

represents that it would be impractical to restrict the activities of all portfolio companies in which the TA Fund invests to assure that no such portfolio company would ever become a service provider to any TA Fund's Plan investors. According to TA, such restriction would be contrary to the best interest of the TA Funds and their investors, particularly, their Plan investors.

As another alternative, TA represents that it could limit the offering of interests in the TA Funds to those Plans which could take advantage of Prohibited Transaction Exemption (PTE) 84-14 (49 FR 9494 March 13, 1984), the Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers (QPAMs) or PTE 96-23 (61 FR 15975, April 10, 1996), the Class Exemption for Plan Asset Transactions Determined by In-House Asset Managers (INHAMs).⁸ However, TA believes that such an approach would be unduly restrictive and not in the best interest of the Plans since relatively few Plans could take advantage of PTE 96-23. Also Plans would be forced to hire a QPAM and incur an additional expense in order to invest in a TA Fund if the Plan's named fiduciary would otherwise make that decision itself.

11. In summary, it is represented that the proposed exemption has satisfied or will satisfy the statutory conditions for an exemption under section 408(a) of the Act because: (a) At the Determination Date, the TA Fund's party in interest status has or will, in all cases, arise after the Plan has made its binding commitment to invest in the TA Fund, including its commitment to make future capital contributions to the TA Fund; (b) the decision by a Plan to make capital contributions to the TA Fund has been and will be made on behalf of the Plan by a Plan fiduciary which is independent of and unrelated to TA and the portfolio company that is acquired by the TA Fund; (c) TA will not otherwise provide investment advice to the Plan within the meaning of 29 CFR 2510.3-21(c) of the Act with respect to such Plan's assets that are invested in the TA Fund; (d) as of the Determination Date, the capital

⁸PTE 84-14 permits various parties which are related to employee benefit plans to engage in transactions involving plan assets, if among other conditions, the assets are managed by QPAMs (i.e., banks, savings and loan associations, insurance companies or investment advisers registered under the Investment Advisers Act of 1940), which are independent of the parties in interest and meet certain financial standards. PTE 96-23 permits various transactions involving employee benefit plans whose assets are managed by INHAMs and party in interest service providers.

commitment of the Plan (together with the capital commitment of any other related Plans maintained by the same employer or employee organization) has not and will not exceed more than 15 percent of the total outstanding capital commitments with respect to the TA Fund; (d) at the Determination Date, the percentage of the Plan's assets committed to be invested in the TA Fund does not and will not exceed 5 percent of the Plan's total assets and the Plan's aggregate commitment to all TA Funds has not and will not exceed 25 percent of the Plan's total assets; (e) a Plan investing in a TA Fund has or will have assets that are in excess of \$50 million; and (f) TA has or will make written disclosures to the Plan regarding the TA Fund both at the time of the initial commitment to invest in such Fund as well as on an ongoing basis.

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested exemption include fiduciaries of Plans whose assets are currently invested in a TA Fund. Accordingly, the Department has determined that the only practical form of providing notice to such Plan fiduciaries is the distribution, by TA, of a copy of the proposed exemption by first class mail within 30 days of the date of publication of the pendency notice in the Federal Register. 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 the pending exemption. Comments with respect to the proposed exemption are due 60 days after the date of publication of the 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.)

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 believe 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 of the plan;

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

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

Signed at Washington, DC, this 28th day of February 1997.

Ivan Strasfeld,

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

[FR Doc. 97-5430 Filed 3-4-97; 8:45 am]

BILLING CODE 4510-29-M

**[Prohibited Transaction Exemption 97-15;
Exemption Application No. D-10172, et al.]**

Grant of Individual Exemptions; The Chicago Corporation (TCC), 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, DC. 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 Chicago Corporation (TCC),
Located in Chicago, IL

(Prohibited Transaction Exemption 97-15;
Application No. D-10172)

Exemption

Section I. Covered Transactions

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A)

through (D) of the Code, shall not apply to the proposed sale, for cash or other consideration, by the Midwest Banc Fund IV Group Trust (the BF IV Group Trust) in which employee benefit plans (the Plans) invest, of certain securities (the Securities) that are held in the BF IV Group Trust Portfolio, to a party in interest with respect to a participating Plan, where the part in interest proposes to acquire or merge with a bank company (the Bank Company) or a financial services company (the Financial Services Company) that issued such securities.

In addition, the restrictions of section 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)(E) of the Code, shall not apply to the payment of a performance fee (the Performance Fee) by Plans investing in the BF IV Group Trust to TCC.

This exemption is subject to the following conditions as set forth below in Section II.

Section II. General Conditions

(a) Prior to a Plan's investment in the BF IV Group Trust, a Plan fiduciary which is independent of TCC and its affiliates (the Independent Fiduciary) approves such investment on behalf of the Plan.

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

(c) No Plan invests more than 10 percent of its assets in beneficial interests (the Beneficial Interests) in the BF IV Group Trust and such Beneficial Interests held by the Plan may not exceed 25 percent of the Group Trust.

(d) No Plan may invest more than 25 percent of its assets in investment vehicles (i.e., collective investment funds or separate accounts) managed or sponsored by TCC and/or its affiliates.

(e) Prior to investing in the BF IV Group Trust,

(1) Each Independent Fiduciary receives a Private Placement Memorandum and its supplement containing description of all material facts concerning the purpose, structure and the operation of the BF IV Group Trust.

(2) An Independent Fiduciary who expresses further interest in the BF IV Group Trust receives—

(A) A copy of the Group Trust Agreement outlining the organizational principles, investment objectives and administration of the BF IV Group Trust, the manner in which Beneficial Interests may be redeemed, the duties of the parties retained to administer the BF IV Group Trust and the manner in

which BF IV Group Trust assets will be valued;

(B) A copy of the Investment Management Agreement describing the duties and responsibilities of TCC, as investment manager of the BF IV Group Trust, the rate of compensation that it will be paid and conditions under which TCC may be terminated; and

(C) Copies of the proposed exemption and grant notice covering the exemptive relief provided herein.

(3) If accepted as an investor in the Group Trust, the Independent Fiduciary is—

(A) Furnished with the names and addresses of all other participating Plans;

(B) Required to acknowledge, in writing, prior to purchasing a Beneficial Interest in the BF IV Group Trust that such Independent Fiduciary has received copies of such documents; and

(C) Required to acknowledge, in writing, to TCC that such fiduciary is independent of TCC and its affiliates, capable of making an independent decision regarding the investment of Plan assets, knowledgeable with respect to the Plan in administrative matters and funding matters related thereto, and able to make an informed decision concerning participation in the BF IV Group Trust.

(f) Each Plan, including the trustee (the Trustee) of the BF IV Group Trust, receives the following written disclosures from TCC with respect to its ongoing participation in the BF IV Group Trust:

(1) Within 120 days after the end of each fiscal year of the BF IV Group Trust as well as at the time of termination, an annual financial report containing a balance sheet for the BF IV Group Trust as of the end of such fiscal year and a statement of changes in the financial position for the fiscal year, as audited and reported upon by independent, certified public accountants. The annual report will also disclose the fees paid or accrued to TCC.

(2) Within 60 days after the end of each quarter (except in the last quarter) of each fiscal year of the BF IV Group Trust, an unaudited quarterly financial report consisting of at least a balance sheet for the BF IV Group Trust as of the end of such quarter and a profit and loss statement for such quarter. The quarterly report will also specify the fees that are actually paid to or accrued to TCC.

(3) Such other information as may be reasonably requested by the Plans or the Trustee (e.g., certain trading activity and portfolio status reports provided to the Trustee as required by Prohibited Transaction Exemption 86-128 (51 FR

41686, November 16, 1986) in order to comply with the reporting requirements of the Act and the Code.

(g) At least annually, TCC holds a meeting of the participating Plans at which time the Independent Fiduciaries of investing Plans are given the opportunity to decide on whether the BF IV Group Trust, the Trustee or TCC should be terminated as well as to discuss any aspect of the BF IV Group Trust and the agreements promulgated thereunder with TCC.

(h) During each year of the BF IV Group Trust's existence, TCC representatives are available to confer by telephone or in person with Independent Fiduciaries on matters concerning such Group Trust.

(i) The terms of all transactions that are entered into on behalf of the BF IV Group Trust by TCC remain at least as favorable to an investing Plan as those obtainable in arm's length transactions with unrelated parties. In this regard, the valuation of assets in the BF IV Group Trust that is done in connection with the payment of Performance Fees is based upon independent market quotations or (where the same are unavailable) determinations made by an independent appraiser.

(j) In the case of the sale by the BF IV Group Trust of Securities to a party in interest with respect to a participating Plan, the party in interest is not TCC, any employer of a participating Plan, or any affiliated thereof, and the BF IV Group Trust receives the same terms as is offered to other shareholders of a Bank Company or a Financial Services Company.

(k) As to each Plan, the total fees paid to TCC and its affiliates constitute no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(l) TCC's Performance Fee is based upon a predetermined percentage of net realized gains minus net unrealized losses. In this regard.

(1) The Performance Fee is not to be paid before December 31, 2001, which represents the completion of the projected acquisition phase of the BF IV Group Trust, and not until all participating Plans have received distributions equal to 100 percent of their capital contributions made to the BF IV Group Trust.

(2) Prior to the termination of the BF IV Group Trust, no more than 75 percent of the Performance Fee credited to TCC is withdrawn from such Group Trust.

(3) The Performance Fee account established for TCC is credited with realized gains and losses and charged

for net unrealized losses and fee payments.

(4) No portion of the Performance Fee is withdrawn if the Performance Fee Account is in a deficit position.

(5) TCC repays all deficits in its Performance Fee account and it maintains a 25 percent cushion in such account before receiving any further fee payment.

(m) Either TCC or the Trustee, on behalf of Plans participating in the BF IV Group Trust, may terminate the Investment Management Agreement at any time pursuant to the provisions in such agreement.

(n) TCC maintains, for a period of six years, the records necessary to enable the persons described in paragraph (o) of this Section II 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 TCC 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 TCC shall be subject to the civil penalty that may be assessed under section 502(i) or the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (o) below.

(o)(1) Except as provided in section (o)(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 (n) of this Section II shall be unconditionally available at their customary location during normal business hours by:

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

(B) Any Independent Fiduciary of a participating Plan or any duly authorized representative of such Independent 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.

(o)(2) None of the persons described above in subparagraphs (B)–(D) of this paragraph shall be authorized to examine the trade secrets of TCC or commercial or financial information which is privileged or confidential.

Section III. Definitions

For purposes of this exemption, (a) the term "TCC" means The Chicago Corporation and any affiliate of TCC as defined in paragraph (b) of Section III.

(b) An "affiliate" of TCC includes—

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

(2) Any officer, director or partner in such person, and

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

(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) An "Independent Fiduciary" is Plan fiduciary who is independent of TCC and its affiliates and is either a Plan administrator, trustee, named fiduciary, as the recordholder of Beneficial Interests in the BF IV Group Trust or an investment manager.

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 on January 14, 1997 at 62 FR 1913.

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, New York

(Prohibited Transaction Exemption 97-17; Application Nos. D-10234 and D-10235)

Section I—Exemption for In-Kind Transfers of Assets

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; provide 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 are 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 transfer 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—Exemption for Receipt of Fees From Funds

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 (once such documents are published in the Federal Register).

(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 may be 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, U.S. 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 this 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 that 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 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 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, partners, 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 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 transactions which occurred prior to the date this exemption is granted, 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 paragraph (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.

(m) The term "Client Plan" means any "employee benefit plan" within the meaning of section 3(3) of the Act and/

or any "plan" within the meaning of Code section 4975 (e)(1).¹

EFFECTIVE DATE: This exemption is effective as of May 31, 1996, for transactions described in Section I, and June 30, 1996, for transactions described in Section II.

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 December 17, 1996, at 61 FR 66320.

WRITTEN COMMENTS AND MODIFICATIONS: US Trust submitted the following comments and requests for modifications regarding the notice of proposed exemption (the Proposal).

First, US Trust notes that paragraph 17 of the Summary of Facts and Representations in the Proposal (the Summary) states that to the extent that US Trust does not currently execute brokerage services for any Fund, but proposes to do so in the future, US Trust intends to provide at least 30 days advance written notice of such additional service. US Trust represents that pursuant to a proposal adopted by the Funds' boards of directors prior to the December 17th publication of the Proposal in the Federal Register, the Funds' retained an affiliate of US Trust to provide such brokerage services. US Trust states that these brokerage services commenced on January 3, 1997.

US Trust represents that written notice of this additional service was provided to each Client Plan that was affected by the in-kind conversion transactions prior to the commencement of such service by US Trust. However, due to holiday schedules, the notices were sent late and were not sent at least 3 days in advance of the commencement of the brokerage services, as was intended by US Trust. In addition to the late notices, for all Client Plans, US Trust proposes to include another copy of the notice in each Client Plan's next account statement.

US Trust notes that section II(n)(2) of the Proposal requires certain annual disclosures regarding brokerage services (which US Trust intends to provide). In addition, the definition of "Secondary Service" in section III(h) expressly exempts brokerage services from the requirements of section II(k), including the 30-day advance notice requirement for the addition of a Secondary Service. Accordingly, US Trust proposes no change in the language of the Proposal and merely notes for the record this

change in the facts from those set out in paragraph 17 of the Summary.

In this regard, the Department acknowledges that advance notices to the Client Plans regarding the brokerage services were not sent at least 30 days prior to the commencement of such services by US Trust, as previously represented. The Department also acknowledges that an advance notice requirement of brokerage services was not specifically set forth in the Proposal. However, the Department believes that prior notice of an additional "Secondary Service" to a Fund for which a fee will be charged should include notice of any brokerage services to be provided by US Trust to the Fund. Therefore, the Department has modified the definition of "Secondary Service" contained in section III(h) of the Proposal by deleting the reference which exempted brokerage services from the notice requirements of section II(k) and adding the following language:

"* * * However, for purposes of transactions which occurred prior to the date this exemption is granted, the term 'Secondary Service' does not include any brokerage services provided by US Trust to the Funds." [emphasis added]

Second, US Trust states that the Proposal does not contain a definition of the term "Plan" or "Client Plan". US Trust notes that in paragraph 2 of the Summary, the Plans to which the exemption would apply presently consist of Code section 401(a) qualified plans that are "pension plans" under section 3(2) of the Act. Paragraph 2 states that US Trust requests that the exemption apply to any "employee benefit plan" within the meaning of section 3(3) of the Act and/or any "plan" within the meaning of Code section 4975(e)(1). Thus, US Trust suggests that the operative language of the exemption be modified to specify that all such plans will be covered.

In this regard, the Department has added, as section III(m) above, a definition of the term "Client Plan" (with a footnote regarding references to Title I of the Act and the corresponding provisions of the Code) in order to respond to the clarification request made by US Trust.

Third, US Trust also requests that the Department clarify that the requirement of section II(f)(5)—that US Trust provide each Client Plan's Second Fiduciary (upon request) with a copy of the proposed and/or final exemption in advance of the Plan's investment—does not apply with respect to any Plan that was already invested in the Funds prior to the date of the Proposal. US Trust states that it has provided the Proposal to Client Plans as part of the notice to

interested persons described in the Proposal (see 61 FR at 66331). In addition, US Trust states that it will continue to provide to any Client Plan's Second Fiduciary copies of the Proposal, upon request, and will provide copies of the final exemption after it is published in the Federal Register.

In this regard, the Department acknowledges the comments made by US Trust and, in an attempt to clarify this matter, has amended section II(f)(5) by adding the parenthetical phrase "* * * (once such documents are published in the Federal Register)."

Fourth, US Trust notes that sections II(1) and III(i) state that a Second Fiduciary will be supplied with a Termination Form "* * * at times specified in paragraphs (k), (l), and (m) of section II". However, US Trust wishes to clarify that paragraph (1) of section II does not specify any time for providing such Form distinct from the times noted in paragraph (k) and (m) of section II. The Department acknowledges the accuracy of this comment, but does not believe that any change to the language of these sections is necessary.

Finally, US Trust states that the correct figures in the example contained in paragraph 8 of the Summary (at the bottom of the second column on page 66326 of the Federal Register) used to illustrate the interests of the Bank Plans and Client Plans in a particular CIF at the time of the conversion, should be 45 percent and 55 percent, respectively. In this regard, the example in the Summary had incorrectly stated these percentages as 45 percent and 65 percent. The Department acknowledges this correction to the record.

Accordingly, the Department has determined to grant the exemption as modified.

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

Consolidated Lumber Corp. Pension Plan (the Plan), Located in Clifton, New Jersey

(Prohibited Transaction Exemption 97-17; Exemption Application No. D-10344)

Exemption

The restrictions of sections 406(a) and 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the sale for cash (the Sale) by the Plan to Consolidated Lumber Corp., the sponsor of the Plan, of certain wholelife

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

insurance policies (the Policies) issued by Confederation Life Insurance Company of Canada provided the following conditions are satisfied: (a) All terms and conditions of the Sale are at least as favorable to the Plan as those which the Plan could obtain in arm's-length transactions with unrelated parties; (b) the Plan receives cash consideration from each Sale that is no less than the greater of (1) the fair market value of the Policies as of the date of the Sale, or (2) each of the Policies' net cash surrender value as of the date of the Sale; and (C) the Plan does not incur any expenses or suffer any losses with respect to the transactions.

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 December 30, 1996, at 61 FR 68798.

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

The Chase Manhattan Bank, N.A. (Chase), Located in New York, New York

(Prohibited Transaction Exemption 97-18; Exemption Application No. D-10348)

Exemption

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to (1) the granting to Chase, as the representative of lenders (the Lenders) participating in a credit facility, of security interests in limited partnership interests in LF Strategic Real Estate Investors, L.P. (the Partnership) owned by certain employee benefit plans (the Plans) with respect to which some of the Lenders are parties in interest; and (2) the agreements by the Plans to honor capital calls made by Chase in lieu of the Partnership's general partner; provided that (a) the grants and agreements are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; and (b) the decisions on behalf of each Plan to invest in the Partnership and to execute such grants and agreements in favor of Chase are made by a fiduciary which is not included among, and is independent of, the Lenders and Chase.

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 December 30, 1996 at 61 FR 68799.

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

APA, Inc. 401(k) Profit Sharing Plan (the Plan), Located in Pleasant Hill, California

(Prohibited Transaction Exemption 97-19; Exemption Application No. D-10375)

Exemption

The restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to: (1) The loan (the Loan) of \$30,000 to Mr. Gary Petsuch (Mr. Petsuch), a party in interest with respect to the Plan, from Mr. Petsuch's segregated account (the Account) in the plan, and (2) the personal guarantee of the Loan by Mr. Petsuch, provided the following conditions are satisfied: (a) The terms of the Loan are at least as favorable to the Plan as those obtainable in an arm's-length transaction with an unrelated party; (b) the loan does not exceed 25% of the assets of the Account; (c) the Loan is secured by a pledge of Mr. Petsuch's interest in an investment account which has been currently valued by an independent party as having a fair market value approximately 280% of the principal amount of the Loan; (d) the account collateralizing the Loan will be maintained at a collateral-to-Loan ratio of not less than 200% throughout the duration of the Loan; (e) Mr. Petsuch has also personally guaranteed the Loan; and (f) Mr. Petsuch is the only Plan participant to be affected by the Loan.

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 January 14, 1997 at 62 FR 1924.

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

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404

of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application 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 28th day of February, 1997.

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

[FR Doc. 97-5431 Filed 3-4-97; 8:45 am]

BILLING CODE 4516-29-M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency has submitted to OMB for approval the information collection described in this notice. The public is invited to comment on the proposed information collections pursuant to the Paperwork Reduction Act of 1995.