of the Act because: (a) The proposed transaction is a one-time transaction for cash; (b) the proposed transaction will enable the Plan and its participants and beneficiaries to avoid any risks associated with the continued holding of the GIC; (c) the Plan will receive the higher of: (1) The fair market value of the GIC or (2) the accumulated book value of the GIC, with such

determination be made by State Street; and (d) the Plan will not incur any expenses or loss from the proposed transaction.

FOR FURTHER INFORMATION CONTACT: Charles S. Edelstein of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

New Bedford Institution for Savings Employee Stock Ownership Plan (the Plan) Located in New Bedford, Massachusetts; Proposed Exemption

[Application No. D-10033]

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), and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the past acquisition and holding by the plan of certain stock warrants (the Warrants) in connection with a merger (the Merger) of NBB Bancorp, Inc. (NBB), the parent company of the Plan's sponsor, New Bedford Institution for Savings (NBB Bank), with Fleet Financial Group, Inc. (Fleet), provided the following conditions were satisfied: (a) The Plan's acquisition and holding of the Warrants occurred in connection with the Merger pursuant to which (i) all shares of common stock of NBB (NBB Stock) were converted, at the election of the shareholder, into cash or shares of common stock of Fleet (Fleet Stock) and (ii) each shareholder received 0.28 Warrants for each share of NBB Stock; (b) the acquisition and holding of the Warrants resulted from the independent action of NBB as a corporate entity, and all holders of NBB Stock, including the Plan, were treated in the same manner with respect to the Merger; and (c) the Warrants were automatically issued to the Plan, which made no affirmative election to acquire the Warrants. **EFFECTIVE DATE:** If the proposed exemption is granted, the exemption will be effective January 27, 1995.

Summary of Facts and Representations

1. The Plan is an employee stock ownership plan which, prior to the Merger, was maintained by NBB Bank, a Massachusetts savings bank and wholly owned subsidiary of NBB, a Delaware corporation. As of September 30, 1994, the Plan had 349 participants and total assets of approximately \$7 million. As of that date, the assets of the Plan consisted of NBB Stock and cash.7 The Plan is administered by a committee (the ESOP Committee) which, prior to the Merger, was appointed by the Board of Directors of NBB Bank and is currently composed of members appointed by Fleet Bank of Massachusetts, N.A. (Fleet Bank). The trustee of the Plan is Investors Bank and Trust Company (the Trustee), a Massachusetts trust company.

2. Fleet is a Rhode Island corporation which is parent company to a number of direct and indirect wholly-owned subsidiary banks, including Fleet Bank. On May 9, 1994, Fleet entered into an Agreement and Plan of Merger with NBB (the Agreement), providing for the Merger. As part of the Merger, Fleet Bank and NBB Bank entered into a separate merger agreement providing for the merger of NBB Bank with and into Fleet Bank. As a result of the Merger, Fleet Bank became the sponsor of the Plan.⁸

3. Under the terms of the Agreement, on the effective date of the Merger, January 27, 1995 (the Effective Date), each share of NBB Stock issued and outstanding immediately prior to the Effective Date (except treasury shares, shares held by NBB, Fleet or any of their subsidiaries in a fiduciary capacity or as collateral for a debt, and certain dissenting shares) was converted, at the election of the shareholder, into either cash in the amount of \$48.50 or 1.457 shares of Fleet Stock. Each shareholder also received 0.28 Warrants for each share of NBB Stock. Each Warrant confers upon its holder the right to acquire one share of Fleet Stock at a purchase price of \$43.875. Warrants may be exercised at any time during the five-year period commencing on the first anniversary of the Effective Date. The Warrants are treated as separate

securities under federal securities laws and are traded on the New York Stock Exchange separately from Fleet Stock. The applicant represents that the Warrants and Fleet Stock issued in connection with the Merger were issued pursuant to an appropriate registration statement filed with the U.S. Securities and Exchange Commission prior to the Effective Date.

4. The applicant represents that immediately prior to the Effective Date, the Plan held 126,061 shares of NBB Stock, all of which were allocated to participants' accounts under the Plan. The Plan's holdings represented approximately 1.3% of the total issued and outstanding shares of NBB Stock.

5. The terms of the Agreement required the termination of the Plan upon the consummation of the Merger.9 In preparation for the termination of the Plan, and the subsequent distribution of the participants' accounts, NBB Bank amended the Plan to permit the participants to direct the Trustee to exchange the NBB Stock allocated to their Plan accounts for cash, Fleet Stock or a combination thereof in accordance with the terms of the Agreement. The applicant represents that in order to avoid a prohibited transaction under section 406(a)(2) of the Act, the Plan was also amended to direct the Trustee to sell the Warrants received by the Plan as soon as practicable.¹⁰

6. Prior to the Effective Date, each participant in the Plan received written information concerning his/her right to elect cash or Fleet Stock in exchange for the NBB Stock allocated to his/her account, and an election form to be returned to the ESOP Committee.¹¹ The

¹⁰ In this regard, we note that although Plan provisions directed the Trustee to sell the Warrants, the Department has taken the position that a trustee may follow such plan provisions only to the extent permitted by section 404(a)(1)(D) of the Act, i.e., insofar as such plan provisions are consistent with the provisions of Titles I and IV of the Act. For example, if a conflict between the prudence standard and plan provisions occurs, section 404(a)(1)(D) requires that plan provisions give way to the statutory requirements. Thus, in this case, the Trustee was responsible for determining, among other things, whether following such provisions would result in an investment decision which would be prudent for the Plan and would produce a result which would be for the exclusive purpose of providing benefits to the Plan participants and beneficiaries.

¹¹ Out of over 300 Plan participants, only 14 failed to make an election. As to these participants, the ESOP Committee directed that they be treated in the same manner as non-Plan holders of NBB Stock who made no election. Accordingly, like the Continued

⁷The applicant represents that the NBB Stock constituted ''qualifying employer securities'' within the meaning of section 407(d)(5) of the Act, and therefore, the Plan's ownership of such stock satisfied the requirements of section 407(a) of the Act. In this proposed exemption, the Department expresses no opinion as to whether the requirements of section 407 of the Act were satisfied.

⁸The applicant represents that each shareholder of NBB Bank, including the Plan, was entitled to vote on the Merger. The right to vote the Plan's NBB Stock was passed through to the participants.

⁹ The applicant represents that the Plan was terminated effective September 30, 1994. The termination was approved by the Internal Revenue Service by letter dated June 12, 1995. The Plan currently is in the process of distributing its assets to the participants and beneficiaries.