$3 per million on the next \$25 million invested. According to the applicant, as to each Plan investing in the Trust, the total fees paid to Fifth Third will constitute no more than reasonable compensation within the meaning of section 408(b)(2) of the Act.³

3. There are currently five Plans participating in the Trust, none of which are sponsored by Fifth Third or any of its affiliates. These Plans are the IBEW Pension Plan, the Pipefitters and Mechanical Equipment Service Union Local 392 Pension Fund (the Pipefitters Pension Plan), the Ironworkers District Council for Southern Ohio and Vicinity Pension Fund (the Ironworkers Pension Plan), the Southwest Ohio District Council of Carpenters' Pension Fund (the Carpenters Pension Plan) and the Laborers International Union of North America Local 265 Pension Fund (the Laborers Pension Plan).

As the following table shows, each Plan investing in the Trust has total assets that are in excess of \$50 million.

³ The Department expresses no opinion herein on whether such fees will satisfy the terms and conditions of section 408(b)(2) of the Act.

Plan	Total assets	Valuation date	Plan	Total assets	Valuation date	Plan	Total assets	Valuation date
IBEW Pension Plan.	\$115,500,000	Mar. 31, 1996.	Iron-workers Pension Plan.	395,000,000	Jan. 31, 1996.	Laborers Pension Plan.	64,496,000	Mar. 31, 1996.
Pipefitters Pension Plan.	172,654,000	Mar. 31, 1996.	Carpenters Pension Plan.	132,696,000	Mar. 31, 1996.			

In addition, as of March 31, 1996, each Plan's investment in the Trust was reported as follows:

Plan	Value of trust investments	Percentage of trust assets	Percentage of plan assets
IBEW Pension Plan	\$3,588,796	28	3.1
Pipefitters Pension Plan	3,097,902	24	2.0
Ironworkers Pension Plan	2,686,711	21	0.7
Carpenters Pension Plan	2,441,064	19	1.8
Laborers Pension Plan	908,672	8	1.4
Total Assets	12,723,145

4. The Plans are not parties in interest with respect to each other within the meaning of section 3(14) of the Act nor do they share common participants. Investment decisions for the Plans are made by separate boards of trustees. The geographic jurisdictions for the Plans cover various counties that are primarily located in the States of Ohio, Indiana and Kentucky. Participants in the Plans are engaged in diverse trades ranging from electrical work to general construction labor. As of December 5, 1996, there were approximately 14,349 participants in all of the Plans investing in the Trust with the participant level ranging from 1,500 participants for the IBEW Pension Plan to 6,243 participants for the Ironworkers Pension Plan.

Plan	Number of participants
IBEW Pension Plan	1,500
Pipefitters Pension Plan	1,400
Ironworkers Pension Plan	6,243
Carpenters Pension Plan	3,655
Laborers Pension Plan	1,551
Total	14,349

5. CDG is a limited liability company maintaining its principal offices in Cincinnati, Ohio. CDG's members are Belvedere Corp., The Madison Realty Partnership, Towne/Center City LLC and Duke Realty Limited Partnership. These entities are commercial real estate developers from the Greater Cincinnati area. CDG was formed on March 24, 1995 for the purpose of developing a

210,000 square foot retail complex in downtown Cincinnati known as "Fountain Square West." Once developed, the Fountain Square West Project will include a three-story anchor retail store (the Lazarus Department Store), a two-story specialty retail center, an office tower and an underground parking garage. As discussed below, the Lazarus Department Store, the retail stores and the parking garage will be held by the Partnership. A portion of the ground comprising the Fountain Square West site, the related air rights, a building pad for the future development of an office building (including the office building) and the exclusive rights to 20 spaces in the underground parking garage will be held by Fifth Third.

6. The Partnership will be a limited partnership organized under the laws of the State of Ohio and it will maintain its principal office at 500 Carew Tower, Cincinnati, Ohio. The primary purposes of the Partnership are to develop, improve, own, manage and lease real estate. It is intended that the Partnership will constitute a real estate operating company.⁴ CDG will serve as the general partner of the Partnership and the Trust will serve as the sole limited partner.

To raise equity capital for the Partnership, CDG will make a capital contribution of approximately \$1.5 million. As for the Trust, Second Fiduciaries of the IBEW Pension Plan, the Pipefitters Pension Plan, the Carpenters Pension Plan and the Laborers Pension Plan have agreed to

make an aggregate capital contribution to the Partnership of up to \$7 million by purchasing additional units in the Trust.⁵ The Plans will contribute to the Partnership as follows:

⁴ According to the Partnership Agreement, the Partnership will function as a "real estate operating company" within the meaning of regulation section 29 CFR 2510.3-101(e). Accordingly, it is represented that transactions involving assets of the Partnership will not be deemed to involve plan assets and will not be subject to the prohibited

transaction provisions of the Act. The Department expresses no opinion in this proposed exemption on whether the Partnership will qualify as a real estate operating company.

⁵ It is represented that the Trust currently has approximately \$500,000 in liquid assets which is

available for investment in the Partnership. As a result, if less than \$6.5 million in units are subscribed for by the Plans, the Trust will combine those proceeds with its existing liquid assets to make the \$7 million investment in the Partnership.

Plan	Allocation percentages	Amount invested	Percentage of plan assets
IBEW Pension Plan	30.8	\$2,156,000	1.8
Pipefitters Pension Plan	30.8	2,156,000	1.2
Carpenters Pension Plan	30.8	2,156,000	1.6
Laborers Pension Plan	07.6	532,000	0.8
Total	7,000,000

Although the Second Fiduciaries of the Ironworkers Pension Plan have declined to purchase additional units in the Trust at this time, it is represented that this Plan will have a *pro rata* interest in the Trust that will include a portion of the Partnership interest.⁶ After the units are acquired, no Plan, including the Ironworkers Pension Plan, will have more than 5 percent of its assets invested in the Trust. In addition, the Trust will not be required to pay any unrelated business income tax in connection with the Partnership investment.

7. Aside from the capital contributions made by CDG and the Trust to the Partnership, the city of Cincinnati (the City) will grant financial incentives to the development of the Fountain Square West Project of up to \$22 million. These financial incentives consist of—

(a) *The City's Purchase of the Downtown Lazarus Department Store.* On October 19, 1995, the City agreed to purchase the downtown Lazarus Store location from Federated Department Stores, Inc. (Federated) for \$11,775,000. (The property was eventually

transferred to the City on January 4, 1996.) This acquisition provided funding which enabled Federated to enter into another lease agreement (the Anchor Tenant Lease) with CDG that would make a new Lazarus Department Store the anchor tenant for the Fountain Square West Project. Under the terms of the Anchor Tenant Lease, Federated must pay CDG \$9,675,000 for tenant improvements to the portion of the Fountain Square West Project leased by Federated. In addition, Federated must pay CDG an initial rental payment of \$2,100,000. Following CDG's assignment of the Anchor Tenant Lease to the Partnership, Federated will make the aforementioned rental payments to the Partnership.

(b) *The City's Issuance of Bonds (the City Bonds).* On May 15, 1996, the City issued bonds in the face amount of \$10,225,000. The proceeds of the City Bond issue were transferred by the City to CDG on May 16, 1996. Such proceeds will be given by CDG to the Partnership after CDG assigns its long-term ground lease with the City (the City Lease)⁷ to

⁷On October 19, 1995, the City and CDG entered into a written lease of the property comprising the Fountain Square West Project, including the air rights, for a basic term minimum total rental amount of \$10,225,000 plus certain "percentage rent." The City Lease provides that while the City Bonds are outstanding, the annual base rent will be equal to the City's annual repayment obligation on the City Bonds. That amount is \$827,567 (interest only) through 1998 and approximately \$1,115,000 per year until the City Bonds are repaid. All interest and principal due on the City Bonds are to be paid off in 2016, which is 20 years from the date of their issuance. After the City Bonds are repaid, the base rent under the City Lease will be \$1 per year.

In addition, during the period before the City Bonds are fully repaid (i.e., before 2016) the City Lease provides for additional annual rent of 3 percent of the gross rents received during the year by the Partnership in excess of \$3 million. Although no gross rents are projected during the initial 10 years of the Fountain Square West Project, after the City Bonds are fully paid, the City Lease will provide for annual rent of 3 percent of gross rents received by the Partnership during the year.

The term of the City Lease has not yet commenced but it is contingent upon whether an office building, to be located on the Fountain Square West site, is ever constructed. If there is no office building constructed within 45 years, the City Lease will expire, provided, however, that CDG will have two additional 10 year options to extend such lease, thereby making the maximum term of the City Lease 65 years. Assuming the office building is constructed within 45 years, the City Lease will

the Partnership. The City Bonds will be used as a funding source for the Fountain Square West Project and they must be repaid to the City with interest over a period of twenty years. To repay the City, CDG has negotiated a property tax abatement on the Fountain Square West Project during the period that the City Bonds are outstanding. It is intended that the abatement will reduce the Partnership's cash outflows that would be required to pay the property taxes.

8. Thus, based upon the foregoing, the Plans and CDG will make a total investment in the Partnership of \$8.5 million. As additional sources of capital, the Partnership will receive the \$10,225,000 in proceeds from the City Bonds that have been issued by the City and the \$5.5 million in proceeds from the Partnership's air rights lease (the Air Rights Lease)⁸ with Fifth Third (see also Representation 13). As a result, the total amount available to the Partnership for construction will be \$24,225,000. It is represented that these construction funds will be greater than the budgeted construction costs of \$24,045,000, which include a "contingency cushion" of \$3.5 million.

9. If, however, construction costs exceed the budgeted funds available to CDG for the construction of the Fountain Square West Project, it is represented that there are several safeguards in place which may obviate

expire after a term of 65 years, provided, however, that CDG has three, additional 10 year options to extend the lease, thereby making the maximum term of the City Lease 95 years. Aside from paying rent, CDG is required under the City Lease to pay all utilities and real estate taxes with respect to the property.

⁸The Air Rights Lease was entered into by and between CDG and Fifth Third on September 7, 1995. It permits CDG to sublease a portion of the ground comprising the Fountain Square West site, related air rights and exclusive rights to 20 underground parking spaces to Fifth Third for a lump sum rental of \$3.5 million. Although the initial term of the Air Rights Lease is 45 years, the lease has not yet commenced, it will coincide with the term of the City Lease and is similarly contingent on whether Fifth Third ever has an office building constructed on the subject property. Assuming the office building is constructed, the initial term of the Air Rights Lease will be automatically extended to 65 years. Afterwards, the Air Rights Lease may be extended by the parties for three successive 10 year periods, thereby making the maximum lease term 95 years.

⁶The Department notes that section 404(a)(1) of the Act requires, among other things, that a fiduciary of a plan must act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries. In order to act prudently in making investment decisions, a plan fiduciary must consider, among other factors, the availability, riskiness and potential return of alternative investments for the plan. Investing the Trust's assets in the Partnership would not satisfy section 404(a)(1) of the Act if such investment provided the Trust with less return in comparison to risk than comparable investments available to the Trust, or if investment in the Partnership involved a greater risk to the security of the Trust's assets than other investments offering a similar return.

The Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives. Thus, in deciding whether and to what extent to invest in the Partnership, SSGA must consider only factors relating to the interests of the Trust. A decision to invest in the Partnership may not be influenced by a desire to stimulate the real estate industry and generate employment by union labor unless the investment, when judged solely on the basis of its economic value to the Trust would be equal or superior to alternative investments available to the Trust.

the Trust's responsibility for any cost overruns. In this regard, CDG has posted a letter of credit with the City in the amount of \$500,000 to assure the City that CDG will perform its obligations under the City Lease including the Partnership's obligation to construct the Fountain Square West Project. In addition, Warm Brothers Construction Company (Warm) and Duke Realty Investments, Inc. (Duke) have provided the City with guarantees with respect to the completion of the Fountain Square West Project.⁹ Further, the Partnership Agreement requires CDG to provide additional capital in excess of \$24,045,000. CDG may exercise this option by contributing additional capital or by selling subordinate equity in the Partnership to a third party. Such equity will not affect the Trust's preferred return or percentage of cash flow distributions made to the Trust described in Representation 10. Only if the foregoing safeguards fail to provide sufficient financing, will the Trust ever be confronted with the decision on whether to make additional contributions to the Partnership or to remove CDG as the general partner.

After construction of the Fountain Square West Project is completed, if CDG determines that additional capital is needed for its operations, both it and the Trust may make additional contributions in accordance with their respective cash flow allocations as set forth below in Representation 10. If the Trust declines to make its share of the contribution, CDG may lend the amount requested to the Partnership.

10. The Partnership Agreement states that cash flow participation¹⁰ will be as follows and will be paid to the extent available in the following order of priority:

- o *First Tier:* Payment of interest and principal on any loan from CDG.
- o *Second Tier:* Payment of a 9 percent preferred return to the Trust.
- o *Third Tier:* Payment of a 9 percent preferred return to the CDG.¹¹

⁹ Although financial information for Warm is not available, it is represented that as of November 1996, Duke had gross revenues of over \$150 million, net operating income of over \$110 million, net income of over \$42 million, free and clear cash flow in excess of \$10 million, a stock capitalization of over \$1 billion and a total market value in excess of \$1.4 billion.

¹⁰ The Partnership Agreement defines cash flow for any fiscal year as all revenues relating to such fiscal year received by the Partnership from the operation of the Fountain Square West Project less all Partnership cash expenditures of any kind with respect to such fiscal year.

¹¹ The Partnership Agreement states that the 9 percent preferred return for both the Trust and CDG is calculated on the basis of capital contributions, less extraordinary cash flow distributions and liquidating distributions.

o *Fourth Tier:* Any remaining cash flow is distributed 42.5 percent to the Trust and 57.5 percent to CDG.¹²

The applicant represents that the cash flow participations by the Trust and CDG were determined on the basis of arm's length negotiations between the parties over a period of several months. The applicant also represents that the percentages reflect many factors, including (a) the efforts by CDG to negotiate the City Lease (along with financial incentives from the City), (b) the efforts of CDG to negotiate the Anchor Tenant Lease and the assignment of that lease to the Partnership, (c) the efforts by CDG to negotiate the Air Rights Lease with Fifth Third and the assignment of that lease to the Partnership, (d) the responsibility of CDG for cost overruns during construction and for any losses of the Partnership, (e) the capital contribution of CDG, and (f) the preferred return provided to the Trust.

11. With respect to investments in the Partnership, it is represented that the Trust and SSGA will receive the following information from CDG:

(a) Within 120 days after the end of the Partnership's fiscal year, an unaudited annual report containing (1) a balance sheet and statements of income, Partners' equity, changes in financial position and cash flow for the year then ended; (2) a report of the activities of the Partnership during the period covered by the report; and (3) an itemization of any payments or fees made to CDG or any related party or affiliate.

(b) Within 60 days of the end of each year, an appraisal report prepared by a qualified, independent appraiser, of each property held by the Partnership.

(c) Periodically (but not less frequently than quarterly), operating and development budgets of the Partnership as well as unaudited operations and financial reports.

In addition, Fifth Third will furnish information with respect to the Partnership to the Second Fiduciaries of Plans investing in the Trust through annual audited financial statements of the Trust, prepared by independent, certified public accountants and in quarterly communications setting forth Partnership financial data. SSGA will also receive copies of this information.

12. The Partnership may be dissolved upon the earlier of any of the following events: (a) The disposition of all or substantially all of the assets of the Partnership, as determined by CDG in

¹² Remaining cash flow will be calculated twice a year as of June 30 and September 30 and will be distributed no later than 90 days after such dates.

its sole discretion, and the receipt of the final payment of the purchase price for the retail improvements comprising the Fountain Square West Project that are owned by the Partnership; (b) the unanimous agreement of CDG and the Trust to terminate and dissolve the Partnership; (c) the withdrawal, expulsion, adjudication of bankruptcy, insolvency, dissolution or other cessation of CDG to exist as a legal entity unless a substitute general partner and limited partner elect to continue the business of the Partnership; or (d) December 31, 2095 which is the expiration of the Partnership.

Upon liquidation, the Partnership Agreement provides for the making of distributions as follows:

- o *First:* An amount necessary to satisfy any reserve for contingent liabilities.
- o *Second:* Payment of interest and principal on any loan from CDG.
- o *Third:* Payment to the Trust for any unpaid cumulative preferred return.
- o *Fourth:* Payment to CDG for any unpaid cumulative paid return.
- o *Fifth:* Payment to the Trust and CDG in the ratio of their respective capital contributions up to the amount of their respective capital contributions.
- o *Sixth:* Balance to be distributed 42.5 percent to the Trust and 57.5 percent to CDG.

The procedure for making the liquidating distributions is reflected in a report of the Fountain Square West Project that was prepared by Carey Leggett Realty Advisors (CLRA) of Columbus, Ohio on January 15, 1996. At the time of liquidation, CLRA assumes that the sales price for the Fountain Square West Project will be \$16,989,000 in the year 2008. Of that amount, the Trust will receive \$10,607,825 (or 62 percent of the sale proceeds). This amount consists of \$7 million of returned capital stemming from the Trust's initial investment and 42.5 percent of the balance after CDG receives its return of capital.

13. As stated above, under the proposed development plan for the Fountain Square West Project, CDG will assign the Anchor Tenant Lease, the City Lease and the Air Rights Lease to the Partnership. The Partnership will construct and own the improvements on that portion of the property that will house the Lazarus Department Store, the specialty retail center and the underground parking garage. After construction, the Partnership will manage the retail portion of the Fountain Square West Project.

The proposed development plan will permit Fifth Third to build and then own the office tower that is

contemplated for construction on the Fountain Square West site. As stated previously, in accordance with the provisions of the Air Rights Lease, Fifth Third will make a lump sum payment to the Partnership of \$3.5 million to sublease a portion of the ground and related air rights which will be leased by the Partnership from the City as well as for exclusive rights to 20 parking spaces at Fountain Square West. In addition, Fifth Third will pay the Partnership \$2 million in order that the Partnership may hire a construction company (possibly, an affiliate of CDG) for the design and construction of the building pad to support the office tower. The total \$5.5 million cost for the air rights, building pad and parking spaces will be paid from Fifth Third's corporate assets and none of the cost or the future cost of constructing the office tower will come from the Trust.¹³

14. The applicant has requested an administrative exemption from the Department because it believes the use of the assets of the Trust in a manner which benefits Fifth Third constitutes a violation of the Act. Specifically, the applicant represents that the investment by the Trust in the Partnership will not only enable the Partnership to develop the retail portion of the Fountain Square West Project, but it will also allow Fifth Third to cause the office tower portion of the Project to be constructed, thereby enhancing the value of that portion of the Project.

15. Fifth Third has appointed SSGA of Boston, Massachusetts to serve as the independent fiduciary for the Trust with respect to the initial, and possibly, future equity investments made by the Trust to the Partnership. In this regard, SSGA will monitor and protect the rights of the Trust and the Plans investing therein to the extent that any actions of Fifth Third may impact adversely on the Partnership. Specifically, SSGA will determine whether it is in the best interest of the Trust and the Plans participating therein to make the initial and subsequent investments in the Partnership. Also included among its duties, SSGA will determine whether it is appropriate for

¹³ Under the Partnership Agreement, the \$3.5 million received pursuant to the Air Rights Lease is to be treated as extraordinary cash flow and allocated between CDG and the Trust in accordance with their respective cash flow allocations. However, to the extent that the proceeds are needed for construction purposes, such funds will not be distributed as extraordinary cash flow. As for the \$2 million payment for the building pad, it is represented that such amount was specifically earmarked and used for construction purposes and that there is no provision in the Partnership Agreement that would permit the distribution of any portion of that payment to the Trust and CDG.

the Trust (a) to assign, transfer, pledge or otherwise encumber its interest in the Partnership provided the Trust obtains written consent from CDG; (b) to withdraw as a limited partner from the Partnership or to withdraw its capital from such Partnership provided the Trust obtains the written consent of CDG; (c) to consent to the sale by CDG of substantially all of the assets of the Partnership or the transfer by CDG of its interest in the Partnership; (d) to contribute to the Partnership the amount necessary to complete construction of the Fountain Square West Project and to require that CDG release control of the Partnership to an entity designated by the Trust, if CDG fails to provide for construction cost overruns; (e) to elect to continue the Partnership by appointing a successor general partner; and whether (f) the entity designated by the Trust to serve as general partner is appropriate upon the occurrence of (d) or (e).

16. Mr. H. Peter Norstrand, Vice President of SSGA, has agreed to undertake the duties of the independent fiduciary. Mr. Norstrand represents that he has over 25 years of experience in commercial real estate as well as considerable experience as a fiduciary under the Act. Both SSGA and Mr. Norstrand represent that they understand their fiduciary obligations and acknowledge that they are acting as a fiduciary with respect to the Trust. Further, neither Mr. Norstrand nor SSGA are related in any way to Fifth Third, CDG or any of their principals. Although SSGA is compensated by Fifth Third, it has derived approximately 0.00005 percent of its gross revenues from Fifth Third for services rendered to date. It is anticipated that for any year that SSGA is retained as the independent fiduciary for the Trust its compensation for these services will be substantially below one percent of its gross revenues.

17. SSGA represents that it has—

(a) Reviewed all relevant documents concerning the Fountain Square West Project, including but not limited to, the lease and sublease agreements, service agreements, guaranties, the Partnership Agreement and the exemption application.

(b) Obtained and reviewed independent economic and market reports on the Cincinnati economy and real estate markets. Among its findings, SSGA observes that forecasts for the City are uniformly consistent and call for slow but steady growth.

(c) Performed a financial analysis of the Fountain Square West Project by reviewing the January 1996 investment summary prepared for Fifth Third by

CLRA. SSGA states that it has independently replicated CLRA's spreadsheets and tested the performance of the investment under various alternative assumptions as well as returns for the City Lease. SSGA has concluded that the assumptions used by CLRA are reasonable and in some cases, conservative.

(d) Reviewed the most recent quarterly and annual reports for Federated whose Lazarus Department Store is expected to anchor the Fountain Square West Project, as well as investment commentary on Federated as published by Bloomberg. SSGA notes that Federated has a headquarters operation in the City and states that the annual rental obligation on the Lazarus Department Store will represent a small fraction of Federated's annual gross income.

(e) Conducted, through Mr. Norstrand, personal interviews with representatives of Fifth Third, CLRA and the principals of CDG and toured the development site and environs. SSGA has concluded that CDG is well-suited to develop and manage the Fountain Square West Project.

18. In addition, SSGA has analyzed the risk of the Fountain Square West Project in the context of "macro" and "micro" levels. On the "macro" level, SSGA has examined the development team who will construct, lease and manage the Fountain Square West Project. Further, SSGA has examined the site on which the Fountain Square West Project will be located and states that the property is perfectly suited for its intended use. Finally, SSGA has considered pricing. In this regard, SSGA has examined "internal rates of return"¹⁴ and has forecasted returns ranging between 11 percent and 14 percent for the Trust's proposed investment. These projected returns reflect the present value of future streams of income which have been based upon such factors as actual market rents negotiated and assumptions of what future market rents will be. In contrast, SSGA notes that the returns forecasted for the Trust by CLRA range from 9 percent to 14 percent.¹⁵

¹⁴ The internal rate of return is the rate of return on invested capital that is generated or capable of being generated within an investment during the period of ownership. The internal rate of return is the rate of profit (or loss) or a measure of performance. It is calculated by finding the discount rate that equates the present value of future cash flows to the cost of the investment. The calculation of the internal rate of return takes into account the amount of the initial investment, cash flows during the life of the investment and the proceeds from the disposition of the investment.

¹⁵ More specifically, SSGA states that it used a three-step process to analyze the potential return on

Overall, SSGA believes that the range of expected returns for the investment are comparable to the range of returns that other investors might expect for a similar transaction. Moreover, because much of the risk has been taken out of the proposed Trust investment (e.g., the City has made a \$22 million financial commitment to the Project and the Anchor Tenant Lease has been closed), SSGA believes that any investor would find these returns appropriate regardless of the collateral benefits (e.g., the creation of jobs).¹⁶

SSGA does not view the disproportionate allocation of cash flow between CDG and the Trust as problematic. SSGA states that because CDG is not only committing to contribute capital and to bear the responsibility for cost overruns, it has also mitigated much of the risks of the investment by negotiating the Anchor Tenant Lease as well as entering into arrangements with the City. These actions, SSGA believes, would seem to justify the allocation of the cash flow.

On the micro-level, SSGA states that the major risk factors it has examined include (a) the creditworthiness of Federated and (b) the ability of the Partnership to lease certain "speculative" space. On the issue of creditworthiness, SSGA believes that Federated will perform under its lease in accordance with its terms. According to SSGA, the Fountain Square West Project will be highly visible involving substantial community involvement. With a headquarters operation within sight of the Fountain Square West Project, SSGA represents that Federated will have the necessary resources to ensure the success of its operation. SSGA also notes that since Federated has emerged from its reorganization as a dominant retailer, its rental

investment. First, SSGA replicated the ten year cash flow forecasts prepared by CLRA. Second, SSGA tested the returns under various alternative assumptions (e.g., an assumption of lower market rents or higher tenant improvement costs). Third, SSGA calculated the internal rate of return for the Trust based on the Partnership distribution protocol during the entire term of the investment. This calculation, according to SSGA, includes an assumption of a sale of the Fountain Square West Project within ten years based on an "exit valuation." The exit valuation is determined by applying a capitalization rate to the eleventh year forecasted net operating income (less assumed selling costs).

¹⁶ Since a major portion of the income derived by the Limited Partner is generated by the Anchor Tenant Lease, SSGA states that the rate of return is dependent on such factors as the division of partnership cash flow, the timing of the initial investment, market rent, lease-up assumptions regarding the balance of the retail space and exit capitalization assumptions. Thus, in SSGA's view, the generation of employment stemming from the Fountain Square West Project will not impact on the Trust's internal rate of return.

obligations at Fountain Square West will represent a small fraction of Federated's gross revenues.

19. With respect to the ability of the Partnership to lease 45,000 square feet of speculative space, SSGA represents that several factors suggest that Fountain Square West will be leased substantially as forecast. In this regard, SSGA states that the speculative space will represent less than 3 percent of the downtown inventory and that forecasted rents will be comparable to rents currently being achieved in the market. In addition, SSGA asserts that the space will afford a retailer the opportunity to be in a new facility that is in close proximity to a popular anchor store having the latest features in storefront design. Further, SSGA notes that the possibility of an existing store presently on the complex moving to an adjacent parcel and the likelihood that Fifth Third will develop and occupy the office tower will strengthen the site as a retail core and provide an additional inducement to a prospective retailer.

20. SSGA has evaluated how the terms of the proposed transaction will compare with the terms of similar transactions between unrelated parties. SSGA notes that the Fountain Square West Project is extremely unique in the following respects: (a) In terms of City commitment, SSGA explains that the City will be making a major financial commitment to the downtown retail core at a time when most American municipalities are cutting back; (b) in terms of location, SSGA observes that few American cities have such an appropriate site available for development; (c) in terms of risk, SSGA believes that the rate of return to the Trust relative to investment risk is appropriate; and (d) in terms of the development team, SSGA represents that the team is of high caliber. In conclusion, SSGA states that the terms of the Fountain Square West Project are comparable to the terms that other investors would accept if they were unrelated parties.

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

(a) Each Plan investing in the Trust will have total assets that are in excess of \$50 million.

(b) No Plan that purchases units in the Trust for purposes of allowing the Trust to invest in the Partnership will have, immediately after the purchase of such units, more than 5 percent of its assets invested in the Trust.

(c) The decision to purchase additional units in the Trust that will allow SSGA to make the initial and any

subsequent equity contributions to the Partnership, will be made by a Second Fiduciary which is independent of Fifth Third and its affiliates and which is not SSGA.

(d) As independent fiduciary for the Trust, SSGA will approve and monitor the Trust's investment in the Partnership.

(e) At the time the Partnership investment is made, the terms of the transaction will be at least as favorable to each Plan participating in the Trust as those obtainable in an arm's length transaction with an unrelated party.

(f) SSGA and the Second Fiduciary of each Plan participating in the Trust will receive initial and ongoing disclosures concerning the Partnership.

(g) As to each Plan participating in the Trust, the total fees paid to Fifth Third will constitute no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

Notice to Interested Persons

Notice of the proposed exemption will be given to the SSGA as well as the Second Fiduciaries of Plans investing in the Trust within 10 days of the publication of the notice of proposed exemption in the Federal Register. Notice will be provided to SSGA and each Second Fiduciary by first class mail. Notice will be provided to active participants in the Plans by posting at local union halls at the locations designated for member notifications. The notice will include a copy of the notice of proposed exemption as published in the Federal Register as well as a supplemental statement, as required, pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on and/or to request a hearing. Retirees in the Plans will be mailed a statement which will include a toll-free telephone number such participants may call if they wish to obtain a copy of the proposed exemption. Comments and requests for a public hearing are due within 40 days of the publication of the notice of proposed exemption in the Federal Register.

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

United States Trust Company of New York and Certain of Its Affiliates
Located in New York, NY

[Application Nos. D-10234 and D-10235]

Proposed Exemption

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

and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Proposed Exemption for In-Kind Transfers of Assets

If the exemption is granted, the restrictions of section 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply, effective as of May 31, 1996, to the in-kind transfer to any diversified open-end investment company (the Fund or Funds) registered under the Investment Company Act of 1940 (the ICA) to which the United States Trust Company of New York or any of its affiliates (collectively, US Trust) serves as investment adviser and may provide other services (i.e. "Secondary Services" as defined in Section III(h) below), of the assets of various employee benefit plans (the Plan or Plans) that are either held in certain collective investment funds (the CIF or CIFs) maintained by US Trust or otherwise held by US Trust as trustee, investment manager, or in any other capacity as fiduciary on behalf of the Plans, in exchange for shares of such Funds; provided that 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 US Trust, as defined in Section III(g) 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 Section II(f) below.

(b) On the basis of the information described in Section II(f) below, the Second Fiduciary authorizes in writing the in-kind transfer of CIF or Plan assets in exchange for shares of the Funds, the investment of such assets in corresponding portfolios of the Funds, and the fees received by US Trust in connection with its services to the Fund. Such authorization by the Second Fiduciary is 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 CIF or Plan assets 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 US Trust in any capacities as fiduciary on behalf of such Plans are transferred in-kind to the

Funds in exchange for shares of such Funds. Notwithstanding the foregoing, solely for purposes of this paragraph (d), assets of the 401(k) Plan and ESOP of United States Trust Company of New York and Affiliated Companies (the UST DC Plan) held by US Trust as trustee and allocated to the U.S. Government Short/Intermediate Term Investment Fund shall be treated as assets held in a CIF.

(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) With respect to any in-kind transfer of CIF assets to a Fund, each Plan receives shares of a Fund which have a total net asset value that is equal to the value of the Plan's pro rata share of the assets of the corresponding CIF on the date of the transfer, based on the current market value of the CIF's assets, as determined in a single valuation performed in the same manner as of the close of the same business day with respect to all such Plans participating in the transaction on such day, using independent sources in accordance with the procedures set forth in Rule 17a-7(b) under the ICA (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 prior to the in-kind transfers, determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of US Trust.

(g) (1) Not later than thirty (30) days after completion of each in-kind transfer of CIF or Plan assets in exchange for shares of the Funds (except for certain transactions described in paragraph (g)(2) below), US Trust sends by regular mail to the Second Fiduciary, a written confirmation containing:

(i) 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 ICA;

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

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

(2) For the in-kind transfer of CIF assets to the Funds which occurred on June 28 and July 31, 1996, the written confirmations described above in

paragraph (g)(1) were made by US Trust to all Second Fiduciaries of the appropriate Plans by October 15, 1996.

(h) For all in-kind transfers of CIF assets, US Trust sends by regular mail to the Second Fiduciary, no later than ninety (90) days after completion of the asset transfer made in exchange for shares of the Funds, a written confirmation containing:

(1) the number of CIF units held by each affected Plan immediately before the in-kind transfer, 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 in-kind transfer, 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), and (q) of Section II below are satisfied.

Section II—Proposed 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) (A) through (F) of the Code shall not apply, effective as of June 30, 1996, to the receipt of fees by US Trust from the Funds for acting as the investment adviser for the Funds as well as for acting as the custodian, transfer agent, sub-administrator or for providing other "Secondary Services" (as defined in Section III(h) below) to the Funds in connection with the investment in the Funds by Plans for which US Trust acts as a fiduciary (Client Plans), other than Plans established and maintained by US Trust for the benefit of its employees and their beneficiaries (Bank Plans), provided that the following conditions are met:

(a) No sales commissions are paid by the Client 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 Client Plans for shares in the Funds is the net asset value per share, as defined in Section III(e), 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 US Trust nor any affiliate (including officers, directors and other persons, as defined in Section III(b) below) purchases from or sells to the Client Plans any shares of the Funds.

(d) For each Client Plan, the combined total of all fees received by US Trust for the provision of services to the Client Plan, and in connection with the provision of services to any of the Funds in which the Plan may invest, are not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(e) US Trust or an affiliate does not receive any fees payable, pursuant to Rule 12b-1 under the ICA (the 12b-1 Fees) in connection with the transactions.

(f) The Second Fiduciary who is acting on behalf of a Client Plan receives in advance of the investment by a Plan in any of the Funds a full and detailed written disclosure of information concerning such Fund including, but not limited to:

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

(2) a statement describing the fees for investment management, investment advisory, or other similar services, any fees for Secondary Services, as defined in Section III(h) below, and all other fees to be charged to or paid by the Client Plan and by such Funds to US Trust, including the nature and extent of any differential between the rates of such fees;

(3) the reasons why US Trust may consider such investment to be appropriate for the Client Plan;

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

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

(g) On the basis of the information described in Section II(f) above, the Second Fiduciary authorizes in writing the investment of assets of the Client Plan in shares of the Fund and the fees to be paid to US Trust in connection with its services to the Funds. The authorization made by the Second Fiduciary must be consistent with the duties, responsibilities and obligations imposed on fiduciaries by Part 4 of Title I of the Act.

(h) The authorization described above in Section II(g) is terminable at will by the Second Fiduciary of a Client Plan, without penalty to such Plan, upon receipt by US Trust of written notice of termination. Such termination will be effected by US Trust selling the shares of the Fund held by the affected Client Plan within one business day following

receipt by US Trust of the termination form (the Termination Form), as defined in Section III(i) below, or any other written notice of termination; provided that if, due to circumstances beyond the control of US Trust, the sale cannot be executed within one business day, US Trust shall have one additional business day to complete such sale.

(i) Each Client Plan receives a credit, either through cash or, if applicable, the purchase of additional shares of the Funds, pursuant to an annual election, which may be revoked at any time, made by the Client Plan, of such Plan's proportionate share of all investment advisory fees charged to the Funds by US Trust, including any investment advisory fees paid by US Trust to third party sub-advisers, within not more than one business day after the receipt of such fees by US Trust. The crediting of all such fees to the Client Plans by US Trust is audited by an independent accounting firm on at least an annual basis to verify the proper crediting of the fees to each Client Plan.

(j) In the event of an increase in the rate of any fees paid by the Funds to US Trust regarding any investment management services, investment advisory services, or fees for similar services that US Trust provides to the Funds over an existing rate for such services that had been authorized by a Second Fiduciary, in accordance with Section II(g), US Trust will, at least thirty (30) days in advance of the implementation of such increase, provide a written notice (separate from the Fund prospectus) to the Second Fiduciary of each of the Client Plans invested in a Fund which is increasing such fees.

(k) In the event of an addition of a Secondary Service, as defined in Section III(h) below, provided by US Trust to the Fund for which a fee is charged or an increase in the rate of any fee paid by the Funds to US Trust for any Secondary Service 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 US Trust for such fee over an existing rate for such Secondary Service which had been authorized by the Second Fiduciary of a Client Plan, in accordance with Section II(g), US Trust will at least thirty (30) days in advance of the implementation of such additional service for which a fee is charged or fee increase, provide a written notice (separate from the Fund prospectus) to the Second Fiduciary of each of the Client 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 Section III(i) below.

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

(1) The authorization is terminable at will by any of the Client Plans, without penalty to such Plans. Such termination will be effected by US Trust selling the shares of the Fund held by the Client Plans requesting termination within one business day following receipt by US Trust, 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 US Trust, the sale of shares of such Client Plans cannot be executed within one business day, US Trust shall have one additional business day to complete such sale; and

(2) Failure by the Second Fiduciary to return the Termination Form on behalf of a Client 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 Section II(g), of US Trust to engage in the transactions on behalf of such Client Plan.

(m) 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 this paragraph (m), sooner than six months after a Termination Form is supplied pursuant to Section II(k) and (l), except to the extent required by such paragraphs to disclose an additional Secondary Service for which a fee is charged or an increase in fees.

(n)(1) With respect to each of the Funds in which a Client Plan invests, US Trust 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 US Trust; and

(2) With respect to each of the Funds in which a Client Plan invests, in the event such Fund places brokerage transactions with US Trust, US Trust 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 US Trust 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 US Trust;

(C) the average brokerage commissions per share, expressed as cents per share, paid to US Trust 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 US Trust.

(o) All dealings between the Client 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.

(p) US Trust maintains for a period of six (6) years the records necessary to enable the persons, as described in Section II(q) below, to determine whether the conditions of the exemption have been met, except that:

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

(2) no party in interest, other than US Trust, 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 Section II(q) below.

(q)(1) Except as provided in Section II(q)(2) and notwithstanding any provisions of Section 504(a)(2) and (b) of the Act, the records referred to in Section II(p) 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 or the Internal Revenue Service;

(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 (q)(1)(ii) and (q)(1)(iii) of Section II shall be authorized to examine trade secrets of US Trust, or commercial or financial information which is privileged or confidential.

Section III—Definitions

For purposes of this proposed exemption,

(a) The term "US Trust" means the United States Trust Company of New York and an affiliate, as defined in Section III(b)(1).

(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 ICA for which US Trust 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 US Trust. For purposes of this proposed

exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to US Trust if:

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

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

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

With the exception of the Bank Plans, if an officer, director, partner, or employee of US Trust (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/advisor, (ii) the approval of any purchase or sale by the Plan of shares of the Funds, and (iii) the approval of any change of fees charged to or paid by the Plan, in connection with any of the transactions described in sections I and II above, then Section III(g)(2) 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 US Trust to the Funds, including but not limited to custodial, accounting, administrative, or any other service. However, for purposes of Section II(k), the term "Secondary Service" does not include any brokerage services provided by US Trust to the Funds.

(i) The term "Termination Form," means the form supplied to the Second Fiduciary, at the times specified in paragraphs (k), (l), and (m) of Section II above, which expressly provides an election to the Second Fiduciary to terminate on behalf of the Plans the authorization, described in Section II(g). Such Termination Form may be used at will by the Second Fiduciary to terminate such authorization without penalty to the Plans and to notify US Trust in writing to effect such

termination by selling the shares of the Fund held by the Plans requesting termination within one business day following receipt by US Trust, 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 US Trust, the sale cannot be executed within one business day, US Trust shall have one additional business day to complete such sale.

(j) The term "UST DB Plan" means the Employees' Retirement Plan of United States Trust Company of New York and Affiliated Companies.

(k) The term "UST DC Plan" means the 401(k) Plan and ESOP of United States Trust Company of New York and Affiliated Companies.

(l) The term "Bank Plan" means the UST DB Plan and the UST DC Plan.

EFFECTIVE DATE: This proposed exemption, if granted, will be effective as of May 31, 1996, for transactions described in Section I, and June 30, 1996, for transactions described in Section II.

Summary of Facts and Representations

1. US Trust. UST New York, a wholly-owned subsidiary of U.S. Trust Corporation, is a New York-chartered bank and trust company. UST New York provides trust and banking services to individuals, corporation, and institutions both nationally and internationally. UST New York serves as trustee, investment manager, and/or custodian to the Plans described below and as investment adviser to certain of the Funds. As of December 31, 1995, UST New York had total assets under management of approximately \$40 billion.

United States Trust Company of the Pacific Northwest (UST Pacific) is a limited purpose non-depository trust company chartered in Oregon and is also a subsidiary of U.S. Trust Corporation. UST Pacific serves as investment adviser to certain of the Funds.

Other Affiliates of UST New York that may offer shares of the Funds to their fiduciary customers, but which did not have customer assets invested in the converting CIFs, are included herein solely with respect to the fee rebate and "negative consent" procedure described below for future fee changes. These entities include certain national banks, such as U.S. Trust Company of California, N.A., and U.S. Trust Company of Texas, N.A., as well as certain state-chartered banks, such as U.S. Trust Company of Connecticut, U.S. Trust Company of Florida Savings

Bank, and U.S. Trust Company of New Jersey.

2. The Plans. The Plans (i.e. the Client Plans and the Bank Plans) presently consist of retirement plans qualified under section 401(a) of the Code for which US Trust serves as a trustee or investment fiduciary. These Plans are considered "pension plans" under section 3(2) of the Act. However, US Trust requests that the proposed exemption apply to any "employee benefit plan", within the meaning of section 3(3) of the Act, and to any "plan" within the meaning of section 4975(e)(1) of the Code (including IRAs), and not solely to qualified plans under Code section 401(a). Currently, UST New York serves as trustee, investment manager, and/or custodian of approximately 250 Plans. As of September 30, 1995, UST New York had approximately \$800 million in Plan assets under management, of which approximately \$675 million represented assets invested in the CIFs.

The Plans include two qualified retirement plans sponsored by US Trust (collectively, the Bank Plans), which are:

(i) The Employees' Retirement Plan of United States Trust Company of New York and Affiliated Companies (the UST DB Plan); and

(ii) The 401(k) Plan and ESOP of United States Trust Company of New York and Affiliated Companies (the UST DC Plan).

Assets of the Bank Plans represent approximately half of the assets of the CIFs described herein.

The applicant states that Actuarial Sciences Associates, Inc., a fiduciary that is independent of US Trust, was appointed to act as the Second Fiduciary for the Bank Plans in connection with the determination made by such Plans to participate in the conversion of the CIFs to the Funds (as discussed below).

In addition, the applicant states that the Client Plans participated in the conversion of the CIFs to the Funds based solely upon decisions made in each case by a Plan fiduciary independent of US Trust (collectively, the Second Fiduciaries). The applicant represents that, following the initial CIF conversions, decisions to participate in any future CIF conversions will also be made on behalf of each Client Plan by a Second Fiduciary (as discussed more fully below), although the specific Client Plans that may be involved have not been identified at the present time.

3. The CIFs. The CIFs comprised the individual portfolios of the United States Trust Company of New York Pooled Pension and Profit Sharing Trust. However, for purposes of the

proposed exemption, the CIFs are deemed to have included a short-term investment fund (identified below as "the Government Fund") that was not structured as a commingled fund but as a separate fund that formed a part of, and was offered as an investment option under, the UST DC Plan.

Specifically, the CIFs were as follows: (i) the Equity Portfolio; (ii) the Fixed Income Portfolio; (iii) the International Portfolio; (iv) the Short-term Fixed Income Portfolio; and (v) the U.S. Government Short/Intermediate Term Fund (i.e. the Government Fund).

As a result of the conversions, each of these CIFs now correspond to one of the Funds described below. However, prior to the initial CIF conversions on May 31, 1996, UST New York determined that approximately 50 percent of the UST DB Plan's assets allocated to the Equity Portfolio CIF would be reallocated to three different domestic equity Funds with certain narrower investment objectives. These Funds, and the percentage of the UST DB Plan's assets that were allocated to each Fund, were: (i) The Early Life Cycle (or "Small Cap") Portfolio (10 percent); (ii) the Optimum Growth Portfolio (20 percent); and (iii) the Equity Value Portfolio (20 percent).

In order to accomplish this result, the applicant states that prior to the conversions US Trust created three new domestic equity CIFs with investment objectives corresponding directly to the objectives of the three proposed Equity Funds. US Trust then transferred to the new CIFs the relevant percentage of the UST DB Plan's assets that were formerly invested in the Equity Portfolio CIF. The new CIFs were: (i) the Early Life Cycle CIF; (ii) the Optimum Growth CIF; and (iii) the Equity Value CIF (collectively, the New CIFs). The applicant states that a pro rata share of each of the underlying securities held by the Equity Portfolio CIF were reallocated to the New CIFs by UST New York in accord with its authority as trustee of the CIFs. No assets were reallocated selectively or disproportionately. The creation of the New CIFs allowed US Trust to accomplish the conversions by a direct, one-to-one exchange of assets between each CIF and a Fund with corresponding investment objectives.

4. The Funds. The Funds are certain portfolios of the following three similarly named but separately registered investment companies: (i) The Excelsior Institutional Trust; (ii) the Excelsior Funds, Inc.; and (iii) the Excelsior Funds. All of the Funds are described further below. However, US Trust requests that the exemption apply prospectively to any similar Fund in

which a Plan invests where US Trust provides investment advisory services and certain Secondary Services. In this regard, US Trust states that all future Funds to which US Trust serves as an investment adviser will assume similar structures and that Plan investments therein will meet all of the terms and conditions of the exemption.

The Excelsior Institutional Trust (the Institutional Funds) is an open-end, diversified management investment company registered under the ICA. Currently, the Institutional Funds comprise the following portfolios: (i) The Equity Fund; (ii) the Income Fund; (iii) the Total Return Bond Fund; (iv) the Bond Index Fund; (v) the Balanced Fund; (vi) the Equity Growth Fund; and (vii) the International Equity Fund.

UST New York serves as investment adviser to the first three of the foregoing Institutional Funds and as sub-adviser to the fourth. UST Pacific serves as investment adviser to the remaining three Institutional Funds. Various parties unrelated to US Trust also provide custodial, transfer agent, recordkeeping, and other non-advisory services (i.e. Secondary Services) to the Institutional Funds. US Trust also performs certain Secondary Services for the Institutional Funds, including co-administration and shareholder services, for which it receives fees.

The Excelsior Funds, Inc. (formerly known as the UST Master Funds, Inc.; hereafter, the UST Funds) is an open-end, diversified management investment company registered under the ICA. Currently, the UST Funds comprise the following portfolios: (i) The Equity Fund; (ii) the Income and Growth Fund; (iii) the Long-Term Supply of Energy Fund; (iv) the Productivity Enhancers Fund; (v) the Environmentally-Related Products and Services Fund; (vi) the Aging of America Fund; (vii) the Communication and Entertainment Fund; (viii) the Business and Industrial Restructuring Fund; (ix) the Global Competitors Fund; (x) the Early Life Cycle Fund; (xi) the International Fund; (xii) the Emerging Americas Fund; (xiii) the Pacific/Asia Fund; (xiv) the Pan European Fund; (xv) the Short-Term Government Securities Fund; (xvi) the Intermediate-Term Managed Income Fund; (xvii) the Managed Income Fund; (xviii) the Money Fund; (xix) the Government Money Fund; and (xx) the Treasury Money Fund.

UST New York serves as investment adviser to each of the UST Funds. Various parties unrelated to US Trust provide custodial, transfer agent, recordkeeping, and other Secondary Services to the UST Funds. US Trust

also performs certain Secondary Services for the UST Funds, including transfer agent and shareholder services, for which it receives fees.

The Excelsior Funds is a separate open-end, diversified management investment company registered under the ICA, the only currently relevant portfolio of which is the Institutional Money Fund (the Money Fund Option).

UST New York serves as supplemental investment manager to the Money Fund Option pursuant to an investment advisory agreement. Various parties unrelated to US Trust provide investment advisory services to the Excelsior Funds, as well as recordkeeping and other Secondary Services. US Trust also performs certain Secondary Services for the Excelsior Funds, including co-administration, custodial, and transfer agent services, for which it receives fees.

5. Actuarial Sciences Associates, Inc. (ASA). ASA is an employee benefits consulting firm established in July 1985 which is located in Somerset, New Jersey. ASA was retained by US Trust to serve as the Second Fiduciary for the UST DB Plan and the UST DC Plan (i.e. the Bank Plans) in connection with the investments made in the Funds. ASA is an affiliate of AT&T Investment Management Corporation (ATTIMCO). ATTIMCO is a wholly-owned subsidiary of AT&T and is a registered investment adviser under the ICA. As of December 31, 1995, ATTIMCO exercised discretionary investment authority over approximately \$75 billion of fiduciary assets. ASA, ATTIMCO and their affiliates are independent of, and unrelated to, US Trust.

Description of the Transactions

6. US Trust represents that the CIFs in which the Plans invested were maintained in accordance with the requirements under New York law that apply to collective investment trusts. US Trust decided to terminate the CIFs and offer to the Plans participating therein appropriate interests in corresponding Funds as alternative investments. Because interests in a CIF generally must be liquidated or withdrawn to effect distributions, US Trust believed that the interests of the Plans invested in the CIFs would be better served by investment in shares of the Funds which could be distributed in-kind. US Trust also believed that the Funds offered the Plans advantages over the CIFs as pooled investment vehicles. For instance, as shareholders of the Funds, the Plans have opportunities to exercise voting and other shareholder rights.

The Plans, as Fund shareholders, periodically receive certain disclosures

concerning the Funds. Such information includes: (i) A copy of the Fund prospectus, which is updated at least annually; (ii) an annual report containing audited financial statements of the Funds and information regarding such Funds' investment performance; and (iii) a semi-annual report containing unaudited financial statements. With respect to the Plans, US Trust reports all transactions in shares of the Funds in periodic account statements provided to each of the Plans. Further, US Trust maintains that the net asset value of the portfolios of the Funds can be monitored daily from information available in newspapers of general circulation.

7. With respect to the requested exemption, US Trust proposes that when from time-to-time a CIF is terminated its assets would be transferred in-kind to a corresponding Fund in exchange for shares of such Fund in order to avoid the potentially large brokerage expenses that would otherwise be incurred in having the CIF sell such assets and having the Fund acquire such assets. In addition, US Trust also proposes that from time-to-time it may be appropriate for an individual Plan for which US Trust serves as fiduciary to transfer all or a pro rata share of its assets in-kind to any of the Funds in exchange for shares of such Funds. 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. In this regard, a particular Fund's eligible investments will be set forth in its prospectus. No brokerage commissions, fees or expenses (other than customary transfer charges paid to parties other than US Trust) will be charged to the Plans or the CIFs in connection with the in-kind transfers of assets to the Funds for shares of the Funds.

Thus, in addition to the retroactive exemptive relief requested herein for the initial in-kind transfer of CIF assets to the Funds in exchange for Fund shares (as discussed in Item 8 below), US Trust also requests prospective relief for transactions involving: (i) The future in-kind transfer by other 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 Funds; or (ii) the in-kind transfer of all or a pro rata portion of the assets of any of the Plans held by US Trust, in any capacity as fiduciary on behalf of such Plans, to the Funds in exchange for shares of such Funds.

US Trust states that the transfers in-kind of assets in exchange for Fund shares 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: (i) Are consistent with the investment objectives, policies, and restrictions of the Fund; (ii) satisfy the applicable requirements of the ICA and the Code; and (iii) have a readily ascertainable market value. In addition, any assets that are transferred will be marketable 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, a Second Fiduciary of each affected Plan will receive certain disclosures from US Trust and approve the transaction in writing.

8. The Conversion Transactions. US Trust specifically requests a retroactive exemption for the in-kind transfers of CIF assets to certain corresponding Funds which have already occurred. The initial in-kind transfers of CIF assets to the Funds occurred on May 31, 1996, and was a partial conversion of various CIFs involving assets of the Bank Plans. Another in-kind transfer of CIF assets occurred on June 30, 1996, and was a partial conversion of such CIFs involving assets of Client Plans that elected to participate in the CIF conversions.

With respect to the in-kind transfers of CIF assets involving the Bank Plans, US Trust states that a proportionate share of each CIF's assets representing the interests of the Bank Plans therein was transferred to the corresponding UST Fund, except for the UST DB Plan's interests in the new Optimum Growth and Equity Value CIFs, which were transferred to the corresponding new Institutional Funds. The following table shows which CIF assets were transferred to particular Funds.

CIF portfolio	Corresponding fund portfolio
Short-Term Fixed Income.	UST Funds/Money Fund.
Fixed Income	UST Funds/Managed Income Fund.

CIF portfolio	Corresponding fund portfolio
U.S. Government Short/Intermediate Term Fund.	UST Funds/Short-Term Government Securities Fund.
International	UST Funds/International Fund.
Equity Portfolio	UST Funds/Equity Fund.
Early Life Cycle	UST Funds/Early Life Cycle Fund.
Optimum Growth	Institutional Optimum Growth Fund.
Equity Value	Institutional Equity Value Fund.

As noted above, the Government Fund was a separate fund forming part of the UST DC Plan, rather than a commingled CIF. However, for purposes of the transactions for which US Trust requests an exemption, this fund was treated in the same manner as a CIF in that all of its assets were transferred to a corresponding Fund.

As of June 30, 1996, US Trust states that certain Client Plan assets invested in the Short-Term Fixed Income CIF were transferred either to the UST Funds/Money Fund or the Excelsior Funds/Money Fund Option at the direction of the Second Fiduciary approving the particular in-kind transfer. Otherwise, a proportionate share of each CIF's assets representing the interests of the Client Plans (whose Second Fiduciaries approved the transaction) were transferred on such date to the corresponding Institutional Funds, as follows:

CIF portfolio	Corresponding fund portfolio
Short-Term Fixed Income.	Excelsior Money Fund Option or UST Funds/Money Fund
Fixed Income	Institutional Total Return Bond Fund.
International	Institutional International Equity Fund.
Equity	Institutional Equity Fund.

Thus, for example, if at the time of the conversion the Bank Plans held 45 percent of the interests in the Equity CIF, 45 percent of those assets were transferred to the Equity Fund portfolio of the UST Funds and the remaining 65 percent of the CIF's assets (representing the interests of Client Plans) were transferred to the Equity Fund portfolio of the Institutional Funds.

Each in-kind transfer of CIF assets was completed in a single transaction on a single day. In each case, the in-kind transfer transactions were accomplished by transferring from the converting CIF

a proportionate share of the Plans' assets then held by the CIF to the corresponding Fund in exchange for an appropriate number of Fund shares. Once all of a CIF's assets were transferred to a Fund, the CIF was terminated and its assets, then consisting of Fund shares, were distributed in-kind to the Plans participating in the CIFs based on each Plan's pro rata share of the assets of the CIFs on the date of the transaction.

Prior to each in-kind transfer transaction, the assets of a transferring CIF were reviewed by US Trust to confirm that they were appropriate investments for the receiving Fund. If any of the assets of a CIF were not appropriate for its corresponding Fund, US Trust sold such assets in the open market through an unaffiliated brokerage firm prior to the in-kind transfer.

9. Advance Disclosure/Approval and Appointment of the Second Fiduciary for the Bank Plans. US Trust provided to each affected Plan disclosures that announced the termination of the particular CIF, summarized the transaction, and otherwise complied with provisions of Section I of this proposed exemption. Based on these disclosures, the Second Fiduciary for each affected Plan approved in writing the Plan's participation in the conversion transaction, including the fees that were to be paid by the Funds to US Trust.

In the case of the initial in-kind transfer transactions involving the Bank Plans which occurred on May 31, 1996, ASA was required to make an independent determination in its fiduciary capacity that participation in the conversion transaction on the terms proposed was in the best interest of each Bank Plan. In this regard, as noted earlier, US Trust appointed ASA to serve as the Second Fiduciary to oversee the conversions of the CIFs to the Funds as they related to the interests of the Bank Plans, including the decision whether to participate therein. As part of its written report setting out the conclusions discussed in Item 11 below, ASA was required to confirm both its independence from US Trust and its qualifications to serve as the Second Fiduciary for the Bank Plans.

10. Valuation Procedures. The assets transferred by a CIF to its corresponding Fund consisted entirely of cash and marketable securities. For purposes of a transfer in-kind, the value of the securities in the CIF was determined based on market value as of the close of business on the last business date prior to the transfer (the CIF Valuation Date). The values on the CIF Valuation Date

were determined using the valuation procedures described in Rule 17a-7 under the ICA. In this regard, the "current market price" for specific types of CIF securities involved in the transaction was determined as follows:

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

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

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

d. For all other securities, the average of the highest current independent bid and lowest current 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, US Trust obtained quotations from at least three sources that were either broker-dealers or pricing services independent of and unrelated to US Trust and, when more than one valid quotation was available, used the average of the quotations to value the securities, in conformance with interpretations by the SEC and practices under Rule 17a-7.

The securities received by a transferee Fund portfolio were valued by such portfolio for purposes of the transfer in the same manner and as of the same day as such securities were valued by the corresponding transferor CIF. The per share value of the shares of each Fund portfolio issued to the CIFs was based on the corresponding portfolio's then-current net asset value. US Trust states that the value of a Plan's investment in shares of each Fund as of the opening of business on the date of the

conversion transaction was equal to the value of such Plan's investment in the CIFs as of the close of business on the last business day prior to the conversion transaction.

Not later than thirty (30) business days after completion of the in-kind transfer transaction (except as otherwise noted),¹⁷ US Trust sent by regular mail a written statement to each affected Plan that included a confirmation of the transaction. Such confirmation contained: (i) The identity of each security that was valued in accordance with Rule 17a-7(b)(4), as described above; (ii) the price of each such security for purposes of the transaction; and (iii) the identity of each pricing service or market-maker consulted in determining the value of such securities.

Not later than ninety (90) days after completion of each in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Funds, US Trust mailed to the Plans a written confirmation of the number of CIF units held by each affected Plan immediately before the conversion (and the related per unit value or the aggregate dollar value of the units transferred), and the number of shares in the Funds that were held by each affected Plan following the conversion (and the related per share net asset value or the aggregate dollar value of the shares received).

In accordance with the conditions of Section I of this proposed exemption, similar procedures will occur upon any future in-kind exchanges between CIFs maintained by US Trust or Plans, and the Funds.

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

11. As stated above, US Trust retained ASA as the Second Fiduciary to oversee the in-kind transfers of CIF assets to the Funds as such transactions affected the Bank Plans. In such capacity, ASA represented that it understood and would accept the duties, responsibilities and liabilities in acting as a fiduciary under the Act for the Bank Plans.

In a written report dated May 30, 1996, ASA stated that it considered the effect of the in-kind transfer transactions on the Bank Plans and the implications

¹⁷ US Trust states that the written confirmations regarding the identity and pricing of securities described under Rule 17a-7(b)(4) that were involved in the in-kind transfers of CIF assets which occurred on June 28 and July 31, 1996 were not made within 30 days of the completion of the transactions due to clerical errors made by certain US Trust personnel. US Trust represents that upon discovery of this error, all of the confirmations were mailed as soon as possible and were received by the Second Fiduciaries of the appropriate Client Plans by October 15, 1996.

of such transactions for Plans invested in the CIFs. ASA noted that this investment opportunity was being offered to the Client Plans on the same terms and conditions as was being offered to the Bank Plans. Based on all available data, ASA concluded that the terms of the in-kind transfers were fair to participants of the Bank Plans. ASA states that such terms were comparable to, and no less favorable than, the terms that would have been reached among unrelated third parties.

Therefore, ASA specifically authorized the in-kind transfers of the CIF assets on May 31, 1996 as the Second Fiduciary for the Bank Plans. In this regard, ASA represented in its written report dated May 30, 1996, that the in-kind transfer transactions were in the best interests of the Bank Plans and their participants and beneficiaries for the following reasons:

(a) the impact of the in-kind transfers on the Bank Plans would be de minimis because the Funds would substantially replicate the CIFs in terms of the investment policies and objectives;

(b) the Funds would probably continue to experience relative performance similar in nature to the CIFs given the continuity of investment objectives and policies, management oversight and portfolio management personnel;

(c) the in-kind transfers would not adversely affect the cash flows, liquidity or investment diversification of the Bank Plans; and

(d) the benefits to be derived by the Bank Plans and their participants by investing in the Funds (e.g., larger investor based permitted by the Funds, cost savings to participants over time through economies of scale, more choices for participants exercising investment control, and ability to obtain investment information through readily available sources) would more than offset the impact of minimum additional expenses that may be borne by the Bank Plans.

In forming an opinion as to the appropriateness of the in-kind transfers, ASA conducted an overall review of the Bank Plans, including the Plan documents. ASA stated that it examined the total investment portfolios of the Bank Plans to ascertain whether the Plans were in compliance with their investment objectives and policies. Further, ASA stated that it examined the liquidity requirements of the Bank Plans and reviewed the concentration of the Bank Plans' assets invested in the CIFs as well as the portion of the CIFs comprised of the assets of the Bank Plans. Finally, ASA stated that it reviewed the diversification provided

by the investment portfolios of the Bank Plans. Based on its review and analysis of the foregoing, ASA represented that the in-kind transfer transactions would not adversely affect the total investment portfolios of the Bank Plans, compliance by such Plans with their stated investment objectives and policies, or the cash flow, liquidity or diversification requirements of the Plans.

As the Second Fiduciary for the Bank Plans, ASA represented that following the in-kind transfer transactions, it was provided by US Trust with the confirmation statements described herein. In addition, ASA stated that it supplemented its findings following review of the post-transfer account information to confirm whether the in-kind transfers had resulted in the Bank Plans' receipt of shares in the Funds equal in value to the Plans' pro rata share of assets of the CIFs on the conversion date (i.e. May 31, 1996). ASA further represented that it would take such action as it deemed necessary to safeguard the interests of the Bank Plans in the event the confirmation statements did not confirm the foregoing.

Other Opportunities Available for Plans To Invest in the Funds

12. Besides the in-kind transfer of assets from a CIF or a Plan to a comparable Fund, in accordance with the conditions of this proposed exemption, a Plan's assets may be invested in the Funds in three other ways. First, a Plan may purchase shares in the Funds for cash directly through US Trust. Second, US Trust may transfer a Plan's assets from one Fund to another Fund. Third, US Trust may effect a daily automated sweep of uninvested cash of a Plan into one or more Funds designated by US Trust. However, all investments for Plans in the Funds must be made pursuant to the Second Fiduciary's written authorization.

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

Funds, it may charge a separate fee for sweep services.¹⁸

Receipt of Fees by US Trust From the Funds

13. Under certain conditions, Prohibited Transaction Exemption (PTE) 77-4, 42 FR 18732 (April 8, 1977)¹⁹ would permit US Trust to receive fees from the Funds for any investments made by the Client Plans under either of two circumstances: (i) where the Client Plan does not pay any investment management, investment advisory, or similar fees for the assets of such Plan invested in shares of a Fund for the entire period of such investment; or (ii) where the Client Plan pays investment management, investment advisory, or similar fees to US Trust based on the total assets of such Plans from which a credit has been subtracted representing such Plan's pro rata share of such investment advisory fees paid to US

¹⁸The Department in a letter, dated August 1, 1986, to Robert S. Plotkin, Assistant Director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, addressed the application of section 408(b)(2) of the Act to arrangements involving "sweep services." In that letter, the Department set forth several examples to illustrate various circumstances under which violations of section 406(b) of the Act would arise with respect to such arrangements. Conversely, the letter provided that, if a bank provides "sweep" services without the receipt of additional compensation or other consideration (other than reimbursement of direct expenses properly and actually incurred in the performance of such services), then the provision of "sweep" services by the bank would not, in itself, constitute a violation of section 406(b) of the Act. Moreover, including "sweep" services under a single fee arrangement for investment management services which is calculated as a percentage of the market value of the total assets under management would not, in itself, constitute an act described in section 406(b)(1), because the bank would not be exercising its fiduciary authority or control to cause a plan to pay an additional fee.

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

¹⁹PTE 77-4, in pertinent part, permits the purchase and sale by an employee benefit plan of shares of a registered, open-end investment company when a fiduciary with respect to the plan is also the investment adviser for the investment company, provided that the conditions of the exemption are met.

In addition, PTE 77-3, 42 FR 18734 (April 8, 1977) permits the acquisition or sale of shares of a registered, open-end investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter, provided certain conditions are met.

In this regard, the Department is expressing no opinion in this proposed exemption regarding whether any of the transactions with the Funds by US Trust involving Plans discussed herein would be covered by PTE 77-4.

Trust by the Fund. As such, with respect to the Client Plans, there may be two levels of fees: (i) Those fees which US Trust charges to the Client Plans for serving as trustee, investment manager, or custodian for such Plans (the Plan-level Fees); and (ii) those fees which US Trust charges to the Fund (the Fund-level Fees) for serving as an investment adviser for the Fund as well as for being custodian of the Fund or for providing other Secondary Services to the Fund.

In its capacity as Plan fiduciary, except for the Bank Plans, US Trust charges each Client Plan a fee for its investment management/trustee services based upon its standard fee schedules and the terms of the specific agreement negotiated between each Plan and US Trust.²⁰ Generally, its standard fees are expressed as a varying percentage of plan assets invested with US Trust.

For their investment advisory services to the Institutional Funds, UST Pacific and UST New York are entitled to receive certain advisory fees from the Institutional Funds, as set out in the prospectuses, currently ranging from approximately 0.12 percent to 0.60 percent of the Fund's daily average assets under management.

For its services as investment adviser to the UST Funds, UST New York is entitled to receive certain advisory fees from the UST Funds, as set out in the prospectuses, currently ranging from approximately 0.25 percent to 1.0 percent of the Funds' daily average assets under management, prior to certain voluntary fee waivers. In addition, UST New York may receive from the UST Funds fees for certain Secondary Services. No such fees are paid to UST New York pursuant to a 12b-1 plan (i.e. distribution expenses payable under Rule 12b-1 of the ICA).

The Funds accrue daily as an expense payable to US Trust a ratable portion of US Trust's investment advisory fees and fees for Secondary Services based upon the average daily net asset value of the Funds. Such fees are paid by the Funds

²⁰The applicant represents that all fees paid by the Client Plans directly to US Trust for services performed by US Trust are exempt from the prohibited transaction provisions of the Act by reason of section 408(b)(2) of the Act and the regulations thereunder (see 29 CFR 2550.408b-2). In this regard, the Department is providing no opinion in this proposed exemption as to whether the conditions required for exemptive relief under section 408(b)(2) of the Act, and the regulations thereunder (see 29 CFR 2550.408b-2), would be met for fees received by US Trust for the provision of services to the Client Plans.

In addition, the Department notes that to the extent there are prohibited transactions under the Act as a result of services provided by US Trust directly to the Client Plans which are not covered by section 408(b)(2), no relief is being proposed herein for such transactions.

to US Trust monthly in arrears approximately two weeks after the end of the month.

US Trust states that the Client Plans for which it serves as a fiduciary generally should not bear any increased cost burdens as a result of investing in the Funds. In this regard, US Trust credits or "rebates" to each Client Plan, generally by the fifth business day of each month (and in no event later than the date it is paid by the Funds), its proportionate share of all Fund-level investment advisory fees for the prior month (the Credit Program).²¹ Under the conditions of this proposed exemption, all "rebates" of such fees must be made by US Trust to the appropriate Client Plan within not more than one business day after the receipt of such fees by US Trust (see Section II(i) above). US Trust charges each Client Plan, in accordance with its pre-established fee schedules, its full investment management fee for all assets under management, including those assets invested in the Funds. US Trust states that the net effect of the Credit Program will be that no Client Plan will pay, for any period, a "double" investment advisory fee for any assets invested in the Funds. Thus, US Trust believes that this procedure effectively operates as a credit against the full Plan-level investment management fee in compliance with the terms of Part II(c) of PTE 77-4. US Trust represents that for each Client Plan, the combined total of all fees received by US Trust for the provision of services to the Client 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.

In the case of the Bank Plans, from which US Trust receives no Plan-level fees, US Trust does not rebate or otherwise credit back to the Plans any portion of the fees it receives from the Funds for investment advisory/management services or Secondary

Services, consistent with the terms of PTE 77-3.²² ASA concluded, as the Second Fiduciary for the Bank Plans in connection with the in-kind transfer of CIF assets that was made into the Funds in exchange for shares of the Funds on May 31, 1996, that the fees to be paid by the Bank Plans as investors in the Funds would be reasonable and within industry standards for mutual fund servicing fees.

14. Audit Requirements. US Trust is responsible for establishing and maintaining a system of internal accounting controls for the crediting of the investment advisory or other fees to the Client Plans under the Credit Program. In this regard, US Trust has retained the services of Coopers & Lybrand of New York, New York (the Auditor), an independent accounting firm, to audit annually the rebating of fees to the Client Plans under this program. Such audits will provide independent verification of the proper crediting of fees to the Client Plans. Information regarding fee credits will be used in the preparation of required financial disclosure reports of the Funds for the benefit of the Client Plans.

By letter dated September 25, 1996, the Auditor has described the procedures that will be utilized in the annual audit of the Credit Program. Specifically, in performing its audit, the Auditor will: (a) Review and test compliance with the specific operational controls and procedures established by US Trust for making expense rebates (i.e. credits of fees under the Credit Program); (b) verify, on a test basis, the monthly expense ratios by agreeing them to the respective Fund's prospectus; (c) recalculate, on a test basis, the monthly average balance invested in the Funds; (d) recalculate, on a test basis, the amount of the rebate to be credited to each Client Plan; (e) recompute, on a test basis, the amount of the rebate determined for selected Client Plans and verify that the proper credit was made to the particular Client Plan in a timely manner; and (f) verify, on a test basis, the total amount of credits or "rebates" made to the convenience account established for the Credit Program.

In the event that either the internal audit by US Trust or the independent audit by the Auditor identifies an error made in the crediting of fees to the Client Plans, US Trust will correct the error. With respect to any shortfall in credit fees to a Client Plan involving

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

15. Future Fee Changes. US Trust states that one of the requirements of PTE 77-4 is that any change in any of the rates of fees requires prior written approval by the Second Fiduciary of the Plans participating in the Funds. US Trust notes that where many Plans participate in a Fund, the addition of a service or any increase in fees cannot be implemented until written approval of such change is obtained from every Second Fiduciary. US Trust proposes to follow an alternative "negative consent" procedure which it believes provides the basic safeguards for the Plans and is more efficient, cost effective, and administratively feasible than that required by PTE 77-4.

Specifically, 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 any Fund to US Trust over an existing rate that had been authorized by the Second Fiduciary, US Trust will provide, at least thirty (30) days in advance of the implementation of such additional service or fee increase, to the Client Plans invested in such Fund a written notice of such additional service or fee increase. Such notice may take the form of a proxy statement, letter, or similar communication that is separate from the Fund prospectus and will explain the nature and amount of the additional service or 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 US Trust

²¹ US Trust represents that initially the credit will take the form of a rebate of fees to the extent of the Funds' investment advisory fees and fees for Secondary Services paid to US Trust. The credit will also involve an "out-of-pocket" payment by US Trust to the extent that it also credits each Plan with the Plan's proportionate share of fees paid by the Funds to service providers unaffiliated with US Trust. Thus, for a period of time, US Trust intends to "rebat" all Fund-level fees to the affected Plans. However, in the future, US Trust will retain a portion of the fees paid to it by the Funds for Secondary Services and will reduce or eliminate the additional credits for fees paid by the Funds to unaffiliated service providers. In this regard, US Trust will continue to "rebat" all investment advisory fees charged to the Funds by US Trust, including any investment advisory fees paid by US Trust to third party sub-advisors.

²² As noted previously, the Department is providing no opinion in this proposed exemption as to whether the fee arrangements discussed herein for the Bank Plans meet the conditions of PTE 77-3.

for such fee over that which had been authorized by the Second Fiduciary of a Client Plan. US Trust believes that notice provided in this way will give the Second Fiduciary of each Plan adequate opportunity to decide whether to continue the authorization of a Plan's investment in any of the Funds in light of the increase in investment management fees, investment advisory fees, or similar fees, the additional Secondary Service for which a fee is charged, or the increase in fees for any Secondary Services. In addition, such fee increase will be disclosed to the Plan in an amendment of or supplement to the Fund's prospectus, as well as in the Fund's Statement of Additional Information, to the extent necessary to comply with disclosure requirements of the U.S. Securities and Exchange Commission (SEC).

The written notice of an additional secondary service for which a fee is charged or a fee increase will be accompanied by a Termination Form, as defined in Section III(i) of this proposed exemption, and by instructions for the use of such form which will expressly provide an election for the Second Fiduciaries of Plans to terminate at will any prior authorizations without penalty to the Plans. Each Client Plan 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 US Trust or changes in other matters in connection with services rendered to the Funds. However, if the Termination Form has been provided to the Plan in the event of an addition of a Secondary Service for which a fee is charged, or an increase in any existing fees for Secondary Services paid by the Fund to US Trust, then such Termination Form need not be provided again to the Plan 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 such fees or addition of such 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 the 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 US Trust redeeming the shares of the Fund held by the affected Plan by the close of business on the day following the date of receipt by US Trust of the Termination Form or any other written notice of termination. If, due to circumstances beyond the control of US Trust, the redemption cannot be executed within one business day, US Trust will have one additional business day to complete such redemption.

16. No sales commissions are paid by the Client 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. In addition, neither US Trust nor any affiliate (including officers, directors and other persons, as defined in Section III(b) above) purchases from or sells to the Client Plans any shares of the Funds. US Trust does not receive any 12b-1 fees, payable pursuant Rule 12b-1 under the ICA, for transactions with the Funds involving the Plans. In all cases, the price paid or received by a Plan for any Fund shares is the net asset value per share, as defined in Section III(e) above, at the time of the transaction and is the same price which would be paid or received for the shares by any other investor at that time. US Trust states that 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.

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

In some cases, a US Trust affiliate may execute securities transactions as a broker for the investment portfolios of certain Funds, to the extent permitted by the ICA and the applicable rules of the SEC. To the extent that US Trust does not currently execute securities brokerage transactions for any Fund for which a fee is paid to US Trust, but

proposes to do so in the future, US Trust will at least thirty (30) days in advance of the implementation of such additional service provide a written notice to the Plan which explains the nature of such additional service and the amount of the brokerage fees involved. Further for any Fund that US Trust provides such brokerages services, US Trust will provide at least annually to any Plan that invests in such Funds a written disclosure indicating: (a) The total, expressed in dollars, brokerage commissions of each Fund's investment portfolio that are paid to US Trust 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 US Trust; (c) the average brokerage commissions per share, expressed as cents per share, paid to US Trust 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 US Trust.

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

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

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

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

(d) For all in-kind transfers of CIF or Plan assets to a Fund, US Trust sends by regular mail to each affected Plan a written confirmation, not later than 30 days after the completion of the transaction (except for certain

transactions described herein where such confirmations were sent at a later date), containing the following information: (1) The identity of each security that was valued for purposes of the transaction in accordance with Rule 17a-7(b)(4) of the ICA; (2) the price of each such security involved in the transaction; and (3) the identity of each pricing service or market maker consulted in determining the value of such securities.

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

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

(g) No sales commissions or redemption fees are paid by a Plan in connection with the purchase of shares of the Funds.

(h) US Trust does not receive any 12b-1 fees in connection with the transactions.

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

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

(k) All dealings by or between the Plans, the Funds and US Trust are on a basis which is at least as favorable to the

Plans as such dealings are with other shareholders of the Funds.

Notice to Interested Persons

Notice of the proposed exemption will be given to interested persons who had investments in the terminating CIFs and from whom approval was sought for the transfer of Plan assets to the Funds. In this regard, interested persons will include ASA, the Second Fiduciary of the Bank Plans; active participants in the Bank Plans; and Second Fiduciaries of the Client Plans. Notice will be provided to each Second Fiduciary by first class mail and to active participants in the Bank Plans by posting at major job sites. Such notice will be given to interested persons within 15 days following the publication of this notice of pendency of the proposed exemption in the Federal Register. The notice will include a copy of the notice of proposed exemption, as published herein, and give interested persons the right to comment on and/or to request a hearing on the proposed exemption. Comments and requests for a public hearing are due within 45 days of the publication of this notice of pendency of the proposed exemption in the Federal Register.

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

Givens 401(k) Savings and Retirement Plan (the Plan) Located in Chesapeake, VA

[Application No. D-10364]

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 F.R. 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed purchase from the Plan of the Plan's interest in a group annuity contract (the GAC Interest) by Givens, Incorporated, a sponsor of the Plan; provided the following conditions are satisfied:

(a) The sale is a one-time transaction for cash;

(b) The Plan suffers no loss nor incurs any expense in connection with the sale; and

(c) The Plan receives a purchase price of no less than the fair market value of

the GAC Interest as of the date of the sale.

Summary of Facts and Representations

1. The Plan is a 401(k) defined contribution plan which provides for individual participant accounts (the Accounts) and participant-directed investment of the Accounts. The Plan is maintained by Givens Trucking Company, Incorporated (GTC), a Virginia corporation, on behalf of eligible employees of a controlled group of brother-sister corporations which includes Givens, Incorporated (Givens), a Virginia corporation engaged in the business of public warehousing in Chesapeake, Virginia. GTC, Givens, and other employers in the controlled group (the Sponsors) initially adopted the Plan effective September 1, 1989 as a prototype 401(k) plan (the Predecessor Plan) offered by the J. & W. Seligman Trust Company (Seligman). Seligman served as trustee of the Predecessor Plan. Effective March 31, 1995, the sponsors replaced Seligman as trustee and formed the Plan by adopting a new plan and trust document which amended and entirely restated the Predecessor Plan. At that time, Commerce Bank, located in Virginia Beach, Virginia, was appointed as the new trustee to replace Seligman. The Plan's current trustee, Branch Banking and Trust Company of Virginia (the Trustee), is the successor to Commerce Bank as the result of the Trustee's acquisition of Commerce Bank in 1995. As of June 30, 1996, the Plan had 232 participants and total assets of \$2,154,700.

2. Among the investment options offered for Account investments under Seligman's trusteeship was a fixed-income fund which invested participant-directed Account funds in a group annuity contract, Mutual Benefit Deferred Variable Annuity Contract No. 0888000033-S (the GAC). The GAC, which was issued to Seligman on October 19, 1989 by Mutual Benefit Life Insurance Company of New Jersey (Mutual Benefit), is a pooled investment vehicle maintained by Seligman for various employee benefit plans, each of which acquired pro-rata interests in the GAC in proportion to amounts invested in the GAC. The terms of the GAC provided that prior to the beginning of each calendar year, Mutual Benefit would establish a guaranteed rate of interest (the Contract Rates) payable on funds deposited pursuant to the GAC during that year.

3. On July 16, 1991, Mutual Benefit was placed into rehabilitation proceedings by the New Jersey Commissioner of Insurance (the

Commissioner).²³ As a result, the assets of the Plan invested in the GAC were frozen, with the exception of certain hardship withdrawals. The accumulated book value of the Plan's interest in the GAC as of July 16, 1991 was \$121,030.18, consisting of the Plan's principal deposits plus interest at the Contract Rates less withdrawals. In 1994, the terms of the GAC were redefined under a rehabilitation plan (the Rehab Plan) approved by the Commissioner and the court overseeing the rehabilitation proceedings, the Superior Court of New Jersey—Mercer County. As a result of the Rehab Plan, all liabilities and obligations of Mutual Benefit with respect to the GAC have been assumed by the MBL Life Assurance Corporation (MBLLAC), a New Jersey life insurance company located in Newark, New Jersey. Under the Rehab Plan, contract holders such as Seligman were offered the ability to "opt in" to the Rehab Plan by accepting restructured contracts or to "opt out" by surrendering the contract for a reduced amount of cash (generally, approximately 55 percent of the contract face value). Seligman, as Plan trustee, elected to "opt in" to the Rehab Plan and was issued a restructured contract designated as Mutual Benefit Life Deferred Variable Annuity Contract No. IVA888000033 (the New GAC) in replacement of the GAC, which was cancelled. Under the terms of the New GAC, interest is earned on deposits not at the GAC's original Contract Rates but at rates determined annually (the Rehab Rates) to reflect MBLLAC's actual investment performance.²⁴ The Rehab Rate for 1996 was established at 5.10 percent. The New GAC provides that Plan participants are subject to a moratorium charge (the Penalty) for withdrawal of any Account balances from the New GAC prior to December 31, 1999, for any reason other than death or financial hardship as determined by MBLLAC. The Penalty is 21.7 percent of the amount withdrawn

through 1996, 16.3 percent through 1997, 10.9 percent through 1998 and 5.4 percent through 1999. The accumulated book value of the Plan's interest in the New GAC was \$129,178 as of June 30, 1996, consisting of the accumulated book value of the Plan's interest in the GAC as of July 16, 1991 plus interest at the Rehab Rates less withdrawals.

4. GTC and Givens (the Applicants) represent that allowing the Plan assets to remain invested in the New GAC exposes Plan participants and beneficiaries to some degree of risk, precludes transfers of Account balances invested in the New GAC to other investment options available in the Plan, precludes participant loans with respect to Account balances invested in the New GAC, and prevents lump-sum distributions to retiring participants who do not qualify for hardship distributions. In order to enable restoration of full Plan operations with respect to the amounts invested in the New GAC, and to protect the Plan participants and beneficiaries from any further risk of investment loss associated with the New GAC, the Applicants propose that Givens purchase the Plan's entire interest in the New GAC (the GAC Interest) from the Plan, and is requesting an exemption to enable such transaction under the terms and conditions described herein.

5. Givens will purchase the GAC Interest from the Plan for a purchase price equal to the Plan's pro-rata share of the accumulated book value of the New GAC as of the purchase date under the restructured terms, as determined by MBLLAC. As of June 30, 1996, the value of the GAC Interest under the GAC's restructured terms, \$129,178, constituted approximately 6 percent of all Plan assets. The purchase price will reflect interest earnings at the Rehab Rates through the date of the sale transaction. The Plan will incur no expenses in connection with the transaction. The Applicants state that the transaction will enable the Plan participants to gain access to the Account balances invested in the New GAC, for participant loans, distributions and non-hardship withdrawals, without incurring the Penalty for withdrawal, which they estimate would be at least \$28,031. The Applicants represent that in the proposed transaction the Plan will experience no loss, since the transaction will enable the Accounts to realize the same amount of cash they would realize from a withdrawal of Account balances from the New GAC, with Rehab Rate interest through the date of withdrawal, if withdrawals without the Penalty were permitted under the terms of the Rehab Plan.

6. In summary, the Applicants represent that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (a) The sale will be a one-time transaction for cash; (b) The Plan will suffer no loss and will incur no expense with respect to the transaction; (c) The transaction will protect the Plan from any risk associated with continued holding of the New GAC, as well as enabling participants to exercise all of their rights under the Plan with respect to distributions, loans, transfers and withdrawals; and (d) the purchase price will be the value of the GAC Interest as of the sale date under the restructured terms of the New GAC, as determined by MBLLAC.

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

General Information

The attention of interested persons is directed to the following:

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

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

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

²³ The Department notes that the decision to acquire and hold interests in the GAC are governed by the fiduciary responsibility requirements of Part 4, Subtitle B, Title I of the Act. In this proposed exemption, the Department is not proposing relief for any violations of Part 4 which may have arisen as a result of the acquisition and holding of interests in the GAC.

²⁴ For the period from July 16, 1991 through April 30, 1994, the Plan earned interest at the Rehab Rates in the amount of \$20,395.82, while Plan withdrawals for this same period totalled \$10,040.52 and the Plan was assessed a contract expense charge of \$60.00. From May 1, 1994 through June 30, 1996, the Plan earned interest at the Rehab Rates in the amount of \$13,771.21 and Plan withdrawals for this same period totalled \$15,918.69. For 1996, the Rehab Rate has been established at 5.10 percent.

whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, DC, this 12th day of December, 1996.

Ivan Strasfeld,

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

[FR Doc. 96-31993 Filed 12-16-96; 8:45 am]

BILLING CODE 4510-29-P

**[Prohibited Transaction Exemption 96-90;
Exemption Application No. D-10150, et al.]**

**Grant of Individual Exemptions; The
Smith Barney Shearson Prototype
Defined Contribution Plan (the Plan), 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.

The Smith Barney Shearson Prototype Defined Contribution Plan (the Plan) Located in Los Angeles, California

[Prohibited Transaction Exemption 96-90; Exemption Application No. D-10150]

Exemption

The restrictions of sections 406(a), 406(b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the past acquisition, holding, and exercise by the Plan of certain stock purchase rights (the Rights),¹ which were issued by the Highland Federal Bank (the Employer) to all shareholders of record, as of November 7, 1995, of common stock of the Employer (the Employer Stock) pursuant to a rights offering (the Rights Offering), provided that the following conditions were satisfied:

- (a) The Plan's acquisition and holding of the Rights in connection with the Rights Offering occurred as a result of an independent act of the Employer as a corporate entity;
- (b) All holders of the Employer stock, including the Plan, were treated in a like manner with respect to all aspects of the Rights Offering; and

¹ The Department notes that the Rights do not constitute "qualifying employer securities" within the meaning of section 407(d)(5) of the Act.

(c) The acquisition, holding, and disposition of the Rights by the affected participant accounts in the Plan occurred in accordance with Plan provisions for the individually directed investment of such accounts.

EFFECTIVE DATE: This exemption is effective for the period from November 8, 1995 to December 15, 1995.

The Department notes that a typographical error appears on page 54225 of the notice of proposed exemption, such that the second sentence in the first paragraph under the caption "Proposed Exemption" should be corrected to read as follows:

If the exemption is granted, the restrictions of sections 406(a), 406(b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code * * *

The operative language in this exemption has been modified accordingly.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on October 17, 1996 at 61 FR 54224.

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

International Brotherhood of Electrical Workers Local Union 613 (IBEW) Local 613 Defined Contribution Pension Fund (the Fund), Located in Atlanta, GA

[Exemption 96-91; Application No. D-10225]

The restrictions of sections 406(a), 406(b) (1) and (2) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the sale (the Sale) of a certain parcel of improved real property (the Property) from the Fund to Mr. Charles W. Eason, Sr., a party in interest with respect to the Fund provided that the following conditions are met: (1) The fair market value of the Property is established by an independent and qualified real estate appraiser; (2) Mr. Eason will pay the greater of: The fair market value of the Property at the time of the transaction or \$123,000; (3) The Sale will be a one-time transaction for cash; and (4) The Fund will pay no fees or commissions associated with the Sale.

For more complete statement of the facts and representations supporting this exemption, refer to the notice of proposed exemption published on September 6, 1996 at 61 FR 47202.