

**DEPARTMENT OF LABOR****Pension and Welfare Benefits Administration**

[Application No. D-10503, et al.]

**Proposed Exemptions; Sanwa Bank California**

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**

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, 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, N.W., Washington, D.C. 20210. Attention: Application No. , stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**Notice to Interested Persons**

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of

proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

**Sanwa Bank California (Sanwa Bank) Located in Los Angeles, CA**

[Application No. D-10503]

**Proposed Exemption****Section I. Proposed Exemption for the In-Kind Transfers of Assets**

If the exemption is granted, the restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (F) shall not apply, effective October 31, 1997, to the purchase, by an employee benefit plan established and maintained by parties other than Sanwa Bank (the Client Plan) or by Sanwa Bank (the Bank Plan) <sup>1</sup> of shares of one or more open-end management investment companies (the Fund or Funds), registered under the Investment Company Act of 1940, as amended (the 1940 Act), in exchange for assets of the Plan transferred in-kind to the Fund by a collective investment fund (the CIF) maintained by Sanwa Bank, where Sanwa Bank is the investment adviser and may provide other services to the Fund (the Secondary Services), as defined in Section III(i), and where Sanwa Bank is also a fiduciary of the Plan, in connection with the termination of such CIFs.

<sup>1</sup> Unless otherwise noted, the Client Plans and the Bank Plans are collectively referred to as the Plans.

This proposed exemption is subject to the following conditions:

(a) A fiduciary (the Second Fiduciary), as defined in Section III(h), which is acting on behalf of each affected Plan and which is independent of and unrelated to Sanwa Bank, receives advance written notice of the in-kind transfer of assets of the CIFs in exchange for shares of the Funds and full written disclosures of information concerning the Funds which includes the following:

(1) A current prospectus for each Fund in which the Client Plan may invest;

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

(3) A statement of the reasons why Sanwa Bank may consider such investment to be appropriate for the Client Plan;

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

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

(b) On the basis of the foregoing information, the Second Fiduciary gives prior approval in writing for each purchase of Fund shares in exchange for the Plan's assets transferred from the CIF, consistent with the responsibilities, obligations and duties imposed on fiduciaries by Part 4 of Title I of the Act. In addition, the Second Fiduciary gives prior approval in writing of the receipt of confirmation statements described in Section I(g) by facsimile or electronic mail if the Second Fiduciary elects to receive such statements in that form.

(c) No sales commissions or other fees are paid by the Plan in connection with the purchase of Fund shares.

(d) All transferred assets are securities for which market quotations are readily available, or cash.

(e) The transferred assets constitute a *pro rata* portion of all assets of a Plan held in the CIF immediately prior to the transfer. Notwithstanding the foregoing, the allocation of fixed-income securities held by a CIF among Plans on the basis of each Plan's *pro rata* share of the aggregate value of such securities will not fail to meet the requirements of this subsection if:

(1) The aggregate value of such securities does not exceed one (1) percent of the total value of the assets held by the CIF immediately prior to the transfer, in connection with the termination of such CIF; and

(2) Such securities have the same coupon rate and maturity, and at the time of the transfer, the same credit ratings from nationally recognized statistical rating agencies.

(f) Each Plan receives Fund shares that have a total net asset value equal to the value of the Plan's transferred assets on the date of the transfer, as determined with respect to securities in a single valuation performed in the same manner and at the close of business on the same day in accordance with Rule 17a-7 (using sources independent of Sanwa Bank and the Fund) and the procedures established by the Funds pursuant to Rule 17a-7. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the last business day prior to the in-kind transfers, determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of Sanwa Bank.

(g) Sanwa Bank sends by regular mail or, if applicable, by facsimile or electronic mail, to the Second Fiduciary of each affected Plan that purchases Fund shares in connection with the in-kind transfer, the following information:

(1) No later than 30 days after the completion of the purchase, a written confirmation which contains—

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

(B) The current market price, as of the date of the in-kind transfer, of each such security involved in the transaction; and

(C) The identity of each pricing service or market-maker consulted in determining the current market price of such securities.

(2) No later than 105 days after the completion of each purchase, a written confirmation which contains —

(A) The number of CIF units held by each affected Plan immediately before the in-kind transfer, the related per unit value, and the total dollar amount of such CIF units; and

(C) The number of shares in the Funds that are held by each affected Plan immediately following the in-kind

transfer, the related per share net asset value and the total dollar amount of such shares.

(h) The conditions set forth in Sections II(d), (e), (n)(1), (o), (p) and (q) are satisfied.

## Section II. Proposed Exemption for the Receipt of fees From the Funds

If the exemption is granted, the restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code shall not apply, effective October 31, 1997, to (1) the receipt of fees by Sanwa Bank from the Funds for investment advisory services provided to the Funds; and (2) the receipt or retention of fees by Sanwa Bank from the Funds for acting as a custodian or shareholder serving agent to the Funds, as well as for providing any other services to the Funds which are not investment advisory services (i.e., the Secondary Services), as defined in Section III(i), in connection with the investment of shares in the Funds by the Client Plans for which Sanwa Bank acts as a fiduciary,<sup>2</sup> provided that the following conditions are met:

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

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

(c) Sanwa Bank, any of its affiliates or their officers or directors do not purchase from or sell to any of the Client Plans shares of any of the Funds.

(d) For each Client Plan, the combined total of all fees received by Sanwa Bank for the provision of services to such Plan, and in connection

with the provision of services to any of the Funds in which the Client Plans may invest, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(e) Sanwa Bank does not receive any fees payable, pursuant to Rule 12b-1 (the 12b-1 Fees) under the 1940 Act in connection with the transactions involving the Funds.

(f) A Second Fiduciary with respect to a Client Plan receives in advance of the investment by the Client Plan in any of the Funds, a full and detailed written disclosure of information concerning such Fund including, but not limited to the disclosures described above in Section I(a).

(g) On the basis of the foregoing information, the Second Fiduciary authorizes in writing—

(1) The investment of assets of the Client Plan in shares of the Fund;

(2) The Funds in which the assets of the Client Plan may be invested; and

(3) The fees received by Sanwa Bank in connection with investment advisory services and Secondary Services provided to the Funds, such authorization by the Second Fiduciary to be consistent with the responsibilities obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.

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

(i) The Client Plans do not pay any Plan-level investment advisory fees to Sanwa Bank with respect to any of the assets of such Client Plans which are invested in shares of the Funds. This condition does not preclude the payment of investment advisory fees by the Funds to Sanwa Bank under the terms of an investment advisory agreement adopted in accordance with section 15 of the 1940 Act or other agreement between Sanwa Bank and the Funds or the retention by Sanwa Bank of fees for Secondary Services paid to Sanwa Bank by the Funds.

<sup>2</sup>Sanwa Bank is not requesting an exemption for investments in the Funds by the Bank Plans. Sanwa Bank represents that the Bank Plans may acquire or sell shares of the Funds pursuant to Prohibited Transaction Exemption (PTE) 77-3 (42 FR 18734, April 8, 1977). 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 expresses no opinion on whether any transactions with the Funds by the Bank Plans would be covered by PTE 77-3.

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

(k) In the event of an (1) addition of a Secondary Service, as defined in Section III(i), provided by Sanwa Bank to the Funds for which a fee is charged or (2) an increase in the rate of any fee paid by the Funds to Sanwa Bank for any Secondary Service that results either from an increase in the rate of such fee or from the decrease in the number or kind of services performed by Sanwa Bank for such fee over an existing rate for such Secondary Service which had been authorized by the Secondary Fiduciary in accordance with Section II(g), Sanwa Bank will, at least 30 days in advance of the implementation of such Secondary Service 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 Funds and which explains the nature and amount of the additional Secondary 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 Client Plans invested in a Fund which is adding a service or increasing fees. Such notice shall be accompanied by the Termination Form, as defined in Section III(j).

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

(1) The authorization is terminable at will by any of the Client Plans, without penalty to such Plans. The termination will be effected by Sanwa Bank redeeming shares of the Funds held by the Client Plans requesting termination within the period of time specified by

the Client Plan, but not later than one business day following receipt by Sanwa Bank from the Second Fiduciary of the Termination Form or any written notice of termination; provided that if, due to circumstances beyond the control of Sanwa Bank, the redemption of shares of such Client Plan cannot be executed within one business day, Sanwa Bank shall have one additional business day to complete such redemption; and

(2) Failure by the Second Fiduciary to return the Termination Form on behalf of the Client Plan will be deemed to be an approval of the additional Secondary Service for which a fee is charged or an increase in the rate of any fees and will result in the continuation of the authorization, as described in Section II(g), of Sanwa Bank to engage in the transactions on behalf of the Client Plan;

(m) The Second Fiduciary is supplied with a Termination Form at least once in each calendar year, beginning with the calendar year that begins after the grant of this proposed exemption is published in the **Federal Register** and continuing for each calendar year thereafter, provided that the Termination Form need not be supplied to the Second Fiduciary, pursuant to this paragraph, sooner than six months after such Termination Form is supplied pursuant to Sections II(j) and (k), except to the extent required by Sections II(j) and (k) to disclose an additional Secondary Service for which a fee is charged or an increase in fees.

(n)(1) With respect to each of the Funds in which a Client Plan invests, Sanwa Bank will provide the Second Fiduciary of such Plan the following information:

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

(B) Upon the request of the Second Fiduciary, 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 Sanwa Bank.

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

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

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

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

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

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

(p) Sanwa Bank maintains for a period of 6 years, in a manner that is accessible for audit and examination, the records necessary to enable the persons, described in Section II(q), 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 Sanwa Bank, the records are lost or destroyed prior to the end of the 6 year period; and

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

(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 Section II(p) 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 (the Service) or the Securities and Exchange Commission (the SEC);

(B) Any fiduciary of each of the Client Plans who has authority to acquire or dispose of shares of any of the Funds owned by such Client 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 Sanwa Bank, or commercial or financial information which is privileged or confidential.

### Section III. Definitions

For purposes of this proposed exemption,

(a) The term "Sanwa Bank" means Sanwa Bank California and any affiliate of Sanwa Bank, as defined in Section III(b).

(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 terms "Fund or Funds" mean any open-end management investment company or companies registered under the 1940 Act for which Sanwa Bank serves as investment adviser and may also provide custodial or other services, such as Secondary Services, as approved by such Funds.

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

(f) The term "Plan" means a welfare plan described in 29 CFR 2510.3-1, as amended; a pension plan described in 29 CFR 2510.3-2, as amended; a plan described in section 4975(e)(1) of the Code; and a retirement plan qualified under section 401(a) of the Code with respect to which Sanwa Bank serves or will serve as trustee, investment manager or custodian, and which constitutes an "employee benefit plan" under section 3(3) of the Act. The term "Client Plan" includes a Plan maintained by an entity other than Sanwa Bank. The term "Bank Plan" includes a Plan maintained by Sanwa Bank, including, but not limited to, the Sanwa Bank California Retirement Plan (the SBC Retirement Plan) and the Sanwa Bank California Premiere Savings Plan (the SBC Savings Plan).

(g) 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.

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

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

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

(3) Such Second Fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption; provided, however, that, with respect to the Bank Plans, the Second Fiduciary may receive compensation from Sanwa Bank in connection with the transactions contemplated herein, but the amount or payment of such compensation may not be contingent upon or in any way affected by the Second Fiduciary's ultimate decision regarding whether the Bank Plans participate in the transactions and may not exceed 5 percent of such Second Fiduciary's gross annual revenues.

With respect to the Client Plans, if an officer, director, partner, or employee of Sanwa Bank (or a relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in the choice of the Plan's investment manager/adviser, the approval of any purchase or redemption by the Plan of shares of the Funds, and the approval of any increase of fees, in connection with any of the transactions described in Sections I and II, then Section III(h)(2) shall not apply.

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

(j) The term "Termination Form" means the form supplied to the Second Fiduciary of a Client Plan, at the times specified in Section II(j), (k), and (m), which expressly provides an election to the Second Fiduciary to terminate on behalf of the Plans the authorization, described in Section II(g). Such Termination Form may be used at will by the Second Fiduciary to terminate such authorization without penalty to the Client Plan and to notify Sanwa

Bank in writing to effect such termination by redeeming shares of the Fund held by the Plans requesting termination not later than one business day following receipt by Sanwa Bank of written notice, either by mail, hand delivery, facsimile or other available means at the option of the Second Fiduciary, of such request for termination; provided that if, due to circumstances beyond the control of Sanwa Bank, the redemption cannot be executed within one business day, Sanwa Bank shall have one additional business day to complete such redemption.

(k) The term "fixed-income security" means any interest-bearing or discounted government or corporate security with a face amount of \$1,000 or more that obligates the issuer to pay the holder a specified sum of money, at specific intervals, and to repay the principal amount of the loan at maturity.

(l) The term "security" shall have the same meaning as defined in section 2(36) of the 1940 Act, as amended, 15 USC 80a-2(36) (1996).

(m) The term "business day" means a banking day as defined by federal or state banking regulations.

**EFFECTIVE DATE:** If granted, this proposed exemption will be effective as of October 31, 1997.

### Summary of Facts and Representations

#### 1. Description of the Parties

The parties involved in the subject transactions are described as follows:

(a) *Sanwa Bank*, a California-chartered bank, is a wholly owned subsidiary of The Sanwa Bank, Limited, which is headquartered in Japan. Sanwa Bank provides trust and banking services to individuals, corporations and institutions, both nationally and internationally. Sanwa Bank serves as trustee, investment manager or custodian to the Plans described herein and will serve as investment adviser to the Funds described more fully below. As of December 31, 1997, Sanwa Bank held total trust and fiduciary assets of approximately \$10.2 billion.

(b) *The Plans* include welfare plans described in 29 CFR 2510.3-1, as amended; pension plans described in 29 CFR 2510.3-2, as amended; plans described in section 4975(e)(1) of the Code; and retirement plans qualified under section 401(a) of the Code with respect to which Sanwa Bank serves or will serve as trustee, investment manager or custodian, and which constitute "employee benefit plans" under section 3(3) of the Act. As of December 31, 1997, Sanwa Bank served

as trustee, investment manager or custodian for approximately 856 Client Plans with total assets of approximately \$1.7 billion. In addition, Sanwa Bank had investment responsibility with respect to approximately \$95 million in Client Plan assets, of which approximately \$25 million represented assets invested in converting CIFs. Whether any Client Plan will participate in a conversion transaction will depend solely on the decision of a fiduciary which is independent of Sanwa Bank (i.e., a Second Fiduciary).<sup>3</sup>

The Plans also include certain Bank Plans that are maintained by Sanwa Bank. Specifically, the Bank Plans presently include the SBC Retirement Plan and SBC Savings Plan. As of December 31, 1997, the SBC Retirement Plan and the SBC Savings Plan had total assets of approximately \$175 million and \$68 million, respectively. As of August 28, 1997, the SBC Retirement Plan had 4,500 participants and the SBC Savings Plan had 3,500 participants. Whether a Bank Plan may participate in a conversion transaction will also be determined by a Second Fiduciary which has been appointed to represent the interests of the Bank Plans.

(c) *The CIFs* are separate investment funds maintained under a trust known as "The Sanwa Bank California Common Trust Fund." The CIFs that were converted in the initial conversion transaction were the following:<sup>4</sup>

- ITS Asset Allocation Investment Fund, also known as Balanced Fund J (the Asset Allocation Fund)
- ITS Common Stock Investment Fund, also known as Equity Fund D (the Equity Fund)
- ITS Bond Investment Fund, also known as Fixed Income Fund C (the Fixed Income Fund)
- ITS International Common Stock Fund, also known as International Equity Fund G (the International Equity Fund)
- ITS Money Market Investment Fund, also known as Money Market Fund E (the Money Market Fund)

The general investment policy and objective of these CIFs correspond substantially to the Funds described below.

(d) *The Funds*, otherwise referred to as "The Eureka Funds," constitute an

open-end management investment company registered under the 1940 Act, as amended. The Funds are and will be separate investment portfolios or "series" of The Eureka Funds that will be offered to investors at "no-load." Therefore, Sanwa Bank requests that the exemption apply both retroactively to the existing Funds and prospectively to any similar Fund with respect to which Sanwa Bank or its affiliates may provide services.

The Eureka Funds initially will consist of five Funds, each to be offered and sold in compliance with SEC rules and regulations. These five Funds are listed as follows:

- The Eureka Global Asset Allocation Fund
- The Eureka Equity Fund
- The Eureka Investment Grade Bond Fund
- The Eureka Prime Money Market Fund
- The Eureka U.S. Treasury Obligations Fund<sup>5</sup>

Sanwa Bank serves as investment adviser to the Funds. For such services performed, Sanwa Bank will receive annualized investment advisory fees currently ranging from 0.10 percent for the U.S. Treasury Obligations Fund to 0.80 percent for the Global Asset Allocation Fund. Although parties unrelated to Sanwa Bank will typically provide custody, transfer agent, recordkeeping and other services (i.e., Secondary Services) to the Funds, it is possible that Sanwa Bank or an affiliate may undertake to provide such services to a Fund in the future.

(f) *Actuarial Sciences Associates, Inc.* (ASA) has been retained temporarily by Sanwa Bank to serve as the Second Fiduciary for Bank Plans investing in the Funds. ASA, which is located in Somerset, New Jersey, is an affiliate of AT&T Investment Management Corporation (ATTIMCO). ATTIMCO is a wholly owned subsidiary of AT&T and is a registered investment adviser under the 1940 Act. As of November 1997, ATTIMCO exercised discretionary authority with respect to over approximately \$40 billion in assets. ASA, ATTIMCO and their affiliates are independent of and unrelated to Sanwa Bank and its affiliates. The fees received by ASA from Sanwa Bank currently represent less than one-tenth of one percent of the gross revenues of ASA and are not likely to exceed 5 percent

of ASA's gross revenues in the foreseeable future.

#### *Description of the Transactions*

2. Sanwa Bank requests exemptive relief with respect to the in-kind transfer, of all or a *pro rata* portion of a Plan's assets that were invested in the terminating CIFs (identified above) to the Funds, in exchange for shares of the Funds. In addition, Sanwa Bank requests exemptive relief for the receipt of fees from the Funds, in connection with the investment of assets of Client Plans for which Sanwa Bank acts as a trustee, investment manager, or custodian, in shares of the Funds in instances where Sanwa Bank is an investment adviser, custodian, and shareholder servicing agent for the Funds.<sup>6</sup> The exemptive relief provided for the receipt of fees would cover Client Plans of Sanwa Bank only. If granted, the exemption would be effective as of October 31, 1997 and would apply to similar transactions that may arise in the future.

#### *In-Kind Transfers by the Plans*

3. Sanwa Bank decided to terminate the aforementioned CIFs and offer to the Plans participating therein the opportunity to acquire shares in their corresponding Funds as alternative investments. Because the interests in CIFs generally must be liquidated or withdrawn to effect distributions, Sanwa Bank believes that the interests of the Plans participating in the CIFs (and similar CIFs that may convert in the future) would be better served by investment in shares of the Funds, which can be distributed in-kind.

In addition, Sanwa Bank believes that the Funds may offer advantages over the CIFs such as pooled investment vehicles in that Plans, as shareholders of a Fund, will have the opportunity to exercise voting and other shareholder rights. Plans, as shareholders of the Funds, also will receive periodic disclosures concerning the Funds, as mandated by the SEC, including a prospectus, which is updated at least annually, an annual report containing audited financial statements of the Funds and information regarding such Funds' performance (unless such performance information is included in the prospectus of such Funds), and a semiannual report containing unaudited financial statements. Further, the Plans will be able to monitor the net asset value of the

<sup>3</sup>The Department is not proposing exemptive relief herein for transactions afforded relief by section 404(c) of the Act.

<sup>4</sup>Sanwa Bank maintains CIFs other than those involved in the subject transactions. Some of these CIFs, which were converted contemporaneously with the CIFs, do not hold Plan assets while others do. As such, it is proposed that those CIFs holding plan assets be covered by the requested exemption if and when they are converted in the future.

<sup>5</sup>The U.S. Treasury Obligations Fund was not involved in the conversion transaction described in this proposed exemption. However, this Fund would be covered by the requested exemption to the extent that a converting CIF were to transfer its assets to such Fund or a Plan or Plans were to invest in this Fund in the future.

<sup>6</sup>As previously noted, Sanwa Bank is not requesting an exemption for investments in the Funds by the Bank Plans. Sanwa Bank represents that the Bank Plans may acquire or sell shares of the Funds pursuant to PTE 77-3.

Funds daily from information available in newspapers of general circulation.

Sanwa Bank believes that if the assets of a terminating CIF are transferred in-kind to a corresponding Fund in exchange for shares of such Fund, potentially large brokerage expenses can be avoided. These consist mainly of expenses that otherwise would be incurred if the CIF assets were liquidated and the proceeds used to purchase Fund shares that are substantially identical to the CIFs. No brokerage commissions or other fees (other than customary transfer charges paid to parties other than Sanwa Bank or its affiliates) have been charged or will be charged to the Plans or the CIFs with respect to the conversions or in connection with any other acquisition or redemption of Fund shares by the Plans. In addition, no Fund has paid or will pay any 12b-1 Fees to Sanwa Bank or its affiliates.

It is represented that the in-kind transfers of CIF assets in exchange for shares of the Funds are ministerial transactions performed in accordance with pre-established objective procedures approved by the Funds' board of trustees. Such procedures require that assets transferred to a corresponding Fund (a) be consistent with the investment objectives, policies and restrictions of the Fund, (b) satisfy the applicable requirements of the 1940 Act and the Code and, (c) have a readily ascertainable market value.

4. Except as indicated below with respect to the International Equity CIF, on October 31, 1997, Sanwa Bank transferred Plan assets held in the affected CIFs to the corresponding Funds as shown in the table.

CIF portfolio	Corresponding fund portfolio
Asset Allocation Fund	Global Asset Allocation Fund.
Equity Fund .....	Equity Fund.
Fixed Income Fund ...	Investment Grade Bond Fund.
International Equity Fund.	Global Asset Allocation Fund.
Money Market Fund ..	Prime Money Market Fund.

With regard to the International Equity CIF, the participants, of which include the SBC Retirement Plan, the SBC Savings Plan and a number of Client Plans, the conversion of the CIF was processed as follows:

(a) The SBC Savings Plan's interest in the International Equity CIF was liquidated and reinvested in shares of a mutual fund investing primarily in foreign securities sponsored and advised by a third party unrelated to

Sanwa Bank, which replaced the CIF as an investment option under the SBC Savings Plan. SBC Savings Plan participants who did not wish to invest in a new mutual fund were given the option of electing instead to have their interest in the International Equity CIF reinvested in another option under the Plan.<sup>7</sup>

(b) Subject to approval of the appropriate Second Fiduciaries, the SBC Retirement Plan and the Client Plan participated in the conversion of the International Equity CIF to Global Asset Allocation Fund, to the extent of their respective interests therein.<sup>8</sup>

5. The initial conversion was completed in a single transaction occurring after the close of business on October 31, 1997 and prior to the opening of business on November 3, 1997. The initial conversion was accomplished by an in-kind transfer of all of the assets of the converting CIF to the corresponding Fund, in exchange for an appropriate number of shares of that Fund. The affected CIF was then terminated and its assets, consisting of Fund shares, were distributed in-kind to the Plans formerly participating in the CIF based on each Plan's *pro rata* share

<sup>7</sup>In response to the Department's inquiry as to why the SBC Savings Plan's interest in the CIF was liquidated and reinvested in a third party fund or in another investment option offered under the Plan, ASA states that none of the Funds offered to the SBC Savings Plan had the same investment policies and objectives that had been offered to participants of such Plan. In this regard, it was determined that in light of the termination of the International Equity CIF, it would be in the interest of participants in the SBC Savings Plan to have monies previously invested in such CIF transferred to a third-party, international equity fund managed by Vanguard, which had objectives similar to the International Equity CIF, rather than to the Global Asset Allocation Fund. According to ASA, the Global Asset Allocation Fund is not solely an international equity fund. Instead, it is a balanced fund with a portion of its assets invested in United States investments. ASA states that the fiduciary of the SBC Savings Plan thought it more appropriate to invest that Plan's assets in an exclusively international equity fund instead of in a balanced fund having some United States investments. ASA further represents that it concurs with the fiduciary's investment decision.

<sup>8</sup>It is represented that Sanwa Bank was of the view that the Global Asset Allocation Fund would be advantageous to current participants in the International Equity CIF in that the Fund would offer enhanced liquidity and economies of scale resulting from a larger fund and an efficient method of diversifying among domestic and international asset classes and reducing risks for participants in the SBC Retirement Plan. In this regard, ASA states that the fiduciary of the SBC Retirement Plan had rebalanced other portions of that Plan's portfolio to reflect the United States and non-equity investments found in the Global Asset Allocation Fund, thereby making the conversion to the Global Asset Allocation Fund for the SBC Retirement Plan an appropriate investment decision. ASA represents that it concurs with this investment decision.

of the CIF's assets on the date of the conversion.<sup>9</sup>

6. Prior to the conversion, the assets of each converting CIF were reviewed to confirm that they were appropriate investments for the receiving Fund. If any of the assets of a CIF were not appropriate for its corresponding Fund, such assets were sold in the open market through a brokerage firm unaffiliated with Sanwa Bank prior to the date of the conversion.

7. Sanwa Bank provided to each affected Plan disclosures that announced the termination of the CIF, summarized the transaction and otherwise complied with the provisions of Section I of this proposed exemption. Based on these disclosures, the Second Fiduciary for each affected Plan approved, in writing, the conversion transaction, including the fees that were to be paid by the Funds to Sanwa Bank and its affiliates. A Plan electing not to participate in the conversion transaction received a cash payment representing the Plan's *pro rata* share of the assets of the converting CIF before the transaction occurred.

8. In the case of the Bank Plans, ASA was required to make an independent determination in its fiduciary capacity that participation in the conversion transaction was in the best interest of the Bank Plans, including the decision whether to participate therein. As part of its written report setting out the conclusions discussed in Representation 12 below, ASA was required to confirm both its independence from Sanwa Bank and its qualifications to serve as the Second Fiduciary for the Bank Plans. In addition, ASA represented that it would not derive more than 5 percent of its gross annual revenues from Sanwa Bank in connection with such in-kind transfers.

9. The assets transferred by a converting CIF to its corresponding Fund consisted entirely of cash and securities for which market quotations were readily available. For this purpose, the value of the CIF's securities was determined based on the market value as of the close of business on the business day prior to the in-kind transfer of such securities to the corresponding Fund (the Valuation Date). The value of the CIF assets on the Valuation Date was determined using the valuation procedures described in SEC Rule 17a-7 under the 1940 Act. In this regard, the "current market price" for specific types of securities was determined as follows:

<sup>9</sup>Although different CIFs may be converted by Sanwa Bank in the future on different dates, similar procedures will apply.

(a) If the security was 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 were no reported transactions in the Consolidated System that day, the average of the highest current independent bid and the lowest current independent offer for such security (reported pursuant to Rule 11Ac1-1 under the 1934 Act), as of the close of business on the Valuation Date.

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

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

(d) For all other securities, the average of the highest current independent bid and lowest current independent offer as of the close of business on the Valuation Date, determined on the basis of reasonable inquiry. (For securities in this category, Sanwa Bank represents that it obtained quotations from at least three sources which were either broker-dealers or pricing services independent of and unrelated to Sanwa Bank and, where more than one valid quotation was available, used the average of the quotations to value the securities, in conformance with interpretations by the SEC and practice under Rule 17a-7.)<sup>10</sup>

10. The securities received by a corresponding Fund were valued by such Fund for purposes of the in-kind transfer in the same manner and as of the same day as such securities were valued by the CIF. The value of the shares of each Fund issued to the CIF was based on the corresponding Fund's then-current net asset value. Since the Funds did not have assets in more than a nominal amount prior to the conversion, each Fund's net asset value was expected to be equal to the value of the assets received from the transferring CIF. Sanwa Bank represents that the value of a Plan's investment in shares of each Fund as of the opening of business was equal to the value of such Plan's investment in each corresponding CIF as of the close of business on the business day before the conversion.

11. Following the initial in-kind transfers, Sanwa Bank sent ASA, as the

<sup>10</sup> Securities of non-U.S. issuers may be traded on U.S. exchanges or NASDAQ, directly or in the form of ADRs, or may be traded on foreign exchanges or foreign over-the-counter markets. In the latter case, valuation was performed in accordance with (d) above.

Second Fiduciary for the Bank Plans, as well as the Second Fiduciaries of the Client Plans, written confirmations of the transactions. In this regard, no later than 30 days after the completion of the conversion, Sanwa Bank sent by regular mail to the Second Fiduciary written confirmation which contains (a) the identity of each transferred security that was valued for purposes of the conversion in accordance with Rule 17a-7(b)(4), as described above, (b) the current market price, as of the Valuation Date, of each such security involved in the conversion, and (c) the identity of each pricing services or market maker consulted in determining the current market price of such securities.<sup>11</sup> In addition, no later than 105 days after the completion of the conversion, Sanwa Bank sent by regular mail a written confirmation to the Second Fiduciary of each affected Plan showing (a) the number of CIF units held by the Plan immediately before the conversion, (i) the related per unit value, (ii) the total dollar amount of the units transferred; and (b) the number of shares of the Funds that are held by such Plan following the conversion, (i) the related per share net asset value, and (ii) the total dollar amount of such shares.

In accordance with the conditions under Section I of this proposed exemption, similar procedures will be adopted upon any future in-kind exchanges between CIFs maintained by Sanwa Bank and the Funds.<sup>12</sup>

#### *Representations of the Second Fiduciary for the Bank Plans Regarding the In-Kind Transfers*

12. As stated above, Sanwa Bank retained ASA as the Second Fiduciary for the limited purpose of overseeing the initial in-kind transfers of CIF assets to the Funds as such transactions would affect the Bank Plans. In such capacity, ASA represented that it consulted with its own counsel regarding the fiduciary provisions of the Act and stated that it understood and accepted the duties,

<sup>11</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.

<sup>12</sup> Although not contemplated by the initial conversion transaction, the requested exemption includes certain procedures that are consistent with PTE 97-41 (62 FR 42830, August 8, 1997). PTE 97-41 permits a client plan to purchase shares of a mutual fund for which a bank or an investment adviser serves as a fiduciary to the client plan, in exchange for plan assets transferred in-kind from a CIF. Specifically, the procedures relate to the methods of communicating the confirmations described above by personal delivery, facsimile or electronic mail (see Section I(b) and (g) of this proposed exemption).

responsibilities and liabilities in acting as a fiduciary under the Act for the Bank Plans.

In a written report dated September 30, 1997, ASA stated that it considered the effect of the in-kind transfer transactions on the Bank Plans and the implications of such transactions for Plans invested in the CIFs. Based on its review of fees to be charged by the Funds, the investment guidelines for the Funds and the performance data available on the CIFs, ASA concluded that the terms of the in-kind transfers were fair to the participants of the Bank Plans and no less favorable than the terms that would have been reached among unrelated parties.

13. Based on representations obtained from officers for Sanwa Bank regarding the termination of the CIFs as well as considering the effects of the in-kind transfers, ASA represented that the transactions were in the best interest of the Bank Plans and their participants and beneficiaries for the following reasons:

(a) In terms of the investment policies and objectives pursued, the Funds have investment objectives comparable to the CIFs and satisfy the stated investment policies of the Bank Plans. Thus, in terms of investment policies and objectives, the impact of the in-kind transfer transactions on the Bank Plans and their participants and beneficiaries would be *de minimis*;<sup>13</sup>

(b) The Funds will probably continue to experience relative performance similar in nature to the CIFs given the comparability of investment objectives and policies and the fact that the same portfolio management personnel will provide portfolio management oversight;

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

(d) By investing in the Funds, the Bank Plans would receive a larger investment base, cost savings to participants over time through economies of scale, more choices for participants exercising investment control, the ability to obtain investment information through readily available sources and fees that would be reasonable and within industry standards.

14. In forming an opinion as to the appropriateness of the in-kind transfers, ASA conducted an overall review of the

<sup>13</sup> Although the Bank Plans represent a larger portion of the CIFs that were terminated as well as a larger portion of the Funds, ASA does not believe the Bank Plans' percentage ownership of the Funds immediately after the conversion is determinative of whether the conversion was proper.

Bank Plans, including the Bank Plan documents. ASA stated that it also examined the investment portfolios of the Bank Plans to ascertain whether or not the such Plans were in compliance with their investment objectives and policies. Further, ASA stated that it examined the cash flow and liquidity requirements of the Bank Plans and the diversification provided by the investment portfolios of the Bank Plans. Based on its review and analysis of the foregoing, ASA represented that the in-kind transfer transactions would not adversely affect the total investment portfolios of the Bank Plans, compliance by such Plans with their stated investment objectives and policies, the cash flows liquidity or diversification requirements of the Bank Plans.

15. As Second Fiduciary, ASA represented that Sanwa Bank would provide it with any documents it considered necessary to perform its duties as Second Fiduciary. In this regard, ASA was advised that within 30 days following the initial in-kind transfer transactions, Sanwa Bank would provide it with the written confirmation statements described herein. In addition, ASA stated that it would supplement its findings following the review of the confirmation statements to verify whether the in-kind transfer transactions had resulted in the receipt by the Bank Plans of shares in the Funds that were equal in value to such Plans' *pro rata* share of assets of the CIFs on the conversion date. Further, ASA represented that it would take such actions as it deemed necessary to safeguard the interests of the Bank Plans in the event the confirmation statements did not verify the foregoing. Finally, ASA explained that it would maintain, for a period of six years from the time of the initial conversion transaction (and make available for review), all relevant records with respect to the performance of its duties as Second Fiduciary for the Bank Plans.

#### *Receipt of Fees by Sanwa Bank*

16. Under certain conditions, PTE 77-4 (42 FR 18732, April 8, 1977) permits Client Plans of Sanwa Bank to engage in the purchase and sale of shares of a registered, open-end investment company when Sanwa Bank, a fiduciary with respect to such Client Plans, is also the investment adviser for the investment company, provided (a) the Client Plan does not pay any investment management, investment advisory or similar fees for the assets of such Plan invested in shares of a Fund for the entire period of the investment; or (b) where the Client Plan pays investment management, investment advisory or

similar fees to Sanwa Bank based on the total assets of such Client Plan from which a credit has been subtracted representing such Plan's *pro rata* share of such investment advisory fees paid to Sanwa Bank by the Fund. As such, with respect to the Client Plans, there may be two levels of fees—(a) those fees which Sanwa Bank may charge to Client Plans for serving as trustee, investment manager or custodian for such Plans (the Plan-level fees); and (b) those fees which Sanwa Bank may charge to the Fund (the Fund-level fees) for serving as an investment adviser for the Fund as well as for being custodian of the Fund or for providing other Secondary Services to the Fund.

17. Since October 31, 1997, Sanwa Bank no longer charges each Client Plan a Plan-level fee for its services as trustee, investment manager or custodian based on Sanwa Bank's standard fee schedules and the terms of specific agreements negotiated between each Client Plan and Sanwa Bank. Such Plan-level fees included asset-based charges that were expressed as a percentage of Client Plan assets. Instead, as permitted by PTE 77-4, for investment advisory services provided to the Funds, Sanwa Bank is receiving Fund-level advisory fees from each of the Funds. As stated above in Representation 1(d), these fees, which are also expressed as a percentage of a Fund's assets currently range from 0.10 percent to 0.80 percent per annum of the daily average assets of the U.S. Treasury Obligations Fund and the Global Asset Allocation Fund, respectively.<sup>14</sup>

In addition to charging Fund-level investment advisory fees, Sanwa Bank is charging Client Plans for Plan-level recordkeeping, administrative, accounting and custodial services which do not involve investment management, such as custody of plan assets, maintaining plan records, preparing periodic reports of plan assets and participant accounts, effecting participant investment directions, processing participant loans and accounting for contributions, payments of benefits and other receipts and distributions. Sanwa Bank's fees for such Plan-level services will continue to be negotiated with each Client Plan and its fees for such services for Bank Plans will continue to be limited to the

<sup>14</sup>It should be noted that Sanwa Bank has agreed to temporarily waive the amount of its investment advisory fees through the end of the Funds' initial fiscal year. Without the waiver, the per annum investment advisory fees for the U.S. Treasury Obligations Fund and the Global Asset Allocation Fund would range from 0.20 percent to 0.90 percent per annum of the Fund's daily average assets.

reimbursement of direct expenses properly and actually incurred in the performance of the services.<sup>15</sup>

At present, all services other than investment advisory services are provided to the Funds or their distributor by unrelated parties. However, as stated above, Sanwa Bank represents that the Funds may, in the future, wish to contract with it or an affiliate to provide administrative, custodial, transfer, accounting or similar services (i.e., Secondary Services) to the Funds or their distributor.<sup>16</sup>

#### *Future Fee Changes and Client Plan Authorization Requirements*

18. Sanwa Bank notes that one of the requirements of PTE 77-4 is that any change in any of the rates of fees requires the prior written approval by the Second Fiduciary of the Plans participating in the Funds. Where many Plans participate in a Fund, Sanwa Bank observes that the addition of a service or any good faith increase in fees could not be implemented until written approval of such change is obtained from every Second Fiduciary. As an alternative, Sanwa Bank proposes to follow the "negative consent" procedure which it believes provides the basic safeguards for the Plans and is more efficient, cost effective and administratively feasible than that required by PTE 77-4.

The negative consent procedure would apply in the following circumstances: (a) an increase in the rate of any Fund-level investment management, investment advisory or similar fees; (b) a proposal by Sanwa Bank or an affiliate to provide a Secondary Service to a Fund for a fee; and (c) an increase in the fee for a Secondary Service paid by a Fund to Sanwa Bank or its affiliates over an existing rate that had been authorized by the Second Fiduciary. In this regard, an increase in fees for Secondary Services can result either from an increase in the rate of such fee or from

<sup>15</sup>Sanwa Bank represents that it is relying upon section 408(b)(2) with respect to its receipt of fees for such administrative services. The Department expresses no opinion herein on whether the provision of such services will satisfy section 408(b)(2) of the Act.

<sup>16</sup>The fact that certain transactions and fee arrangements are the subject of an administrative exemption does not relieve the fiduciaries of the Client Plans from the general fiduciary responsibility provisions of section 404 of the Act. Thus, the Department cautions Second Fiduciaries of the Client Plans investing in the Funds that they have an ongoing duty under section 404 of the Act to monitor the services provided to such 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. These 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.



a decrease in the number or kind of services performed by Sanwa Bank or its affiliates for such fee over that which had been authorized by the Second Fiduciary of a Client Plan. Under such circumstances, Sanwa Bank will provide at least 30 days advance notice of the implementation of a proposed fee increase to Client Plans invested in the affected Fund. The notice will take the form of a proxy statement, letter or similar communication which is separate from the Fund's prospectus and which explains the nature and amount of the additional service or the nature and amount of the fee increase.<sup>17</sup>

19. The written notice of a fee increase or additional Secondary Service for which a fee is charged will be accompanied by a Termination Form. The Termination Form will enable the Second Fiduciary to terminate any prior authorization to invest Client Plan assets in a Fund or Funds without penalty to the affected Client Plan. In addition, each Client Plan will be supplied with a Termination Form annually during the first quarter of each calendar year, regardless of whether there has been any fee increase or additional Secondary Service for which a fee is charged. If, however, the Termination Form has been provided to the Client Plan in connection with a fee increase or an additional Secondary Service for which a fee is charged, the Termination Form need not be provided again to the client Plan until at least six months have elapsed, unless such Termination Form is required to be sent sooner as a result of another fee increase or an addition of such Secondary Services.

The Termination Form will be accompanied by instructions which state that any relevant authorization previously given by the Second Fiduciary is terminable at will be the

Second Fiduciary, without penalty to the Plan, and that failure to return the Form will be deemed to be an approval of the fee increase or the additional Secondary Service and will result in the continuation of such authorization. Termination of an authorization to invest Client Plan assets in the Funds will result in the redemption of shares of the Fund held by the Plan by the close of business on the business day following the date of receipt by Sanwa Bank of the Termination Form or any other written notice of termination, either by mail, hand delivery, facsimile or other available means of written communication at the option of the Second Fiduciary. If, due to circumstances beyond the control of Sanwa Bank, the redemption cannot be effected within one business day, Sanwa Bank will have one additional business day to complete such redemption.

20. Although an investment in the Funds may result in an overall cost increase to many of the Client Plans, the Second Fiduciary will be obligated to take such impact into account in determining whether to authorize the Plans' investment in the Funds. In any event, such additional costs will be consistent with the costs of similar alternative investments that will be available to the Plans upon the termination of the CIFs. In this respect, Sanwa Bank believes that as to each Plan, the combined total of all Plan-level and Fund-level fees received by Sanwa Bank for the provision of services to the Client Plans and to the Funds, respectively, will not be in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

21. The requested exemption will be subject to the satisfaction of certain general conditions that will further protect the interests of the Plans. For example, the transactions will be subject to the prior authorization of a Second Fiduciary, acting on behalf of each Plan, who has been provided with the written disclosures described above. The Second Fiduciary generally will be the administrator, sponsor or a committee appointed by the sponsor to act as a named fiduciary for a Client Plan or, in the case of the Bank Plans, a qualified party independent of Sanwa Bank.

22. With respect to disclosure, the Second Fiduciary of each Plan will receive advance written notice of the in-kind transfer of assets of the CIFs and written disclosure of information concerning the Funds consistent with PTE 77-4 and PTE 97-41. Among the disclosures that will be given to the Second Fiduciary include, but are not limited to, the following: (a) a current

prospectus for each portfolio of each of the Funds in which the Client Plan may invest; (b) a statement describing the fees for investment advisory or other similar services, any fees for Secondary Services, and all other fees to be charged to or paid by the Client Plan and by such Funds to Sanwa Bank, including the nature and extent of any differential between the rates of such fees; (c) a statement of the reasons why Sanwa Bank may consider such investment to be appropriate for the Client Plan; (d) a statement of whether there are any limitations applicable to Sanwa Bank with respect to which assets of a Client Plan may be invested in Fund shares, and, if so, the nature of such limitations; and (e) a copy of the proposed exemption and/or a copy of the final exemption upon the request of the Second Fiduciary.

On the basis of the disclosures, the Second Fiduciary must authorize in writing the investment of Plan assets in shares of the Fund in connection with the transactions described herein as well as the compensation received by Sanwa Bank (or its affiliates) in connection with its services to the Funds. Such written authorization will extend to only those Funds with respect to which the Plan has received the written disclosures referred to above and which are specifically mentioned in such disclosures.

Having obtained the authorization of the Second Fiduciary, Sanwa Bank will invest the assets of a Plan among the Funds, subject to satisfaction of the other terms and conditions of the requested exemption. Sanwa Bank will not, however, invest the assets of a Plan in any Fund not specifically mentioned in the written disclosure and authorization described above. If a new Fund were established, Sanwa Bank would invest assets of a Plan in such new Fund under the requested exemption only after providing the required disclosures and obtaining a separate written authorization from the Second Fiduciary which specifically mentions the new Fund.

23. In addition to the disclosures provided to the Plan prior to investment in a Fund, Sanwa Bank will provide, at least annually to the Second Fiduciary of each Client Plan, an updated prospectus of each Fund in accordance with the requirements of the 1940 Act and applicable SEC rules. 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 the Funds, the current statement of additional information or some other written statement) containing a description of

<sup>17</sup> The Department notes that an increase in the amount of a fee for an existing investment advisory service or a 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 an investment advisory fee or a fee for a Secondary Service has already been described in writing to the Second Fiduciary and the Second Fiduciary has provided authorization for the amount of such fee, and such fee has been waived, no further action by Sanwa Bank will be required in order for Sanwa Bank to receive such fee at a later time. Thus, for example, no further disclosure would be necessary if Sanwa Bank has received authorization for a fee for custodial services from a Client Plan investor 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 Sanwa Bank providing notice of the fee increase and a Termination Form in the manner described above.

all fees paid by the Funds. Finally, all dealings by or between the Client Plans and any Fund will be on a basis which is no less favorable to such Plans than dealings between the Fund and other non-Plan shareholders holding the same class of shares as the Client Plans.

Although it does not anticipate doing so initially, Sanwa Bank or an affiliate may in the future execute securities brokerage transactions for some or all of the Funds, as and to the extent permitted by the 1940 Act and applicable SEC rules. If and when Sanwa Bank proposes to provide brokerage services to any Fund for compensation, Sanwa Bank will, at least 30 days in advance of the implementation of such service, provide written notice to the Client Plans explaining the nature of such brokerage services and the amount of the fees to be paid therefor. Further, with respect to any Fund for which Sanwa Bank provides brokerage services, Sanwa Bank will provide, at least annually to each Client Plan that invests in such Fund a written disclosure indicating (a) the total brokerage commissions paid by the Fund to Sanwa Bank, expressed in dollars; (b) the total brokerage commissions paid by the Fund to brokerage firms unrelated to Sanwa Bank, expressed in dollars; (c) the average brokerage commissions per share paid by the Fund to Sanwa Bank, expressed as cents per share; and (d) the average brokerage commissions per share paid by the Fund to brokerage firms unrelated to Sanwa Bank, expressed as cents per share.

24. In addition to the foregoing, the requested exemption will be subject to the following requirements: (a) the Plans and other investors will purchase or redeem Fund shares in accordance with standard procedures described in the prospectus for each Fund; (b) no Plan will pay a sales commission or redemption fee in connection with the purchase or redemption of Fund shares; (c) Sanwa Bank will not purchase from or sell to any Plan shares of the Fund; (d) the price paid or received by the Plans for Fund shares 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 pay or receive for shares of the same class.

25. 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) With respect to the in-kind transfer of the assets of a Plan invested in a CIF in exchange for shares of a Fund, a Second Fiduciary has authorized or will

authorize in writing, such in-kind transfer prior to the transaction only after receiving full written disclosure of information concerning the Fund.

(b) Each Plan has received or will receive shares of the Funds in connection with the transfer of assets of a terminating CIF which have a total net asset value that is equal to the value of such Plan's *pro rata* share of the CIF assets on the date of the transfer as determined in a single valuation performed in the same manner and at the close of the business day, using independent sources in accordance with procedures established by the Funds which comply with Rule 17a-7 of the 1940 Act, as amended, and the procedures established by the Funds pursuant to Rule 17a-7 for the valuation of such assets.

(c) Sanwa Bank has sent or will send by regular mail or personal delivery, or, if applicable, by facsimile or electronic mail, no later than 30 days after completion of each in-kind transfer of CIF assets in exchange for shares of the Funds, a written confirmation containing the following information: (1) the identity of each transferred security that was valued for purposes of the transaction in accordance with Rule 17a-7(b)(4) of the 1940 Act; (2) the current market price, as of the date of the in-kind transfer, of each such security involved in the transaction; and (3) the identity of each pricing service or market maker consulted in determining the current market price of such securities.

(d) Sanwa Bank has sent or will send by regular mail, or personal delivery, or, if applicable, by facsimile or electronic mail, no later than 105 days after completion of each transfer, a written confirmation that contains the following information: (1) the number of CIF units held by a Plan immediately before the conversion (and the related per unit value and the total dollar amount of such CIF units); and (2) the number of shares in the Funds that are held by the Plan following the conversion (and the related per share net asset value and the total dollar amount of the shares received).

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

(f) No sales commissions or redemption fees have been or will be paid by a Plan or a CIF in connection with the in-kind transfer of assets to the Fund, in exchange for shares of the Funds or in connection with the

purchase or redemption of Fund shares by a Plan.

(g) For each Client Plan, the combined total of all fees received by Sanwa Bank for the provision of Plan-level services, and in connection with the provision of investment advisory services or Secondary Services to any of the Funds in which Plans may invest, is not and will not be in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(h) Sanwa Bank has not received and will not receive any 12b-1 Fees in connection with the transactions.

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

(j) The Second Fiduciary will receive written notice accompanied by the Termination Form with instructions on the use of the form at least 30 days in advance of the implementation of any increase in the rate of any fees paid by the Funds to Sanwa Bank regarding investment advisory services, fees for Secondary Services or an additional Secondary Service for which a fee is charged which exceed the rates authorized for Sanwa Bank by the Second Fiduciary.

(k) All dealings by or between the Client Plans and any Fund have been and will remain on a basis which is no less favorable to such Client Plans than dealings between the Fund and other non-Plan shareholders holding the same class of shares as the Client Plans.

#### Notice to Interested Persons

Sanwa Bank proposes to provide notice of the proposed exemption to the Second Fiduciary of the Bank Plans, active participants in the Bank Plans and the Second Fiduciary of each affected Client Plan. Notice will be provided to each Second Fiduciary by first class mail and to active participants in the Bank Plans by posting at major job sites. Such notice will be given to interested persons within 30 days following the publication of the notice of pendency in the **Federal Register**. The notice will include a copy of the notice of proposed exemption as published in the **Federal Register** as

well as a supplemental statement, as required, pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on and/or to request a hearing. Comments and requests for a public hearing are due within 60 days of the publication of the notice of proposed exemption in the **Federal Register**.

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

**Plumbers and Pipe Fitters National Pension Fund (the Fund) Located in Crofton, MD**

[Exemption Application No. D-10514]

**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)(1)(A), 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code<sup>18</sup> shall not apply, effective October 9, 1997, to the transfer to the Fund from the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (the Union), a party in interest with respect to the Fund, of the Union's limited partnership interests in Diplomat Properties, Limited Partnership, (the Partnership), the sole asset of which is a certain resort hotel and country club complex (the Property); and to the transfer to the Fund of Union's holding of stock in Diplomat Properties, Inc. (the Stock), the corporate general partner of such Partnership, in consideration for a capital contribution by the Fund to the Partnership in the amount of \$40 million dollars, plus reasonable costs incurred by the Union in purchasing the Property, and in consideration for the release of a certain loan obligation (the Loan) of the Partnership which was guaranteed by the Union and collateralized by Union assets; provided that:

(1) the transaction was a one-time transaction;

<sup>18</sup> For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(2) an I/F which has the following qualifications acted on behalf of the Fund:

(a) the I/F is an individual, group of individuals, or a business entity which has substantial experience and expertise in the commercial real estate field;

(b) neither the I/F nor any of its affiliates have any ownership or other interest in the Union or its affiliates, nor does the Union or any of its affiliates have any ownership interest in the I/F or its affiliates; and

(c) neither the I/F nor its affiliates engages in any business transactions with the Union or its affiliates.

(3) prior to the Fund entering the transaction, the I/F reviewed and approved the terms of the transaction, determined that the transaction was an appropriate investment for the Fund, that the amount paid by the Fund to acquire ownership of the Property through the Partnership was appropriate and fair, that the total costs incurred were necessary for the acquisition of the Property and were reasonable, and that the transaction was in the best interest of the Fund and its participants and beneficiaries;

(4) the fair market value of the Property held by the Partnership was determined by an independent, qualified appraiser, as of the date of the transaction;

(5) the Fund paid no fees or commissions as a result of the transaction; and

(6) the terms of the transaction were no less favorable to the Fund than those it would have received under similar circumstances when negotiated at arm's length with unrelated third parties.

**Summary of Facts and Representations**

1. The Fund is a Taft-Hartley multi-employer defined benefit pension fund, as defined in section 3(37) of the Act.<sup>19</sup> The Fund is funded solely by employer contributions negotiated under collective bargaining agreements with the Union. As of January 1997, it is represented that the Fund received contributions from 5,187 active employers. As of October 3, 1997, there were estimated to be 97,988 participants and beneficiaries of the Fund. As of June 30, 1997, the Fund had assets of

<sup>19</sup> It is represented that the Fund is the successor to the former Sabine Area Pipefitters Local No. 195 Pension Trust Fund, which was involved in the correction of a 1988 prohibited transaction that had occurred before the former Local 195 Pension Fund merged into the Fund in 1990. It is represented that the correction of the prohibited transaction did not involve any assets of the National Pension Fund except to the extent that the Local 195 Joint Apprenticeship Committee was assessed first tier excise taxes under section 4975 of the Code for its use of assets of the former Local 195 Pension Fund.

approximately \$3.166 billion. It is represented that the transaction which is the subject of this proposed exemption involved less than 2 percent (2%) of the total assets of the Fund.

The Fund is administered from its offices in Crofton, MD by the plan administrator. Six (6) individuals serve as members of the Board of Trustees (the Trustees) of the Fund. Three of the Trustees are appointed by employers who contribute to the Fund, and three of the Trustees are appointed by the Union. The three Trustees selected by the Union also serve as officers of the Union. As fiduciaries to the Fund, the Trustees are parties in interest with respect to the Fund within the meaning of section 3(14)(A) of the Act.

2. The Union is an employee organization some of whose members participate in the Fund. As such, the Union is a party in interest with respect to the Fund within the meaning of section 3(14) of the Act.

3. The Property, located in Hollywood and Hallandale, Florida, was constructed in the late 1950's and consists of several parcels, including a oceanfront hotel, a vacant parcel of oceanfront real estate, a motel, a golf course, a clubhouse with tennis courts, and a marina. The hotel consists of two towers containing a total of 655 rooms. The north tower is the older of the towers and is in poor condition. The south tower has 256 rooms, large convention areas, and a parking garage. It is represented that the hotel at one time operated as a premier hotel and country club catering to the middle income convention trade, but due to a decline in the market, the hotel has been closed since 1992.

The vacant parcel, located on a 2.99-acre oceanfront site, functions as a parking lot. The motel, located on the Intracoastal Waterway and across the street from the hotel, has approximately 300 rooms, only 150 of which are operational. The golf course, containing 122.91 acres, is represented to be in relatively good shape and continues to function as a low budget operation. It is represented that the clubhouse and tennis courts are in need of upgrading. In the alternative, the real estate underlying the clubhouse and tennis courts could be re-zoned for residential use. The marina, the newest addition to the Property, provides a 52-slip facility, offering a number of finger piers, and a covered gazebo. It is represented that twelve (12) of the boat slips are under annual leases, and that the marina is subject to a long-term lease with a local yacht club.

4. The Union Labor Life Insurance Company (ULLICO) acquired, through

foreclosure, ownership of the Property as a result of a default by an unrelated third party on a mortgage loan. In this regard, in May 1991, title to the Property was transferred to TNDL Limited (TNDL), a wholly-owned subsidiary of ULLICO.

Early in 1997, TNDL placed the Property on the market for sale. It is represented that as a result of this public solicitation, TNDL received seven or eight bids from prospective purchasers, including the Union and at least one from a well-known hotel chain.

It is represented that when the Property was offered for sale, the Trustees of the Fund were interested in acquiring it as an investment for the Fund. However, a non-negotiable condition in the sale offer by TNDL excluded assets of any employee benefit fund subject to the Act from being used to purchase the Property.

5. The successful bidder on the Property was the Union which purchased the Property on October 1, 1997, for \$40 million in cash, plus expenses incurred by the Union in acquiring the Property. Upon the advice of counsel, the Union chose to acquire and hold title to the Property through its wholly-owned subsidiary, the Partnership, in order to avoid state real property transfer taxes that would otherwise arise upon any subsequent sale of the Property.

It is represented that the Partnership obtained the money to purchase the Property from the proceeds of the Loan from the National City Bank of Cleveland, Ohio (the Bank). It is represented that repayment of the Loan by the Partnership was guaranteed by the Union. The Loan was secured by cash, cash equivalents, and securities owned by the Union and held by the Bank in a custodial account.

The term of the Loan was two (2) years with no prepayment penalty. The payment schedule consisted of payments only of interest for 23 months with a balloon payment of the principal amount, plus accrued interest in the 24th month. The interest rate on the Loan was the Bank's 7-day money market rate, adjusted weekly. It is represented that the \$25,000 origination loan fee charged by the Bank on the Loan was withheld from the \$40 million dollar Loan made to the Partnership by the Bank.

6. At the time the Partnership acquired the Property, an appraisal of the Property was prepared by Bruce C. Roe (Mr. Roe), President, and Zillah L. Tarcoe, Senior Analyst, of Roe Research, Inc., in Ft. Lauderdale, Florida. It is represented that the appraisers are

qualified in that each is licensed by the State of Florida as a state-certified general real estate appraiser. It is further represented that Mr. Roe is a Member of the American Society of Real Estate Counselors (CRE) and a Member of the Appraisal Institute (MAI).

It is represented that the appraisers are independent in that neither has a present or prospective interest in the Property, nor has either any personal interest or bias with respect to the parties involved. Neither the employment nor the compensation of the appraisers was conditioned upon the reporting of a predetermined value or direction in value of the Property.

After physically inspecting the Property and reconciling the values for the Property established by the cost approach, income approach, and sales comparison approach, the appraisers established a separate value, based on fee simple interest "as is," for each of the parcels which make up the Property, including the oceanfront hotel, the vacant oceanfront parcel, the motel, the golf course and club house, and the marina. The sum of these separate values for each of the parcels was \$44,350,000, as of August 8, 1997. Including a 10 percent (10%) discount for a bulk sale of all of the parcels of the Property "as is" to a single purchaser, the fair market value of the Property, as determined by the appraisers to be \$40 million, as of August 8, 1997.

7. It is represented that on October 9, 1997, the Union and the Fund closed on the transaction that is the subject of this proposed exemption. Accordingly, the Fund, as applicant, has requested a retroactive exemption, effective October 9, 1997, to permit the past transfer from the Union to the Fund of the Union's limited partnership interests in the Partnership and the Stock in the corporate general partner of the Partnership which was owned by the Union. In this regard, it is represented that the Union owned 100 percent of the Stock of the corporate general partner of the Partnership. As general partner, the corporation owned one percent (1%) of the outstanding interest in the Partnership. The other 99 percent (99%) of the interests in the Partnership were owned by the Union, as limited partner.

It is represented that at the time of the sale of the Property to the Partnership, there existed no agreement pursuant to which the Partnership was obligated to sell the Property to any third party or pursuant to which any third party was obligated to buy the Property, including the Fund. Further, at the time of the sale of the Property to the Partnership, there existed no agreement pursuant to which the Union was obligated to sell its

interest in the Partnership to any third party or pursuant to which a third party was obligated to buy the Union's interest in the Partnership, including the Fund. Finally, there never existed any agreement or understanding between TNDL and the Fund with respect to the purchase of the Property by the Fund. In this regard, it is represented that TNDL's representatives were unaware that the Trustees of the Fund were contemplating purchasing the Property after it was sold by TNDL to the Union.

It is represented that in consideration for the transfer by the Union of the Stock and the limited partnership interests, the Fund made a capital contribution to the Partnership in the amount of \$40 million dollars. In addition, the Fund agreed to reimburse the Union for the following expenditures (totaling \$367,605) which were incurred by the Union in purchasing the Property: (a) attorney hourly fees, travel, and other expenses (\$215,756) paid to persons unrelated to the Fund; (b) due diligence fees (e.g., geotechnical, evaluation, updated boundary surveys, appraisal fees) (\$42,643); (c) a letter of credit fee (\$8,406) paid to the issuer, NationsBank; and (d) earnest money deposit of \$100,000 paid into escrow and credited to the Partnership at closing, plus \$800 of interest accrued in escrow. It is represented that the letter of credit fee resulted from a term in the sale contract with TNDL, the seller of the Property, which required that the earnest money deposit be in the form of a letter of credit. Further, some due diligence and other fees not included in the amounts set forth above were incurred by the Union prior to the establishment of the Partnership. It is represented that these due diligence and other fees include the following: (a) \$647.50 custodian fee paid to National City Bank; (b) \$2,978 paid to CT Corporation for assistance in establishing the Partnership and the corporate general partner of the Partnership; and (c) \$75,000 to the I/F for the initial opinion on the value of the Property. It is represented that these amounts were paid by the Partnership and/or the Fund subsequent to the closing on the Property and the transfer of the ownership of the Partnership to the Fund.<sup>20</sup>

<sup>20</sup>The Department notes that the actions of the Trustees relying on the advice of the I/F and acting on behalf of the Fund, in connection with its consideration of the merits of the acquisition of the limited partnership interests in the Partnership and the Stock of the corporate general partner of the Partnership as an investment for the Fund and the subsequent acquisition and holding of the Property are governed by the fiduciary responsibility

Because the Property was the sole asset of the Partnership, it is represented that the economic effect of the transfer which is the subject of this proposed exemption for all practical purposes was the same as a sale of the Property by the Union to the Fund. Subsequent to the transfer, it is represented that the capital contribution made by the Fund to the Partnership was used to retire the Loan between the Bank and the Partnership. In this regard, it is represented that on October 10, 1997, the Fund transferred directly to the Bank sufficient assets to pay off the Loan.

8. It is represented that the transaction which is the subject of this proposed exemption was in the interest of the Fund, because it provided a valuable investment opportunity to the Fund which it is represented will result in a superior return.

Further, it is represented that the cities of Hollywood and Hallandale support the redevelopment of the Property. In this regard, it is represented that additional funding for the development of the Property is under consideration by the U.S. Department of Housing and Urban Development through a community development loan guarantee program for projects that produce full time job opportunities for low income residents. Additionally, it is represented that the Fund's ownership of the Property through the limited partnership structure will permit the Fund to avoid the liabilities associated with a more direct ownership of real estate and will not threaten the tax exempt status of the Fund.

9. In the opinion of the Trustees, an important safeguard in this proposed exemption is that an I/F, acting on behalf of the Fund, reviewed and approved the subject transaction, and that such I/F concluded that the transaction was prudent and in the interests of the participants and beneficiaries of the Fund. It is represented that, as of September 22, 1997, Chadwick, Saylor & Co. Inc. (CSC) was retained by the Trustees to act as I/F on behalf of the Fund. As a result, CSC provided the Trustees with a report of its opinion of the subject transaction, dated September 29, 1997, a supplemental report of the same date, a subsequent report, dated December 15, 1997, and an additional letter dated, May 11, 1998.

CSC has acknowledged that as I/F it was solely responsible to the Fund. In this regard, it is represented that the fee of the I/F was paid by the Fund. It is further represented that CSC is independent in that there is no relationship between the Union and CSC, and that CSC is not related to or affiliated with the Fund. Further, CSC represents that it had no conflicts affecting its ability to serve as the I/F and to provide an independent evaluation of the transaction which is the subject of this proposed exemption.

CSC represents that it is an investment advisor registered under the Investment Advisors Act of 1940; that it possesses substantial expertise in the area of commercial real estate investments; and that it is qualified to provide the independent fiduciary services required. In this regard, either CSC or its principals have represented in excess of forty (40) tax exempt institutional real estate investors (private and public pensions, endowments and foundations) in a fiduciary capacity.

In fulfilling its role as I/F, CSC received and reviewed the Fund's policy statement and various reports, schedules, and other material provided by the Fund's consultants, real estate managers, and various professionals. Included in the information reviewed by CSC is the following: (a) the sale and purchase agreement between the Union and TNDL, and attachments and related correspondence; (b) documents, plans, surveys, and maps pertaining to existing and anticipated improvements on the Property; (c) documents, maps, and other correspondence pertaining to the condition of title of the Property, including encumbrances, taxes and other liens, and information on certain adjacent sites; (d) ordinances and other information relating to zoning and building codes; (e) the statement of value of the Property from the independent appraisers; and (f) preliminary feasibility studies, status, and condition reports related to the contemplated development and redevelopment of the Property.

After reviewing the material listed above, CSC is of the opinion that the Fund's investment in the Partnership represents a moderate expenditure of capital (based on the Fund's overall investment portfolio) to produce disproportionately high returns. In this regard, CSC believes that the probable internal rate of return to the Fund will be in excess of 15% from its investment in the Property and successful conclusion of development and redevelopment efforts over the next several years. It is further represented

that this rate of return is substantially greater than the overall rate of return experienced by the Fund from its current real estate portfolio. Based on diversification characteristics of the investment in the Partnership, CSC believes that the Fund will enjoy a very competitive risk-adjusted return from its investment.

With respect to diversification of the assets of the Fund, CSC represents that allowing for the subject transaction, equity real estate represents less than 6 percent (6%) of the Fund's total investment portfolio. It is further represented that the total real estate commitments of the Fund, including the 6% equity position and non-equity debt type investments (e.g. loans, bonds, mortgages, and mortgage-backed securities), were slightly in excess of 15 percent (15%) of the Fund's total investment portfolio, as of June 30, 1997.

CSC recognized the degree of risk assumed by the acquisition of properties which are generally unoccupied and are in need of development or redevelopment to become occupied and to generate a positive cash flow. Based on the risk/reward characteristics of the subject transaction, CSC is of the opinion that the acquisition cost (which represents approximately 1.2 percent (1.2%) of the Fund's total investment portfolio, as of June 30, 1997) is an appropriate expenditure and does not represent unwarranted risk.

With respect to the appraisal of the Property prepared by Roe Research, Inc., CSC believes that the \$40 million dollar value ascribed to the Property is appropriate and fair. However, CSC did not subscribe to the "bulk sale discount" for the Property, as set forth in the appraisal report. In the opinion of CSC, the value of the unique characteristics of the Property, offering a "self-contained" resort complex, collectively could be greater than the value determined by individual transactions on the various parcels which make up the Property.

In the opinion of CSC, the amount (approximately \$40 million dollars, plus reasonable costs) paid by the Fund to acquire the Property does not exceed the fair market value of such Property at the time of acquisition, including consideration for miscellaneous costs, presuming that such costs when fully identified are customary and reasonable and do not exceed the costs incurred by the Union in its purchase of the Property from TNDL. With regard to such costs, CSC in May 1998, after reviewing the total acquisition cost schedule, including financing related costs, legal fees, property specific

requirements of part 4, subpart B, of Title I. The Department expresses no opinion herein, as to whether any of the relevant provisions of part 4, subpart B, of Title I have been violated regarding the Fund's investment in the Partnership and subsequent holding of the Property, and no exemption from such provisions is proposed herein.

related costs, and the cost of the I/F's valuation, opined that all enumerated acquisition costs were reasonable and that the costs that were incurred were necessary for making a prudent decision on the acquisition of the Property.

In the opinion of CSC, it is appropriate for the Fund to hold title to the Property through the Partnership where the Fund owns 100 percent (100%) of the Stock of the corporate general partner of such Partnership. In this regard, it is CSC's assumption that the Partnership may be restructured in the future to accommodate tax or other issues, to sell a portion of the Property, or to accommodate co-investor or lender capital funding. In this regard, it is represented that such holding by the Fund will permit the Fund to avoid liabilities associated with a more direct ownership of real estate and will not threaten the tax-exempt status of the Fund.

CSC recognizes that certain aspects of the Fund's investment in the Partnership could potentially cause unrelated business income tax (UBTI) to the Fund. In this regard, CSC has been advised by counsel to the Fund that the structuring of the Fund's ownership, operations, and sales will be focused on minimizing any tax consequence to the Fund. Based on this advice of counsel, it is CSC's opinion that the risk-adjusted returns to the Fund, including consideration for potential UBTI, fully justify the acquisition, and development/redevelopment processes planned by the Fund for the Property.

In September 1997, when CSC issued its opinion, certain budgets, cash flows, or schedules pertaining to the development, redevelopment, operation and potential of the various components of the Property were not available. In addition, CSC's opinions as to the fairness of the transaction were based on certain assumptions related to functions yet to be performed or completed and certain permits and approvals yet to be received. Notwithstanding these facts, in the course of its review of materials with respect to the subject transaction, it is represented that nothing came to the attention of CSC that indicated that these matters could not be favorably resolved, and in CSC's opinion, it is reasonable for the Fund to assume that such matters will be favorably resolved.

Therefore, based on all of the information CSC reviewed as of the date of its initial opinion and affirmed in its subsequent report, CSC concludes, solely on behalf of the Fund, that the acquisition price in the amount of \$40 million, plus reasonable costs is appropriate and fair. Moreover, based on the foregoing, it is CSC opinion that

the transaction which is the subject of this exemption represents a prudent investment for the Fund and is in the best interest of the participants and beneficiaries of the Fund.

10. In summary, the applicant, represents that the proposed transaction meets the statutory criteria for an exemption under section 408(a) of the Act because:

(1) The transaction was a one-time transaction;

(2) The I/F acted on behalf of the Fund;

(3) Prior to entering the transaction, the I/F reviewed approved the terms of the transaction, determined that the transaction was an appropriate investment for the Fund, that the amount paid by the Fund to acquire ownership of the Property through the Partnership was fair and reasonable, that the total costs incurred were necessary for the acquisition of the Property and were reasonable, and that the transaction was in the best interest of the Fund and its participants and beneficiaries;

(4) The fair market value of the Property held by the Partnership was determined by an independent, qualified appraiser;

(5) The Fund paid no fees or commissions as a result of the transaction; and

(6) The terms of the transaction were no less favorable to the Fund than those it would have received under similar circumstances when negotiated at arm's length with unrelated third parties.

**FOR FURTHER INFORMATION CONTACT:**

Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (This is not a toll-free number.)

**Collection Bureau Services Profit Sharing Plan and Trust (the Plan), Located in Missoula, MT**

[Application No. D-10525]

**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 (1) the proposed lease (the Lease) by the Plan of certain improved real property (the Property) to Collection Bureau Services (the Employer), a party in interest with

respect to the Plan, and (2) the possible purchase of the Property by the Employer in the future, pursuant to the Employer's option to purchase the Property under the Lease.

This proposed exemption is subject to the following conditions:

(1) The Plan is represented for all purposes under the Lease by a qualified, independent fiduciary;

(2) The terms and conditions of the Lease are at least as favorable to the Plan as those the Plan could obtain in a comparable arm's length transaction with an unrelated party;

(3) The rent paid to the Plan under the Lease is no less than the fair market rental value of the Property, as established by a qualified, independent appraiser;

(4) The rent is adjusted, at a minimum, every three years, based upon an updated independent appraisal of the Property, but in no event shall such adjustments result in the rent being less than the rental amount for the Property existing for the preceding period;

(5) The Lease is triple net (with all expenses for maintenance, taxes, and insurance to be borne by the Employer as the tenant);

(6) The independent fiduciary for the Plan (the I/F) reviews the terms and conditions of the Lease on behalf of the Plan and determines that the Lease is in the best interests of, and appropriate for, the Plan;

(7) The I/F monitors and enforces compliance with all of the terms and conditions of the Lease, and of the exemption (if granted), throughout the duration of the Lease;

(8) The I/F expressly approves any improvements by the Employer to the Property, any renewal of the Lease beyond the initial term, and any sale of the Property to the Employer, pursuant to the Employer's option to purchase the Property under the Lease;

(9) In the event that the Employer exercises its option to purchase the Property under the Lease, the Employer pays the Plan an amount which is the greater of either (a) the original acquisition cost of the Property, plus holding expenses, or (b) the fair market value of the Property, as of the date of the sale, as established by a qualified, independent appraiser; and

(10) At all times throughout the duration of the Lease, the fair market value of the Property represents no more than 25 percent of the total assets of the Plan.

**Summary of Facts and Representations**

1. The Plan is a defined contribution plan sponsored by the Employer. The

Employer, a Montana corporation, is engaged in the collection and credit reporting business. As of October 13, 1997, the Plan had approximately 26 participants and beneficiaries. As of that date, the Plan had total assets of \$1,131,567. The trustees of the Plan are Jeffrey J. Koch and Douglas N. Klein.

2. Among the assets of the Plan is the Property, which consists of a single family residence located at 218 East Spruce, Missoula, Montana, adjacent to the Employer's premises. The Property is a one story, two bedroom, one bath structure. The Property was acquired by the Plan in 1982 from an unrelated party for \$32,500 and is not mortgaged or otherwise subject to any debt. Since September 16, 1996, the Property has been leased to an unrelated party at the rate of \$550 per month.<sup>21</sup> The Employer proposes to lease the Property from the Plan and convert the Property to commercial office space, at the Employer's own expense (at an estimated cost of approximately \$1,000).

3. The Property was appraised in May, 1997, by Pamela A. Lundt and Lonnie S. Warner of Professional Property Management, Inc. (PPMI). Ms. Lundt and Ms. Warner (the Appraisers), the partners of PPMI, are both real estate brokers licensed in the State of Montana. The applicant represents that both of the Appraisers are highly experienced in conducting comparative rental market analysis for residential and commercial properties in Missoula, Montana and the surrounding area. In addition, PPMI currently manages in excess of 700 residential and commercial properties in Missoula and the surrounding area.

The Appraisers' valuation of the Property included an analysis of four other leases of comparable properties in the local market area. Based upon this market data, the Appraisers concluded that the Property had a fair market rental value in the range of \$575 to \$600 per month, if leased on a triple net basis, as of May 9, 1997.

4. PPMI has also been retained by the Employer to represent the Plan as an independent fiduciary for the Plan (i.e.,

the I/F). PPMI represents that it is unrelated to, and independent of, the Employer and derives less than 1% of its annual income from the Employer. PPMI states that it is knowledgeable as to the subject transactions. PPMI also acknowledges and accepts its duties, responsibilities, and liabilities in acting as a fiduciary under the Act with respect to the Plan for purposes of the Lease.<sup>22</sup>

5. The Lease provides for a rental rate of \$600 per month and an initial term of one year, which may be renewed for additional one year periods, up to a maximum total of 15 years, upon the express approval of PPMI, as the I/F for the Plan. The Lease provides for rent adjustments, at a minimum, every three years, based upon an updated independent appraisal of the fair market rental value of the Property. However, in no event shall such adjustments result in the rent being less than the rental amount for the Property existing for the period preceding the adjustment.

The Lease is triple net (with all expenses for maintenance, taxes, and insurance to be borne by the Employer as the tenant). The Lease permits the Employer to make improvements to the Property at the Employer's expense, upon the express approval by the I/F. Any such improvements to the Property will belong to the Plan upon termination of the Lease. The Employer will indemnify and hold the Plan harmless for all claims and demands arising from or in any way relating to the Property.

6. The Lease grants the Employer the option to purchase the Property from the Plan, subject to approval by PPMI. In this regard, PPMI, as the I/F for the Plan, must determine that a sale of the Property would be in the best interests of the Plan. Any such sale would be a one-time transaction for cash, and the Plan would incur no expenses relating to the sale.

If the Employer exercises its option, the Employer will purchase the Property from the Plan for an amount which is the greater of either (a) the original acquisition cost of the Property, plus holding expenses, or (b) the fair market value of the Property as of the date of the sale, as established by a qualified, independent appraiser. The appraiser must take into account any possible special value that the Property may have to the Employer, as a result of the Employer's premises being located adjacent to the Property.

7. PPMI, acting as the I/F for the Plan, represents that it has reviewed the terms and conditions of the Lease on behalf of the Plan and determined that such terms and conditions are at least as favorable to the Plan as those the Plan could obtain in a comparable arm's length transaction with an unrelated party. PPMI represents that the Lease would be in the best interests of, and appropriate for, the Plan. PPMI states that the Lease will generate income for the Plan, and the Employer will be a stable, long-term tenant. In this regard, PPMI states that the Employer is capable of meeting its contractual obligations under the Lease, based upon an examination of the Employer's financial condition. Finally, PPMI will monitor and enforce compliance with the terms and conditions of the Lease, and of the exemption (if granted), throughout the duration of the Lease.

8. In summary, the applicant represents that the proposed transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (1) the Plan will be represented for all purposes under the Lease by PPMI, a qualified, independent fiduciary; (2) the terms and conditions of the Lease will be at least as favorable to the Plan as those the Plan could obtain in a comparable arm's length transaction with an unrelated party; (3) the rent charged by the Plan under the Lease will be no less than the fair market rental value of the Property, as established by a qualified, independent appraiser; (4) the rent will be adjusted, at a minimum, every three years, based upon an updated independent appraisal of the Property, but in no event shall such adjustments result in the rent being less than the rental amount for the Property existing for the preceding period; (5) the Lease will be triple net (with all expenses for maintenance, taxes, and insurance to be borne by the Employer as the tenant); (6) PPMI, as the I/F for the Plan has reviewed the terms and conditions of the Lease on behalf of the Plan and determined the Lease would be in the best interests of, and appropriate for, the Plan; (7) PPMI will monitor and enforce compliance with the terms and conditions of the Lease, and of the exemption (if granted), throughout the duration of the Lease; (8) PPMI will expressly approve any improvements by the Employer to the Property, any renewal of the Lease beyond the initial term, and any sale of the Property to the Employer, pursuant to the Employer's option to purchase the Property under the Lease; (9) in the event that the Employer exercises its option to

<sup>21</sup> From October 1, 1994 to September 16, 1996, the Plan leased the Property to the Employer for commercial use. In an audit of the Plan, the Department cited the prohibited lease, among other things, in a letter dated December 17, 1996, as a violation of the Act. In a letter dated February 26, 1997, the Department noted that the Employer had taken all corrective action required by the Department, including the payment, on January 24, 1997, of \$2,585.50 in excise taxes assessed by the Internal Revenue Service. Since that amount exceeded the amount of the section 502(l) penalty assessed by the Department, under the Department's regulations (see 29 CFR 2570.86), no further payment was due, and the Department closed its investigation of the Plan.

<sup>22</sup> In this regard, PPMI will confer with legal counsel having expertise with respect to the requirements of the Act, as needed.

purchase the Property under the Lease, the Employer will pay the Plan an amount which is the greater of either (a) the original acquisition cost of the Property, plus holding expenses, or (b) the fair market value of the Property, as of the date of the sale, as established by a qualified, independent appraiser; and (10) at all times throughout the duration of the Lease, the fair market value of the Property will represent no more than 25 percent of the total assets of the Plan.

**Notice to Interested Persons**

Notice of the proposed exemption shall be given to all interested persons by first-class mail or by posting the required information at the Employer's offices 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 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.)

**Breland Investments, Inc. Profit Sharing Plan and Trust (the Plan), Located in Phoenix, Arizona**

[Exemption Application No: D-10529]

**Proposed Exemption**

The Department is considering granting an exemption under the

authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to (1) the proposed loan (the Loan) by the individually directed account (the Account in the Plan<sup>23</sup> of Dr. Albert E. Breland (Dr. Breland), to Mesa Scholastic Enterprises (Mesa), a disqualified person with respect to the Plan, and (2) the personal guarantee of the Loan by Dr. Breland, a disqualified person with respect to the Plan, provided the following conditions are satisfied:

(a) The terms of the Loan are at least as favorable to the Account as those obtainable in an arm's length transaction with an unrelated party;

(b) The amount of the Loan does not exceed 25% of the assets in the Account;

(c) The Loan is secured by a first deed of trust on the commercial real property (the Property), which has been appraised by a qualified independent appraiser to have a fair market value not less than 150% of the outstanding balance of the Loan throughout its duration;

**Summary of Facts and Representations**

1. The Plan is a profit sharing plan which provides its participants with the opportunity to direct the investment of their individual accounts. Currently it has one participant, Dr. Breland, and one beneficiary, Mrs. Nancy V. Breland

(Mrs. Breland), Dr. Breland's wife. The aggregate fair market value of the Plan's, and the Account's, assets as of June 30, 1997 was approximately \$900,000. The Plan is sponsored by Breland Investments, Inc., a corporation wholly owned by Dr. and Mrs. Breland which manages various investments in real estate, securities and other assets. The trustees of the Plan are Dr. and Mrs. Breland.

2. Mesa is an Arizona General Partnership in which Dr. and Mrs. Breland own a majority interest. Located in Mesa, Arizona, it is engaged in leasing the Property to the Mesa Montessori Preschool. In the past three years, Mesa has averaged annual revenues of approximately \$48,300, consisting primarily of the \$4,000 per month received in rent from the Mesa Montessori Preschool.

3. The Loan involves only the Account and is described by the applicant as follows: An amount of \$123,500 will be loaned by the Account to Mesa for purposes of paying a balloon payment due on a prior third-party loan related to the Property. The Loan will be repaid over a 10 year period, with equal payments of principal and interest. The interest rate will be 10% per annum, which was determined after contacting three prominent commercial banks in the Phoenix metropolitan area to survey the applicable interest rates for a similar transaction between unrelated parties. The Loan will be secured by a first deed of trust on the Property.<sup>24</sup>

Institution	Rate	Contact
Harris Trust Bank of Arizona .....	3% over 10 year Treasury Bill rate, plus an initial charge of 2 points.	Glenn Elstoen.
Northern Trust .....	8.5 to 9%, plus an initial charge of 1/2 to 1 point .....	Harold Dorenbecher.
Wells Fargo .....	8.475, plus an initial charge of 1 1/2 points .....	Roy Miller.

Regarding Mesa's creditworthiness, the applicant represents that all payments on past and present debt obligations have been paid in a timely manner. In addition, because the monthly payments on the proposed Loan will be less than those due under

the current loan related to the Property, and because two additional loans for which Mesa pays approximately \$1,095 per month will be paid off by September 1998, the applicant believes that Mesa will have ample income to ensure payment of the proposed Loan. Finally, the Brelands, in their individual capacity, will be responsible for repayment of the Loan in the event of default by Mesa because of their status as general partners in Mesa.

4. The Property consists of a .8469 acre parcel of real property improved with a 3,243 square foot one-story preschool building located at 2830 South Carriage Lane in Mesa, Arizona. The parcel was originally transferred from the Brelands to Mesa in 1983.

5. On May 1, 1997, Mr. Gary E. Ringel (Mr. Ringel) and Mr. Carter T. Froelich (Mr. Froelich), both employees of U.S.L. Valuation, appraised the Property. Both Mr. Ringel and Mr. Froelich are State Certified Real Estate Appraisers in Arizona, and represent that they have no present or prospective interest in the Property, no personal interest or bias with respect to the parties involved, and are otherwise independent. After reviewing and analyzing the data related to the Property, the appraisers determined that the Property is worth \$406,000, or 3.29 times the amount of the Loan.

In their appraisal, Mr. Ringel and Mr. Froelich relied on both the sales comparison, or market, approach and

<sup>23</sup> Because Dr. Breland is the only participant in the Plan, there is no jurisdiction under 29 CFR 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

<sup>24</sup> The applicant contacted the Harris Trust Bank of Arizona, Northern Trust, and Wells Fargo. The rates obtained were based on the following information: A loan for commercial real property in the Phoenix metropolitan area in the amount of \$120,000 to \$130,000 payable over a 10 year term, and secured by the property which has a fair market value in excess of twice the loan amount. The following provides the quoted rates:



the income approach in reaching their conclusion as to the value of the Property. Using the sales comparison approach, the appraisers analyzed preschool building sales in the Phoenix area and compared those to the Property with adjustments made for property rights, financing, conditions of sale, market conditions, location and physical features, and arrived at a fair market value of \$405,000. With respect to the income approach, Mr. Ringel and Mr. Froelich employed the direct capitalization method, the preferred technique of preschool investors, and estimated the value of the subject property to be \$407,000. Giving the two methods equal weight, the appraisers concluded the value of the Property to be \$406,000.

7. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 4975(c)(2) of the Code for the following reasons: (a) the terms of the Loan are at least as favorable to the Account as those obtainable in an arm's length transaction with an unrelated party; (b) the amount of the Loan does not exceed 25% of the assets in the Account; and (c) the Loan is secured by a first deed of trust on the Property, which has been appraised by a qualified independent appraiser to have a fair market value not less than 150% of the outstanding balance of the Loan throughout its duration.

#### Notice to Interested Persons

Because Dr. Overland is the only participant to be affected by the proposed transaction, it has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Mr. James Scott Frazier, telephone (202) 219-8881. (This is not a toll-free number).

#### General Information

The attention of interested persons is directed to the following:

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

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

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

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

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

Signed at Washington, DC, this 22nd day of May, 1998.

**Ivan Strasfeld,**

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

[FR Doc. 98-14196 Filed 5-22-98; 8:45 am]

BILLING CODE 4510-29-P

#### NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

##### Sunshine Act Meeting

**TIME, DATE, AND PLACE:** June 25, 1998.

**Status:** Open.

9:00 a.m.-4:00 p.m. Benton Foundation, The Richard M. Neustadt Center for Communications in the Public Interest, 1634 I Street, NW., Washington, DC.

**Status:** Closed.

4:00 p.m.-5:00 p.m. Discussion, internal personnel matters.

**MATTERS TO BE DISCUSSED:** Benton Foundation programs dealing with

library advocacy and children issues, Charles Benton; Report, Working Group on Issues of Journal Pricing, Publishing, and Copyright; Report, Access to Government Information; Update, NCLIS Action Plan; GPO Depository Library Program; ALA/NCLIS Public Libraries and the Internet Study; Library Statistics Program; Survey of international activities and assessment of NCLIS' role(s); Discussion, issues affecting children and the Internet; and administrative matters.

**Status:** Open.

June 26, 1998.

9:00 a.m.-12:00 N—Library of Congress, James Madison Memorial Building, West Dining Room, Washington, DC.

**MATTERS TO BE DISCUSSED:** Institute of Museum and Library Services Program Activities; LSTA Leadership Grants; Guidelines for State-Based Grants; Legislation and Library and Information issues.

To request further information or to make special arrangements for physically challenged persons, contact Barbara Whiteleather (202-606-9200) no later than one week in advance of the meeting.

Dated: May 21, 1998.

**Robert S. Willard,**

*Acting Executive Director.*

[FR Doc. 98-14338 Filed 5-26-98; 4:02 pm]

BILLING CODE 7527-01-M

#### NATIONAL CREDIT UNION ADMINISTRATION

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

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Request for comment.

**SUMMARY:** The NCUA is resubmitting the following information collections without change to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. Chapter 35). These information collections are published to obtain comments from the public.

**DATES:** Comments will be accepted until July 28, 1998.

**ADDRESSES:** Interested parties are invited to submit written comments to NCUA Clearance Officer or OMB Reviewer listed below:

*Clearance Officer:* Mr. James L. Baylen (703) 518-6411, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-