

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

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

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

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

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

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

(h) The term "secondary service" means a service other than an investment management, investment advisory, or similar service, which is provided by the Bank to the Funds. However, for purposes of this exemption, the term "secondary service" will not include any brokerage services provided to the Funds by the Bank for the execution of securities transactions engaged in by the Funds.

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

within one business day, the Bank shall have one additional business day to complete such sale.

**EFFECTIVE DATE:** This exemption is effective as of April 1, 1994.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on March 20, 1995 at 60 FR 14786.

**WRITTEN COMMENTS AND MODIFICATIONS:**

The applicant submitted the following comments and requests for modifications regarding the notice of proposed exemption (the Proposal).

With respect to Section I(h) of the Proposal, the condition requires that a Second Fiduciary receive, in advance of any investment by the Client Plan in a Fund, full and detailed written disclosure of information concerning the Funds. However, the applicant states that the condition as written might be construed as requiring the disclosure of such information before every investment thereafter in the same Fund (i.e., if one reads "any investment" to mean "each and every investment"). The applicant requests that, in order to avoid confusion on this point, the phrase "\* \* \* in advance of any investment" be changed to read "\* \* \* in advance of any *initial* investment" (emphasis added). The Department concurs with the applicant's requested clarification and has so modified the language of Section I(h) of the Proposal.

With respect to Section I(i) of the Proposal, the applicant states that this condition, which in general requires the Second Fiduciary for each Client Plan to have authorized in writing the investment of assets of the Client Plan in a particular Fund, begins with the clause "[o]n the basis of the information described above in paragraph (h) of Section I." The applicant represents that while the Bank will be providing the information required by Section I(h), and anticipates that the Second Fiduciary will take such information into consideration in determining whether to approve any investment in a Fund, the Bank will not in every case be able to determine the precise basis on which a Second Fiduciary has approved use of a Fund as an investment vehicle. Thus, the applicant requests that this clause be either deleted or otherwise clarified. In this regard, the Department concurs with the applicant's requested clarification and has deleted the words "[o]n the basis of \* \* \*" in the opening clause of Section I(i) and has substituted therefor the words "[a]fter consideration of \* \* \*".

With respect to Section I(m)(2) of the Proposal, the condition requires that the Bank provide the Second Fiduciary of a Client Plan investing in the Fund with a copy of the "\* \* \* annual financial disclosure report prepared by the Bank" which includes information about the Fund portfolios. The applicant requests that the information referred to here should be clarified to mean the annual financial reports of the Funds which are prepared by the Funds, not by the Bank. In addition, the applicant requests that the condition be clarified to require that only the annual reports of the Funds in which a Client Plan is invested need to be sent to the Second Fiduciary for that Client Plan. The Department concurs with the applicant's requested clarification and has modified the language of Section I(m)(2) by deleting the words "\* \* \* prepared by the Bank" and substituting therefor the words "\* \* \* of the Funds in which such Client Plan is invested".

With respect to Section III(d) of the Proposal, the applicant states that the 1784 Funds is a Massachusetts business trust with separate series recognized for tax purposes as a separate corporation, but which collectively is not recognized as a corporation. Thus, the applicant requests that the Department delete the word "Inc." after the reference to the 1784 Funds in the definition contained in Section III(d). In addition, the applicant notes that references throughout the Proposal to the "Fund" are in fact generally meant as references to one or more of the separate series of the 1784 Funds. In this regard, the applicant requests that the definition in Section III(d) indicate that the term "Fund" or "Funds" "\* \* \*" shall include the 1784 Fund, *each series thereof*, or any other \* \* \* (emphasis added). The Department concurs with the applicant's requested clarification and has so modified the language of Section III(d) of the Proposal.

Finally, pursuant to telephone conversations with representatives of the Department, the applicant has confirmed in writing that when the Bank is engaged to provide investment advisory services for a Fund under the requested exemption, such services will be performed by the Bank or a third party sub-advisor retained by the Bank. The applicant represents that no "sub-advisor" to the Bank will be retained directly by a Fund. In this regard, the Bank states that the fees payable by a Fund ultimately for the account of a sub-advisor to the Bank will be rebated by the Bank to the Client Plans, as discussed in the Proposal and required by Section I(d) above.