

administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, D.C., this 7th day of November, 1996.

Ivan Strasfeld,

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

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**[Application No. D-10108, et al.]**

**Proposed Exemptions; Morgan Stanley & Company Incorporated**

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

**ACTION:** Notice of proposed exemptions.

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

**Written Comments and Hearing Requests**

All interested persons are invited to submit written comments or requests 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. 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 requests 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.

Morgan Stanley & Co. Incorporated;  
Located in New York, New York

[Application No. D-10108]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

**Section I—Transactions**

A. Effective August 25, 1995, the restrictions of section 406(a)(1) (A) through (D) of the Employee Retirement Income Security Act of 1974 (the Act)

and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975 (c)(1) (A) through (D) of the Code, shall not apply to any purchase or sale of a security between an employee benefit plan and a broker-dealer affiliated with Morgan Stanley & Co. and subject to British law (MSC/UK Affiliate), if the following conditions, and the conditions of Section II, are satisfied:

(1) The MSC/UK Affiliate customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(2) Such transaction is on terms at least as favorable to the plan as those which the plan could obtain in an arm's length transaction with an unrelated party.

(3) Neither the MSC/UK Affiliate nor an affiliate thereof has discretionary authority or control with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets, and the MSC/UK Affiliate is a party in interest or disqualified person with respect to the plan assets involved in the transaction solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code, or by reason of a relationship to a person described in such sections. For purposes of this paragraph, the MSC/UK Affiliate shall not be deemed to be a fiduciary with respect to a plan solely by reason of providing securities custodial services for a plan.

B. Effective August 25, 1995, the restrictions of section 406(a)(1) (A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to the lending of securities that are assets of an employee benefit plan to an MSC/UK Affiliate if the following conditions, and the conditions of Section II, are satisfied:

(1) Neither the MSC/UK Affiliate (the Borrower) nor an affiliate of the Borrower has discretionary authority or control with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(2) The plan receives from the Borrower, either by physical delivery or by book entry in a securities depository located in the United States, by the close of business on the day on which the securities lent are delivered to the Borrower, collateral consisting of U.S. currency, securities issued or

guaranteed by the United States Government or its agencies or instrumentalities, or irrevocable United States bank letters of credit issued by a person other than the Borrower or an affiliate thereof, or any combination thereof, having, as of the close of business on the preceding business day, a market value (or, in the case of letters of credit, a stated amount) equal to not less than 100 percent of the then market value of the securities lent. The collateral referred to in this Section I(B)(2) must be held in the United States;

(3) Prior to the making of any such loan, the Borrower shall have furnished the following items to the fiduciary for the plan who is making decisions on behalf of the plan with respect to the lending of securities (the Lending Fiduciary): (1) the most recent available audited statement of the Borrower's financial condition, (2) the most recent available unaudited statement of the Borrower's financial condition (if more recent than such audited statement), and (3) a representation that, at the time the loan is negotiated, there has been no material adverse change in the Borrower's financial condition since the date of the most recent financial statement furnished to the plan that has not been disclosed to the Lending Fiduciary. Such representation may be made by the Borrower's agreement that each such loan shall constitute a representation by the Borrower that there has been no such material adverse change;

(4) The loan is made pursuant to a written loan agreement, the terms of which are at least as favorable to the plan as those which the plan could obtain in an arm's-length transaction with an unrelated party. Such agreement may be in the form of a master agreement covering a series of securities-lending transactions;

(5) The plan (1) receives a reasonable fee that is related to the value of the borrowed securities and the duration of the loan, or (2) has the opportunity to derive compensation through the investment of cash collateral. Where the plan has that opportunity, the plan may pay a loan rebate or similar fee to the Borrower, if such fee is not greater than the plan would pay an unrelated party in an arm's-length transaction;

(6) The plan receives the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities;

(7) If the market value of the collateral on the close of trading on a business day is less than 100 percent of the market value of the borrowed securities at the close of trading on that day, the Borrower shall deliver, by the close of business on the following business day, an additional amount of collateral (as described in paragraph (2)) the market value of which, together with the market value of all previously delivered collateral, equals at least 100 percent of the market value of all the borrowed securities as of such preceding day. Notwithstanding the foregoing, part of the collateral may be returned to the Borrower if the market value of the collateral exceeds 100 percent of the market value of the borrowed securities, as long as the market value of the remaining collateral equals at least 100 percent of the market value of the borrowed securities;

(8) The loan may be terminated by the plan at any time, whereupon the Borrower shall deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the plan within (1) the customary delivery period for such securities, (2) three business days, or (3) the time negotiated for such delivery by the plan and the Borrower, whichever is lesser; and

(9) In the event the loan is terminated and the Borrower fails to return the borrowed securities or the equivalent thereof within the time described in paragraph (8) above, then (i) the plan may, under the terms of the loan agreement, purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the Borrower under the agreement, and any expenses associated with the sale and/or purchase, and (ii) the Borrower is obligated, under the terms of the loan agreement, to pay, and does pay to the plan, the amount of any remaining obligations and expenses not covered by the collateral plus interest at a reasonable rate. Notwithstanding the foregoing, the Borrower may, in the event the Borrower fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the then current market value of the collateral, provided such replacement is approved by the Lending Fiduciary.

(10) If the Borrower fails to comply with any condition of this exemption, in the course of engaging in a securities-lending transactions, the plan fiduciary who caused the plan to engage in such

transaction shall not be deemed to have caused the plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the Borrower's failure to comply with the conditions of the exemption.

C. Effective August 25, 1995, the restrictions of sections 406(a)(1) (A) through (D) and 406(b)(2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code shall not apply to any extension of credit to an employee benefit plan by an MSC/UK Affiliate to permit the settlement of securities transactions or in connection with the writing of options contracts provided that the following conditions are met:

(a) The MSC/UK Affiliate is not a fiduciary with respect to any assets of such plan, unless no interest or other consideration is received by such fiduciary or any affiliate thereof in connection with such extension of credit; and

(b) Such extension of credit would be lawful under the Securities Exchange Act of 1934 and any rules or regulations thereunder if such act, rules or regulations were applicable.

#### *Section II—General Conditions*

A. The MSC/UK Affiliate is registered as a broker-dealer with the Securities and Futures Authority of the United Kingdom (the S.F.A.);

B. The MSC/UK Affiliate is in compliance with all requirements of Rule 15a-6 (17 CFR 240.15a-6) under the Securities and Exchange Act of 1934, which provides for foreign broker-dealers a limited exemption from U.S. registration requirements;

C. Prior to the transaction, the MSC/UK Affiliate enters into a written agreement with the plan in which the MSC/UK Affiliate consents to the jurisdiction of the courts of the United States with respect to the transactions covered by this exemption;

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

beyond the control of the MSC/UK Affiliate, such records are lost or destroyed prior to the end of such six year period;

(2) The records referred to in subsection (1) above are unconditionally available for examination during normal business hours by duly authorized employees of the Department of Labor, the Internal Revenue Service, plan participants and beneficiaries, any employer of plan participants and beneficiaries, and any employee organization any of whose members are covered by such plan; except that none of the persons described in this subsection shall be authorized to examine trade secrets of Morgan Stanley & Co. or the MSC/UK or any commercial or financial information which is privileged or confidential.

### Section III—Definitions

“Affiliate” of a person shall include:

(i) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person; (ii) any officer, director, or partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and (iii) any corporation or partnership of which such other person is an officer, director or partner. For purposes of this definition, the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

“Security” shall include equities, fixed income securities, options on equity and on fixed income securities, government obligations, and any other instrument that constitutes a security under U.S. securities laws. The term “security” does not include swap agreements or other notional principal contracts.

### Summary of Facts and Representations

1. Morgan Stanley & Co. Incorporated (MSC) is an international securities firm that performs securities underwriting, distribution and trading, merger, acquisition, restructuring and other corporate financial services for clients world wide. Clients include multinational corporations, governments, emerging growth companies, financial institutions and individual investors.

2. MSC has foreign affiliates world wide who are in the business of trading securities, including a broker-dealer affiliate in London, England (the MSC/UK Affiliate), currently Morgan Stanley & Co. International Limited. MSC represents that in the ordinary course of their business as broker-dealers, these

foreign affiliates customarily operate as traders in dealers markets wherein the broker-dealer purchases and sells securities for its own account and engages in purchases and sales of securities with its clients, and that such trades are referred to as principal transactions. MSC states that in issuing Prohibited Transaction Class Exemption 75-1 (PTCE 75-1, 40 FR 50845, October 31, 1975) the Department has recognized the functions of registered broker-dealers in principal transactions on behalf of clients which are employee benefit plans covered by the Act. Part II of PTCE 75-1 provides exemptive relief from section 406(a) of the Act for principal transactions between plans and broker-dealers which are registered under the Securities Exchange Act of 1934, provided all requirements stated in Part II are satisfied. MSC represents that like the U.S. dealer markets, international equity and debt markets, including the options markets, are no less dependent on a willingness of dealers to trade as principals. In the absence of an exemption for principal transactions, such as PTCE 75-1, those responsible for trading activities on behalf of plan investors would be prevented from engaging in transactions with those broker-dealers and banks that provide the markets for the securities and are most capable of handling such transactions.

3. MSC represents that over the past decade, plans have increasingly invested in foreign equity and debt securities, including foreign government securities. MSC states that plans seeking to enter into such investments may wish to increase the number of trading partners available to them by trading with foreign broker-dealers such as the MSC/UK Affiliate. However, where MSC provides services to such plans which are covered by the Act, principal transactions with the MSC/UK Affiliate would be prohibited by the Act. The exemptive relief afforded U.S. broker-dealers by PTCE 75-1 would not be available with respect to the MSC/UK Affiliate because that class exemption is limited to broker-dealers registered with the U.S. Securities and Exchange Commission (S.E.C.) under the Securities Exchange Act of 1934 (the 1934 Act). MSC represents that its MSC/UK Affiliate is not so registered but, instead, is governed by the rules, regulations and registration requirements of the Securities and Futures Authority of the United Kingdom (the S.F.A.). Furthermore, MSC represents that Rule 15(a)-6 of the 1934 Act offers foreign broker-dealers limited exemption from the S.E.C.

registration requirements pursuant to provisions with which the MSC/UK Affiliate is able to comply. However, MSC states that because of the S.E.C. registration requirement of PTCE 75-1, the MSC/UK Affiliate is prevented from engaging in principal transactions with plans with respect to which MSC is a party in interest, even though such affiliate is registered with the S.F.A., experienced in the markets, and able to satisfy the Rule 15(a)-6 requirements for S.E.C. registration exemption. Accordingly, MSC is requesting an individual exemption to permit its MSC/UK Affiliate to engage in principal transactions with plans under the terms and conditions set forth herein, which MSC represents are equivalent to those set forth in PTCE 75-1, Part II.<sup>1</sup>

4. The proposed exemption will be applicable only to transactions affected by an MSC/UK Affiliate which is registered as a broker-dealer with the S.F.A. and in compliance with Rule 15(a)-6. MSC represents that the role of a broker-dealer in a principal transaction in the United Kingdom is substantially identical to that of a broker-dealer in a principal transaction in the United States. MSC further represents that registration of a broker-dealer with the S.F.A. is equivalent to registration of a broker-dealer with the S.E.C. under the 1934 Act. MSC maintains that the S.F.A. has promulgated rules for broker-dealers which are equivalent to S.E.C. rules, relating to registration requirements, minimum capitalization, reporting requirements, periodic examinations, fund segregation, client protection, and enforcement. MSC represents that the rules and regulations set forth by the S.F.A. and the S.E.C. share a common objective: the protection of the investor by the regulation of securities markets. MSC explains that under S.F.A. rules, persons who manage investments or give advice with respect to investments must be registered as a “registered representative”. If a person is not a registered representative and, as part of his duties, makes commitments in market dealings or transactions, that person must be registered as a “registered trader”. MSC represents that the S.F.A. rules require each firm which employs registered representatives or

<sup>1</sup> The Department notes that the proposed principal transactions are subject to the fiduciary responsibility requirements of part 4, subtitle B, title I of the Act. Section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan.

registered traders to have positive tangible net worth and be able to meet its obligations as they fall due, and that the S.F.A. rules set forth comprehensive financial resource and reporting/disclosure rules regarding capital adequacy. In addition to demonstration of capital adequacy, MSC states that the S.F.A. rules impose reporting/disclosure requirements on broker-dealers with respect to risk management, internal controls, and all records relating to a counterparty, and that all records must be produced at the request of the S.F.A. at any time. MSC states that S.F.A.'s registration requirements for broker-dealers are backed up by potential fines and penalties, and rules which establish a comprehensive disciplinary system.

5. MSC represents that in addition to the protections which are afforded by registration with S.F.A., compliance with the requirements of Rule 15a-6 (17 CFR 240.15a-6) under the 1934 Act will offer additional protections in lieu of registration with the S.E.C. MSC states that Rule 15a-6 provides an exemption from U.S. broker-dealer registration for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a "U.S. institutional investor" or a "U.S. major institutional investor", provided that the foreign broker dealer, among other things, enters into these transactions through a U.S. registered broker-dealer intermediary. The term "U.S. institutional investor", as defined in Rule 15a-6(b)(7), includes an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 (the Act) if (a) the investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company or registered investment advisor, or (b) the employee benefit plan has total assets in excess of \$5 million, or (c) the employee benefit plan is a self-directed plan with investment decisions made solely by persons that are "accredited investors" as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended. The term "U.S. major institutional investor" is defined as a person that is a U.S. institutional investor that has total assets in excess of \$100 million. MSC represents that the intermediation of the U.S. registered broker-dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

MSC represents that under Rule 15a-6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major institutional investor in accordance with Rule 15a-6 must, among other things:

(a) Consent to service of process for any civil action brought by, or proceeding before, the S.E.C. or any self-regulatory organization;

(b) Provide the S.E.C. with any information or documents within its possession, custody or control, any testimony of any such foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the S.E.C. requests and that relates to transactions effected pursuant to the Rule;

(c) Rely on the U.S. registered broker-dealer through which the transactions with the U.S. institutional and major institutional investors are effected to (among other things):

(1) Effect the transactions, other than negotiating their terms;

(2) Issue all required confirmations and statements;

(3) As between the foreign broker-dealer and the U.S. registered broker-dealer, extend or arrange for the extension of credit in connection with the transactions;

(4) Maintain required books and records relating to the transactions, including those required by Rules 17a-3 (Records to be Made by Certain Exchange Members) and 17a-4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act;

(5) Receive, deliver, and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or U.S. major institutional investor in compliance with Rule 15c3-3 of the 1934 Act (Customer Protection—Reserves and Custody of Securities); and

(6) Participate in all oral communications (e.g., telephone calls) between the foreign associated person and the U.S. institutional investor (not the U.S. major institutional investor), and accompany the foreign associated person on all visits with both U.S. institutional and major institutional investors. By virtue of this participation, the U.S. registered broker-dealer would become responsible for the content of all these communications.

6. MSC represents that a normal part of the execution of securities transactions by broker-dealers on behalf of customers, including employee benefit plans, is the extension of credit to customers to permit the settlement of transactions in the customary settlement

period, and that such extensions of credit are also customary activities of broker-dealers in connection with the writing of option contracts. MSC notes that exemptive relief for such transactions is provided under Part V of PTCE 75-1. However, the exemptive relief under Part V of PTCE 75-1, like that under Part II, is available only with respect to broker-dealers which are registered with the S.E.C. under the 1934 Act. Accordingly, MSC requests that the exemption include relief for extensions of credit by the MSC/UK affiliate in the ordinary course of the purchase or sale of securities, regardless of whether they are effected on an agency or a principal basis. The proposed exemption provides relief for extensions of credit by the MSC/UK Affiliate to a plan to permit the settlement of securities transactions or in connection with the writing of options contracts, provided that the MSC/UK Affiliate is not a fiduciary with respect to any assets of the plan, unless no interest or other consideration is received by the MSC/UK Affiliate in connection with such extension of credit. The proposed exemption also requires that the extension of credit would be lawful under the 1934 Act and any rules or regulations thereunder if such act, rules, or regulations were applicable.

7. In addition to exemptive relief for principal transactions and extensions of credit in connection with the purchase or sale of securities, MSC is also requesting exemptive relief for the lending of securities, equivalent to that provided under the terms and conditions of Prohibited Transaction Class Exemption 81-6 (PTCE 81-6, 46 FR 7527, January 23, 1981, amended at 52 FR 18754, May 19, 1987), a class exemption to permit certain loans of securities by employee benefit plans. MSC represents that in PTCE 81-6 the Department has recognized that securities lending represents a low-risk means of enhancing the investment return of plans with respect to securities that would otherwise be idle. MSC represents that the conditions of Section I(B) of the proposed exemption will subject the MSC/UK Affiliate to all of the conditions imposed on broker-dealers under PTCE 81-6, other than registration under the 1934 Act. MSC notes that such conditions include requirements relating to daily marking to market, setting collateral at 100 percent of the market value of the securities, the rules for termination of the loan, and return of the borrowed securities. In addition, MSC notes that

the collateral will be in U.S. dollars and will be held in the United States.

8. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) With respect to principal transactions affected by the MSC/UK Affiliate, the exemption will enable plans to realize the same benefits of efficiency and convenience which derive from principal transactions executed pursuant to Part II of PTCE 75-1 by broker-dealers registered in the United States; (2) With respect to extensions of credit by the MSC/UK Affiliate in connection with purchases or sales of securities, the exemption will enable the MSC/UK to extend credit in the ordinary course of business to affect the transactions within the customary settlement period or in connection with the writing of options contracts; (3) With respect to securities lending transactions affected by the MSC/UK Affiliate, the exemption will enable plans to realize a low-risk return on securities that otherwise would remain idle, as in securities lending transactions executed pursuant to PTCE 81-6 by broker-dealers registered in the United States; and (3) The proposed exemption generally imposes terms and conditions upon the transactions executed by the MSC/UK Affiliate which are the same as those imposed on U.S. broker-dealers under PTCE 75-1 and PTCE 81-6.

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

General Electric Pension Trust (the GE Trust), Located in Fairfield, Connecticut

[Application Nos. D-10285 Thru D-10287]

#### 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 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>2</sup> shall not apply, effective July 12, 1996, to the past sale by the GE

Trust of its stock in AmeriData Technologies, Inc. (the AmeriData Stock) to General Electric Capital Corporation (GECC) and GECC's indirect, wholly-owned subsidiary, GAC Acquisition I Corporation (GAC), both of which are parties in interest with respect to the GE Trust and affiliates of the General Electric Company (GE) the sponsor of the GE Trust, in connection with the merger (the Merger) of GAC and AmeriData Technologies, Inc. (AmeriData), provided that the following conditions were satisfied:

(a) The sale of the AmeriData Stock by the GE Trust was a one-time transaction for cash;

(b) The GE Trust received the fair market value for each share of the AmeriData Stock on the date of the sale;

(c) The GE Trust received no less consideration than that received by similarly situated AmeriData shareholders at the same time in the same transaction;

(d) The GE Trust paid no commissions, fees or other expenses in connection with the sale of the AmeriData Stock to GECC and GAC;

(e) The terms of the sale were no less favorable to the GE Trust than those obtainable by other similarly situated shareholders of AmeriData Stock;

(f) The GE Trust tendered its shares of AmeriData Stock only at the close of the tender-offer period and only after a majority of the outstanding shares of AmeriData had been tendered; and

(g) The transactions engaged in by the GE Trust with respect to the AmeriData Stock (including the acquisition, holding and subsequent sale to GECC and GAC) were not part of an arrangement designed to benefit GE, any of its affiliates, or any other party in interest with respect to the GE Trust.

**EFFECTIVE DATE:** This proposed exemption, if granted, will be effective as of July 12, 1996, the closing date of the tender-offer period for the AmeriData Stock in connection with the Merger.

#### Summary of Facts and Representations

1. The GE Trust is a single pension trust through which three (3) defined benefit plans (the Plans) are funded. These Plans provide pension and death benefits to eligible employees and their beneficiaries. As of December 31, 1995, there were approximately 465,000 participants in the Plans. The Plans which participate in the GE Trust are:

(a) the General Electric Company Pension Plan (the GE Plan), which is maintained by GE; (b) the Components Pension Plan for Puerto Rico, which is maintained by Caribe General Electric Products, Inc., an affiliate of GE; and (c)

the ERC Retirement Plan, which is maintained by Employers Reinsurance Corporation, an affiliate of GE. As of December 31, 1995, the GE Trust had total net assets of approximately \$30.3 billion.

2. The assets of the GE Trust are held in trust by seven (7) trustees (the Trustees) who are all employees of GE and who are appointed by the Benefit Plans Investment Committee (BPIC). The Board of Directors of GE appoints officers of GE to serve as members of BPIC. BPIC determines the investment policies with respect to the assets of the Plans in the GE Trust.

3. GE offers diversified manufacturing and technical services worldwide. An indirect, wholly-owned subsidiary of GE, GECC, provides financial services in the following categories: special insurance services, consumer services, specialized financing, equipment management, and mid-market financing. The affiliates of GE play a primary role in the proposed transaction. In this regard, GECC established GAC, as an indirect, wholly-owned special purpose subsidiary, to acquire AmeriData. In this regard, it is represented that GAC will be merged into AmeriData at which time AmeriData will become an affiliate of GE. Because GECC is a participating employer under the GE Plan, GECC and GAC are parties in interest with respect to the GE Trust.

4. AmeriData, with offices in Stamford, Connecticut, is a corporation registered under the laws of the State of Delaware. AmeriData is an international provider of computer products and services, as well as technology consulting services. Shares of AmeriData Stock are widely-held and publicly-traded on the New York Stock Exchange. It is represented that approximately 24,938,845 shares of AmeriData Stock are considered outstanding for purposes of Delaware General Corporation Law (DGCL), as of July 23, 1996.

5. The Applicants represent that, as of December 31, 1995, the readily identifiable shareholders of AmeriData Stock were: (1) the GE Trust; (2) two investment Partnerships; (3) SBC Technologies, Inc., a wholly-owned subsidiary of AmeriData; and (4) the officers and directors of AmeriData. It is represented that the remaining shares of AmeriData Stock were held by the general public.

As of December 31, 1995, the officers and directors of AmeriData owned 11.8 percent (11.8%) of the shares of AmeriData Stock. It is represented that, as of May 20, 1996, management shareholders of AmeriData owning approximately 6 percent (6%) of the

<sup>2</sup> For purposes of this proposed exemption references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

outstanding shares of AmeriData Stock had entered into binding agreements to tender their shares. None of the officers and directors of AmeriData are employed by GE or its affiliates.

With respect to the two investment partnerships, the combined ownership represented a total of 10.9% of the shares of AmeriData Stock. Neither investment partnership has any affiliation with GE.

6. As of December 31, 1995, the GE Trust owned approximately 2,101,404 shares of the AmeriData Stock. These shares represented approximately 9.7 percent (9.7%) of the total outstanding shares of the AmeriData Stock at that time. It is represented that the Trustees acquired the 2,101,404 shares of the AmeriData Stock in a number of transactions over the period from May 1993 through October 1994. The cost to the GE Trust of its 2,101,404 shares of AmeriData stock, as shown on the GE Trust's financial records, was \$21,566,026. It is represented that the GE Trust acquired some of the AmeriData Stock in blind transactions on the open market. In addition, the remaining AmeriData Stock was acquired in various transactions with AmeriData or its predecessor, including but not limited to purchases, the exercise of warrants, and the receipt of stock dividends.<sup>3</sup> It is represented that at the time of these transactions neither AmeriData nor its predecessor was related to GE, nor was either a party in interest with respect to the GE Trust. The Applicants represent that the decisions made by the Trustees regarding the acquisition of the AmeriData Stock were made independent of, and without knowledge that in the future an affiliate of GE would attempt to acquire all of the outstanding shares of AmeriData Stock.

7. On May 20, 1996, GECC, GAC and AmeriData entered into an agreement and plan of merger (the Merger Agreement). In this regard, the Boards of Directors of these parties unanimously approved the acquisition of AmeriData by GECC and GAC by means of the merger of GAC with and into AmeriData. In connection with the Merger, GAC made a tender offer on May 24, 1996, for all outstanding shares

of AmeriData Stock. The tender-offer period began on May 24, 1996, and was to expire on June 21, 1996, subject to the satisfaction or waiver of certain closing conditions. Because certain closing conditions could not be satisfied or waived before June 21, the tender-offer period was extended until July 12, 1996.

Pursuant to the tender, GAC offered to purchase the stock of AmeriData for \$16 a share or approximately \$490 million in the aggregate. The tender price represented a premium of approximately 47.1 percent (47.1%) over the closing price of \$10<sup>7</sup>/<sub>8</sub> per share for AmeriData Stock on April 19, 1996, thirty-one (31) days prior to the public announcement of the execution of the Merger Agreement. In this regard, it is represented the trading price of shares of AmeriData Stock on the open market during the tender-offer period, ranged from \$15<sup>3</sup>/<sub>4</sub> to \$15<sup>7</sup>/<sub>8</sub> per share, except that the closing price per share was \$15<sup>5</sup>/<sub>8</sub> on May 27, and \$16 on June 17, and July 5, 8, and 10, 1996. The Board of Directors of AmeriData unanimously approved such tender offer and recommended that its shareholders accept the tender.

8. While it would have been possible for the GE Trust, as a shareholder of AmeriData Stock to ignore the recommendation of the Board of Directors and sell its shares in the open market or in a private transaction before the close of the tender-offer period, it is represented that this approach would probably have resulted in loss of some profits to the GE Trust. Since any purchaser of the AmeriData Stock (either in the open market or in a private transaction) during the tender-offer period could normally expect to resell such shares for the tender-offer price, the transaction would be worthwhile for such purchaser only if it paid to the GE Trust a price less than the tender-offer price so as to realize a profit from the spread. By accepting the tender offer, the GE Trust avoided losing part of the profit on its investment and was able to sell its shares for the full tender-offer price.

9. Regardless of whether or not the GE Trust tendered its shares, once a majority of the outstanding shares of AmeriData Stock were tendered by shareholders other than the GE Trust, in no event could the GE Trust have continued to hold its shares of AmeriData Stock. In this regard, under the terms of the Merger Agreement, GAC was not required to proceed with the purchase of the tendered shares, if less than a majority of AmeriData Stock was tendered as of the close of the tender-offer period. However, if a majority, but less than 100 percent (100%) of the

shares of AmeriData Stock were tendered, then GAC was bound to acquire the tendered shares. Further, under the terms of the Merger Agreement once a majority of shares had been tendered, GAC in its capacity as the acquiring corporation, was obligated to cause a forced redemption of all the shares of AmeriData Stock which had not been tendered initially. In this regard, under the terms of the Merger Agreement, such follow-on merger would redeem, at the same \$16 per share consideration, all the remaining shares of AmeriData Stock held by parties other than GAC. GAC was assured under Delaware law, that once a majority of shares had been tendered, it would be able to acquire all of the shares of AmeriData either through a short-form merger or a shareholder vote followed by a merger. In the event that at least 90 percent (90%) of the shares of AmeriData Stock were tendered in the tender offer, such follow-on merger would be a "short-form" merger under Section 253 of the DGCL and would not require a vote of shareholders. In the event that less than 90 percent (90%) of the shares were tendered, a follow-on merger under Section 251 of DGCL would be accomplished by a shareholder vote.

It is represented that the total number of shares of AmeriData Stock tendered to GAC at the close of the tender-offer period was 22,421,080 out of a total of 24,938,845 shares. The number of shares tendered represented 89.9 percent (89.9%) of the total number of outstanding shares of AmeriData Stock. In order to proceed with a "short-form" merger under Section 253 of the DGCL which would not require a vote of shareholders, GAC subsequently purchased a sufficient number of shares of AmeriData Stock directly from AmeriData at the same \$16 per share price so that GAC became a 90 percent (90%) shareholder. AmeriData was then merged with GAC using the "short-form" merger provisions of DGCL with the result that AmeriData as a surviving company is now a wholly owned subsidiary of GECC.

10. The Applicants represent that the Trustees made a fiduciary decision not to tender the GE Trust's shares of AmeriData Stock until the close of the tender-offer period, and then to do so only if at that time at least 51 percent (51%) of the other shareholders had already tendered their shares. The Trustees determined that such a conditional tender should be made, and that the shares of AmeriData Stock held by the GE Trust should be tendered only if the specified conditions were met immediately prior to the close of the

<sup>3</sup> In this regard, the Department is not providing any opinion in this proposed exemption as to whether the acquisition and holding of the AmeriData Stock by the GE Trust violated any of the provisions of Part IV of Title I of the Act. However, the Department notes that section 404(a) of the Act requires, among other things, that a plan fiduciary act prudently, solely in the interest of the participants and beneficiaries of a plan, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions for such plan.

tender-offer period, so that the arm's length nature of the transaction by the Trustees would be confirmed by the actions of independent parties, prior to the tender by the Trustees. Also, the Trustees concluded that by waiting for a majority of shareholders other than the GE Trust to tender, no issue would arise as to whether the Trustees had facilitated the acquisition by GAC of AmeriData Stock, since once a majority of other shareholders had tendered their shares, GAC was obligated to redeem all of the outstanding shares of AmeriData Stock.

11. The Trustees carried out the conditional tender in a two part process. First, several days prior to the close of the tender-offer period, the Trustees filed a letter with the Chase Manhattan Bank, in its capacity as Depository for the tender-offer, which stated that the Trustees' tender of the shares of AmeriData Stock held by the GE Trust was conditional and was to be effective if and only if immediately prior to the expiration of the tender-offer period, at least 51 percent (51%) of the shares of AmeriData Stock had been validly tendered and not withdrawn. In addition, the Trustees dispatched a letter which would effectuate the transmittal of its shares of AmeriData Stock, providing that the conditions of its tender were met. As more than a majority of shares of AmeriData Stock were tendered by independent shareholders at the close of the tender-offer period, the GE Trust tendered its shares to GAC on July 12, 1996. In this regard, it is represented that, as of July 17, 1996, a check in an amount of approximately \$33,622,464 million representing a purchase price of \$16 per share, payable to the GE Trust for its 2,101,404 shares of AmeriData Stock tendered to GAC was received by State Street Bank, acting as custodian for the GE Trust. Accordingly, the GE Trust and the Plans (collectively, the Applicants) request retroactive relief from the prohibited transactions provisions of the Act provided certain conditions were met for the past sale to GAC under the terms of the tender offer of AmeriData Stock which, prior to the effective date of this exemption, was held by the GE Trust.

12. The Applicants maintain that the proposed sale is administratively feasible in that the transaction would be a one-time cash sale. In this regard, there will be no need for the Department to monitor or supervise the transaction. It is represented that the cost of filing the application for exemption will be borne by GE Trust and that the cost of notifying interested persons will be borne by GE or one of its affiliates.

13. It is represented that the transaction is protective of the GE Trust and the Plans, because the terms of transaction to the Plan were no less favorable than those received by other similarly situated shareholders of AmeriData Stock. In this regard, the terms of the tender were carefully negotiated on an arm's length basis as to all AmeriData shareholders by parties independent of the Applicants.

It is represented that the transaction has sufficient safeguards for the protection of the Plans. Among such safeguards included in this exemption, is the fact that the GE Trust could only tender its shares of AmeriData Stock at the close of the tender-offer period and then only if at the close of such period a majority of the outstanding shares of AmeriData Stock had already been tendered by parties other than the GE Trust. In this regard it is represented that GE Trust could not have caused the transaction to occur because of their decision to tender. In addition, because the GE Trust did not tender its shares until the end of the tender-offer period and then tendered only after a majority of independent investors in AmeriData had tendered, it is represented that the arm's length nature of the tender was confirmed.

It is further represented that the GE Trust was protected, because a majority of the shares of AmeriData Stock were tendered by independent shareholders before the GE Trust tendered its shares. Since all tenders were revocable up to the close of the tender-offer period, had a third party made a more favorable offer, then all the shareholders, including the GE Trust, would have revoked their tender to GAC in favor of such competing offer. Accordingly, it is represented that there was no potential for abuse. In addition, it is represented that during the tender-offer period, there was in fact no competing tender offer made by a third party.

14. It is represented that the transaction is in the interest of the GE Trust and the Plans, because accepting the tender resulted in the highest and best sales price of AmeriData Stock for the GE Trust and the Plans. In this regard, the GE Trust and the Plans avoided disposing of their shares of AmeriData Stock on the open market at less than the tender-offer price. It is represented that the GE Trust was informally advised by outside investment counsel that, because the GE Trust would be disposing of a large block of AmeriData Stock, if such shares were sold on the open market the price would likely be reduced to as low as \$15½ per share. It is estimated that if the GE Trust had disposed of the

AmeriData Stock on the open market at \$15½ per share, rather than tendering such shares at \$16 per share, the Plans would have received \$1,050,702 less.

Further, the GE Trust and the Plans benefit from being able to tender the AmeriData Stock, rather than sell the shares on the open market. In this regard, in a sale on the open market the Plans would have paid commissions, which were not incurred by the Plans by accepting the tender offer.

15. In summary, the Applicants represent that the transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The sale of the AmeriData Stock by the GE Trust was a one-time transaction for cash;

(b) The GE Trust, and the Plans received the fair market value for each share of the AmeriData Stock on the date of the sale;

(c) The GE Trust received no less consideration than other similarly situated shareholders of the AmeriData Stock received at the same time in the same transaction;

(d) The GE Trust paid no commissions, fees, or other expenses in connection with the sale of the AmeriData Stock to GECC and GAC;

(e) The terms of the sale were no less favorable to the GE Trust, and the Plans, than those obtainable in an arm's length transaction engaged in by other similarly situated shareholders of AmeriData Stock; and

(f) The GE Trust tendered its shares of AmeriData Stock only at the close of the tender-offer period and only after a majority of the outstanding shares of AmeriData had been tendered.

#### Notice to Interested Persons

The Applicants represent that because of the large number of potentially interested persons, it is not possible to provide a separate copy of the Notice of Proposed Exemption (the Notice) to each participant in the Plans. However, GE will post a photocopy of the Notice, as published in the Federal Register, plus a copy of the supplemental statement (the Supplemental Statement), in the form set forth in the Department's regulations under 29 CFR 2570.43(b)(2), on bulletin boards normally used for employee notices in each of its offices and operating facilities and in the offices and operating facilities of its affiliates within fifteen (15) days of the publication of such Notice in the Federal Register. Apart from this method of notifying all interested persons, the Applicants represent that the only practical form of providing notice to former employees,

retirees, and other employees, is to publish a notice in the 1995 Summary Annual Report which will be distributed to such person on or before December 15, 1996, via first class mail. Such notice in the Summary Annual Report will notify former employees, retirees, and other employees that they may obtain a copy of the proposed exemption and information on how to comment from Joseph C. Keifer, Controller of the GE Trust at (203) 921-2167. The comment period will end thirty (30) days after the mailing of the Summary Annual Report.

**FOR FURTHER INFORMATION CONTACT:** Janet L. Schmidt of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

First Chicago NBD Corporation  
(FCNBD), Located in Chicago, Illinois

[Application No. D-10361]

Proposed Exemption

### *I. Transactions*

A. Effective October 8, 1996, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

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

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

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

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.<sup>4</sup>

<sup>4</sup>Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3-21(c).

B. Effective October 8, 1996, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;  
(ii) Solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.<sup>5</sup> For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that the conditions set forth in paragraphs B.(1) (i), (iii) and (iv) are met; and

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

C. Effective October 8, 1996, the restrictions of sections 406(a), 406(b)

<sup>5</sup>For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust, provided:

(1) such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) the pooling and servicing agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust.<sup>6</sup>

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in section III.S.

D. Effective October 8, 1996, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975(a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

### *II. General Conditions*

A. The relief provided under Part I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as they would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated

<sup>6</sup>In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.



to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's Structured Rating Group (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Inc. (D & P) or Fitch Investors Service, Inc. (Fitch);

(4) The trustee is not an affiliate of any member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, nor any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as

such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

### III. Definitions

For purposes of this exemption:

A. *Certificate* means:

(1) A certificate—

(a) That represents a beneficial ownership interest in the assets of a trust; and

(b) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) A certificate denominated as a debt instrument—

(a) That represents an interest in a Real Estate Mortgage Investment Conduit (REMIC) within the meaning of section 860D(a) of the Internal Revenue Code of 1986; and

(b) That is issued by and is an obligation of a trust;

With respect to certificates defined in (1) and (2) above for which FCNBD or any of its affiliates is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this exemption, references to "certificates representing an interest in a trust" include certificates denominated as debt which are issued by a trust.

B. *Trust* means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either

(a) Secured consumer receivables that bear interest or are purchased at a discount (including, but not limited to, home equity loans and obligations secured by shares issued by a cooperative housing association);

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T);

(c) Obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property (including obligations secured by leasehold interests on commercial real property);

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in section III.U);

(e) "Guaranteed governmental mortgage pool certificates," as defined in 29 CFR 2510.3-101(i)(2);

(f) Fractional undivided interests in any of the obligations described in clauses (a)–(e) of this section B.(1);<sup>7</sup>

(2) property which had secured any of the obligations described in subsection B.(1);

(3) Undistributed cash or temporary investments made therewith maturing no later than the next date on which distributions are to be made to certificateholders; and

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any insurance policies, third-party guarantees, contracts of suretyship and other credit support arrangements with respect to any obligations described in subsection B.(1).

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) the investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by S&P's, Moody's, D&P, or Fitch for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. *Underwriter* means:

(1) FCNBD;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with FCNBD; or

(3) Any member of an underwriting syndicate or selling group of which FCNBD or a person described in (2) is a manager or co-manager with respect to the certificates.

D. *Sponsor* means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

<sup>7</sup>It is the Department's view that the definition of "trust" contained in III.B. includes a two-tier structure under which certificates issued by the first trust, which contains a pool of receivables described above, are transferred to a second trust which issues securities that are sold to plans. However, the Department is of the further view that, since the exemption provides relief for the direct or indirect acquisition or disposition of certificates that are not subordinated, no relief would be available if the certificates held by the second trust were subordinated to the rights and interests evidenced by other certificates issued by the first trust.

E. *Master Servicer* means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. *Subservicer* means an entity which, under the supervision of and on behalf of the master servicer, services receivables contained in the trust, but is not a party to the pooling and servicing agreement.

G. *Servicer* means any entity which services receivables contained in the trust, including the master servicer and any subservicer.

H. *Trustee* means the trustee of the trust, and in the case of certificates which are denominated as debt instruments, also means the trustee of the indenture trust.

I. *Insurer* means the insurer or guarantor of, or provider of other credit support for, a trust. Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. *Obligor* means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. *Excluded Plan* means any plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

L. *Restricted Group* with respect to a class of certificates means:

- (1) Each underwriter;
- (2) Each insurer;
- (3) The sponsor;
- (4) The trustee;
- (5) Each servicer;

(6) Any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) Any affiliate of a person described in (1)–(6) above.

M. *Affiliate* of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under

common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

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

N. *Control* means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be "independent" of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. *Sale* includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's-length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. *Forward delivery commitment* means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party).

R. *Reasonable compensation* has the same meaning as that term is defined in 29 CFR 2550.408c-2.

S. *Qualified Administrative Fee* means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) The amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. *Qualified Equipment Note Secured By A Lease* means an equipment note:

(1) Which is secured by equipment which is leased;

(2) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(3) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as would be the case if the equipment note were secured only by the equipment and not the lease.

U. *Qualified Motor Vehicle Lease* means a lease of a motor vehicle where:

(1) The trust holds a security interest in the lease;

(2) The trust holds a security interest in the leased motor vehicle; and

(3) The trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as would be the case if the trust consisted of motor vehicle installment loan contracts.

V. *Pooling and Servicing Agreement* means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, "Pooling and Servicing Agreement" also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

W. *FCNBD* means First Chicago NBD Corporation and its affiliates.

The Department notes that this proposed exemption is included within the meaning of the term "Underwriter Exemption" as it is defined in section V(h) of Prohibited Transaction Exemption 95-60 (60 FR 35925, July 12, 1995), the Class Exemption for Certain Transactions Involving Insurance Company General Accounts at 35932.

#### Summary of Facts and Representations

1. FCNBD, a Delaware corporation, is a Chicago, Illinois based bank holding company formed by the merger of First Chicago Corporation with and into NBD Bancorp, Inc., which has assets of over \$113 billion and through its subsidiaries operates more than 763 branches in various cities in Florida, Illinois, Indiana, Michigan and Wisconsin, as well as various overseas locations. FCNBD also owns and operates subsidiaries that engage in trust, brokerage, investment management, equipment leasing, venture capital, mortgage banking, consumer finance and insurance.

First Chicago Capital Markets, Inc. (FCCM), a Delaware corporation, is a wholly-owned indirect subsidiary of FCNBD. FCCM was organized in 1988 and pursuant to an August 1988 order (the 1988 Order) of the Federal Reserve Board (FRB) is authorized to engage, to a limited extent, in underwriting and dealing in certain mortgage-backed securities, municipal revenue bonds, commercial paper and consumer receivables-related securities transactions. In March, 1994, FCCM received further authorization from the FRB to: (i) underwrite and deal in all types of debt securities, including rated and unrated long-term debt, medium term notes and convertible debt securities; (ii) privately place and act as riskless principal in all types of securities, including equity securities; and (iii) engage in certain related investment and advisory activities. These orders are currently subject to the condition that FCNBD does not derive more than 10% of its total gross revenues from such activities. FCCM does not at this time have authority to underwrite equity securities. FCCM is a broker-dealer registered with the Securities and Exchange Commission and in all 50 states, and is a member of the National Association of Securities Dealers, Inc. In addition, FCNBD affiliates have the power to sell interests in their own assets in the form of asset-backed securities.

FCNBD's investment banking department has served as senior manager with full structuring responsibilities for over \$16.4 billion in public asset-backed securities transactions since 1988 and agented \$1.1 billion of private placement transactions in 1994 alone. It has one of the largest departments specializing in asset-backed securities of any bank or Wall Street firm, with approximately 50 professionals. The asset-backed securities staff has extensive experience in structuring both taxable and tax-exempt obligations having a wide range of structural characteristics as well as security arrangements. FCNBD originated and placed \$22.8 billion in asset-backed commercial paper transactions through October 1995.

#### *Trust Assets*

2. FCNBD seeks exemptive relief to permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts: (1) single and multi-family residential or commercial mortgage investment trusts;<sup>8</sup> (2) motor vehicle

receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.<sup>9</sup>

3. Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. The terms of the ground leases pledged to secure leasehold mortgages will in all cases be at least ten years longer than the term of such mortgages.<sup>10</sup>

#### *Trust Structure*

4. Each trust is established under a pooling and servicing agreement between a sponsor, a servicer and a trustee. The sponsor or servicer of a trust selects assets to be included in the trust. These assets are receivables which may have been originated by a sponsor or servicer of the trust, an affiliate of the sponsor or servicer, or by an unrelated lender and subsequently acquired by the trust sponsor or servicer.<sup>11</sup>

pool investment trusts, would generally apply to trusts containing single-family residential mortgages, provided that the applicable conditions of PTE 83-1 are met. FCNBD requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure. However, FCNBD has stated that it may still avail itself of the exemptive relief provided by PTE 83-1.

<sup>9</sup>Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate. The applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates because the certificates in the trusts may be plan assets.

<sup>10</sup>Trust assets may also include obligations that are secured by leasehold interests on residential real property. See PTE 90-32 involving Prudential-Bache Securities, Inc. (55 FR 23147, June 6, 1990 at 23150).

<sup>11</sup>It is the view of the Department that section III.B.(4) includes within the definition of the term "trust" rights under any yield supplement or similar arrangement which obligates the sponsor or master servicer, or another party specified in the relevant pooling and servicing agreement, to

On or prior to the closing date, the sponsor acquires legal title to all assets selected for the trust, establishes the trust and designates an independent entity as trustee. On the closing date, the sponsor conveys to the trust legal title to the assets, and the trustee issues certificates representing fractional undivided interests in the trust assets. FCNBD, alone or together with other broker-dealers, acts as underwriter or placement agent with respect to the sale of the certificates. All of the public offerings of certificates presently contemplated are to be underwritten by FCNBD on a firm commitment basis. In addition, FCNBD anticipates that it may privately place certificates on both a firm commitment and an agency basis. FCNBD may also act as the lead underwriter for a syndicate of securities underwriters.

Certificateholders will be entitled to receive monthly, quarterly or semi-annual installments of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable.

When installments or payments are made on a semi-annual basis, funds are not permitted to be commingled with the servicer's assets for longer than would be permitted for a monthly-pay security. A segregated account is established in the name of the trustee (on behalf of certificateholders) to hold funds received between distribution dates. The account is under the sole control of the trustee, who invests the account's assets in short-term securities which have received a rating comparable to the rating assigned to the certificates. In some cases, the servicer may be permitted to make a single deposit into the account once a month. When the servicer makes such monthly deposits, payments received from obligors by the servicer may be commingled with the servicer's assets during the month prior to deposit. Usually, the period of time between receipt of funds by the servicer and deposit of these funds in a segregated account does not exceed one month. Furthermore, in those cases where distributions are made semi-annually, the servicer will furnish a report on the operation of the trust to the trustee on a monthly basis. At or about the time this report is delivered to the trustee, it

supplement the interest rates otherwise payable on the obligations described in section III.B.(1), in accordance with the terms of a yield supplement arrangement described in the pooling and servicing agreement, provided that such arrangements do not involve swap agreement or other notional principal contracts.

<sup>8</sup>The Department notes that PTE 83-1 [48 FR 895, January 7, 1983], a class exemption for mortgage

will be made available to certificateholders and delivered to or made available to each rating agency that has rated the certificates.

5. Some of the certificates will be multi-class certificates. FCNBD requests exemptive relief for two types of multi-class certificates: "strip" certificates and "fast-pay/slow-pay" certificates. Strip certificates are a type of security in which the stream of interest payments on receivables is split from the flow of principal payments and separate classes of certificates are established, each representing rights to disproportionate payments of principal and interest.<sup>12</sup>

"Fast-pay/slow-pay" certificates involve the issuance of classes of certificates having different stated maturities or the same maturities with different payment schedules. Interest and/or principal payments received on the underlying receivables are distributed first to the class of certificates having the earliest stated maturity of principal, and/or earlier payment schedule, and only when that class of certificates has been paid in full (or has received a specified amount) will distributions be made with respect to the second class of certificates. Distributions on certificates having later stated maturities will proceed in like manner until all the certificateholders have been paid in full. The only difference between this multi-class pass-through arrangement and a single-class pass-through arrangement is the order in which distributions are made to certificateholders. In each case, certificateholders will have a beneficial ownership interest in the underlying assets. In neither case will the rights of a plan purchasing a certificate be subordinated to the rights of another certificateholder in the event of default on any of the underlying obligations. In particular, if the amount available for distribution to certificateholders is less than the amount required to be so distributed, all senior certificateholders then entitled to receive distributions will share in the amount distributed on a pro rata basis.<sup>13</sup>

<sup>12</sup> It is the Department's understanding that where a plan invests in REMIC "residual" interest certificates to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to income tax under the Code. The Department emphasizes that the prudence requirement of section 404(a)(1)(B) of the Act would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in certificates pursuant to this exemption.

<sup>13</sup> If a trust issues subordinated certificates, holders of such subordinated certificates may not share in the amount distributed on a pro rata basis with the senior certificateholders. The Department

6. For tax reasons, the trust must be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing agreements provide for the substitution of receivables by the sponsor only in the event of defects in documentation discovered within a short time after the issuance of trust certificates (within 120 days, except in the case of obligations having an original term of 30 years, in which case the period will not exceed two years). Any receivable so substituted is required to have characteristics substantially similar to the replaced receivable and will be at least as creditworthy as the replaced receivable.

In some cases, the affected receivable would be repurchased, with the purchase price applied as a payment on the affected receivable and passed through to certificateholders.

#### *Parties to Transactions*

7. The *originator* of a receivable is the entity that initially lends money to a borrower (obligor), such as a homeowner or automobile purchaser, or leases property to a lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be entities that originate receivables in the ordinary course of their business, including finance companies for whom such origination constitutes the bulk of their operations, financial institutions for whom such origination constitutes a substantial part of their operations, and any kind of manufacturer, merchant, or service enterprise for whom such origination is an incidental part of its operations. Each trust may contain assets of one or more originators. The originator of the receivables may also function as the trust sponsor or servicer.

8. The *sponsor* will be one of three entities: (i) a special-purpose or other corporation unaffiliated with the servicer, (ii) a special-purpose or other corporation affiliated with the servicer, or (iii) the servicer itself. Where the sponsor is not also the servicer, the sponsor's role will generally be limited to acquiring the receivables to be included in the trust, establishing the trust, designating the trustee, and assigning the receivables to the trust.

9. The *trustee* of a trust is the legal owner of the obligations in the trust. The trustee is also a party to or

beneficiary of all the documents and instruments deposited in the trust, and as such is responsible for enforcing all the rights created thereby in favor of certificateholders.

The trustee will be an independent entity, and therefore will be unrelated to FCNBD, the trust sponsor or the servicer. FCNBD represents that the trustee will be a substantial financial institution or trust company experienced in trust activities. The trustee receives a fee for its services, which will be paid by the servicer or sponsor. The method of compensating the trustee which is specified in the pooling and servicing agreement will be disclosed in the prospectus or private placement memorandum relating to the offering of the certificates.

10. The *servicer* of a trust administers the receivables on behalf of the certificateholders. The servicer's functions typically involve, among other things, notifying borrowers of amounts due on receivables, maintaining records of payments received on receivables and instituting foreclosure or similar proceedings in the event of default. In cases where a pool of receivables has been purchased from a number of different originators and deposited in a trust, the receivables may be "subserviced" by their respective originators and a single entity may "master service" the pool of receivables on behalf of the owners of the related series of certificates. Where this arrangement is adopted, a receivable continues to be serviced from the perspective of the borrower by the local subservicer, while the investor's perspective is that the entire pool of receivables is serviced by a single, central master servicer who collects payments from the local subservicers and passes them through to certificateholders.

Receivables of the type suitable for inclusion in a trust invariably are serviced with the assistance of a computer. After the sale, the servicer keeps the sold receivables on the computer system in order to continue monitoring the accounts. Although the records relating to sold receivables are kept in the same master file as receivables retained by the originator, the sold receivables are flagged as having been sold. To protect the investor's interest, the servicer ordinarily covenants that this "sold flag" will be included in all records relating to the sold receivables, including the master file, archives, tape extracts and printouts.

The sold flags are invisible to the obligor and do not affect the manner in which the servicer performs the billing,

notes that the exemption does not provide relief for plan investment in such subordinated certificates.

posting and collection procedures related to the sold receivables. However, the servicer uses the sold flag to identify the receivables for the purpose of reporting all activity on those receivables after their sale to investors.

Depending on the type of receivable and the details of the servicer's computer system, in some cases the servicer's internal reports can be adapted for investor reporting with little or no modification. In other cases, the servicer may have to perform special calculations to fulfill the investor reporting responsibilities. These calculations can be performed on the servicer's main computer, or on a small computer with data supplied by the main system. In all cases, the numbers produced for the investors are reconciled to the servicer's books and reviewed by public accountants.

The *underwriter* will be a registered broker-dealer that acts as underwriter or placement agent with respect to the sale of the certificates. Public offerings of certificates are generally made on a firm commitment basis. Private placement of certificates may be made on a firm commitment or agency basis. It is anticipated that the lead and co-managing underwriters will make a market in certificates offered to the public.

In some cases, the originator and servicer of receivables to be included in a trust and the sponsor of the trust (although they may themselves be related) will be unrelated to FCNBD. In other cases, however, affiliates of FCNBD may originate or service receivables included in a trust or may sponsor a trust.

#### *Certificate Price, Pass-Through Rate and Fees*

11. In some cases, the sponsor will obtain the receivables from various originators pursuant to existing contracts with such originators under which the sponsor continually buys receivables. In other cases, the sponsor will purchase the receivables at fair market value from the originator or a third party pursuant to a purchase and sale agreement related to the specific offering of certificates. In other cases, the sponsor will originate the receivables itself.

As compensation for the receivables transferred to the trust, the sponsor receives certificates representing the entire beneficial interest in the trust, or the cash proceeds of the sale of such certificates. If the sponsor receives certificates from the trust, the sponsor sells all or a portion of these certificates for cash to investors or securities underwriters.

12. The price of the certificates, both in the initial offering and in the secondary market, is affected by market forces, including investor demand, the pass-through interest rate on the certificates in relation to the rate payable on investments of similar types and quality, expectations as to the effect on yield resulting from prepayment of underlying receivables, and expectations as to the likelihood of timely payment.

The pass-through rate for certificates is equal to the interest rate on receivables included in the trust minus a specified servicing fee.<sup>14</sup> This rate is generally determined by the same market forces that determine the price of a certificate. The price of a certificate and its pass-through, or coupon, rate together determine the yield to investors. If an investor purchases a certificate at less than par, that discount augments the stated pass-through rate; conversely, a certificate purchased at a premium yields less than the stated coupon.

13. As compensation for performing its servicing duties, the servicer (who may also be the sponsor or an affiliate thereof, and receive fees for acting in that capacity) will retain the difference between payments received on the receivables in the trust and payments payable (at the pass-through rate) to certificateholders, except that in some cases a portion of the payments on receivables may be paid to a third party, such as a fee paid to a provider of credit support. The servicer may receive additional compensation by having the use of the amounts paid on the receivables between the time they are received by the servicer and the time they are due to the trust (which time is set forth in the pooling and servicing agreement). The servicer typically will be required to pay the administrative expenses of servicing the trust, including in some cases the trustee's fee, out of its servicing compensation.

The servicer is also compensated to the extent it may provide credit enhancement to the trust or otherwise arrange to obtain credit support from another party. This "credit support fee" may be aggregated with other servicing fees, and is either paid out of the interest income received on the receivables in excess of the pass-through rate or paid in a lump sum at the time the trust is established.

14. The servicer may be entitled to retain certain administrative fees paid

<sup>14</sup> The pass-through rate on certificates representing interests in trusts holding leases is determined by breaking down lease payments into "principal" and "interest" components based on an implicit interest rate.

by a third party, usually the obligor. These administrative fees fall into three categories: (a) prepayment fees; (b) late payment and payment extension fees; and (c) expenses, fees and charges associated with foreclosure or repossession, or other conversion of a secured position into cash proceeds, upon default of an obligation.

Compensation payable to the servicer will be set forth or referred to in the pooling and servicing agreement and described in reasonable detail in the prospectus or private placement memorandum relating to the certificates.

15. Payments on receivables may be made by obligors to the servicer at various times during the period preceding any date on which pass-through payments to the trust are due. In some cases, the pooling and servicing agreement may permit the servicer to place these payments in non-interest bearing accounts maintained with itself or to commingle such payments with its own funds prior to the distribution dates. In these cases, the servicer would be entitled to the benefit derived from the use of the funds between the date of payment on a receivable and the pass-through date. Commingled payments may not be protected from the creditors of the servicer in the event of the servicer's bankruptcy or receivership. In those instances when payments on receivables are held in non-interest bearing accounts or are commingled with the servicer's own funds, the servicer is required to deposit these payments by a date specified in the pooling and servicing agreement into an account from which the trustee makes payments to certificateholders.

16. The underwriter will receive a fee in connection with the securities underwriting or private placement of certificates. In a firm commitment underwriting, this fee would consist of the difference between what the underwriter receives for the certificates that it distributes and what it pays the sponsor for those certificates. In a private placement, the fee normally takes the form of an agency commission paid by the sponsor. In a best efforts underwriting in which the underwriter would sell certificates in a public offering on an agency basis, the underwriter would receive an agency commission rather than a fee based on the difference between the price at which the certificates are sold to the public and what it pays the sponsor. In some private placements, the underwriter may buy certificates as principal, in which case its compensation would be the difference between what it receives for the

certificates that it sells and what it pays the sponsor for these certificates.

#### *Purchase of Receivables by the Servicer*

17. The applicant represents that as the principal amount of the receivables in a trust is reduced by payments, the cost of administering the trust generally increases, making the servicing of the trust prohibitively expensive at some point. Consequently, the pooling and servicing agreement generally provides that the servicer may purchase the receivables remaining in the trust when the aggregate unpaid balance payable on the receivables is reduced to a specified percentage (usually 5 to 10 percent) of the initial aggregate unpaid balance.

The purchase price of a receivable is specified in the pooling and servicing agreement and will be at least equal to: (1) the unpaid principal balance on the receivable plus accrued interest, less any unreimbursed advances of principal made by the servicer; or (2) the greater of (a) the amount in (1) or (b) the fair market value of such obligations in the case of a REMIC, or the fair market value of the receivables in the case of a trust that is not a REMIC.

#### *Certificate Ratings*

18. The certificates will have received one of the three highest ratings available from either S&P's, Moody's, D&P or Fitch. Insurance or other credit support (such as surety bonds, letters of credit, guarantees, or overcollateralization) will be obtained by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of this credit support is set by the rating agencies at a level that is a multiple of the worst historical net credit loss experience for the type of obligations included in the issuing trust.

#### *Provision of Credit Support*

19. In some cases, the master servicer, or an affiliate of the master servicer, may provide credit support to the trust (i.e. act as an insurer). In these cases, the master servicer, in its capacity as servicer, will first advance funds to the full extent that it determines that such advances will be recoverable (a) out of late payments by the obligors, (b) from the credit support provider (which may be the master servicer or an affiliate thereof) or, (c) in the case of a trust that issues subordinated certificates, from amounts otherwise distributable to holders of subordinated certificates, and the master servicer will advance such funds in a timely manner. When the servicer is the provider of the credit support and provides its own funds to cover defaulted payments, it will do so either on the initiative of the trustee, or on its own initiative on behalf of the

trustee, but in either event it will provide such funds to cover payments to the full extent of its obligations under the credit support mechanism. In some cases, however, the master servicer may not be obligated to advance funds but instead would be called upon to provide funds to cover defaulted payments to the full extent of its obligations as insurer. Moreover, a master servicer typically can recover advances either from the provider of credit support or from future payments on the affected assets.

If the master servicer fails to advance funds, fails to call upon the credit support mechanism to provide funds to cover delinquent payments, or otherwise fails in its duties, the trustee would be required and would be able to enforce the certificateholders' rights, as both a party to the pooling and servicing agreement and the owner of the trust estate, including rights under the credit support mechanism. Therefore, the trustee, who is independent of the servicer, will have the ultimate right to enforce the credit support arrangement.

When a master servicer advances funds, the amount so advanced is recoverable by the master servicer out of future payments on receivables held by the trust to the extent not covered by credit support. However, where the master servicer provides credit support to the trust, there are protections in place to guard against a delay in calling upon the credit support to take advantage of the fact that the credit support declines proportionally with the decrease in the principal amount of the obligations in the trust as payments on receivables are passed through to investors. These safeguards include:

(a) There is often a disincentive to postponing credit losses because the sooner repossession or foreclosure activities are commenced, the more value that can be realized on the security for the obligation;

(b) The master servicer has servicing guidelines which include a general policy as to the allowable delinquency period after which an obligation ordinarily will be deemed uncollectible. The pooling and servicing agreement will require the master servicer to follow its normal servicing guidelines and will set forth the master servicer's general policy as to the period of time after which delinquent obligations ordinarily will be considered uncollectible;

(c) As frequently as payments are due on the receivables included in the trust (monthly, quarterly or semi-annually, as set forth in the pooling and servicing agreement), the master servicer is required to report to the independent

trustee the amount of all past-due payments and the amount of all servicer advances, along with other current information as to collections on the receivables and draws upon the credit support. Further, the master servicer is required to deliver to the trustee annually a certificate of an executive officer of the master servicer stating that a review of the servicing activities has been made under such officer's supervision, and either stating that the master servicer has fulfilled all of its obligations under the pooling and servicing agreement or, if the master servicer has defaulted under any of its obligations, specifying any such default. The master servicer's reports are reviewed at least annually by independent accountants to ensure that the master servicer is following its normal servicing standards and that the master servicer's reports conform to the master servicer's internal accounting records. The results of the independent accountants' review are delivered to the trustee; and

(d) The credit support has a "floor" dollar amount that protects investors against the possibility that a large number of credit losses might occur towards the end of the life of the trust, whether due to servicer advances or any other cause. Once the floor amount has been reached, the servicer lacks an incentive to postpone the recognition of credit losses because the credit support amount thereafter is subject to reduction only for actual draws. From the time that the floor amount is effective until the end of the life of the trust, there are no proportionate reductions in the credit support amount caused by reductions in the pool principal balance. Indeed, since the floor is a fixed dollar amount, the amount of credit support ordinarily increases as a percentage of the pool principal balance during the period that the floor is in effect.

#### *Disclosure*

20. In connection with the original issuance of certificates, the prospectus or private placement memorandum will be furnished to investing plans. The prospectus or private placement memorandum will contain information material to a fiduciary's decision to invest in the certificates, including:

(a) Information concerning the payment terms of the certificates, the rating of the certificates, and any material risk factors with respect to the certificates;

(b) A description of the trust as a legal entity and a description of how the trust was formed by the seller/servicer or other sponsor of the transaction;

(c) Identification of the independent trustee for the trust;

(d) A description of the receivables contained in the trust, including the types of receivables, the diversification of the receivables, their principal terms, and their material legal aspects;

(e) A description of the sponsor and servicer;

(f) A description of the pooling and servicing agreement, including a description of the seller's principal representations and warranties as to the trust assets and the trustee's remedy for any breach thereof; a description of the procedures for collection of payments on receivables and for making distributions to investors, and a description of the accounts into which such payments are deposited and from which such distributions are made; identification of the servicing compensation and any fees for credit enhancement that are deducted from payments on receivables before distributions are made to investors; a description of periodic statements provided to the trustee, and provided to or made available to investors by the trustee; and a description of the events that constitute events of default under the pooling and servicing contract and a description of the trustee's and the investors' remedies incident thereto;

(g) A description of the credit support;

(h) A general discussion of the principal federal income tax consequences of the purchase, ownership and disposition of the pass-through securities by a typical investor;

(i) A description of the underwriters' plan for distributing the pass-through securities to investors; and

(j) Information about the scope and nature of the secondary market, if any, for the certificates.

21. Reports indicating the amount of payments of principal and interest are provided to certificateholders at least as frequently as distributions are made to certificateholders. Certificateholders will also be provided with periodic information statements setting forth material information concerning the underlying assets, including, where applicable, information as to the amount and number of delinquent and defaulted loans or receivables.

22. In the case of a trust that offers and sells certificates in a registered public offering, the trustee, the servicer or the sponsor will file such periodic reports as may be required to be filed under the Securities Exchange Act of 1934. Although some trusts that offer certificates in a public offering will file quarterly reports on Form 10-Q and Annual Reports on Form 10-K, many trusts obtain, by application to the

Securities and Exchange Commission, a complete exemption from the requirement to file quarterly reports on Form 10-Q and a modification of the disclosure requirements for annual reports on Form 10-K. If such an exemption is obtained, these trusts normally would continue to have the obligation to file current reports on Form 8-K to report material developments concerning the trust and the certificates. While the Securities and Exchange Commission's interpretation of the periodic reporting requirements is subject to change, periodic reports concerning a trust will be filed to the extent required under the Securities Exchange Act of 1934.

23. At or about the time distributions are made to certificateholders, a report will be delivered to the trustee as to the status of the trust and its assets, including underlying obligations. Such report will typically contain information regarding the trust's assets, payments received or collected by the servicer, the amount of prepayments, delinquencies, servicer advances, defaults and foreclosures, the amount of any payments made pursuant to any credit support, and the amount of compensation payable to the servicer. Such report also will be delivered to or made available to the rating agency or agencies that have rated the trust's certificates.

In addition, promptly after each distribution date, certificateholders will receive a statement prepared by the servicer or trustee summarizing information regarding the trust and its assets. Such statement will include information regarding the trust and its assets, including underlying receivables. Such statement will typically contain information regarding payments and prepayments, delinquencies, the remaining amount of the guaranty or other credit support and a breakdown of payments between principal and interest.

#### *Forward Delivery Commitments*

24. To date, no forward delivery commitments have been entered into by FCNBD in connection with the offering of any certificates, but FCNBD may contemplate entering into such commitments. The utility of forward delivery commitments has been recognized with respect to offering similar certificates backed by pools of residential mortgages, and FCNBD may find it desirable in the future to enter into such commitments for the purchase of certificates.

#### *Secondary Market Transactions*

25. It is FCNBD's normal policy to attempt to make a market for securities for which it is lead or co-managing underwriter. FCNBD anticipates that it will make a market in certificates.

#### *Retroactive Relief*

26. FCNBD represents that it has not engaged in transactions related to mortgage-backed and asset-backed securities based on the assumption that retroactive relief would be granted prior to the date of their application. However, FCNBD requests the exemptive relief granted to be retroactive to October 8, 1996, the date of their application, and would like to rely on such retroactive relief for transactions entered into prior to the date exemptive relief may be granted.

#### *Summary*

27. In summary, the applicant represents that the transactions for which exemptive relief is requested satisfy the statutory criteria of section 408(a) of the Act due to the following:

(a) The trusts contain "fixed pools" of assets. There is little discretion on the part of the trust sponsor to substitute receivables contained in the trust once the trust has been formed;

(b) Certificates in which plans invest will have been rated in one of the three highest rating categories by S&P's, Moody's, D&P or Fitch. Credit support will be obtained to the extent necessary to attain the desired rating;

(c) All transactions for which FCNBD seeks exemptive relief will be governed by the pooling and servicing agreement, which is made available to plan fiduciaries for their review prior to the plan's investment in certificates;

(d) Exemptive relief from sections 406(b) and 407 for sales to plans is substantially limited; and

(e) FCNBD anticipates that it will make a secondary market in certificates.

#### *Discussion of Proposed Exemption*

##### *I. Differences Between Proposed Exemption and Class Exemption PTE 83-1*

The exemptive relief proposed herein is similar to that provided in PTE 81-7 [46 FR 7520, January 23, 1981], Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, amended and restated as PTE 83-1 [48 FR 895, January 7, 1983].

PTE 83-1 applies to mortgage pool investment trusts consisting of interest-bearing obligations secured by first or second mortgages or deeds of trust on single-family residential property. The exemption provides relief from sections

406(a) and 407 for the sale, exchange or transfer in the initial issuance of mortgage pool certificates between the trust sponsor and a plan, when the sponsor, trustee or insurer of the trust is a party-in-interest with respect to the plan, and the continued holding of such certificates, provided that the conditions set forth in the exemption are met. PTE 83-1 also provides exemptive relief from section 406 (b)(1) and (b)(2) of the Act for the above-described transactions when the sponsor, trustee or insurer of the trust is a fiduciary with respect to the plan assets invested in such certificates, provided that additional conditions set forth in the exemption are met. In particular, section 406(b) relief is conditioned upon the approval of the transaction by an independent fiduciary. Moreover, the total value of certificates purchased by a plan must not exceed 25 percent of the amount of the issue, and at least 50 percent of the aggregate amount of the issue must be acquired by persons independent of the trust sponsor, trustee or insurer. Finally, PTE 83-1 provides conditional exemptive relief from section 406 (a) and (b) of the Act for transactions in connection with the servicing and operation of the mortgage trust.

Under PTE 83-1, exemptive relief for the above transactions is conditioned upon the sponsor and the trustee of the mortgage trust maintaining a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifying certificate holders against reductions in pass-through payments due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount not less than the greater of one percent of the aggregate principal balance of all trust mortgages or the principal balance of the largest mortgage.

The exemptive relief proposed herein differs from that provided by PTE 83-1 in the following major respects: (1) The proposed exemption provides individual exemptive relief rather than class relief; (2) The proposed exemption covers transactions involving trusts containing a broader range of assets than single-family residential mortgages; (3) Instead of requiring a system for insuring the pooled receivables, the proposed exemption conditions relief upon the certificates having received one of the three highest ratings available from S&P's, Moody's, D&P or Fitch (insurance or other credit support would be obtained only to the extent necessary for the certificates to attain the desired rating); and (4) The proposed exemption provides more

limited section 406(b) and section 407 relief for sales transactions.

## II. Ratings of Certificates

After consideration of the representations of the applicant and information provided by S&P's, Moody's, D&P and Fitch, the Department has decided to condition exemptive relief upon the certificates having attained a rating in one of the three highest generic rating categories from S&P's, Moody's, D&P or Fitch. The Department believes that the rating condition will permit the applicant flexibility in structuring trusts containing a variety of mortgages and other receivables while ensuring that the interests of plans investing in certificates are protected. The Department also believes that the ratings are indicative of the relative safety of investments in trusts containing secured receivables. The Department is conditioning the proposed exemptive relief upon each particular type of asset-backed security having been rated in one of the three highest rating categories for at least one year and having been sold to investors other than plans for at least one year.<sup>15</sup>

## III. Limited Section 406(b) and Section 407(a) Relief for Sales

FCNBD represents that in some cases a trust sponsor, trustee, servicer, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates may be a pre-existing party in interest with respect to an investing plan.<sup>16</sup> In these cases, a direct or indirect sale of certificates by that party in interest to the plan would be a prohibited sale or exchange of property under section 406(a)(1)(A) of

<sup>15</sup> In referring to different "types" of asset-backed securities, the Department means certificates representing interests in trusts containing different "types" of receivables, such as single family residential mortgages, multi-family residential mortgages, commercial mortgages, home equity loans, auto loan receivables, installment obligations for consumer durables secured by purchase money security interests, etc. The Department intends this condition to require that certificates in which a plan invests are of the type that have been rated (in one of the three highest generic rating categories by S&P's, D&P, Fitch or Moody's) and purchased by investors other than plans for at least one year prior to the plan's investment pursuant to the proposed exemption. In this regard, the Department does not intend to require that the particular assets contained in a trust must have been "seasoned" (e.g., originated at least one year prior to the plan's investment in the trust).

<sup>16</sup> In this regard, we note that the exemptive relief proposed herein is limited to certificates with respect to which FCNBD or any of its affiliates is either (a) the sole underwriter or manager or co-manager of the underwriting syndicate, or (b) a selling or placement agent.

the Act.<sup>17</sup> Likewise, issues are raised under section 406(a)(1)(D) of the Act where a plan fiduciary causes a plan to purchase certificates where trust funds will be used to benefit a party in interest.

Additionally, FCNBD represents that a trust sponsor, servicer, trustee, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates representing an interest in a trust may be a fiduciary with respect to an investing plan. FCNBD represents that the exercise of fiduciary authority by any of these parties to cause the plan to invest in certificates representing an interest in the trust would violate section 406(b)(1), and in some cases section 406(b)(2), of the Act.

Moreover, FCNBD represents that to the extent there is a plan asset "look through" to the underlying assets of a trust, the investment in certificates by a plan covering employees of an obligor under receivables contained in a trust may be prohibited by sections 406(a) and 407(a) of the Act.

After consideration of the issues involved, the Department has determined to provide the limited sections 406(b) and 407(a) relief as specified in the proposed exemption.

**NOTICE TO INTERESTED PERSONS:** The applicant represents that because those potentially interested participants and beneficiaries cannot all be identified, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the Federal Register. Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the Federal Register.

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

## General Information

The attention of interested persons is directed to the following:

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

<sup>17</sup> The applicant represents that where a trust sponsor is an affiliate of FCNBD, sales to plans by the sponsor may be exempt under PTE 75-1, Part II (relating to purchases and sales of securities by broker-dealers and their affiliates), if FCNBD is not a fiduciary with respect to plan assets to be invested in certificates.



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 7th day of November, 1996.

Ivan Strasfeld

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

[FR Doc. 96-29035 Filed 11-12-96; 8:45 am]

BILLING CODE 4510-29-P

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## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Nixon Presidential Historical Materials; Opening of Materials; Correction

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Correction.

**SUMMARY:** This document corrects the hours that the tape recordings described in the notice published in the Federal Register on October 11, 1996, will be

made available to the general public in NARA's research room at 8601 Adelphi Road, College Park, MD.

In notice document 96-26174 beginning on page 53460 in the issue of Friday, October 11, 1996, make the following correction:

In the second full paragraph in the second column of page 53460, the hours are corrected to read "between 9 a.m. and 4:30 p.m."

Dated: November 8, 1996.

Nancy Y. Allard,

*Alternate Federal Register Liaison.*

[FR Doc. 96-29142 Filed 11-12-96; 8:45 am]

BILLING CODE 7515-01-M

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## NATIONAL LABOR RELATIONS BOARD

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** National Labor Relations Board.

**TIME AND DATE:** 10:00 a.m., Friday, November 1, 1996.

**PLACE:** Board Conference Room, Eleventh Floor, 1099 Fourteenth St., N.W., Washington, D.C. 20570.

**STATUS:** Closed to public observation pursuant to 5 U.S.C. Section 552b(c)(2) (internal personnel rules and practices); (c)(6) (personal information where disclosure would constitute a clearly unwarranted invasion of personal privacy) and 9(B) Disclosure would significantly frustrate implementation of a proposed Agency action\* \* \*).

**MATTERS TO BE CONSIDERED:** Personnel Matters.

**CONTACT PERSON FOR MORE INFORMATION:** John J. Toner, Executive Secretary, Washington, D.C. 20570, Telephone: (202) 273-1940.

Dated: Washington, D.C., November 7, 1996.

By direction of the Board.

John J. Toner,

*Executive Secretary, National Labor Relations Board.*

[FR Doc. 96-29194 Filed 11-8-96; 3:17 pm]

BILLING CODE 7545-01-M

## NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-245, 50-336, and 50-423; License Nos. DPR-21, DPR-65, and NPF-49]

### Northeast Nuclear Energy Company (Millstone Nuclear Power Station Units 1, 2 and 3); Order Requiring Independent, Third-Party Oversight of Northeast Nuclear Energy Company's Implementation of Resolution of Millstone Station Employees' Safety Concerns

I

Northeast Nuclear Energy Company (Licensee) is the holder of Facility Operating License Nos. DPR-21, DPR-65, and NPF-49 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to Title 10 of the Code of Federal Regulations (10 CFR) Part 50 on October 31, 1986,<sup>1</sup> September 26, 1975, and January 31, 1986, respectively. The licenses authorize the operation of Millstone Units 1, 2 and 3 in accordance with conditions specified therein. All three facilities are located on the Licensee's site in Waterford, Connecticut.

II

Over the past several years, the Licensee's management has failed to ensure compliance with regulatory requirements. In an attempt to address this compliance problem, the NRC issued an Order on August 14, 1996 establishing independent, third-party oversight of corrective actions for design and plant operation deficiencies. The August 14, 1996 Order, directing the implementation of an Independent Corrective Action Verification Program (ICAVP) for the Millstone facilities, summarizes the Licensee's failures to meet Criterion XVI of Appendix B to 10 CFR Part 50 and other NRC requirements. The August 14, 1996 Order also outlines what the NRC found to be ineffective implementation of the Licensee's oversight programs, including its NRC-approved quality assurance (QA) program. The purpose of the ICAVP is to provide independent verification, for selected systems, that the Licensee's own Configuration Management Plan (CMP) has identified and resolved existing problems, documented and utilized licensing and design bases, and established programs,

<sup>1</sup> Millstone Unit 1 was issued its provisional operating license on October 7, 1970, and commenced operation on March 1, 1971. This unit received a full term operating license on October 31, 1986.