examination, such records as are necessary to enable the persons described, below, in section II(t)(1), to determine whether the conditions of this exemption have been met, except that—

(1) This record-keeping condition shall not be violated if, due to circumstances beyond the control of State Street and/or its affiliates, the records are lost or destroyed prior to the end of the six-year period; and

(2) No party in interest other than State Street and its affiliates shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by section II(t)(1) of this exemption; and

(t)(1) Except as provided in section II(t)(2), below, of this exemption and notwithstanding any provisions of sections (a)(2) and (b) of section 504 of the Act, the records referred to in section II(s) of this exemption are unconditionally available at their customary location for examination during normal business hours by:

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

(B) Any fiduciary of a participating Client Plan, (and/or a CIF, as applicable), or a State Street Plan, or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any participating Client Plan, State Street Plan, or any duly authorized employee or representative of such employer; and

(D) Any participant or beneficiary of any participating Client Plan, State Street Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in section II(t)(1)(B)–(t)(1)(D) are authorized to examine the trade secrets of State Street or its affiliates or commercial or financial information which is privileged or confidential.

III. Definitions

For purposes of this exemption, the following definitions shall apply:

(a) The term, ''affiliate'' or ''affiliates,'' means:

(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, or partner in any such person; and

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

(b) The term, ''control,'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term, ''State Street Plan(s),'' refer to employee benefit plans covered by the Act sponsored and maintained by State Street and/or an affiliate for its own employees;

(d) The term, ''Index Fund(s),'' refers to any investment fund, account or portfolio as to which State Street or a U.S. affiliate serves as discretionary trustee or manager and in which one or more investors invest, and

(1) which is designed to track the rate of return, risk profile, and other characteristics of an Index, as defined, below, in section III(f) of this exemption, by either:

(A) Replicating the same combination of securities which compose such Index, or

(B) sampling the securities which compose such Index based on objective criteria and data;

(2) for which State Street or its affiliate does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) that contains ''plan assets'' subject to the Act, pursuant to the Plan Asset Regulation; and

(4) that involves no agreement, arrangement, or understanding regarding the design or operation of the fund which is intended to benefit State Street or its affiliate or any party in which State Street or its affiliate may have an interest;

(e) The term, ''Model-Driven Fund(s),'' refers to any investment fund, account, or portfolio as to which State Street or a U.S. affiliate serves as discretionary trustee or manager and in which one or more investors invest, and

(1) which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third-party data, not within the control of State Street or an affiliate, to transform an Index;

(2) which contains ''plan assets'' subject to the Act, pursuant to the Plan Asset Regulation; and

(3) that involves no agreement, arrangement, or understanding regarding the design or operation of the fund or the utilization of any specific objective criteria which is intended to benefit State Street, any affiliate of State Street, or any party in which State Street or any affiliate may have an interest;

(f) The term, ''Index,'' refers to a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) The organization creating and maintaining the index is—

(A) engaged in the business of providing financial information, evaluation, advice, or securities brokerage services to institutional clients,

(B) a publisher of financial news or information, or

(C) a public stock exchange or association of securities dealers;

(2) the index is created and maintained by an organization independent of State Street; and

(3) the index is a generally accepted standardized index of securities which is not specifically tailored for the use of State Street; and

(g) The term, ''Clearing Broker,'' means a U.S. broker-dealer registered under the Securities Exchange Act of 1934 that is unrelated to State Street or its affiliates, that has net capital equal to at least $10 million and that regularly serves as a clearing broker for introducing brokers in the ordinary course of its business, but only in the context, and to the extent, of its service as a clearing broker for an Affiliated Broker Dealer that is acting as introducing broker.

For a complete statement of the facts and representations supporting the Department's decision to grant PTE 97–63, refer to the proposed exemption (62 FR 51684, October 2, 1997) and the final exemption (62 FR 66689, December 19, 1997). For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption replacing PTE 97–63, refer to the notice (68 FR 6197, February 6, 2003).

Signed at Washington, DC, this 19th day of June, 2003.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 03–15930 Filed 6–23–03; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11079, et al.]

Proposed Exemptions; Kinder Morgan, Inc.

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

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

Written Comments and Hearing Requests

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

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. __, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: ''*moffitt.betty@dol.gov*'', or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 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, 5 U.S.C. App. 1 (1996), 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.

Kinder Morgan, Inc., Located in Houston, Texas

[Exemption Application Number D–11079]

Proposed Exemption

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

Section I—Transactions Involving Contributions In-Kind

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(E), 407(a)(2), 406(b)(1), and 406(b)(2) of the Act shall not apply to: (1) The acquisition of publicly traded Employer Stock by the Trusts through the voluntary in-kind contribution (the Contribution) of such Stock by the Employer for the purpose of pre-funding welfare benefits provided by the Plans; and (2) the holding by the Trusts of Employer Stock acquired pursuant to a Contribution, provided that:

(a) Each Contribution is authorized pursuant to, and made in conformity with, all relevant provisions of each affected Plan;

(b) The Plans and/or Trusts do not pay any amount or type of consideration whether in cash or other property (including the diminution of any Employer obligation to fund a Plan) for Employer Stock contributed in-kind by the Employer;

(c) Each Contribution is voluntary and unrelated to any Employer obligation to fund a Plan;

(d) The Plans do not cede any right to receive a cash contribution from the Employer as a result of any Contribution made to any Plan;

(e) The Plans and/or Trusts do not pay any fees or commissions in connection with any Contribution; and

(f) Each condition set forth below in Section II is satisfied.

Section II—Conditions

The exemption is conditioned upon the adherence by the Employer to the material facts and representations described in this notice of proposed exemption and upon the satisfaction of the following requirements:

(a) Only Employer Stock that constitutes ''qualifying employer securities'' (QES), as such term is set forth in section 407(d)(5) of the Act, will be transferred by the Employer to a Trust pursuant to a Contribution;[1]

(b) Employer Stock transferred by the Employer on behalf of a Plan will thereafter be held by the Trust (or Trusts) for the purpose of funding welfare benefits for the participants and beneficiaries of such Plan;

(c) Employer Stock contributed to, or otherwise acquired by, a Trust will be held in a separate account (an Account) under such Trust;

(d) The appropriate fair market value of any Employer Stock contributed by the Employer to a Trust will be established by an Independent Fiduciary, as such term is defined in section III(c) of this proposed exemption;

(e) The Independent Fiduciary will represent the interests of the Plans for all purposes related to each Contribution for the duration of the Trust's holding of such Employer Stock, and will authorize the trustee of each Trust to accept Employer Stock pursuant to a Contribution only after such Independent Fiduciary determines, at the time of the transaction, that such transaction is feasible, in the interest of the affected Plans, and protective of the participants and beneficiaries of such Plans;

[1] Section 407(d)(5) of the Act provides that the term ''qualifying employer security'' means an employer security that is stock or a marketable obligation (as defined in subsection (e)). After December 17, 1987, in the case of a plan other than an individual account plan, stock is considered a ''qualifying employer security'' only if such stock satisfies the requirements of subsection 407(f)(1) of the Act. Section 407(f)(1) of the Act provides that stock satisfies such requirement if, immediately following the acquisition of such stock—(A) no more than 25 percent of the aggregate amount of stock of the same class issued and outstanding at the time of acquisition is held by the plan, and (B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer.

(f) The Independent Fiduciary will: (1) Verify that the price of Employer Stock contributed by the Employer is appropriate and, thereafter, monitor the Employer Stock and have sole responsibility for the ongoing management of the Accounts; and (2) take whatever action is necessary to protect the rights of the Plans funded by the Trusts, including, but not limited to, the making of all decisions regarding the acceptance and acquisition of Employer Stock contributed by the Employer, the retention and any disposition of such Stock, and the exercise of any voting rights associated with such Stock;

(g) With certain exceptions described in paragraphs (h) and (i) below, the total amount of: (1) Employer Stock; (2) qualifying employer real property (QERP), as defined by section 407(d)(4) of the Act; and (3) QES other than the Employer Stock (collectively, the Limited Assets) held by each Plan shall not comprise more than twenty-five percent (25%) of the fair market value of the assets held by such Plan as determined on the date of each such transaction;

(h) For purposes of calculating the percentage limitation described in paragraph (g) of this section, and to the extent the conditions of Prohibited Transaction Exemption (PTE) 91–38 have been met,[2] Employer Stock will not constitute a ''Limited Asset'' to the extent that such Employer Stock:

(1) Is held by an unrelated common or collective trust fund maintained by an independent bank in which any of the Plans through the Trusts may invest; and

(2) Has a total fair market value that does not exceed five percent (5%) of the fair market value of each such common or collective trust fund;

(i) Notwithstanding the requirement set forth in paragraph (g) above, the amount of Limited Assets held by a Plan may exceed 25% of the total assets held by such Plan solely by reason of:

(1) The Limited Assets appreciate in value at a rate that is greater than the rate attributable to the Plan's non-Limited Assets, and such difference in rates causes the value of the Limited Assets to exceed 25% of the Plan's total asset value; or

(2) The non-Limited Assets have declined in value at a rate that is greater than the rate attributable to the Plan's Limited Assets, and such difference in rates causes the value of the Limited Assets to exceed 25% of the Plan's total asset value; and

(j) At no time will any of the assets of the Trusts revert to the use or benefit of the Employer.

Section III. Definitions

(a) The term ''Employer'' means Kinder Morgan, Inc., any successor to Kinder Morgan, Inc., and/or any affiliates of Kinder Morgan, Inc.;

(b) The term ''Employer Stock'' means shares of publicly traded common stock of the Employer and includes any replacement publicly traded shares of such stock;

(c) The term ''Independent Fiduciary'' means a fiduciary with respect to a Plan who is: (1) Qualified as an investment manager; (2) independent of and unrelated to the Employer; and (3) appointed to act on behalf of the Plans with respect to each Contribution. For purposes of this exemption, if granted, a fiduciary will not be deemed to be independent of and unrelated to the Employer if (i) such fiduciary directly or indirectly controls, is controlled by or is under common control with the Employer; or (ii) the Employer pays such fiduciary an amount of income during the fiduciary's current tax year that exceeds one percent (1%) of such fiduciary's gross income (for federal income tax purposes) over its prior tax year;

(d) The term ''Plan'' means an employee welfare benefit plan maintained by the Employer; and

(e) The term ''Trust'' means a trust which is qualified under Section 501(c)(9) of the Code, and established for the purpose of funding life, sickness, accident, and other welfare benefits for the participants and beneficiaries of the Plans.

Summary of Facts and Representations

1. Kinder Morgan, Inc. (hereinafter, either the Employer or the Applicant) is an energy company that operates more than 30,000 miles of natural gas and products pipelines in various states. The Employer is the sole owner of Natural Gas Pipeline Company of America (NGPL), KN Energy Retail Division, Kinder Morgan Power Company, and KM International Services, Inc. The Employer also owns Kinder Morgan G.P., Inc., the general partner of Kinder Morgan Energy Partners, L.P. (KMP). The Employer had annual operating revenues of $1,054,918,000 in 2001 and the book value of the Employer's assets as of December 31, 2001 was $9,533,085,000.

The Employer Stock is common stock issued by the Employer. The Applicant represents that the Employer Stock is widely held, publicly traded, and may be freely exchanged on the New York Stock Exchange (NYSE symbol: KMI). The applicant states further that the Employer Stock qualifies as a ''qualifying employer security'', as defined by section 407(d)(5) of the Act, and also satisfies the requirements of section 407(f)(1) of the Act.

2. The Employer sponsors the Plans. The Plans provide various types of welfare benefits to current and/or former employees of the Employer.[3] Included in the Plans is the Retiree Plan, a welfare benefit plan that provides health, life, and disability benefits to all full-time salaried, non-union hourly, and union hourly retirees of the Employer.[4] In addition, the Retiree Plan provides disability benefits and life insurance benefits for a small, closed group of individuals currently employed by the Employer. The Applicant estimates that, as of March 1, 2002, the Retiree Plan had 4,891 participants and beneficiaries and $67,268,272 in net assets as of January 31, 2002. The Applicant represents that any of the assets held by the Trusts on behalf of the Retiree Plan may be used to support any of the payments made in connection with the benefits provided by the Retiree Plan.

According to the Applicant, the assets of the Retiree Plan are not invested in loans to any party in interest involved in the transactions described herein. However, the Applicant notes that less than one-half of one percent of the Retiree Plan's assets held in the Trusts

[2] PTE 91–38 (56 FR 31966 (July 12, 1991)) requires, among other things, that the interests of a plan in an unrelated common or collective trust fund may not exceed ten percent (10%) of the total of all assets in such common or collective trust fund.

[3] Currently, the Plans are: (1) The Retiree Medical Plan covering the United Mine Workers of America; (2) Western Alfalfa Corporation Retiree Medical Plan; (3) Kinder Morgan, Inc. Medical Plan; (4) Kinder Morgan Bulk Terminals, Inc. Health Benefit Plan; (5) Kinder Morgan, Inc. for Elizabeth River Terminals Employees; (6) Kaiser Foundation Health Plans, Inc. (Northern-Southern California); (7) Mountain Medical Affiliates (Colorado) Plan; (8) Health Net of California; (9) Kinder Morgan, Inc. Master Employee Welfare Benefit Plan; (10) Kinder Morgan, Inc. Dental Plan; (11) Kinder Morgan, Inc. Life Insurance Plan; (12) Kinder Morgan, Inc. Group Business Travel Insurance Plan; (13) Kinder Morgan, Inc. Accidental Death & Dismemberment Insurance Plan; (14) Kinder Morgan, Inc. Long Term Disability Insurance Plan; (15) Kinder Morgan, Inc. Flexible Spending Account Plan; (16) Kinder Morgan, Inc. Weekly Accident and Sickness Plan for Liquid Terminals Employees; (17) Kinder Morgan, Inc. Life Insurance Plan for Elizabeth River Terminals Employees; (18) Kinder Morgan, Inc. Weekly Accident and Sickness and Accidental Death and Dismemberment Insurance Plan for Elizabeth River Terminals Employees; (19) Kinder Morgan, Inc. Long Term Disability Insurance Plan for Elizabeth River Terminals Employees; (20) Kinder Morgan, Inc. Dental Expense Insurance Benefit Plan for Elizabeth River Terminals Employees; (21) Kinder Morgan, Inc. Severance Plan; and (22) Kinder Morgan, Inc. Vision Plan.

[4] The Employer currently anticipates pre-funding only the Retiree Plan to the extent this proposed exemption is granted.

may be invested indirectly (through certain funds maintained by an independent bank) in securities of the Employer that constitute QES. The Applicant represents that such investment is permitted by section 407(a) and 408(e) of the Act.[5]

3. The Trusts are voluntary employees' beneficiary association trusts (VEBAs). The following Trusts are used to fund the Retiree Plan (the Retiree Plan Trusts): (1) The KMI Post-Retirement VEBA Trust (Bargained VEBA); (2) the KMI Post-Retirement Non-Bargaining VEBA Trust (Nonbargained Medical VEBA); (3) the KMI Retiree Life Insurance VEBA Trust (Life Insurance VEBA); and (4) the KMI Retiree Contributions VEBA Trust (Retiree Contribution Funding VEBA). The Applicant states that each Trust is intended to meet the requirements of section 501(c)(9) of the Code. As such, the trust agreement with respect to each Retiree Plan Trust or any other Trust prohibits the reversion to the Employer of the assets held by such Trust.

The Applicant states that the assets held by the Bargained VEBA are used to provide benefits to participants in the Retiree Plan that are covered under collective bargaining agreements. The assets held by the Nonbargained Medical VEBA, meanwhile, are used to provide benefits to participants in the Retiree Plan that are not covered under a collective bargaining agreement. The assets held by the Life Insurance VEBA are used to provide death benefits to both bargained and nonbargained Retiree Plan participants. The assets held by the Retiree Contribution Funding VEBA are used to provide certain benefits to former bargained and nonbargained employees of the Employer and their dependents.

4. The transactions described in this proposed exemption involve the pre-funding of the Retiree Plan by the Employer.[6] The Applicant states that the Employer is not required to make minimum contributions to the Retiree Plan other than the contributions required under certain rate agreements (discussed below). Nevertheless, the Employer now seeks to pre-fund the Retiree Plan Trusts to a combined level of 100% of the accumulated post-retirement benefit obligation of the Retiree Plan, which is an amount redetermined annually by the third-party administrator of the Retiree Plan, based on the Retiree Plan's future obligations (determined in accordance with Financial Accounting Statement 106).

The Applicant believes that the Retiree Plan, and any other affected Plan, will benefit from the proposed Contributions. In this regard, the Applicant represents that certain opportunities for expansion, acquisition, and debt reduction in the energy industry has re-prioritized the use of cash available to the employer. At no time in the foreseeable future does the Employer anticipate the future funding of retiree welfare benefits through the making of substantial cash contributions to its Retiree Plan (other than those amounts as required under the Rate Agreements). Rather, the Applicant states that the Contributions offer a practical means of pre-funding the Retiree Plan and will make the benefits offered by such Plan more secure.

Initially, the Contributions will involve the transfer of specific amounts of Employer Stock to the Retiree Plan Trusts. With respect to the Bargained VEBA, the Employer seeks to contribute approximately $3,882,358 in Employer Stock and $3,430,041 in cash. To the extent this proposed exemption is granted, approximately 50% of the total assets held by the Bargained VEBA will be in the form of Employer Stock. Additionally, with respect to the Nonbargained Medical VEBA, the Employer intends to contribute approximately $11,920,891 in Employer Stock and approximately $767,457 in cash. To the extent this proposed exemption is granted, approximately 15.8% of the total assets held by the Nonbargained Medical VEBA will be in the form of Employer Stock. Further, with respect to the Life Insurance VEBA, the Employer intends to contribute approximately $4,480,667 in Employer Stock and approximately $2,037,024 in cash. To the extent this proposed exemption is granted, approximately 50% of the total assets held by the Life Insurance VEBA will be in the form of Employer Stock.[7]

Thereafter, if granted, the proposed exemption could affect other Plans that provide welfare benefits. In this regard, the Applicant states that Plans other than the Retiree Plan may prospectively hold Employer Stock contributed by the Employer. The Applicant notes that any Contribution to a Plan other than the Retiree Plan and/or any holding of Employer Stock by such Plan will be subject to the same conditions as those applicable to the Retiree Plan.

5. The Applicant states that each Contribution will be voluntary. In this regard, the Applicant represents that the receipt by a Plan of Employer Stock pursuant to a Contribution will not affect the right of such Plan to receive cash contributions from the Employer. The Applicant notes that the Employer is currently subject to two rate agreements (the Rate Agreements) entered into between the Federal Energy Regulatory Commission and NGPL and Kinder Morgan Interstate Gas Transmission LLC. Both Rate Agreements require the Employer to contribute a specified amount annually to a Trust for an indefinite period of time. The Applicant states that all of the contributions made by the Employer to satisfy the funding requirements under the Rate Agreements will be accounted for separately, and only cash contributions by the Employer will be used to satisfy the funding requirements under the Rate Agreements.

The Applicant notes that subsequent to the contribution of cash to the Retiree Plan pursuant to any Rate Agreement, such cash is not thereafter segregated from any of the assets held under the Retiree Plan. Therefore, the collective assets of the Retiree Plan are used to pay all Retiree Plan participant benefits as they become due. The Applicant represents that to the extent the Retiree Plan is not sufficiently funded at the time a participant's benefits are due, regardless of the reason for the insufficient funding, the Employer will pay from its general assets the benefits owed to such participant.

6. Each Contribution will be subject to several conditions designed to protect the Retiree Plan and any other affected Plans (hereinafter, either, a Plan). In this regard, Employer Stock transferred to a Trust will be held in the Accounts, which are separate accounts under such Trust, for the sole purpose of funding benefits provided by the Plan. Accordingly, at no time will such Employer Stock revert to the use or benefit of the Employer. In addition, each Contribution must be authorized by the appropriate Plan and made in conformity with the terms of such Plan. Further, no Plan will pay any

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[5] The Department is expressing no opinion herein as to whether the securities of the Employer held by the Trusts constitute ''qualifying employer securities'', as defined in section 407(d)(5) of the Act. The Department is also expressing no opinion herein as to whether the acquisition or holding of such securities is permitted by section 407(a) of the Act or covered by the statutory exemption provided by section 408(e) of the Act. Further, the Department is offering no relief herein for transactions other than those described in section I of this proposed exemption.

[6] However, the Applicant notes that other Plans may be affected since the manner in which welfare benefits are provided to the Employer's current and former employees is subject to periodic restructuring.

[7] The Retiree Contribution Funding VEBA is funded through contributions derived from participants in the Retiree Plan. As such, this VEBA will not receive any Employer Stock pursuant to the Contribution.

consideration for the Employer Stock nor any fees or commissions that arise in connection with the Contributions.

The Applicant notes that the transactions described herein require the oversight of an Independent Fiduciary. In this regard, a Plan fiduciary who is independent of the Employer and qualified as an investment manager must authorize each contribution of Employer Stock only after such Independent Fiduciary determines at the time of the transaction that such transaction is feasible, in the interest of the affected Plans, and protective of the participants and beneficiaries of such Plans. The Applicant represents that, to date, no Independent Fiduciary has been chosen. However, the Applicant states that the Employer may not pay any Independent Fiduciary that is chosen, or any successor thereto, an amount of income during the fiduciary's current tax year that exceeds one percent (1%) of such fiduciary's gross income (for federal income tax purposes) over its prior tax year. In addition, any Independent Fiduciary chosen by the Employer will acknowledge, in writing, that it: (1) Will act prudently and in the interest of the Plan's participants and beneficiaries with respect to the proposed transactions; and (2) fully understands that risks and benefits associated with the transactions discussed herein. The Applicant represents that any fees or costs associated with the Independent Fiduciary will be borne, either directly or indirectly, by the Trusts.

The Applicant represents that the Independent Fiduciary will establish the appropriate fair market value for the Employer Stock. In this regard, the Independent Fiduciary will: (1) Determine the recorded New York Stock Exchange closing price (the Closing Price) for the Employer Stock for the day on which such Employer Stock is contributed to a Trust; and (2) determine whether to discount the Closing Price by analyzing the percentage of issued and outstanding Employer Stock represented by the Contribution.[8]

Prior to approving any Contribution, the Independent Fiduciary will evaluate the appropriateness of the Trust(s)' acceptance of such Contribution given the investment needs of the affected Plan, the nature of the Contribution, and the impact of the Contribution on the risk and return characteristics of such Plan's portfolio.[9] With respect to the nature of the Contribution, the Applicant states that the Independent Fiduciary will perform an analysis of both the Employer Stock and the Employer for the purpose of: (1) Valuing such Employer Stock; and (2) analyzing the acquisition of such Employer Stock in light of the overall portfolio of the affected Plan. The Employer will provide the Independent Fiduciary with access to all information on the Employer that the Independent Fiduciary reasonably requires to make these analyses, including financial statements, annual reports, materials filed with the Securities and Exchange Commission, and independent research and reports.

The Applicant represents that the Independent Fiduciary will also have full discretion to accept or reject any Contribution, and to otherwise manage the Accounts subject to the specific investment allocation policies and guidelines of the Plan (the Investment Guidelines) as mutually agreed between the Employer and the Independent Fiduciary. These Guidelines will be re-evaluated at least annually by the Independent Fiduciary and the Employer. The Investment Guidelines may prohibit investment of assets in certain types of investments. Notwithstanding the Investment Guidelines mutually agreed to by the parties, the Independent Fiduciary and any successor Independent Fiduciary will remain subject to the fiduciary responsibility provisions of Section 404 of ERISA.

The Applicant represents that the Independent Fiduciary will analyze the impact of the Contribution on the risk and return characteristics of the affected Plan's portfolio. In analyzing such impact, the Independent Fiduciary will review: The expected return of the portfolio; the overall volatility of the portfolio; and the beta risk level or market risk of the portfolio. The Independent Fiduciary will compare the performance of modeled portfolios that include the Employer Stock with the performance of comparable portfolios that do not include the Employer Stock. Based on the results of the Independent Fiduciary's analysis, the Independent Fiduciary must determine, prior to its authorization of a Contribution, that the risk/return tradeoff of accepting the Contribution would be at least as favorable, if not more favorable, to the affected Plan(s) than without such Contribution.

The Applicant notes that subsequent to a Contribution, the Independent Fiduciary will periodically monitor, and have the ability to so monitor, the Employer Stock. Accordingly, the ongoing management of the Employer Stock will be subject to the sole discretion of the Independent Fiduciary. Finally, the Independent Fiduciary will make all of the decisions regarding the retention and any disposition of the Employer Stock, and the exercise of any voting rights associated with such Stock.

7. The amount of Employer Stock contributed to the Trusts will be limited. In this regard, with limited exceptions, the aggregate fair market value of the Employer Stock will not exceed 25% of the fair market value of the assets of an affected Plan.[10] A Plan may hold and continue to hold Employer Stock in excess of 25% solely in situations where the Employer Stock: Appreciates at a greater rate than that of the other assets held under the Plan (*i.e.,* other than the Employer Stock); or depreciates at a rate that is less than that of the other assets held under the Plan. However, in no case will a Contribution be made to a Plan that contemporaneously holds an amount of Employer Stock that exceeds 25% of its total assets at the time of the Contribution.

The Applicant states that the Contributions will benefit the Retiree Plan, and any other Plan so affected. In this regard, the Applicant states that, subsequent to a Contribution, the Employer Stock will not be subject to any restrictions with respect to its marketability. Accordingly, the Employer Stock will be fully transferable at the discretion of the Independent Fiduciary. Further, the

[8] According to the Applicant, the Independent Fiduciary will discount the Closing Price of the Employer Stock contributed by the Employer to the Trusts if the Independent Fiduciary determines that such amount of Stock may not be sold at the Closing Price within a reasonable period of time from the date of the Contribution.

[9] This analysis will include: (1) A review the Investment Guidelines to determine whether investment in Employer Stock is appropriate; (2) a determination as to whether acceptance of the Employer Stock is within the Investment Guidelines with respect to the percentage of Plan assets that may be committed to Employer Stock; (3) a determination as to the value of the Plan's assets committed to equities at the time of the proposed Contribution; (4) a determination as to whether the Plan can accept the proposed Contribution without exceeding the Investment Guidelines relating to equity investments; (5) a determination as to whether the proposed Contribution would have a detrimental effect on the ability of the Retiree Plan to meet its liquidity needs; and (6) a confirmation that the proposed Contribution would not be in lieu of any required asset or cash contributions.

[10] This percentage limitation will generally be applied without regard to amounts of Employer Stock held by unrelated common or collective trust funds maintained by independent managers, so long as the Employer Stock held in such unrelated fund does not exceed five percent (5%) of the value of each such common or collective trust fund, and the Plan's interest in such fund does not exceed ten percent (10%) of the total assets in such common or collective trust fund.

Applicant anticipates that Employer Stock contributed by the Employer will appreciate in value and, therefore, will provide security to current and former employees of the Employer with respect to their receipt of welfare benefits through an affected Plan.

9. In summary, the Applicant represents that with respect to the transactions described herein, the requirements of section 408(a) of the Act have been met since, among other things:

(a) Each Contribution will be authorized pursuant to, and made in conformity with, all relevant provisions of each affected Plan;

(b) The Plans and/or Trusts will not pay any amount or type of consideration whether in cash or other property (including the diminution of any Plan funding obligation of the Employer) for Employer Stock contributed in-kind by the Employer;

(c) Each Contribution will be voluntary and unrelated to any current or future Employer obligation to fund a Plan;

(d) The Plans will not cede any right to receive a cash contribution from the Employer in connection with any Contribution made to any Plan;

(e) The Plans and/or Trusts do not pay any fees or commissions in connection with any Contribution;

(f) Only Employer Stock that constitutes QES will be transferred by the Employer to a Trust pursuant to a Contribution;

(g) The appropriate fair market value of any Employer Stock contributed by the Employer to a Trust will be established by an Independent Fiduciary;

(h) An Independent Fiduciary will represent the interests of the Plans for all purposes related to each Contribution for the duration of the Trust's holding of such Employer Stock and will authorize the trustee of each Trust to accept Employer Stock pursuant to a Contribution only after such Independent Fiduciary determines, at the time of the transaction, that such transaction is feasible, in the interest of the affected Plans, and protective of the participants and beneficiaries of such Plans;

(i) The Independent Fiduciary will: (1) Monitor the Employer Stock and have sole responsibility for the ongoing management of the Accounts; and (2) take whatever action is necessary to protect the rights of the Plans funded by the Trusts, including, but not limited to, the making of all decisions regarding the acceptance and acquisition of Employer Stock contributed by the Employer, the retention and any disposition of such Stock, and the exercise of any voting rights associated with such Stock;

(j) With certain exceptions, the total amount of the Limited Assets held by each Plan shall not comprise more than 25% of the fair market value of the assets held by such Plan; and

(k) At no time will any of the assets of the Trusts revert to the use or benefit of the Employer.

Notice to Interested Persons: The applicant represents that notice will be provided within sixty (60) calendar days from the date of publication of this Notice in the **Federal Register** to all active employees of the Employer by means of a posting at those locations within the principal places of employment of the Employer which are customarily used for notices regarding labor-management matters for review and by an electronic mailing (*i.e.*, e-mail) to all active employees. Such posting will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, and a copy of the supplemental statement (the Supplemental Statement), as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such interest persons of their right to comment and to request a hearing. All retirees of the Employer (including both those retirees who participate in a Plan and those terminated participants in a Plan who are not yet receiving retirement benefits) will be notified in a separate first class mailing by Silverstone Group, Inc., within sixty (60) calendar days of the date of publication of the notice of the proposed exemption in the **Federal Register**. Such newsletter will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, and a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such interested persons of their right to comment and to request a hearing.

FOR FURTHER INFORMATION CONTACT: Christopher Motta of the Department, telephone (202) 693–8544. (This is not a toll-free number.)

Fifth Third Bank, Located in Grand Rapids, Michigan

[Application No. D–11101]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Old Kent Bank and Trust Company and its affiliates previously received the approval of the Department to engage in similar transactions (October 15, 1999) (FAN 99–25E) pursuant to PTE 96–62 (61 FR 39988, July 31, 1996) (EXPRO).

Section I—Proposed Exemption for Receipt of Fees

If the proposed exemption is granted, the restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply effective on or after April 2, 2001, to: the receipt of fees by Fifth Third Bank, a Michigan banking corporation, and its affiliates (Fifth Third), from the Kent Funds prior to October 26, 2001 or from the Fifth Third Funds on or after October 26, 2001 (the Funds), open-end investment companies registered under the Investment Company Act of 1940 (the 1940 Act), for acting as an investment adviser for the Funds, as well as for acting as administrator, custodian, accountant, transfer agent, and provider of other services to the Funds (including brokerage services in the future) which are not advisory services (collectively referred to as ''Secondary Services'' as defined in Section III(h) below), in connection with the purchase and sale of shares of the Funds by certain employee benefit plans and individual retirement accounts (the Plans) for which Fifth Third serves as fiduciary with investment discretion; provided that the conditions set forth in Section II are met.

Section II—Conditions

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

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

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

(d) Each Plan receives a credit, through a cash rebate that will be accrued daily and, if the Plan so elects, will be automatically invested in shares of the money market funds selected by the Plan, of such Plan's proportionate share of all fees charged to the Funds by

Fifth Third for investment advisory services, including any investment advisory fee paid to third-party subadvisors, not later than two business days (or, prior to the date this final exemption is published in the **Federal Register**, one business day) after receipt of such fees by Fifth Third. The crediting of all investment advisory fees to the Plans by Fifth Third is audited by an independent accounting firm on at least an annual basis to verify the proper crediting of the fees to each Plan.

(e) The combined total of all fees received by Fifth Third for the provision of services to a Plan, and in connection with the provision of services to the Funds in which the Plan may invest, is not in excess of ''reasonable compensation'' within the meaning of section 408(b)(2) of ERISA.

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

(g) The Plans are not employee benefit plans sponsored or maintained by Fifth Third.

(h) A second fiduciary acting for the Plan, who is independent of and unrelated to Fifth Third (the Second Fiduciary), receives, in advance of any initial investment by the Plan in a Fund, full and detailed written disclosure of information concerning the Fund, including, but not limited to:

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

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

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

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

(5) Upon the 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 in paragraph (h) above, the Second Fiduciary authorizes in writing the investment of assets of the Plan in each particular Fund, the fees to be paid by such Fund to Fifth Third (including fees for investment advisory services), and the cash rebate to the Plan of fees received by Fifth Third from the Fund for investment advisory services.

(j) All authorizations made by a Second Fiduciary regarding investments in a Fund and the fees paid to Fifth Third (including fees for investment advisory services) are subject to an annual reauthorization wherein any such prior authorization referred to in paragraph (i) above shall be terminable at will by the Plan, without penalty to the Plan, upon receipt by Fifth Third 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 provided to the Second Fiduciary at least annually. However, if the Termination Form has been provided to the Second Fiduciary pursuant to paragraph (k) or paragraph (l) below, then the Termination Form need not be provided again for an annual reauthorization pursuant to this paragraph unless at least six months have elapsed since the form was provided in connection with the 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 Plan, without penalty to the Plan, upon receipt by Fifth Third's investment services group of written notice from the Second Fiduciary; and

(2) Failure to return the Termination Form will result in continued authorization of Fifth Third to engage in the transactions described above on behalf of the Plan.

(k) The Second Fiduciary of each Plan invested in a particular Fund receives full written disclosure, in a statement separate from the Fund prospectus, of any proposed increases in the rates of fees charged by Fifth Third to the Fund for Secondary Services at least 30 days prior to the implementation of such increase in fees. The disclosure will be accompanied by a copy of the Termination Form, with instructions as described in paragraph (j) above. The Second Fiduciary will also receive full written disclosure, prior to the effective date, in a Fund prospectus or otherwise, of any increases in the rates of fees charged by Fifth Third to the Fund for investment advisory services even though such fees will be rebated as required by paragraph (d) above.

(l) In the event that Fifth Third provides an additional Secondary Service to a Fund for which a fee is charged or there is an increase in the amount of fees paid by the Fund to Fifth Third for any Secondary Services resulting from a decrease in the number of services performed by Fifth Third for such fees in connection with a previously authorized Secondary Service, Fifth Third will, at least 30 days in advance of the implementation of such additional service or effective fee increase, provide written notice to the Second Fiduciary explaining the nature and the amount of such services or of the effective increase in fees of the affected Fund. Such notice shall be accompanied by the Termination Form.

(m) On an annual basis, Fifth Third provides the Second Fiduciary of a Plan investing in the Fund with:

(1) A copy of the current prospectus for the Fund and, upon such Second Fiduciary's request, a copy of the Statement of Additional Information for such Fund which contains a description of all fees paid by the Fund to Fifth Third (including fees for investment advisory services);

(2) A copy of the annual financial disclosure report of the Fund in which such Plan is invested, 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;

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

(4) With respect to each of the Funds in which a Plan invests, in the event such Fund places brokerage transactions with Fifth Third, a statement specifying:

(i) The total (expressed in dollars) of brokerage commissions of each Fund's investment portfolio that are paid to Fifth Third by such Fund;

(ii) The total (expressed in dollars) of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to Fifth Third;

(iii) The average brokerage commissions per share (expressed as cents per share) paid to Fifth Third by each investment portfolio of a Fund; and

(iv) The average brokerage commissions per share (expressed as cents per share) paid by each investment portfolio of a Fund to brokerage firms unrelated to Fifth Third.

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

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

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

(i) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service;

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

(iii) Any participant or beneficiary of a Plan or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraph (1)(ii) and (iii) above shall be authorized to examine trade secrets of Fifth Third, commercial or financial information which is privileged or confidential, or records that are unrelated to the Plan(s) that the fiduciary serves or under which the participant or beneficiary is entitled to receive benefits.

(r) Within sixty (60) days of June 24, 2003, Fifth Third will file Form 5330 with the Internal Revenue Service and pay the excise taxes applicable under section 4975(a) of the Code in connection with the error in processing rebates of investment advisory fees during the period beginning October 26, 2001 and ending on March 1, 2003.

Section III—Definitions

For purposes of this exemption:

(a) ''Fifth Third'' means Fifth Third Bank, a Michigan banking corporation, and any affiliate thereof (as affiliate is 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) ''Control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) ''Fund'' or ''Funds'' means the Kent Funds prior to October 26, 2001, the Fifth Third Funds on and after October 26, 2001, and each separate investment portfolio thereof, or any other diversified open-end investment company registered under the 1940 Act for which Fifth Third serves as investment advisor and may also serve (or may in the future serve) as administrator, custodian, accountant, or transfer agent, or provide some other Secondary Service (as defined in paragraph (h) below) which has been approved by the Funds.

(e) ''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 the Fund or portfolio of the Fund, less the liabilities charged to each such portfolio or Fund, by the number of outstanding shares.

(f) ''Relative'' means a relative as that term is defined in section 3(15) of ERISA (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) ''Second Fiduciary'' means a fiduciary of a Plan who is independent of and unrelated to Fifth Third. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to Fifth Third if:

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

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

(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 exemption.

If an officer, director, partner, or employee of Fifth Third (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 Plan's investment advisor, (ii) the approval of such purchase or sale between the Plan and a Fund, and (iii) the approval of any change in fees charged to or paid by the Plan in connection with any of the transactions described in Section II above, then subparagraph (2) above shall not apply.

(h) ''Secondary Service'' means a service other than an investment management, investment advisory, or similar service that is (or will in the future be) provided by Fifth Third to a Fund, including (but not limited to) brokerage services, custodian services, transfer and dividend disbursing agent services, administrator or sub-administrator services, accounting services, and shareholder servicing agent services.

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

Effective Date: The proposed exemption, if granted, will be effective as of April 2, 2001, the date that Old Kent Financial Corporation, the holding company of Fifth Third, merged with and into Fifth Third Financial Corporation, a newly formed, wholly-owned subsidiary of Fifth Third Bancorp.

Summary of Facts and Representations

1. Fifth Third (formerly Old Kent Bank and Trust Company), a state-chartered Michigan banking corporation (Fifth Third or the Applicant) with its principal offices in Grand Rapids, Michigan, is a subsidiary of Fifth Third Financial Corporation (FTFC) which is itself a wholly-owned subsidiary of Fifth Third Bancorp (FT Bancorp), a regional bank holding company headquartered in Cincinnati, Ohio. As of December 31, 2002, the total assets of Fifth Third were approximately $81 billion. Fifth Third serves as a fiduciary with investment discretion to various employee benefit plans.

Fifth Third Bank, an Ohio banking corporation (FTB (Ohio)), a wholly-owned subsidiary of FT Bancorp, provides Secondary Services to the Funds, and provided investment advisory services to the Kent Funds from April 2, 2001, through April 30,

2001. Its principal offices are in Cincinnati, Ohio. Fifth Third Asset Management Inc. (FTAM), a registered investment advisor and wholly owned subsidiary of FTB (Ohio), serves as investment advisor to the Funds, with the exception of the Fifth Third Pinnacle Funds. FTAM's principal offices are in Cincinnati, Ohio. Heartland Capital Management, Inc. (Heartland), a registered investment advisor and wholly owned subsidiary of FTFC, serves as investment advisor to the Fifth Third Pinnacle Funds, an investment portfolio of the Funds. Heartland's principal offices are in Indianapolis, Indiana. BISYS Fund Services, Inc. (BISYS) is a Delaware corporation, which provides certain Secondary Services to the Funds on behalf of Fifth Third. Its principal offices are in Columbus, Ohio. The parties involved in the transactions described in this proposed exemption include Fifth Third (the Applicant), FTB (Ohio), FTAM, Heartland, BISYS, the Funds, and the Plans. The proposed exemption would also cover other Fifth Third affiliates which serve or may in the future serve as fiduciaries with investment discretion to employee benefit plans.

2. The Funds include the Kent Funds and the Fifth Third Funds (the Funds).[11] The Kent Funds, (established on May 9, 1986) merged into the Fifth Third Funds (established on September 15, 1988) effective October 26, 2001. The Funds are Massachusetts business trusts organized as open-end, diversified investment management companies registered under the Investment Company Act of 1940, as amended, consisting of a number of separate investment portfolios (Portfolios), each with a different investment objective.

The Fifth Third Funds had combined assets as of December 31, 2002 of $11,714,062,533.77. This proposed exemption relates to all of the Portfolios of the Funds in existence on or after April 2, 2001, including future Portfolios, and to any other investment company for which Fifth Third may provide investment advisory services and/or Secondary Services and which may be made available for investment to the Plans. The Plans involved in the proposed transactions are employee benefit plans (as defined in section 3(3) of ERISA) for which Fifth Third serves as fiduciary with discretionary authority over the investment of their assets, as well as individual retirement accounts with respect to which Fifth Third exercises investment discretion. The Plans include pension, profit sharing, and stock bonus plans of various sizes, as well as thrift and section 401(k) plans. However, Fifth Third's records are kept in terms of retirement accounts rather than plans. (There are typically multiple retirement accounts set up for a single plan.)

As of December 31, 2002, Fifth Third served as fiduciary for 17,336 retirement accounts, with assets ranging from approximately $30,000 to $1 billion. Of these, 1,271 were defined benefit and 16,065 were defined contribution retirement accounts. Of the defined contribution retirement accounts, 12,850 were related to cash or deferred arrangements (*i.e.*, section 401(k) plans). Fifth Third had full investment discretion with respect to 10,054 retirement accounts and was the directed trustee of 7,282 retirement accounts.

3. Fifth Third seeks retroactive and prospective relief to permit the Applicant and its affiliates, as fiduciaries exercising investment discretion over the assets of the Plans, to cause the Plans to purchase and sell shares of the Kent Funds (prior to October 26, 2001) or the Fifth Third Funds (on and after October 26, 2001), open-end, registered investment companies from which Fifth Third receives fees for the provision of investment advisory services and certain Secondary Services. Fifth Third, formerly known as Old Kent Bank and Trust Co. (Old Kent Bank), sought and received PTE 92–67, 57 FR 38859 (Aug. 27, 1992) on behalf of itself, affiliates, and subsidiaries. PTE 92–67 related to the cash rebate to the Plans of investment advisory fees paid to Old Kent Bank by the Funds. PTE 77–4 provides a class exemption from section 406 of the Act and section 4975 of the Code for a plan's purchases or sales of mutual fund shares, subject to certain conditions, where the fund's investment advisor is a plan fiduciary or affiliated with a plan fiduciary and not an employer of employees covered by the plan. Prior to April 2, 2001, Lyon Street Asset Management (''LSAM''), a subsidiary of the Applicant, served as investment advisor to the Kent Funds. Old Kent Bank subsequently obtained relief under EXPRO for transactions substantially similar to those which are the subject of this application, the receipt of fees by Old Kent Bank and its affiliates from the Funds for investment advisory services and for Secondary Services (provided to the Kent Funds by Old Kent Bank and its affiliates, as well as by BISYS, an unrelated party to such Funds). This relief under FAN 99–25E replaced the exemptive relief under PTE 92–67.

4. The Applicant states that effective April 2, 2001, Old Kent Financial Corporation (OKFC), the holding company of the Applicant, merged with and into FTFC, a newly formed wholly-owned subsidiary of FT Bancorp, the holding company of FTB (Ohio), and other entities. OKFC was acquired by FT Bancorp in a stock transaction and as a result of the merger, Old Kent Bank became and remains a wholly owned subsidiary of FTFC.[12] Old Kent Bank was renamed Fifth Third Bank and continues to be a Michigan banking corporation. Its Board of Directors remains substantially unchanged, and it is the legal entity that operates all of the ongoing former Old Kent Bank banking and trust business locations. There was no transfer of ownership of the banking and trust operations of Old Kent Bank to any unrelated entity, except that some duplicate branch locations were divested and certain nonbanking lines of business were sold.

5. In FAN 99–25E, LSAM, a subsidiary of Old Kent Bank (now Fifth Third Bank), was described as the investment advisor to the Kent Funds, an open-end, registered investment company. Following the merger, the Applicant states that FTB(Ohio) created a new asset management subsidiary, FTAM. FTAM began advising the Kent Funds as of April 30, 2001.[13] FTAM

[11] Where applicable, the term ''Funds'' as used herein also refers to any other diversified open-end investment company registered under the 1940 Act for which Fifth Third may in the future serve as investment advisor. Where required by the context, the term ''Fund'' when used herein in the singular refers both to the Kent Funds prior to October 26, 2001, and to the Fifth Third Funds on and after October 26, 2001.

[12] The Applicant states that FT Bancorp and OKFC had initially entered into an Agreement and Plan of Merger dated as of November 20, 2000 (the Original Merger Agreement). The Original Merger Agreement was amended and restated as of January 16, 2001 (the Restated Merger Agreement). FTFC was also a party to the Restated Merger Agreement. Old Kent Bank was a wholly owned subsidiary of OKFC with business locations throughout Michigan and in Illinois. Upon consummation of the merger pursuant to the Restated Merger Agreement, OKFC merged with and into FTFC, so that FTFC was the surviving corporation. The merger was intended and consummated as a reorganization under the provisions of section 368 of the Code, as well as a plan of reorganization for purposes of sections 354, 361, and 368 of the Code. The merger was consummated in accordance with the Michigan Business Corporation Act and the Ohio General Corporation Law. The surviving corporation, FTFC, continues its corporate existence under the laws of the state of Ohio. Subject to normal exclusions and adjustments, at the effective time of the merger, each outstanding share of common stock of OKFC was exchanged for a fractional share of the common stock of FT Bancorp. The exchange ratio was 0.74, so that each share of common stock of OKFC became a 0.74 fractional share of common stock of FT Bancorp. The merger was effective at 12:01 a.m. on April 2, 2001.

[13] See below, during the period from April 2, 2001 (the date of the merger) through April 30,

employed many of the same individuals who staffed LSAM, and those individuals continued to advise the Kent Funds after the merger. Thus, the Applicant represents that the change to FTAM did not involve a change in actual control or management of the Kent Funds. Further, the investment advisory fees paid by the Kent Funds to FTB(Ohio) for April 2001 and to FTAM thereafter were identical to the fees that the Kent Funds previously paid to LSAM. Also in FAN 99–25E, Old Kent Bank, Old Kent Securities Corporation, and other affiliates of Old Kent Bank were described as performing secondary services for the Kent Funds. Old Kent Securities Corporation merged with and into Fifth Third Securities Corporation, a subsidiary of FTFC. Fifth Third Securities Corporation employed many of the same individuals who staffed Old Kent Securities Corporation. However, after the merger, secondary services were provided to the Kent Funds by FTB(Ohio) under substantially identical fee arrangements. Additionally, FAN 99–25E mentioned BISYS, an unrelated entity, as a provider of secondary services to the Kent Funds. After the merger, BISYS continued to provide secondary services to the Kent Funds as FTB(Ohio)'s agent.

LSAM ceased to serve as investment advisor to the Kent Funds effective April 2, 2001. From April 2, 2001, through April 30, 2001, the Kent Funds were advised directly by FTB (Ohio) pursuant to an Interim Advisory Agreement. Effective April 30, 2001, the Interim Advisory Agreement was assumed by FTAM, a subsidiary of FTB (Ohio), which provided investment advisory services to the Kent Funds from April 30, 2001, through October 26, 2001. Secondary Services were provided to the Kent Funds between April 2, 2001, and October 26, 2001, by affiliates of the Applicant, including FTB (Ohio), and by BISYS. Effective October 26, 2001, the Kent Funds were merged with and into the Fifth Third Funds. All of the assets in each of the portfolios of the Kent Funds were transferred to newly created shell portfolios under the Fifth Third Funds, and shareholders of the Kent Funds became shareholders of the Fifth Third Funds. FTAM serves as investment advisor to the Fifth Third Funds, with the exception of the Fifth Third Pinnacle Funds, which is advised by Heartland. Secondary Services are provided to the Fifth Third Funds by FTB (Ohio) and by BISYS. Other Fifth Third affiliates may in the future also provide investment advisory services and Secondary Services to the Fifth Third Funds.

The Kent Funds themselves continued until October 26, 2001. On that date, all of the assets in each of the portfolios of the Kent Funds were transferred to newly created shell portfolios under the Fifth Third Funds, an open-end, registered investment company. The Applicant represents that (1) the roles of all service providers, including FTAM, FTB(Ohio), and BISYS, are the same with respect to the Fifth Third Funds as they had been with respect to the Kent Funds prior to October 26, 2001; (2) the fees paid by the new portfolios of the Fifth Third Funds to FTAM and to FTB(Ohio), BISYS, and any other secondary service providers are identical to the fees previously paid by the Kent Funds; (3) FTB(Ohio) has formally committed itself to maintaining total fund operating expenses (as a percentage of total assets), until at least April 2, 2003, at a level less than or equal to the level of such expenses for each corresponding Kent Fund as of April 2, 2001 (the date of the merger, as described above); and (4) the operation of the cash rebates to plan accounts, as described in FAN 99–25E, remains unchanged.

6. Fifth Third requests that FAN 99–25E be replaced by this proposed exemption effective as of April 2, 2001 and requests that the proposed exemption contain one prospective modification to the described transactions.

Fifth Third requests relief for the following transactions:

(a) The payment of investment advisory fees by the Plans to Fifth Third with respect to assets of the Plans invested in the Funds. Each Plan will receive a rebate of its proportionate share of investment advisory fees charged to the Funds by Fifth Third. The Plans will receive such rebate in the form of cash or, if an election has been made by a Plan, in the form of a cash rebate applied to the purchase of additional money market funds shares, in either case within two business days of the receipt of the fees by Fifth Third. If a Plan elects to have its cash rebate applied toward the purchase of additional shares, the fair market value of such shares on the date of purchase equals the amount of the cash rebate.

(b) The receipt and the retention of fees paid by the Funds to Fifth Third for certain Secondary Services provided to the Funds. Fifth Third currently acts as administrator, transfer agent, and fund accountant for the Funds, and may in the future provide additional Secondary Services to the Funds. The fees for such services are based on a percentage of the Funds' average daily net assets. Such fees are accrued daily and paid monthly.

In addition to the changes to the parties, there is one difference in the above transactions from those described in FAN 99–25E. The Applicant requests that, with respect to the transactions occurring on and after the date of publication in the **Federal Register** of the notice granting this exemption, Fifth Third be allowed to credit a Plan, through a cash rebate that will be accrued daily and, if the Plan so elects, will be automatically invested in shares of the money market funds selected by the Plan, of such Plan's proportionate share of all fees charged to the Funds by Fifth Third for investment advisory services, including any investment advisory fee paid to third-party subadvisors, not later than two business days after receipt of such fees by Fifth Third. The crediting of all investment advisory fees to the Plans by Fifth Third will continue to be audited by an independent accounting firm on at least an annual basis to verify the proper crediting of the fees to each Plan.

Fifth Third asserts that the request for up to two business days to effect the rebate is primarily because of the potentially larger number of accounts that may require rebating due to the merger of the OKFC group of companies and the FT Bancorp group of companies. Specifically, the Applicant represents that the number of accounts that currently receive rebates is 662; the number that potentially could participate in the rebating program is 6,355. Although Fifth Third expects to be able to effect the rebate in one business day after receipt of the fees in most cases, the Applicant believes the two business days would give Fifth Third more time to deal with any unexpected glitch in the processing of a large number of rebates without having to be concerned about violating the terms of the exemption and thus possibly engaging in a prohibited transaction.

7. The Applicant represents that the procedures set forth in FAN 99–25E have been followed to date, even though the relevant parties have changed due to the merger of OKFC, the holding company of Old Kent Bank (the prior name of Fifth Third Michigan), with and into FTFC, a newly formed wholly-owned subsidiary of FT Bancorp, effective April 2, 2001. The appropriate officers of Fifth Third Bank acknowledge that the procedures set forth in FAN 99–25E have been

2001, the Kent Funds were advised by FTB(Ohio) pursuant to an Interim Advisory Agreement. This Interim Advisory Agreement was assumed by FTAM as of April 30, 2001.

followed despite the change in the relevant parties.

8. The Applicant represents that, prior to investing a Plan's assets in a Fund, Fifth Third will obtain the advance approval of an independent second fiduciary of the Plan, who will generally be the Plan's named fiduciary, trustee, or sponsoring employer (the Second Fiduciary). Fifth Third will provide the Second Fiduciary with a current prospectus for the Funds, a statement describing the fees to be charged to or paid by the Plan and by the Funds (including fees for investment advisory or similar services and any Secondary Services), a statement of the reasons why Fifth Third considers the investment to be appropriate for the Plan, and a statement describing any applicable limitation with respect to which assets of the Plan may be invested in the Funds.

9. Under section 408(a) of ERISA, the Department may not grant an exemption unless a determination is made that such exemption is (i) administratively feasible; (ii) in the interests of the plan and of its participants and beneficiaries, and (iii) protective of the rights of the plan's participants and beneficiaries.

Fifth Third asserts that the exemption would be administratively feasible because it is substantially similar to FAN 99–25E, except for changes to the parties and limited additional relief provided on a prospective basis to allow the maximum permitted time for rebating Funds-level fees to Plans to increase to two business days. The Applicant does not believe that these changes will significantly affect the protective nature of the exemption. The exemption establishes objective criteria for its application, and compliance with such criteria can be readily determined and audited. Fifth Third states that the proposed exemption is in the interests of investing plans and their participants and beneficiaries since investing assets of a Plan in mutual funds such as the Funds provides the Plans, and their participants and beneficiaries, with certain advantages which are not available through investment in commingled investment trusts (CITs), the alternative collective investment vehicle in which Fifth Third invests assets of employee benefit plans. Fifth Third notes that, because mutual funds share prices are published in daily newspapers, individuals are able to track the performance of their accounts on a daily basis. The daily deposit and redemption features of mutual funds allow for investment of new monies without delay and allow assets of the Plan to realize investment returns up to the date of redemption. Additionally, the various Portfolios offered by the Funds allow the investment managers or participants to transfer their investments between Portfolios with different investment objectives more promptly than could be done using CITs. Distributions can also be made in Funds shares, which eliminates any cost that might be associated with reinvesting cash distributions into new forms of investments. In sum, the Funds are an efficient alternative for the collective investment of assets, and the Plans will benefit from these efficiencies.

If the exemption is not granted, Plans for which Fifth Third serves as a fiduciary with investment discretion will be precluded from investing their assets in the Funds using the rebate mechanism. Fifth Third believes that the Funds represent appropriate investment vehicles that should be made available to the Plans.

10. On February 25, 2003, Fifth Third informed the Department that the Applicant recently discovered that an inadvertent error was made in processing rebates of investment advisory fees to certain retirement accounts. The system Fifth Third has installed for processing rebates involves assigning a code to each asset (*i.e.*, each Fifth Third Fund) held in an account. The assigned code establishes the factor based on which the rebate is accrued and paid. The account itself is then coded to identify if that account is or is not to receive rebates. Fifth Third discovered that although each account was correctly coded, the system identified certain asset codes as ineligible to pay rebates to the accounts. As a result, accounts holding assets with those asset codes did not receive the full rebate to which they were entitled.

Fifth Third states that this error appears to have initially occurred at the time of the merger of the Kent Funds into the Fifth Third Funds effective October 26, 2001. Thus, the rebate of the fees paid for October 2001 was the first rebate affected by the error. Both the number of plans and IRAs affected and the dollar amounts involved are relatively small. Fifth Third has determined that 44 tax-qualified plans and 32 IRAs are involved. The amounts that should have been rebated and were not are $39,736.08 for tax-qualified plans and $8,120.09 for IRAs.

Fifth Third provides that it is correcting this error by returning the principal amount of the rebates to the applicable plans and IRAs plus earnings to the date of correction. The earnings will be calculated using the method set forth in the Department of Labor's Voluntary Fiduciary Correction (''VFC'') Program. Thus, the earnings added to each rebated amount will be the greater of ''Lost Earnings'' or the ''Restoration of Profits,'' both as defined in the VFC Program. *See* Sections 5(b)(5) and 5(b)(6) of the VFC Program. Fifth Third represents that the rebates are now functioning properly for all of the Fifth Third Funds. Thus, the fee rebates shown on the account statements for the tax-qualified plans and the IRAs will be correct going forward, beginning with the posting in early March for the fees paid in February 2003.

Fifth Third represents that within sixty (60) days of the date of publication in the **Federal Register** of the notice granting this exemption, Fifth Third will file Form 5330 with the Internal Revenue Service and pay the excise taxes applicable under section 4975(a) of the Code in connection with the error in processing rebates of investment advisory fees during the period beginning October 26, 2001 and ending on March 1, 2003.

11. In summary, First Third represents that the transactions described herein will satisfy the statutory criteria of section 408(a) of ERISA and section 4975(c)(2) of the Code for the following reasons: (a) The transactions will allow the Plans to continue to enjoy the advantages of investment in mutual Funds, including more ready access to information regarding performance, thus enabling Plan fiduciaries and participants to make more informed decisions regarding their investments; (b) prior to the initial investment of Plan assets in the Funds, a second, independent fiduciary of each Plan will receive full disclosure regarding the proposed investment and the fees to be received by Fifth Third, and has the opportunity to approve or disapprove the investment; (c) no sales commissions or redemption fees will be paid by the Plans in connection with the acquisition or sale of shares of the Funds; and (d) all dealings among the Plans, the Funds, and Fifth Third will be on a basis no less favorable to the Plans than such dealings with the other shareholders of the Funds.

Notice to Interested Persons: Fifth Third will furnish a copy of the notice of the proposed exemption along with the supplemental statement described at 29 CFR 2570.43(b)(2) to the named fiduciary of any affected Plan that Fifth Third serves as a fiduciary with investment discretion over such Plan's assets. The notice will be delivered by first class mail within 15 days of the date of publication of the proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Wendy McColough of the Department, telephone (202) 693–8561. This is not a toll-free number.

Raleigh Pathology Laboratory Associates, P.A. Profit Sharing Plan (the Profit Sharing Plan), Located in Raleigh, NC

[Application No. D–11171]

Proposed Exemption

The Department of Labor is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) 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,[14] shall not apply to the proposed exchange of an unimproved waterfront lot (the Pine Knoll Shores Lot) owned by the Plan and allocated to the individually-directed account (the Account) in the Plan of James R. Edwards, M.D., for one unimproved tract of land (Parcel One) owned personally by Dr. Edwards and his spouse, Mrs. Delores Edwards.

This proposed exemption is subject to the following conditions:

(a) The exchange of the Pine Knoll Shores Lot between the Account and Dr. and Mrs. Edwards for Parcel One is a one-time transaction.

(b) The fair market value of the Pine Knoll Shores Lot and Parcel One is determined by qualified, independent appraisers, who will update their appraisal reports at the time the exchange is consummated.

(c) For purposes of the exchange, Parcel One has a fair market value that is no less than the fair market value of the Pine Knoll Shores Lot at the time the transaction is consummated.

(d) The terms and conditions of the exchange are at least as favorable to the Account as those obtainable in an arm's length transactions with an unrelated party.

(e) The exchange does not involve more than 25 percent of the Account's assets.

(f) The exchange allows the Account to divest itself of property that is susceptible to hurricane damage and high maintenance costs, and it permits the Account to acquire virtually maintenance-proof property having increased liquidity.

(g) Dr. Edwards is the only participant in the Plan whose Account is affected by the transaction and he desires that such transaction be consummated.

Summary of Facts and Representations

1. Raleigh Pathology Laboratory Associates, P.A. (the Employer) of Raleigh, North Carolina, is a professional corporation. Through duly licensed physicians and other employees, the Employer provides professional pathology services to patients of Wake Medical Center, patients of health maintenance organizations and others.

2. The Plan is a defined contribution plan which was established by the Employer, effective January 1, 2002, as a result of the merger of the Raleigh Pathology Laboratory Associates, P.A. Money Purchase Pension Plan (the Pension Plan), also sponsored by the Employer, into the Plan. As of December 31, 2001, which is the most recent date that financial information is available, the Plan had 20 participants and assets with an approximate aggregate fair market value of $13,885,737.83.

3. The Plan is administered by 8 trustees (the Trustees). The Plan's current Trustees are James R. Edwards, M.D., Gordon B. LeGrand, M.D., Dana D. Copeland, M.D., D. Emerson Scarborough, M.D., Dennis E. Ose, M.D., Cheryl A. Szpak, M.D., George H. Clarke, M.D., and Shrinivas Rajagopalan.

Pursuant to provisions of the Plan, each participant has the right to direct investments under such Plan for his or her own account. In such instances, the investments are earmarked for the account of the participants directing such investments.

4. Dr. Edwards, a stockholder, director and an employee of the Employer, as well as a Trustee, has an individually-directed account in the Plan. As of May 5, 2002, the assets in Dr. Edwards's Account were valued at $2,143,643.53.

5. Among the assets in Dr. Edward's Account is the Pine Knoll Shores Lot. This unimproved parcel of waterfront property is located at 122 Arborvitae Court, Pine Knoll Shores, Carteret County, North Carolina. The Pine Knoll Shores Lot is also legally described as ''Lot 11, Block TT, Section 5, Pine Knoll Shores Extension'' and it consists of approximately 9/10 of an acre of land. The property is not located in close proximity to any other property that is owned by Dr. Edwards.

The Account acquired the Pine Knoll Shores Lot as a real estate investment for $65,000 from Romaine and Kathryn Howard, who were unrelated parties, on September 30, 1981. Because the Account paid the Howards cash consideration for the Pine Knoll Shores Lot, the property was not encumbered by a mortgage. Currently, there is no mortgage or other encumbrances existing on the property and it represents approximately 19 percent of the assets of Dr. Edward's Account.

The Pine Knoll Shores Lot is located at the point where the Hoffman Inlet meets Bogue Sound. The lot has open water frontage on two full sides (approximately 202 feet on one side and 135 feet on the other). Although sea walls have been constructed on both sides of the property, they have required frequent maintenance since the North Carolina coastline is prone to hurricane damage.

Since the Pine Knoll Shores Lot has been allocated to the Account, it has not been used by or leased to anyone, including parties in interest. However, the Account has incurred $36,307 in maintaining the sea wall, $14,853 in real estate taxes,[15] and $7,571 for general maintenance for total expenses of approximately $58,731. Thus, together with the $65,000 acquisition price, the Account has expended $123,731 in connection with its interest in the Pine Knoll Shores Lot.

6. The Pine Knoll Shores Lot has been most recently appraised by Edward Michael Lupton, a North Carolina Certified Real Estate Appraiser, who is affiliated with the appraisal firm of Putnam Real Estate of Morehead, North Carolina. In an appraisal report dated December 17, 2002, Mr. Lupton, a qualified, independent real estate appraiser, placed the fair market value of a fee simple interest in the Pine Knoll Shores Lot at $408,000 as of the same date as his report. In valuing the Pine Knoll Shores Lot, Mr. Lupton utilized the sales comparison approach because he believed this method would provide the most reliable indication of market value since other valuation methods were not applicable to vacant lots in the subject neighborhood.

7. Because of ongoing expenses and the risk of further significant hurricane damage has left the Pine Knoll Shores Lot exposed to possible significant future losses, it is proposed that the Account divest itself of this property. Therefore, an administrative exemption is requested from the Department to

[14] For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[15] Although the Plan acquired the Pine Knoll Shores Lot in 1981 and Dr. Edwards's Account began paying real estate taxes from that date, the applicant represents that Dr. Edwards has only been able to locate records relating to amounts paid for real estate taxes since 1992.

allow the Account to exchange the Pine Knoll Shores Lot for Parcel One. Although Parcel One does not officially exist at this time, it will be excised from a 20.9718 acre tract of land which is owned by Dr. and Mrs. Edwards and constitutes their homeplace. The subject property will occupy the southwest corner formed by the intersection of Brassfield Road and Cahill Road in Barton's Creek Township, Wake County, North Carolina and consist of approximately 4.017 acres of land. Further, Mrs. Edwards will, by quitclaim deed to Dr. Edwards, release her undivided interest in Parcel One. Following the exchange, Parcel One will constitute approximately 19 percent of the assets of the Account.

8. Currently, boundary lines have been established to form Parcel One by Mr. Ronald Thomas, an independent appraiser who is affiliated with the real estate appraisal firm of Worthy & Wachtel Inc. of Raleigh, North Carolina. In an appraisal report dated December 29, 2002, Mr. Thomas, using the sales comparison approach to valuation, placed the fair market value of Parcel One at $408,000 as of December 17, 2002. Mr. Thomas also determined that the ''highest and best use'' of Parcel One is for single family residential development as four building lots, each consisting of one acre.

9. Once formed and duly recorded with the Wake County Register of Deeds, Parcel One will be transferred by Dr. Edwards to his Account. Simultaneously with the exchange, the Plan trustees will transfer the Pine Knoll Shores Lot to Dr. Edwards. The Account will not pay any real estate fees or commissions in connection with the transaction. In addition, the Account will receive real property having an independently appraised fair market value that is equal to the fair market value of the Pine Knoll Shores Lot on the day of the exchange. For this purpose, the appraisers will update their appraisals just prior to or on the date of the transaction.

10. In summary, it is represented that the proposed transaction will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The exchange of the Pine Knoll Shores Lot by the Account to Dr. and Mrs. Edwards for Parcel One will be a one-time transaction.

(b) The fair market values of the Pine Knoll Shores Lot and Parcel One will be determined by qualified, independent appraisers.

(c) For purposes of the exchange, Parcel One will have a fair market value that will be no less than the fair market value of the Pine Knoll Shores Lot at the time the transaction is consummated.

(d) The terms and conditions of the exchange will be at least as favorable to the Account as those obtainable in an arm's length transaction with an unrelated party.

(e) The exchange will not involve more than 25 percent of the Account's assets.

(f) The exchange will allow the Account to divest itself of property that is susceptible to hurricane damage and high maintenance costs, and it will permit the Account to acquire virtually maintenance-proof property having increased liquidity.

(g) Dr. Edwards is the only participant in the Plan whose Account will be affected by the transaction and he desires that such transaction be consummated.

Notice to Interested Persons

Because Dr. Edwards is the only participant in the Plan whose Account will be affected by the proposed transaction, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons. Therefore, comments and requests for a hearing are due 30 days after publication of the notice of pendency in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Blessed Chuksorji, telephone (202) 693–8567. (This is not a toll-free number.)

Valley OB-GYN Clinic P.C. Employees Pension Plan (the Plan), Located in Saginaw, Michigan

[Application No. D–11172]

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 proposed loan of $550,000 by the Plan to Valley OB-GYN Realty Company (the Company), a party in interest with respect to the Plan; provided that the following conditions are satisfied:

a. The Loan does not exceed 25% of the total assets of the Plan at any time;

b. The terms of the Loan are at least as favorable to the Plan as those terms which would exist in an arm's-length transaction with an unrelated party;

c. The Loan is secured by a building which has a fair market value, as determined by an independent, qualified appraiser, of at least 150% of the outstanding principal balance of the Loan (plus accrued but unpaid interest) throughout its duration (unless other property is pledged as collateral, as noted below in condition f.);

d. An independent, qualified fiduciary (the Independent Fiduciary) reviews the proposed terms and conditions of the Loan, and determines that the Loan is in the best interest and protective of the Plan and its participants and beneficiaries;

e. The Independent Fiduciary monitors the Loan throughout its duration and takes whatever actions are necessary to safeguard the interests of the Plan and its participants and beneficiaries; and

f. The Plan has the right, under the terms of the Loan and mortgage note related thereto, to require the Company to pledge additional property as collateral for the Loan, in the event such property is needed to maintain full collateralization at the amount specified herein.

Summary of Facts and Representations

1. The Plan is a qualified retirement plan sponsored by Valley OB-GYN Clinic, P.C (the Employer). The trustees of the Plan are Ronald C. Hazen, M.D., James R. Hines, M.D., and Duane B. Heilbronn, Jr., M.D. (the Trustees). Duane B. Heilbronn acts as the Plan's administrator. As of December 31, 2001, the Plan had approximately 42 participants and $7,702,976 in total assets.

2. The sponsor of the Plan is the Employer, a Michigan professional services corporation owned in equal shares by Ronald C. Hazen, M.D., James R. Hines, M.D., Duane B. Heilbronn, Jr., M.D., John Llewelyn, M.D. and Kenneth Su, M.D. The Employer is a medical practice.

3. The Loan will have a principal amount of $550,000, and a ten (10) year duration. The Loan will bear an interest rate of 9% per annum. The promissory note evidencing the Loan (the Note) requires monthly payments of principal and interest in the amount of $6,967 (or more) to be made on or before the 1st of each month. The Note requires monthly payments of principal and interest amortized over the entire ten (10) year duration of the Loan. The Note further provides that if any default should be made in the payment of any installment of principal and interest due thereunder, and should the Company fail to cure such default within thirty (30) days after delivery of written notice

thereof, then the full unpaid balance of the Note and all interest accrued thereon shall become immediately due and payable. The Plan, as the payee under the Note, shall have and may exercise any one or more of the rights and remedies provided by law, pursuant to the mortgage and other documents relating thereto. Among other things, the Note reserves the Plan the right to require the Company to pledge additional property as collateral for the Loan in the event such property is needed to maintain full collateralization at amounts which exceed at least 150% of the outstanding principal balance of the Loan.

The applicant represents that the Loan will represent no more than 25% of the Plan's total assets at any time.

4. The Loan will be secured at all times by a mortgage (the Mortgage) on a medical office building (the Building) owned by the Company that is currently leased to the Employer. The Building is located at 926 North Michigan Avenue, Saginaw, Michigan. The Mortgage will be duly recorded under the laws of the State of Michigan.

The Building was appraised (the Appraisal) on October 11, 2002 by Roland M. Adams, SRA, a certified independent real estate appraiser (Mr. Adams) with Adams Appraisal Services, located in Freeland, Michigan. In the Appraisal, Mr. Adams relied primarily on the cost and income approaches to value the Building.

Mr. Adams states that the cost approach is based on the idea that an informed purchaser would pay no more than the cost of producing a substitute property with the same utility as the subject property. Under the cost approach, the fair market value of the Building was determined to be approximately $926,000.

Mr. Adams also considered the income approach, where such analysis converts anticipated benefits (dollar income or amenities) to be derived from the ownership of property into a value estimate. The income approach is widely applied in appraising income-producing properties. Anticipated future income and/or reversions are discounted to a present-worth figure through the capitalization process. Mr. Adams stated that under the income approach, the fair market value of the Building was approximately $922,000.

Mr. Adams states that due to the Building's overall good condition, he gave equal consideration to the cost and income approaches. In conclusion, Mr. Adams determined that the fair market value of the Building was $925,000, as of October 11, 2002.

5. Citizens Bank in Saginaw, Michigan (the Bank) has examined the terms of the Loan. By letter dated April 21, 2003, Kimberly E. Johnson, a vice president of the Bank, represents that the Bank would provide a similar loan under the same terms for the same amount, payable in equal monthly installments of principal and interest over a ten (10) year period at an interest rate of 9% per annum.

6. The Loan will be monitored by Ronald Krawczyk, CPA (Mr. K), who will serve as the independent fiduciary (the I/F) on behalf of the Plan for purposes of the Loan. Mr. K has submitted a statement dated April 17, 2003, in which he discusses his role as the I/F. Mr. K believes that the Loan would be in the best interest of the Plan's participants and beneficiaries. Mr. K has reviewed the terms and conditions of the Loan in consideration of the Plan's overall investment portfolio, and found the Loan to be consistent with the Plan's overall investment objectives and liquidity needs. In this regard, Mr. K represents that the terms and conditions of the Loan are comparable with, and as favorable to, the Plan as the terms and conditions of a similar loan between unrelated parties. Mr. K believes that the Loan will be a stable investment opportunity that will provide consistent returns for the Plan at a steady rate of interest commensurate with market rates. The Loan will be adequately collateralized by property (*i.e.*, the Building or other property) that will be valued in excess of at least 150% of the outstanding principal amount of the Loan. Mr. K further states that the proposed rate of return for the Loan will exceed similar rates of return that could be obtained through other fixed-income investment vehicles. Mr. K believes that the Loan will insure a favorable rate of return to the Plan on a continuing basis, throughout its duration.

As the I/F, Mr. K will have an affirmative duty to monitor the Loan to ensure that monthly payments are timely made by the Company. Mr. K will consult with counsel for the Plan on a regular basis to determine that no default occurred under the terms of the Loan. In the event of default, Mr. K will act for the Plan and promptly transmit notice of default to the Company and the Trustees. Mr. K will then monitor, on behalf of the Plan, the progress for any cure of such default. Mr. K will have the authority and ability to act unilaterally to protect the interests of the Plan with respect to all options for recovery on the Note, under applicable Michigan law, including foreclosure on the Building with the right to sell the Building, or other property that is securing the Loan to third parties. Such action may be taken by Mr. K without the prior approval of the Trustees, if necessary. Mr. K will also periodically review the condition of the Building.[16] Mr. K represents that he will take such actions as are necessary to ensure, and verify, that the fair market value of the Building is equal to or greater than, an amount that is at least 150% of the outstanding principal balance of the Loan (plus accrued but unpaid interest). If necessary, Mr. K will require the Company to pledge additional property as security for the Loan.

With respect to Mr. K's qualifications to act as the I/F for the Plan for purposes of the Loan, Mr. K represents that he is a licensed CPA and has been in practice for 33 years. Mr. K maintains that he has had extensive auditing experience, having served as a trained auditor and audit manager. Mr. K states that he has performed audits and other financial services for various industries, including banks, hospitals, manufacturing firms and other businesses. Mr. K states that he is a member of the American Institute of CPA's (*i.e.*, the AICPA) and the Michigan Association of CPA's.

Mr. K represents that he is, and will remain, independent of the Employer and the Company, for purposes of his proposed duties and responsibilities as the I/F for the Plan.

7. With respect to the possibility of the need to appoint an individual or entity to succeed Mr. K as the I/F for the Plan, the applicant states that it will notify the Department at least sixty (60) days in advance of such appointment. The person or entity so appointed will have the same responsibilities as Mr. K, and will have experience that is similar or comparable to that of Mr. K. Finally, the individual or entity that may be selected as the new I/F will be independent of the Employer and the Company.

8. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

a. The Loan will not exceed 25% of the total assets of the Plan at any time;

b. The terms of the Loan are at least as favorable to the Plan as those terms

[16] Among other things, Mr. K notes that the insurance provisions relating to the Building are adequate to protect the Plan's interests. Pursuant to the terms of the Note, the Company is required to maintain both fire and casualty and general liability insurance policies on the Building at all times in commercially reasonable amounts satisfactory to the Plan. The amount of such policies shall be no less than the unpaid principal balance and accrued interest under the Note.

that would exist in an arm's-length transaction with an unrelated party;

c. The Loan will be secured by the Building, which has a fair market value, as determined by an independent, qualified appraiser, of at least 150% of the outstanding principal balance of the Loan (plus accrued but unpaid interest);

d. Mr. K., as the I/F for the Plan, has reviewed the proposed terms and conditions of the Loan, and determined that the Loan would be in the best interest and protective of the Plan and its participants and beneficiaries;

e. Mr. K, as the I/F for the Plan, will monitor the Loan throughout its duration and take whatever actions are necessary to safeguard the interests of the Plan and its participants and beneficiaries; and

f. The Plan has the right to require the Company to pledge additional property as collateral for the Loan in the event such property is needed to maintain full collateralization at an amount which is at least 150% of the outstanding principal balance of the Loan (plus accrued but unpaid interest).

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department at (202) 693–8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

Signed at Washington, DC, this 19th day of June, 2003.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 03–15928 Filed 6–23–03; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–50,560]

Crown Pacific Including Temporary Workers of Express Personnel, Gilchrist, Oregon; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on April 14, 2003, applicable to workers of Crown Pacific, Gilchrist, Oregon. The notice was published in the **Federal Register** on May 1, 2003 (68 FR 23323).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. Information provided by the company shows that temporary workers of Express Personnel were employed at Crown Pacific to produce dimensional lumber at the Gilchrist, Oregon location of the subject firm.

Based on these findings, the Department is amending this certification to include temporary workers of Express Personnel employed at Crown Pacific, Gilchrist, Oregon.

The intent of the Department's certification is to include all workers at the Gilchrist location of Crown Pacific who were adversely affected by increased imports.

The amended notice applicable to TA–W–50,560 is hereby issued as follows:

> All workers of Crown Pacific, Gilchrist, Oregon, and temporary workers of Express Personnel, producing dimensional lumber at Crown Pacific, Gilchrist, Oregon, who became totally or partially separated from employment on or after October 11, 2002, through April 14, 2005, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC this 9th day of May 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

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BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–50,728 and TA–W–50,728A]

Delco Remy America, Inc., Anderson, Indiana; Delco Remy America, Inc. d/b/a Remy Logistic, Anderson, Indiana; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on March 24, 2003, applicable to workers of Delco Remy America, Inc., Anderson, North Carolina. The notice was published in the **Federal Register** on April 7, 2003 (68 FR 16834).

At the request of the company, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of light and heavy duty starters and alternators.

Information shows that worker separations occurred at Remy Logistic, a division of Delco Remy America, Inc., Anderson, Indiana. Workers at Remy Logistic (a warehouse) ship, store and inspect products made by Delco Remy.

Accordingly, the Department is amending the certification to include workers of Delco Remy America, Inc., d/b/a Remy Logistic, Anderson, Indiana.

The intent of the Department's certification is to include all workers of Delco Remy America, Inc. who were adversely affected by increased imports.

The amended notice applicable to TA–W–50,728 is hereby issued as follows: