

approach. Under the direct approach, NIOSH independently analyzed the results of MSHA's field study and obtained estimates of measurement imprecision consistent with those calculated by MSHA. The NIOSH evaluation demonstrates that the sampling and analytical method, as employed during the field study, meets NIOSH's Accuracy Criterion at concentrations greater than or equal to 0.13 mg/m<sup>3</sup>. The indirect approach involved combining independently derived estimates, previously placed into the public record, of intra-laboratory weighing imprecision, pump-related variability, and variability associated with physical differences between individual sampler units. This indirect approach indicated that the NIOSH Accuracy Criterion can be met at concentrations greater than or equal to 0.11 mg/m<sup>3</sup>.

#### C. Refinements in MSHA's Measurement Process

To ensure that the NIOSH Accuracy Criterion is met over a wide range of dust concentrations, NIOSH has recommended two modifications to MSHA's sampling and analytical method, which have now been adopted. These modifications involve (1) measuring both the pre- and post-exposure weights to the nearest µg on a balance calibrated using the established procedure within MSHA's laboratory; and (2) discontinuing the practice of truncating the recorded weights used in calculating dust concentration. This means that MSHA will no longer ignore digits representing hundredths and thousandths of a milligram. NIOSH's independent analysis of the study data confirmed that, with the two recommended modifications, MSHA's sampling and analytical method for collecting and processing single, full-shift samples would meet the NIOSH Accuracy Criterion at all respirable dust standards greater than or equal to 0.2 mg/m<sup>3</sup>.

Accordingly, MSHA's existing inspector sample processing and data entry procedures have been changed, and the Agency is now reporting the pre- and post-exposure weights of inspector samples to the nearest µg. In addition, MSHA is now using only constant flow control pumps in the inspector sampling program. MSHA believes that exclusive use of constant-flow pumps, as in the field study, will further enhance the quality of the Agency's sampling program.

#### D. Precision of Respirable Coal Mine Dust Weighings

As part of MSHA's ongoing measurement assurance program, MSHA also investigated the precision of weighings made to a µg with MSHA's automatic weighing system on a group of filter capsules. This involved weighing the same unexposed filter capsules 139 times over a 218-day period. Statistical imprecision in the difference between two consecutive weighings of the same capsule was calculated in accordance with procedures developed by the National Bureau of Standards (NBS) for the MSHA weighing laboratory in 1981 ("Measurement Assurance Program for Weighings of Respirable Coal Mine Dust Samples"; *Journal of Quality Technology*, 13(3):157-165, (July 1981)). Using the NBS procedure, imprecision in the measured difference between two weighings on different days was estimated to be 6.5 µg. Since this value includes a component of day-to-day variability, it is statistically consistent with the 5.8 µg estimate used by NIOSH in its "indirect" evaluation. (The 5.8 µg estimate, which applies to the standard deviation of the difference between two weighings within the same laboratory on the same day, was derived from an analysis of comparative weighings made on 300 unexposed cassettes. The results of the analysis along with the data on comparative weighings were placed into the public record on September 9, 1994.)

Moreover, the estimate of imprecision in measured weight gain derived from the new field study discussed earlier (9.1 µg), falls only slightly above the 6.5 µg laboratory estimate. This suggests that the process of handling and actually exposing the dust cassette in a mine environment does not add appreciably to the imprecision in measured weight gain.

While investigating the precision of weighings made to a µg, MSHA observed that a gain in the weight of the unexposed filter capsules had occurred over the course of the 218-day period. Analysis of the weighing data showed that the filter capsules increased in weight at the average rate of approximately 0.8 µg per day, beginning after approximately 30 days of unprotected exposure to the laboratory environment. An investigation into possible causes failed to establish the reason for the observed weight gain.

This weight gain was observed only for filter capsules that were left completely exposed and unprotected in the laboratory environment over an extended period of time, a situation

never encountered in actual practice. MSHA also weighed filters that were more than three years old, which had been kept in their original cassettes with both the inlet and outlet ports capped. These showed no evidence of weight gain. Both MSHA and NIOSH conclude that the weight gains observed in the 218-day laboratory investigation are irrelevant to the accuracy of the sampling and analytical process used in MSHA's respirable coal mine dust sampling program. This is because, in conjunction with the MSHA respirable coal mine dust program, all dust samples analyzed by the Pittsburgh Weighing Laboratory are processed within 24 hours after arriving in the laboratory.

#### E. Documentation

Documentation of the analyses conducted by MSHA and NIOSH, as well as the field data used to derive the new estimates of measurement imprecision, are available from the MSHA Office of Standards, Regulations, and Variances. The Agencies are publishing this notice to re-open the record and to seek public comment on this new information.

#### III. Request for Comments

The Agencies specifically request comments on the following:

1. The use of the NIOSH Accuracy Criterion as the basis for finding that a single, full-shift measurement will accurately represent the respirable dust concentration to which a miner is exposed during such shift; and
2. The experimental field data, which NIOSH has concluded demonstrate that MSHA's sampling and analytical method meets the NIOSH Accuracy Criterion at dust concentrations of 0.2 mg/m<sup>3</sup> and above.

Dated: March 6, 1996.

J. Davitt McAteer,  
Assistant Secretary for Mine Safety and Health.

Dated: March 6, 1996.

Linda Rosenstock,  
Director, National Institute for Occupational Safety and Health.

[FR Doc. 96-5829 Filed 3-7-96; 4:12 pm]

BILLING CODE 4510-43-P

#### Pension and Welfare Benefits Administration

[Application No. D-10142, et al.]

#### Proposed Exemptions; Budge Clinic Profit Sharing Plan and Trust (the Plan)

AGENCY: Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restriction of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

## Written Comments and Hearing Requests

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this Federal Register Notice. Comments and request for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, 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.

Budge Clinic Profit Sharing Plan and Trust (the Plan), Located in Logan, Utah [Application No. D-10142]

## 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). If the exemption is granted the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed sale of certain improved real property located in Logan, Utah (the Property) by the Plan to IHC Health Services, Inc., a party in interest with respect to the Plan; provided that the following conditions are satisfied:

- (A) All terms and conditions of the transaction are no less favorable to the Plan than those which the Plan could obtain in an arm's-length transaction with an unrelated party;
- (B) The Plan receives a cash purchase price for the Property which is no less than the fair market value of the Property as of the sale date; and
- (C) The Plan does not incur any expenses or suffer any loss with respect to the transaction.

## Summary of Facts and Representations

1. The Plan is a defined contribution pension plan with 111 participants and total assets of \$7,070,904 as of December 31, 1994. The Plan is sponsored by the Budge Clinic, Inc. (the Employer), a

Utah professional corporation engaged in the provision of medical services in Logan, Utah. Effective September 12, 1995, substantially all of the assets of the Employer were acquired (the Acquisition) by IHC Health Services, Inc. (IHC). IHC is a wholly-owned subsidiary of Intermountain Health Care, Inc., the subsidiaries and affiliates of which provide health care through a system of hospitals, clinics, HMOs, and PPOs in Utah, Wyoming and Idaho. The Plan's trustee is Neal Byington (the Trustee), an employee of the Employer.

2. The Employer's place of business is a clinic facility (the Clinic) located at 225 East 400 North in Logan, Utah. The Clinic consists of a 22,374 square foot medical clinic building (the Building) and adjacent parking area situated on a commercially-zoned lot (the Land) measuring 74,923 square feet. The Employer owns 24,298 square feet of the Land, which is additional parking space at the rear of the Clinic lot (the Employer Property). The remaining 50,625 square feet of the Land, occupied by paved parking space and the Building (together, the Plan Property), are owned by the Plan and leased to the Employer pursuant to a 21-year lease (the Lease) executed on January 1, 1980. The Employer's lease of the Property from the Plan is exempt from the prohibited transactions provisions of the Act by virtue of an individual administrative exemption, Prohibited Transaction Exemption 81-97 (PTE 81-97, 46 FR 53815, October 30, 1981). The interests of the Plan under the Lease are represented by an independent fiduciary (the Fiduciary), who protects the Plan's interests and monitors the Employer's compliance with the terms and conditions of the Lease. Upon commencement of the Lease, the Fiduciary was Roland R. Hancey, an officer with Zion's First National Bank (the Bank) in Logan, Utah, but Mr. Hancey has retired. The successor to Mr. Hancey as independent fiduciary is Karl Ward, a trust officer with the Bank who continues to serve as Fiduciary under the Lease and for purposes of PTE 81-97.

3. The Employer represents that as part of the Acquisition, virtually all of the employees of the Employer have become employees of IHC. The Employer and IHC have agreed that the Plan will be terminated effective December 31, 1995, and they intend to offer all Plan participants the opportunity to receive a cash distribution of their account balances in the Plan or to "roll over" their account balances into an I.R.A. or into the defined contribution plan maintained by IHC. As part of the Acquisition, IHC

has agreed to purchase the Plan Property from the Plan, in order to enable the rapid liquidation of that Plan asset and to secure for the Employer the continued use and occupancy of the Plan Property. The Employer and IHC are requesting an exemption to permit this purchase transaction under the terms and conditions described herein.

4. It is proposed that IHC will make a single cash payment to the Plan for the Plan Property in the amount of no less than the fair market value of the Plan Property as of the sale date, but in no event less than \$1,180,000. The Plan Property has been appraised by Thomas D. Singleton, MAI (Singleton), a professional independent real estate appraiser in Logan, Utah. Singleton represents that as of December 31, 1994, the Plan Property had a fair market value of \$1,180,000. Singleton's appraisal recognizes the Employer's ownership of an adjacent parcel, the Employer Property, as well as the Employer's proposal to purchase the Plan Property, and the resulting valuation reflects a premium price for the Plan Property because of the Employer's current and proposed occupancy of the Property and its ownership of the adjacent parcel. Singleton states that he based the appraisal on the assumption that the Employer will continue to lease/occupy the Plan Property because the value would likely decrease if the Employer were to vacate and move elsewhere, due to (a) the local market's inability to support more than one clinic of a size comparable to the Employer, and (b) the market trend toward greater centralization of medical facilities near major hospital campuses, such as the Logan Hospital which has relocated to a different part of the city. Regarding the Employer's ownership of the adjacent Employer Property, Singleton determined that it would not be economically feasible to separate the adjoining parcels physically or to consider them separately for valuation purposes. Singleton determined the value of the Plan Property by deducting from his valuation of the entire combined parcel his estimate of the value of the Employer Property. As part of the proposed purchase transaction, Singleton's appraisal will be updated as of the purchase date, and the purchase price will be the greater of \$1,180,000 or the fair market value as of the sale date in accordance with the update of Singleton's appraisal. The Plan will not incur any expenses related to the transaction. The Employer will continue to occupy the Plan Property under the Lease through the date of the proposed

transaction, and thereafter the Employer will occupy the Clinic under the authority of IHC. The Employer represents that the proposed transaction is in the best interests and protective of the participants and beneficiaries of the Plan because it will enable the Plan to make allocations of cash to the Accounts representing their pro-rata interests in the Plan Property as a Plan asset, and the Plan will receive a purchase price of no less than the fair market value of the Plan Property at the time of the transaction.

5. The Fiduciary represents that there have been no events of default by the Employer under the Lease and that each rental payment due under the Lease has been timely made to the Plan. The Fiduciary states that he has caused the Plan Property to be appraised periodically for its fair market rental value as required under the Lease and that the rent payable under the Lease has been increased in accordance with such appraisals. The Fiduciary represents that in all respects the Employer has been and continues to be in compliance with the terms and conditions of the Lease. The Trustee also represents that there have never been any events of default under the Lease.

6. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (a) The Plan, which is terminating, will receive cash for the Plan Property for allocation to the Accounts on a pro-rata basis, to enable Plan participants to receive cash distributions or to "roll over" into another plan or an I.R.A.; (b) The purchase price will be no less than the fair market value of the Plan Property as of the sale date as determined by Singleton's updated appraisal, and in no event less than \$1,180,000; and (c) the Plan will not incur any expenses related to the proposed transaction.

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

C.C.L. Label, Inc., 401(k) Profit-Sharing Plan (the Plan), Located in Grand Rapids, Michigan

[Application No. D-10168]

#### 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).

If the exemption is granted, the restrictions of section 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale by the Plan of certain publicly traded limited partnership interests (the Interests) to CCL Label, Inc. (CCL), a party in interest with respect to the Plan, provided that the following conditions are satisfied: (1) the sale is a one-time transaction for cash; (2) the Plan pays no commissions nor other expenses relating to the sale; and (3) the purchase price is the greater of: (a) the fair market value of the Interests as of the date of the sale, or (b) the original acquisition cost of the Interests.

#### Summary of Facts and Representations

1. The Plan is a profit sharing plan sponsored by CCL. CCL, a Michigan corporation, is a member of a controlled group of corporations and is engaged in the manufacture of decorative labels. The Plan has approximately 481 participants and beneficiaries. As of December 31, 1994, the Plan had total assets of approximately \$9,914,333.31. The trustee of the Plan is Comerica Bank, N.A.

2. Among the assets of the Plan are the Interests, which are 5,644 shares of the Aetna Real Estate Association Partnership (the Partnership). The Plan acquired the Interests on January 1, 1989, when the American Design, Inc. Profit Sharing Retirement Plan (the American Design Plan) was merged into, and survived by, the Plan. The American Design Plan acquired the Interests in 1986 for a total of \$112,880 (\$20 per share). The Partnership has made cash distributions with respect to the Interests in the cumulative amount of \$52,037.68 (\$9.22 per share), as of November 15, 1995.

The Partnership is open-ended, with no set term. The Partnership originally invested in 15 properties, two of which have been sold, leaving thirteen. The applicant represents that the Partnership intends to continue holding the remaining 13 properties until the real estate market has completely rebounded from the depressed prices of the past few years.

3. The applicant represents that although the Interests are publicly traded, they are very thinly traded and generally sell for considerably less than their net asset value.<sup>1</sup> Moreover, the net asset value of the Interests has been

<sup>1</sup> The Department expresses no opinion herein on whether the acquisition and holding of the Units by the Plan violated any of the provisions of Part 4 of Title I in the Act.

declining. As of December 31, 1994, the net asset value of the Interests as determined by Independent Property Appraisals, an independent valuation service, was \$14.96 per share, a total of \$84,434.24. A summary of the trades of other shares of the Partnership on the secondary market for the period between February 1, 1995 and February 28, 1995 as reported in the *Investment Advisor* shows that the average price per share during that period was \$7.52, which would make the Interests worth \$42,443.

4. In order to divest the Plan of an under-performing asset, CCL proposes to purchase the Interests from the Plan for the greater of: (a) The fair market value of the Interests as of the date of the sale, or (b) the Interests' original acquisition cost to the American Design Plan. Because the fair market value of the Interests is less than their acquisition cost, CCL will purchase the Interests from the Plan for the latter amount. Accordingly, CCL will pay the Plan a purchase price of \$112,880.

Taking into account a purchase price of \$112,880 and all cash distributions received, the applicant represents that the Interests will provide a simple average annual return of approximately five percent for each of the nine years that the Plan (and its predecessor) have held the Interests. The sale will be a one-time transaction for cash, and the Plan will pay no commissions nor other expenses relating to the sale.

The applicant represents that the proposed transaction is in the interests of the Plan because the Plan cannot sell the Interests on the open market without incurring a substantial loss. The proceeds from the sale are to be redirected into more productive investments.

5. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (1) The sale will be a one-time transaction for cash; (2) the Plan will pay no commissions nor other expenses relating to the sale; and (3) the purchase price will be the greater of: (a) The fair market value of the Interests as of the date of the sale, or (b) the original acquisition cost of the Interests.

#### Tax Consequences of Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the

sponsoring employer to the plan and therefore must be examined under applicable provisions of the Code, including sections 401(a)(4), 404 and 415.

#### Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons by personal delivery and by first-class mail within 10 days of the date of publication of the notice of pendency 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/or to request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 40 days of the date of publication of this notice in the Federal Register.

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

Dauphin Deposit Bank and Trust Company, Located in Harrisburg, Pennsylvania

[Application No. D-10187]

#### Proposed Exemption

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

#### *Section I—Exemption for In-Kind Transfer of CIF Assets*

If the exemption is granted, the restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (F) of the Code, shall not apply to the proposed in-kind transfer of assets of plans for which Dauphin Deposit Bank and Trust Company (Dauphin) acts as a fiduciary (the Client Plans), other than plans established and maintained by Dauphin (the Banks Plans), that are held in certain collective investment funds maintained by Dauphin (CIFs) in exchange for shares of the Marketvest Funds (the Funds), open-end investment companies registered under the Investment Company Act of 1940 (the 1940 Act), in situations where Dauphin acts as investment advisor for the Fund and may provide some other "Secondary Service" to the Fund as defined in Section V(h), in connection with the termination of such CIFs, provided that the following conditions

and the general conditions of Section III are met:

(a) No sales commissions or other fees are paid by the Client Plans in connection with the purchase of Fund shares through the in-kind transfer of CIF assets, and no redemption fees are payable in connection with the sale of such shares by the Client Plans to the Funds.

(b) Each Client Plan receives shares of a Fund which have a total net asset value that is equal to the value of the Plan's pro rata share of the assets of the CIF on the date of the in-kind transfer, based on the current market value of the CIF's assets as determined in a single valuation performed in the same manner at the close of that business day using independent sources in accordance with Rule 17a-7 of the Securities and Exchange Commission (SEC) under the 1940 Act (see 17 CFR 270.17a-7) and the procedures established by the Funds pursuant to Rule 17a-7 for the independent 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 Friday preceding the weekend of the CIF transfers, determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of Dauphin.

(c) All or a pro rata portion of the assets of a Client Plan held in a CIF are transferred in-kind to the Funds in exchange for shares of such Funds.

(d) A second fiduciary who is independent of and unrelated to Dauphin (the Second Fiduciary) receives advance written notice of the in-kind transfer of assets of the CIFs and full written disclosure of information concerning the Funds, including:

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

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

(3) The reasons why Dauphin considers investing in the Fund is an appropriate investment decision for the Client Plan;

(4) A statement describing whether there are any limitations applicable to Dauphin with respect to which assets of a Client Plan may be invested in a Fund, 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.

(e) After consideration of the foregoing information, the Second Fiduciary authorizes in writing the in-kind transfer of the Client Plan's CIF assets to a corresponding Fund in exchange for shares of the Fund.

(f) For all in-kind transfers of CIF assets to a Fund, Dauphin sends by regular mail to each affected Client Plan the following information:

(1) Within 30 days after completion of the transaction, a written confirmation containing:

(i) The identity of each security that was valued for purposes of the transaction in accordance with Rule 17a-7(b)(4);

(ii) The price of each such security involved in the transaction;

(iii) The identity of each pricing service or market-maker consulted in determining the value of such securities; and

(2) Within 90 days after completion of each in-kind transfer, a written confirmation containing:

(i) The number of CIF units held by the Client Plan immediately before the transfer, the related per unit value, and the total dollar amount of such CIF units; and

(ii) The number of shares in the Funds that are held by the Client Plan following the transfer, the related per share net asset value, and the total dollar amount of such shares.

(g) The conditions set forth in paragraphs (e), (f) and (n) of Section II below are satisfied.

#### *Section II—Exemption for Receipt of Fees*

If the exemption is granted, the restrictions of section 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (F) of the Code, shall not apply to the proposed receipt of fees by Dauphin from the Funds for acting as an investment adviser for the Funds as well as for providing other services to the Funds which are "Secondary Services" as defined in Section V(h), in connection with the investment by the Client Plans in shares of the Funds, provided that the following conditions

and the general conditions of Section III are met:

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

(1) The Client Plan receives a cash credit of such Plan's proportionate share of all fees charged to the Funds by Dauphin for investment advisory services, including any investment advisory fees paid by Dauphin to third party sub-advisers, no later than the same day as the receipt of such fees by Dauphin. The crediting of all such fees to the Client Plans by Dauphin is audited by an independent accounting firm on at least an annual basis to verify the proper crediting of the fees to each Plan.

(2) The Client Plan does not pay any Plan-level investment management fees, investment advisory fees, or similar fees to Dauphin with respect to any of the assets of such Plan which are invested in shares of any of the Funds. This condition does not preclude the payment of investment advisory or similar fees by the Funds to Dauphin under the terms of an investment management agreement adopted in accordance with section 15 of the 1940 Act, nor does it preclude the payment of fees for Secondary Services to Dauphin pursuant to a duly adopted agreement between Dauphin and the Funds.

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

(c) Dauphin, including any officer or director of Dauphin, does not purchase or sell shares of the Funds from or to any Client Plan.

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

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

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

(g) The Client Plans are not employee benefit plans sponsored or maintained by Dauphin.

(h) The Second Fiduciary receives, in advance of any initial investment by the Client Plan in a Fund, full and detailed written disclosure of information concerning the Funds, including but not limited to:

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

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

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

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

(5) Upon request of the Second Fiduciary, a copy of the proposed exemption and/or a copy of the final exemption, if granted, once such documents are published in the Federal Register.

(i) After consideration of the information described above in paragraph (h), the Second Fiduciary authorizes in writing the investment of assets of the Client Plan in each particular Fund and the fees to be paid by such Funds to Dauphin.

(j) All authorizations made by a Second Fiduciary regarding investments in a Fund and the fees paid to Dauphin are subject to an annual reauthorization wherein any such prior authorization referred to in paragraph (i) shall be terminable at will by the Client Plan, without penalty to the Client Plan, upon receipt by Dauphin of written notice of termination. A form expressly providing an election to terminate the authorization described in paragraph (i) above (the Termination Form) with instructions on the use of the form must be supplied to the Second Fiduciary no less than annually; provided that the Termination Form need not be supplied to the Second Fiduciary pursuant to this paragraph sooner than six months after such Termination Form is supplied pursuant to paragraph (l) below, except to the extent required by such paragraph in order to disclose an additional service or fee increase. The instructions for the Termination Form must include the following information:

(1) The authorization is terminable at will by the Client Plan, without penalty to the Client Plan, upon receipt by

Dauphin of written notice from the Second Fiduciary; and

(2) Failure to return the Termination Form will result in continued authorization of Dauphin to engage in the transactions described in paragraph (i) on behalf of the Client Plan.

(k) For each Client Plan using the fee structure described in paragraph (a)(1) above with respect to investments in a particular Fund, the Second Fiduciary of the Client Plan receives full written disclosure in a Fund prospectus or otherwise of any increases in the rates of fees charged by Dauphin to the Funds for investment advisory services.

(l) (1) For each Client Plan using the fee structure described in paragraph (a)(2) above with respect to investments in a particular Fund, an increase in the rate of fees paid by the Fund to Dauphin regarding any investment management services, investment advisory services, or similar services that Dauphin provides to the Fund over an existing rate for such services that had been authorized by a Second Fiduciary in accordance with paragraph (i) above; or

(2) For any Client Plan under this proposed exemption, an addition of a Secondary Service (as defined in Section IV(h) below) provided by Dauphin to the Fund for which a fee is charged, or an increase in the rate of any fee paid by the Funds to Dauphin for any Secondary Service that results either from an increase in the rate of such fee or from the decrease in the number of kind of services performed by Dauphin for such fee over an existing rate for such Secondary Service which had been authorized by the Second Fiduciary of a Client Plan in accordance with paragraph (i) above;

Dauphin 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 of the increase in fees) to the Second Fiduciary of the Client Plan. Such notice shall be accompanied by a Termination Form with instructions as described in paragraph (i) above.

(m) On an annual basis, Dauphin provides the Second Fiduciary of a Client Plan investing in the Funds with:

(1) A copy of the current prospectus for the Funds in which the Client Plan invests and, upon such fiduciary's request, a copy of the Statement of Additional Information for such Funds which contains a description of all fees paid by the Funds to Dauphin;

(2) A copy of the annual financial disclosure report prepared by Dauphin which includes information about the Fund portfolios as well as audit findings of an independent auditor within 60 days of the preparation of the report; and

(3) Oral or written responses to inquiries of the Second Fiduciary as they arise.

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

(1) The total, expressed in dollars, of brokerage commissions of each Fund that are paid to Dauphin by such Fund;

(2) The total, expressed in dollars, of brokerage commissions of each Fund that are paid by such Fund to brokerage firms unrelated to Dauphin;

(3) The average brokerage commissions per share, expressed as cents per share, paid to Dauphin by each Fund; and

(4) The average brokerage commissions per share, expressed as cents per share, paid by each Fund to brokerage firms unrelated to Dauphin.

(o) All dealings between the Client Plans and the Funds are on a basis no less favorable to the Plans than dealings with other shareholders of the Funds.

#### *Section III—General Conditions*

(a) Dauphin maintains for a period of six years the records necessary to enable the persons described below in paragraph (b) to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Dauphin, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than Dauphin or an affiliate 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 (b) below.

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

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

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

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

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

#### *Section IV—Definitions*

For purposes of this proposed exemption:

(a) The term "Dauphin" means Dauphin Deposit Bank and Trust Company and any affiliate thereof as defined below in paragraph (b) of this section.

(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" shall include the Marketvest Funds, Inc. or any other diversified open-end investment company or companies registered under the 1940 Act for which Dauphin serves as an investment adviser and may also serve as a custodian, dividend disbursing agent, shareholder servicing agent, transfer agent, Fund accountant, or provide some other "Secondary Service" (as defined below in paragraph (h) of this Section) which has been approved by such Funds.

(e) The term "net asset value" means the amount for purposes of pricing all purchases and sales calculated by dividing the value of all securities, determined by a method as set forth in the Fund's prospectus and statement of additional information, and other assets belonging to the Fund or portfolio of the Fund, less the liabilities charged to each such portfolio or Fund, 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 Client Plan who is independent of and unrelated to Dauphin. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to Dauphin if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with Dauphin;

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

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

If an officer, director, partner or employee of Dauphin (or relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of the Client Plan's investment adviser, (ii) the approval of any such purchase or sale between the Client Plan and the Funds, and (iii) the approval of any change in fees charged to or paid by the Client Plan in connection with any of the transactions described in Sections I and II above, then paragraph (g)(2) of this section 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 Dauphin to the Funds. However, for purposes of Section II(k), the term "Secondary Service" will not include any brokerage services provided to the Funds by Dauphin for the execution of securities transactions engaged in by the Funds.

(i) The term "Termination Form" means the form supplied to the Second Fiduciary which expressly provides an election to the Second Fiduciary to terminate on behalf of a Client Plan the authorization described in paragraph (h) of Section II. Such Termination Form may be used at will by the Second Fiduciary to terminate an authorization without penalty to the Client Plan and to notify Dauphin in writing to effect a termination by selling the shares of the Funds held by the Client Plan requesting such termination within one business day following receipt by Dauphin of the form; provided that if, due to circumstances beyond the control of Dauphin, the sale cannot be executed within one business day, Dauphin shall

have one additional business day to complete such sale.

**EFFECTIVE DATE:** If the proposed exemption is granted, the exemption will be effective as of March 29, 1996.

#### Summary of Facts and Representations

1. Dauphin is a banking corporation of the Commonwealth of Pennsylvania that serves as trustee, investment manager and/or custodian to employee benefit plans. As of December 31, 1994, Dauphin provided trust services to approximately 1,000 employee benefit trusts, and had total assets under management of approximately \$723 million.

2. Dauphin acts as a trustee, directed trustee, investment manager, and/or custodian for the Client Plans. The Client Plans may include various pension, profit sharing, and stock bonus plans as well as voluntary employees' beneficiary associations, supplemental unemployment benefit plans, simplified employee benefit plans, retirement plans for self-employed individuals (i.e. Keogh Plans) and individual retirement accounts (IRAs). Some of the Client Plans may be participant-directed individual account plans.

As custodian of a Client Plan, Dauphin is responsible for maintaining custody over all or a portion of the Client Plan's assets, for providing trust accounting and valuation services, for asset and transaction reporting, and for execution and settlement of directed transactions. Where Dauphin serves as trustee or directed trustee, it is responsible for ownership of the assets of the Client Plan, and may provide additional trust services such as benefit payments, loan processing, and participant accounting. Where Dauphin is also acting as the investment manager, Dauphin has investment discretion over the Client Plan's assets and is responsible for implementing the Plan's funding policies and investment objectives, executing transactions, and periodic performance measurements.

The Client Plans pay fees in accordance with fee schedules negotiated with Dauphin. Fees vary from fixed amounts to asset-based amounts, depending on the level of services provided, and may include further charges for additional trust services such as processing benefit payments.

Dauphin maintains three CIFs specifically for its employee benefit plan trust customers, such as the Client Plans. These CIFs are: (a) The Employee Benefit Equity Fund; (b) the Employee Benefit Fixed Income Fund; and (c) the Employee Benefit Short-Term Fixed Income Fund. The CIFs are utilized for

those Client Plans for which Dauphin serves as trustee and/or investment manager. The applicant states that the CIFs allow Dauphin to provide professional investment management with appropriate degrees of investment diversification to Client Plans of all sizes.

The specific Client Plans of Dauphin to which this proposed exemption, if granted, would apply are those: (a) Whose assets are invested in the CIFs and will be transferred to the Funds; or (b) whose assets will be invested directly in the Funds.

However, Dauphin does not seek relief for investments in the Funds by the Bank Plans.<sup>2</sup>

3. The Funds will be a Maryland corporation registered as an open-end investment company with the SEC under the 1940 Act. The Funds will consist of a series of investment portfolios (each a "Fund") representing distinct investment vehicles, which will have their own prospectuses or joint prospectuses with one or more other Funds. The shares of each Fund will represent a proportionate interest in the assets of that Fund.

The Funds that will be available for investment in connection with the transactions described herein are the following: (a) The Equity Fund; (b) the Short-Term Bond Fund; and (c) the Intermediate U.S. Government Bond Fund. Additional Funds may be created in the future which could be used for investment by the Client Plans.

The overall management of the Funds, including the negotiation of investment advisory contracts, will rest with each Fund's Board of Directors, more than a majority of whose members will be independent of Dauphin. The Board of Directors will be elected by the shareholders of the Funds.

Dauphin will serve as the investment adviser to each Fund and will receive maximum investment advisory fees from each Fund that will vary between 0.75% and 1.00% of the Fund's average net assets on an annual basis, depending on the particular Fund. However, these

<sup>2</sup> Dauphin represents that it will comply with the requirements of Prohibited Transaction Exemption (PTE) 77-3, 42 FR 18734 (April 8, 1977), with respect to any investments in the Funds made by the Bank Plans. PTE 77-3 permits the acquisition or sale of shares of a registered, open-end investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter, provided certain conditions are met. The Department is expressing no opinion in this proposed exemption regarding whether any of the transactions with the Funds by the Bank Plans would be covered by PTE 77-3.



fees will be subject to voluntary waivers by Dauphin and initially will be between 0.49% and 0.80% of the Fund's average net assets. Dauphin also will serve as custodian of the Funds and will receive a custodial services fee.

The other service-providers to the Funds will be independent of and unaffiliated with Dauphin. Such service-providers currently will include: (a) Federated Administrative Services, which will act as the Fund's administrator; (b) Edgewood Services, Inc., a subsidiary of Federated Investors, which will act as the Fund's distributor; and (c) Federated Services Co., which will act as the transfer agent, dividend disbursing agent and portfolio accountant for the Fund.

The Funds will be able to charge a distribution fee of 0.25% of a Fund's average net assets, pursuant to Rule 12b-1 under the 1940 Act. Dauphin represents that such 12b-1 fees will be dormant at the outset of the Funds and will not be charged to the investments of any of the Client Plans. Dauphin states that if the 12b-1 fee is activated at any time, the Funds will create a separate class of shares not subject to the 12b-1 fee, and the Client Plans will be invested in that separate class of shares. Therefore, Dauphin will not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the transactions.

The Funds will also be able to charge fees of 0.25% under a shareholder services plan. However, the Client Plans will not be subject to these shareholder services fees.

4. Dauphin will be making the Funds available to the Client Plans as replacements for the CIFs. Dauphin believes that there are material advantages to the Client Plans from the use of the Funds, and Dauphin's customers are interested in having mutual funds available as investment vehicles for their employee benefit plan trust accounts. Mutual funds are valued on a daily basis, whereas the CIFs were valued monthly. The daily valuation permits: (i) immediate investment of Plan contributions in varied types of investments; (ii) greater flexibility in transferring assets from one type of investment to another; and (iii) daily redemption of investments for purposes of making distributions. In addition, information concerning the investment performance of mutual funds is generally available each day in newspapers of general circulation, which will allow Client Plan sponsors and participants to monitor the performance of their investments on a daily basis. Furthermore, unlike CIF units, mutual fund shares can be given

to participants in plan distributions, thus avoiding the expense and delay of liquidating plan investments and facilitating roll-overs into IRAs.

Investments by Client Plans in the Funds will occur in two ways. First, the CIFs which are maintained by Dauphin for the Client Plans are scheduled to be terminated on March 29, 1996, and the assets of the CIFs will be transferred in-kind to the corresponding Funds on behalf of those Client Plans for which independent fiduciary approval for the transfer is obtained. Second, Client Plans will also be able to make direct purchases of Fund shares for cash on an ongoing basis.

Dauphin states that the price that will be paid or received by a Client Plan for shares in a Fund will be the net asset value per share at the time of the transaction, as defined in Section V(e), and will be the same price which will be paid or received for the shares by any other investor at that time. In addition, Dauphin states that no sales commissions or redemption fees will be charged in connection with the purchase or sale of Fund shares by the Client Plans.

5. Until March 29, 1996, Dauphin generally will invest assets of Client Plans for which it acts as a trustee with investment discretion in the CIFs. In addition, certain Client Plans where investment decisions are directed by a Second Fiduciary may use a CIF as an investment option for individual accounts in the Client Plans. However, on Friday, March 29, 1996, Dauphin plans to terminate its three CIFs. The assets in the CIFs will be transferred to the Marketvest Equity Fund, the Marketvest Intermediate U.S. Government Bond Fund, and the Marketvest Short-Term Bond Fund. Each CIF will transfer its assets to the corresponding Fund in exchange for shares of the Fund at the then current market value of the CIF assets, in accordance with Rule 17a-7 under the 1940 Act (as discussed below).<sup>3</sup> The in-kind transfer of a Client Plan's CIF assets to the Funds will be subject to the prior written consent of the Second Fiduciary for the Client Plan. Any Client Plan that does not provide prior written approval for the transfer of its CIF assets

<sup>3</sup> Rule 17a-7 permits transactions between investment funds that use the same investment adviser, subject to certain conditions. Rule 17a-7 requires, among other things, that such transactions be effected at the "independent current market price" for each security, involve only securities for which market quotations are readily available, involve no brokerage commissions or other remuneration, and comply with valuation procedures adopted by the board of directors of the investment company to ensure that all requirements of the Rule are satisfied.

to the Funds, by the deadline set for such approvals, will receive a cash distribution of its pro rata share of the CIF assets no later than Friday, March 29, 1996, preceding the transfers.

The in-kind transfers of the CIF assets will occur using market values for such assets as of the close of business on Friday, March 29, 1996. The securities transferred from the CIFs will be the same as the securities received by the Funds. The value of the securities will be determined in a single valuation by Dauphin as investment adviser for the Funds, in accordance with the requirement of Rule 17a-7(b) that transactions be effected at the "independent current market price" of the securities.

Under Rule 17a-7, the "independent current market price" for specific types of CIF securities involved in the transactions will be determined by Dauphin 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 (the '34 Act), the last sale price with respect to such security reported in the consolidated transaction reporting system (the Consolidated System); 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 '34 Act), as of the close of business on the CIF valuation date.

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 or, if there are no reported transactions on such exchange that day, the average of the highest current independent bid and lowest current independent offer on the exchange as of the close of business on the CIF valuation date.

c. If the security 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 CIF valuation date.

d. For all other securities, the average of the highest current independent bid and lowest current independent offer determined on the basis of reasonable inquiry from at least three independent sources as of the close of business on the CIF valuation date.

Dauphin states that it will also send by regular mail to each affected Client Plan, not later than 30 days after completion of the transactions, a written



confirmation containing the following information:

(1) The identity of each security that was valued for purposes of the transaction in accordance with Rule 17a-7(b)(4);

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

(3) The identity of each pricing service or market-maker consulted in determining the value of such securities. In this regard, securities which will be valued in accordance with Rule 17a-7(b)(4) are securities for which the current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or the NASDAQ system. As noted above, such securities will 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 Friday preceding the weekend of the CIF transfers, determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of Dauphin.

Each Client Plan that approves the CIF asset transfers to the Funds will receive account statements describing the asset transfers either on such Plan's monthly account statement or quarterly account statement. These statements will show the disposition of the CIF units from the Client Plan account and the acquisition by the account of Fund shares. This information will be provided to the affected Client Plans with written confirmation of the number of CIF units held by the Client Plan immediately before the transfer, the related per unit value and the total dollar amount of such CIF units as well as the number of shares of the Funds held by the Client Plan following the transfer, the related per share net asset value, and the total dollar amount of such shares.

Thus, Dauphin represents that as of Monday, April 1, 1996, Client Plans formerly invested in the terminated CIFs will hold Fund shares which have the same value, based on the Client Plans' pro rata share of the underlying market value of the securities transferred to the Funds, as their assets in the CIF as of the close of business on Friday, March 29, 1996.

6. Prior to investing a Client Plan's assets in a Fund through an in-kind transfer of CIF assets or otherwise, Dauphin will obtain the approval of a Second Fiduciary acting for the Client Plan. The Second Fiduciary generally will be the Client Plan's named fiduciary, trustee (if other than Dauphin), or the sponsoring employer.

Dauphin will provide the Second Fiduciary with a current prospectus for the Fund and a written statement giving full disclosure of the fee structure under which either Dauphin's investment advisory and other fees will be credited back to the Client Plan or the Plan-level investment management fees will be waived. The disclosure statement and the letter that precedes the disclosure statement will describe why Dauphin believes the investment of a Client Plan's assets in the Funds may be appropriate. Dauphin states that these disclosures will be based on the requirements of PTE 77-4 (42 FR 18732, April 8, 1977).<sup>4</sup>

On the basis of such information, the Second Fiduciary will authorize Dauphin to invest the Client Plan's assets in the Funds and to receive fees from the Funds. In connection with the proposed in-kind asset transfers from the CIFs, if a Client Plan's Second Fiduciary does not provide Dauphin with its approval of the investment in a corresponding Fund by the deadline established for approvals of the transfers from a CIF, the Client Plan will receive a distribution from the CIF prior to such transfers and the distribution will be invested in an appropriate investment vehicle for the Client Plan, in accordance with the terms of the Plan.

8. Dauphin will charge investment advisory fees to the Funds in accordance with the investment advisory agreements between Dauphin and the Funds. These agreements will be approved by the independent members of the Board of Directors of the Funds, in accordance with the applicable provisions of the 1940 Act, and any subsequent changes in the fees will have to be approved by such Directors. These fees also will not be increased without the approval of the shareholders of the affected Funds. The fees will be paid monthly by the Funds. In addition, Dauphin will charge fees for custody services it will provide to the

<sup>4</sup>PTE 77-4, in pertinent part, permits the purchase and sale by an employee benefit plan of shares of a registered, open-end investment company when a fiduciary with respect to the plan is also the investment adviser for the investment company, provided that, among other things, the plan does not pay an investment management, investment advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment. Section II(c) of PTE 77-4 states that this condition does not preclude the payment of investment advisory fees by the investment company under the terms of an investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940. Section II(c) states further that this condition does not preclude payment of an investment advisory fee by the plan 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 investment company.

Funds in accordance with a custodial services agreement with the Funds.

Dauphin will avoid charging the Client Plans duplicative investment management fees by either: (a) Crediting the Client Plan's pro rata share of the Fund advisory fees back to the Client Plan; or (b) waiving any investment management fee for the Client Plan at the Plan-level.

The "crediting" fee structure will be designed to preserve the negotiated fee rates of the Client Plans so as to minimize the impact of the change to the Funds on a Client Plan's fees. Dauphin will charge a Client Plan its standard fees as applicable to the particular Client Plan for serving as trustee, directed trustee, investment manager or custodian. At the beginning of each month, and in no event later than the same day as the payment of investment advisory fees by the Funds to Dauphin for the previous month, Dauphin will credit to each Client Plan in cash its proportionate share of all investment advisory fees charged by Dauphin to the Funds for the previous month. The credit will include the Client Plan's share of any investment advisory fees paid by Dauphin to third party sub-advisors.

Dauphin states that the credit will not include the custodial fees payable by the Funds to Dauphin because the custodial services rendered at the Fund-level will not be duplicative of any services provided directly to the Client Plan. The custodial services to the Fund will involve maintaining custody and providing reporting relative to the individual securities owned by the Fund. The services to the Client Plan will involve maintaining custody over all or a portion of the Client Plan's assets (which may include Fund shares, but not the assets underlying the Fund shares), providing trust accounting and participant accounting (if applicable), providing asset and transaction reporting, execution and settlement of directed transactions, processing benefit payments and loans, maintaining participant accounts, valuing plan assets, conducting non-discrimination testing, preparing Forms 5500 and other required filings, and producing statements and reports regarding overall plan and individual participant holdings. Dauphin states that these trust services will be necessary regardless of whether the Client Plan's assets are invested in the Funds. Thus, Dauphin represents that its proposed receipt of fees for both secondary services at the Fund-level and trustee services at the Plan-level will not involve the receipt of "double fees" for duplicative services to the Client Plans because a Fund will be

charged for custody and other services relative to the individual securities owned by the Fund, while a Client Plan will be charged for the maintenance of Plan accounts reflecting ownership of the Fund shares and other assets.<sup>5</sup>

Dauphin represents that for each Client Plan, the combined total of all fees it will receive directly and indirectly from the Client Plans for the provision of services to the Plans and/or to the Funds will not be in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.<sup>6</sup>

9. Dauphin will maintain a system of internal accounting controls for the crediting of all fees to the Client Plans. In addition, Dauphin will retain the services of KPMG Peat Marwick (the Auditor), an independent accounting firm, to audit annually the crediting of fees to the Client Plans under this program. Such audits will provide independent verification of the proper crediting to the Client Plans.

In its annual audit of the credit program, the Auditor will: (i) Review and test compliance with the specific operational controls and procedures established by Dauphin for making the credits; (ii) verify on a test basis the monthly credit factors transmitted to Dauphin by the Funds; (iii) verify on a test basis the proper assignment of identification fields to the Client Plans; (iv) verify on a test basis the credits paid in total to the sum of all credits paid to each Client Plan; (v) recompute, on a test basis, the amount of the credit determined for selected Client Plans and verify that the credit was made to the proper Client Plan account.

In the event either the internal audit by Dauphin or the independent audit by

the Auditor identifies an error made in the crediting of fees to the Client Plans, Dauphin will correct the error. With respect to any shortfall in credited fees to a Client Plan, Dauphin will make a cash payment to the Client Plan equal to the amount of the error plus interest paid at money market rates offered by Dauphin for the period involved. Any excess credits made to a Client Plan will be corrected by an appropriate deduction from the Client Plan account or reallocation of cash during the next payment period after discovery of the error to reflect accurately the amount of total credits due to the Client Plan for the period involved.

10. Dauphin represents that the use of the "crediting" fee structure will be available for any investments made by Client Plans in the Funds. The use of this fee structure must be approved prior to the Client Plan's initial investment in the Funds by a Second Fiduciary acting for the Client Plan. The Second Fiduciary will receive full and detailed written disclosure of information concerning the Funds in advance of any investment by the Client Plan in the Funds, including the Fund prospectuses as well as a separate statement describing the crediting fee structure.

After consideration of such information, the Second Fiduciary will authorize in writing the investment of assets of the Client Plan in one or more specified Funds and the fees to be paid by the Funds to Dauphin. In addition, the Second Fiduciary of each Client Plan invested in a particular Fund will receive full written disclosure, in a statement separate from the Fund prospectus, of any proposed increases in the rates of fees charged by Dauphin to the Funds for secondary services which are above the rates reflected in the Fund prospectuses, at least thirty (30) days prior to the effective date of such increase.

In the event that Dauphin provides an additional secondary service for which a fee is charged or there is an increase in the rate of fees paid by the Funds to Dauphin for any secondary service, including any increase resulting from a decrease in the number or kind of services performed by Dauphin for such fees in connection with a previously authorized secondary service, Dauphin will, at least 30 days in advance of the implementation of such additional service or fee increase, provide written notice to the Second Fiduciary explaining the nature and the amount of the additional service for which a fee will be charged or the nature and amount of the increase in fees of the

affected Fund.<sup>7</sup> Such notice will be made separate from the Fund prospectus and will be accompanied by a Termination Form. The Second Fiduciary also will receive full written disclosure in a Fund prospectus or otherwise of any increases in the rate of fees charged by Dauphin to the Funds for investment advisory services, even though such fees will be credited to the investing Client Plans.

The authorizations made by a Second Fiduciary of any Client Plan will be terminable at will, without penalty to the Client Plan, upon receipt by Dauphin of written notice of termination. A form (the Termination Form) expressly providing an election to terminate the authorization, with instructions on the use of the form, will be supplied to the Second Fiduciary no less than annually. However, the Termination Form will not need to be supplied to the Second Fiduciary for an annual reauthorization sooner than six months after such Termination Form is supplied for an additional service or for an increase in fees (as discussed above), unless another Termination Form is required to disclose additional services or fee increases. The Termination Form will instruct the Second Fiduciary that the authorization is terminable at will by the Client Plan, without penalty to the Client Plan, upon receipt by Dauphin of written notice from the Second Fiduciary, and that failure to return the Termination Form will result in the continued authorization of Dauphin to engage in the subject transactions on behalf of the Client Plan.

The Termination Form will be used to notify Dauphin in writing to effect a termination by selling the shares of the Funds held by the Client Plan, requesting such termination within one business day following receipt by Dauphin of the form. If, due to circumstances beyond the control of Dauphin, the sale cannot be executed within one business day, Dauphin will

<sup>5</sup> The Department notes that although certain transactions and fee arrangements are the subject of an administrative exemption, a Client Plan fiduciary must still adhere to the general fiduciary responsibility provisions of section 404 of the Act. Thus, the Department cautions the fiduciaries of the Client Plans investing in the Funds that they will have an ongoing duty under section 404 of the Act to monitor the services provided to the Client Plans to assure that the fees paid by the Client Plans for such services are reasonable in relation to the value of the services provided. Such responsibilities will include determinations that the services provided are not duplicative and that the fees are reasonable in light of the level of services provided.

The Department also notes that Dauphin, as a trustee and investment manager for a Client Plan in connection with the decision to invest Client Plan assets in the Funds, will have a fiduciary duty to monitor all fees paid by a Fund to Dauphin, its affiliates, and third parties for services provided to the Fund to ensure that the totality of such fees will be reasonable and will not involve the payment of any "double" fees for duplicative services to the Fund by such parties.

<sup>6</sup> The Department is expressing no opinion in this proposed exemption as to whether the fee arrangements discussed herein will comply with section 408(b)(2) of the Act and the regulations thereunder (see 29 CFR 2550.408b-2).

<sup>7</sup> With respect to increases in fees, the Department notes that 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 fees. However, in the event a secondary service fee has already been described in writing to the Second Fiduciary and the Second Fiduciary has provided authorization for the fee, and such fee was temporarily waived, no further action by Dauphin would be required in order for the Bank to receive such fee at a later time. Thus, for example, no further disclosure would be necessary if Dauphin 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.

be obligated to complete the sale within the next business day.

11. Dauphin represents that for smaller Client Plans, the Fund-level investment advisory fees generally do not exceed the Plan-level investment management fees, so that the Client Plan will not benefit from a Fund-level fee credit. In these cases, if the Second Fiduciary authorizes the fee structure, Dauphin will waive the Plan-level investment management fees that would otherwise be charged for the Client Plan's assets invested in the Funds, so that the Plan-level fees will be offset and the Client Plan will pay only one investment management fee for those assets, at the Fund-level. This fee structure, which is one of the fee structures described in PTE 77-4, will ensure that Dauphin does not receive any additional investment management, advisory or similar fee as a result of investments in the Funds by the Client Plans.

Disclosures, approvals, and notifications with regard to any changes in fees or secondary services will be handled in the same manner as for the fee structure described in paragraph 10 above, with one exception. The exception is that notifications with regard to increases in rates of investment advisory fees for the Funds will conform to the procedures for increases in rates of secondary service fees as described in paragraph 10. Therefore, in such instances, there will be prior written notification of the fee increase to the Second Fiduciary for the Client Plan and a Termination Form will be provided. The reason for the exception is that the total fees paid by the Client Plan, under this fee structure, will be directly affected by any increases in Fund-level investment advisory fees because such fees will not be credited back to the Client Plan.

12. Dauphin states that a Second Fiduciary will always receive a written statement giving full disclosure of the fee structures prior to any investment in the Funds. The disclosure statement will explain why Dauphin believes that the investment of assets of the Client Plan in the Funds may be appropriate. The disclosure statement also will describe whether there are any limitations on Dauphin with respect to which Client Plan assets may be invested in shares of the Funds and, if so, the nature of such limitations.<sup>8</sup>

<sup>8</sup>See section II(d) of PTE 77-4 which requires, in pertinent part, that an independent plan fiduciary receive a current prospectus issued by the investment company and a full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company, including a discussion of whether there

13. On an annual basis, the Second Fiduciary of a Client Plan investing in the Funds will receive copies of the current Fund prospectuses and, upon such fiduciary's request, a copy of the Statement of Additional Information for such Funds as well as copies of the annual financial disclosure reports containing information about the Fund and independent auditor findings.

In addition, if the Funds obtain brokerage services in the future from any broker-dealers that are affiliates of Dauphin, Dauphin will provide at least annually to the Second Fiduciary of Client Plans investing in the Funds written disclosures indicating the following: (i) the total, expressed in dollars, of brokerage commissions of each Fund that are paid to Dauphin by such Fund; (ii) the total, expressed in dollars, of brokerage commissions of each Fund that are paid by such Fund to brokerage firms unrelated to Dauphin; (iii) the average brokerage commissions per share, expressed as cents per share, paid to Dauphin by each Fund portfolio; and (iv) the average brokerage commissions per share, expressed as cents per share, paid by each Fund portfolio to brokerage firms unrelated to Dauphin. All such brokerage services would be provided in accordance with section 17(e) of the 1940 Act and Rule 17e-1 thereunder. Such provisions require, among other things, that the commissions, fees or other remuneration for any brokerage services provided by an affiliate of an investment company's investment adviser be reasonable and fair compared to what other brokers receive for comparable transactions involving similar securities.

14. No sales commissions will be paid by the Client Plans in connection with the purchase or sale of shares of the Funds. In addition, no redemption fees will be paid in connection with the sale of shares by the Client Plans to the Funds. Dauphin states that it will not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the transactions. Dauphin states further that all other dealings between the Client Plans and the Funds will be on a basis no less favorable to the Client Plans than such dealings will be with the other shareholders of the Funds.

15. In summary, Dauphin represents that the transactions described herein will satisfy the statutory criteria of section 408(a) of the Act because: (a) the Funds will provide the Client Plans

are any limitations on the fiduciary/investment adviser with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations.

with a more effective investment vehicle than collective investment funds maintained by Dauphin without any increase in investment management, advisory or similar fees paid to Dauphin; (b) Dauphin will require annual audits by an independent accounting firm to verify the proper crediting to the Client Plans of investment advisory fees charged by Dauphin to the Funds; (c) with respect to any investments in a Fund by the Client Plans and the payment of any fees by the Fund to Dauphin, a Second Fiduciary will receive full written disclosure of information concerning the Fund, including a current prospectus and a statement describing the fee structure, and will authorize in writing the investment of the Client Plan's assets in the Fund and the fees paid by the Fund to Dauphin; (d) any authorizations made by a Client Plan regarding investments in a Fund and fees to be paid to Dauphin, or any increases in the rates of fees for secondary services which will be retained by Dauphin, will be terminable at will by the Client Plan, without penalty to the Client Plan, upon receipt by Dauphin of written notice of termination from the Second Fiduciary; (e) no commissions or redemption fees will be paid by the Client Plan in connection with either the acquisition of Fund shares or the sale of Fund shares; (f) Dauphin will not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the transactions; (g) the in-kind transfers of CIF assets into the Funds will be done with the prior written approval of independent fiduciaries (i.e., the Second Fiduciary) following full and detailed written disclosure concerning the Funds; (h) all dealings between the Client Plans and the Funds will be on a basis which is at least as favorable to the Client Plans as such dealings are with other shareholders of the Funds.

#### Notice to Interested Persons

Notice of the proposed exemption shall be given to all Second Fiduciaries of Client Plans described herein that have investments in a terminating CIF and from whom approval will be sought for a transfer of a Client Plan's CIF assets to a Fund. In addition, interested persons shall include the Second Fiduciaries of all Client Plans that are currently invested in the Funds, as of the date the notice of the proposed exemption is published in the Federal Register, where Dauphin is providing services to the Funds and receives fees which would be covered by the proposed exemption, if granted.

Notice to interested persons shall be provided by first class mail within fifteen (15) days following the publication of the proposed exemption in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and a supplemental statement (see 29 CFR 2570.43(b)(2)) which informs all interested persons of their right to comment on and/or request a hearing with respect to the proposed exemption. Comments and requests for a public hearing are due within forty-five (45) days following the publication of the proposed exemption in the Federal Register.

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

#### General 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 6th day of March, 1996.

Ivan Strasfeld,

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

[FR Doc. 96-5746 Filed 3-8-96; 8:45 am]

**BILLING CODE 4510-29-P**

#### **[Prohibited Transaction Exemption 96-12 ; Exemption Application No. D-09840, et al.]**

#### **Grant of Individual Exemptions; World Omni Financial Corporation and Its Affiliates, et al.**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemptions.

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

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

a hearing, unless otherwise stated, were received by the Department.

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

#### Statutory Findings

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

- (a) The exemptions are administratively feasible;
- (b) They are in the interests of the plans and their participants and beneficiaries; and
- (c) They are protective of the rights of the participants and beneficiaries of the plans.

#### World Omni Financial Corporation and Its Affiliates

Located in Deerfield Beach, Florida

[Prohibited Transaction Exemption 96-12;  
Application No. D-9840]

#### Section I—Transactions

A. Effective June 27, 1994, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to Section I.A. (1) or (2).

Notwithstanding the foregoing, Section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded