

### Written Comments

The Department received one written comment from the applicant (the Comment) with respect to the Notice and no requests for a public hearing. The Comment states that Robb and Lynne Morgan Ruyle did not consummate the transaction as outlined in the Notice. Instead, Robb and Lynne Morgan Ruyle each decided to terminate their respective IRAs, distribute the IRAs' assets to themselves, file the appropriate tax returns, and pay the penalties and taxes associated with such distributions. As such, the Applicant states that this exemption need not apply to the Robb and Lynne Morgan Ruyle IRAs.

The Department concurs and has eliminated all references to the Robb and Lynne Morgan Ruyle IRAs in this exemption.<sup>6</sup>

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

**FOR FURTHER INFORMATION CONTACT:** Ekaterina A. Uzlyan of the Department at (202) 219-8883. (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 do 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

<sup>6</sup>The files containing exemption requests for Robb and Lynn Morgan Ruyle were assigned numbers D-10687 and D-10686, respectively. Because the applicant requested that this exemption not apply to the Robb and Lynn Morgan Ruyle IRAs, the Department has closed these files administratively.

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 21st day of January, 1999.

**Ivan Straszfeld,**

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

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### DEPARTMENT OF LABOR

#### Pension and Welfare Benefits Administration

[Application No. D-10468, et al.]

#### Proposed Exemptions; Wells Fargo Bank, N.A. (Wells Fargo)

**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 restrictions 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 requests 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.

**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, NW., Washington, DC. 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, NW., Washington, DC. 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.

**Wells Fargo Bank, N.A. (Wells Fargo),  
Located in San Francisco, CA**

[Application No. D-10468]

**Proposed Exemption**

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).<sup>1</sup>

**Section I. Proposed Exemption for the  
Conversion of Assets (the Conversion  
Transactions)**

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 September 16, 1996, to the exchange of the assets of various employee benefit plans (the Plans) that are either held in certain collective investment funds (the CIF or CIFs) maintained by Wells Fargo, or otherwise held by Wells Fargo as trustee, investment manager or in any other capacity as fiduciary on behalf of the Plans, for shares of any open-end investment company (the Fund or Funds) registered under the Investment Company Act of 1940 (the 1940 Act) to which Wells Fargo or any of its affiliates (collectively, Wells Fargo) serves as investment adviser and may provide other services, provided the following conditions are met:

- (a) The Plans are not sponsored by Wells Fargo.
- (b) No sales commissions are paid by a Plan in connection with a Conversion Transaction.
- (c) All or a *pro rata* portion of the assets of a CIF or all or a *pro rata* portion of the assets of the Plans held by Wells Fargo in any capacity as fiduciary on behalf of such Plans are transferred in-kind to the Funds in exchange for shares of such Funds.
- (d) 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.
- (e) The current market value of the assets of a Plan or the CIF is 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-7b (Rule 17a-7) under the Investment Company Act of 1940 (the 1940 Act), as amended, and the procedures established by the Funds pursuant to Rule 17a-7 for the valuation of such assets. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the last business day prior to the Conversion Transaction determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of Wells Fargo.

(f) A second fiduciary (the Second Fiduciary) who is acting on behalf of each affected Plan and who is independent of and unrelated to Wells Fargo, as defined in paragraph (g) of Section III below, receives advance written notice of the Conversion Transaction and the disclosures described in paragraph (f) of Section II below.

(g) On the basis of the information described in paragraph (f) of Section II below, the Second Fiduciary authorizes in writing the Conversion Transaction, the investment of such assets in corresponding Funds and the fees received by Wells Fargo in connection with its services to the Funds. Such authorization by the Second Fiduciary is consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(h)(1) For the Conversion Transaction which occurred on September 16, 1996, the written confirmation described below in paragraph (h)(2) was made by Wells Fargo to all Second Fiduciaries of the appropriate Plans within 38 business days of the transaction.

(2) Not later than 30 days after completion of each Conversion Transaction (except for the transaction described in paragraph (h)(1) above), Wells Fargo sends by regular mail to the Second Fiduciary, a written confirmation that contains the following information:

(A) 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 1940 Act;

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

(C) The identity of each pricing service or market maker consulted in determining the value of such assets.

(i) No later than 90 days after completion of each Conversion Transaction, Wells Fargo sends by regular mail to the Second Fiduciary, a written confirmation that contains the following information:

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

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

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

**Section II. Proposed Exemption for  
Receipt of Fees From Funds  
(Transactions Involving the Receipt of  
Fees)**

If the exemption is granted, the restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(D) through (F) of the Code, shall not apply to the receipt of fees by Wells Fargo from the Funds for acting as the investment adviser, as well as for acting as the custodian, sub-administrator, or for providing any "secondary service" (the Secondary Service) to the Funds [as defined in Section III(h)], in connection with the investment in the Funds by the Plans for which Wells Fargo acts as a fiduciary, provided that:

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

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

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

(d) As to each individual Plan, the combined total of all Plan-level and Fund-level fees received by Wells Fargo for the provision of services to such

<sup>1</sup> For purposes of this proposed exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

Plan and to the Funds (with respect to the Plan's assets invested in the Funds), respectively, are not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(e) Wells Fargo does not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act (the 12b-1 Fees) in connection with the transactions.

(f) The Second Fiduciary receives, in advance of the investment by the Plan in a Fund, a full and detailed written disclosure of information concerning such Fund (including, but not limited to—

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

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

(3) The reasons why Wells Fargo may consider such investment to be appropriate for the Plan;

(4) A statement describing whether there are any limitations applicable to Wells Fargo with respect to which assets of a 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, if granted, once such documents are published in the **Federal Register**.

(g) On the basis of the prospectus and disclosure referred to in paragraph (f) of this Section II, the Second Fiduciary gives prior approval for such purchases, holdings and sales of Fund shares through Conversion Transactions that is consistent with the responsibilities obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act. Such approval must be in accordance with the provisions of Prohibited Transaction Exemption (PTE) 77-4 (42 FR 18732, April 8, 1977) or its successor, as it may be amended from time to time.

(h) The authorization, described in paragraph (g) of this Section II, is terminable at will by the Second Fiduciary of a Plan, without penalty to such Plan. Such termination will be effected by Wells Fargo redeeming the shares of the Fund held by the affected Plan by the close of the business day following the date of receipt by Wells Fargo, either by mail, hand delivery, facsimile, or other available means of written communication at the option of the Second Fiduciary, of the termination form (the Termination Form), as defined

in paragraph (i) of Section III below, or any other written notice of termination; provided that if, due to circumstances beyond the control of Wells Fargo, the sale cannot be executed within one business day, Wells Fargo shall have one additional business day to complete such redemption.

(i) Each Plan satisfies either (but not both) of the following:

(1) For a Plan for which Wells Fargo serves as a non-discretionary trustee, the Plan does not pay any Plan-level investment management fees, investment advisory fees, or similar fees to Wells Fargo with respect to Plan assets invested in the Funds. (This condition does not preclude the payment of investment advisory fees or similar fees by a Fund to Wells Fargo under the terms of its investment advisory agreement adopted in accordance with section 15 of the 1940 Act, nor does it preclude the payment of fees for Secondary Services to Wells Fargo pursuant to a duly adopted agreement between Wells Fargo and the Funds.)

(2) For a Plan for which Wells Fargo serves as a discretionary fiduciary (i.e., a trustee or investment manager), such Plan pays Wells Fargo an investment advisory fee based on total Plan assets from which a credit has been subtracted representing such Plan's *pro rata* share of investment advisory fees paid by the Funds. (This condition also does not preclude the payment of fees for Secondary Services to Wells Fargo pursuant to a duly adopted agreement between Wells Fargo and the Funds.)

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

(k) In the event of an addition of a Secondary Service, as defined in paragraph (g) of Section III below, provided by Wells Fargo to the Fund for

which a fee is charged or an increase in the rate of any fee paid by the Funds to Wells Fargo for any Secondary Service, as defined in paragraph (h) of Section III below, that results either from an increase in the rate of such fee or from the decrease in the number or kind of services performed by Wells Fargo for such fee over an existing rate for such Secondary Service which had been authorized by the Second Fiduciary of a Plan, in accordance with paragraph (g) of this Section II, Wells Fargo will, at least 30 days in advance of the implementation of such additional service for which a fee is charged or fee increase, provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of the Fund and which explains the nature and amount of the additional service for which a fee is charged or the nature and amount of the increase in fees) to the Second Fiduciary of each of the Plans invested in a Fund which is adding a service or increasing fees. Such notice shall be accompanied by the Termination Form, as defined in paragraph (i) of Section III below.

(l) The Second Fiduciary is supplied with a Termination Form at the times specified in paragraphs (j), (k) and (m) of this Section II with instructions regarding the use of such Termination Form including the following information—

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

(2) Failure by the Second Fiduciary to return the Termination Form on behalf of a Plan will be deemed to be an approval of the additional Secondary Service for which a fee is charged or increase in the rate of any fees, if such Termination Form is supplied pursuant to paragraphs (j) and (k) of this Section II, and will result in the continuation of the authorization, as described in paragraph (h) of this Section II, of Wells Fargo to engage in the transactions on behalf of such 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 notice granting this proposed exemption is published in the **Federal Register** and continuing for each calendar year thereafter; provided that the Termination Form need not be supplied to the Second Fiduciary, pursuant to paragraph (m) of this Section II, sooner than six months after such Termination Form is supplied pursuant to paragraphs (j) and (k) of this Section II, except to the extent required by said paragraphs (j) and (k) of this Section II 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 Plan invests, Wells Fargo 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 Wells Fargo; and

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

(C) The average brokerage commissions per share, expressed as cents per share, paid to Wells Fargo 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 Wells Fargo.

(o) 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.

(p) Wells Fargo maintains, for a period of six years, in a manner that is convenient and accessible for audit and examination, the records necessary to

enable the persons, described in paragraph (q) of Section II below, to determine whether the conditions of this proposed exemption have been met, except that—

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

(2) No party in interest, other than Wells Fargo, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (q) of Section II below;

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

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

(B) 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

(C) 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)(B) and (q)(1)(C) of Section II shall be authorized to examine trade secrets of Wells Fargo, or commercial or financial information which is privileged or confidential.

### Section III. Definitions

For purposes of this proposed exemption,

(a) The term "Wells Fargo" means Wells Fargo Bank, N.A. and any of its affiliates, as defined in paragraph (b) of this Section III.

(b) An "affiliate" of a person includes:

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

(2) Any officer, director, employee, relative, or partner in any such person; and

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

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

(d) The term "Fund" or "Funds" means any diversified open-end investment company or companies registered under the 1940 Act for which Wells Fargo serves as investment adviser (including sub-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 redemptions through the Conversion Transactions, calculated by dividing the value of all securities, determined by a method adopted by the Fund's board of directors in accordance with the 1940 Act, 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 Wells Fargo. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to Wells Fargo if—

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

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

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

If an officer, director, partner, or employee of Wells Fargo (or a relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (A) the choice of the Plan's investment manager/adviser, (B) the approval of any purchase or redemption by the Plan of shares of the Funds through a Conversion Transaction, and (C) the approval of any change of fees charged to or paid by the Plan, in connection with any of the transactions described in Sections I and II above, then

paragraph (g)(2) of Section III above, shall not apply.

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

(i) The term "Termination Form" means the form supplied to the Second Fiduciary, at the times specified in paragraphs (j), (k) 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 paragraph (g) of Section II. Such Termination Form may be used at will by the Second Fiduciary to terminate such authorization without penalty to the Plans and to notify Wells Fargo in writing to effect such termination by redeeming the shares of the Fund held by the Plans requesting termination by the close of the business day following the date of receipt by Wells Fargo, 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 Wells Fargo, the redemption cannot be executed within one business day, Wells Fargo shall have one additional business day to complete such redemption.

**EFFECTIVE DATE:** If granted, this proposed exemption will be effective September 16, 1996 with respect to the Conversion Transactions described in Section I and effective as of the date of the grant with respect to Transactions Involving the Receipt of Fees, as described in Section II.

#### Preamble

On April 4, 1996, the Department granted PTE 96-54 at 61 FR 37933. PTE 96-54 permitted, effective July 2, 1993 until October 1, 1993, the in-kind transfer of all or a *pro rata* portion of assets of Plans that were held in certain CIFs maintained by Wells Fargo to certain Funds advised by Wells Fargo, in exchange for shares of the Funds, in connection with the partial termination of the CIFs. The assets transferred consisted of stock, U.S. Treasury obligations, other government and agency obligations, certain fixed income obligations, asset-backed securities and other securities. The Department made a decision to bifurcate the original exemption request thereby exempting the transaction described in PTE 96-54. The Department also provided no exemptive relief in PTE 96-54 for

transactions involving the receipt of fees by Wells Fargo from the Funds beyond that provided under PTE 77-4.<sup>2</sup>

In its amended exemption request, Wells Fargo has agreed to modify the original application so that it will apply to current and future Conversion Transactions and to implement a "negative consent" procedure with respect to fees paid to Wells Fargo by the Funds (i.e., Transactions Involving the Receipt of Fees). If granted, the proposed exemption will be effective as of September 16, 1996 with respect to the Conversion Transactions and effective on the date the grant notice is published in the **Federal Register** for Transactions Involving the Receipt of Fees.

#### Summary of Facts and Representations

##### *Description of the Parties*

1. *Wells Fargo*, which is located in San Francisco, California, is a wholly owned subsidiary of Wells Fargo & Company (WFC) and the seventh largest commercial bank in the United States. Wells Fargo currently serves as a fiduciary with respect to the assets of certain Plans. As of January 15, 1999, Wells Fargo had approximately \$15 billion under management. Wells Fargo also serves as a trustee of certain CIFs and as the investment adviser or sub-adviser with respect to the Funds that are described below.

Effective December 31, 1995, WFC and its affiliates sold certain elements of their institutional trust business, including interests in other entities to Barclays Bank PLC (Barclays). These entities were subsequently reorganized primarily into Barclays Global Fund Advisors. In addition to the Barclays' transaction, effective January 23, 1996, First Interstate Bancorp, a bank holding company (First Interstate), merged into WFC, with the latter as the surviving entity. Effective April 1, 1996, First Interstate's wholly owned subsidiary, First Interstate Bank of California, N.A., was merged into Wells Fargo. Although First Interstate's bank subsidiaries in six other states also merged into Wells Fargo in June 1996, several former First Interstate bank subsidiaries in other states currently remain as separate subsidiaries of WFC. These First Interstate entities have also been made parties to this exemption request.

2. *The Plans*, as well as those that may invest in the future, consist of various

<sup>2</sup> In relevant part, PTE 77-4 permits, under certain conditions, the purchase and sale by an employee benefit plan of shares of a registered open-end investment company when a fiduciary with respect to such plan is also the investment adviser for the investment company.

pension plans as defined in section 3(2) of the Act, independently-sponsored pension and profit sharing plans, qualified plans of owner-employees and welfare plans, as defined in section 3(1) of the Act. The Plans do not include any plans sponsored by Wells Fargo.<sup>3</sup>

3. *The CIFs* are various portfolios of the Wells Fargo Bank Collective Investment Funds for Business Retirement Programs and the Wells Fargo Bank Collective Investment Funds for BRP Retirement Plans<sup>4</sup> and similar CIFs that may be formed in the future for which Wells Fargo serves as trustee and manager. (Any CIFs acquired as part of the First Interstate transaction have been and will be merged into the Wells Fargo CIFs.)

The CIFs were formed effective April 1, 1995 with the assets spun off from the Wells Fargo Investment Funds for Employee Retirement Plans in anticipation of the Barclays transaction. Many of the CIFs invest as "feeder" funds in counterpart to Wells Fargo "master" funds. Under this arrangement, the master fund holds all of the investment assets while the feeder fund invests in the master fund and does not hold the actual investment property but instead holds interests in the master fund. Plans have the option of investing either directly in the master fund or indirectly, by investing in the feeder fund which will then invest in the master fund.<sup>5</sup>

The CIFs described herein relate only to those CIFs for which a Wells Fargo affiliate serves as trustee/manager and/or investment adviser. These CIFs are identified as follows:

##### *Wells Fargo Bank Collective Investment Funds for Business Retirement Programs (BRP)*

- "Feeder" CIFs for BRP Employee Retirement Plans—

<sup>3</sup> The Department herein is not proposing relief for any transaction afforded relief by Section 404(c) of the Act.

<sup>4</sup> The applicant represents that the Wells Fargo Bank Collective Investment Funds for Business Retirement Plans do not charge a fee whereas the Wells Fargo Bank Collective Investment Funds for BRP Retirement Plans charges a management fee of 75 basis points.

<sup>5</sup> It is represented that the primary benefit of the master-feeder arrangement is the flexibility it offers clients of Wells Fargo with respect to the payment of investment management fees while allowing a pooling of a larger group of assets. A master-feeder arrangement gives a plan the option of having the plan, or the plan sponsor, pay the investment management fee directly to the investment manager if Plan assets are invested in the master fund (in which case the investment management fee would be paid at the plan-level) or having the investment management fee paid out of the Plan's assets invested in the fund assuming plan assets are invested in the feeder fund (in which case the investment management fee would be paid at the feeder fund-level).

Asset Allocation Fund,  
Bond Index Fund,  
U.S. Treasury Allocation Fund,  
S&P 500 Stock Fund,  
S&P MidCap Stock Fund,  
Equity Value Fund,  
Money Market Fund,  
Extended Market Fund,  
International Equity Fund,  
Income Accumulation Fund,  
Core Bond Fund,  
Growth Stock Fund,  
Short-Intermediate Term Fund,  
Small Capitalization Growth Fund.

The 14 foregoing CIFs, other than the Money Market Fund, are "shadow" or "feeder" funds that are managed by Wells Fargo. These CIFs invest in counterpart "master" collective investment trusts that are also managed by Wells Fargo.

- "Master" CIFs for BRP Retirement Plans—  
Core Bond Fund for BRP Retirement Plans,  
Growth Stock Fund,  
Short-Intermediate Term Fund,  
Small Capitalization Growth Fund.

The aforementioned 4 CIFs are "master" funds that are managed by Wells Fargo. These CIFs invest directly in portfolio securities. Wells Fargo BRP Plan clients invest directly in these CIFs.

*Wells Fargo Bank Collective Investment Funds for BRP Retirement Plans*

- "Feeder CIFs" for BRP Retirement Plans—  
Asset Allocation,  
Bond Index Fund,  
U.S. Treasury Allocation Fund,  
S&P 500 Stock Fund,  
International Equity Fund.

The above-mentioned 5 CIFs are "shadow" or "feeder" funds that are managed by Wells Fargo. These CIFs invest in counterpart "master" collective investment trusts that are managed by Wells Fargo. The CIFs are distinct from the parallel, but similarly-named counterpart Funds for BRP Employee Retirement Plans (also listed above) and, as also noted previously, have different fee arrangements.

4. *The Mutual Funds* to which the requested exemption will apply are certain investment portfolios of the Stagecoach Funds, Inc. (the Stagecoach Funds), the Overland Express Funds, Inc. (the Overland Funds), certain corresponding master funds in which these Funds may invest (e.g., the MasterWorks Funds), and to any similar Funds for which Wells Fargo or any of its affiliates may provide investment advisory and other services. The Funds are being offered to Plan investors at no load.

(a) *The Stagecoach Funds* constitute an open-end management investment company that was organized as a Maryland corporation on September 9, 1991 and registered under the 1940 Act. Currently, the Stagecoach Funds comprise 25 portfolios, some of which are "feeder" portfolios that invest in the Master Investment Trust, an open-end investment company organized as a Delaware business trust on August 15, 1991 and registered under the 1940 Act. Wells Fargo serves as investment adviser to all of the Stagecoach Funds. For those Fund portfolios that operate under the master-feeder structure, all advisory services are performed at the master fund-level by Wells Fargo. Under such circumstances, the feeder funds have no investment adviser.

The portfolios of the Stagecoach Funds are presented below. As noted, some of the feeder Funds may invest in the Master Investment Trust through a series of master portfolios (the Master Portfolios) having objectives similar to the affected Funds. Other Funds may not be used by Plans as investment vehicles.

*Portfolios for the Stagecoach Funds*

Money Market Mutual Fund\*  
Aggressive Growth Fund  
Balanced Fund\*  
Corporate Stock Fund  
Diversified Income Fund  
Equity Value Fund\*  
Growth & Income Fund\*  
Small Cap Fund\*  
Asset Allocation Fund\*  
U.S. Government Allocation Fund  
California Tax-Free Money Market Fund\*\*  
Government Money Market Fund  
National Tax-Free Money Market Fund\*\*  
Treasury Money Market Mutual Fund\*  
Prime Money Market Mutual Fund\*  
Arizona Tax-Free Bond Fund  
California Tax-Free Bond Fund\*\*  
California Tax-Free Income Fund\*\*  
Ginnie Mae Fund\*  
Intermediate Bond Fund  
Short-Intermediate U.S. Government Income Fund\*  
Money Market Trust\*  
National Tax-Free Fund  
Oregon Tax-Free Fund  
California Tax-Free Money Market Trust

\*Feeder Fund investing in the Master Investment Trust through a comparable Master Portfolio.

\*\*Fund generally not used by a Plan as an investment vehicle.

For investment advisory services rendered to the Stagecoach Funds, Wells Fargo is paid an annualized investment advisory fee ranging from 0.20 percent of the average daily net

assets of the National Tax-Free Money Market Fund to 0.60 percent of the average daily net assets of the Small Cap Master Portfolio which holds the assets of the Small Cap Fund.

(b) *The Overland Funds* constitute an open-end management investment company that has been organized as a Maryland corporation on April 27, 1987 and registered under the 1940 Act. At present, the Overland Funds consist of 15 portfolios, some of which are feeder portfolios that also invest in the Master Investment Trust. Wells Fargo serves as investment adviser to all of the Overland Funds. For those portfolios of the Overland Funds that operate under the master-feeder structure, all advisory services are performed at the master-fund level through comparable Master Portfolios. Again, under such circumstances, the feeder Funds would have no investment adviser.

*Portfolios for the Overland Funds*

Asset Allocation Fund  
California Tax-Free Bond Fund\*\*  
California Tax-Free Money Market Fund\*\*  
Money Market Fund  
Municipal Income Fund\*  
National Tax-Free Institutional Money Market Fund\*\*  
Overland Sweep Fund\*\*  
Short-Term Government-Corporate Income Fund\*  
Short-Term Municipal Income Fund\*  
Strategic Growth Fund\*  
U.S. Government Income Fund  
U.S. Treasury Money Market Fund  
Variable Rate Government Funds Index Allocation Fund\*  
Small Cap Strategy Fund\*

\*Feeder Fund investing in the Master Investment Trust through a comparable Master Portfolio.

\*\*Fund generally not used by a Plan as an investment vehicle.

For investment advisory services provided to those Overland Funds that are available to Plan investors, Wells Fargo is paid an annualized investment advisory fee ranging from 0.25 percent of the average daily net assets of the U.S. Treasury Money Market Fund to 0.70 percent of the average daily net assets of the Asset Allocation Fund.

In addition, to investment advisory services, Wells Fargo may provide certain non-advisory or Secondary Services to the Stagecoach Funds and Overland Funds for which it is separately compensated at the "Fund" or "feeder" Fund level, in the case of a master-feeder arrangement.<sup>6</sup> Currently,

<sup>6</sup>Because of the manner in which fees are structured under the aforementioned master-feeder

these annualized fees and their respective ranges can be summarized as follows:

- *Custodial Services*, 0.0167 percent plus certain transaction charges according to published schedules (e.g., wire transfers).
- *Portfolio Accounting*, 0.070 percent of the first \$50 million, 0.045 percent of the next \$50 million and 0.2 percent of any excess.
- *Transfer Agency Services*, 0 percent or 0.02 percent (Overland Funds and Stagecoach Money Market Funds) to 0.06 percent (other Stagecoach Funds).
- *Shareholder Servicing*, 0 percent (Overland and certain Stagecoach Funds) to 0.25 percent (certain Stagecoach Funds).
- *Subadministration*, 0.04 percent of the 0.06 percent fee paid to Stephens, Inc. as administrator. Some of the subadministration services performed by Wells Fargo include maintaining and preserving the records of the Funds, tracking authorized versus issued shares, furnishing statistical and research data, and coordinating (or assisting in) the preparation and filing with the SEC of registration statements, notices, reports and other materials required to be filed under applicable laws.

#### The Conversion Transactions

5. Besides the Conversion Transactions that were described in PTE 96-54, on September 16, 1996, Wells Fargo began offering Plans shares of the Funds as an investment vehicle alternative to units in the CIFs. Although Wells Fargo intends that the CIFs and their corresponding Funds will be identical from the standpoint of their investment objectives, it anticipates that the Fund option will be selected by Plans that desire to obtain daily price quotations and ease of trading. Therefore, Wells Fargo is providing each Plan the opportunity to designate one or more Funds in lieu of the parallel CIFs for investment purposes with respect to part or all of the assets of the Plan. The decision to engage in a Conversion Transaction is subject to the review and approval of a Second Fiduciary.

In addition, Wells Fargo represents that it may choose to terminate one or more CIFs if the CIF does not have a sufficient number of investors to make it economically viable. Further, Wells Fargo proposes that from time to time it may be appropriate for an individual Plan for which Wells Fargo serves as a

arrangements, Wells Fargo has confirmed that it does not receive any double fees for the services it renders to the Funds.

fiduciary to transfer all or a *pro rata* share of its assets that are held in a custodial Account with Wells Fargo, in-kind, to any of the Funds in exchange for shares of such Funds. In this regard, 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 invests only in common stock and money market securities, the Conversion Transaction would involve all or a *pro rata* share of the common stock and money market securities held by the Plan, if the stock and securities are eligible for purchase by the Fund and would not involve the transfer or exchange of the real estate holdings of the Plan. No brokerage commissions or other fees or expenses (other than customary transfer charges paid to parties other than Wells Fargo or its affiliates) have been or will be charged to the Plans in connection with any of the Conversion Transactions and the acquisition of shares of the Funds by the investing Plans.

Finally, to avoid potentially large brokerage expenses that would otherwise be incurred, Wells Fargo proposes that an exchange of Plan interests in a CIF for shares in a corresponding Fund (or a direct exchange of securities between a Plan and a Fund as previously described) may be effected by means of a direct transfer to the Fund of the Plan's proportionate interest in the CIF (or of the securities), in exchange for the issuance of Fund shares. In this regard, the Plan's proportionate interest in certain securities investments of the CIF would be transferred directly.<sup>7</sup>

6. Wells Fargo represents that the Conversion Transactions are ministerial transactions performed in accordance with pre-established objective procedures which are approved by the board of trustees of each Fund. Such procedures require that assets transferred to a Fund (a) be consistent with the investment objectives, policies and restrictions of the corresponding portfolios of the Fund, (b) satisfy the applicable requirements of the 1940 Act and the Code and, (c) have a readily ascertainable market value. In addition, any assets that are transferred will be

<sup>7</sup>In certain cases, a Conversion Transaction will not take place to the extent that it will result in the creation of fractional shares. In this situation, the number of shares to be transferred will be automatically (mechanically) rounded up or down to the next nearest whole number. For this purpose, Wells Fargo states that fractional dollar amounts ending below \$0.005 and fractional share amounts ending below 0.5 will be rounded downward to the next lower cent or whole share, respectively. Amounts at or above these figures will be rounded upward to the next higher cent or whole share.

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 Conversion Transaction. Further, prior to entering into a Conversion Transaction, each affected Plan will receive certain disclosures from Wells Fargo and approve such transaction in writing.

Prior to a Conversion Transaction, the assets of a transferring CIF will be reviewed to confirm that they are appropriate investments for the receiving Fund. If any of the assets of a CIF are not appropriate for its corresponding Fund, Wells Fargo intends to sell such assets in the open market through an unaffiliated brokerage firm.

7. As noted above, on September 16, 1996, Wells Fargo exchanged all interests in the Small Capitalization Growth "shadow" or feeder CIF for mutual fund shares of the Stagecoach Small Capitalization Fund. The feeder CIF held interests in the Small Capitalization Growth Fund, which was managed by Wells Fargo and invested in portfolio securities. The Small Capitalization Growth Fund consisted of a master CIF and the subject feeder CIF.

The transaction involved an in-kind transfer by the Plans of their interests in the feeder CIF to the Fund and a simultaneous transfer of such interests to the master CIF in exchange for all of its underlying assets. Wells Fargo represents that the Small Capitalization CIF assets were valued for purposes of the Conversion Transaction in accordance with Rule 17a-7 (see Representation 9) such that the value of the Fund shares received by the CIF interest-holders on the conversion date was equal to the value of the CIF interests as so calculated. All interests in the Small Capitalization CIF (both master and feeder) were transferred in-kind and the CIF was subsequently terminated. Wells Fargo further represents that Plans participating in the Small Capitalization CIF were provided notice of the Conversion Transaction and every Plan affirmatively elected to participate in such Conversion Transaction.

Following the Conversion Transaction, Wells Fargo states that it provided Second Fiduciaries with written confirmations of the transaction. In this regard, approximately 38 business days after the Conversion Transaction, Wells Fargo sent each affected Second Fiduciary written confirmation of the identity of the assets that were valued for purposes of the in-kind transfer in accordance with Rule

17a-7(b)(4), the price determined for such assets and the identity of each pricing service or market maker consulted in determining their value.<sup>8</sup> In addition, no later than 90 days after the Conversion Transaction, Wells Fargo sent each affected Second Fiduciary written confirmation of (a) the number of CIF units held by the Plan before the Conversion Transaction (and the related per unit value and the aggregate dollar value of the units transferred); and (b) the number of Fund shares received by the Plan as the result of the Conversion Transaction (and the related per share net asset value and the aggregate dollar value of the shares received).

Wells Fargo requests that the exemption apply retroactively for the Conversion Transaction that took place on September 16, 1996 and prospectively with respect to any similar Fund in which a Plan invests and with respect to which Wells Fargo or any of its affiliates may provide investment advisory and other services. For this purpose, Wells Fargo represents that all other future Funds to which Wells Fargo will serve as investment adviser and that utilize the exemption will assume similar investment structures and Plan investments therein will be subject to the terms and conditions of the exemption.

#### *Advance Disclosure/Approval*

8. With respect to each Conversion Transaction, Wells Fargo will provide the Second Fiduciary of each affected Plan with the disclosures required by PTE 77-4. In this regard, such information will include, but is not limited to, (a) a current prospectus for the Fund in which the Plan is considering investing; (b) a statement describing the fees that are to be paid to Wells Fargo and its affiliates and to unrelated parties, including the nature and extent of any differential between the rates of the fees; and (c) the reasons why Wells Fargo considers such investment to be appropriate for the Plan. In addition, upon the request of the Second Fiduciary, Wells Fargo will provide a copy of the proposed exemption and/or a copy of the final exemption, if granted. Based on the required disclosures, the Second Fiduciary will approve, in writing, the Conversion Transaction, including the fees to be paid by the Funds to Wells Fargo.

<sup>8</sup>The securities subject to valuation under Rule 17(a)-7(b)(4) include all securities other than "reported securities" as the term is defined in Rule 11Aa3-1 under the Securities Exchange Act of 1934, or those quoted on the NASDAQ system or for which the principal market is an exchange.

#### *Valuation Procedures*

9. The assets transferred in connection with a Conversion Transaction will consist entirely of cash and marketable securities. For this purpose, the value of the securities in the CIF will be determined based on market value as of the close of business on the last business date prior to the transfer (the Valuation Date). The values on the Valuation Date will be determined in a single valuation using the valuation procedures described in Rule 17a-7 under the 1940 Act. In this regard, the "current market price" for specific types of CIF securities will be determined as follows:

(a) If the security is a "reported security" as the term is defined in Rule 11Aa3-1 under the Securities Exchange Act of 1934 (1934 Act), the last sale price with respect to such security reported in the consolidated transaction reporting system (the Consolidated System) for the Valuation Date; or if there are 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 1934 Act), as of the close of business on the Valuation Date; or

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

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

(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 Valuation Date, determined on the basis of reasonable inquiry. For securities in this category, Wells Fargo intends to obtain quotations from at least three sources that are either broker-dealers or pricing services independent of and unrelated to Wells Fargo and, where more than one valid quotation is available, use the average of the quotations to value the securities, in conformance with interpretations by the SEC and practice under Rule 17a-7.

The securities received by a transferee Fund portfolio will be valued by such portfolio for purposes of the transfer in the same manner and as of the same day as such securities will be valued by the corresponding transferor CIF. The per share value of the shares of each portfolio of each Fund portfolio issued to the CIFs will be based on the corresponding portfolio's then-current

net asset value. Wells Fargo represents 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 will be not less than the value of such Plan's investment in the CIF as of the close of business on the last business day prior to the Conversion Transaction.

Not later than 30 business days after completion of a Conversion Transaction, Wells Fargo will send by regular mail a written confirmation of the transaction to each affected Plan. Such confirmation will contain: (a) The identity of each security that is valued in accordance with Rule 17a-7(b)(4), as described above; (b) the price of each such security for purposes of the transaction; and (c) the identity of each pricing service or market maker consulted in determining the value of such securities.

No later than 90 days after completion of each Conversion Transaction, Wells Fargo will mail to the Plan a written confirmation of the fair market value (i.e., the Rule 17a-7 value) of the securities held by the Plan immediately before the Conversion Transaction and the number of shares in each Fund that are held by the Plan following the Conversion Transaction (and the related per share net asset value and the aggregate dollar value of the shares received).

#### *Transactions Involving the Receipt of Fees*

10. In connection with the Plans' investment in the Funds, Wells Fargo represents that PTE 77-4 permits it to receive fees from the Funds under either of two circumstances: (a) Where a Plan does not pay any investment management, investment advisory, or similar fees with respect to the assets of such Plan invested in shares of a Fund for the entire period of such investment; or (b) where a Plan pays investment management, investment advisory, or similar fees to Wells Fargo based on the total assets of such Plan from which a credit has been subtracted representing such Plan's *pro rata* share of such investment advisory fees paid to Wells Fargo by the Fund. As such, Wells Fargo notes that there may be two levels of fees—those fees which a Wells Fargo affiliate could charge to the Plans for serving as trustee with investment discretion or as investment manager (the Plan-level fees); and those fees a Wells Fargo affiliate could charge to the Funds (the Fund-level fees) for serving as investment adviser, custodian, or service provider.

In this regard, Wells Fargo states that its client Plans are typically subject to standard Plan-level fee schedules

covering various services provided by it and/or its affiliates. These fees are subject to negotiation with the individual Plans. Wells Fargo represents that it also receives investment management fees with respect to the CIFs. All fees are disclosed and approved in advance as part of the Plan's fee schedule and vary from CIF to CIF. Wells Fargo further represents that it may be reimbursed by the CIFs for certain direct expenses (e.g., charges of outside auditors).

With respect to Fund-level fees, Wells Fargo represents that all such fees are described in prospectuses and include investment advisory fees that are paid to Wells Fargo as well as certain fees for Secondary Services provided by Wells Fargo entities (see Representation 4). Wells Fargo states that it does not receive any 12b-1 Fees in connection with the transactions. In addition, Wells Fargo represents that the Funds' service providers may be reimbursed for certain third-party expenses.

11. Depending upon the nature of its fiduciary relationship with a Plan, Wells Fargo currently utilizes the following fee structures:

(a) *With respect to Plans for which Wells Fargo serves as a nondiscretionary trustee*, such Plans pay a Plan-level fee to Wells Fargo for basic administrative services. The administrative services include, among others, Wells Fargo's acting as custodian of the assets of a Plan, maintaining the records of a Plan, preparing periodic reports concerning the status of the Plan and its assets, and accounting for contributions, benefit distributions, and other receipts and disbursements.<sup>9</sup> Wells Fargo represents that these Plan-level functions are separate and distinct from those it performs at the Fund-level. At the Fund-level, the Wells Fargo is receiving compensation for investment advisory services rendered to the Funds. In addition, Wells Fargo is retaining fees for providing Secondary Services to the Funds.

(b) *For Plans for which it serves as a discretionary fiduciary (i.e., trustee or investment adviser)*, Wells Fargo presently charges an overall Plan-level management fee that includes investment management/investment advisory services in addition to Plan-level administrative services. Currently, the standard fee is 95 basis points. For such managed accounts, Wells Fargo is utilizing the "credit" or "offset" approach of PTE 77-4, i.e., it charges a

Plan-level investment management fee based on total assets under management from which an advance credit is subtracted representing the Plan's *pro rata* share of the Fund-level investment advisory fees paid to Wells Fargo. In addition, Wells Fargo proposes to retain fees for Secondary Services provided to the Funds.

12. Wells Fargo believes that the foregoing fee arrangements comply with PTE 77-4 and that as to each Plan, the combined total of all Plan-level and Fund-level fees received by it for the provision of services to the Plans and to the Funds (with respect to the Plan's assets invested in the Funds), respectively, are not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.<sup>10</sup> However, Wells Fargo notes that there is one difference from PTE 77-4 for which it has requested exemptive relief from the Department. In this regard, one of the requirements of PTE 77-4 has been that any future change in any of the rates of fees would require prior written approval by the Second Fiduciary of the Plans participating in the Funds. Wells Fargo maintains that where many Plans participate in a Fund, the addition of a service or any good faith increase in fees cannot be implemented until written approval of such change is obtained from every Second Fiduciary. Therefore, Wells Fargo proposes to follow an alternative "negative consent" procedure set out in other similar exemptions granted by the Department. Wells Fargo believes the negative consent procedure will provide the basic safeguards for the Plans and is more efficient, cost effective, and administratively feasible than those contained in 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 the Funds to Wells Fargo over an existing rate that had been authorized by the Second Fiduciary, Wells Fargo will provide, at least 30 days in advance of the

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

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

#### *Authorization Requirements for the Second Fiduciary*

13. The written notice of an additional service for which a fee is charged or a fee increase, as described in Representation 12, will be accompanied by a Termination Form, as defined in paragraph (i) of Section III, and by instructions on the use of such

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

<sup>9</sup>For Plan-level trustee services, Wells Fargo may be paid a quarterly fee of up to 0.30 percent on the first \$1 million of Account assets, 0.15 percent based on the next \$9 million of Account assets and 0.05 percent on the balance.

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

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

#### *Conditions for Exemption*

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

With respect to disclosure, the Second Fiduciary of each Plan will receive advance written notice of the in-kind transfer of assets of the Plan or the CIF upon termination of a CIF (with respect to any Conversion Transaction) and full written disclosure of information concerning the Funds (including a current prospectus for each of the Funds and a statement describing the fee structure), consistent with the requirements of PTE 77-4, as well as information regarding the terms and conditions of the requested exemption.

On the basis of the information disclosed, the Second Fiduciary will authorize in writing the investment of assets of the Plans in shares of the Fund in connection with the transactions set forth herein and the compensation received by Wells Fargo in connection with its services to the Funds. For any Conversion Transaction, the Second Fiduciary's written authorization will extend to only those investment portfolios of the Funds with respect to which the Plan has received the written disclosures referred to above. For other investments, written authorization may be set out in the Plan documents or the Plan's investment management agreement as contemplated by PTE 77-4, provided again that investment in any Fund may be made only with respect to those investment portfolios of the Funds with respect to which the Plan has received the written disclosures. Having obtained the authorization of the Second Fiduciary, Wells Fargo will invest the assets of a Plan among the portfolios and in the manner covered by the authorization, subject to satisfaction of the other terms and conditions of this proposed exemption.

In addition to the disclosures provided to the Plan prior to investment in any of the Funds, Wells Fargo represents that it will routinely provide at least annually to the Second Fiduciary updated prospectuses of the Funds in accordance with the requirements of the 1940 Act and the SEC rules promulgated thereunder.

Further, the Second Fiduciary will be supplied, upon request, with a report or statement (which may take the form of the most recent financial report of such Funds, the current statement of additional information, or some other written statement) which contains a description of all fees paid by the Fund. Depending upon the type of relationship (e.g., discretionary or non-discretionary) Wells Fargo has with the Plan, each Plan will be advised that it may or may not be required to pay a Plan-level investment management or advisory fee with respect to Plan assets invested in the Funds and that Wells Fargo will receive and retain fees for Secondary Services.

Wells Fargo and its affiliates currently do not execute securities brokerage transactions for the investment portfolios of the Funds. To the extent that it proposes to do so in the future, Wells Fargo will, at least 30 days in advance of the implementation of such additional service, provide a written notice to the Plan's Second Fiduciary which explains the nature of such additional brokerage service and the amount of the fees. Further, with respect to any Fund for which Wells Fargo will provide such brokerage services, Wells Fargo will provide at least annually to the Second Fiduciary of any Plan that invests in such Funds with a written disclosure indicating (a) the total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid to Wells Fargo 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 Wells Fargo; (c) the average brokerage commissions per share, expressed as cents per share, paid to Wells Fargo 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 Wells Fargo.

In addition to the foregoing, Wells Fargo represents that (a) Plans and other investors will purchase or redeem shares in the Funds in accordance with standard procedures adopted by each Fund's board of directors; (b) the Plans will pay no sales commissions or redemption fees in connection with purchase or redemption of shares in the Funds by the Plans; (c) Wells Fargo will not purchase from or sell to any of the Plans shares of any of the Funds; and (d) the price paid or received by the Plans for shares of the Funds will be the net asset value per share at the time of such purchase or redemption and will be the same price as any other investor would

have paid or received at that time. The value of the Funds' shares and the value of each Funds' portfolios are determined on a daily basis. Assets are valued at fair or market value, as required by Rule 17a-7. Net asset value per share for purposes of pricing purchases and redemptions is determined by dividing the value of all securities and other assets of each portfolio, less the liabilities charged to each portfolio, by the number of each portfolio's outstanding shares.

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

(a) The Plans or the CIFs have not and will not pay sales commissions or redemption fees in connection with a Conversion Transaction or in connection with purchases or redemptions by the Plans or the CIFs of shares of the Funds.

(b) The Plans have received or will receive shares of the Funds that are equal in value to the assets of the Plans or the CIFs exchanged for such shares, with the value of such Plan or CIF asset determined in a single valuation performed in the same manner and as of the close of business on the same day in accordance with the procedures set forth in Rule 17a-7 under the 1940 Act, as amended from time to time or any successor rule, regulation or similar pronouncement.

(c) Within 38 business days of the initial Conversion Transaction involving the Small Capitalization CIF and not later than 30 business days after completion of a subsequent Conversion Transaction, each affected Plan has received or will receive written confirmation of the assets involved in the exchange which were valued in accordance with Rule 17a-7(b)(4), the price of such assets and the identity of the pricing service or market maker consulted.

(d) No later than 90 days after completion of a Conversion Transaction, Wells Fargo has mailed or will mail to the Second Fiduciary of each Plan, a written confirmation containing (1) the aggregate dollar value of the assets held by the Plan immediately before a Conversion Transaction, (2) the number of CIF units held by a Plan prior to the Conversion Transaction (and the related per unit value or the aggregate dollar value of the assets transferred), and (3) the number of shares of the Funds that are held by such Plan following the conversion (and the related per share net asset value and the aggregate dollar value of the shares received).

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

(f) Neither Wells Fargo nor an affiliate, including any officer or director have not and will not purchase from or sell to any of the Plans shares of any of the Funds.

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

(h) Wells Fargo will not receive any 12b-1 Fees in connection with the transactions.

(i) Depending on the nature of its relationship with Wells Fargo, a Plan either (i) will not pay any Plan-level investment management, investment advisory or similar fees to Wells Fargo with respect to any of the assets of such Plans which are invested in shares of the Funds; or (ii) will pay a Plan-level investment advisory fee based on total Plan assets from which a credit has been subtracted representing the Plan's *pro rata* share of investment advisory fees paid by the Funds.

(j) Prior to investment by a Plan in any of the Funds, the Second Fiduciary has received or will receive a full and detailed written disclosure of information concerning such Fund.

(k) On the basis of the disclosures, the Second Fiduciary has authorized or will authorize the Conversion Transaction, as applicable, and investment of the Plan's assets in the Funds.

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

(m) The authorization by the Second Fiduciary will be terminable at will without penalty to such Plans, and any such termination will be effected by the close of the business day following the date of receipt by Wells Fargo, either by mail, hand delivery, facsimile or other available means of written communication at the option of the Second Fiduciary, of the Termination Form or any other written notice of termination, unless due to circumstances beyond the control of

Wells Fargo delay execution for no more than one additional business day.

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

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

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

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

**Plumbers and Pipefitters National Pension Fund (the Pension Plan) and Pipefitters Local No. 211 Joint Educational Trust (the Welfare Plan) (Collectively, the Plans) Located in Alexandria, VA and Houston, TX, Respectively**

[Application Nos. D-10700 and L-10709]

**Proposed Exemption**

The Department of Labor is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a) 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 sale (the Sale) of certain real property (the Property) by the Pension Plan to the Welfare Plan, a party in interest with respect to the

Pension Plan; provided the following conditions are satisfied:

(A) The terms and conditions of the transaction are no less favorable to the Pension Plan and the Welfare Plan than those which either the Pension Plan or the Welfare Plan would receive in an arm's-length transaction with an unrelated party;

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

(C) The Pension Plan and the Welfare Plan incur no expenses, fees, or commissions from the Sale other than their own respective appraisal, recording, and legal expenses;

(D) The Welfare Plan pays as consideration for the Property no more than the fair market value of the Property as determined by a qualified, independent appraiser on the date of the Sale;

(E) The Pension Plan sells the Property for a price that is not less than the fair market value of the Property as determined by a qualified, independent appraiser on the date of the Sale; and

(F) The fiduciaries for the Pension Plan and the Welfare Plan, respectively, will enforce the terms of the proposed exemption, if granted.

#### Summary of Facts and Representations

1. The Pension Plan is a jointly administered Taft-Hartley trust fund established pursuant to section 302(c)(5) of the Labor Management Relations Act which is intended to qualify under section 401(a) of the Code. The Pension Plan's participants are employees covered by collective bargaining agreements between sponsoring employers of the Pension Plan and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the United Association), including seven employees of the Welfare Plan. The United Association and its local affiliates are the sole collective bargaining agencies for employees covered by applicable collective bargaining agreements who are employed by the sponsoring employers of the Pension Plan.

The Pension Plan is administered by a six member Board of Trustees (the Trustees) of whom three members are appointed by the sponsoring employers, and three members are appointed by the United Association. The Trustees of the Pension Plan are represented by the applicant to have investment discretion over the assets of the Pension Plan. Currently the Trustees are Messrs. Charles H. Carlson, Fred G. Christman, and James A. House, who were appointed by the employers; and Messrs. Martin J. Maddaloni, Chairman,

General President of the Union Association, Thomas H. Patchell, General Secretary-Treasurer of the Union Association, and Patrick R. Perno, Admin. Asst. to the General President for the Union, who were appointed by the United Association.

The applicant represents that, as of June 30, 1997, the Pension Plan had total assets of approximately \$3,166,000,000; and as of September 23, 1998, the Pension Plan had approximately 97,988 participants and beneficiaries.

2. The Welfare Plan is a jointly administered Taft-Hartley trust fund established pursuant to section 302(c)(5) of the Labor Management Relations Act, which provides training for apprentices and journeymen pipe fitters located in the Houston, Texas area, who are members of the United Association Local Union No. 211 (Local 211). The Welfare Plan has four trustees (the Trustees) who are represented by the applicant to have investment discretion over the assets of the Welfare Plan. Currently the Trustees include Messrs. William A. Gregory and John Morrow, who were appointed by the sponsoring employers of the Welfare Plan; and Messrs. Lynn Williams, Business Manager of Local 211 and Richard Seeton, who were appointed by Local 211.

The applicant represents that as of July 31, 1997, the Welfare Plan had total assets of \$1,147,297. Presently there are 137 participants in the apprenticeship program given by the Welfare Plan.

The applicant further represents that none of the Trustees of the Pension Plan serves as a Trustee of the Welfare Plan, and none of the Trustees of the Welfare Plan serves as a Trustee of the Pension Plan. However, the applicant represents that the Sale is a prohibited transaction because seven employees of the Welfare Plan are participants of the Pension Plan; and as such, the Welfare Plan is an employer as defined under section 3(14) of the Act and is a party in interest with respect to the Pension Plan.

3. The Property is described by the applicant as 1.5863 acres of land, being Tract 10, out of the J. R. Harris Survey, Abstract 27, Houston, Harris County, Texas, with improvements consisting of asphalt paving and a chain link fence. It is located at the southeast corner of Old Galveston Road and Loop 610. The Property was appraised by an independent appraiser, Randy L. Seale, MAI, with Allen, Williford & Seale, located in Houston, Texas, who determined that the Property had a fair market value of \$69,100, as of June 30, 1998.

4. The Pension Plan proposes to sell the Property to the Welfare Plan for cash in a one-time transaction with no expenses, fees, or commissions incurred from the Sale by either the Pension Plan or the Welfare Plan other than their own respective appraisal, recording, and legal expenses. The applicant represents that the Pension Plan will receive, as consideration from the Sale, no less than the fair market value of the Property as determined on the date of the Sale by a qualified, independent appraiser.

The applicant represents that the Pension Plan is prompted to take this action because the Property does not fit within the investment strategy of the Pension Plan. The applicant further represents that the continued possession of the Property will increase costs and expenses to the Pension Plan without generating a reasonable return on the investment. Title to the Property was obtained by the Pension Plan in June 1990 as a result of Local 211's pension plan being merged into the Pension Plan. During 1992, consideration was given to having the Property sold to the Welfare Plan and then abandoned. In 1994 the Pension Plan listed the Property with a commercial real estate agent in Houston, Texas in an attempt to sell it to an unrelated party. After one year, when no offers to purchase the Property were received, the Pension Plan did not renew the listing agreement. During June 1997, the Pension Plan agreed to sell the Property to the Welfare Plan upon obtaining from the Department an exemption from the prohibited transaction provisions of the Act.

The applicant represents that the Trustees for both Plans have determined that the proposed Sale of the Property will be in the best interests of their respective Plans and the rights of their participants and beneficiaries will be protected because the Property will provide each of the Plans with desirable improvements in their respective investments. The Pension Plan will sell an illiquid and superfluous asset, and the Welfare Plan will acquire an asset that has a proximity to its present facilities which will provide increased on-site parking space and increased security in a changing neighborhood, and thus, minimizing inconveniences to participants and beneficiaries and personnel of the Welfare Plan, enhancing its administrative efficiencies.

The applicant also represents that compliance with the terms and conditions of the requested exemption will be monitored and enforced by the independent fiduciaries of the

respective Plans. The respective fiduciaries of both Plans represent that the proposed Sale is in the best interests of the Plans and is protective of the rights of the participants and beneficiaries of the Plans; and that they have the power, authority, and responsibility to take the necessary action in the proposed transaction so that the Welfare Plan will not pay more and the Pension Plan will not receive less than the fair market value as determined by the independent appraiser on the date of the Sale.

5. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because (a) the Sale is a one-time transaction for cash; (b) the Plans will not incur any expenses from the transaction other than their own respective expenses; (c) the Pension Plan will receive no less than the fair market value of the Property as determined on the date of the Sale by a qualified, independent appraiser; (d) the Welfare Plan will pay no more than the fair market value of the Property as determined on the date of the Sale by a qualified, independent appraiser; and (e) the proposed transaction will be enforced by the Plans respective independent fiduciaries.

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

State Street Bank and Trust Company (State Street), Located in Boston, Massachusetts

[Application Number D-10701]

### 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. Transactions

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and 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)(A) through (E) of the Code, shall not apply to the sale (the Sale) of fractional amounts of certain fixed-income instruments (Fractional Amounts) to State Street and its affiliates by plans for which State Street or its affiliates provide fiduciary or other services (Client Plans), as well as employee benefit plans established and maintained by State Street or its

affiliates (State Street Plans; collectively, the Plans), provided that the following conditions are met:

(a) Each Sale involves a one time transaction for cash;

(b) The terms of each Sale are at least as favorable to the Plan as those terms which would be available in an arm's-length transaction with an unrelated party;

(c) The Plans receive an amount which is not less than the par value for each of the Fractional Amounts;

(d) In the case of single Client Plans:

(1) Each Sale is subject to the prior consent of an independent plan fiduciary;

(2) The independent fiduciary of each Plan is furnished with notice within 90 days of the proposed Sale, providing information necessary for the independent fiduciary to determine whether to approve the Sale transaction. If the fixed-income instruments are not redenominated within a year of provision of this notice, additional notice will be provided to the independent fiduciaries of each Plan each year notifying them of their right not to participate in this program of Sales; and

(3) Each independent fiduciary who determines to participate in the Sale receives written confirmation of the decision to participate and written confirmation of the transaction and its terms.

(e) In the case of Client Plans participating in collective funds for which State Street serves as trustee or investment manager,

(1) Each Sale engaged in by the collective fund is subject to the prior approval of each independent plan fiduciary of Plans participating in the fund;

(2) The independent fiduciary of each Plan is furnished notice within 90 days of the proposed Sale, containing information necessary for the independent fiduciary to determine whether to approve the Sale transaction or withdraw from the collective fund prior to the Sale. If the fixed-income instruments are not redenominated within a year of provision of this notice, additional notice will be provided to the independent fiduciaries each year notifying them of their right to withdraw from the collective fund;

(3) Each independent fiduciary of a plan participating in a collective fund who determines to participate in the Sale receives written confirmation of the decision to participate and written confirmation of the transaction and its terms;

(f) In the case of the Plans, State Street must engage in the Sale within 30 days

of the date that the Fractional Amounts are received by State Street as custodian or trustee for the Plans from the issuers of the fixed-income security;

(g) The Plans do not incur any commissions or other expenses in connection with the Sales; and

(h)(1) State Street or an affiliate maintains or causes to be maintained within the United States, for a period of six years from the date of such transaction, the records necessary to enable the persons described in this section to determine whether the conditions of this exemption have been met; except that a party in interest with respect to an employee benefit plan, other than State Street or its affiliates, shall not be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) or (b) of the Code, if such records are not maintained, or are not available for examination, as required by this section, and a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of State Street or its affiliates, such records are lost or destroyed prior to the end of such six year period;

(2) The records referred to in subsection (1) above are unconditionally available for examination during normal business hours by duly authorized employees of (a) the Department, (b) the Internal Revenue Service, (c) plan participants and beneficiaries, (d) any employer of plan participants and beneficiaries, and (e) any employee organization whose members are covered by such plan; except that none of the persons described in (c) through (e) of this subsection shall be authorized to examine trade secrets of State Street or its affiliates or any commercial or financial information which is privileged or confidential.

#### Section II. Definitions

(a) The term "affiliate" of State Street means any other bank or similar financial institution directly or indirectly controlling, controlled by, or under common control with State Street.

(b) The term "Euro" means the single European currency introduced on January 1, 1999 in eleven Member States of the European Union.<sup>12</sup>

(c) The term "Fractional Amount" means, with respect to any fixed-income instrument, an amount less than one Euro.

(d) The term "independent plan fiduciary" means a plan fiduciary

<sup>12</sup> For purposes of reference, on January 6, 1999, 1 Euro equaled approximately 1.16 U.S. dollars.

independent of State Street and any of its affiliates.

(e) The term "par value" means the face value of the fixed-income instrument.

(f) The term "Plan" includes all employee benefit plans to which State Street or an affiliate acts as a service provider, including a fiduciary, and all plans established and maintained by State Street and its affiliates, which have net assets of at least \$25,000,000.

**EFFECTIVE DATE:** This exemption is effective for the period beginning on January 1, 1999 and ending three years from the date on which each country joining the European Economic and Monetary Union converts to the Euro.

#### *Summary of Facts and Representations*

1. State Street, a Massachusetts banking corporation, is a commercial bank which provides a wide range of banking, fiduciary, record keeping, custodial, brokerage and investment services to corporations, institutions, governments, employee benefit plans, governmental retirement plans and private investors worldwide. State Street is a wholly-owned subsidiary of State Street Corporation, a bank holding company organized in 1970 under the laws of the Commonwealth of Massachusetts. As a Massachusetts trust company and a member bank of the Federal Reserve System, State Street is a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 and section 581 of the Code. As of December 31, 1997, State Street Corporation's total assets were \$37.975 billion with shareholders' equity of \$1.995 billion.

2. Among the assets of the Client Plans and the State Street Plans are corporate and government-issued fixed-income instruments denominated in the currencies of the following eleven European nations: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Portugal and Spain. In May 1998, these eleven nations agreed to join the Economic and Monetary Union (EMU) and to cooperate in the creation of a European Central Bank and the development of a central currency (the Euro), in lieu of the individual currencies of the eleven members (Legacy Currencies). Beginning on January 1, 1999, these Legacy Currencies will be converted into the Euro,<sup>13</sup> although the Legacy Currencies

will continue to coexist with the Euro for a limited time as denominations of the Euro.<sup>14</sup>

During the initial transition weekend that included January 1, 1999, nine of the eleven securities markets (Austria, Belgium, Finland, France, Germany, Italy, Luxembourg, Portugal and Spain) in the EMU underwent a conversion in which: (1) All stock exchanges and depositories commenced pricing, trading and settling only in the Euro, (2) approximately 1500 government securities were redenominated, (3) currency balances were converted to the Euro, and (4) all securities transactions pending over that weekend were converted to settle in the Euro. Since January 1, 1999 forward, the stock exchanges, depositories and national or central banks in these nine countries operate only in the Euro. Ireland permitted Legacy Currency or Euro currency instructions until January 8, 1999, and the Netherlands is permitting Legacy Currency or Euro currency instructions throughout the entire three-year transition period.

With regard to fixed-income instruments, the process of conversion is scheduled to take place over a three-year period. The applicant states that the other European nations not currently part of the EMU may decide to follow these eleven nations and start their own conversion process after January 1, 1999. In that event, these other nations may take approximately three years from their commencement of the conversion process to redenominate fixed-income securities. State Street represents that in the process of this redenomination, Fractional Amounts (as defined in paragraph (c) of Section II) will be created as a result of the relationship between the former currency values and the Euro.<sup>15</sup>

Council of the European Union mandated the following conversion rates: 1 Eur=40.3399 BEF, 1 Eur=1.95583 DEM, 1 Eur=166.386 ESP, 1 Eur=6.55957 FRF, 1 Eur=.787564 IEP, 1 Eur=1936.27 ITL, 1 Eur=40.3399 LUF, 1 Eur=2.20371 NLG, 1 Eur=13.7603 ATS, 1 Eur=200.482 PTE, 1 Eur=5.94573 FIM.

<sup>14</sup> For example, a French Franc will be treated as a sub-unit of a Euro in the same way as a centime is treated as a subunit of the Franc. The applicant represents that because the conversion rate will be irrevocably fixed throughout a three-year transitional period, all existing banknotes and coins will continue in circulation as legal tender but will be treated as referring to the Euro at the fixed conversion rate.

<sup>15</sup> In the case of Austria, Belgium, Finland, Germany, Ireland, Italy, Luxembourg, Portugal, and Spain, fixed-income instruments are being reissued in whole Euros. These securities markets are dealing with the resulting Fractional Amounts by issuing fractional shares of the fixed-income securities. Instead of issuing fractional shares, France and the Netherlands have directed that their sovereign debt instruments are to be redenominated

4. State Street seeks exemptive relief permitting it and its affiliates to purchase the Fractional Amounts resulting from the conversion to the Euro of certain fixed-income instruments denominated in the Legacy Currencies that are held by its Client Plans and the State Street Plans. State Street represents that while its custody systems currently support Fractional Amounts, it is widely predicted that there will be little or no market for Fractional Amounts resulting from the conversion to the Euro. In addition, State Street represents that the Fractional Amounts will need to be disposed of as soon as possible after the Euro conversion because these Fractional Amounts will likely trade at a discount in any potential secondary market. In addition, when transaction costs and other costs are considered, the cost of selling the Fractional Amounts may exceed their value. Accordingly, State Street proposes purchasing the Fractional Amounts for 120% of par value from its clients, including Client Plans, and the State Street Plans to ensure that no losses are sustained by such investors in the Sale of the Fractional Amounts.

5. State Street represents that it contacted the independent fiduciaries of each of its Client Plans within 90 days of December 31, 1998 to provide notice of the subject transaction. In notifying the independent fiduciaries of the Client Plans, State Street provided several items of important information. First, State Street informed the Client Plans regarding the conversion of certain European currencies into the Euro. In doing so, State Street advised the Client Plans of the background and timing of the conversion, including the fact that Fractional Amounts would result from the process of conversion. Second, State Street advised the Client Plans that such Fractional Amounts were not being traded on the open market. Also, as an accommodation to its customers, State Street informed the Client Plans that it would purchase the Fractional Amounts for 120% of the par value of such shares, and clients would see a confirmation of that transaction and future activity regarding the Fractional Amounts on their quarterly statements as the issuers of the fixed-income

in whole Euros, with the value of the fractional share compensated with cash. As for corporate issuers in France and the Netherlands, State Street represents that it is unclear how they will redenominate. Regardless, State Street represents that it is treating each transaction as the Sale by the plan of a Fractional Amount of the underlying security, regardless of the treatment by France and the Netherlands, and is paying to each Plan an amount equal to 120% of the par value of such Fractional Amount.

<sup>13</sup> On December 31, 1998, the Council of the European Union adopted the irrevocably fixed conversion rates between the Euro and the currencies of the Member States adopting the Euro. See Council Regulation (EC) No. 2866/98. The

instruments converted their fixed-income securities. Third, Client Plans were informed that if they opt not to have their Fractional Amounts purchased by State Street, State Street would accommodate such request and permit the Client Plans to deal with the Fractional Amounts as they so choose. In this regard, State Street represents that every Client Plan was given an adequate amount of time prior to December 31, 1998 to opt out of the program. In the case of Client Plans participating in collective funds, such Plans were given the opportunity to withdraw from the fund if they objected to participation in the program of Sales.

State Street represents that every independent fiduciary of the single Client Plans and Client Plans participating in collective funds has agreed to participate in the program of Sales. State Street provided each independent fiduciary with written confirmation of their decision to participate in the program of Sales. Furthermore, State Street represents that its quarterly statements will continue to provide the Client Plans with an indication of the activity in the accounts with respect to Fractional Amounts as issuers redenominate the fixed-income securities.

6. State Street represents that the subject transactions are administratively feasible in that each Sale is for cash at an amount equal to 120% of the par value of the Fractional Amounts and that all transaction records will be maintained. Furthermore, State Street states that each transaction should be viewed as being in the best interest of the Plans and their participants and beneficiaries because such transactions provide for more efficient administration of the currency conversion process for such assets and increased value to the Plan's investments. Finally, State Street represents that the subject transactions are protective of the Plans' participants and beneficiaries because each Plan receives 120% of the par value for the Fractional Amounts during a time when any market that may develop for these interests could result in them being sold at a discount.

7. In summary, State Street represents that the transactions satisfy the statutory criteria of section 408(a) of the Act and section 4975 of the Code because:

(a) Each Sale involves a one time transaction for cash;

(b) The terms of each Sale are at least as favorable to the Plan as those terms which would be available in an arm's-length transaction with an unrelated party;

(c) The Plans receive an amount which is not less than the par value for each of the Fractional Amounts;

(d) In the case of Single Client Plans:  
(1) Each Sale is subject to the prior consent of an independent plan fiduciary;

(2) The independent fiduciary of each Plan is furnished with notice within 90 days of the proposed Sale, providing information necessary for the independent fiduciary to determine whether to approve the Sale transaction. If the fixed-income instruments are not redenominated within a year of provision of this notice, additional notice will be provided to the independent fiduciaries each year notifying them of their right not to participate in this program of Sales; and

(3) each independent fiduciary who determines to participate in the Sale receives written confirmation of its decision to participate and written confirmation of the transaction and its terms.

(e) In the case of Client Plans participating in collective funds for which State Street serves as trustee or investment manager,

(1) Each Sale engaged in by the collective fund is subject to the prior approval of each independent plan fiduciary of Plans participating in the fund;

(2) The independent fiduciary of each Plan is furnished notice within 90 days of the proposed Sale, containing information necessary for the independent fiduciary to determine whether to approve the Sale transaction or withdraw from the collective fund prior to the Sale. If the fixed-income instruments are not redenominated within a year of provision of this notice, additional notice will be provided to the independent fiduciaries each year notifying them of their right to withdraw from the collective fund;

(3) Each independent fiduciary of a plan participating in a collective fund who determines to participate in the Sale receives written confirmation of the decision to participate and written confirmation of the transaction and its terms;

(f) In the case of the Plans, State Street must engage in the Sale within 30 days of the date that the Fractional Amounts are received by State Street from the issuers of the fixed-income security; and

(g) The Plans do not incur any commissions or other expenses in connection with the Sales.

**NOTICE TO INTERESTED PERSONS:** Because of the large number of interested persons associated with the Plans, the Department and the applicant have agreed that notification through

publication of the proposal in the **Federal Register** is sufficient.

**FOR FURTHER INFORMATION:** Contact James Scott Frazier of the Department, phone number (202) 219-8881 (this is not a toll-free number).

#### General Information

The attention of interested persons is directed to the following:

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

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

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

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of 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 21st day of January, 1999.

**Ivan Strasfeld,**

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

[FR Doc. 99-1848 Filed 1-26-99; 8:45 am]

BILLING CODE 4510-29-P

## NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

### National Endowment for the Arts; President's Committee on the Arts and the Humanities: Meeting XLIV

Pursuant to Section 10 (a) (2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the President's Committee on the Arts and the Humanities will be held on February 5, 1999 from 8:30 a.m. to 12:30 p.m. The Committee will convene to discuss a variety of reports and projects. The meeting will be held in the James W. McLamore Center at the University of Miami, 5250 University Drive, Coral Gables, Florida.

The Committee meeting will begin at 8:30 a.m. with a welcome from the University President and opening remarks by Dr. John Brademas, Chairman. This will be followed by the Director's Update from Harriet Mayor Fulbright. There also will be a report on International issues, including cultural policy meetings and international art exhibits, reports from the National Endowments for the Arts and the Humanities and the Institute of Museum & Library services, and a report on the Coming Up Taller project. There will be a discussion of "Gaining the Arts Advantage," the Committee's new report on arts education. The meeting will conclude with general discussion about future plans.

The President's Committee on the Arts and the Humanities was created by Executive Order in 1982 to advise the President, the two Endowments, and the Institute of Museum and Library Services on measures to encourage private sector support for the nation's cultural institutions and to promote public understanding of the arts and the humanities.

If, in the course of discussion, it becomes necessary for the Committee to discuss non-public commercial or financial information of intrinsic value, the Committee will go into closed session pursuant to subsection (c) (4) of the Government in the Sunshine Act, 5 U.S.C. 552b.

Any interested persons may attend as observers, on a space available basis, but seating is limited. Therefore, for this meeting, individuals wishing to attend must contact Regina Syquia of the President's Committee in advance at (202) 682-5409 or write to the Committee at 1100 Pennsylvania Avenue, NW, Suite 526, Washington, DC 20506. Further information with reference to this meeting can also be obtained from Ms. Syquia.

If you need special accommodations due to a disability, please contact Ms. Syquia through the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TDY-TDD 202/682-5496, at least seven (7) days prior to the meeting.

**Kathy Plowitz-Worden,**

*Panel Coordinator, Panel Operations,  
National Endowment for the Arts.*

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## NUCLEAR REGULATORY COMMISSION

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** U.S. Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

**SUMMARY:** The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. The title of the information collection: Exercise of Discretion for an Operating Facility, NRC Enforcement Policy (NUREG-1600).
2. Current OMB approval number: 3150-0136.
3. How often the collection is required: On occasion.
4. Who is required or asked to report: Nuclear power reactor licensees.
5. The number of annual respondents: 36.
6. The number of hours needed annually to complete the requirement or request: 2,160.
7. Abstract: The NRC's revised Enforcement Policy includes the circumstances in which the NRC may exercise enforcement discretion. This

enforcement discretion is designated as a Notice of Enforcement Discretion (NOED) and relates to circumstances which may arise where a licensee's compliance with a Technical Specification Limiting Condition for Operation or with other license conditions would involve an unnecessary plant transient or performance of testing, inspection, or system realignment that is inappropriate for the specific plant conditions, or unnecessary delays in plant startup without a corresponding health and safety benefit. A licensee seeking the issuance of a NOED must provide a written justification, which documents the safety basis for the request and provides whatever other information the NRC staff deems necessary to decide whether or not to exercise discretion.

Submit, by March 29, 1999, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW (lower level), Washington, DC. OMB clearance requests are available at the NRC worldwide web site (<http://www.nrc.gov/NRC/PUBLIC/OMB/index.html>). The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton, U.S. Nuclear Regulatory Commission, T-6 F33, Washington, DC, 20555-0001, by telephone at 301-415-7233, or by Internet electronic mail at [BJS1@NRC.GOV](mailto:BJS1@NRC.GOV).

Dated at Rockville, Maryland, this 21st day of January 1999.

For the Nuclear Regulatory Commission.

**Brenda Jo Shelton,**

*NRC Clearance Officer, Office of the Chief  
Information Officer.*

[FR Doc. 99-1843 Filed 1-26-99; 8:45 am]

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