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 406(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 as of January 12, 1995, to the cash sale of certain commercial paper notes (the Notes) for \$25,031,269 by the Common Trust Cash Investment Fund (the Fund) to Boston Safe Deposit and Trust Company (Boston Safe), a party in interest with respect to employee benefit plans invested in the Fund, provided that the following conditions are met:

- (a) The sale was a one-time transaction for cash;
- (b) The Fund received an amount which was equal to the greater of either (i) the amortized cost of the Notes, plus accrued but unpaid interest, as of the date of sale, or (ii) the fair market value of the Notes, as determined by an independent pricing service at the time of sale;
- (c) The Fund did not pay any commissions or other expenses in connection with the sale;
- (d) Boston Safe, as trustee of the Fund, determined that the sale of the Notes was appropriate for and in the best interests of the Fund, and the employee benefit plans invested in the Fund, at the time of the transaction;
- (e) Boston Safe took all appropriate actions necessary to safeguard the interests of the Fund, and the employee benefit plans invested in the Fund, in connection with the transactions; and
- (f) If the exercise of any of Boston Safe's rights, claims or causes of action in connection with its ownership of the Notes results in Boston Safe recovering from the issuer of the Notes, or any third party, an aggregate amount that is more than the sum of:
- (1) the purchase price paid for the Notes by Boston Safe (i.e. \$25,031,269);
- (2) the original issue discount on the Notes which remained unamortized as of the date Boston Safe acquired the Notes from the Fund; and
- (3) the interest due on the Notes from and after the date Boston Safe purchased the Notes from the Fund, at the rate specified in the Notes, Boston Safe will refund such excess amounts promptly to the Fund (after deducting all reasonable expenses incurred in connection with the recovery).

**EFFECTIVE DATE:** The proposed exemption, if granted, will be effective as of January 12, 1995.

## **Summary of Facts and Representations**

1. Boston Safe is a Massachusetts trust company which provides a wide range of banking and fiduciary services to a broad array of clients, including employee benefit plans subject to the Act. The Fund is a common trust fund established and maintained by Boston Safe as trustee for the collective investment and reinvestment of assets contributed thereto by Boston Safe and its affiliates on behalf of their trust services clients, including employee benefit plans. The Fund is exempt from federal income tax pursuant to section 584 of the Code. As of December 6, 1994, the value of the Fund's portfolio (including the Notes) was approximately \$935 million. As of such date, participating investors in the Fund included seventeen employee benefit plans (primarily voluntary employees' beneficiary associations).

2. The Fund purchased the Notes on August 1, 1994 for \$24,988,375. The Notes were one year debentures with a par value of \$25 million, issued by Orange County, California (the Issuer) on July 8, 1994 with a maturity date of July 10, 1995. The aggregate principal amount of the entire series of the Notes was \$600 million. Interest on the Notes was taxable and payable monthly at a variable rate which was reset on the first day of each month. The interest rate was equal to the one-month London Interbank Offered Rate (LIBOR) set forth on the second business day prior to the reset date. The interest on the Notes was payable on the first business day of every month and at maturity. The principal of and unpaid accrued interest on the Notes were payable at maturity.

The Notes were secured by a repayment fund (the Repayment Fund) established by the Issuer at the time the Notes were issued. The assets of the Repayment Fund were invested in the Orange County Investment Pool (the Orange County Pool), an investment fund established by the Issuer for the collective investment of the assets of the Issuer and its several governmental subdivisions.

3. The decision to invest Fund assets in the Notes was made by Boston Safe as trustee of the Fund. Prior to the investment, Boston Safe conducted an investigation of the potential investment, including an examination of the financial condition of the Issuer. Boston Safe represents that the Fund's investment in the Notes was consistent with the Fund's investment policies and

objectives.<sup>1</sup> At the time the Fund acquired the Notes, the Notes were rated "A–1 plus" by Standard & Poor's Corporation and "P–1" by Moody's Investor Services, Inc.

4. On December 6, 1994, due to large trading losses in the Orange County Pool, the Issuer filed two voluntary petitions under Chapter 9 of the Bankruptcy Code—one on behalf of the Issuer and the other on behalf of the Orange County Pool. Responding to these events, after written notice to participating investors, Boston Safe transferred the Notes to a liquidating account (the Liquidating Account) maintained on behalf of the participating investors then having an interest in the Fund. This transfer was effective December 6, 1994. As of such date, the seventeen employee benefit plans held approximately 15% of the interests in the Liquidating Account.

Boston Safe states that placing the Notes in the Liquidating Account allowed for the continued operation of the Fund because the segregation of the Notes from the other assets in the Fund confined the potential investment losses resulting from the Notes to those investors participating in the Fund as of December 6, 1994. Boston Safe was able

The Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan. Section 404(a) of the Act also states that a plan fiduciary should diversify the investments of a plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

In this regard, the Department is not providing any opinion as to whether a particular category of investments or investment strategy would be considered prudent or in the best interests of a plan as required by section 404 of the Act. The determination of the prudence of a particular investment or investment course of action must be made by a plan fiduciary after appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including a plan's potential exposure to losses and the role the investment or investment course of action plays in that portion of the plan's portfolio with respect to which the fiduciary has investment duties (see 29 CFR 2550.404a-1). The Department also notes that in order to act prudently in making investment decisions, a plan fiduciary must consider, among other factors, the availability, risks and potential return of alternative investments for the plan. Thus, a particular investment by a plan, which is selected in preference to other alternative investments, would generally not be prudent if such investment involves a greater risk to the security of a plan's assets than other comparable investments offering a similar return or result.

<sup>&</sup>lt;sup>1</sup> The Department is expressing no opinion in this proposed exemption regarding whether the acquisition and holding of the Notes by the Fund violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act.