

## General Information

The attention of interested persons is directed to the following:

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

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

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

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 30th day of September, 1998.

**Ivan Straszfeld,**

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

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 98-46;  
Exemption Application No. D-10503, et al.]

### Grant of Individual Exemptions; Sanwa Bank California, et al.

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

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) 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).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

## Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

### Sanwa Bank California (Sanwa Bank), Located in Los Angeles, CA

[Prohibited Transaction Exemption 98-46;  
Exemption Application No. D-10503]

### Exemption

#### Section I. Exemption for the In-Kind Transfers of Assets

The restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (F) shall not apply, effective October 31, 1997, to the purchase, by an employee benefit plan established and maintained by parties other than Sanwa Bank (the Client Plan) or by Sanwa Bank (the Bank Plan)<sup>1</sup> of shares of one or more open-end management investment companies (the Fund or Funds), registered under the Investment Company Act of 1940, as amended (the 1940 Act), in exchange for assets of the Plan transferred in-kind to the Fund by a collective investment fund (the CIF) maintained by Sanwa Bank, where Sanwa Bank is the investment adviser and may provide other services to the Fund (the Secondary Services), as defined in Section III(i), and where Sanwa Bank is also a fiduciary of the Plan.

This exemption is subject to the following conditions:

(a) A fiduciary (the Second Fiduciary), as defined in Section III(h), which is acting on behalf of each affected Plan and which is independent of and unrelated to Sanwa Bank, receives advance written notice of the in-kind transfer of assets of the CIFs in exchange for shares of the Funds and full written disclosures of information concerning the Funds which includes the following:

(1) A current prospectus for each Fund in which the Client Plan may invest;

<sup>1</sup> Unless otherwise noted, the Client Plans and the Bank Plans are collectively referred to as the Plans.

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

(3) A statement of the reasons why Sanwa Bank may consider such investment to be appropriate for the Client Plan;

(4) A statement of whether there are any limitations applicable to Sanwa Bank with respect to which assets of a Client Plan may be invested in Fund shares, and, if so, the nature of such limitations; and

(5) A copy of the proposed exemption and/or a copy of the final exemption upon the request of the Second Fiduciary.

(b) On the basis of the foregoing information, the Second Fiduciary gives prior approval in writing for each purchase of Fund shares in exchange for the Plan's assets transferred from the CIF, consistent with the responsibilities, obligations and duties imposed on fiduciaries by Part 4 of Title I of the Act. In addition, the Second Fiduciary gives prior approval in writing of the receipt of confirmation statements described in Section I(g) by facsimile or electronic mail if the Second Fiduciary elects to receive such statements in that form.

(c) No sales commissions or other fees are paid by the Plan in connection with the purchase of Fund shares.

(d) All transferred assets are securities for which market quotations are readily available, or cash.

(e) The transferred assets constitute a *pro rata* portion of all assets of a Plan held in the CIF immediately prior to the transfer. Notwithstanding the foregoing, the allocation of fixed-income securities held by a CIF among Plans on the basis of each Plan's *pro rata* share of the aggregate value of such securities will not fail to meet the requirements of this subsection if:

(1) The aggregate value of such securities does not exceed one (1) percent of the total value of the assets held by the CIF immediately prior to the transfer; and

(2) Such securities have the same coupon rate and maturity, and at the time of the transfer, the same credit ratings from nationally recognized statistical rating agencies.

(f) Each Plan receives Fund shares that have a total net asset value equal to the value of the Plan's transferred assets on the date of the transfer, as determined with respect to securities in a single valuation performed in the

same manner and at the close of business on the same day in accordance with Securities and Exchange Commission (SEC) Rule 17a-7 under the 1940 Act, as amended (Rule 17a-7), (using sources independent of Sanwa Bank and the Fund) and the procedures established by the Funds pursuant to Rule 17a-7.

(g) Sanwa Bank sends by regular mail or, if applicable, by facsimile or electronic mail, to the Second Fiduciary of each affected Plan that purchases Fund shares in connection with the in-kind transfer, the following information:

(1) No later than 30 days after the completion of the purchase, a written confirmation which contains—

(A) The identity of each transferred security that was valued for purposes of the transaction in accordance with Rule 17a-7(b)(4);

(B) The current market price, as of the date of the in-kind transfer, of each such security involved in the transaction; and

(C) The identity of each pricing service or market-maker consulted in determining the current market price of such securities.

(2) No later than 105 days after the completion of each purchase, a written confirmation which contains—

(A) The number of CIF units held by each affected Plan immediately before the in-kind transfer, the related per unit value, and the total dollar amount of such CIF units; and

(B) The number of shares in the Funds that are held by each affected Plan immediately following the in-kind transfer, the related per share net asset value and the total dollar amount of such shares.

(h) The conditions set forth in Sections II(d), (e), (n)(1), (o), (p) and (q) are satisfied.

#### Section II. Exemption for the Receipt of Fees from the Funds

The restrictions of section 406(a) and section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code shall not apply, effective October 31, 1997, to (1) the receipt of fees by Sanwa Bank from the Funds for investment advisory services provided to the Funds; and (2) the receipt or retention of fees by Sanwa Bank from the Funds for acting as a custodian or shareholder serving agent to the Funds, as well as for providing any other services to the Funds which are not investment advisory services (i.e., the Secondary Services), as defined in Section III(i), in connection with the investment of shares in the Funds by the Client Plans for which Sanwa Bank acts

as a fiduciary, provided that the following conditions are met:

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

(b) The price paid or received by the Client Plans 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 which would have been paid or received for the shares of the same class by any other investor at that time.

(c) Sanwa Bank, any of its affiliates or their officers or directors do not purchase from or sell to any of the Client Plans shares of any of the Funds.

(d) For each Client Plan, the combined total of all fees received by Sanwa Bank for the provision of services to such Plan, and in connection with the provision of services to any of the Funds in which the Client Plans may invest, is not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(e) Sanwa Bank does not receive any fees payable, pursuant to Rule 12b-1 (the 12b-1 Fees) under the 1940 Act in connection with the transactions involving the Funds.

(f) A Second Fiduciary with respect to a Client Plan receives in advance of the investment by the Client Plan in any of the Funds, a full and detailed written disclosure of information concerning such Fund including, but not limited to the disclosures described above in Section I(a).

(g) On the basis of the foregoing information, the Second Fiduciary authorizes in writing—

(1) The investment of assets of the Client Plan in shares of the Fund;

(2) The Funds in which the assets of the Client Plan may be invested; and

(3) The fees received by Sanwa Bank in connection with investment advisory services and Secondary Services provided to the Funds, such authorization by the Second Fiduciary to be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(h) The authorization, described in Section II(g) is terminable at will by the Second Fiduciary of a Client Plan, without penalty to such Client Plan. Such termination will be effected by Sanwa Bank redeeming the shares of the Funds held by the affected Client Plan within one business day following receipt by Sanwa Bank, either by mail, hand delivery, facsimile, or other available means at the option of the

Second Fiduciary, of written notice of termination (the Termination Form), as defined in Section III(j); provided that if, due to circumstances beyond the control of Sanwa Bank, the redemption cannot be executed within one business day, Sanwa Bank shall have one additional business day to complete such redemption.

(i) The Client Plans do not pay any Plan-level investment advisory fees to Sanwa Bank with respect to any of the assets of such Client Plans which are invested in shares of the Funds. This condition does not preclude the payment of investment advisory fees by the Funds to Sanwa Bank under the terms of an investment advisory agreement adopted in accordance with section 15 of the 1940 Act or other agreement between Sanwa Bank and the Funds or the retention by Sanwa Bank of fees for Secondary Services paid to Sanwa Bank by the Funds.

(j) In the event of an increase in the rate of any fees paid by the Funds to Sanwa Bank regarding investment advisory services that Sanwa Bank provides to the Funds over an existing rate for such services that had been authorized by a Second Fiduciary of a Client Plan, in accordance with Section II(g), Sanwa Bank will, at least 30 days in advance of the implementation of such increase, provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of the Fund and which explains the nature and amount of the increase in fees) to the Second Fiduciary of each Client Plan invested in a Fund which is increasing such fees. Such notice shall be accompanied by the Termination Form, as defined in Section III(j).

(k) In the event of an (1) addition of a Secondary Service, as defined in Section III(i), provided by Sanwa Bank to the Funds for which a fee is charged or (2) an increase in the rate of any fee paid by the Funds to Sanwa Bank for any Secondary Service that results either from an increase in the rate of such fee or from the decrease in the number or kind of services performed by Sanwa Bank for such fee over an existing rate for such Secondary Service which had been authorized by the Second Fiduciary in accordance with Section II(g), Sanwa Bank will, at least 30 days in advance of the implementation of such Secondary Service or fee increase, provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of the Funds and which explains the nature and amount of the

additional Secondary Service for which a fee is charged or the nature and amount of the increase in fees) to the Second Fiduciary of each of the Client Plans invested in a Fund which is adding a service or increasing fees. Such notice shall be accompanied by the Termination Form, as defined in Section III(j).

(l) The Second Fiduciary is supplied with a Termination Form at the times specified in Sections II(j), (k) and (m), which expressly provides an election to terminate the authorization, described above Section II(g), with instructions regarding the use of such Termination Form including statements that—

(1) The authorization is terminable at will by any of the Client Plans, without penalty to such Plans. The termination will be effected by Sanwa Bank redeeming shares of the Funds held by the Client Plans requesting termination on the date established by the Client Plan on the Termination Form or, if the Client Plan does not specify a date, not later than one business day following receipt by Sanwa Bank from the Second Fiduciary of the Termination Form or any written notice of termination; provided that if, due to circumstances beyond the control of Sanwa Bank, the redemption of shares of such Client Plan cannot be executed on the date specified by the Client Plan or within one business day when the Client Plan does not specify a date, Sanwa Bank shall have one additional business day to complete such redemption; and

(2) Failure by the Second Fiduciary to return the Termination Form on behalf of the Client Plan will be deemed to be an approval of the additional Secondary Service for which a fee is charged or an increase in the rate of any fees and will result in the continuation of the authorization, as described in Section II(g), of Sanwa Bank to engage in the transactions on behalf of the Client Plan;

(m) The Second Fiduciary is supplied with a Termination Form at least once in each calendar year, beginning with the calendar year that begins after the grant of this exemption is published in the Federal Register and continuing for each calendar year thereafter, provided that the Termination Form need not be supplied to the Second Fiduciary, pursuant to this paragraph, sooner than six months after such Termination Form is supplied pursuant to Sections II(j) and (k), except to the extent required by Sections II(j) and (k) to disclose an additional Secondary Service for which a fee is charged or an increase in fees.

(n)(1) With respect to each of the Funds in which a Client Plan invests, Sanwa Bank will provide the Second

Fiduciary of such Plan the following information:

(A) At least annually, a copy of an updated prospectus of such Fund; and

(B) Upon the request of the Second Fiduciary, a report or statement (which may take the form of the most recent financial report, the current statement of additional information, or some other written statement) which contains a description of all fees paid by the Fund to Sanwa Bank.

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

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

(B) The total, expressed in dollars, brokerage commissions of each Fund that are paid by such Fund to brokerage firms unrelated to Sanwa Bank;

(C) The average brokerage commissions per share, expressed as cents per share, paid to Sanwa Bank by each Fund; and

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

(o) All dealings between the Client Plans and any of the Funds are on a basis no less favorable to such Client Plans than dealings between the Funds and other non-Plan shareholders holding the same class of shares as the Client Plans.

(p) Sanwa Bank maintains for a period of 6 years, in a manner that is accessible for audit and examination, the records necessary to enable the persons, described in Section II(q), to determine whether the conditions of this exemption have been met, except that—

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

(2) No party in interest, other than Sanwa Bank, 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(q).

(q)(1) Except as provided in paragraph (q)(2) of this Section II and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in

Section II(p) 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 (the Service) or the SEC;

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

(C) Any participant or beneficiary of the Plans or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraph (q)(1)(B) and (q)(1)(C) of Section II shall be authorized to examine trade secrets of Sanwa Bank, or commercial or financial information which is privileged or confidential.

### Section III. Definitions

For purposes of this exemption,

(a) The term "Sanwa Bank" means Sanwa Bank California and any affiliate of Sanwa Bank, as defined in Section III(b).

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

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

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

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

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

(d) The terms "Fund" or "Funds" mean any open-end management investment company or companies registered under the 1940 Act for which Sanwa Bank serves as investment adviser and may also provide custodial or other services, such as Secondary Services, as approved by such Funds.

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

(f) The term "Plan" means a welfare plan described in 29 CFR 2510.3-1, as amended; a pension plan described in

29 CFR 2510.3-2, as amended; a plan described in section 4975(e)(1) of the Code; and a retirement plan qualified under section 401(a) of the Code with respect to which Sanwa Bank serves or will serve as trustee, investment manager or custodian, and which constitutes an "employee benefit plan" under section 3(3) of the Act. The term "Client Plan" includes a Plan maintained by an entity other than Sanwa Bank. The term "Bank Plan" includes a Plan maintained by Sanwa Bank, including, but not limited to, the Sanwa Bank California Retirement Plan and the Sanwa Bank California Premiere Savings Plan.

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

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

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

(2) Such Second Fiduciary, or any officer, director, partner, employee or relative of such Second Fiduciary is an officer, director, partner or employee of Sanwa Bank (or is a relative of such persons); and

(3) Such Second Fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption; provided, however, that, with respect to the Bank Plans, the Second Fiduciary may receive compensation from Sanwa Bank in connection with the transactions contemplated herein, but the amount or payment of such compensation may not be contingent upon or in any way affected by the Second Fiduciary's ultimate decision regarding whether the Bank Plans participate in the transactions and may not exceed 5 percent of such Second Fiduciary's gross annual revenues.

With respect to the Client Plans, if an officer, director, partner, or employee of Sanwa Bank (or a relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in the choice of the Plan's investment manager/adviser, the approval of any purchase or redemption by the Plan of shares of the Funds, and the approval of any increase of fees, in

connection with any of the transactions described in Sections I and II, then Section III(h)(2) shall not apply.

(i) The term "Secondary Service" means a service, other than an investment advisory or similar service, which is provided by Sanwa Bank to the Funds, including but not limited to, accounting, administrative, brokerage or custodial services.

(j) The term "Termination Form" means the form supplied to the Second Fiduciary of a Client Plan, at the times specified in Section II(j), (k), and (m), which expressly provides an election to the Second Fiduciary to terminate on behalf of the Plans the authorization, described in Section II(g). Such Termination Form may be used at will by the Second Fiduciary to terminate such authorization without penalty to the Client Plan and to notify Sanwa Bank in writing to effect such termination by redeeming shares of the Fund held by the Plans requesting termination on the date established by the Client Plan on the Termination Form or, if the Client Plan does not specify a date, not later than one business day following receipt by Sanwa Bank of written notice, either by mail, hand delivery, facsimile or other available means at the option of the Second Fiduciary, of such request for termination; provided that if, due to circumstances beyond the control of Sanwa Bank, the redemption cannot be executed on the date specified by the Client Plan or within one business day when the Client Plan does not specify a date, Sanwa Bank shall have one additional business day to complete such redemption.

(k) The term "fixed-income security" means any interest-bearing or discounted government or corporate security with a face amount of \$1,000 or more that obligates the issuer to pay the holder a specified sum of money, at specific intervals, and to repay the principal amount of the loan at maturity.

(l) The term "security" shall have the same meaning as defined in section 2(36) of the 1940 Act, as amended, 15 USC 80a-2(36) (1996).

(m) The term "business day" means a banking day as defined by federal or state banking regulations.

**EFFECTIVE DATE:** This exemption is effective as of October 31, 1997.

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 (the Notice) published on May 29, 1998 at 63 FR 29443.

## Written Comments

The Department received two written comments with respect to the Notice and no requests for a public hearing. The first comment was submitted by an educational association (the Association) whose retirement plan (the Association Plan) is administered by Sanwa Bank as directed trustee. The comment raised numerous concerns, many of which did not relate to the investment in the Funds by the Association Plan and recommended that the exemption be denied. The second comment, which was submitted by Sanwa Bank, suggested modifications to the Notice and the Summary of Facts and Representations (the Summary) in several areas.

Following is a discussion of the comments received, including Sanwa Bank's responses to the Association's comment as well as the Department's responses to the modifications to the proposed exemption suggested by Sanwa Bank.

### *The Association's Comment*

In its comment, the Association requests that the exemption be denied primarily because the notice of proposed exemption provided by Sanwa Bank to its clients "did not consist of a complete disclosure of the nature of the relationship between Sanwa Bank and the Eureka Funds," specifically with respect to the fees. The Association states that documents provided to the Association Plan were "automatically completed" by Sanwa Bank to show the conversion of the Funds. As a result, the Association represents that it did not give its informed consent to Sanwa Bank.

In addition, the Association states that it is not clear whether there has been a reduction in both the trust and custodial administrative charges resulting from "duplicative" management fees. If there has been a fee offset, the Association believes that it has been in Sanwa Bank's favor as the Plan-level trust fund fee is 6 basis points and the Fund-level fee is in the neighborhood of 100 basis points.

Further, the Association finds the "negative consent" procedure described in the Notice problematic because it is not clear whether the fees would be offset fairly and equally. The Association represents that there may also be pressure by a Plan to consent to the negative consent procedure. If a Plan refused to use the Funds, the Association believes that Sanwa Bank may decline to act as trustee or custodian of other client funds.

In response to the Association's comment, Sanwa Bank notes at the

outset that it did not receive any objections from any other Plans participating in the conversion transactions and that the comment is the first indication it has received about the Association concerns, despite the fact that investments by the Association Plan in the Funds have been reported in periodic statements provided to the Association by Sanwa Bank since the conversion transactions. In Sanwa Bank's view, the Association's comment reflects misunderstandings regarding the procedures that were followed in connection with the conversion transactions as well as the purposes and scope of the proposed exemption.

As directed trustee of the Association Plan, Sanwa Bank represents that it has been subject to investment directions of an independent investment manager appointed by the Association. However, prior to the conversion transactions, Sanwa Bank explains that the investment manager authorized and directed the investment of the cash balances of the Association Plan in one of its CIFs, the ITS Money Market Investment Fund (the Money Market CIF). In August–September 1997, the Sanwa Bank states that it provided the investment manager written notices (a) announcing the termination and conversion of the Money Market CIF and Sanwa Bank's other CIFs, (b) explaining that the Money Market CIF would be converted to the Eureka Prime Money Market Fund (the Prime Fund), (c) describing the nature and extent of Sanwa Bank's relationship with the Prime Fund and other Funds (and containing disclosures required by the proposed exemption), and (d) asking the investment manager to choose a new cash management vehicle for the Association Plan from among four separate alternatives which included, in addition to the Prime Fund, the Eureka U.S. Treasury Obligations Fund, a money market mutual fund advised by a party unrelated to Sanwa Bank and an insured deposit at Sanwa Bank. By letter dated October 14, 1997, Sanwa Bank explains that the investment manager gave it standing authorization to invest cash balances of the Association Plan in the Prime Fund. Sanwa Bank states that it has informed the investment manager that if the use of the Prime Fund is not satisfactory to either the Association or the investment manager, it is prepared to carry out authorized directions regarding an alternative disposition of cash balances of the Association Plan.

In response to the Association's assertion that notices provided by Sanwa Bank regarding the conversion transactions did not "consist of a complete disclosure of the nature of the

relationship between Sanwa Bank and the Funds," Sanwa Bank states that it provided written notice to the investment manager prior to the conversion transactions disclosing that Sanwa Bank was to serve as investment adviser to the Funds as well as the rate of compensation it was to receive from each of the Funds for its services as investment adviser.

In response to the Association's comment suggesting that trust and custodial administration charges be reduced or offset, Sanwa Bank explains that these fees are, in no way, duplicative of the fees it receives from the Funds for performing investment advisory services. This is reflected in the proposed exemption which requires that no investment management or similar fees be charged to a Client Plan with respect to Plan assets invested in the Funds. Further, Sanwa Bank points out that the proposed exemption does not require, and was never intended to require, the reduction or offsetting of trust or custodial administration fees that Sanwa Bank receives from Client Plans for trust and custodial administrative services.<sup>2</sup>

In regard to the Association's concern that the "negative consent" procedure places implicit pressure on a Plan to agree to the procedure or face the consequence that Sanwa Bank might decline to act as trustee or custodian, Sanwa Bank states that consistent with other individual exemptions granted by the Department, the proposed exemption allows the Second Fiduciary to decide whether or not to accept a fee increase. In this regard, Sanwa Bank explains that the Second Fiduciary is free to accept a fee increase by failing to object to such increase or may object to the increase and request the redemption of Fund shares held by the Plan. Therefore, Sanwa Bank represents that it sees no reason to alter the basic principle established in several other exemptions that the negative consent procedure is appropriate and is protective of the rights of affected plans.

In conclusion, Sanwa Bank does not believe the Association's comment justifies denying the exemption or otherwise changing it. Further, Sanwa Bank notes that a Plan is free to terminate its relationship with a Fund at any time without penalty. Therefore,

<sup>2</sup> Sanwa Bank notes that the Association was in error in stating that Fund-level fees paid to Sanwa Bank were in the neighborhood of 100 basis points. Sanwa Bank explains that the Prime Fund prospectus indicates that the total expenses of that Fund, including Sanwa Bank's compensation (after voluntary waivers) and expenses and fees paid to third parties unrelated to Sanwa Bank, only amount to 55 basis points per annum.

Sanwa Bank requests that the Department grant the exemption.

#### *Sanwa Bank's Comment*

##### 1. Section I of the Notice

Sanwa Bank states that language at the end of the introductory paragraph of Section I of the Notice provides that the exemption will apply to transactions that occur "in connection with the termination of the CIFs" and that similar language appears in Section I(e)(1) of the Notice. Sanwa Bank represents that although the CIFs involved in the conversion transactions that occurred on October 31, 1997 did, in fact, terminate, it specifically requested that the exemption extend not only to conversion transactions in which the affected CIFs terminate but to conversion transactions where the CIFs do not terminate. Sanwa Bank explains that this is the rationale for including the procedures set forth in Section I(e). For example, assets transferred in-kind from a non-terminating CIF to a Fund would consist of the *pro rata* share of the CIF's assets attributable to those Plans electing to participate in the conversion transaction if not all of the Plans elected to participate. Sanwa Bank notes that such transfers from non-terminating CIFs are permitted in prior individual exemptions and in Prohibited Transaction Exemption (PTE) 97-41, the Department's class exemption for Collective Investment Fund Conversion Transactions (62 FR 42830, August 8, 1997). Therefore, Sanwa Bank requests that the clause "in connection with the termination of such CIFs" be deleted entirely from the introductory paragraph of Section I and Section I(e)(1) of the Notice.

In addition, Sanwa Bank requests that the first sentence of Section I(e) of the Notice be amended to read as follows:

The transferred assets constitute all or a *pro rata* portion of all assets of a Plan held in the CIF immediately prior to the transfer.

The Department does not concur with the requested clarification and has not made the change suggested by Sanwa Bank. The Department notes that when a Plan elects to transfer assets from a non-terminating CIF to a Fund, the Plan's proportionate share of all of its assets in the CIF must be transferred to the Fund such that none of the Plan's assets must remain in the CIF. Therefore, the Department has left the condition, as originally proposed, intact.

##### 2. Footnote 12 of the Summary

Sanwa Bank states that the last sentence of Footnote 12 of the Summary should be revised to read as follows:

Specifically, the procedures relate to the methods of communicating the confirmations described above by personal delivery, facsimile or electronic mail (see Section I(b) and (g) of this proposed exemption) and to *pro rata* allocations of CIF assets where the CIF making an in-kind transfer does not terminate in connection with the transaction (see section I(e) of this proposed exemption).

In response to this comment, the Department has decided not to make the requested revision for the reasons cited above in Item 1.

##### 3. Section I(f) of the Notice

Sanwa Bank suggests that the initial reference to Rule 17a-7 in Section I(f) be amended to read as follows: "Securities and Exchange Commission (SEC) Rule 17a-7 under the 1940 Act, as amended (Rule 17a-7). In response, the Department concurs with this revision and has amended the Notice, accordingly.

Sanwa Bank also states that Section I(f) of the Notice provides that the assets transferred to a Fund are to be valued using sources independent of Sanwa Bank in accordance with Rule 17a-7 and procedures established by the Fund pursuant to Rule 17a-7. Specifically, Sanwa Bank represents that the last sentence of Section I(f) states that "such procedures must require" that securities for which there is no market price must be valued pursuant to certain specified procedures. Sanwa Bank notes that although this language has appeared in prior individual exemptions but not in PTE 97-41, it does not contemplate the possibility of future amendments or modifications of the Rule. Sanwa Bank further notes that in adopting PTE 97-41, the Department noted that the requirement that valuations be determined in accordance with Rule 17a-7 was "designed to provide flexibility for future transactions." Thus, for example, if Rule 17a-7 is subsequently amended by the SEC to accommodate new pricing systems, banks or plan advisers could take advantage of the amended Rule without having to request an amendment to the class exemption. Therefore, Sanwa Bank requests that the last sentence of Section I(f) be deleted.

In response, the Department concurs with this clarification and has made the requested change.

##### 4. Section II(b) of the Notice

Sanwa Bank states that the Funds' prospectus and prior correspondence to the Department indicate that the Funds issue more than one class of shares. The existence of separate share classes is also reflected in Section II(o) of the Notice and in paragraph (d) of

Representation 24 of the Summary. Accordingly, Sanwa Bank requests that Section II(b) of the Notice be modified to read as follows:

The price paid or received by the Client Plans 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 which would have been paid or received for shares of the same class by any other investor at that time.

In addition, Sanwa Bank requests that paragraph (e) of Representation 25 of the Summary be revised to read as follows:

The price that has been or will be paid or received by a Plan for shares of the Funds is the net asset value per share at the time of the transaction and is the same price for shares of the same class which will be paid or received by any other investor at that time.

The Department concurs with the revisions and has made the requested changes.

##### 5. Section II(l) of the Notice

Section II(l) of the Notice provides that, if a Second Fiduciary terminates a prior authorization to invest in the Funds, Sanwa Bank must redeem the Client Plan's shares "within the period of time specified by the Client Plan, but not later than one business day following receipt by Sanwa Bank from the Second Fiduciary of the Termination Form \* \* \*." Sanwa Bank believes this provision is intended to give Client Plans the flexibility to choose a redemption that best suits the Plan's needs and circumstances and precludes a Client Plan from specifying a redemption date beyond one business day after receipt of the Termination Form.

To provide Client Plans who wish to have the flexibility to choose another redemption date, Sanwa Bank suggests that the second sentence of Section II(l) be amended to read as follows (bracketed word and comma deleted; underlined words added):

The termination will be effected by Sanwa Bank redeeming shares of the Funds held by the Client Plans requesting termination within the period of time specified by the Client Plan [but] or, if the Client Plan does not specify a date, not later than one business day following receipt by Sanwa Bank from the Second Fiduciary of the Termination Form or any written notice of termination; provided that if, due to circumstances beyond the control of Sanwa Bank, the redemption of shares of such Client Plan cannot be executed within one business day, Sanwa Bank shall have one additional business day to complete such redemption; and

In connection with the foregoing change, Sanwa Bank also suggests that the second sentence of Section III(j)

(definition of "Termination Form") be amended to read as follows (underlined words added):

Such Termination Form may be used at will by the Second Fiduciary to terminate such authorization without penalty to the Client Plan and to notify Sanwa Bank in writing to effect such termination by redeeming shares of the Fund held by the Plans requesting termination *within the time period specified by the Client Plan or, if the Client Plan does not specify a date, not later than one business day following receipt by Sanwa Bank of written notice, either by mail, hand delivery, facsimile or other available means at the option of the Second Fiduciary, of such request for termination; provided that if, due to circumstances beyond the control of Sanwa Bank, the redemption cannot be executed within one business day, Sanwa Bank shall have one additional business day to complete such redemption.*

The Department does not completely concur with the requested modifications made by Sanwa Bank and believes that they could be more accurately constructed. With respect to Section II(l) of the Notice, the Department has decided to delete the phrase "within the time frame specified by the Client Plan" and substitute the phrase "on the date established by the Client Plan on the Termination Form." For purposes of consistency, the Department has also added the clause "on the date specified by the Client Plan or within one business day when the Client Plan does not specify a date" after the word "executed." As revised, Section II(l) would read as follows:

The termination will be effected by Sanwa Bank redeeming shares of the Funds held by the Client Plans requesting termination on the date established by the Client Plan on the Termination Form or, if the Client Plan does not specify a date, not later than one business day following receipt by Sanwa Bank from the Second Fiduciary of the Termination Form or any written notice of termination; provided that if, due to circumstances beyond the control of Sanwa Bank, the redemption of shares of such Client Plan cannot be executed on the date specified by the Client Plan or within one business day when the Client Plan does not specify a date, Sanwa Bank shall have one additional business day to complete such redemption; and

Similarly, the Department has revised Section III(j) of the Notice to read as follows:

Such termination will be effected by Sanwa Bank redeeming the shares of the Funds held by the affected Client Plan within one business day following receipt by Sanwa Bank, either by mail, hand delivery, facsimile, or other available means at the option of the Second Fiduciary, of written notice of termination (the Termination Form), as defined in Section III(j); provided that if, due to circumstances beyond the

control of Sanwa Bank, the redemption cannot be executed on the date specified by the Client Plan or within one business day when the Client Plan does not specify a date, Sanwa Bank shall have one additional business day to complete such redemption.

Finally, the Department has modified the first sentence in the second paragraph of Representation 19 by deleting the word "by" and adding the clause "on the date established by the Client Plan on the Termination Form, or if the Client Plan does not specify a date not later than \* \* \*" after the word "Plan." In addition, the Department has revised the last sentence of Representation 19 to read as follows:

If, due to circumstances beyond the control of Sanwa Bank, the redemption cannot be effected on the date specified by the Client Plan or within one business day when the Client Plan does not specify a date, Sanwa Bank will have one additional business day to complete such redemption.

#### 6. Section II(q)(1) of the Notice

Section II(q)(1) of the Notice provides that the records required to be maintained in connection with the exemption must be available for examination by duly authorized representatives of the SEC, as well as the Department and the Service. Sanwa Bank notes that although the requirement that records be available for SEC examination was included in a few individual exemptions granted during 1996 it is not included in individual exemptions granted prior to that time. Therefore, Sanwa Bank requests that Section II(q)(1)(A) of the Notice be modified to provide that the required records must be made available to authorized representatives of the Department and the Service.

The Department is not persuaded by this comment and has not made the requested change to the Notice. Because of the involvement of mutual funds in the transactions described herein, the Department believes that the records maintained in connection with the exemption should be subject to SEC examination.

#### 7. Other Modifications to the Notice

In addition to the changes noted above, Sanwa Bank has requested (and the Department has agreed to make) several miscellaneous modifications to the Notice. In this regard, the Department has redesignated "Section I(g)(2)(C)" of the Notice as "Section I(g)(2)(B)." Further, in Section III(d) of the Notice, the Department has inserted quotation marks after the word "Fund" and before the word "Funds."

#### 8. Paragraph (b) of Representation 1 of the Summary

Sanwa Bank represents that the second paragraph of Representation 1 of the Summary should be revised to reflect the fact that as of August 28, 1997, the SBC Savings Plan had 3,000 participants instead of 3,500 participants.

In response, the Department has noted this change and has made the requested modification.

#### 9. Paragraph 3 of Representation 3 of the Summary

Sanwa Bank confirms that it has not received and will not receive any 12b-1 fees in connection with the transactions covered by the proposed exemption. However, Sanwa Bank wishes to point out that because the Funds issue more than one class of shares, one class of shares is subject to 12b-1 fees. Thus, although the class of Fund shares purchased by Plans is not subject to 12b-1 fees, Sanwa Bank emphasizes that it does receive 12b-1 fees with respect to the another class of shares purchased by non-Plan investors. Accordingly, Sanwa Bank notes that the last sentence of the third paragraph of Representation 3 of the Summary should be clarified to read as follows: "In addition, no Fund has paid or will pay any 12b-1 fees to Sanwa Bank or its affiliates in connection with the transactions."

In response, the Department has made the requested modification.

#### 10. Representation 17 of the Summary

Sanwa Bank notes that the first two sentences of Representation 17 of the Summary, regarding certain Plan-level fees should be clarified by substituting in their place the following language:

Through October 31, 1997, Sanwa Bank charged each Client Plan a Plan-level fee for its services as trustee, investment manager or custodian based on Sanwa Bank's standard fee schedules and the terms of specific agreements negotiated between each Client Plan and Sanwa Bank. Such Plan-level fees included asset-based charges that were expressed as a percentage of Client Plan assets. Since October 31, 1997, however, Sanwa Bank no longer charges each Client Plan a Plan-level investment management, investment advisory, or similar fee with respect to assets of such Client Plan invested in shares of the Fund.

In response, the Department has made the requested modification.

#### 11. Footnote 14 of the Summary

Sanwa Bank asserts that because Footnote 14 of the Summary might be construed to imply that Sanwa Bank has waived all investment advisory fees it



receives from the Funds through the end of the Funds' initial fiscal year, it wishes to clarify that it has agreed to waive temporarily a portion of such investment advisory fees.

The Department has noted this clarification.

For further information regarding the comments or other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10503) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Accordingly, after giving full consideration to the entire record, including the written comments provided by the Association and Sanwa Bank, the Department has made the aforementioned changes to the Notice and Summary and has decided to grant the exemption subject to the modifications or clarifications described above.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

**Bernard Chaus, Inc., Employee Savings Plan (the Plan), Located in New York, New York**

[Prohibited Transaction Exemption 98-47; Exemption Application No. D-10606]

**Exemption**

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, effective December 24, 1997, to: (1) the past acquisition by the Plan of certain stock rights (the Rights) pursuant to a stock rights offering (the Offering) by Bernard Chaus, Inc. (the Employer), the sponsor of the Plan; (2) the past holding of the Rights by the Plan during the subscription period of the Offering; (3) the past disposition or exercise of the Rights by the Plan; and (4) the proposed payment by the Employer to the Plan of an amount necessary to credit Plan accounts of participants affected by an administrative error relating to Rights which were not exercised or sold prior to the expiration of the Rights; provided the following conditions are satisfied:

(A) The Plan's acquisition and holding of the Rights occurred in connection with the Offering made available to all shareholders of common stock of the Employer;

(B) The acquisition and holding of the Rights by the Plan resulted from an independent act of the Employer as a corporate entity and all holders of the common stock of the Employer, including the Plan, were treated in a substantially similar manner with respect to the Offering;

(C) All decisions regarding the holding and disposition of the Rights by the Plan were made, in accordance with the Plan provisions for individually-directed investment of participant accounts, by the individual Plan participants whose accounts in the Plan received Rights in connection with the Offering, including all determinations regarding the exercise or sale of the Rights received through the Offering, except for those participants who failed to file timely and valid instructions concerning the Rights, in which case the Rights were sold; and

(D) Within 30 days of the date of publication of this final exemption in the **Federal Register**, with respect to the Plan accounts of participants affected by an administrative error whereby 27 Rights (of the 17,041 Rights received by the Plan) were not exercised or sold prior to the expiration of the Rights, the Employer credits the affected accounts with an amount equal to the value such accounts would have received if the Rights had been sold on the last day of the Offering, including interest thereon through the date of such crediting at a rate equal to the average rate of earnings on all Plan assets during that period.

**EFFECTIVE DATE:** This exemption is effective as of December 24, 1997.

For a more complete statement of the summary of facts and representations supporting the Department's decision to grant this exemption refer to the Notice of Proposed Exemption published on August 6, 1998 at 63 FR 42077.

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

**ACRA Local 725 Health & Welfare Fund (the Welfare Plan) and ACRA Local 725 Pension Fund (the Pension Plan; together, the Plans), Located in Dade, Broward and Monroe Counties, Florida**

[Prohibited Transaction Exemption 98-48; Exemption Application Nos. L-10536 and D-10537]

**Exemption**

The restrictions of section 406(b)(2) of the Act shall not apply to the payment of interest by the Pension Plan to the Welfare Plan on past mistaken contributions (the Mistaken Contributions) pursuant to an indemnification agreement by the Board of Trustees of the Pension Plan with respect to the Mistaken Contributions, provided the following conditions are satisfied: (a) The Mistaken Contributions occurred as a result of an inadvertent clerical error committed by the Plans' independent third party administrator; (b) the principal amount of the Mistaken Contributions was repaid as soon as the error was discovered; and (c) the amount of interest to be paid to the Welfare Plan by the Pension Plan has been determined by a third party bank to be the fair market rate of interest.

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 June 29, 1998 at 63 FR 35289.

**WRITTEN COMMENTS AND HEARING**

**REQUESTS:** The Department received no hearing requests with respect to the proposed exemption. The only comment received by the Department was submitted by the applicant to correct an error that appeared in the proposed exemption. The proposed exemption had indicated that the Plans were located in Macon, Georgia. While the Plans' current third party administrative manager, Core Management Resources, Inc., is located in Macon, the applicant commented that the Plans' trustees and participants are essentially located in Dade, Broward and Monroe Counties, Florida. The Department has amended the exemption accordingly and otherwise granted the exemption as proposed.

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

**General Information**

The attention of interested persons is directed to the following:



(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 30th day of September, 1998.

**Ivan Strasfeld,**

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

[FR Doc. 98-26622 Filed 10-5-98; 8:45 am]

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## NATIONAL CREDIT UNION ADMINISTRATION

### Agency Information Collection Activities: Submission to OMB for Review; Comment Request

AGENCY: National Credit Union  
Administration (NCUA).

**ACTION:** Request for comment.

**SUMMARY:** The NCUA has submitted the following information collection without changes to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (P.L. 104-13, 44 U.S.C. Chapter 35). This information collection is published to obtain comments from the public. This collection was published as proposed on July 20, 1998. No comments relating to the information collection were received within the 60 day comment period.

**DATES:** Comments will be accepted until November 5, 1998.

**ADDRESSES:** Interested parties are invited to submit written comments to the NCUA Clearance Officer or OMB Reviewer listed below:

*Clearance Officer:* Mr. James L. Baylen (703) 518-6411, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, Fax No. 703-518-6433, E-mail: jbaylen@ncua.gov.

*OMB Reviewer:* Alexander T. Hunt (202) 395-7860, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

#### FOR FURTHER INFORMATION CONTACT:

Copies of the information collection request, with applicable supporting documentation, may be obtained by calling the NCUA Clearance Officer, James L. Baylen, (703) 518-6411.

**SUPPLEMENTARY INFORMATION:** Proposal for the following collection of information:

*OMB Number:* 3133-0011.

*Form Number:* NCUA 9600.

*Type of Review:* Extension of a currently approved collection.

*Title:* Application for Insurance of Accounts State-Chartered Credit Unions.

*Description:* Section 201 of the Federal Credit Union Act (12 U.S.C. 1781) requires state-chartered credit unions desiring federal insurance to submit an application. The requirement also applies to federal credit unions converting to state charters and desiring federal insurance.

*Respondents:* State-chartered credit unions and federal credit unions converting to state charter that desire federal insurance of member accounts.

*Estimated No. of Respondents/Recordkeepers:* 61.

*Estimated Burden Hours Per Response:* 4.5 hours.

*Frequency of Response:* Other. As required.

*Estimated Total Annual Burden Hours:* 268.

*Estimated Total Annual Cost:* N/A.

**Becky Baker,**

*Secretary of the Board.*

[FR Doc. 98-26772 Filed 10-5-98; 8:45 am]

BILLING CODE 7535-01-U

## NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-321 and 50-366]

### Southern Nuclear Operating Co. Inc., et al.; Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. DPR-57 and NFP-5 issued to Southern Nuclear Operating Company, Inc., et al. (the licensee) for operation of the Edwin I. Hatch Nuclear Plant, Units 1 and 2, located in Appling County, Georgia.

The proposed amendments would revise the Technical Specifications to accommodate an increase in maximum licensed thermal power level from 2558 megawatts thermal (MWt) to 2736 MWt.

The licensee submitted the proposed changes by letter dated August 8, 1997. In processing this request, the staff recognized on September 29, 1998, it inadvertently failed to publish a notice of proposed issuance of the amendments in the **Federal Register**. In the August 8, 1997, original application, the licensee requested that the proposed amendments be issued prior to startup from the fall 1998 refueling outage on Unit 2. Startup from the refueling outage is presently scheduled for October 18, 1998.

Upon being informed by the staff that a notice of proposed issuance of amendments inadvertently was not published, the licensee requested, by letter dated September 30, 1998, that the proposed amendments be processed on an exigent basis.

The need for exigency is based on the fact that the licensee would be required to postpone changes to procedures, instrumentation, and setpoints on Unit 2 until after startup and power ascension of the plant if the amendments were not issued prior to restart. The licensee would then be required to implement these changes while online which would increase the possibility of a plant scram and introduce a potential for unnecessary transients on the plant.