

Occupational Safety and Health Administration is soliciting comments concerning the proposed extension of the information collection request for the Access to Employee Exposure and Medical Records Standard 29 CFR 1910.1020. The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

**DATES:** Comments must be submitted on or before August 22, 1997.

**ADDRESSES:** Comments are to be submitted to the Docket Office, Docket No. ICR-97-19, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW, Washington, DC 20210, telephone (202) 219-7894.

Written comments limited to 10 pages or fewer may also be transmitted by facsimile to (202) 219-5046.

**FOR FURTHER INFORMATION CONTACT:** Contact Todd Owen, Directorate of Health Standards Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3647, 200 Constitution Avenue, NW, Washington, DC 20210. Telephone: (202) 219-7075. Copies of the referenced information collection request are available for inspection and copying in the Docket Office and will be mailed to persons who request copies by telephoning Barbara Bielaski at (202) 219-8076 or Todd Owen at (202) 219-7075. For electronic copies of the Information Collection Request on Access to Employee Exposure and Medical Records contact OSHA's WebPage on Internet at <http://www.osha.gov/> and click on standards.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The purpose of the Access to Employee Exposure and Medical

Records Standard and its information collection requirements are to provide employees and their designated representatives the right to access relevant exposure and medical records, and to provide representatives of the Assistant Secretary the right of access to these records in order to fulfill responsibilities under the Occupational Safety and Health Act. Access by employees, their representatives, and the Assistant Secretary is necessary to yield both direct and indirect improvements in the detection, treatment, and prevention of occupational disease. Each employer is responsible for assuring compliance with this standard, but the activities involved in complying with the access to medical records provisions can be carried out, on behalf of the employer, by the physician or other health care personnel in charge of employee medical records.

##### II. Current Actions

This action requests an extension of the current Office of Management and Budget approval of the paperwork requirements in the Access to Employee Exposure and Medical Records Standards.

Extension is necessary to continue to allow employee, employee designated representatives and OSHA access to exposure and medical records.

*Type of Review:* Extension.

*Agency:* Occupational Safety and Health Administration.

*Title:* Access to Employee Exposure and Medical Records 29 CFR 1910.1020.

*OMB Number:* 1218-0065.

*Agency Number:* Docket Number ICR-97-19.

*Affected Public:* Business or other for-profit, Federal government, State and Local governments.

*Total Respondents:* 747,874.

*Frequency:* On occasion.

*Total Responses:* 3,068,284.

*Average Time per Response:* 0.15 hour.

*Estimated Total Burden Hours:* 448,886.

*Total Annualized capital/startup costs:* 0

Total initial annual costs (operating/maintaining systems or purchasing services): \$10.00 (for shipping records to the National Institute for Occupational Safety and Health) Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request. The comments will become a matter of public record.

Dated: June 17, 1997.

**Adam M. Finkel,**

*Director, Directorate of Health Standards Programs.*

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#### DEPARTMENT OF LABOR

##### Pension and Welfare Benefits Administration

[Application No. D-10346, et al.]

##### Proposed Exemptions; 1st Source 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 restriction of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

##### Written Comments and Hearing Requests

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

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

#### 1st Source Bank Located in South Bend, Indiana

[Application No. D-10346]

#### 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).<sup>1</sup>

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

If the exemption is granted the restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section

4975(c)(1) (A) through (F) of the Code, shall not apply, effective September 19, 1996, to the in-kind transfer to separate series of an open-end investment company registered under the Investment Company Act of 1940 (the Funds) to which 1st Source Bank or any of its affiliates (collectively, the Bank) serves as investment advisor, and may provide other services, of the assets of various employee benefit plans (the Plans) that are held in certain collective investment funds (the CIFs) maintained by the Bank or otherwise held by the Bank as trustee, investment manager, or in any other capacity as fiduciary on behalf of the Plans, in exchange for shares of such Funds; provided that the following conditions are met:

(A) A fiduciary (the Second Fiduciary) who is acting on behalf of each affected Plan and who is independent of and unrelated to the Bank, as defined in paragraph (G) of Section III below, receives in advance of the investment by the Plan in any of the Funds a full and detailed written disclosure of information concerning such Fund, including, but not limited to:

(1) A current prospectus for each portfolio of each of the Funds in which such Plan is considering investing,

(2) A statement describing the fees for investment management, investment advisory, or other similar services, any fees for secondary services (Secondary Services), as defined in paragraph (H) of section III below, and all other fees to be charged to or paid by the Plan and by such Funds to the Bank, including the nature and extent of any differential between the rates of such fees,

(3) The reasons why the Bank may consider such investment in the Funds to be appropriate for the Plan,

(4) A statement describing whether there are any limitations applicable to the Bank 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 this proposed exemption and/or a copy of the final exemption;

(B)(1) With respect to each of the Funds in which a Plan invests, the Bank 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 the Bank;

(2) On the basis of the information described above in paragraph (A) of this section I, the Second Fiduciary authorizes in writing the in-kind transfer of assets of the Plans in exchange for shares of the Funds, the investment of such assets in corresponding portfolios of the Funds, and the fees received by the Bank in connection with its services to the Funds, such authorization by the Second Fiduciary to be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act;

(C) No sales commissions or other fees are paid by the Plans in connection with the purchase of Fund shares through the in-kind transfer of Plan assets in the CIFs, and no redemption fees are paid in connection with the sale of such shares by the Plans to the Fund;

(D) All or a *pro rata* portion of the assets of the Plans held in the CIFs or all or a *pro rata* portion of the assets of the Plans held by the Bank in any capacities as fiduciary on behalf of such Plans are transferred in-kind to the Funds in exchange for shares of such Funds;

(E) The Plans receive shares of the Funds that have a total net asset value that is equal to the value of the assets of the Plans or the CIFs exchanged for such shares on the date of transfer, based on the current market value of the assets of the Plans or the CIFs;

(F) The current market value of the assets of the Plans or the CIFs to be transferred in-kind in exchange for shares is determined in a single valuation performed in the same manner and at the close of business on the same day, using independent sources in accordance with the procedures set forth in Rule 17a-7(b) (Rule 17a-7), issued by the Securities and Exchange Commission under the Investment Company Act of 1940, and the procedures established by the Funds pursuant to Rule 17a-7 for the valuation of such assets. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the day preceding the CIF or Plan transfers determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of the Bank;

<sup>1</sup> For purposes of this exemption, references to specific provisions of title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(G) For all conversion transactions that occur after the date of publication in the **Federal Register** of a notice proposing this exemption: Not later than thirty (30) days after completion of each in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Funds, the Bank sends by regular mail to the Second Fiduciary, as defined in paragraph (G) of Section III below, a written confirmation which contains the following information:

(1) 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 Investment Company Act of 1940;

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

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

(H) No later than ninety (90) days after completion of each in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Funds, the Bank sends by regular mail to the Second Fiduciary, who is acting on behalf of each affected Plan and who is independent of and unrelated to the Bank, as defined in paragraph (G) of section III below, a written confirmation that contains the following information:

(1) The number of CIF units held by each affected Plan immediately before the transfer, 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 each affected Plan following the transfer, the related per share net asset value, and the aggregate dollar value of the shares received;

(I) The combined total of all fees received by the Bank for the provision of services to the Plans, and in connection with the provision of services to any of the Funds in which the Plans may invest, are not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act;

(J) The Bank does not receive any fees payable pursuant to Rule 12b-1 under the Investment Company Act of 1940 in connection with the transactions described herein;

(K) The Plans are not sponsored by the Bank;

(L) All dealings between the Plans and any of the Funds are on a basis no less favorable to the Plans than dealings between the Funds and other shareholders holding the same class of shares as the Plans; and

(M) The requirements of Prohibited Transaction Class Exemption 77-4 (42 FR 18732, April 8, 1977) are met with respect to all arrangements under which

investment advisory fees are paid to the Bank directly or indirectly by Plans with assets invested in the Funds.

#### *Section II—General Conditions*

(A) The Bank maintains for a period of six years the records necessary to enable the persons, as described in paragraph (B) of this section II, to determine whether the conditions of this exemption have been met, except that:

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

(2) No party in interest, other than the Bank, shall be subject to the civil penalty that may be assessed under section 503(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (B) of this section;

(B)(1) Except as provided in paragraph (B)(2) of this section II and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (A) 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 or the Internal Revenue Service,

(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 paragraphs (B)(1)(b) and (B)(1)(c) of this section II shall be authorized to examine trade secrets of the Bank or commercial or financial information which is privileged or confidential.

#### *Section III—Definitions*

For purposes of this exemption:

(A) The term "Bank" means 1st Source Bank and any affiliate of the Bank, 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 Investment Company Act of 1940 for which the Bank serves as investment 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 sales calculated by dividing the value of all securities, determined by a method as set forth in a Fund's prospectus and statement of additional information, and other assets belonging to each of the portfolios in such Fund, less the liabilities charged to each portfolio, by the number of outstanding shares.

(F) The term "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 sister.

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

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

(2) Such Second Fiduciary, or any officer, director, partner, employee, or relative of such Second Fiduciary is an officer, director, partner, or employee of the Bank (or is a relative of such person), or

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

If an officer, director, partner, or employee of the Bank (or a relative of such persons) is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of the Plan's investment manager/advisor, (ii) the approval of any purchase or sale by the Plan of shares of the Funds, and (iii) the approval of any change of fees charged

to or paid by the Plan, in connection with any of the transactions described in section I 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 the Bank to the Funds, including but not limited to custodial, accounting, brokerage, administrative or any other service.

**EFFECTIVE DATE:** This exemption, if granted, will be effective as of September 19, 1996.

### Summary of Facts and Representations

1. The Bank is a state chartered banking association having its principal office in South Bend, Indiana. The Bank has total nontrust assets of approximately \$1.74 billion and trust assets of approximately \$1.17 billion. The 1st Source Corporation, with headquarters in South Bend, owns all of the outstanding stock of the Bank.

2. The Plans involved in the transactions for which the Bank requests exemptive relief are numerous plans for which the Bank has acted or will act as fiduciary and has exercised or will exercise investment discretion with respect to all or a portion of the assets of such Plans.<sup>2</sup> For this reason, specific information relating to each individual Plan does not appear in the application. However, it is anticipated that the Plans include or will include various employee benefit plans, as defined by section 3(3) of the Act, and certain plans or trusts as defined by section 4975(e)(1) of the Code. These Plans are sponsored or maintained by parties unrelated to the Bank<sup>3</sup> and include, among others, pension, profit sharing, stock bonus, and other retirement plans qualified for tax purposes under section 401(a) of the Code, voluntary employees' beneficiary associations and other welfare benefit plans, and individual retirement accounts and simplified employee pension plans described in section 408 of the Code.

The Bank represents that, as fiduciary, it exercises investment discretion with respect to all or a portion of the assets of approximately 443 such Plans having total assets under management by the Bank of approximately \$443 million. The Bank receives compensation for serving as fiduciary with respect to these Plans in accordance with standard published fee schedules or as otherwise

<sup>2</sup>The Department herein is not proposing relief for transactions afforded relief by section 404(c) of the Act.

<sup>3</sup>The Department herein is not proposing relief for transactions involving any plan sponsored by the Bank or its affiliates.

agreed upon by the Bank and the sponsors of such Plans.<sup>4</sup> The Bank represents that it generally receives separate compensation for investment management services and for administrative services other than investment management. These administrative services include, among others, acting as custodian of the Plan's assets, maintaining Plan records, preparing periodic reports concerning the status of the Plan and its assets, and accounting for Plan contributions and benefit distributions and other receipts and disbursements. Depending on the terms of the Plan's governing documents, the Bank's compensation is paid either from the Plan's assets or by its sponsor.

3. The transactions for which the Bank requests exemptive relief involve the Funds, each which constitutes a separate investment portfolio or a series of portfolios having a separate prospectus and representing a distinct investment vehicle. In the aggregate, the Funds comprise an Ohio business trust registered as an open-end investment company under the Investment Company Act of 1940 (the 1940 Act). The Funds currently include a diversified equity fund, an income equity fund, a special equity fund and an intermediate fixed income fund, along with the a money market portfolio. Additional series may be established in the future, and the existing portfolios may be modified, reorganized, or terminated.

4. BISYS Fund Services Limited Partnership, located in Columbus, Ohio (BISYS), acts as the administrator of the Funds and the distributor of shares of the Funds. BISYS Fund Services, Inc. (BISYS Services), an affiliate of BISYS, is the transfer agent and shareholder servicing agent of the Funds. The Bank represents that BISYS and BISYS Services are unrelated to the Bank. The Funds pay a monthly fee to BISYS for its services. Although the Funds have adopted a plan of distribution in accordance with Rule 12b-1 under the 1940 Act, such plan relates only to retail shareholders and the Bank represents that the Funds do not currently pay any 12b-1 fees to any entity. When sale commissions or "loads" or redemption fees are charged in connection with purchases or sales of Fund shares, the

<sup>4</sup>The Department expresses no opinion as to whether the provision of services by the Bank or its affiliates to the Plans satisfies the requirements for statutory exemption, as set forth in section 408(b)(2) of the Act and 29 CFR 2550.408(b)(2) of the Department's regulation. To the extent that such provision of services to the Plan by the Bank or its affiliates does not satisfy the requirements of section 408(b)(2) of the Act, the Department, herein, is offering no relief.

Funds implement procedures which exempt the Plans from any such charges. The Bank represents, and the conditions of this proposed exemption require, that in the event the Funds pay any such fees in the future, no portion of such fees will be paid, directly or indirectly to the Bank or any of its affiliates in connection with the acquisition or holding of Fund shares by any Plan with respect to which the Bank or any of its affiliates acts as a fiduciary.

5. The Bank, through the 1st Source Trust Investment Division, acts as investment adviser to the Funds. The Bank receives compensation from the Funds or from BYSIS or BYSIS Services for the services provided to the Funds, and expects to receive compensation for any additional services it may provide in the future.<sup>5</sup> The Bank's compensation is computed daily and paid monthly in accordance with various agreements between the Bank and the Funds, BYSIS, or BYSIS Services. These agreements are approved by the trustees of the Funds and by the shareholders of the Funds. The Fund trustees will also approve any changes in the compensation paid to the Bank for services rendered with respect to the Funds.

6. Investors in the Funds, including Plans, are able to purchase or sell Fund shares in accordance with the standard procedures described in the prospectus for each portfolio. In addition, the Bank makes available to Plans an automated cash management procedure (the ACMP), or "sweep" arrangement, whereby otherwise uninvested cash balances of Plan may be invested automatically overnight in the Money Market Portfolio.<sup>6</sup> Under the ACMP, the Bank's computerized system will automatically scan or "sweep" the accounts of the affected Plans as of the end of each business day to determine whether such accounts have positive or negative net cash balances. Based on this information, the system will automatically invest the cash of Plans having positive balances down to the last \$.01 in shares of the Money Market Portfolio or, in the case of Plans having negative cash balances, automatically liquidate Fund shares held by the Plan

<sup>5</sup>The Department notes that pursuant to paragraph (K) of Section I of the proposed exemption, in any compensation arrangements between the Bank and BYSIS or BYSIS Services, the Bank is prohibited from receiving any fees payable pursuant to Rule 12-b1 of the Investment Company Act of 1940 in connection with any of the transactions described herein.

<sup>6</sup>In this proposed exemption the Department is not proposing any exemptive relief for any transactions relating to the ACMP or the investments by the Plans in the Money Market Portfolio.

as necessary to eliminate the negative balance. The purchases and sales of Fund shares will be effected and posted to the accounts as of the business day following the business day on which the cash balance sweep occurs. The procedure will be fully automated, and the Bank will have no discretion with respect to the timing of the sweep. The Money Market Portfolio will be required to maintain a constant net asset value of \$1.00 per share at all times. The Bank will not charge separate or additional fees to Plans participating in the ACMP. A Plan may participate in the ACMP only with the written approval of an independent fiduciary of the Plan based on written disclosures provided by the Bank. The Bank represents that it expects that substantially all Plans served by the Bank will elect to participate in the ACMP. However, a Plan participating in the ACMP may terminate participation at any time by notifying the Bank, orally or in writing. The Bank will take the steps necessary to terminate a Plan's participation as soon as practicable after receipt of the notice. The Bank will impose no fee, charge, or penalty of any kind in connection with a Plan's termination of its participation in the ACMP.

7. The Bank represents that it maintains collective investment funds (the CIFs) in accordance with Regulation 9 promulgated by the Comptroller of the Currency (12 CFR Part 9) and Internal Revenue Service Revenue Ruling 81-100 (1981-1 C.B. 326). The Bank has decided for business reasons to discontinue certain of the CIFs. The Bank believes that the interests of the Plans are better served by the investment of Plan assets in shares of the Funds rather than through the CIFs, for a variety of reasons, summarized as follows: Each of the Funds is valued on a daily basis, and the daily valuation permits almost immediate investment of contributions to a Plan in various types of investments, maximum flexibility in transferring Plan assets from one type of investment to another, and daily redemption of Fund shares for purposes of making distributions or other disbursements under a Plan. In addition, information concerning the investment performance of each of the Funds is available in newspapers of general circulation. This allows Plan sponsors and participants to monitor Fund performance on a daily basis. As shareholders of the Funds, the Plans receive disclosures mandated by the Securities and Exchange Commission and have the opportunity to exercise voting and other shareholder rights

conferred by the 1940 Act. Finally, Fund shares may be distributed in kind to retiring or terminating participants, whereas interests in CIFs generally must be liquidated or withdrawn to effect distributions. While the CIFs are currently valued on a daily basis, the Funds offer the additional benefits of access to information on investment performance and the availability of disclosure documents.

8. The proposed exemption applies to the in-kind transfer of Plan assets from investment in the CIFs to investment in shares of the Funds, subject to the prior written authorization of an independent fiduciary. No sales commissions are paid by the Plans in connection with the in-kind transfers. All or a pro-rata portion of the assets of the Plans are transferred in-kind in exchange for shares of the Funds. The net asset value of the shares in the Funds received by the Plans equals the value of the assets transferred to the Funds on the date of transfer. In this regard, the proposed exemption requires that each Plan receive Fund shares in connection with the transfer of assets of a terminating CIF which have a net asset value that is equal to the value of the Plan's pro rata share of the CIF assets on the date of the transfer, based on the current market value of such assets as determined in a single valuation as the close of the same business day using independent sources in accordance with procedures established by the Fund which comply with Rule 17a-7 of the 1940 Act. A written confirmation of each transfer transaction is sent to each Plan involved. The proposed exemption does not apply to any receipt by the Bank of compensation for services rendered to any of the Funds where Plan assets have been invested in shares of the Funds. In this regard, with respect to the Bank's receipt of compensation from the Funds for investment advisory services, and the continued receipt of fees from the Plans for services rendered, the proposed exemption requires the Bank to meet all requirements of Prohibited Transaction Class Exemption 77-4 (PTE 77-4, 42 FR 18732, April 8, 1977). With respect to Plan assets invested in shares of the Funds, the Bank's sole compensation for investment advisory services will be the fees paid by the Funds to the Bank. The Bank represents that in accordance with PTE 77-4, no Plan will pay fees to the Bank for investment management services with respect to Plan assets invested in shares of the Fund, and that procedures are proposed which ensure this result, described as follows:

9. *Fees:* Under the current fee structure, the Bank charges the Plans, on

a quarterly basis, fees for serving as trustee (Plan-level Fees). Plan-level Fees consist of separate fees for basic administration services, such as reporting, which do not include investment advisory or management services (Admin Fees), and for discretionary investment management services (Investment Fees). The Bank also receives fees, computed and charged daily, from the Funds for investment advisory and management services rendered to the Funds (Fund-level Fees). Under the arrangements of the proposed exemption, the structure of Plan-level fees does not change. The Admin Fee is charged regardless of whether Plan assets are invested in the Funds. The Investment Fee is also charged, but only with respect to Plan assets not invested in the Funds. To the extent that Plan assets are invested in the Funds, the Bank does not charge the Investment Fee with respect to such assets. A division of the Bank, 1st Source Trust Investment Division, receives the Fund-level Fees directly from the Funds. The Bank represents that the total combined Plan-level Fees and Fund-level Fees received by the Bank do not and will not exceed "reasonable compensation" within the meaning of section 408(b)(2) of the Act.<sup>7</sup>

10. The Bank as fiduciary will not invest Plan assets in shares of the Funds unless a fiduciary of each affected Plan who is unrelated to the Bank (the Second Fiduciary) has authorized such investment. The Bank represents that the Second Fiduciary with respect to each Plan will be the Plan's administrator, sponsor, or a committee appointed by the sponsor to act as a named fiduciary of the Plan. The Bank will not be permitted to invest a Plan's assets in shares of the Funds unless the Second Fiduciary has received full written disclosures concerning the Funds and all compensation received by the Bank in connection with its services to the Funds and, based on such information, authorized the investment under the following procedures:

The Second Fiduciary of each Plan will receive a current prospectus of the Fund portfolios and a written statement describing the compensation received by the Bank in connection with its services to the Funds. The statement will describe applicable limitations, if any, on investments by the Plan in shares of the Funds. On the basis of such information, the Second Fiduciary will authorize in writing the investment

<sup>7</sup> The Department expresses no opinion as to whether the Plan-level Fees and the Fund-level Fees constitute "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

of Plan assets in shares of the Funds and the compensation received by the Bank. The authorization will be terminable at will by the Second Fiduciary, without penalty to the Plan. In the event of any termination of the authorization, the Bank will sell shares of the Funds held by the Plan within one (1) business day following receipt by the Bank of written notice of such termination, unless due to circumstances beyond the control of the Bank, the sale of such shares cannot be executed within one business day, in which case the Bank will have an additional business day to complete such sale.

The exemption also requires the Bank to make certain disclosures to the Second Fiduciary after the transfer transactions in confirmation thereof. Within 30 days after completion of each in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Funds, the Bank is required to provide the Second Fiduciary with a written confirmation of the transaction which discloses the identity of each of the assets that was valued for purposes of the transaction in accordance with Rule 17a-7(b)(4) of the Investment Company Act of 1940, the price of each such asset involved in the transaction, and the identity of each pricing service or market maker consulted in determining the value of such assets. Additionally, within 90 days after completion of each in-kind transfer of assets of the Plans or the CIFs in exchange for shares of the Funds, the Bank is required to provide the Second Fiduciary with a written confirmation of the transaction which discloses (1) the number of CIF units held by each affected Plan immediately before the transfer, 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 each affected Plan following the transfer, the related per share net asset value, and the aggregate dollar value of the shares received. The Bank represents that for the conversion transactions which have occurred prior to the publication of this proposed exemption in the **Federal Register**, all of this confirmatory information has been provided to the Second Fiduciary after the completion of each in-kind transfer of assets in exchange for shares of the Funds.

11. The Bank represents that the transactions for which the exemption is requested took place on and after September 9, 1996. Hence, the Bank requests that the exemption be effective retroactively to that date.

12. In summary, the Bank represents that the transactions described herein

will satisfy the criteria of section 408(a) of the Act for the following reasons:

(a) The Funds provide the Plans with a more effective investment vehicle than the CIFs maintained by the Bank without any increase in investment management, advisory or similar fees paid to the Bank;

(b) With respect to the transfer of a Plan's CIF assets into a Fund in exchange for Fund shares, a Second Fiduciary authorized in writing such transfer prior to the transaction only after full written disclosure of information concerning the Fund;

(c) Each Plan receives shares of a Fund in connection with the transfer of assets of a terminating CIF which have a net asset value that is equal to the value of the Plan's pro rata share of the CIF assets on the date of the transfer, based on the current market value of such assets as determined in a single valuation at the close of the same business day using independent sources in accordance with procedures established by the Fund which comply with Rule 17a-7 of the 1940 Act;

(d) No sales commissions or other fees, including any fees payable pursuant to Rule 12b-1 of the 1940 Act, are paid by a Plan in connection with the purchase of Fund shares through the in-kind transfer of CIF assets;

(e) The Plans will not pay any "loads", redemption fees or sales commissions charged by the Funds in connection with the purchases or sales of Fund shares;

(f) The Bank will provide ongoing disclosures to Second Fiduciaries of the Plans to verify the fees paid to the Bank and its affiliates by the Fund; and

(g) All dealings by or between the Plans and the Fund have been and will remain on a basis which is at least as favorable to the Plans as such dealings with other shareholders of the Fund.

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

**John Hancock Mutual Life Insurance Company (JH), Located in Boston, Massachusetts**

[Application Nos. D-10416-10420]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions

resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the: (1) The acquisition by a separate account maintained by JH (the FPGT Account) from Willamette Industries, Inc. (Willamette) of certain oil and gas rights (the Deer Creek Oil and Gas Rights), subject to existing leases (the Leases) of such rights to Enerfin Resources Northwest Limited Partnership (Enerfin), a party in interest with respect to the plans invested in the FPGT Account; and (2) the continuation of the Leases following the acquisition by the FPGT Account, provided the following conditions are satisfied: (a) As part of its decision to enter into the separate account contract establishing the FPGT Account, an independent fiduciary determines that the acquisition of the Deer Creek Oil and Gas Rights is in the interest of the participants of the plans investing in the FPGT Account and that the price paid for the rights is no more than the fair market value of such rights; (b) an independent fiduciary determines that the continuation of the Leases is in the best interests of the FPGT Account; and (c) an independent fiduciary will monitor the performance of Enerfin under the Leases, as well as any proposed modifications or renewals of the Leases, and will take such steps as are necessary to protect the interests of the FPGT Account with respect to the Leases.

**Summary of Facts and Representations**

1. JH, a Massachusetts corporation, is a mutual life insurance company. JH offers group annuity contracts to contract holders, including retirement plans. Certain of these contracts provide that, in accordance with contract holder direction, the premiums or contributions received under these group annuity contracts will be allocated to segregated asset accounts or "separate accounts". A separate account may be established to back a group of substantially identical group annuity contracts issued to a group of unrelated customers (a "pooled separate account").

2. JH currently holds legal title to large holdings in timberland. Beneficial ownership in these assets has been allocated to a number of JH pooled and single customer separate accounts known as the "ForesTree" separate accounts. JH currently has established a total of fifteen such pooled and non-pooled ForesTree separate accounts which are invested only in timberland. Twenty contract holders currently participate in these ForesTree separate accounts. These contract holders

include both plans covered under the Act and non-ERISA governmental plans. The group annuity contracts state that JH shall be the sole owner of the ForesTree separate account assets and that JH shall have the right to control, manage and administer the account, including the sole discretion to select investments in accordance with the investment policy established by JH for the account.

3. The timberland investments allocated to the ForesTree separate accounts are managed by Hancock Natural Resource Group, Inc. (HNRG), which was established in 1995. HNRG is an indirect, wholly owned subsidiary of JH. Before 1995, HNRG was operated as a unit within JH. HNRG manages 2.2 million acres of timberland currently valued at approximately \$2.2 billion. Pursuant to an agreement with JH, HNRG is responsible for all decisions regarding the acquisition and disposition of timberland properties and for the management of the properties, including matters such as timber harvesting and reforestation, road building and maintenance, leases of interests to third parties, acquisition of insurance and payment of taxes. On-site work is performed by independent forest managers under contract with HNRG.

4. JH is engaged in traditional life insurance business, including the sale of all types of life insurance for both the individual and group markets, and the sale of annuity products and long-term care insurance. The premiums received by JH are invested by the company as part of its general account. Currently, JH's general account is approximately \$30 billion, which is invested in numerous public and private bonds, mortgages, real estate and other investments.

5. One of the investments in JH's general account is a limited partnership interest in Enerfin. The JH general account is the sole limited partner of Enerfin and is entitled to 99% of the partnership profits. Enerfin III-95, an entity unrelated to JH, is Enerfin's general partner. Enerfin is engaged in the business of leasing oil and gas rights from the fee owners of these mineral interests.

6. JH has entered into an agreement to purchase from Willamette approximately 100,000 acres of timberland located in the State of Oregon known as the Columbia Tree Farm (the Farm). JH is and has always been unaffiliated with Willamette. The purchase price for the Farm is \$350 million. The Farm consists of six parcels. Under its agreement with Willamette, JH has a right to purchase

some or all of these six parcels before November 15, 1997. Under this agreement, each of the six parcels has been allocated a portion of the total purchase price. This purchase price (and each parcel's allocable share of the purchase price) represents no more than the fair market value of the land and its timber since the price was negotiated at arm's-length between JH and Willamette. In determining the purchase price for the Farm (and the underlying parcels), JH did not take into account any of the oil and gas rights that are appurtenant to the timberland.

7. The Farm is being acquired on behalf of various HNRG pension clients and will be allocated to JH ForesTree separate accounts in which those clients invest. The applicant has requested the exemption proposed herein for certain transactions involving the separate account to which one of the Farm parcels (the Deer Creek Parcel) is to be allocated. This single customer separate account, the FPGT Account, will be established for the First Plaza Group Trust, a collective trust holding assets of certain qualified plans sponsored by General Motors Corporation and its subsidiaries. The named fiduciary with respect to investment activities of each of the plans participating in the First Plaza Group Trust is General Motors Investment Management Corporation (GMIMCo), a wholly owned subsidiary of General Motors Corporation. GMIMCo qualifies as an In-House Asset Manager as that term is defined in Prohibited Transaction Exemption 96-23 (61 FR 15975, April 10, 1996).<sup>8</sup>

8. The following plans participate in the First Plaza Group Trust:

(a) General Motors Hourly Rate Employees Pension Plan, a defined benefit plan which had 609,669 participants and approximately \$40 billion in assets as of December 31, 1996;

(b) General Motors Retirement Plan for Salaried Employees, a defined benefit plan with 218,299 participants and approximately \$24 billion in assets as of December 31, 1996;

(c) Saturn Individual Retirement Plan for Represented Team Members, a defined contribution plan with 7,315 participants and approximately \$103 million in assets as of December 31, 1996;

(d) Saturn Personal Choices Retirement Plan for Non-Represented Team Members, a defined benefit plan with 2,445 participants and approximately \$11.5 million in assets as of December 31, 1996;

(e) Employees' Retirement Plan for GMAC Mortgage Corporation, a defined benefit plan with 2,700 participants and approximately \$38.8 million as of December 31, 1996;

(f) National Car Rental System, Inc. Hourly Paid Employees' Pension Plan, a defined benefit plan with 2,716 participants and approximately \$4.3 million as of December 31, 1996; and

(g) National Car Rental system, Inc. Salaried Employees' Pension Plan, a defined benefit plan with 1,718 participants and approximately \$27.6 million in assets as of December 31, 1996.

9. The Deer Creek Parcel is subject to the Leases, two existing oil and gas leases with Enerfin, an affiliate of JH. These Leases are the result of arm's-length negotiations between the prior fee owners of the Deer Creek Parcel and Enerfin's predecessor in interest and were entered into prior to any discussion by JH regarding the purchase of the timberland. As is typical of oil and gas leases, the Leases are long-term leases. While the Leases may terminate if Enerfin fails to develop the mineral rights, if those rights are developed the Leases will continue as long as the Deer Creek Parcel is producing oil or gas. The Leases, which were originally granted in 1985 and 1988, have an approximate current fair market value of \$109,000 to the holder of the mineral rights. This value was determined by an appraisal conducted on April 30, 1996 by Forrest A. Garb and Associates (Garb), International Petroleum Consultants of Dallas, Texas, an independent appraiser, which set a total value of \$607,000 for all the mineral rights subject to Enerfin leases. On February 11, 1997, at the request of GMIMCo, Garb reviewed the April 30, 1996 appraisal and concluded that the fair market value allocated to the Deer Creek Parcel mineral interests was \$109,000.

10. In order to avoid a potential prohibited transaction prior to the granting of the exemption proposed herein, JH purchased for the FPGT Account Willamette's interest in the Deer Creek Parcel exclusive of the Oil and Gas Rights. Closing on the purchase took place on February 14, 1997, pursuant to the agreement between JH and Willamette (see rep. 6, above). Ownership of the Deer Creek Oil and Gas Rights will remain with Willamette. The \$52,052,432 purchase price originally established between

<sup>8</sup>The applicant represents that JH and GMIMCo did not purport to rely on PTE 96-23 for the transactions which are the subject of the exemption proposed herein because such reliance may have required GMIMCo to exercise a level of discretion with respect to the transactions that would be inappropriate given the fiduciary structure of the separate account and could adversely impact the parties' compliance with other applicable law.

Willamette and JH for the Deer Creek Parcel was reduced by the fair market value of the Oil and Gas Rights because it originally included such rights. Once the exemption proposed herein is granted, JH on behalf of the FPGT Account will purchase the Deer Creek Oil and Gas Rights from Willamette. The transfer of the Deer Creek Oil and Gas Rights to the FPGT Account will not in any way affect the obligations and rights of Enerfin or the lessor under the Leases. Following the transfer, the lease payments will be paid by Enerfin to the new lessor, JH (on behalf of the FPGT Account).

11. As part of its decision to enter into the separate account contract establishing the FPGT Account, GMIMCo has reviewed and approved the acquisition of the Deer Creek Oil and Gas Rights, including the purchase price and the underlying Enerfin Leases. GMIMCo will also monitor Enerfin's performance under the Leases, including any proposed modification of the Leases, and will take any steps necessary to protect the interest of the plans. It is not contemplated that any changes will be made to the Leases.

12. The applicant represents that denial of the exemption proposed herein would preclude the FPGT Account from taking advantage of the investment opportunity offered by the Deer Creek Parcel solely because of pre-existing and relatively insignificant Leases to a partnership owned by JH. The Leases were originally entered into between Enerfin's predecessor in interest and unrelated third parties and are arm's-length contracts that, if anything, add to the value of the Deer Creek Parcel. The Leases will provide additional cash flow income to the FPGT Account that was not taken into account at the time the purchase price for the Deer Creek Parcel was established.

13. In summary, the applicant represents that the proposed transactions satisfy the criteria contained in section 408(a) of the Act because: (a) the consideration to be paid for the Deer Creek Oil and Gas Rights has been determined by arm's-length negotiations between JH, acting on behalf of plans invested in the FPGT Account, and Willamette, and has been validated by an independent appraisal performed by Garb; (b) the Leases are pre-existing contracts that were negotiated at arm's-length between unrelated parties; (c) as part of its decision to enter into a separate account contract establishing the FPGT Account, a plan fiduciary unaffiliated with JH has reviewed and approved all terms of the acquisition of the Deer Creek Oil and

Gas Rights, including the underlying Enerfin Leases; and (d) the independent fiduciary will monitor Enerfin's performance under the Leases to ensure that the plans' interests are protected. **FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

**AmSouth Bank of Alabama (AmSouth) Located in Birmingham, Alabama**

[Application No. D-10422]

**Proposed Exemption**

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

*Section I—Transactions*

If the exemption is granted, the restrictions of section 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the receipt of fees by AmSouth from the AmSouth Mutual Funds, or any other diversified open-end investment companies registered under the Investment Company Act of 1940 (the Funds), for acting as an investment adviser for the Funds as well as for providing other services to the Funds which are "Secondary Services" as defined in Section III(h), in connection with the investment by the Client Plans in shares of the Funds, provided that the conditions set forth in Section II below are met.

*Section II—Condition*

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

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

(2) The Client Plan does not pay any Plan-level investment management fees, investment advisory fees, or similar fees to AmSouth with respect to any of the assets of such Plan which are invested in shares of any of the Funds. This condition does not preclude the

payment of investment advisory or similar fees by the Funds to AmSouth under the terms of an investment management agreement adopted in accordance with section 15 of the Investment Company Act of 1940 (the 1940 Act), nor does it preclude the payment of fees for Secondary Services to AmSouth pursuant to a duly adopted agreement between AmSouth and the Funds.

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

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

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

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

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

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

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

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

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

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

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

Funds, and if so, the nature of such limitations; and

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

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

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

(1) The authorization is terminable at will by the Client Plan, without penalty to the Client Plan, upon receipt by AmSouth of written notice from the Second Fiduciary; and

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

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

(l)(1) For each Client Plan using the fee structure described in paragraph (a)(2) above with respect to investments in a particular Fund, an increase in the rate of fees paid by the Fund to AmSouth regarding any investment management services, investment

advisory services, or similar services that AmSouth provides to the Fund over an existing rate for such services that had been authorized by a Second Fiduciary in accordance with paragraph (i) above; or

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

AmSouth will, at least 30 days in advance of the implementation of such additional service for which a fee is charged or fee increase, provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of the Fund and which explains the nature and amount of the additional service for which a fee is charged or of the increase in fees) to the Second Fiduciary of the Client Plan. Such notice shall be accompanied by a Termination Form with instructions as described in paragraph (j) above.

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

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

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

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

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

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

(2) The total, expressed in dollars, of brokerage commissions of each Fund

that are paid by such Fund to brokerage firms unrelated to AmSouth;

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

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

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

(p) AmSouth maintains for a period of six years the records necessary to enable the persons described below in paragraph (q) to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of AmSouth, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than AmSouth or an affiliate shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975 (a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (q) below.

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

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

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

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

### *Section III—Definitions*

For purposes of this proposed exemption:

(a) The term "AmSouth" means AmSouth Bank of Alabama and any affiliate thereof as defined below in paragraph (b) of this section.

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

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

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

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

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

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

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

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

(g) The term "Second Fiduciary" means a fiduciary of a Client Plan who is independent of and unrelated to AmSouth. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to AmSouth if:

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

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

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

If an officer, director, partner or employee of AmSouth (or relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the choice of the Client Plan's investment adviser, (ii) the approval of any such purchase or sale between the Client Plan and the Funds, and (iii) the approval of any change in fees charged to or paid by the Client Plan in connection with any of the transactions described in Sections I and II above, then paragraph (g)(2) of this section shall not apply.

(h) The term "Secondary Service" means a service other than an investment management, investment advisory, or similar service, which is provided by AmSouth to the Funds, including (but not limited to) custodian services, transfer and dividend disbursing agent services, administrator or sub-administrator services, accounting services, shareholder servicing agent services and brokerage services.

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

**EFFECTIVE DATE:** If the proposed exemption is granted, the exemption will be effective as of April 16, 1997.

### Summary of Facts and Representations

1. AmSouth is an Alabama banking corporation that serves as trustee, investment manager and/or custodian to a number of employee benefit plans. As of October 31, 1996, AmSouth and its affiliates—AmSouth Bank of Tennessee and AmSouth Bank of Florida—had approximately \$20 billion in assets under administration, of which \$6.4 billion were assets of employee benefits plans covered under the Act as well as other benefit plans. AmSouth and its affiliates are subsidiaries of AmSouth Bancorporation. References made herein to AmSouth are intended to refer both to AmSouth and its affiliates.

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

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

The Client Plans pay fees in accordance with fee schedules negotiated with AmSouth. Fees for custodian, trustee and investment management services are based on a percentage of assets in the account, subject to certain minimum fee amounts. AmSouth also may provide other services to a Client Plan, as selected by the Client Plan sponsor or named fiduciary. Fees may be paid by the Client Plan or the Client Plan sponsor, depending on the particular circumstances.

The specific Client Plans of AmSouth for which this proposed exemption is being requested are those to which AmSouth or an affiliate is a fiduciary and whose assets either (i) are currently invested in the Funds, or (ii) may be invested in the Funds in the future.

However, AmSouth does not seek relief for investments in the Funds by any employee benefit plans maintained by AmSouth or an affiliate for its own employees (the Bank Plans).<sup>9</sup>

<sup>9</sup> AmSouth represents that it will comply with the requirements of Prohibited Transaction Exemption (PTE) 77-3, 42 FR 18734 (April 8, 1977), with respect to any investments in the Funds made by the Bank Plans. PTE 77-3 permits the acquisition or sale of shares of a registered, open-end

3. The AmSouth Mutual Funds, a Massachusetts business trust organized on October 1, 1987, are registered as an open-end investment company with the Securities and Exchange Commission (SEC) under the 1940 Act.

AmSouth Mutual Funds consist of eleven investment portfolios (each a "Fund") representing distinct investment vehicles, which have their own prospectuses or joint prospectuses with one or more other Funds. The shares of each Fund represent proportionate interests in the assets of that Fund.

The nine Funds currently available for investment by the Client Plans in connection with the transactions described herein are the following: (i) The AmSouth Equity Fund; (ii) the AmSouth Regional Equity Fund; (iii) the AmSouth Balanced Fund; (iv) the AmSouth Bond Fund; (v) the AmSouth Limited Maturity Fund; (vi) the AmSouth Government Income Fund; (vii) the AmSouth Prime Obligations Fund; (viii) the AmSouth U.S. Treasury Fund; and (ix) the AmSouth Tax Exempt Fund.<sup>10</sup>

The overall management of the Funds, including the negotiation of investment advisory contracts, rests with the Board of Trustees of the Funds, all of whose current members are independent of AmSouth and its affiliates. The Board of Trustees of each Fund is elected by the shareholders of the Fund.

AmSouth serves as the investment adviser to each Fund within the meaning of the 1940 Act. AmSouth receives investment advisory fees from the Funds that vary between 0.30 percent and 0.80 percent of a Fund's average net assets on an annual basis, depending on the particular Fund and subject to voluntary fee waivers by AmSouth.

AmSouth also serves as a sub-administrator for the Funds. As sub-administrator, AmSouth is responsible for assisting the administrator of the Funds in clerical, recordkeeping and administrative services relating to the legal compliance and day-to-day operations of the Funds. AmSouth

investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter, provided certain conditions are met. The Department is expressing no opinion in this proposed exemption regarding whether any of the transactions with the Funds by the Bank Plans would be covered by PTE 77-3.

<sup>10</sup>The applicant states that the Client Plans generally do not invest in tax-free or tax-exempt Funds because the investment returns of such Plans are already tax-exempt.

receives fees from the administrator of the Funds for its services as the sub-administrator in accordance with an agreement between the Funds and the administrator. In addition, AmSouth was selected by the Funds to serve as custodian for the Funds, effective as of April 16, 1997, pursuant to the conditions of this proposed exemption. Thus, AmSouth receives fees for custody services provided to the Funds in accordance with custodial services agreements between itself and such Funds.

The other service providers to the Funds are currently independent of and unaffiliated with AmSouth. These service-providers include: (i) The administrator, ASO Services Company, Inc.; (ii) the distributor, BISYS Fund Services, L.P. (formerly the Winsbury Company); and (iii) the transfer agent and fund accountant, BISYS Funds Services of Ohio, Inc.

Purchases of shares of the Funds may be subject to a sales charge. However, sales charges are waived for investments by investors for whom AmSouth or an affiliate acts as a fiduciary, including the Client Plans. AmSouth and its affiliates also will not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the transactions involving the Client Plans.

4. AmSouth represents that there are material advantages to the Client Plans from the use of the Funds as investment vehicles. AmSouth states that the Funds provide a means for Client Plans of all sizes to receive the benefits of AmSouth's investment management expertise and greater diversification than would be available through a separate account arrangement. The Funds are also valued on a daily basis. The daily valuation permits: (i) Immediate investment of Client Plan contributions in varied types of investments; (ii) greater flexibility in transferring assets from one type of investment to another; and (iii) daily redemption of investments for purposes of making distributions. Information concerning the investment performance of most of the Funds is available each day in newspapers of general circulation, which allows Client Plan sponsors and participants to monitor the performance of their investments on a daily basis. Fund shares can be given to participants in Client Plan distributions, thus avoiding the expense and delay of liquidating plan investments and facilitating roll-overs into IRAs.

Investments by Client Plans in the Funds occur through direct purchases of shares of the Funds on an ongoing basis. No sales commissions or redemption fees are charged in connection with the

purchase or sale of Fund shares by Client Plan customers of AmSouth.

5. Because AmSouth is considered a fiduciary with respect to a Client Plan as to which it serves as trustee and serves as an investment adviser to the Funds (and receives fees for such investment advisory services), AmSouth has required that any Client Plan's investments in the Funds meet the conditions of Prohibited Transaction Exemption 77-4 (PTE 77-4, 42 FR 18732, April 8, 1977) to avoid engaging in a prohibited transaction in connection with such investments.<sup>11</sup>

In order to meet the conditions of PTE 77-4 that a Client Plan not pay duplicative fees for investment advisory services, AmSouth states that it has not charged a Client Plan any direct fees for investment management with respect to assets that are invested in the Funds. These Client Plans have paid fees to AmSouth solely for non-investment trust or custody services. AmSouth states that the fees it has received for investment management of a Client Plan's assets have come solely from the Funds in accordance with the respective advisory agreements between such Funds and AmSouth.

AmSouth states that Client Plans have not paid any commissions or other sales charges in connection with their investments in the Funds, as required under PTE 77-4. In addition, the applicant states that all of the other conditions of PTE 77-4, including advance written disclosure of information to a Client Plan regarding the fees to be received by AmSouth from each Fund and advance written authorization from an independent fiduciary of such Client Plan for investment in the Fund and the receipt of fees from the Fund by AmSouth, have been met.<sup>12</sup>

<sup>11</sup> PTE 77-4, in pertinent part, permits the purchase and sale by an employee benefit plan of shares of a registered, open-end investment company when a fiduciary with respect to the plan is also the investment adviser for the investment company, provided that, among other things, the plan does not pay an investment management, investment advisory or similar fee with respect to the plan assets invested in such shares for the entire period of such investment. Section II(c) of PTE 77-4 states that this condition does not preclude the payment of investment advisory fees by the investment company under the terms of an investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940. Section II(c) states further that this condition does not preclude payment of an investment advisory fee by the plan based on total plan assets from which a credit has been subtracted representing the plan's pro rata share of investment advisory fees paid by the investment company.

<sup>12</sup> The Department is expressing no opinion in this proposed exemption as to whether the transactions with the Funds by Client Plans managed by AmSouth have met the conditions necessary for an exemption under PTE 77-4.

6. AmSouth is requesting an individual exemption that, like the relief provided by PTE 77-4, would permit the receipt of fees by AmSouth or an affiliate from the Funds for acting as investment adviser as well as for providing non-advisory services (i.e. "Secondary Services" as defined herein). The applicant states that the conditions of this proposed exemption are based on PTE 77-4. However, there are two differences between the conditions of PTE 77-4 and the conditions proposed herein:

(i) the use of a "termination form" under this proposed exemption would take the place of the PTE 77-4 requirement that an independent plan fiduciary (referred to therein as a "Second Fiduciary") affirmatively approve any changes in the rates of fees charged by the mutual funds; and

(ii) the Client Plans subject to this proposed exemption may, as an alternative to not paying a plan-level investment management fee to AmSouth for any assets invested in the Fund shares (referred to as an "offset" fee structure), receive a cash credit of such Plan's proportionate share of the Funds' investment advisory fees (referred to as a "crediting" fee structure).

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

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

#### *Crediting Fee Structure*

7. The "crediting" fee structure will be designed to preserve the negotiated fee rates of the Client Plans so as to minimize the impact of the change to the Funds on a Client Plan's fees. AmSouth will charge a Client Plan its standard fees as applicable to the particular Client Plan for serving as

trustee, directed trustee, investment manager or custodian. At the beginning of each month, and in no event later than one business day after the payment of investment advisory fees by the Funds to AmSouth for the previous month, AmSouth will credit to each Client Plan in cash its proportionate share of all investment advisory fees charged by AmSouth to the Funds for the previous month. The credit will include the Client Plan's share of any investment advisory fees paid by AmSouth to third party sub-advisors.

AmSouth states that the credit will not include the custodial fees or other fees for secondary services payable by the Funds to AmSouth because such services rendered at the Fund-level will not be duplicative of any services provided directly to the Client Plan. For example, the custodial services to the Funds will involve maintaining custody and providing reporting relative to the individual securities owned by the Funds. The services to the Client Plans will involve maintaining custody over all or a portion of the Client Plans' assets (which may include Fund shares, but not the assets underlying the Fund shares), providing trust accounting and participant accounting (if applicable), providing asset and transaction reporting, execution and settlement of directed transactions, processing benefit payments and loans, maintaining participant accounts, valuing plan assets, conducting non-discrimination testing, preparing Forms 5500 and other required filings, and producing statements and reports regarding overall plan and individual participant holdings. AmSouth states that these trust services will be necessary regardless of whether the Client Plans' assets are invested in the Funds. Thus, AmSouth represents that its receipt of fees for both secondary services at the Fund-level and trustee services at the Plan-level will not involve the receipt of "double fees" for duplicative services to the Client Plans because a Fund will be charged for custody and other services relative to the individual securities owned by the Fund, while a Client Plan will be charged for the maintenance of Plan accounts reflecting ownership of the Fund shares and other assets.<sup>13</sup>

<sup>13</sup>The Department notes that although certain transactions and fee arrangements are the subject of an administrative exemption, a Client Plan fiduciary must still adhere to the general fiduciary responsibility provisions of section 404 of the Act. Thus, the Department cautions the fiduciaries of the Client Plans investing in the Funds that they will have an ongoing duty under section 404 of the Act to monitor the services provided to the Client Plans to assure that the fees paid by the Client Plans for such services are reasonable in relation to the value of the services provided. Such responsibilities will

AmSouth represents that for each Client Plan, the combined total of all fees it receives directly and indirectly from the Client Plans for the provision of services to the Plans and/or to the Funds will not be in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.<sup>14</sup>

8. AmSouth will maintain a system of internal accounting controls for the crediting of all fees to the Client Plans. In addition, AmSouth has retained the services of Ernst & Young LLP (the Auditor), an independent accounting firm, to audit annually the crediting of fees to the Client Plans under this program. Such audits will provide independent verification of the proper crediting to the Client Plans.

In its annual audit of the credit program, the Auditor will: (i) verify on a test basis the investment advisory fees paid by the Funds to AmSouth; (ii) verify on a test basis the daily factors used to determine the investment advisory fees; (iii) verify on a test basis the credits paid in total for a one-month period; (iv) recompute, on a test basis using the daily factors described above, the amount of the credit determined for selected plans; (v) verify on a test basis the proper assignment of identification fields for receipt of fee credits to the plans; and (vi) verify on a test basis that the credits were posted to the plans within one business day.

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

include determinations that the services provided are not duplicative and that the fees are reasonable based on the level of services provided.

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

<sup>14</sup>The Department is expressing no opinion in this proposed exemption as to whether the fee arrangements discussed herein will comply with section 408(b)(2) of the Act and the regulations thereunder (see 29 CFR 2550.408b-2).

discovery of the error to reflect accurately the amount of total credits due to the Client Plan for the period involved.

9. AmSouth represents that the use of the "crediting" fee structure will be available for investments made by Client Plans in the Funds in situations where: (i) the Client Plan sponsor wishes to pay all fees of the Client Plan, including investment management; and (ii) fees charged by AmSouth at the Plan-level are negotiated. With respect to (i) above, AmSouth states that the Client Plan sponsor would not be able to take over payment of the investment management fees if the "offset" structure (as discussed further below) were used because in such instances the investment management fees would be paid directly out of the Client Plan's investment in the Funds. With respect to (ii) above, AmSouth states that from time to time Plan-level fees are negotiated to amounts which are below AmSouth's published fee schedules due to competitive pressures in the marketplace. When the negotiated fees paid at the Plan-level are less than the investment advisory fees paid to AmSouth by the Funds, the "credit" method would be used as it would be the most beneficial and practical method available to accommodate these Client Plans.

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

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

In the event that AmSouth provides an additional secondary service for which a fee is charged or there is an increase in the rate of fees paid by the Funds to AmSouth for any secondary

service, including any increase resulting from a decrease in the number or kind of services performed by AmSouth for such fees in connection with a previously authorized secondary service, AmSouth will, at least 30 days in advance of the implementation of such additional service or fee increase, provide written notice to the Second Fiduciary explaining the nature and the amount of the additional service for which a fee will be charged or the nature and amount of the increase in fees of the affected Fund.<sup>15</sup> Such notice will be made separate from the Fund prospectus and will be accompanied by a Termination Form. The Second Fiduciary also will receive full written disclosure in a Fund prospectus or otherwise of any increases in the rate of fees charged by AmSouth to the Funds for investment advisory services prior to the effective date of such increases, even though these fees will be credited to the investing Client Plans.

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

<sup>15</sup> With respect to increases in fees, the Department notes that an increase in the amount of a fee for an existing secondary service (other than through an increase in the value of the underlying assets in the Funds) or the imposition of a fee for a newly-established secondary service shall be considered an increase in the rate of such fees. However, in the event a secondary service fee has already been described in writing to the Second Fiduciary and the Second Fiduciary has provided authorization for the fee, and such fee was temporarily waived, no further action by AmSouth would be required in order for the Bank to receive such fee at a later time. Thus, for example, no further disclosure would be necessary if AmSouth had received authorization for a fee for custodial services from Plan investors and subsequently determined to waive all or a portion of the fee for a period of time in order to attract new investors but later charged the full fee.

in the continued authorization of AmSouth to engage in the subject transactions on behalf of the Client Plan.

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

#### *Offset Fee Structure*

10. AmSouth represents that small and mid-size Client Plans that invest in the Funds would be offered an "offset" fee structure (i.e. a waiver of the investment management fee for the Client Plan at the Plan-level) rather than a "crediting" fee structure (i.e. a credit of the Client Plan's pro rata share of Fund-level advisory fees back to the Client Plan). These Client Plans typically would be so-called "401(k)" Plans (i.e. deferred compensation arrangements pursuant to section 401(k) of the Code) that are designed to be simple, standardized products using fixed fee arrangements. In addition, AmSouth typically would offer the "offset" fee structure for other plan products when Plan-level fees are not negotiated to an amount which is below AmSouth's published fee schedule.<sup>16</sup> In these cases, if the Second Fiduciary authorizes the "offset" fee structure under this proposed exemption, AmSouth will waive Plan-level investment management fees that would otherwise be charged for the Client Plan's assets invested in the Funds, so that the Plan-level fees will be "offset" and the Client Plan will pay only one investment management fee for those assets, at the Fund-level.<sup>17</sup> This "offset"

<sup>16</sup> AmSouth states that larger Client Plans often may negotiate Plan-level fees to amounts below AmSouth's published fee schedule. If, as a result of the negotiations, the Plan-level investment management fees are less than the Fund-level investment advisory fees, the Client Plan would benefit more from a Fund-level fee credit than an "offset" of the Plan-level fees for assets invested in the Funds.

<sup>17</sup> In this regard, the Department notes that when a Second Fiduciary authorizes a particular fee structure to prevent AmSouth from receiving "double fees" for investment management and investment advisory services, AmSouth's disclosures to the Second Fiduciary should, in a clear and concise manner, reveal sufficient information to the Second Fiduciary to enable such Fiduciary to determine the nature and extent of any differentials between the rates of fees charged at the Plan-level and the rates of fees charged at the Fund-level. Such information would enable the Second Fiduciary to adhere to its duties and responsibilities under section 404 of the Act to act prudently when

fee structure, which is similar to one of the fee structures described in PTE 77-4, will ensure that AmSouth does not receive any duplicative investment management, advisory or similar fees as a result of investments in the Funds by the Client Plans.

Disclosures, approvals, and notifications with regard to any changes in fees or secondary services will be handled in the same manner as for the "credit" fee structure described in paragraph 9 above, with one exception. The exception is that notifications with regard to increases in rates of investment advisory fees for the Funds will conform to the procedures for increases in rates of secondary service fees as described in paragraph 9. Therefore, in such instances, there will be prior written notification of the fee increase to the Second Fiduciary for the Client Plan, in a statement separate from the Fund prospectus, and a Termination Form will be provided. The reason for the exception is that the total fees paid by the Client Plan, under the "offset" fee structure, will be directly affected by any increases in the rates of Fund-level investment advisory fees because such fees will not be credited back to the Client Plan.

11. AmSouth states that a Second Fiduciary will always receive a written statement giving full disclosure of the fee structures prior to any investment in the Funds. The disclosure statement will explain why AmSouth believes that the investment of assets of the Client Plan in the Funds may be appropriate. The disclosure statement also will describe whether there are any limitations on AmSouth with respect to which Client Plan assets may be invested in shares of the Funds and, if so, the nature of such limitations.<sup>18</sup>

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

approving and monitoring the services provided to the Client Plan and would help ensure that the fees paid for such services are reasonable.

<sup>18</sup> See section II(d) of PTE 77-4 which requires, in pertinent part, that an independent plan fiduciary receive a current prospectus issued by the investment company and a full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company, including a discussion of whether there are any limitations on the fiduciary/investment adviser with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations.

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

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

14. In summary, AmSouth represents that the transactions described herein will satisfy the statutory criteria of section 408(a) of the Act because: (a) the Funds will provide the Client Plans with an effective investment vehicle without any duplicative investment management, advisory or similar fees paid to AmSouth; (b) AmSouth will require annual audits by an independent accounting firm to verify the proper crediting to the Client Plans of investment advisory fees charged by AmSouth to the Funds under the "crediting" fee structure; (c) with respect to any investments in a Fund by the Client Plans and the payment of any fees by the Fund to AmSouth, a Second

Fiduciary will receive full written disclosure of information concerning the Fund, including a current prospectus and a statement describing the fee structure, and will authorize in writing the investment of the Client Plan's assets in the Fund and the fees paid by the Fund to AmSouth; (d) any authorizations made by a Client Plan regarding investments in a Fund and fees to be paid to AmSouth, or any increases in the rates of fees for secondary services which will be retained by AmSouth, will be terminable at will by the Client Plan, without penalty to the Client Plan, upon receipt by AmSouth of written notice of termination from the Second Fiduciary; (e) no commissions or redemption fees will be paid by the Client Plan in connection with either the acquisition of Fund shares or the sale of Fund shares; (f) AmSouth will not receive any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with the subject transactions; and (g) all dealings between the Client Plans and the Funds will be on a basis which is at least as favorable to the Client Plans as such dealings are with other shareholders of the Funds.

#### Notice to Interested Persons

Notice of the proposed exemption shall be given to all Second Fiduciaries of Client Plans that were invested in the Funds as of the effective date of the proposed exemption (i.e. April 16, 1997). In addition, notice of the proposed exemption shall be given to Client Plans that are currently invested in the Funds, as of the date the notice of the proposed exemption is published in the **Federal Register**, where AmSouth is providing services to the Funds and receives fees which would be covered by the proposed exemption, if granted.

Notice to interested persons shall be provided by first class mail within thirty (30) days following the publication of the proposed exemption in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and a supplemental statement (see 29 CFR 2570.43(b)(2)) which informs all interested persons of their right to comment on and/or request a hearing with respect to the proposed exemption. Comments and requests for a public hearing are due within sixty (60) days following the publication of the proposed exemption in the **Federal Register**.

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

**Alloy Die Casting Co. Employees' Profit Sharing Plan and Trust (the Plan) Located in Anaheim, California**

[Application No. D-10439]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed cash sale by the Plan to the Alloy Die Casting Co./W.E. Holmes, Inc. (Alloy), the Plan sponsor and a party in interest with respect to the Plan, of units (the Units) in the Krupp Insured Plus-II Limited Partnership (the Partnership), provided: (a) the sale is a one-time transaction for cash; (b) no commissions or other expenses are paid by the Plan in connection with the sale; and (c) the Plan will receive the greater of: (1) \$13.05 per Unit, or (2) \$1.15 above the highest bid price for the Units at the most recent sealed bid auction for the Units which has occurred prior to the time of the sale.

**Summary of Facts and Representations**

1. Alloy, an Anaheim, California corporation, is the sponsor of the Plan. The Plan is a profit sharing plan which had 148 participants and aggregate assets with an approximate fair market value of \$3,873,829 as of December 31, 1996.

2. On July 21, 1987, the Plan bought 51,282 Units in the Partnership for \$1 million. The Plan's cost basis was \$19.50 per Unit. Through February 27, 1997, the Plan had received distributions from the Partnership in the amount of \$14.88 per Unit. Consequently, the unrecovered cost to the Plan of the Units is currently \$4.62 per Unit.

3. Alloy was sold in 1996, and the Plan is in the process of being terminated and liquidated. All assets of the Plan, with the exception of the Units, have been converted into cash or short-term equivalents.

4. The Partnership is a Massachusetts limited partnership which invests primarily in federally insured mortgages on multi-family residential properties through the purchase of mortgage-backed securities. Krupp Insured Plus Corp. (Krupp) and Mortgage Services

Partners Limited Partnership are the general partners of the Partnership. The applicant represents that the Units cannot be converted into short-term cash equivalents because transfers of the Units are subject to certain restrictions whereby Unit holders are not able to liquidate their investment.<sup>19</sup> As a result of these restrictions, it is not administratively feasible for the Plan to distribute the Units to the participants; instead, it must sell the Units in order to distribute each participant's pro-rata share of the value of such Units in cash.

5. The applicant represents that there is no established market for the Units. Alloy has therefore requested the exemption proposed herein to purchase the Units from the Plan for cash. The applicant represents that no commissions will be paid in connection with the transaction. Alloy has offered to pay the Plan \$1.15 per Unit in excess of the fair market value of the Units as determined by the highest bid price at the most recent sealed bid auction for the Units which has occurred prior to the time of the sale. The applicant states that Krupp has represented that the most recent sealed bid auction took place on February 14, 1997, at which time the average price paid per Unit was \$11.55, and the highest price paid per Unit was \$11.90. Thus, Alloy has offered to pay the Plan the higher of: (a) \$13.05 per Unit, or (b) \$1.15 per Unit above the highest bid price for the Units at the most recent sealed bid auction which has occurred prior to the date of the sale.

6. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because: (a) the sale would be a one-time transaction for cash, and no commissions or other expenses would be paid by the Plan in connection with the transaction; (b) the transaction will provide liquidity for the Plan which is currently being terminated; (c) the purchase price for the Units will exceed the Plan's original cost for the Units less distributions received from the Partnership; and (d) the Plan will receive not less than \$1.15 more per Unit than the highest bid price at the most recent sealed bid auction for the Units.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department,

<sup>19</sup>The Department notes that the decisions to acquire and hold the Units are governed by the fiduciary responsibility requirements of Part 4, Subtitle B, Title I of the Act. In this regard, the Department herein is not proposing relief for any violations of Part 4 of the Act which may have arisen as a result of the acquisition and holding of the Units.

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 accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 18th day of June, 1997.

**Ivan Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 97-33;  
Exemption Application No. D-10011]

#### Grant of Individual Exemption to Make Permanent as Modified Prohibited Transaction Exemption (PTE) 91-8 Involving Equitable Life Assurance Society of the United States and its Affiliates (Equitable) and Equitable Real Estate Management, Inc. (ERE)<sup>1</sup>, Located in New York, New York

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

**ACTION:** Grant of individual exemption  
to make permanent as modified PTE  
91-8, which involves Equitable and  
ERE.

**SUMMARY:** This document contains a  
final individual exemption to make  
permanent as modified the temporary  
relief provided by PTE 91-8 (56 FR  
1411/1419, January 14, 1991). PTE 91-  
8 is a temporary exemption which  
expired January 13, 1996. This  
exemption makes permanent as  
modified PTE 91-8 and provides relief  
for the provision of property  
management and/or leasing services by  
ERE to an Account (as defined in  
Section IV below), provided that the  
conditions set forth in Section II are  
met.

**EFFECTIVE DATE:** The Department of  
Labor is extending the temporary  
exemptive relief provided under PTE  
91-8 until the date the final exemption  
is published in the **Federal Register**.  
However, effective January 13, 1996  
until the date the final exemption is  
published in the **Federal Register**,  
Equitable and ERE have a period of up  
to 90 days after the end of each calendar  
year to prepare the annual report

<sup>1</sup> By letter dated April 23, 1997, the applicants  
have informed the Department that Equitable has  
agreed to sell ERE to Lend Lease Corporation  
Limited, effective on or about June 10, 1997. Lend  
Lease Corporation Limited is an Australian-based  
real estate and financial management company with  
substantial business operations in the United States.  
Also, see the comment submitted by Equitable and  
ERE regarding the status of ERE under this  
exemption.

required by this exemption pursuant to  
Section II(4)(a).

Thereafter, PTE 91-8, as modified and  
made permanent, is effective on the date  
the final exemption is published in the  
**Federal Register**.

**FOR FURTHER INFORMATION CONTACT:**  
Ekaterina A. Uzlyan, Office of  
Exemption Determinations, U.S.  
Department of Labor, telephone (202)  
219-8883. (This is not a toll-free  
number.)

**SUPPLEMENTARY INFORMATION:** On  
September 6, 1996, the Department of  
Labor (the Department) published in the  
**Federal Register** (61 FR 47205/47214) a  
notice of proposed exemption to make  
permanent as modified PTE 91-8 (the  
Notice). PTE 91-8 provides an  
exemption from the restrictions of  
section 406(a), 406(b)(1) and 406(b)(2) of  
the Employee Retirement Income  
Security Act of 1974 (the Act) and from  
the sanctions resulting from the  
application of section 4975 of the  
Internal Revenue Code of 1986 (the  
Code), by reason of section 4975(c)(1)  
(A) through (E) of the Code.

This exemption to make permanent  
PTE 91-8 was requested in an  
exemption application by Equitable and  
ERE pursuant to section 408(a) of the  
Act and section 4975(c)(2) of the Code,  
and in accordance with the procedures  
set forth in 29 CFR part 2570, subpart  
B (55 FR 32836, August 10, 1990).  
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. Accordingly, this exemption to  
make permanent PTE 91-8 is being  
issued solely by the Department.

The Notice gave interested persons an  
opportunity to comment on the  
proposed exemption and to request a  
hearing. The Department received five  
written comments. Three comments and  
an additional clarifying comment were  
filed by the representatives of certain  
pension plans that currently participate  
in one or more of the Accounts to which  
ERE provides property management  
and/or leasing services as described  
herein. The comments generally raised  
issues about certain aspects of the  
Notice, and were subsequently sent by  
the Department to Equitable and ERE for  
their response. Set forth below in  
paragraph 2 is a list of each of the points  
made by the commentators together  
with the responses to those points from  
Equitable and ERE and Jackson Cross  
Company as the Independent Fiduciary  
for the transactions described herein.

The fourth and fifth comment were  
filed by Equitable and ERE and  
generally request clarifications and  
modifications to the Notice.

Accordingly, upon consideration of  
the entire record, including the written  
comments, the Department has  
determined to grant the exemption  
subject to certain modifications. For a  
more complete statement of the facts  
and representations supporting the  
Department's decision to grant this  
exemption refer to the Notice published  
on September 6, 1996 at 61 FR 47205/  
47214.

A summary description of PTE 91-8  
and this exemption; a discussion of the  
comments; and the Department's  
modifications are addressed below.

#### 1. Description of PTE 91-8 and of this exemption

This exemption makes permanent as  
modified PTE 91-8. PTE 91-8 was a  
temporary individual exemption which  
permits the provision of certain real  
estate property management and, in  
some instances, leasing services by  
EREIM<sup>2</sup>, affiliates of EREIM and  
Tishman Speyer Properties<sup>3</sup>, to various  
real estate separate accounts (the  
Accounts) in which employee benefit  
plans participate. The Accounts are  
managed by Equitable, EREIM or  
subsidiaries thereof. PTE 91-8 also  
permitted the provision, by the law  
department of Equitable, of certain legal  
services to the Accounts required in  
connection with individual properties  
held by the Accounts<sup>4</sup>. This exemption  
to make permanent as modified PTE 91-  
8 was requested by Equitable and ERE  
pursuant to Paragraphs IX and X of the  
notice of proposed exemption relating to  
PTE 91-8 that was published in the  
**Federal Register** on February 28, 1990  
at 55 FR 7057/7069. Furthermore,  
pursuant to Paragraphs IX and X of the  
notice of proposed exemption relating to  
PTE 91-8, the application for a

<sup>2</sup> At the time PTE 91-8 was granted, ERE or  
Equitable Real Estate Investment Management, Inc.  
was known as EREIM, and was an indirect wholly  
owned subsidiary of Equitable.

<sup>3</sup> In the Notice, Equitable represented that  
Tishman Speyer Properties (TSP), a partnership in  
which Equitable had a 50 percent ownership  
interest at the time PTE 91-8 was issued, is no  
longer affiliated with Equitable, and requested that  
this exemption be inapplicable to TSP.  
Accordingly, the Department determined that this  
exemption will not apply to TSP.

<sup>4</sup> In the Notice, Equitable represented that under  
PTE 91-8 the exemption for the provision of legal  
services to the Accounts by Equitable's in-house  
law department was never implemented. Therefore,  
Equitable requested that this exemption eliminate  
reference to the relief for the provision of legal  
services by the law department to the Accounts.  
Accordingly, in this exemption the Department  
eliminates relief for the provision of legal services  
by the law department to the Accounts.