

Signed at Washington, DC, this 30th day of March, 1999.

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 99-13; Exemption Application No. D-10468, et al.]

Grant of Individual Exemptions; Wells Fargo Bank, N.A. (Wells Fargo), et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of Individual Exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, 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. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

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

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

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

[Prohibited Transaction Exemption (PTE) 99-13; Exemption Application No. D-10468]

Exemption

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

The restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (F) of the Code, shall not apply, effective September 16, 1996, to the exchange of the assets of various employee benefit plans (the Plans) that are either held in certain collective investment funds (the CIF or CIFs) maintained by Wells Fargo, or otherwise held by Wells Fargo as trustee, investment manager or in any other capacity as fiduciary on behalf of the Plans, for shares of any open-end investment company (the Fund or Funds) registered under the Investment Company Act of 1940 (the 1940 Act) to which Wells Fargo or any of its affiliates (collectively, Wells Fargo) serves as investment adviser and may provide other services, provided the following conditions are met:

- (a) The Plans are not sponsored by Wells Fargo.
- (b) No sales commissions are paid by a Plan in connection with a Conversion Transaction.
- (c) All or a *pro rata* portion of the assets of a CIF or all or a *pro rata* portion of the assets of the Plans or any separate portfolio thereof held by Wells Fargo in any capacity as fiduciary on behalf of such Plans are transferred in-kind to the Funds in exchange for shares of such Funds. Notwithstanding the foregoing, the allocation of fixed-income securities held by a CIF among Plans on the basis of each Plan's *pro rata* share of the aggregate value of such securities will not fail to meet the requirements of this subsection if—

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

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

(d) The Plans or the CIFs receive shares of the Funds that have a total net asset value equal in value to the assets of the Plans or the CIFs exchanged for such shares on the date of transfer.

(e) The current market value of the assets of a Plan or the CIF is determined in a single valuation performed in the same manner as of the close of the same business day with respect to all such Plans participating in the transaction on such day, using independent sources in accordance with the procedures set forth in Rule 17a-7b (Rule 17a-7) under the Investment Company Act of 1940 (the 1940 Act), as amended, and the procedures established by the Funds pursuant to Rule 17a-7 for the valuation of such assets.

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

(g) On the basis of the information described in paragraph (f) of Section II below, the Second Fiduciary authorizes in writing the Conversion Transaction, the investment of such assets in corresponding Funds and the fees received by Wells Fargo in connection with its services to the Funds. Such authorization by the Second Fiduciary is consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act. In addition, the Second Fiduciary must give prior approval, in writing, for the receipt of confirmation statements described below in paragraph (h)(2) and (i) by facsimile or electronic mail if the Second Fiduciary elects to receive such statements in that form.

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

(2) Not later than 30 days after completion of each Conversion Transaction (except for the transaction described in paragraph (h)(1) above),

Wells Fargo sends by regular mail or personal delivery or, if applicable, by facsimile or electronic mail to the Second Fiduciary, a confirmation that contains the following information:

(A) The identity of each of the assets that was valued for purposes of the transaction in accordance with Rule 17a-7(b)(4) under the 1940 Act;

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

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

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

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

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

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

Section II. Exemption for Receipt of Fees From Funds (transactions involving the receipt of Fees)

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

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

(b) The price paid or received by the Plans for shares of the Funds, in connection with a Conversion Transaction is the net asset value per share, as defined in paragraph (e) of Section III, at the time of the transaction

and is the same price which would have been paid or received for the shares by any other investor at that time.

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

(d) As to each individual Plan, the combined total of all Plan-level and Fund-level fees received by Wells Fargo for the provision of services to such Plan and to the Funds (with respect to the Plan's assets invested in the Funds), respectively, are not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

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

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

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

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

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

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

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

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

(h) The authorization, described in paragraph (g) of this Section II, is terminable at will by the Second Fiduciary of a Plan, without penalty to such Plan. Such termination will be effected by Wells Fargo redeeming the

shares of the Fund held by the affected Plan by the close of the business day following the date of receipt by Wells Fargo, either by mail, hand delivery, facsimile, or other available means of written communication at the option of the Second Fiduciary, of the termination form (the Termination Form), as defined in paragraph (i) of Section III below, or any other written notice of termination; provided that if, due to circumstances beyond the control of Wells Fargo, the sale cannot be executed within one business day, Wells Fargo shall have one additional business day to complete such redemption.

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

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

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

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

increasing such fees. Such notice shall be accompanied by the Termination Form, as defined in paragraph (i) of Section III below.

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

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

(1) The authorization is terminable at will by any of the Plans, without penalty to such Plans. Such termination will be effected by Wells Fargo redeeming shares of the Fund held by the Plans requesting termination within one business day following the date of receipt by Wells Fargo, either by mail, hand delivery, facsimile, or other available means at the option of the Second Fiduciary, of the Termination Form or any other written notice of termination; provided that if, due to circumstances beyond the control of Wells Fargo, the redemption of shares of such Plans cannot be executed within one business day, Wells Fargo shall have one additional business day to complete such redemption; and

(2) Failure by the Second Fiduciary to return the Termination Form on behalf of a Plan will be deemed to be an approval of the additional Secondary Service for which a fee is charged or

increase in the rate of any fees, if such Termination Form is supplied pursuant to paragraphs (j) and (k) of this Section II, and will result in the continuation of the authorization, as described in paragraph (h) of this Section II, of Wells Fargo to engage in the transactions on behalf of such Plan.

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

(n)(1) With respect to each of the Funds in which a Plan invests, Wells Fargo will provide the Second Fiduciary of such Plan:

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

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

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

(A) The total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid to Wells Fargo by such Fund;

(B) The total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to Wells Fargo;

(C) The average brokerage commissions per share, expressed as cents per share, paid to Wells Fargo by each portfolio of a Fund; and

(D) The average brokerage commissions per share, expressed as cents per share, paid by each portfolio of a Fund to brokerage firms unrelated to Wells Fargo.

(o) All dealings between the Plans and any of the Funds are on a basis no less

favorable to such Plans than dealings between the Funds and other shareholders holding the same class of shares as the Plans.

(p) Wells Fargo maintains, for a period of six years, in a manner that is convenient and accessible for audit and examination, the records necessary to enable the persons, described in paragraph (q) of Section II below, to determine whether the conditions of this proposed exemption have been met, except that—

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

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

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

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

(B) Any fiduciary of each of the Plans who has authority to acquire or dispose of shares of any of the Funds owned by such a Plan, or any duly authorized employee or representative of such fiduciary; and

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

(2) None of the persons described in paragraph (q)(1)(B) and (q)(1)(C) of Section II shall be authorized to examine trade secrets of Wells Fargo, or commercial or financial information which is privileged or confidential.

Section III. Definitions

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

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

(1) Any person directly or indirectly through one or more intermediaries,

controlling, controlled by, or under common control with the person.

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

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

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

(d) The term "Fund" or "Funds" means any diversified open-end investment company or companies registered under the 1940 Act for which Wells Fargo serves as investment adviser (including sub-adviser), and may also provide custodial or other services as approved by such Funds.

(e) The term "net asset value" means the amount for purposes of pricing all purchases and redemptions through the Conversion Transactions, calculated by dividing the value of all securities, determined by a method adopted by the Fund's board of directors in accordance with the 1940 Act, and other assets belonging to each of the portfolios in such Fund, less the liabilities charged to each portfolio, by the number of outstanding shares.

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

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

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

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

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

If an officer, director, partner, or employee of Wells Fargo (or a relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (A) the choice of the Plan's investment

manager/adviser, (B) the approval of any purchase or redemption by the Plan of shares of the Funds through a Conversion Transaction, and (C) the approval of any change of fees charged to or paid by the Plan, in connection with any of the transactions described in Sections I and II above, then paragraph (g)(2) of Section III above, shall not apply.

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

(i) The term "Termination Form" means the form supplied to the Second Fiduciary, at the times specified in paragraphs (j), (k) and (m) of Section II above, which expressly provides an election to the Second Fiduciary to terminate on behalf of the Plans the authorization, described in paragraph (g) of Section II. Such Termination Form may be used at will by the Second Fiduciary to terminate such authorization without penalty to the Plans and to notify Wells Fargo in writing to effect such termination by redeeming the shares of the Fund held by the Plans requesting termination by the close of the business day following the date of receipt by Wells Fargo, either by mail, hand delivery, facsimile or other available means at the option of the Second Fiduciary, of written notice of such request for termination; provided that if, due to circumstances beyond the control of Wells Fargo, the redemption cannot be executed within one business day, Wells Fargo shall have one additional business day to complete such redemption.

EFFECTIVE DATE: This exemption is effective as of September 16, 1996 with respect to the Conversion Transactions described in Section I and effective as of the date of the grant with respect to Transactions Involving the Receipt of Fees, as described in Section II.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on January 27, 1999 at 64 FR 4132.

Written Comments

The Department received one written comment with respect to the Notice and no requests for a public hearing. The comment was submitted by Wells Fargo and suggested several modifications to the conditional language of the Notice and the Summary of Facts and

Representations (the Summary). Presented below are a discussion of Wells Fargo's comments and the Department's responses to such comments.

1. *Section I(c) of the Notice.* On page 4133 of the Notice, Section I(c) states that all or a *pro rata* portion of the assets of a CIF or all or a *pro rata* portion of the assets of the Plans that are held by Wells Fargo in any capacity as fiduciary on behalf of such Plans are transferred in-kind to the Funds in exchange for shares of such Funds. Wells Fargo requests that the Department amend Section I(c) of the Notice by inserting the phrase "or any separate portfolio thereof" after the phrase "all or a *pro rata* portion of the assets of the Plan." Wells Fargo states that it may serve as the directed trustee of a Plan which has a variety of investment portfolios that are managed by different investment managers. Under such circumstances, Wells Fargo notes that the Plan fiduciaries may exchange one or more, but less than all, of such portfolios. Wells Fargo believes the foregoing change to Section I(c) would clarify that the Plan can make the change without exchanging all shares that are held in a portfolio and managed by the other investment manager.

In addition, Wells Fargo notes that on page 42835 of PTE 97-41 (62 FR 42830, August 8, 1997), Section II(c) contains an exception to the requirement that assets transferred in a Conversion Transaction must constitute a *pro rata* portion of the CIF assets. Under this exception, which is applicable for Conversion Transactions occurring after August 8, 1997, if the CIF holds small positions that are not easily divisible, the securities will be allocated such that the transfer will include a *pro rata* share in the value of all such securities in the aggregate rather than in each security individually.

Specifically, Section II(c) of PTE 97-41 permits this type of allocation to be made for fixed-income securities if the following conditions are met:

- The aggregate value of such securities does not exceed one (1) percent of the total value of the CIF assets immediately prior to the transfer; and
- The securities have the same coupon rate and maturity and, at the time of the transfer, the same ratings from nationally recognized statistical ratings agencies.

Consistent with Section II(c) of PTE 97-41, Wells Fargo requests that the following sentence be added to Section I(c) of the Notice in order to allow a CIF (or, for that matter, a Plan) to avoid transaction costs associated with

liquidating small positions in fixed-income securities prior to maturity:

* * * Notwithstanding the foregoing, the allocation of fixed-income securities held by a CIF among Plans on the basis of each Plan's *pro rata* share of the aggregate value of such securities will not fail to meet the requirements of this subsection if—

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

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

In response to these comments, the Department has made the changes suggested by Wells Fargo.

2. *Section I(e) of the Notice.* On page 4133 of the Notice, Section I(e) provides that assets that are transferred by a Plan or a CIF to a Fund are to be valued using sources independent of Wells Fargo in accordance with Rule 17a-7. In particular, the last sentence of Section I(e) describes the procedures currently required under Rule 17a-7 of the 1940 Act for the valuation of Plan or CIF assets that are transferred in-kind to a Fund.

Wells Fargo requests that the last sentence of Section I(e) be deleted in order to make the condition consistent with PTE 97-41.* Wells Fargo believes that the reference to Rule 17a-7 should provide flexibility to permit the use of new pricing systems which are approved by the SEC by amendment to Rule 17a-7 without having the parties request an amendment to the exemption.

In response to this comment, the Department concurs with this clarification and has made the requested change.

3. *Sections I(g), I(h)(2) and I(i) of the Notice.* On page 4133 of the Notice, Section I(g) describes the written authorization that is to be given by the Second Fiduciary with respect to a Conversion Transaction. Also on page 4133 of the Notice, Sections I(h)(2) and I(i) provide for the types of confirmation statements that Wells Fargo is to send the Second Fiduciary of a Plan by regular mail.

* On page 58229 of the Preamble to the Notice underlying PTE 97-41 (61 FR 58224, November 13, 1996), the Department noted that the requirement that valuations of plan assets transferred from a CIF to a Fund be determined in accordance with Rule 17a-7 under the 1940 Act to provide flexibility for future transactions. Thus, if Rule 17a-7 was subsequently amended by the SEC to accommodate new pricing systems, the Department observed that Banks could take advantage of the amended Rule without having to request an amendment to the class exemption.

Wells Fargo requests that these conditions be amended to permit personal delivery of the foregoing information and the use of facsimile or electronic mail. With respect to Section I(g) of the Notice, Wells Fargo suggests that the following new sentence be added as a second sentence:

In addition, the Second Fiduciary must give prior approval, in writing, for the receipt of confirmation statements described below in paragraph (h)(2) and (i) by facsimile or electronic mail if the Second Fiduciary elects to receive such statements in that form.

Further, with respect to Sections I(h)(2) and I(i) of the Notice, Wells Fargo suggests that the phrase "or personal delivery or, if applicable, by facsimile or electronic mail" be added after the term "regular mail."

In response, the Department concurs with the requested clarifications and has made the changes suggested by Wells Fargo.

4. *Representation 1 of the Summary.* On page 4136 of the Summary, Representation 1 describes Wells Fargo, its parent, Wells Fargo & Company (WFC), and their various affiliates. Wells Fargo states that in a merger of equals effective November 2, 1998, WFC was merged with and into a wholly owned subsidiary of Norwest Corporation. In addition, Wells Fargo states that the name of the combined company is "Wells Fargo & Company."

To reflect these factual updates, the Department has revised Representation 1 by adding the following new, third paragraph:

Effective as of November 2, 1998, WFC was merged with and into a wholly owned subsidiary of Norwest Corporation. The name of the combined company is "Wells Fargo & Company."

For further information regarding the Wells Fargo's comment letter or other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10468) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Accordingly, after giving full consideration to the entire record, including the written comments provided by Wells Fargo, the Department has made the aforementioned changes to the Notice and the Summary and has decided to

grant the exemption subject to the modifications or clarifications described above.

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

MONY Life Insurance Company (MONY)

Located in New York, NY

[Prohibited Transaction Exemption 99-14; Exemption Application No. D-10661]

Exemption

Section I. Covered Transactions

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective November 16, 1998, to the (1) receipt of common stock of the MONY Group, Inc. (the Holding Company), the parent company of MONY, or (2) the receipt of cash or policy credits, by or on behalf of any eligible policyholder (the Eligible Policyholder) of MONY which is a plan (the Plan), subject to applicable provisions of the Act and/or the Code, other than an Eligible Policyholder which is a Plan maintained by MONY or an affiliate for its employees, in exchange for such Eligible Policyholder's membership interest in MONY, in accordance with the terms of a plan of reorganization (the Plan of Reorganization) adopted by MONY and implemented pursuant to section 7312 of the New York Insurance Law.

This exemption is subject to the conditions set forth below in Section II.

Section II. General Conditions

(a) The Plan of Reorganization is implemented in accordance with procedural and substantive safeguards that are imposed under New York Insurance Law and is subject to review and approval by the Superintendent of Insurance of the State of New York (the Superintendent).

(b) The Superintendent reviews the terms of the options that are provided to Eligible Policyholders of MONY as part of such Superintendent's review of the Plan of Reorganization, and the Superintendent only approves the Plan of Reorganization following a determination that such Plan of Reorganization is fair and equitable to all Eligible Policyholders and is not detrimental to the public.

(c) Each Eligible Policyholder has an opportunity to vote to approve the Plan of Reorganization after full written

disclosure is given to the Eligible Policyholder by MONY.

(d) One or more independent fiduciaries of a Plan that is an Eligible Policyholder receives Holding Company stock, cash or policy credits pursuant to the terms of the Plan of Reorganization and neither MONY nor any of its affiliates exercises any discretion or provides investment advice with respect to such acquisition.

(e) After each Eligible Policyholder entitled to receive stock is allocated at least 7 shares of Holding Company stock, additional consideration is allocated to Eligible Policyholders who own participating policies based on actuarial formulas that take into account each participating policy's contribution to the surplus of MONY which formulas have been reviewed by the Superintendent.

(f) All Eligible Policyholders that are Plans participate in the transactions on the same basis within their class groupings as other Eligible Policyholders that are not Plans.

(g) No Eligible Policyholder pays any brokerage commissions or fees in connection with their receipt of Holding Company stock or in connection with the implementation of the commission-free sales and purchase programs.

(h) All of MONY's policyholder obligations remain in force and are not affected by the Plan of Reorganization.

Section III. Definitions

For purposes of this exemption:

(a) The term "MONY" means "MONY Life Insurance Company" and any affiliate of MONY as defined in paragraph (b) of this Section III.

(b) An "affiliate" of MONY includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with MONY. (For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

(2) Any officer, director or partner in such person, and

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

(c) The term "Eligible Policyholder" means a policyholder who is eligible to vote and to receive consideration under MONY's Plan of Reorganization. Such Eligible Policyholder is a policyholder of the mutual insurer on the date the Plan of Reorganization is adopted by the Board of Trustees of MONY and on the effective date of the reorganization.

(d) The term "policy credit" means:

(1) Dividend additions under an

individual participating nonvariable annuity contract, (2) an increase in accumulation value of an individual nonparticipating nonvariable annuity contract, (3) an increase in the accumulation value in the separate investment account under an individual participating variable annuity contract, (4) an increase in the accumulation value in the general account investment option under an individual nonparticipating variable annuity contract or individual nonparticipating variable life insurance policy, (5) dividend deposits or dividend additions, as appropriate (depending on the selection of the underlying policy), (6) an increase in fund value on an individual nonparticipating nonvariable life insurance policy, (7) an extension of the expiry date on a policy which is in force as extended term life insurance pursuant to a non-forfeiture provision of a life insurance policy, or (8) an increase in the accumulation account value in the general account investment option under a group annuity contract or certificate issued thereunder.

EFFECTIVE DATE: This exemption is effective as of November 16, 1998, the date of MONY's Plan of Reorganization.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) that was published December 16, 1998 at 63 FR 69314.

Written Comments

The Department received three written comments with respect to the Notice. Two comments were submitted by Plan participants who are Eligible Policyholders of MONY. The third comment was submitted by MONY.

The first commenter expressed general approval of the Notice and the form of consideration that he would be receiving as a result of MONY's Plan of Reorganization. The commenter also endorsed the idea that his Plan policy would continue to contribute to the financial success of MONY.

The second commenter indicated that her only concern was that her investment account with MONY would remain unaffected by the Plan of Reorganization. However, after discussing this matter with a Department representative who explained that the exemption was predicated on the requirement that all of MONY's policyholder obligations would remain in force and would not be affected by the Plan of Reorganization, the commenter decided to withdraw her comment.

The third commenter, MONY, suggested certain technical and clarifying changes to the Notice and the Summary of Facts and Representations (the Summary). In addition, MONY was provided with comments from the New York State Insurance Department (the New York Department), whose comments were, in turn, incorporated into the comments submitted by MONY.

Following is a discussion of the comments received from MONY and the Department's responses with respect thereto.

1. *Section I.* On page 69314 of the Notice, Section I describes MONY Group, Inc. as a subsidiary of MONY. MONY notes that while MONY Group was a subsidiary of MONY at the time MONY filed its exemption application, on the effective date of the reorganization (November 16, 1998), the MONY Group became the parent company of MONY when MONY issued all of its common stock to the MONY Group. In this regard, MONY suggests that the phrase "a subsidiary" be deleted and replaced with "the parent company."

The Department concurs with the requested modification and has revised Section I, accordingly.

Also on page 69314 of the Notice, Section I uses the phrase "employee benefit plans" to describe the Plans that are covered by the exemption. MONY wishes to clarify that it may be a disqualified person with respect to arrangements involving individual retirement accounts which are described in section 4975(e)(1) of the Code but which may not constitute "employee benefit plans" as that term is defined under the Act and the Department's regulations. Therefore, MONY suggests that the exemption use the phrase "Plan subject to ERISA or section 4975(e) of the Code."

The Department has considered this comment and concurs basically with MONY's clarification. However, for the sake of consistency in the use of defined terms in the Notice as well as for parallelism, the Department has decided to revise the phrase to state "Plan subject to applicable provisions of the Act and/or the Code."

2. *Section II(a).* On page 69314 of the Notice, Section II(a) states, in pertinent part, that the Plan of Reorganization is subject to review and supervision by the Superintendent of Insurance of the State of New York (the Superintendent). MONY suggests that the word "supervision" be replaced with the word "approval" because the New York Department believes the word "approval" more accurately reflects the

role of the Superintendent with respect to MONY's Plan of Reorganization.

The Department concurs and has modified Section II(a), accordingly.

3. *Section II(d)*. On page 69315 of the Notice, Section II(d) states that an Eligible Policyholder may elect to receive Holding Company stock, cash or policy credits pursuant to the Plan of Reorganization provided the decision is made by one or more independent fiduciaries of such Plan and that neither MONY nor any of its affiliates exercises any discretion or provides investment advice with respect to such election. MONY wishes to clarify that the only election provided under its Plan of Reorganization is a cash election that is provided to certain policyholders that would otherwise receive Holding Company stock. Specifically, MONY notes that under its Plan of Reorganization, Eligible Policyholders who are allocated 75 shares or less of Holding Company stock will be provided the option to elect cash instead of stock. However, because the principal thrust of the condition is to ensure that an Eligible Policyholder's decision to receive Holding Company stock, cash or policy credits is not influenced by MONY or any of its affiliates, MONY suggests that the Department revise General Condition II(d) of the Notice to read as follows:

(d) One or more independent fiduciaries of a Plan that is an Eligible Policyholder receives Holding Company stock, cash or policy credits pursuant to the terms of the Plan of Reorganization and neither MONY nor any of its affiliates exercises any discretion or provides investment advice with respect to such acquisition.

The Department concurs and has modified Section II(d), accordingly.

4. *Section II(e)*. On page 69315 of the Notice, Section II(e) provides that the actuarial formulas developed by MONY to determine the allocation of stock among Eligible Policyholders have been approved by the Superintendent. MONY suggests that the word "approved" be replaced by the word "reviewed" because the New York Department believes the word "reviewed" more accurately reflects their role with respect to the allocation methodology, which the New York Department did not specifically approve.

The Department concurs and has modified Section II(e), accordingly.

5. *Section III(d)*. On page 69315 of the Notice, Section III(d) defines the term "policy credit" to mean "an increase in the accumulation account value (to which no surrender or similar charges are applied) in the general account or an increase in an dividend accumulation on a policy." To make the definition

more comprehensive, MONY suggests the following replacement definition of the term:

(d) "Policy credit" means (1) dividend additions under an individual participating nonvariable annuity contract, (2) an increase in accumulation value of an individual nonparticipating nonvariable annuity contract, (3) an increase in the accumulation value in the separate investment account under an individual participating variable annuity contract, (4) an increase in the accumulation value in the general account investment option under an individual nonparticipating variable annuity contract or individual nonparticipating variable life insurance policy, (5) dividend deposits or dividend additions, as appropriate (depending of the selection of the underlying policy), (6) an increase in fund value on an individual nonparticipating nonvariable life insurance policy, (7) an extension of the expiry date on a policy which is in force as extended term life insurance pursuant to a non-forfeiture provision of a life insurance policy, or (8) an increase in the accumulation account value in the general account investment option under a group annuity contract or certificate issued thereunder.*

In addition, MONY suggests that Footnote 2, which appears on page 69315 of the Notice, be placed at the end of the revised definition of the term "policy credit" where the asterisk is shown above.

The Department concurs with the revisions suggested by MONY and has made the requested changes.

6. *Representation 4*. On page 69316 of the Summary, the second sentence of the fourth paragraph of Representation 4 states that MONY hired the actuarial firm of Tillinghast Towers-Perrin (TT-P) to conduct the actuarial review of the Plan of Reorganization. MONY wishes to clarify that because the Superintendent actually selected the actuarial firm of TT-P to assist him in his actuarial review of the Plan of Reorganization, the word "MONY" should be deleted and replaced with the term "the Superintendent."

The Department concurs with this clarification.

7. *Representation 6*. On page 69316 of the Summary, the second sentence of the second paragraph of Representation 6 states that as a result of the reorganization, MONY's charter and by-laws were extinguished in accordance with New York Insurance Law. MONY wishes to clarify that it was required to amend and restate its charter and by-laws to reflect the new organizational structure of the company. Therefore, it suggests that the word "extinguished" be replaced with the words "amended and restated."

In response, the Department concurs with the requested modification.

8. *Footnote 9*. On page 69317 of the Summary, Footnote 9 of Representation 8 states that (as a result of MONY's demutualization) both the fixed and variable components of an insurance policy will be provided in exchange for the policyholder's membership interests. For purposes of clarification, MONY requests that the term "insurance policy" be deleted and replaced with the word "consideration."

In response to this change, the Department concurs that Footnote 9 should have read as follows:

⁹ MONY notes that both the fixed and variable components of consideration will be provided in exchange for the policyholder's membership interests.

9. *Representation 9*. On page 69317 of the Summary, the first sentence of the first paragraph of Representation 9 states that amounts to be distributed to Eligible Policyholders that are Plans will be held in an escrow or similar arrangement in the event that the Department does not provide exemptive relief prior to the date of the reorganization. MONY wishes to point out that its Plan of Reorganization and exemption application provide that such amounts "may" be held in an escrow or similar arrangement pending the finalization of the exemption and that subsequent text in Representation 9 reflects the fact that the escrow arrangement may be determined to be unnecessary if the proposed exemption specifies the date of reorganization as the effective date of the exemption.

The Department concurs with this modification.

MONY also wishes to point out that after the Department issued the Notice specifying the date of reorganization as the effective date of the exemption, the New York Department did not require that amounts distributed to Eligible Policyholders be held in an escrow or similar arrangement. As such, MONY represents that the required distributions to the Plans have taken place.

10. *Representation 10*. On page 69317 of the Summary, the first sentence of the first paragraph of Representation 10 states that MONY's Plan of Reorganization provides for the establishment of a commission-free sales program (the Program) whereby Stock Eligible Policyholders who receive between 25 and 99 shares of Holding Company stock will be given the opportunity to sell their Holding Company stock on the open market within 60 days prior to the commencement date of the program. While this representation is generally accurate, MONY notes that it, subject to

the New York Department's review, has determined that policyholders who receive up to 99 shares may participate in the Program. In addition, MONY has determined that the Program will be offered for three months commencing August 17, 1999 and ending November 17, 1999, which date may be extended by MONY with the approval of the Superintendent.

For further information regarding the comments or other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10661) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Accordingly, after giving full consideration to the entire record, including the written comments received, the Department has decided to grant the exemption subject to the modifications and clarifications described above.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady 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 or disqualified person from certain other provisions to which the exemptions 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an

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

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 30th day of March, 1999.

Ivan Strasfeld,

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

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BILLING CODE 4510-29-P

DEPARTMENT OF LABOR

Office of the Assistant Secretary for Veterans Employment and Training Service

Funding for Fiscal Year (FY) 1999; Federal Contractor Award Information System (FCAIS)

AGENCY: Office of the Assistant Secretary for Veterans' Employment and Training Service (OASVET), DOL.

ACTION: Notice.

SUMMARY: The Department of Labor invites proposal for one new award in FY 1999 as authorized under Title 38 United States Code, Section 4212. These awards will allow for the transition of the current FCAIS system to an efficient, interactive, and user-friendly data information system that will collect data from the Commerce Business Daily (CBD) and the Federal Procurement Data System (FPDS).

DATES: Applications will be accepted commencing with the issuance of this notice. The closing date for receipt of application is May 10, 1999, at 4:45 p.m. (Eastern Time) at the address below.

COPIES OF THE APPLICATION PACKAGE: Ms. Lisa Harvey, Procurement Services Center, 200 Constitution Ave., NW, Room N-5416, Washington, DC 20210. Requests by telephone and by fax will not be honored.

SUPPLEMENTARY INFORMATION: The Office of the Assistant Secretary for Veterans' Employment and Training announces the availability of \$249,000 to allow for the transition of the current FCAIS system to an efficient, interactive, user-friendly data information system, and that will collect data from the Commerce Business Daily (CBD) and the Federal Procurement Data System (FPDS). The successful applicant will provide information received from the CBD and FPDS to State Employment Security Agencies (SESAs), and Workforce Development Boards (WDBs), on current and new Federal contracts for job development and job listing purposes. This information is used by SESA and WDB staff to advise covered Federal contractors of their obligations to consider hiring special disabled, Vietnam-era veterans, and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. The grant recipient will be required to:

a. Collect and maintain a data base of CBD and FPDS contract award information and disseminate that information to SESA and WDB staff on at least some monthly bases.

b. Maintain, store, and update a database of Federal contractors as new contracts are awarded, and distribute this data to state service delivery agencies in the media and format requested.

c. Answer question by telephone about the FCAIS, and make referrals to VETS Staff, and State local service delivery offices and personnel.

d. Identify Federal contractor award needs and develop a system that satisfies DVOPs and LVERs staff requirements on Federal contractors, subcontractors and other employers listing with the State employment service work or workforce development local office.

The grantee will need to develop a nationally accessible system that will enable State staff to verify contractor information, and advise VETS when changes are needed. It is expected that when this new system is developed and approved, the grantee will no longer be responsible for maintaining the current FCAIS.

Eligible applicants must be State or local governments, commercial, or nonprofit entities capable of interfacing with the USDOL, all SESAs and WDBs. Grantees with slow start up of the FY 1999 program will be funded at less than total grant award.

However, the Office of the Assistant Secretary reserves the right not to fund a grantee who is performing poorly and