

transmitted by facsimile to (202) 219-5046.

FOR FURTHER INFORMATION CONTACT: Theda Kenney, Directorate of Safety Standards Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3605, 200 Constitution Avenue, NW, Washington, DC 20210, telephone (202) 219-8061. A copy of the referenced information collection request is available for inspection and copying in the Docket Office and will be mailed to persons who request copies by telephoning Theda Kenney at (202) 219-8061, extension 100, or Barbara Bielaski at (202) 219-8076, extension 142. For electronic copies of the Information Collection Request on the Electrical Standards for Construction (29 CFR part 1926, Subpart K), contact OSHA's WebPage on the Internet at <http://www.osha.gov> and click on "Regulations and Compliance."

SUPPLEMENTARY INFORMATION:

I. Background

The Occupational Safety and Health Act of 1970 (the Act) authorizes the promulgation of such health and safety standards as are necessary or appropriate to provide safe or healthful employment and places of employment. The statute specifically authorizes information collection by employers as necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents.

The written description of the Assured Equipment Grounding Conductor Program (AEGP) required by § 1926.404(b)(1)(iii) allows employers, employees, and OSHA compliance officers to determine how the requirements of the standard are being met, including the method of recording tests. For example, the employer's written program might specify the use of yellow tape to color code every tool and cord set. By referring to the written program, OSHA compliance officers and other persons can easily determine if the employer is complying with the program.

The posting of warning signs enables employees to avoid accidental contact of electrical equipment used on construction sites. Contact with unguarded live electrical parts, especially at high voltage, can be hazardous to employees.

The tagging of controls, equipment and circuits is intended to prevent the inadvertent reactivation of the controls, equipment and circuits while they are being serviced.

II. Current Actions

This notice requests public comment on OSHA's burden hour estimates prior to OSHA seeking Office of Management and Budget (OMB) approval of the information collection requirements contained in the Electrical Standards for Construction (29 CFR part 1926, Subpart K).

Type of Review: Extension of a Currently Approved Collection.

Agency: U.S. Department of Labor, Occupational Safety and Health Administration.

Title: Electrical Standards for Construction (29 CFR part 1926, Subpart K).

OMB Number: 1218-0130.

Agency Number: Docket Number ICR-98-31.

Affected Public: Business or other for-profit.

Number of Respondents: 278,500.

Frequency: Initially, On Occasion.

Average Time per Response: Varies from .02 to .17 hour.

Estimated Total Burden Hours: 53,001.

Total Annualized Capital/Startup Costs: \$0.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget (OMB) approval of the information collection request. The comments will become a matter of public record.

Signed at Washington, DC, this 15th day of July 1998.

Charles N. Jeffress,

Assistant Secretary of Labor.

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-10349, et al.]

Proposed Exemptions; Harris Trust & Savings Bank

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of Proposed Exemptions.

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

Written Comments and Hearing Requests

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

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

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

proposed exemption are issued solely by the Department.

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

Harris Trust & Savings Bank and Its Affiliates (Harris Trust) Located in Chicago, Illinois

[Application No. D-10349]

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—Exemption for Acquisition of Fund Shares With Assets Transferred in-Kind From a CIF

If the exemption is granted, the restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply, as of March 21, 1997, to the acquisition by employee benefit plans (the Plans), including two plans sponsored by Harris Trust for its own employees (the In-house Plans), of shares of any open-end investment companies (the Funds) registered under the Investment Company Act of 1940 (the '40 Act) for which Harris Trust is an investment adviser and may provide other services, with Plan assets transferred in-kind to the Funds from certain collective investment funds maintained by Harris Trust (the CIFs), in connection with the termination of the CIFs, provided that the following conditions are satisfied:

(a) For each Plan, a second fiduciary who is unrelated to, and independent of, Harris Trust (the Independent Fiduciary) receives prior written notice of the in-kind transfer of Plan assets from a CIF to a Fund in exchange for shares of the Fund, as well as the disclosures described in Section II(f).

(b) On the basis of the information described in Section II(f), the Independent Fiduciary gives prior written approval for each acquisition of Fund shares with Plan assets transferred from a CIF and the fees to be received by Harris Trust in connection with its services to the Fund. Such approval must be consistent with the general fiduciary responsibility provisions

imposed on fiduciaries by Part 4 of Title I of the Act.

(c) No sales commissions are paid by the Plans in connection with the acquisition of Fund shares with Plan assets transferred from a CIF.

(d) All or a pro rata portion of the assets of a CIF are transferred in-kind to a Fund in exchange for shares of the Fund.

(e) Each Plan receives Fund shares having a total net asset value equal to the value of the Plan's pro rata share of the corresponding CIF's assets on the date of the in-kind transfer, based on the current market value of the CIF's assets as determined in a single valuation performed in the same manner and as of the close of business of the same day, using independent sources in accordance with Securities and Exchange Commission (SEC) Rule 17a-7¹ of the '40 Act and the procedures established by the Fund pursuant to Rule 17a-7. Such procedures require that all securities for which a current market value cannot be obtained by reference to the last sales price for transactions reported on a recognized securities exchange or quoted in the NASDAQ system, must be valued based upon an average of the highest current independent bid and lowest current independent offer, as of the close of business on the last business day preceding the in-kind transfer, determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of Harris Trust;

(f) Within 30 days after completion of each acquisition of Fund shares with Plan assets transferred in-kind from a CIF, Harris Trust sends by regular mail to the Independent Fiduciary a written confirmation containing the following information:

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

(2) The market price, as of the date of the in-kind transfer, of each such security; and

(3) The identity of each pricing service or market-maker consulted in determining the value of such securities.

(g) Within 90 days after completion of each acquisition of Fund shares with Plan assets transferred in-kind from a CIF, Harris Trust sends by regular mail to the Independent Fiduciary a written confirmation containing the following information:

(1) The number of CIF units held by the Plan immediately before the in-kind transfer, the related per unit value, and

the total dollar amount of such CIF units; and

(2) The number of shares in the Funds that are held by the Plan immediately after the in-kind transfer, the related per share net asset value, and the total dollar amount of such shares.

(h) The conditions set forth in paragraphs (c), (d), (e), (f), (i), (o), (p), and (q) of Section II are satisfied.

Section II—Exemption for Receipt of Fees From the Funds

If the exemption is granted, the restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply, as of March 21, 1997, to the receipt of fees by Harris Trust from the Funds for acting as an investment adviser for the Funds, as well as for acting as the custodian, transfer agent, sub-administrator for the Funds, or for providing any other "secondary service" (as defined in Section III(i), below) to the Funds, in connection with the investment in shares of the Funds by Plans for which Harris Trust is a fiduciary (the Client Plans), other than the In-house Plans, provided that the following conditions are satisfied:

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

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

(c) Neither Harris Trust nor an affiliate (including officers or directors, and other persons, as defined in Section III(b), below) purchases from or sells to the Client Plans shares of the Funds.

(d) For each Client Plan, the combined total of all fees received by Harris Trust for its services to the Client Plan, and in connection with its services to any of the Funds in which the Client Plan may invest, constitutes no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(e) Harris Trust receives no fees payable pursuant to Rule 12b-1 under the 40 Act (12b-1 fees) in connection with the transactions.

(f) Prior to the initial investment by a Client Plan in any of the Funds, the Independent Fiduciary receives full and

¹ 17 CFR 270.17a-7.

detailed written disclosure of information concerning the Fund, including, but not limited to

(1) A current prospectus for the Fund;

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

(3) The reasons why Harris Trust considers an investment in the Fund to be appropriate for the Client Plan;

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

(5) Upon request of the Independent Fiduciary, a copy of the notice of exemption, if granted (and a copy of this notice of proposed exemption), once published in the **Federal Register**.

(g) On the basis of the information described in paragraph (f), the Independent Fiduciary gives prior written authorization for

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

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

(3) The fees to be paid to Harris Trust in connection with its services to the Funds.

Such authorization by the Independent Fiduciary must be consistent with the general fiduciary provisions of Part 4 of Title I of the Act.

(h) The authorization described in paragraph (g) is terminable by the Independent Fiduciary at will without penalty to the Client Plan, upon written notice of termination to Harris Trust. Harris Trust shall effect such termination by selling the shares of the Fund held by the Client Plan by the close of the business day following the date of receipt by Harris Trust of the termination form (the Termination Form), as defined in Section III(j), or any other written notice of termination. However, if, due to circumstances beyond the control of Harris Trust, the sale cannot be executed within one business day, Harris Trust shall have one additional business day to complete such sale.

(i) Each Client Plan receives a credit, either through cash, or, if applicable, the purchase of additional shares of the Funds pursuant to an annual election made by the Client Plan (which may be revoked at any time), of such Client Plan's proportionate share of all investment advisory fees charged to the

Funds by Harris Trust, including any investment advisory fees paid by Harris Trust to third party sub-advisers, within one business day of the receipt of such fees by Harris Trust. The crediting of all such fees to the Client Plans by Harris Trust must be audited by an independent accounting firm at least annually to verify the proper crediting of the fees to each Client Plan.

(j) In the event of an increase in the rate of any fees paid by the Funds to Harris Trust for any investment management services, investment advisory services, or other similar services above the rate which has been approved previously by an Independent Fiduciary, in accordance with paragraph (g), Harris Trust will provide at least 30 days' written notice (separate from the Fund Prospectus) to each Client Plan invested in a Fund which is increasing such fees.

(k) In the event of an addition of a Secondary Service by Harris Trust to a Fund for which a fee is charged, or in the event of an increase in a fee paid by the Funds to Harris Trust for any Secondary Service (which may result from either an increase in the rate of such fee or a decrease in the number or kind of services performed for such fee) above the rate which has been approved previously by an Independent Fiduciary, in accordance with paragraph (g), Harris Trust will provide at least 30 days' written notice (separate from the Fund Prospectus) to each Client Plan invested in a Fund which is adding a service or increasing its fees. Such notice shall be accompanied by the Termination Form.

(l) The Independent Fiduciary is supplied with a Termination Form at the times specified in paragraphs (k), (l), and (m), which expressly provides an election to terminate the authorization described in paragraph (g), with instructions regarding the use of the Termination Form, including the following information:

(1) The authorization is terminable by the Independent Fiduciary at will without penalty to the Client Plan, upon written notice of termination to Harris Trust. Harris Trust shall effect such termination by selling the shares of the Fund held by the Client Plan by the close of the business day following the date of receipt by Harris Trust of the Termination Form, or any other written notice of termination. However, if, due to circumstances beyond the control of Harris Trust, the sale cannot be executed within one business day, Harris Trust shall have one additional business day to complete such sale; and

(2) Failure of the Independent Fiduciary to return the Termination

Form will be deemed to be an approval of the additional Secondary Service for which a fee is charged or an increase in the rate of any fees, if such Termination Form is supplied pursuant to paragraphs (k) and (l), and will result in continuation of authorization, as described in paragraph (g), for Harris Trust to engage in the transactions on behalf of the Client Plan.

(m) The Independent Fiduciary is supplied annually with a Termination Form during the first quarter of each calendar year, beginning with the calendar year immediately following the date of publication in the **Federal Register** of a notice of exemption for the subject transactions. However, the Termination Form need not be supplied to the Independent Fiduciary sooner than six months after it has been supplied pursuant to paragraphs (k) and (l), except to the extent required to disclose either an additional Secondary Service for which a fee is charged or an increase in fees.

(n)(1) With respect to each of the Funds in which a Client Plan invests, Harris Trust will provide the Independent Fiduciary of such Client Plan:

(A) at least annually, a copy of an updated prospectus of the Fund;

(B) upon the request of the Independent Fiduciary, with a report or statement (which may take the form of the most recent financial report, the current statement of additional information, or some other written statement), which contains a description of all fees paid by the Fund to Harris Trust; and

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

(A) the total dollar amount of brokerage commissions of each Fund's investment portfolio paid to Harris Trust by such Fund;

(B) the total dollar amount of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to Harris Trust;

(C) the average brokerage commissions per share, in cents per share, paid to Harris Trust by each portfolio of a Fund; and

(D) the average brokerage commissions per share, in cents per share, paid by each portfolio of a Fund to brokerage firms unrelated to Harris Trust.

(o) All dealings between the Client Plans and the Funds are on a basis no

less favorable to the Client Plans than dealings between the Fund and its other shareholders holding shares of the same class as the Client Plans.

(p) Harris Trust maintains for a period of six years the records necessary to enable the persons described in paragraph (q) to determine whether the conditions of this exemption have been satisfied, except that

(1) a party in interest with respect to a Plan, other than Harris Trust, shall not be subject to a civil penalty under section 502(i) of the Act or to the taxes imposed by section 4975 (a) and (b) of the Code, if such records are not maintained or are not available for examination, as required by paragraph (q); and

(2) a prohibited transaction shall not be deemed to have occurred if, due to circumstances beyond Harris Trust's control, such records are lost or destroyed prior to the end of the six year period;

(q) Notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, Harris Trust makes the records referred to in paragraph (p) unconditionally available during normal business hours at their customary location to the following persons or a duly authorized representative thereof:

(A) the Department or the Internal Revenue Service; (B) any fiduciary of a Client Plan with the authority to acquire or dispose of shares of the Funds owned by the Client Plan; and (C) any participant or beneficiary of a Client Plan. However, none of the persons described in (B) or (C) are authorized to examine the trade secrets of Harris Trust, or commercial or financial information which is privileged or confidential.

Section III—Definitions

For purposes of this proposed exemption:

(a) The term "Harris Trust" means Harris Trust & Savings Bank and any affiliate thereof, as "affiliate" is defined in paragraph (b).

(b) The term "affiliate" of a person includes:

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

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

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

(c) The term "control" means the power to exercise a controlling influence over the management or

policies of a person other than an individual.

(d) The term "collective investment fund" or "CIF" means a common or collective trust fund or pooled investment fund maintained by Harris Trust.

(e) The term "Fund" or "Funds" means any diversified open-end management investment company or companies registered under the '40 Act for which Harris Trust serves as an investment adviser, and may also provide custodial or other services approved by the Funds.

(f) The term "net asset value" per share means the amount which is calculated by dividing the value of all securities (determined by a method set forth in a Fund's prospectus and statement of additional information) and other assets belonging to each portfolio in the Fund, less the liabilities chargeable to each such Fund portfolio, by the number of outstanding shares.

(g) The term "relative" means a "relative" as defined in section 3(15) of the Act (or a "member of the family" as defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(h) The term "Independent Fiduciary" means a fiduciary of a Plan who is unrelated to, and independent of, Harris Trust. For purposes of this proposed exemption, a Plan fiduciary will not be deemed to be unrelated to, and independent of, Harris Trust if

(1) such fiduciary directly or indirectly controls, is controlled by, or is under common control with Harris Trust;

(2) such fiduciary, or any officer, director, partner, employee, or relative of such fiduciary is an officer, director, partner, or employee of Harris Trust (or is a relative of such persons); or

(3) Such fiduciary directly or indirectly receives any compensation or other consideration from Harris Trust for his or her own personal account in connection with any transaction described in this proposed exemption. However, with respect to the In-house Plans, the Independent Fiduciary may receive compensation from Harris Trust in connection with the subject transactions, provided that the amount or payment of such compensation is not contingent upon, nor in any way affected by, the Independent Fiduciary's ultimate decision regarding the Plans' participation in the transactions.

With the exception of the In-house Plans, if an officer, director, partner or employee of Harris Trust (or relative of such persons) is a director of the Plan fiduciary and abstains from participation in (i) the choice of the

Plan's investment adviser, (ii) the approval of any purchase or sale between the Plan and the Funds, and (iii) the approval of any change in fees paid by the Plan in connection with any of the subject transactions, then paragraph (g)(2) shall not apply.

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

(j) The term "Termination Form" means the form supplied to the Independent Fiduciary, at the times specified in Section II(k), (l), and (m), which expressly provides to the Independent Fiduciary an election to terminate at will the authorization described in Section II(g) without penalty to the Plan. The Independent Fiduciary may use such Termination Form to provide written notice of termination to Harris Trust and instruct Harris Trust to effect the termination by selling the shares of a Fund held by the Plan by the close of the business day following the date of receipt by Harris Trust of the Termination Form. However, if, due to circumstances beyond the control of Harris Trust, the sale cannot be executed within one business day, Harris Trust shall have one additional business day to complete such sale.

(k) The term "security" shall have the same meaning as defined in section 2(36) of the '40 Act, as amended, 15 USC 80a-2(36)(1996).

Effective Date: The proposed exemption, if granted, will be effective as of March 21, 1997.

Summary of Facts and Representations

1. Harris Trust & Savings Bank is an Illinois state-chartered bank, a member of the Federal Reserve system, and the largest of 14 banks owned by Harris Bankcorp, Inc. Harris Bankcorp, Inc. is a wholly owned subsidiary of Bankmont Financial Corp., which, in turn, is a wholly owned subsidiary of Bank of Montreal, a publicly traded Canadian banking institution. Harris Trust & Savings Bank and its affiliates are hereafter collectively referred to as Harris Trust.

As of December 30, 1995, Harris Trust had total assets of approximately \$17.1 billion. Harris Trust serves as trustee, investment manager, and/or custodian for approximately 600 Plans. As of December 30, 1995, Harris Trust had approximately \$162 billion in Plan assets under management, of which

approximately \$2 billion was invested in the CIFs.

2. On January 11, 1996, the sale of a portion of Harris Trust's investment management business to Citibank, N.A. was announced. In connection with such sale, Harris Trust terminated certain CIFs on March 21, 1997 and transferred the CIFs' assets in-kind to the Funds in exchange for shares of the Funds. Harris Trust requests an exemption for the in-kind transfer of assets of Plans that were invested in these CIFs who received shares of the Funds. Harris Trust was a fiduciary for Plan assets that were held in these CIFs, and was also an investment adviser for the Funds in which the Plans invested.² The Plans that invested in the terminated CIFs included not only the Client Plans of Harris Trust but also two In-house Plans.³ In addition, Harris Trust represents that conversions of other CIFs to Funds, through an in-kind transfer of the CIFs' assets to those Funds in exchange for Fund shares, may occur in the future. Thus, Harris Trust requests that the proposed exemption cover these future conversions, provided that the same terms and conditions discussed herein are satisfied.⁴

² Prohibited Transaction Class Exemptions 77-4 and 97-41 (PTCE 77-4, 42 FR 18732, April 8, 1977 and PTCE 97-41, 62 FR 42830, August 8, 1997) permit, under certain conditions, the purchase or sale by an employee benefit plan of shares of a registered, open-end investment company whose investment adviser is also a fiduciary of such plan (but not an employer of employees covered by the plan). In Advisory Opinion 94-35A, the Department expressed the view that the relief provided by PTCE 77-4 is unavailable for the purchase of investment company shares other than for cash. PTCE 97-41 provides, under certain conditions, specific relief for the purchase of investment company shares with assets transferred in-kind from a collective investment fund, but, like PTCE 77-4, does not extend to in-house plans, and also requires that the other conditions of PTCE 77-4 are satisfied (see Section III of PTCE 97-41, 62 FR 42836). Thus, Harris Trust has requested that all the conversion transactions described herein, as well as its fee arrangement (which is outside the scope of relief afforded by either PTCE 77-4 or PTCE 97-41), be covered by a single individual exemption.

³ Prohibited Transaction Exemption 77-3 (PTCE 77-3, 42 FR 18734, April 8, 1977) permits, under certain conditions, the acquisition or sale of shares of a registered, open-end investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter. However, the Department, at this time, offers no opinion as to whether PTCE 77-3 covers the purchase of investment company shares other than for cash.

⁴ In addition, Harris intends to offer Client Plans which are invested in certain non-terminating CIFs the opportunity to redeem for cash all or a portion of their interests in these CIFs and purchase shares of a corresponding Fund. These redemption transactions will not involve in-kind exchanges and

Harris Trust also requests an exemption for Harris Trust to receive fees from the Funds for services rendered to the Funds, in connection with the investments made in Fund shares by Plans for which Harris Trust is a fiduciary. This exemption would include those Client Plans whose assets were transferred from a terminated CIF but would not include assets transferred by the In-house Plans. One affiliate of Harris Trust, Harris Trust Bank of Arizona, and a number of the community banks of Harris Trust which have trust departments, may offer shares of the Funds to their Client Plans. These banks include Harris Bank Naperville, Harris Bank Wilmette, N.A., Harris Bank Barrington, N.A., Harris Bank Winnetka, N.A., Harris Bank St. Charles, Harris Bank Batavia, N.A. and Harris Trust Company of Florida.

3. The terminated CIFs consisted of the five portfolios of an entity known as the Harris Trust and Savings Bank Trust for Collective Investment of Employee Benefit Accounts. These portfolios were (i) the Government/Agency Intermediate Fund, (ii) the Convertible Fund, (iii) the International Equity Fund, (iv) the Balanced Blend Fund, and (v) the Special Capital Fund.

The Funds corresponding to the terminated CIFs consisted of five portfolios of Harris Insight Funds (the Insight Funds). These portfolios are (i) the Intermediate Government Bond Fund, (ii) the Convertible Securities Fund, (iii) the International Fund, (iv) the Balanced Fund, and (v) the Small-Cap Value Fund.

The Insight Funds further consist of the Harris Insight Funds Trust and HT Insight Funds, Inc., both open-end, diversified management investment companies registered under the "40 Act. Harris Trust serves as investment adviser to each of the Insight Funds. Harris Trust retains subadvisers for certain of the Insight Funds to whom it pays a direct fee. Harris Trust has also entered into portfolio management contracts with an affiliate, Harris Investment Management, Inc., to whom Harris Trust pays the investment advisory fees it receives from the Funds.

Harris Trust requests that the exemption cover not only the Insight Funds but any mutual fund with respect to which Harris Trust may be the investment adviser.

The Conversion Transactions

4. Harris Trust represents that permitting the acquisition by the Plans of Fund shares with Plan assets

are mentioned only in connection with the requested exemption for the receipt of fees.

transferred in-kind to the Funds will avoid the transaction costs that would otherwise be incurred in liquidating CIF assets and making the same investments for the Funds, thus resulting in significant savings, direct and indirect, to the Plans. No sales commissions (other than customary transfer charges to parties other than Harris Trust) will be paid by the Plans in connection with the acquisition of Fund shares with Plan assets transferred from a CIF. Harris Trust believes that the Funds will offer the Plans advantages over the CIFs as pooled investment vehicles. In addition to readily obtainable daily price quotations, ease of trading, and faster distributions (shares of a Fund may be distributed in-kind), the Plans as shareholders of a Fund would have the opportunity to exercise voting and other shareholder rights.

5. With respect to both the past conversion of CIFs to Funds that occurred on March 21, 1997, and the potential conversion of other CIFs to Funds that may occur in the future, Harris Trust makes the following representations regarding disclosures to the Independent Fiduciaries for the Plans. Prior to any conversion, Harris Trust will provide to the Independent Fiduciary of each Plan (including that of the In-house Plans) written notice of termination of the CIF, as well as full and detailed written disclosure of information concerning the Fund, including, but not limited to

(1) A current prospectus for the Fund;

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

(3) The reasons why Harris Trust considers an investment in the Fund to be appropriate for the Plan;

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

(5) Upon request of the Independent Fiduciary, a copy of the notice of exemption, if granted (and a copy of this notice of proposed exemption), once published in the **Federal Register**.

On the basis of this information, the Independent Fiduciary must give prior written approval for each acquisition of Fund shares with Plan assets transferred from a CIF and the fees to be received by Harris Trust in connection with its services to the Fund. Such approval must be consistent with the general

fiduciary responsibility provisions of Part 4 of Title I of the Act. Plans whose Independent Fiduciaries do not consent to their participation in the CIF conversion will have their interests in the CIF redeemed in accordance with the terms of the CIF prior to the conversion.

Specifically, with respect to the In-house Plans, Harris Trust appointed Magna Trust Company (Magna), formerly known as Illinois State Trust Company, as the Independent Fiduciary to oversee and approve the in-kind transfer of CIF assets attributable to the In-house Plans that were involved in the conversions that occurred on March 21, 1997. Magna provides various services to more than 4,900 fiduciary accounts. These services include employee benefit plan administration, investment management services, and serving as custodian of securities and investment advisor for two bank proprietary mutual funds. Magna is responsible for more than \$2 billion in assets, with \$1.2 billion in discretionary assets.

As part of its written report, dated January 24, 1997, Magna confirmed both its independence from Harris Trust and its qualifications to serve as the Independent Fiduciary for the In-house Plans. Magna also represented that it understood and accepted the duties, responsibilities, and liabilities in acting as a fiduciary under the Act for the In-house Plans. Based on the disclosures made by Harris Trust regarding the conversion transactions, Magna determined that participation therein was in the best interests of, and appropriate for, each In-house Plan.

In a supplemental report, dated July 7, 1997, Magna represented that following the conversion transactions, it was provided by Harris Trust with the required confirmation statements. In addition, Magna confirmed that the conversion transactions were performed in accordance with the proposed exemption.

6. With respect to both the past conversion of CIFs to Funds that occurred on March 21, 1997, and any future conversions of other CIFs to Funds that may occur, Harris Trust makes the following representations regarding the valuation and other procedures for such transactions.

All or a pro rata portion of the assets of a CIF are transferred in-kind to a Fund in exchange for shares of the Fund distributed to the Plans. The assets transferred consist entirely of cash and marketable securities. Other CIF assets, or assets which do not meet the investment objectives of the Fund, are sold on the open market through an unaffiliated brokerage firm prior to the

conversion. The current market value of the CIF assets is determined by a single valuation for each asset, with all valuations performed in the same manner and as of the close of business of the same day, in accordance with Rule 17a-7 of the '40 Act⁵ and the procedures established by the Fund pursuant to Rule 17a-7. Rule 17a-7 requires, among other things, that such transactions be effected at the "independent current market price" for each security.⁶ In this regard, the "independent current market price" for specific types of CIF securities involved in the conversion is determined as follows:

(a) If the security is a "reported security," as the term is defined in Rule 11Aa3-1 under the Securities Exchange Act of 1934 (the '34 Act) (17 C.F.R. 240.11Aa3-1), the last sale price with respect to such security reported in the consolidated transaction reporting system (the Consolidated System; or, if there are no reported transactions in the Consolidated System that day, the average of the highest current independent bid and the lowest current independent offer for such security (reported pursuant to Rule 11Ac1-1), as of the close of business on the CIF valuation date; or

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

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

(d) For all other securities, the average of the highest current independent bid and

⁵ Rule 17a-7 provides an exemption from the prohibited transaction provisions of section 17(a) of the '40 Act (15 U.S.C. 80a-7(a)), which prohibit, among other things, transactions between an investment company and its investment adviser or affiliates of its investment adviser. Thus, Rule 17a-7 permits transactions between the Funds and other accounts that use the same or affiliated investment advisers, subject to certain conditions that are designed to insure fair valuation of the assets involved in the transaction.

⁶ Rule 17a-7 also includes the following requirements: (a) the transaction must be consistent with the investment objectives and policies of the Fund, as described in its registration statement; (b) the security that is the subject of the transaction must be one for which market quotations are readily available; (c) no brokerage commissions or other remuneration may be paid in connection with the transaction; and (d) the Fund's board of directors (i.e., those directors who are independent of the Fund's investment adviser) must adopt procedures to insure that the requirements of Rule 17a-7 are followed, and determine no less frequently than quarterly that the transactions during the preceding quarter were in compliance with such procedures.

lowest current independent offer determined on the basis of reasonable inquiry from at least three independent sources as of the close of business on the CIF valuation date.

Harris Trust represents that the values for the securities established in determining the amount transferred from the CIF are the same values used in determining the amount received by the Fund. Thus, each Plan receives Fund shares having a total net asset value equal to the value of the Plan's pro rata share of the CIF's assets on the date of the in-kind transfer.

Within 30 days after completion of each acquisition of Fund shares with Plan assets transferred in-kind from a CIF, Harris Trust sends by regular mail to the Independent Fiduciary a written confirmation containing the following information:

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

(2) The market price, as of the date of the in-kind transfer, of each such security; and

(3) The identity of each pricing service or market-maker consulted in determining the value of such securities.

Within 90 days after completion of each acquisition of Fund shares with Plan assets transferred in-kind from a CIF, Harris Trust sends by regular mail to the Independent Fiduciary a written confirmation containing the following information:

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

(2) The number of shares in the Funds that are held by the Plan immediately after the in-kind transfer, the related per share net asset value, and the total dollar amount of such shares.

Harris Trust's Receipt of Fees From the Funds

7. Prior to the investment by a Client Plan in any of the Funds, the Independent Fiduciary receives a full and detailed written disclosure of information concerning the Fund, as previously described in paragraph 5 above (with respect to the conversion transactions). On the basis of this information, the Independent Fiduciary must give prior written approval for the investment by the Client Plan in each Fund and the fees to be paid to Harris Trust in connection with its services to the Fund. Such authorization must be consistent with the general fiduciary provisions of Part 4 of Title I of the Act. The authorization is terminable by the Independent Fiduciary at will without

penalty to the Client Plan, upon written notice of termination to Harris Trust.

8. Harris Trust represents that there are two levels of fees charged to a Client Plan: (i) those fees which Harris Trust charges for serving as a trustee, investment manager, or custodian of the Client Plan (the Plan-level fees); and (ii) those fees which Harris Trust charges to the Funds (the Fund-level fees) for serving as an investment adviser to the Fund, as well as for serving as a custodian or transfer agent for the Funds or for providing other Secondary Services to the Funds. Harris Trust's rebate procedures relating to its Fund-level fees are described below. These rebate procedures insure that there is a credit of Fund-level fees against all Plan-level investment management fees charged to a Client Plan by Harris Trust and eliminates any "double fees" for such services, similar to the requirements of PTCE 77-4, Part II(c).⁷

The Rebate Procedures

In its capacity as a plan fiduciary, Harris Trust charges each Client Plan a fee for investment management/trustee services, based upon its standard fee schedules and the terms of the specific agreement it has with the Client Plan.⁸ Plan-level fees for investment management, investment advisory, or other similar services provided by Harris Trust are currently charged in the form of a single asset-based investment management fee, which is billed on a quarterly basis. There is also a Plan-level trustee fee for basic administrative services provided by Harris Trust, as well as other specific service fees. Currently, the annual investment

management fee ranges from .375% to .80% of the market value of the assets calculated at the end of each calendar quarter prior to the quarterly billing date, depending upon the amount of assets under management. Plan-level fees are subject to annual minimums for administration and management, expressed as flat dollar amounts.

Harris Trust also provides "sweep" services to the Client Plans, which allow idle cash to be automatically invested temporarily in Fund shares, in order to insure that a Client Plan's assets are fully invested at all times. Harris Trust does not charge separate fees for the provision of such sweep services. Instead, charges for sweep services are built into Harris Trust's Plan-level investment management and trustee fees, and any investment advisory fees received by Harris Trust from the Fund into which idle cash is swept will be credited back to the Client Plan in the manner of other Fund investments.⁹

For its services as investment adviser to the Insight Funds, Harris Trust is entitled to receive monthly advisory fees from the Insight funds, as disclosed in the prospectus, currently ranging from approximately 0.11% to 1.05% of the Funds' assets under management, subject to certain voluntary fee waivers. In addition, Harris Trust may receive fees from the Insight Funds for certain Secondary Services. Harris Trust receives no 12b-1 fees payable pursuant to Rule 12b-1 under the "40 Act.

The Funds accrue daily as an expense payable to Harris Trust a ratable portion of Harris Trust's investment advisory and other administrative fees, based upon the average daily net asset value of the Funds. Such fees are paid by the Fund to Harris Trust monthly in arrears. Harris Trust intends that the Client Plans generally will not incur any increased fees for investing in the Funds. Harris Trust rebates to each Client Plan, on the same business day as the receipt of such fees by Harris Trust, the Client Plan's proportionate share of all advisory fees payable to Harris Trust by the Funds as of such date. Such rebate is effectuated through the purchase of additional shares of the Funds. This rebate procedure is approved by the Independent Fiduciary at the time it provides its original written approval of the investment of a

Client Plan's assets in the Funds. Harris Trust continues to charge each Client Plan (other than the In-house Plans) its full investment management fee for all assets under management, including those assets invested in the Funds. The net effect of these procedures is that no Client Plan ever pays, in any period, a "double" investment advisory fee for any Client Plan assets invested in the Funds. Harris Trust represents that the combined total of all fees it receives for its services to a Client Plan, and for its services to any of the Funds in which the Client Plan invests, constitute no more than "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

In the case of the In-house Plans, from which Harris Trust receives no Plan-level fees, Harris Trust also rebates to each In-house Plan its proportionate share of all advisory fees payable to Harris Trust by the Funds through the purchase of additional shares of the Funds, in accordance with the procedures described above.

9. Harris Trust represents that it maintains a system of internal accounting controls for the crediting of all Fund-level fees to the Client Plans. Harris Trust is audited by its independent accounting firm, currently KPMG Peat Marwick LLP (the Auditor), at least annually to verify the proper crediting of the fees to each Client Plan. Information regarding fees is used in the preparation of required financial disclosure reports of the Funds for the benefit of the Client Plans.

Specifically, in performing its audit, the Auditor: (a) reviews and tests compliance with the specific operational controls and procedures established by the Harris Trust for making credits; (b) verifies, on a test basis, the daily credit factors transmitted to Harris Trust by the Funds; (c) verifies, on a test basis, the credits paid in total to sum of all credits paid to each Client Plans; (d) verifies, on a test basis, the credits paid in total to the sum of all credits paid to each Client Plan; and (e) recomputes, on a test basis, the amount of the credit determined for selected Client Plans and verifies that the proper credit was made to the proper Client Plan.

In the event that either the internal audit by Harris Trust or the independent audit by the Auditor identifies an error made in the crediting of fees to the Client Plans, Harris Trust will correct the error. With respect to any shortfall in credited fees to a Client Plan, Harris Trust will make a cash payment to the Client Plan equal to the amount of the error plus interest based on the greater of either (a) the money market rate

⁷ As previously noted in Footnote 2, PTCE 77-4 permits, under certain conditions, the purchase or sale (for cash) by an employee benefit plan of shares of a registered, open-end investment company whose investment adviser is also a fiduciary of such plan (but not an employer of employees covered by the plan). PTCE 77-4 requires, among other things, that the plan not pay an investment management, investment advisory, or other similar fee with respect to the plan assets invested in such shares for the entire period of such investment. However, Section II(c) of PTCE 77-4 states that this condition does not preclude the payment of investment advisory fees by the investment company under the terms of an investment advisory agreement adopted in accordance with section 15 of the '40 Act. Section II(c) further states that this condition does not preclude the payment of investment advisory fees by the Client Plan, based on total plan assets, where a credit representing the Client Plan's pro rata share of investment advisory fees paid by the investment company has been subtracted.

⁸ Harris Trust represents that all fees paid by the Client Plans directly to Harris Trust for services performed by Harris Trust are statutorily exempt under section 408(b)(2) of the Act and the regulations thereunder. However, the Department expresses no opinion herein as to whether the fees received by Harris Trust for the provision of services to the Client Plans would comply with the requirements of section 408(b)(2).

⁹ See the Department's letter dated August 1, 1986 to Robert S. Plotkin, Assistant Director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, which states the Department's views regarding the application of the prohibited transaction provisions of the Act to sweep services provided to employee benefit plans by fiduciary banks and the potential applicability of certain statutory exemptions.

offered by Harris Trust for the period involved, or (b) the total rate of return for shares of the Funds, including dividends, that would have been acquired during such period. Any excess credits made to a Client Plan will be corrected by an appropriate deduction and reallocation of cash during the next payment period to reflect accurately the amount of total credits due to the Plan for the period involved.

10. Harris Trust states that any increase in the rate of fees paid by a Fund to Harris Trust must receive the prior written approval from every Independent Fiduciary of every plan investing in shares of the Fund. Harris Trust uses a "negative consent" procedure to obtain such approvals. This procedure is described as follows.

In the event of an increase in the rate of any fees paid by the Funds to Harris Trust for any investment management services, investment advisory services, or other similar services above that rate which has been approved by an Independent Fiduciary for a Client Plan, Harris Trust provides at least 30 days' written notice to each Client Plan investing in shares of a Fund which is increasing such fees. Such notice may take the form of a proxy statement, letter, or similar communication that is separate from the Fund Prospectus and must explain the nature and amount of the additional service or the nature and amount of the increase in fees.

In the event of an addition of a Secondary Service by Harris Trust to a Fund for which a fee is charged, or in the event of an increase in a fee paid by the Funds to Harris Trust for any Secondary Service (which may result from either an increase in the rate of such fee or a decrease in the number or kind of services performed for such fee) above that rate which has been approved by an Independent Fiduciary, notice provided to Client Plans must be accompanied by a Termination Form, which is described in paragraph 11 below.

However, with respect to the In-house Plans, Harris Trust did not retain the Independent Fiduciary for the In-house Plans for purposes of reviewing Fund-level fee changes on an on-going basis. Harris Trust states that following completion of the conversion transactions on March 21, 1997, the In-house Plans' investments in the Funds were managed by in-house fiduciaries, consistent with the requirements of PTCE 77-3.¹⁰

¹⁰ The Department expresses no opinion herein as to whether any transactions with the Funds by the In-house Plans are covered by PTCE 77-3.

11. Each Independent Fiduciary will be supplied annually with a Termination Form during the first quarter of each calendar year, beginning with the calendar year immediately following the date of publication in the **Federal Register** of a notice of exemption for the subject transactions. However, the Termination Form need not be supplied to the Independent Fiduciary sooner than six months after it has already been supplied, except to the extent required to disclose either an additional Secondary Service for which a fee is charged or an increase in fees.

The Termination Form, which expressly provides an election to terminate the authorization, provides instructions regarding the use of the Termination Form, including the information discussed in Section II(l)(1) and (2), above.

12. No sales commissions are paid by the Client Plans in connection with the purchase or sale of shares of the Funds, and no redemption fees are paid in connection with the sale of such shares by the Client Plans to the Funds. In addition, neither Harris Trust nor an affiliate (including officers or directors, and other persons) will be allowed to directly purchase from or sell to the Client Plans any shares of the Funds. The price paid or received by a Client Plan for shares of a Fund is the net asset value per share at the time of the transaction, and is the same price which would have been paid or received for the shares by any other investor at that time. Finally, all dealings between the Client Plans and the Funds are on a basis no less favorable to the Client Plans than dealings between the Fund and its other shareholders.

13. To insure that the Independent Fiduciary has the information necessary to effectively monitor each of the Funds in which a Client Plan invests, Harris Trust provides to the Independent Fiduciary certain on-going disclosures, as discussed in Section II(n)(1) and (2), above.

In this regard, a Harris Trust affiliate may execute securities brokerage transactions for the investment portfolios of certain of the Funds. To the extent that Harris Trust does not currently execute securities brokerage transactions with respect to any Fund for which a fee is paid to Harris Trust, but proposes to do so in the future, Harris Trust will provide at least 30 days' written notice to each Client Plan investing in shares of such Fund. Such notice will be accompanied by a Termination Form allowing the Client Plan an option to object to the addition of brokerage services to a Fund, as a Secondary Service, by Harris Trust.

Failure of the Independent Fiduciary to return the Termination Form will be deemed to be approval by the Client Plan of brokerage services by Harris Trust. Harris Trust currently has one affiliated broker, Harris Investors Direct, Inc. (Harris Investors). Harris Trust represents that Harris Investors has not provided any brokerage services with respect to the transactions which have taken place to date.

If any Harris Trust affiliate, including Harris Investors, provides brokerage services to a Fund, Harris Trust will provide the Independent Fiduciary of the Client Plan with a statement at least annually that specifies information about the commissions received by the Harris Trust affiliate, as discussed in Section II(n)(2)(A) through (D), above.

14. In summary, Harris Trust represents that the subject transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (a) the Funds provide the Client Plans and the In-house Plans with a more advantageous investment vehicle than the CIFs, yet avoid the payment to Harris Trust of any duplicative fees for investment management, investment advisory, or other similar services;

(b) with respect to the conversions of CIFs to Funds, an Independent Fiduciary approves in advance any transfer of Plan assets in exchange for Fund shares and only after full written disclosure of information concerning the Funds; (c) each Plan receives Fund shares having a total net asset value equal to the value of the Plan's pro rata share of the CIF's assets on the date of the in-kind transfer, as determined by a single valuation for each asset, with all valuations performed in the same manner and as of the close of business of the same day, in accordance with the procedures established by the Fund pursuant to Rule 17a-7 of the 40 Act (requiring the use of independent sources); (d) the Independent Fiduciary receives written confirmation of the entire transaction that discloses the number of CIF units held by the Plan immediately before the conversion and the number of Fund shares held by the Plan immediately after, the related per unit and per share values, and the total dollar amount of the CIF units and the Fund shares involved in the transaction;

(e) with respect to any investments in a Fund by the Client Plans and the payment of any fees by the Fund to Harris Trust, an Independent Fiduciary approves such investments and fees in advance and only after full written disclosure of information concerning the Fund, including a current prospectus and a statement describing

all fees to be paid to Harris Trust; (f) any authorizations made by a Client Plan regarding investments in a Fund, fees paid by the Fund to Harris Trust, or any increases in fees for secondary services provided to the Fund by Harris Trust, are terminable by the Independent Fiduciary at will, without penalty to the Client Plan, upon written notice to Harris Trust; (g) annual audits by an independent accounting firm are required to verify the proper crediting to the Client Plans of fees charged by Harris Trust to the Funds; (h) the Client Plans and the In-house Plans do not pay any commissions or redemption fees in connection with their acquisition of Fund shares (either through a direct purchase of the shares or through a transfer of CIF assets in exchange for the shares) or the Plans' sale of Fund shares; and (i) all dealings between the Client Plans and the In-house Plans and the Funds are on a basis no less favorable to the Plans than dealings between the Fund and its other shareholders.

Notice to Interested Persons

Harris Trust will provide notice of the proposed exemption to interested persons by first-class or overnight mail within 15 days of the date of publication of this notice of pendency in the **Federal Register**. Interested persons consist of the Independent Fiduciaries of all Plans which had investments in a CIF which terminated on March 21, 1997. Interested persons also consist of any other Independent Fiduciaries for Plans which, at the time this notice is published in the **Federal Register**, have approved, or will approve, any transfer of a Plan's assets from a CIF to a Fund, in connection with the termination of a CIF prior to the date this proposed exemption is granted. Such notice shall include a copy of this notice of the proposed exemption, as published in the **Federal Register**, and shall inform interested persons of their right to comment and/or request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 45 days of the date of publication of this notice in the **Federal Register**.

For Further Information Contact: Ms. Karin Weng of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Individual Retirement Accounts (the IRAs) for Marcia A. Hendrichsen, Larry L. Hendrichsen, Lawrence D. Hendrichsen, Located in Burlington, Iowa, and William H. Napier, George Rashid, Jr., Jake E. Rashid, Carl A. Saunders, and John C. Schuldt, Located in Fort Madison, Iowa (Collectively, the Participants)

[Exemption Application Number: D-10547]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed cash sale (the Sale) of certain membership units (the Units) in the Catfish Bend Casinos, L.C. (Catfish Bend), by the IRAs¹¹ to the Participants, disqualified persons with respect to the IRAs, provided that the following conditions are met:

- (a) The Sale of the Units by each IRA is a one-time transaction for cash;
- (b) The terms and conditions of each Sale are at least as favorable to each IRA as those obtainable in an arm's length transaction with an unrelated party;
- (c) Each IRA receives the fair market value of the Units at the time of each Sale; and
- (d) Each IRA is not required to pay any commissions, costs or other expenses in connection with each Sale.

Summary of Facts and Representations

1. The IRAs are individual retirement accounts, as described in section 408(a) of the Code. Among the assets of each IRA are certain membership Units in Catfish Bend, an Iowa limited liability company which operates the riverboat casino Catfish II. Currently, there are 66,521 Units outstanding which are owned by 496 members.

The applicants describe the IRAs and their holdings of the Units as follows:

- (a) The IRA of Marcia A. Hendrichsen currently holds assets valued at approximately \$59,127, which includes 20 Units. The IRA originally purchased the Units on January 27, 1994 for \$2,000.
- (b) The IRA of Larry L. Hendrichsen currently holds assets valued at approximately \$48,490, which includes 20 Units.

¹¹ Because each IRA has only one participant, there is no jurisdiction under 29 CFR § 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

The IRA originally purchased the Units on January 27, 1994 for \$2000.

(c) The IRA of Lawrence D.

Hendrichsen currently holds assets valued at approximately \$49,832, which includes 10 Units. The IRA originally purchased the Units on January 27, 1994 for \$1000.¹²

(d) The IRA of William H. Napier currently holds assets valued at approximately \$20,000, which includes 100 Units. The IRA obtained the Units when Mr. Napier rolled them over with the rest of his assets from his individual account in the Napier Wright & Wolf law firm plan, which originally purchased the Units on January 27, 1994 for \$10,000.

(e) The IRA of George Rashid, Jr. currently holds assets valued at approximately \$42,434, which includes 200 Units. The IRA originally purchased the Units on January 28, 1994 for \$20,000.

(f) The IRA of Jake E. Rashid currently holds assets valued at approximately \$619,014, which includes 300 Units. The IRA originally purchased the Units on January 28, 1994 for \$30,000.

(g) The IRA of Carl A. Saunders currently holds assets valued at approximately \$36,797, which includes 100 Units. The IRA originally purchased the Units on January 31, 1994 for \$10,000.

(h) The IRA of John C. Schuldt, president of Catfish Bend, currently holds assets valued at approximately \$104,665, which includes 320 Units. The IRA purchased the Units on June 13, 1994 for \$32,000.

2. The applicants request exemptions for the Sale of the Units by each individual IRA to its respective Participant. The applicants represent that the IRAs have benefitted from significant appreciation and returns since purchasing the Units. The applicants believe that at present price levels, an excellent opportunity for the Sale of the Units now exists. Accordingly, they wish to sell the Units from their respective IRAs to ensure that each IRA realizes a substantial profit.¹³

¹² The Department notes that the Units held in the IRAs of Marcia, Larry L., and Laurence Hendrichsen, are valued at \$250 per Unit, based on the Deloitte and Touche appraisal discussed below. However, in the case of the remaining IRAs, the participants carried the value of the Units at \$200 per unit. This amount reflects the value of the Units prior to the Deloitte and Touche appraisal, and is, in effect, obsolete. Thus, the value of the Catfish interests is \$250 per Unit as reflected in the aforementioned Deloitte and Touche appraisal.

¹³ The Department notes that the Internal Revenue Service has taken the position that a lack of diversification of investments may raise questions in regard to the exclusive benefit rule under section 401(a) of the Code. See, e.g. Rev. Rul. 73-532, 1973-2 C.B. 128. The Department further notes that

In addition, the applicants represent that the continued holding of the Units will cause the IRAs to incur unrelated business income tax (UBIT) pursuant to section 512 of the Code.¹⁴ Therefore, because of the aforementioned reasons, the applicants seek an exemption to purchase the Units from the IRAs.

3. Gary Hoyer, attorney for Catfish Bend, engaged the Valuation Group of Deloitte and Touche (D&T), an independent, qualified appraiser located in Chicago, Illinois, to determine the fair market value of the Units. The applicants represent that D&T has previously provided services for Catfish Bend. However, the applicants state that payments made by Catfish Bend to D&T constitute substantially less than one percent (1%) of D&T's annual gross revenues. After a comprehensive review of all relevant information, D&T valued the interests on a per Unit basis at \$250.

In its analysis, D&T sought to determine the fair market value of a Unit on a "nonmarketable minority interest" basis. According to the report submitted by D&T, a nonmarketable minority interest refers to a minority position in the equity of an enterprise which is not actively traded on a public exchange.

In valuing the Units, D&T considered the factors described in the Internal Revenue Service's Revenue Ruling 59-60, which provides general guidelines for valuing ownership interests in closely-held enterprises. In addition, the report submitted by D&T indicates that it reviewed the historical operational and financial data of Catfish Bend, and conducted a thorough onsite inspection of the riverboat before arriving at a conclusion as to the value of the Units.

4. The applicants represent that the proposed transactions will be administratively feasible in that each Sale will be a one-time transaction for cash. Furthermore, the applicants state that the transactions will be in the best interests of the IRAs as they will provide each IRA with the opportunity to dispose of the Units for a significant profit and eliminate any potential UBIT liability. Finally, the applicants assert

section 408(a) of the Code, which describes the tax qualification provisions for IRAs, mandates that the trust be created for the exclusive benefit of an individual or his beneficiaries. However, the Department is expressing no opinion in this proposed exemption regarding whether violations of the Code have taken place with respect to the purchase and subsequent retention of the Units by some of the Participants.

¹⁴ In this regard, six of the eight IRAs have previously incurred and paid UBIT as a result of holding the Units. The other two IRAs did not incur UBIT due to the fact that the earnings on the Units failed to exceed the \$1000 threshold for triggering the tax.

that the transactions will be protective of the rights of each participant and beneficiary as indicated by the fact that each IRA will receive the fair market value of the Units, as determined by a qualified, independent appraiser on the date of Sale and will incur no commissions, costs, or other expenses as a result of the Sale.

5. In summary, the applicants represent that the proposed transactions satisfy the statutory criteria of section 4975(c)(2) because: (a) the Sale of the Units by each IRA will be a one-time transaction for cash; (b) the terms and conditions of each Sale will be at least as favorable to each IRA as those obtainable in an arm's length transaction with an unrelated party; (c) each IRA will receive the fair market value of the Units at the time of each Sale; and (d) each IRA will not be required to pay any commissions, costs or other expenses in connection with each Sale.

Notice to Interested Persons: Because the applicants are the only Participants in the IRAs, it has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

For Further Information Contact: Mr. James Scott Frazier, telephone (202) 219-8881. (This is not a toll-free number).

Bernard Chaus, Inc. Employee Savings Plan (the Plan) Located in New York, New York

[Application No. D-10606]

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 C.F.R. Part 2570, Subpart B (55 F.R. 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective December 24, 1997, to (1) the past acquisition by the the Plan of certain stock rights (the Rights) pursuant to a stock rights offering (the Offering) by Bernard Chaus, Inc. (the Employer), the sponsor of the Plan; (2) the past holding of the Rights by the Plan during the subscription period of the Offering; (3) the past disposition or exercise of the Rights by the Plan; and (4) the proposed

payment by the Employer to the Plan of an amount necessary to credit Plan accounts of participants affected by an administrative error relating to Rights which were not exercised or sold prior to the expiration of the Rights; provided the following conditions are satisfied:

(A) The Plan's acquisition and holding of the Rights occurred in connection with the Offering made available to all shareholders of common stock of the Employer;

(B) The acquisition and holding of the Rights by the Plan resulted from an independent act of the Employer as a corporate entity and all holders of the common stock of the Employer, including the Plan, were treated in a substantially similar manner with respect to the Offering;

(C) All decisions regarding the holding and disposition of the Rights by the Plan were made, in accordance with the Plan provisions for individually-directed investment of participant accounts, by the individual Plan participants whose accounts in the Plan received Rights in connection with the Offering, including all determinations regarding the exercise or sale of the Rights received through the Offering, except for those participants who failed to file timely and valid instructions concerning the Rights, in which case the Rights were sold; and

(D) Within 30 days of the date of publication of the final exemption in the **Federal Register**, with respect to the Plan accounts of participants affected by an administrative error whereby 27 Rights (of the 17,041 Rights received by the Plan) were not exercised or sold prior to the expiration of the Rights, the Employer credits the affected accounts with an amount equal to the value such accounts would have received if the Rights had been sold on the last day of the Offering, including interest thereon through the date of such crediting at a rate equal to the average rate of earnings on all Plan assets during that period.

EFFECTIVE DATE: This exemption, if granted, will be effective as of December 24, 1997.

Summary of Facts and Representation

1. The Employer is a designer, manufacturer and marketer of women's apparel. The Employer is incorporated in New York, with its corporate headquarters in New York, New York.

2. The Plan is a defined contribution employee benefit plan with provisions intended to satisfy section 401(k) of the Code. The trustee of the Plan is the Prudential Trust Company of Moosic, Pennsylvania (the Trustee), and the Plan is administered by the Employer.

3. The Plan provides for individual participant accounts (the Accounts) and participant-directed investment of the Accounts among seven investment funds (the Funds), one of which (the Stock Fund) invests exclusively in common stock of the Employer (the Stock). As of December 19, 1998, the Plan had total assets of approximately \$3.4 million, and the Accounts of 205 Plan participants had balances invested or partially invested in the Stock Fund. As of December 17, 1997 (the Record Date), there were 2,627,727 shares of Stock issued and outstanding, of which 17,041 shares, or about 0.65%, were owned by the Accounts participating in the Stock Fund.

4. The Applicant represents that as part of an effort to increase capital, the Employer determined it was in the best interests of its shareholders to provide for the offering of rights to purchase additional shares of newly-issued common stock. Accordingly, on December 24, 1997, the Employer commenced the Offering by issuing to all holders of Stock, as of the Record Date, one transferable subscription Right for each share of Stock held. Each Right conferred upon its holder an entitlement to purchase 5.464751 shares of additional Stock (the Additional Shares) at price of \$1.4309 per share¹⁵. The Employer authorized the issuance of up to 13,977,270 Additional Shares through the Offering. The provisions of the Offering included oversubscription privileges which were exercisable by Plan participants, whose Accounts received Rights, in the same manner as other recipients of the Rights.¹⁶

5. The Employer represents that the Offering did not involve any guarantee or other assurance that any market in the Rights would develop or remain available during the Offering. However, the Stock and the Rights were both traded on the New York Stock Exchange (NYSE) through the last trading day prior to the expiration of the Offering. The terms of the Offering permitted exercise of the Rights commencing December 24, 1997 until 5:00 p.m. EST on January 23, 1998, at which time any unexercised Rights expired.

6. In anticipation of the Offering, the Plan was amended to permit each Plan participant with an Account balance invested in the Stock Fund (the Invested Participants) as of the Record Date to

direct the Trustee either to exercise or sell Rights attributable to his or her Stock Fund account, and such amendment also established the procedure for such directions. The Employer represents that on December 24, 1997, all Invested Participants were sent, via first class mail, a copy of the Offering circular published by the Employer, a letter from the Plan administrator providing information about the Offering and describing the procedures for participant directions with respect to the Offering, and a direction form. The direction forms sent to the Invested Participants enabled them to direct the Trustee either to exercise the Rights allocated to their Accounts or to sell such Rights on the open market. As provided in the amended Plan, with respect to any Invested Participant who failed to submit a direction form to the Trustee by 5:00 p.m. EST on January 19, 1998, or submitted an invalid direction form, the Trustee was required to sell the Rights on the open market. The Employer represents that this required sale was disclosed to the Invested Participants in the informational documents relating to the Offering that were sent on December 24, 1997.

7. For each Invested Participant who directed the Trustee to exercise Rights allocated to his or her Account, the funds needed to pay the exercise price were obtained by redeeming specific investments in one or more Funds in which the Invested Participant's Account was invested. The Invested Participants directed the Trustee to sell any specific dollar amount from any specific Fund for the cash needed to pay the exercise price. Where amounts were redeemed from the Funds prior to the last day of the Offering, the amended Plan provided that the Trustee deposit the proceeds of such redemptions in a special short-term investment account pending the Trustee's payment to the subscription agent of the exercise price for the Additional Shares.

8. Rights were exercisable by an Invested Participant only to the extent of funds available in his or her Account in the Plan. If amounts in the Invested Participant's Account were insufficient to pay the exercise price for the Additional Shares subscribed for, the amended Plan provided that the Trustee was to attempt to sell any Rights not exercised. The proceeds of any Rights that were sold and any income from the special short-term investment account were credited, with respect to such sale proceeds, to the Accounts of the Invested Participants whose allocable Rights were sold, and in the case of such income, to the Accounts of the Invested

Participants whose redemption proceeds were deposited in the special short-term investment account.

9. In the event that the market price of the Stock, including the effect of any applicable brokerage commissions and other expenses at the time the Trustee would submit Rights for exercise, was less than the exercise price under the Offering, the amended Plan provided that the Trustee would not exercise such Rights. The Employer represents that at 5:00 p.m. EST on January 23, 1998, the time of expiration of the Offering and the date on which the Trustee exercised Rights on behalf of the Invested Participants directing the exercise of the Rights, the exercise price of a Right to obtain shares of the Stock was less than the market price for shares of the Stock on the NYSE, after giving effect to any brokerage commissions and other expenses relating to such transactions. Accordingly, the Trustee exercised at that time all Rights for which a direction to exercise had been properly submitted (i.e., with a valid direction form) by an Invested Participant.

10. The Employer represents that, in order to give the Trustee sufficient time to perform the administrative procedures required to review participant direction forms and to implement directions, including the liquidation of other Plan assets as required to enable an Account to purchase the appropriate number of shares of the Stock at the exercise price with the Rights, the procedure for participant direction with respect to the Offering included timing deadlines for the filing of instructions in advance of the expiration of the Offering. Accordingly, Invested Participants were required to return the direction forms to the Trustee by 5:00 p.m. EST on January 19, 1998. The Employer states that this deadline for filing instructions with the Trustee was specifically and prominently disclosed to all Invested Participants in the Offering materials they received on December 24, 1997.

11. The Employer represents the following summary of the Offering:

(a) All 2,627,727 Rights, including overallocments, were exercised in the Offering. Among the 205 Invested Participants, 23 directed the exercise of Rights allocated to their Accounts, resulting in the exercise of 3,771 Rights, including overallocments, or about 0.147% of the total number of Rights exercised.

(b) Among the Invested Participants, 22 affirmatively directed that the Rights allocated to their Accounts be sold, resulting in the sale of 3,287 Rights.

(c) The remainder of the Invested Participants did not respond. In

¹⁵ Except that the Rights issued to Josephine Chaus, the chair of the board of directors and principal shareholder of the Employer, entitled her to subscribe for and purchase 5.1811105 Additional Shares.

¹⁶ Oversubscription privileges were exercised by only one Plan participant whose Account received Rights.

accordance with the amended Plan, the Rights allocated to their Accounts were sold, resulting in the sale of 9,956 Rights. Because of an administrative error in the communications between the Plan administrator and the Trustee, 27 Rights allocated to the Accounts were not sold prior to the expiration of the Rights. The Employer represents that it shall credit the Accounts of the participants affected by this administrative error with an amount equal to the value these Accounts would have received if the Rights had been sold as planned on the last day of the Offering plus interest thereon through the date of such crediting at a rate equal to the average rate of earnings on all Plan assets during that period.

(d) The Employer represents that all directions and instructions which were filed by the Invested Participants with respect to the Offering were observed and executed by the Trustee. In addition, all Invested Participants had been notified adequately in advance of the Offering of the procedure for directing and instructing the Trustee with respect to their Accounts' rights under the Offering. Thus, the Employer represents that all actions by the Trustee relating to the Offering, with respect to the Accounts, were pursuant to the express participant directions, except for the Accounts of participants who failed to file timely and valid instructions with the Trustee pursuant to the direction procedure. The Employer states that the Trustee's action on behalf of Accounts whose participants failed to file instructions with the Trustee, which was the sale of the Rights received by such Accounts, was disclosed in the explanatory materials for the Offering and in the direction forms sent to Invested Participants. The Employer states further that all actions taken by the Trustee in connection with the Offering were consistent with the participant-directed nature of investments under the Plan.

12. In summary, the applicant represents that the transactions satisfied the criteria of section 408(a) of the Act for the following reasons: (a) The Plan's acquisition of the Rights resulted from an independent act of the Employer; (b) With respect to all aspects of the Offering, all holders of the Stock, including the Accounts of Invested Participants in the Plan, were treated in a substantially similar manner; (c) All decisions with respect to the Plan's acquisition, holding and control of the Rights were made by the individual Invested Participants with Account balances invested in the Stock Fund, except for those who failed to file timely

and valid instruction forms, in which case the Rights were sold; (d) The disposition or exercise of the Rights received by the Invested Participants was executed by the Trustee in an orderly manner pursuant to the terms of the Offering relating to the submission of valid instruction forms by such Participants; and (e) The acquisition and holding of the Rights by the Plan affected all of the Invested Participants, and their Accounts held only about 0.65% of the Stock outstanding as of the Record Date of the Offering.

For Further Information Contact: Ronald Willett 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, 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 31st day of July 1998.

Ivan Strasfeld,

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

[FR Doc. 98-21001 Filed 8-5-98; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 98-38; Exemption Application No. D-10558, et al.]

Grant of Individual Exemptions; Roark Young, Russell Rice, Mary J. Rice, Bruce Lamchick, Steven McKean, David McKean & Burton Young

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

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

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

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No.