

conceivably be considered interested persons, the only practical form of notice is publication in the **Federal Register**.

### General Information

The attention of interested persons is directed to the following:

(1) Before an exemption may be granted under section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interest of the IRAs and Keogh Plans and their participants and beneficiaries and protective of the rights of the participants and beneficiaries of such plans.

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

(3) If granted, the proposed amendment will be applicable to a transaction only if the conditions specified in the class exemption are met.

### Written Comments and Hearing Request

All interested persons are invited to submit written comments or requests for a public hearing on the proposed amendment to the address and within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed amendment. Comments received will be available for public inspection with the referenced application at the above address.

### Proposed Amendment

Under section 408(a) of 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, August 10, 1990), the Department proposes to amend PTE 97-11 as set forth below:

Section III(b) is amended to read: "The term "IRA" means an individual retirement account described in Code section 408(a), an individual retirement annuity described in Code section 408(b) or an education individual retirement account described in section 530 of the Code. For purposes of this exemption, the term IRA shall not include an IRA which is an employee

benefit plan covered by Title I of ERISA, except for a Simplified Employee Pension (SEP) described in section 408(k) of the Code or a Simple Retirement Account described in section 408(p) of the Code which provides participants with the unrestricted authority to transfer their balances to IRAs or Simple Retirement Accounts sponsored by different financial institutions."

**Ivan Strasfeld,**

*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

[Application No. D-11050, et al.]

### Proposed Exemptions; Provident Mutual Life Insurance Company (Provident)

**AGENCY:** Pension and Welfare Benefits 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 Pension and Welfare Benefits Administration (PWBA), 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 PWBA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffittb@pwba.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 Pension and Welfare Benefits 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.

### Provident Mutual Life Insurance Company (Provident)

*Located in Berwyn, PA*

[Application No. D-11050]

### Proposed Exemption

Based on the facts and representations set forth in the application, the

Department 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).<sup>1</sup>

#### *Section I. Covered Transactions*

If the exemption is granted, the restrictions of section 406(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 (D) of the Code, shall not apply to (1) the initial issuance, by Provident, of its common stock (Provident Shares) to the conversion agent (the Conversion Agent), as stockholder of record, on behalf of any eligible policyholder of Provident (the Eligible Member), including any Eligible Member which is an employee benefit plan (within the meaning of section 3(3) of ERISA), an individual retirement annuity (within the meaning of section 408 or 408A of the Code) or a tax sheltered annuity (within the meaning of section 403(b) of the Code) (each, a Plan), including a Plan sponsored by Provident for Provident employees (a Provident Plan); (2) the exchange, by the Conversion Agent, of Provident Shares for common stock (Sponsor Class A Shares) issued by Nationwide Financial Services, Inc. (the Sponsor), or, the receipt of cash (Cash) or policy credits (Policy Credits) by an Eligible Member, in exchange for such Eligible Member's membership interest in Provident or in connection with the merger (the Merger) between Provident and the Eagle Acquisition Corporation (the Merger Sub), a wholly-owned subsidiary of the Sponsor, in accordance with the terms of a plan of conversion (the Plan of Conversion) and merger agreement (the Merger Agreement), adopted by Provident and implemented pursuant to the Pennsylvania Insurance Company Mutual-to-Stock Conversion Act, as amended, codified at 40 P.S. sections 911-A to 929-A (the Conversion Act) and the applicable provisions of the Pennsylvania Business Corporation Law of 1998.

In addition, if the exemption is granted, the restrictions of section 406(a)(1)(E) and (a)(2) and section 407(a)(2) of the Act shall not apply to the receipt and holding, by a Provident Plan, of Sponsor Class A Shares, whose fair market value exceeds 10 percent of

the value of the total assets held by such Plan.

The proposed exemption is subject to the general conditions set forth below in Section II.

#### *Section II. General Conditions*

(a) The Plan of Conversion, including the Merger Agreement, is subject to approval, review and supervision by the Commissioner of Insurance of the Commonwealth of Pennsylvania (the Commissioner) and is implemented in accordance with procedural and substantive safeguards that are imposed under the laws of the Commonwealth of Pennsylvania.

(b) The Commissioner reviews the terms of the options that are provided to Eligible Members of Provident as part of such Commissioner's review of the Plan of Conversion and Merger, and approves the Plan of Conversion and Merger following a determination that such Plan of Conversion is fair and equitable to all Eligible Members. The New York Superintendent of Insurance (the Superintendent) may object to the Plan of Conversion if he or she finds that such Plan of Conversion is not fair or equitable to all New York policyholders.

(c) As part of their separate determinations, both the Commissioner and the Superintendent concur on the terms of the Plan of Conversion.

(d) Each Eligible Member has an opportunity to vote at a special meeting (the Eligible Members' Meeting) to approve the Plan of Conversion and Merger after full written disclosure is given to the Eligible Member by Provident.

(e) Any determination to receive Sponsor Class A Shares, Cash, or Policy Credits by an Eligible Member which is a Plan, pursuant to the terms of the Plan of Conversion, is made by one or more Plan fiduciaries that are independent of Provident and its affiliates and neither Provident nor any of its affiliates exercises any discretion or provides investment advice, within the meaning of 29 CFR 2510.3-21(c), with respect to such decisions.

(f) After each Eligible Member is allocated a fixed component equivalent to approximately 20% of Provident Shares, additional consideration is allocated to Eligible Members based on actuarial formulas that take into account each policy's contributions to the surplus and asset valuation reserve of Provident, which formulas have been approved by the Commissioner.

(g) In the case of an Eligible Member who is entitled to receive Provident Shares only upon consummation of the Merger, such Provident Shares are exchanged for Sponsor Class A Shares,

Cash or Policy Credits in accordance with an election made by such Eligible Member.

(h) In the case of a Provident Plan, the independent Plan fiduciary (the Independent Fiduciary)—

(1) Votes on whether to approve or not to approve the proposed demutualization;

(2) Elects between consideration in the form of Sponsor Class A Shares, Cash or Policy Credits on behalf of such Plans;

(3) Reviews and approves Provident's allocation of Sponsor Class A Shares, Cash or Policy Credits received for the benefit of the participants and beneficiaries of the Provident Plans;

(4) Votes on Sponsor Class A Shares that are held by the Provident Plans and disposes of such shares held by the Retirement Pension Plan for Certain Home Office, Managerial and Other Employees of Provident Mutual Life Insurance Company (the Home Office Pension Plan), which exceeds the limitation of section 407(a)(2) of the Act, as soon as it is reasonably practicable, but in no event later than six months after the effective date (the Effective Date) of the Plan of Conversion and Merger;

(5) Provides the Department with a complete and detailed final report as it relates to the Provident Plans prior to the Effective Date of the demutualization; and

(6) Takes all actions that are necessary and appropriate to safeguard the interests of the Provident Plans and their participants and beneficiaries.

(i) All Eligible Members that are Plans participate in the transactions on the same basis as all Eligible Members that are not Plans.

(j) No Eligible Member pays any brokerage commissions or fees in connection with the receipt of Sponsor Class A Shares or Policy Credits or in connection with the implementation of the commission-free purchase and sale program (the Commission-Free Program).

(k) All of Provident's policyholder obligations remain in force and are not affected by the Plan of Conversion or Merger.

(l) The terms of the transactions are at least as favorable to the Plans as an arm's length transaction with an unrelated party.

#### *Section III. Definitions*

For purposes of this proposed exemption:

(a) The term "Provident" means Provident Mutual Life Insurance Company and any of its affiliates as

<sup>1</sup> For purposes of this proposed exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

defined in paragraph (b) of this Section III.

(b) An "affiliate" of Provident includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Provident. (For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.); and

(2) Any officer, director or partner in such person.

(c) The term "Allocable Provident Shares" means the number of Provident Shares determined in accordance with Section 3.1(c) of the Merger Agreement, representing the total number of Provident Shares that will be notionally allocated to Eligible Members in accordance with the Plan of Conversion and the "Actuarial Contribution Memorandum" (for purposes of allocating among Eligible Members the consideration that is actually to be distributed to Eligible Members in the form of Sponsor Class A Shares, Cash or Policy Credits). The Actuarial Contribution Memorandum sets forth the principles, assumptions and methodologies for the calculation of the Actuarial Contribution of Eligible Policies, which is the estimated past contribution of such Eligible Policy to Provident's statutory surplus and asset valuation reserve, plus the contribution that such policy is expected to make in the future, as calculated according to the principles, assumptions and methodologies set forth in the Plan of Conversion and its exhibits.

(d) The term "Eligible Member" means the owner of an "eligible policy," as provided by the records of Provident and by its articles of incorporation and bylaws, on the adoption date of the Plan of Conversion. (An "Eligible Policy" is defined as a policy that is in force on the adoption date.) Provident and any of its subsidiaries will not be Eligible Members with respect to any policy that entitles the policyholder to receive consideration, unless the consideration is to be utilized in whole or in part for a plan or program funded by that policy for the benefit of participants or employees who have coverage under that plan or program. Provident may

deem a person to be an Eligible Member in order to correct any immaterial administrative errors or oversights.

(e) With respect to the conversion of Provident from a mutual life insurance company to a stock insurance company (the Conversion), the term "Policy Credit" means consideration to be paid in the form of an increase in cash value, account value, dividend accumulations, face amount, extended term period or benefit payment, as appropriate, depending on the policy, or extension of the policy's expiration date. With respect to the Merger, the term "Policy Credit" means consideration to be paid in the form of an adjustment of policy values for certain policies under the Plan of Conversion.

(f) The "Effective Date" means the date the actual Conversion and Merger will transpire. It is expected to occur in the latter part of the third quarter in 2002, however the exact date is not known at this time.

## Summary of Facts and Representations

### The Parties

1. Provident, a mutual life insurance company organized under the laws of the Commonwealth of Pennsylvania, maintains its principal place of business at 1000 Chesterbrook Avenue, Berwyn, Pennsylvania. Provident was formed in 1865 and converted to a mutual insurance company in 1922 pursuant to the Pennsylvania Act of April 20, 1921. Provident's business is concentrated in life insurance products and it offers a broad range of life insurance and variable annuity products and related services to its policyholders. As of December 31, 2000, Provident and its subsidiaries had approximately \$9.2 billion in assets, with \$8.2 billion set aside primarily to pay future policyholder benefits. Provident had approximately \$3.9 billion in general account assets and \$2.8 billion in separate account assets as of December 31, 2000.

2. As a mutual life insurance company, Provident has no authorized, issued or outstanding capital stock. Pursuant to Pennsylvania law and Provident's Articles of Incorporation and By-Laws, Provident's policyholders, through the purchase of Provident's insurance policies, acquire both

insurance coverage from, and membership rights in, Provident. The membership rights of policyholders consists principally of the right to vote in the election of directors of Provident and the right to share in any residual value of Provident in the event that Provident were to be liquidated. Each Provident policyholder is entitled to one vote regardless of the number or size of policies he or she holds. In this regard, Provident policyholders are entitled to vote on the Conversion.

3. Provident has a number of subsidiaries and affiliates that provide a variety of financial services, including investment management and brokerage services. Provident and its affiliates also provide a variety of fiduciary and other services to Plans described in section 3(3) of the Act and to other Plans described in section 4975(e)(1) of the Code, including Plan administration and related services, investment management services, and securities brokerage and related services. Many of the Plans to which Provident and its affiliates provide services are also Provident policyholders.

As of December 31, 2000, Provident had over 1,050 outstanding policies and contracts held in connection with Plans. These Plans include defined benefit pension plans, defined contribution plans, *i.e.*, 401(k) plans, and welfare benefit plans such as group life, short- and long-term disability, accidental death and dismemberment, and group health coverage.

Although Provident is not a party in interest with respect to any of its policyholders that are Plans merely because it has issued an insurance policy to such Plans, its provision of the foregoing services to the Plans may cause it to be considered a party in interest under section 3(14)(A) and (B) of the Act.

4. Besides issuing insurance policies and providing services to certain client Plans, Provident and its subsidiaries and affiliates sponsor three in-house Plans which are expected to receive consideration in connection with the Plan of Conversion described herein. A description of each of the affected Provident Plans is summarized in the following table:

Name of plan and type	Approximate number of participants (as of 12/31/00)	Total assets (as of 12/31/00)	Coverage
The Home Office Pension Plan (Defined Benefit)	2,231	\$191,031,805	Actives, Deferred and Retirees.
Savings Plan for Certain Employees, Agents and Managers of Provident Mutual Life Insurance Company (the Savings Plan) (Defined Contribution: 401(k) & Profit Sharing).	2,636	\$85,655,382	Actives, Separated and Beneficiaries.

Name of plan and type	Approximate number of participants (as of 12/31/00)	Total assets (as of 12/31/00)	Coverage
Pension Plan for Agents of Provident Mutual Life Insurance Company (the Agents Pension Plan) (Defined Contribution: Money Purchase).	1,316	\$86,819,283	Actives, Separated and Beneficiaries.

EMJAY Corporation is the trustee for the Savings Plan and the Agents Pension Plan. The Home Office Pension Plan is not required to have a trustee because all funds are held under insurance contracts issued by Provident. Investment decisions for each Provident Plan are made by Provident's Benefits Committee, which serves as the Plan administrator. Members of the Benefits Committee consist of officers of Provident.

#### *Provident's Conversion*

5. Provident is considering a transaction which would allow for its conversion from a mutual life insurance company into a stock life insurance company in accordance with the requirements of the Conversion Act, as amended and as codified at 40 P.S. Sections 911-A to 929-A. It is anticipated that, in the Conversion, Eligible Members of Provident, including Plans, will initially be issued Provident Shares, or for certain other policyholders, Cash or Policy Credits in respect of the extinguishment of their membership interests in Provident. Eligible Members receiving Cash or Policy Credits in the Conversion will be those for whom the receipt of such consideration is mandatory under the Plan of Conversion and the Merger Agreement. Provident Shares issued in the Conversion will be held by the Conversion Agent on behalf of the Eligible Members.

Immediately following the Conversion, pursuant to the Merger Agreement, the Merger Sub will merge with and into Provident. In turn, Provident will become a wholly-owned subsidiary of the Sponsor.<sup>2</sup> Eligible

Members that receive Provident Shares in the Conversion will exchange those shares for Sponsor Class A Shares or, subject to certain limitations, Cash or Policy Credits. The Sponsor Class A Shares will be registered under the Securities Exchange Act of 1934, as amended, and listed on the New York Stock Exchange.

6. Provident represents that at present, it can increase its capital primarily through earnings contributed through its operating businesses, through the issuance of surplus notes, or by divestiture of all or a portion of interests in subsidiaries or other investments. However, Provident explains that none of these methods may provide a long-term source of capital to allow the insurer to develop new businesses or provide greater stability and protection for its policyholders. Therefore, Provident believes that its proposed Conversion and affiliation with the Sponsor will be in the best interests of its policyholders (including its Plan policyholders) because it will—

- Help assure the continuity of Provident's life insurance and other business, enhance Provident's competitiveness, and generate significant opportunities for improved financial performance;
- Provide Provident with greater flexibility to obtain capital as compared to the current mutual life insurance structure, and significantly enhance Provident's ability to become a financially-stronger organization with greater resources to back its obligations to policyholders;
- Provide Provident with increased flexibility to fund the growth of existing product lines, expand into new product lines, and take advantage of investment and acquisition opportunities;
- Benefit both short-term and long-term interests of Provident, its policyholders, employees, the communities in which Provident does business, and other groups that will be affected by the transaction; and
- Allow Provident to become affiliated with a larger enterprise with significant financial strength.

Moreover, Provident states that the Conversion and Merger will not, in any way, change premiums or reduce benefits, values, guarantees, or other

policy obligations of Provident to its policyholders. Also, Provident represents that it will continue to pay policyholder dividends as declared.

7. Accordingly, Provident requests an administrative exemption from the Department which, if granted, will permit

(1) the initial issuance, by Provident, of Provident Shares to the Conversion Agent, as stockholder of record, on behalf of any Eligible Member, including any Eligible Member which is a Plan, including a Provident Plan<sup>3</sup>; (2) the exchange, by the Conversion Agent, of Provident Shares for Sponsor Class A Shares issued by the Sponsor, or, the receipt of Cash or Policy Credits, in exchange for such policyholder's membership interest in Provident or in connection with the Merger between Provident and the Merger Sub, a wholly-owned subsidiary of the Sponsor, in accordance with the terms of the Plan of Conversion and the Merger Agreement, adopted by Provident and implemented pursuant to the Conversion Act and the applicable provisions of the Pennsylvania Business Corporation Law of 1998.

Provident represents that the receipt of the demutualization consideration pursuant to the Plan of Conversion by an Eligible Member which is a Plan may be viewed as a prohibited sale or exchange of property between the Plan and Provident in violation of section 406(a)(1)(A) of the Act. Moreover, Provident states that the transaction may also be construed as a transfer of plan assets to, or a use of plan assets by or for the benefit of, a party in interest

<sup>2</sup> Provident states that because Pennsylvania law does not provide for demutualizations structured as reverse triangular mergers or permit the direct merger of a stock company into a mutual company, it would not be possible for the insurer to become a wholly-owned subsidiary of the Sponsor through the merger of the Merger Sub with and into Provident without the prior conversion of Provident from a mutual company to a stock company under Pennsylvania law. As a result, Provident explains that it is necessary for Provident to convert from a mutual insurance company to a stock corporation under Pennsylvania law before the Merger Sub can merge with and into Provident. In addition, Provident states that because it holds non-transferable licenses and policy form approvals necessary for the operation of its business, and for other substantial business reasons, Provident must be the surviving entity in any merger.

<sup>3</sup> Provident represents that it is aware that the Sponsor Class A Shares would constitute "qualifying employer securities" within the meaning of section 407(d)(5) of the Act, and that section 408(e) of the Act would apply to such distributions. Nevertheless, Provident has specifically requested that the exemption apply to the receipt of Sponsor Class A Shares by any of the Provident Plans, if applicable, regardless of the ability by such Plan to utilize section 408(e) of the Act. (The Department, however, expresses no opinion herein on whether the Sponsor Class A Shares would constitute a "qualifying employer security" within the meaning of section 407(d)(5) of the Act and whether section 408(e) of the Act would apply to such distributions.) Provident believes that this expanded type of exemptive relief will provide the greatest flexibility for Wilmington Trust, the independent fiduciary for the Provident Plans, to select suitable types of consideration.

in violation of section 406(a)(1)(D) of the Act.

In addition to the above, Provident is requesting that the exemption apply, for a period of up to 6 months following the Effective Date, to the holding, by the Home Office Pension Plan, of Sponsor Class A Shares whose fair market value exceeds 10 percent of the Provident Plan's assets, in violation of sections 406(a)(1)(E) and (a)(2) and 407(a)(2) of the Act.<sup>4</sup>

The proposed exemption includes a number of conditions that protect Eligible Members that are Plans, which are consistent with the conditions proposed under prior demutualization exemptions granted by the Department. Generally, the conditions rely on the safeguards provided under Pennsylvania insurance law to protect the interests of all policyholders, including those that are Plans, in connection with the Conversion and Merger. Among the safeguards is the requirement that distributions to Eligible Members that are Plans pursuant to the exemption must be on terms no less favorable to the Plans than Eligible Members that are not Plans. In this regard, Eligible Members that are Plans must participate in the Conversion on the same basis as Eligible Members that are not Plans.

In addition, to represent the interests of the Provident Plans with respect to such activities as voting and the election of demutualization consideration, Provident has retained Wilmington Trust Company (Wilmington Trust), to act as the Independent Fiduciary.

<sup>4</sup> Section 406 (a)(1)(E) of the Act prohibits the acquisition by a plan of any employer security which would be in violation of section 407(a) of the Act. Section 406(a)(2) of the Act states that no fiduciary who has authority or discretion to control the assets of a plan shall permit the plan to hold any employer security if he [or she] knows that holding such security would violate section 407(a) of the Act. Section 407(a)(1) of the Act prohibits the acquisition by a plan of any employer security which is not a qualifying employer security. Section 407(a)(2) of the Act provides that a plan may not acquire any qualifying employer security, if immediately after such acquisition, the aggregate fair market value of such securities exceeds 10 percent of the fair market value of the plan's assets.

In addition to the above, section 407(f) of the Act, which is applicable to the holding of a qualifying employer security by a plan other than an eligible individual account plan, requires that (a) immediately following its acquisition by a plan, 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 stock be held by persons who are independent of the issuer. Provident has confirmed that to the best of its knowledge, none of the Sponsor Class A Shares which will be issued to the Provident Plans will violate the provisions of section 407(f) of the Act.

#### *Pennsylvania Law Procedural Requirements for Conversions*

8. The Conversion Act establishes an approval process for the demutualization of a life insurance company organized under Pennsylvania law. In this regard, a plan of demutualization must be approved by the board of directors of the converting company, by the Commissioner, and by a vote of the Eligible Members of the converting company.

First, the Plan of Conversion, including the Merger, must be approved by an affirmative vote of not less than two-thirds of the converting company's board of directors. Then, the Plan of Conversion, including the Merger, must be approved by the Commissioner who will approve it if, after holding a public hearing, he or she determines that the Plan of Conversion complies with all provisions of Pennsylvania law and is fair and equitable to the company and the policyholders. The policyholders of the mutual life insurance company generally must also approve the Plan of Conversion and the Merger. The Conversion Act provides that the policyholders eligible to vote on the Plan of Conversion are "Eligible Members" of the mutual life insurance company. Before the Conversion and the Merger can become effective, the Plan of Conversion must be put to a vote of the eligible members of the converting company. Under the Conversion Act, the eligible members must be provided with notice of the meeting of policyholders called for the purpose of voting whether to approve the demutualization plan, and the Plan of Conversion must be approved by a vote of not less than two-thirds of the votes of the insurer's eligible members voting thereon in person, by proxy or by mail.

9. Consistent with the requirements of Pennsylvania law, the Plan of Conversion adopted by Provident provides for Provident to file an application with the Commissioner under Section 803-A of the Conversion Act to reorganize as a stock life insurance company. The Commissioner will hold a hearing on whether the terms of the demutualization comply with the Conversion Act after giving written notice to Provident and other interested persons. The Plan of Conversion also provides for Provident Eligible Members to be able to comment on the Plan of Conversion at the hearing, for the Eligible Members to vote on the Plan of Conversion at the Eligible Members' Meeting and for Provident to provide notice to its Eligible Members of both the public hearing and the Eligible Members' Meeting.

The Conversion Act explicitly permits the Commissioner to employ staff personnel and to engage outside consultants to assist him in determining whether a demutualization plan meets the requirements of the Conversion Act and any other relevant provisions of the Pennsylvania law. In the case of the proposed demutualization, the Commissioner has retained an actuarial firm, Tillinghast Towers Perrins, and is expected to hire an accounting firm, legal advisers and an investment banking firm as consultants.

A decision by the Commissioner to approve a demutualization plan pursuant to the Conversion Act is then subject to judicial review in Pennsylvania courts.

In addition to the Pennsylvania regulatory requirements, Provident has agreed to file a copy of the Plan of Conversion with the Superintendent.<sup>5</sup> The Plan of Conversion may also be subject to review by the Superintendent, who may raise objections if the Plan of Conversion is deemed to be unfair or inequitable to New York policyholders. If the Superintendent opines unfavorably on the Plan of Conversion, Provident, as a practical matter, would either amend the Plan of Conversion or work out a satisfactory solution with the Superintendent. If the Superintendent were to require changes unacceptable to the Commissioner, Provident would have to work with both regulators to arrive at a satisfactory solution.

Provident's Plan of Conversion was adopted by its Board of Directors on December 14, 2001. Provident expects the Eligible Members' Meeting will occur in the latter part of the third quarter for the 2002 calendar year, with

<sup>5</sup> Specifically, section 1106(i) of the New York Insurance Law [Section 1106(i)] authorizes the Superintendent to review the demutualization plan of a foreign life insurer licensed in New York and to specify the conditions, if any, that the Superintendent would impose in order for the foreign insurer to retain its New York license following its demutualization. In this regard, Section 1106(i) requires that a foreign life insurer licensed in New York file with the Superintendent a copy of the demutualization plan at least 90 days prior to the earlier of (a) the date of any public hearing required to be held on the plan of reorganization by the insurer's state of domicile and (b) the proposed effective date of the demutualization.

If, after examining the plan of demutualization, the Superintendent finds that the plan is not fair or equitable to the New York policyholders of the insurer, the Superintendent must set forth the reasons for his findings. In addition, the Superintendent must notify the insurer and its domestic state insurance regulator of his findings and his reasons for such findings and advise of any requirements he considers necessary for the protection of current New York policyholders in order to permit the insurer to continue to conduct business in New York as a stock life insurer after the demutualization.

notice of such meeting having been mailed at least 30 days prior to the scheduled meeting date to approximately 1,050 Plan policyholders which are Eligible Members.

Approximately 316,317 Eligible Members will be eligible to vote on the Plan of Conversion and each Eligible Member will be entitled to only one vote, regardless of the number or size of the policies owned. Further, Provident's hearing on the Plan of Conversion is expected to be held on May 23, 2002 in King of Prussia, Pennsylvania. As for the actual Conversion and Merger, Provident expects these events will transpire during the latter part of the third quarter of 2002.<sup>6</sup> Provident expects these events should occur within three months of approval of the Plan of Conversion by the Commissioner. If the Conversion and Merger are not completed by December 31, 2002, the Merger Agreement may be terminated. If the Merger Agreement is terminated, the Conversion and Merger will not take place.

#### *Distributions to Eligible Members*

10. Provident's Plan of Conversion provides for Eligible Members to ultimately receive Sponsor Class A Shares, Cash, or Policy Credits as consideration for giving up their membership interests in the mutual company, which interests are extinguished as a result of the demutualization. For this purpose, an Eligible Member is essentially a policyholder whose name appears on the insurer's records as owner of an eligible policy on the date the Plan of Conversion is adopted. As stated above, any determination to receive Sponsor Class A Shares, Cash or Policy Credits by an Eligible Member which is a Plan, pursuant to the Plan of Conversion, will be made by one or more Plan fiduciaries which are independent of Provident and its affiliates. In this regard, neither Provident nor its affiliates will exercise any investment discretion or provide "investment advice," within the

<sup>6</sup> However, the Department notes that the Merger and Plan of Conversion must take place five business days after the Eligible Members' Meeting. At such meeting, Eligible Members have the opportunity to vote for or against the Conversion and Merger. Notice of the Eligible Members' Meeting cannot be sent to Eligible Members until issuance of an order from the Commissioner approving the Plan of Conversion. The Department also notes that if the subject exemption is not received prior to the Effective Date of the Plan of Conversion, Provident will, subject to the Commissioner's approval, either pay consideration to such Eligible Members or delay payment of such consideration and place said amount in an escrow or similar arrangement subject to terms and conditions approved by the Commissioner.

meaning of 29 CFR 2510.3-21(e), with respect to such decisions.<sup>7</sup>

11. It is anticipated that the following steps will occur on or prior to the Effective Date:

(a) The Sponsor will make a capital contribution in Cash to the Merger Sub in an amount equal to the excess of (x) the total amount of Cash and Policy Credits that are to be paid or credited to Eligible Members in the transactions, over (y) the total amount of Cash and Policy Credits to be paid or funded by Provident from its surplus as it existed prior to the Conversion and Merger. The amount to be paid or funded by Provident from its surplus as it existed prior to the Merger will, when added to the amount paid or payable by Provident in respect of costs and expenses incurred in connection with the Conversion and the Merger, be equal to not more than 10 percent of the value of Provident as of the Effective Date without taking into account any diminution resulting from such costs and expenses.

(b) Provident will convert to a stock company. Immediately following the Conversion and under the terms of the Plan of Conversion, the Conversion Agent will vote the Provident Shares in favor of the Merger.

(c) The Merger Sub then will merge with and into Provident, with Provident as the surviving corporation. The Provident Shares evidenced by the global certificate will be extinguished. In exchange therefor, Eligible Members will be entitled to receive Sponsor Class A Shares, Cash, or Policy Credits.

12. In order to determine the amount of consideration to which each Eligible Member is entitled (combinations of

<sup>7</sup> "The proceeds of the demutualization will belong to the Plan if they would be deemed to be owned by the Plan under ordinary notions of property rights. See ERISA Advisory Opinion 92-02A, January 17, 1992 (assets of plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law). It is the view of the Department that, in the case of an employee welfare benefit plan with respect to which participants pay a portion of the premiums, the appropriate plan fiduciary must treat as plan assets the portion of the demutualization proceeds attributable to participant contributions. In determining what portion of the proceeds are attributable to participant contributions, the plan fiduciary should give appropriate consideration to those facts and circumstances that the fiduciary knows or should know are relevant to the determination, including the documents and instruments governing the plan and the proportion of total participant contributions to the total premiums paid over an appropriate time period. In the case of an employee pension benefit plan, or where any type of plan or trust is the policyholder, or where the policy is paid for out of trust assets, it is the view of the Department that all of the proceeds received by the policyholder in connection with a demutualization would constitute plan assets." See ERISA Advisory Opinion 2001-02A, February 15, 2001.

different forms of consideration will not be permitted), each Eligible Member will be allocated a number of Provident Shares equal to the sum of (a) a fixed minimum number of shares<sup>8</sup> and (b) an additional number of shares based on actuarial formulas that take into account each policy's contributions to the surplus and asset valuation reserve of Provident, which formulas have been approved by the Commissioner. As noted above, upon consummation of the Merger, the Provident Shares that are allocated to those policyholders who are entitled to receive stock will be exchanged for Sponsor Class A Shares, Cash or Policy Credits in accordance with the terms of the Merger Agreement.

#### **Consideration Payable to Eligible Members**

13. Under the Plan of Conversion, certain Eligible Members will receive Cash or Policy Credits in respect of the extinguishment of their membership interests in the Conversion. The remaining Eligible Members will be issued Provident Shares in respect of their membership interests in Provident. With respect to the Merger, the Provident Shares will be extinguished and, in exchange therefore, Eligible Members will be entitled to receive Sponsor Class A Shares, Cash, or Policy Credits.

Eligible Members who own the following types of policies will be required under the Plan of Conversion to receive Policy Credits in exchange for their membership interests in Provident: a policy that is an individual retirement annuity contract (the IRA) within the meaning of section 408(b) or 408A of the Code or a tax sheltered annuity contract (the TSA) within the meaning of section 403(b) of the Code; or a policy that is an individual annuity contract that has been issued pursuant to a Plan qualified

<sup>8</sup> The fixed component of consideration will equal the quotient of: (A) 20% of the total number of Allocable Provident Shares divided by (B) the total number of Eligible Members, provided that any resulting fractional number of Provident Shares shall be rounded to the nearest whole number of Provident Shares. Determination of Allocable Provident Shares depends upon the "Sponsor Final Stock Price" which, as defined in the Merger Agreement, means "the volume weighted average of the sales prices of the Sponsor Class A Shares as published by Bloomberg Professional Service for the 15 consecutive Trading Dates ending on the fifth Trading Day immediately preceding the Closing Date." The aggregate purchase price is also subject to a "collar" adjustment based on fluctuations in the stock price of the Sponsor Class A Shares and an adjustment related to the amount of assets to be allocated to a "closed block" of assets for the benefit of certain dividend receiving policies. Thus, the total number of shares allocated to the fixed component will not fully be determined until the Closing Date of the Merger and such total may be subject to further regulatory approval.

under sections 401(a) or 403(a) of the Code directly to the Plan participant; or a policy that is an individual life insurance policy that has been issued pursuant to a Plan qualified under section 401(a) or 403(a) of the Code directly to the plan participant. These policyholders are collectively referred to as "Policy Credit Recipients."

Also, with respect to the Conversion, certain Eligible Members will be required to receive consideration in the form of Cash in exchange for their membership interests in Provident. Said policyholders are collectively referred to as "Cash Recipients." A Cash Recipient is a policyholder whose address for mailing purposes as shown on Provident's records is located outside the United States; or whose address for mailing purposes as shown on Provident's records on the Effective Date is an address at which mail is undeliverable or deemed to be undeliverable in accordance with guidelines approved by the Commissioner; or to whom Provident determines in good faith to the satisfaction of the Commissioner that it is not reasonably feasible or appropriate to provide consideration in the form that such Eligible Member would otherwise receive.<sup>9</sup>

Eligible Members that own group annuity contracts designed to fund benefits under a retirement plan which is qualified under section 401(a) or section 403(a) of the Code (including a plan covering employees described in section 401(c)) that do not affirmatively elect to receive Sponsor Class A Shares or Cash in the Merger will receive Policy Credits (Qualified Plan Recipients). All other Eligible Members will have the option to receive Cash rather than Sponsor Class A Shares in the Merger.<sup>10</sup> It is possible that not all Eligible Members opting to receive Cash or Policy Credits will receive Cash or Policy Credits. Instead, the aggregate amount of Cash and Policy Credits available will be limited. If elections for Cash and Policy Credits are over-subscribed, available Cash and Policy Credits first will be paid or credited to Mandatory Consideration Recipients and then will be paid or credited sequentially to Optional Consideration Recipients, starting with electing Eligible Members entitled to receive the smallest amount of consideration and continuing to electing Eligible Members receiving the largest amount of

consideration at which all Optional Consideration Recipients at that level of consideration can be paid with the available funds. No Eligible Member will receive a combination of Cash or optional Policy Credits and Sponsor Class A Shares.

Each Provident Share issued in the Conversion to an Eligible Member (other than an Optional Consideration Recipient) will be exchanged for one Sponsor Class A Share on a one for one exchange in the Merger. The amount of Cash or value of Policy Credits received by each Mandatory Consideration Recipient or Optional Consideration Recipient in the Conversion or Merger will be based on (x) the number of Sponsor Class A Shares such Eligible Member would have received if such Eligible Member had received Sponsor Class A Shares in the Merger and (y) the average market value of such Sponsor Class A Shares for the 15 consecutive trading days ending on the fifth trading day immediately preceding the Effective Date.

#### *Limitation on Consideration and Effect on Existing Policies*

14. The amount of Cash and Policy Credits that may be paid or credited pursuant to the Plan of Conversion and the Merger Agreement, in the aggregate, will not exceed (x) the total amount paid or credited that will be funded out of Provident's surplus as this surplus existed prior to the Merger, with certain limitations not relevant for purposes of this request, and (y) additional amounts paid or credited with funds supplied by the Sponsor as a capital contribution to the Merger Sub. These additional amounts cannot exceed 20 percent of the value of Provident as of the Effective Date, determined without taking into account any diminution resulting from costs or expenses paid or payable by Provident in connection with the Conversion and Merger, but including amounts paid or credited out of Provident's surplus pursuant to clause (x) above.

Under the current terms of the Merger Agreement, the amount of Cash or Policy Credits that may be paid or funded with Cash supplied by the Sponsor is further limited so that no more than 20 percent of the total number of Eligible Members receiving consideration provided or funded by the Sponsor (including Eligible Members receiving Sponsor Class A Shares) will receive Cash or Policy Credits. The parties to the Merger have agreed to waive this limitation if the Internal Revenue Service issues certain tax rulings.

#### *The Closed Block (the Closed Block)*

15. Pursuant to the Plan of Conversion, Provident will, for policyholder dividend purposes only, operate the Closed Block for the benefit of individual policies paying "experience-based policy dividends". For accounting purposes only, assets of Provident will be allocated to the Closed Block in an amount that produces cash flows which, together with anticipated revenue from the Closed Block policies and contracts, are expected to be sufficient to support the Closed Block policies, including, but not limited to, provisions for payment of claims and certain charges and taxes, and to provide for continuation of dividend scales payable for 2001, if the experience underlying such scales (including the portfolio interest rate) continues, and to allow for appropriate adjustments in such scales if such experience changes. Assets in the Closed Block remain as general account assets of Provident and are fully subject to the claims of creditors of Provident, like any general account assets.

#### *Commission-Free Program*

16. Under the terms of the Plan of Conversion, the Sponsor will establish the Commission-Free Program within 90 days after the Effective Date which will continue for at least 90 days thereafter. The Commission-Free Program will provide any shareholder holding fewer than 100 Sponsor Class A Shares the opportunity to either sell all of such shareholder's shares or to buy additional shares necessary to increase such shareholder's shares to 100, in either case, at the prevailing market prices but without paying brokerage commissions, mailing charges, registration fees, or other administrative or similar expenses.

#### *Independent Fiduciary*

17. As stated above, Wilmington Trust will serve as the Independent Fiduciary for all of the Provident Plans in connection with the implementation of Provident's Plan of Conversion. Generally, such transactions over which Wilmington Trust will exercise investment discretion may result in the acquisition, holding or disposition of Sponsor Class A Shares by the Provident Plans. Wilmington Trust states that it is familiar with the Department's independent fiduciary requirements and has acknowledged and accepted such duties, responsibilities and liabilities to act on behalf of the Provident Plans. In return for services rendered, Wilmington Trust

<sup>9</sup> The Policy Credit Recipients and the Cash Recipients are hereinafter collectively referred to as "Mandatory Consideration Recipients."

<sup>10</sup> Optional Cash Recipients and Qualified Plan Recipients are together referred to herein as "Optional Consideration Recipients."



will be compensated by either Provident, a successor, or an affiliate.

Wilmington Trust was founded in 1903 and its home state is Delaware. As of December 31, 2001, Wilmington Trust had approximately \$7.3 billion in banking assets and \$24.6 billion in assets under management. Wilmington Trust maintains its primary focus on asset management and trust services and is also a specialty provider of corporate financial services on an international scale. Since 1942, Wilmington Trust has provided trustee, custodial, and administrative services for all types of qualified and non-qualified employee benefit plans, and currently has approximately 1,000 employee benefit plans under management.

Wilmington Trust represents that it is independent of Provident and its affiliates. In this regard, Wilmington Trust asserts that it has no business, ownership or control relationship, nor is it otherwise affiliated with Provident and its affiliates. Further, Wilmington Trust represents that while it either directly or through its affiliates may provide one or more banking, trust or other customary services to Provident or its affiliates from time to time, it derives less than one percent of its annual income from Provident and its affiliates.

As the Independent Fiduciary for the Provident Plans, Wilmington Trust will be required to (a) vote on whether to approve or not to approve the proposed demutualization; (b) elect between consideration in the form of Sponsor Class A Shares, Cash or Policy Credits on behalf of such Plans; (c) review and approve Provident's allocation of Sponsor Class A Shares, Cash or Policy Credits received for the benefit of the participants and beneficiaries of the Provident Plans; (d) vote on Sponsor Class A Shares that are held by the Provident Plans and dispose of such stock held by the Home Office Pension Plan, which exceeds the limitation of section 407(a)(2) of the Act, as soon as it is reasonably practicable, but in no event later than six months after the Effective Date of the Plan of Conversion; and (e) take all actions that are necessary and appropriate to safeguard the interests of the Provident Plans and their participants and beneficiaries. In addition, Wilmington Trust will provide the Department with a complete and detailed final report as it relates to the Provident Plans prior to the Effective Date of the demutualization. Finally, Wilmington Trust states that it has conducted a preliminary review of Provident's Plan of Conversion and it sees nothing in the Plan that would preclude the Department from proposing the requested exemption.

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

(a) The Plan of Conversion will be implemented in accordance with procedural and substantive safeguards that are imposed under Pennsylvania law and will be subject to review and supervision of the Commissioner and the Superintendent.

(b) The Commissioner will review the terms and options that are provided to Eligible Members of Provident as part of such Commissioner's review of the Plan of Conversion and Merger and the Commissioner will approve the Plan of Conversion and Merger following a determination that such Plan is fair and equitable to Eligible Members (including Eligible Members that are Plans).

(c) The Superintendent will object to the Plan of Conversion if he or she finds that such Plan is not fair or equitable to New York policyholders.

(d) As part of their separate determinations, both the Commissioner and the Superintendent must concur on the terms of the Plan of Conversion.

(e) In the case of an Eligible Member that is a Plan, one or more independent Plan fiduciaries will have an opportunity to vote to approve the terms of the Plan of Conversion (or to comment on such Plan), and will be solely responsible for all such decisions after receiving full and complete disclosure from Provident.

(f) The Plan of Conversion and Merger will help assure the continuity of Provident's life insurance and other business, will enhance the competitiveness of Provident and will generate significant opportunities for improved financial performance.

(g) The proposed exemption will allow Eligible Members that are Plans to receive Sponsor Class A Shares, Cash or Policy Credits, in exchange for their membership interests in Provident and neither Provident nor any of its affiliates will exercise investment discretion or provide "investment advice," within the meaning of 29 CFR 2510.3-21(c), with respect to such decisions or options given.

(h) Each Eligible Member will have an opportunity to determine whether to vote to approve the terms of the Plan of Conversion and Merger and will also be solely responsible for any decisions that may be permitted under the Plan of Conversion regarding the form of consideration to be received in the demutualization.

(i) All Plans that are Eligible Members will participate in the transactions and

on the same basis as Eligible Members that are not Plans.

(j) No Eligible Member will pay any brokerage commissions or fees in connection with the receipt of Sponsor Class A Shares or Policy Credits or in connection with the implementation of the Commission-Free Program.

(k) The demutualization will not, in any way, change premiums or reduce policy benefits, values, guarantees or other policy obligations of Provident to its policyholders.

**FOR FURTHER INFORMATION CONTACT:** Ms. Anna M. N. Mpras of the Department, telephone (202) 693-8565. (This is not a toll-free number.)

**Chiquita Processed Foods 401(k) Retirement Savings Plan (the 401(k) Plan) and the Chiquita Savings and Investment Plan (the Savings Plan; collectively the Plans)**

*Located in New Richmond, WI and Cincinnati, OH, respectively*

[Application Nos. D-11063 and D-11064]

**Proposed Exemption**

Based on the facts and representations set forth in the application, 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).<sup>11</sup> If the exemption is granted, the restrictions of sections 406(a), 406(b) 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 March 19, 2002, to (1) the acquisition and holding by the Plans of certain new warrants (the Warrants) to purchase new common stock (the New Common Stock) issued by Chiquita Brands International, Inc. (the Employer), a party in interest with respect to the Plans; and (2) the subsequent exercise of the Warrants, as directed by participants in the Plans, provided that the following conditions were met:

(a) The Plans had little, if any, ability to affect the negotiation or confirmation of either the Plan of Reorganization of Chiquita (the Original POR) filed by the Employer on November 28, 2001 under Chapter 11 of Title 11 of the United States Code (the Bankruptcy Code), the First Amended Plan of Reorganization of Chiquita (the First Amended POR),

<sup>11</sup> For purposes of this proposed exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.



subsequently filed under the Bankruptcy Code by the Employer on January 18, 2002, or the Second Amended Plan of Reorganization of Chiquita (the Second Amended POR), subsequently filed under the Bankruptcy Code by the Employer on March 7, 2002.

(b) The acquisition and holding of the Warrants did not occur until the Second Amended POR had been confirmed.

(c) The Plans acquired the Warrants automatically in connection with the Employer's bankruptcy proceedings and without any unilateral action on their part.

(d) All shareholders, including the Plans, were treated in a like manner with respect to the issuance of the Warrants.

(e) The Warrants represented less than 25 percent of the assets of either Plan.

(f) Any decision to exercise the Warrants acquired by the Plans in connection with the Employer's bankruptcy will be made by the participants in accordance with the terms of a warrant agreement (the Warrant Agreement), as well as in accordance with the Plan provisions for individually-directed investment of participant accounts.

(g) The Plans did not pay any fees or commissions in connection with the receipt of the Warrants, nor will the Plans pay any fees or commissions in connection with the holding or exercise of the Warrants.

(h) The trustees of the Plans (the Trustees) will not allow participants to exercise the Warrants held by their individual accounts in the Plans unless the fair market value of the New Common Stock exceeds the exercise price of the Warrants.

**EFFECTIVE DATE:** If granted, this proposed exemption will be effective as of March 19, 2002.

### Summary of Facts and Representations

1. The Employer is a New Jersey corporation maintaining its principal place of business in Cincinnati, Ohio. The Employer is an international marketer, producer and distributor of fresh fruits, vegetables and processed foods sold under the "Chiquita" and other brand names.

2. The Plans, which are sponsored by the Employer, are defined contribution plans that provide for participant-directed investments. Participants in the Plans may direct the investments of their accounts into a variety of funds, including the Employer's common stock fund. The Savings Plan, formerly known as the "United Brands Company Savings and Investment Plan," was adopted by the Employer effective January 1, 1986.

As of December 21, 2001, the Savings Plan had total assets of approximately \$34,521,487 and 989 participants. Of the total assets, the Savings Plan held 1,285,537 shares of Employer common stock (the Old Employer Common Stock) which represented approximately 2.27% of the fair market value of the assets of the Savings Plan and was allocated to the individual accounts of 557 participants. Putnam Fiduciary Trust Company, a trust company having its principal place of business in Boston, Massachusetts, serves as the trustee for the Savings Plan.

The 401(k) Plan was formed, effective April 1, 1999, as the result of a merger of the American Fine Foods 401(k) Plan and the Stokely USA, Inc. Retirement Savings Plan into the Friday Canning Corporation 401(k) Savings Plan. As of December 21, 2001, the 401(k) Plan had total assets of approximately \$37,521,487 and 2,624 total participants. Of the total assets, the 401(k) Plan held 199,515 shares of the Old Employer Common Stock which represented about 0.32% of the fair market value of the assets of such plan and was allocated to the accounts of 283 participants. UMB Bank, N.A., a trust company having its principal place of business in Kansas City, Missouri, serves as the trustee for the 401(k) Plan.

3. The Plans are administered by the Chiquita Brands International, Inc. Employee Benefits Committee (the Benefits Committee) appointed by the Board of Directors of the Employer. Since the participants in the Plans direct the investment of their accounts, neither the Benefits Committee, nor the Trustees, exercise investment discretion over the assets involved in the transactions that are described herein.<sup>12</sup>

4. The Savings Plan previously allowed participants to defer up to 12% of compensation and provides for matching and discretionary Employer contributions. The Savings Plan was amended to comply with recent tax law changes in February 2002. As part of the amendment process, the Savings Plan was amended to allow participants to defer up to 15% of compensation.

The 401(k) Plan also was amended to comply with recent tax law changes.

<sup>12</sup> The Department notes that ERISA's general standards of fiduciary conduct applied to the decision to offer Old Employer Common Stock as an investment option under the Plans. In this regard, section 404(a)(1) of the Act requires that a fiduciary discharge his or her duties in regards to the plan solely in the interest of the participants and beneficiaries, and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

The 401(k) Plan allows participants to defer up to 15% of compensation and also provides for matching and discretionary employer contributions.

5. On November 28, 2001, the Employer filed, with the Bankruptcy Court, the Original POR under the Bankruptcy Code, along with its petition. Under the Original POR, holders of shares of Old Employer Common Stock were entitled to receive shares of New Common Stock and Warrants to purchase additional shares of New Common Stock. The Old Employer Common Stock was to be cancelled on the Effective Date of the reorganization. The Effective Date would be a business day selected by the Employer after the Original POR was confirmed by the Bankruptcy Court and certain material conditions to the effectiveness of the Original POR had been satisfied. Namely, the approval of such POR in the Bankruptcy Court and the execution of an amended finance facility by Chiquita Brands, Inc., a wholly owned subsidiary of the Employer, which employs some Plan participants and also owns Chiquita Processed Foods. As holders of the Old Employer Common Stock, the Plans were entitled to receive shares of New Common Stock and the Warrants on the Effective Date, or as soon as reasonably practicable thereafter, under the Original POR.

6. On January 18, 2002, the Employer filed the First Amended POR with the Bankruptcy Court primarily to reflect actual distributions to the Employer's common and preferred shareholders. After the filing of the Chapter 11 case, up until January 2002, the Employer's preferred shareholders had been able to convert their owned shares of Employer preferred stock (the Employer Preferred Stock) to shares of Old Employer Common Stock. As a result, the Employer could not determine exact distributions to each class, because the numbers of outstanding shares of the Employer Preferred Stock were changing daily. However, the Bankruptcy Court entered an order prohibiting the conversion at the option of the holder of the Employer Preferred Stock into shares of Old Employer Common Stock after January 8, 2002. As a result of this prohibition, the Employer was able to set the distributions and filed the First Amended POR with the Bankruptcy Court to show accurate stock distributions.

7. On March 7, 2002, the Employer filed the Second Amended POR with the Bankruptcy Court. The Second Amended POR was confirmed by the Bankruptcy Court on March 8, 2002,

and became effective on March 19, 2002.

The major change in the Second Amended POR was the modification of certain releases in the Original POR and the First Amended POR. In this regard, in the Original POR and First Amended POR, holders of equity and claims who were entitled to receive distributions under the POR were deemed to release certain claims against certain parties relating to transactions in securities, the Employer, the POR and the Chapter 11 case. In the Second Amended POR, the releases by holders of equity were limited to claims in respect of the distributions that would be received as a result of such POR.

In addition, under each POR, all holders of Old Employer Common Stock would be entitled to receive their *pro rata* share of the New Common Stock and the Warrants. Moreover, the Old Employer Common Stock would be cancelled and extinguished.

8. On March 19, 2002, the Effective Date of the Second Amended POR, approximately 40 million shares of New Common Stock, including 800,000 shares of New Common Stock that were subject to delayed delivery were issued or issuable pursuant to the Second Amended POR. Of these, approximately one million shares of New Common Stock, as well as 13,333,333 Warrants, were distributed to the Plans and the other shareholders of the Old Employer Common Stock and Employer Preferred Stock and preference stock. Based on the number of shares of Old Employer Common Stock held by the Plans as of March 19, 2002, the Plans received 10,086 shares of New Common Stock (the Plans did not contain Employer Preferred Stock or preference stock). Of the New Common Stock issued to the Plans, 1,416 shares were allocated to the 401(k) Plan and 8,670 shares were allocated to the Savings Plan.

In addition to shares of New Common Stock, approximately 168,114 Warrants were issued to the Plans. The Warrants represented less than 25 percent of each Plan's assets. Of the Warrants distributed, 23,604 Warrant shares were transferred to the 401(k) Plan and 144,510 Warrant shares were transferred to the Savings Plan and allocated, on March 20, 2002, to the individual accounts of the affected participants. Any fractional shares of New Common Stock and Warrants were converted through market sales into cash, which in turn, was subsequently allocated to the participants' accounts.<sup>13</sup>

<sup>13</sup> The cash equivalent of the fractional shares to which the participants of the Savings Plan were entitled, after applying certain conversion rates,

The Second Amended POR also authorized the adoption of a new stock option plan, and the issuance thereunder of options for the purchase of up to 5,925,926 shares of New Common Stock. If all such options and all Warrants are exercised, the Employer will have issued and outstanding 59,259,259 shares of New Common Stock.

Because of the relatively small amount of Old Employer Common Stock in the Plans, it is represented that the participants, although entitled to vote, had little, if any ability to negotiate the terms of the Original POR, the First Amended POR or the Second Amended POR.

9. The Warrants are exercisable for 13,333,333 shares of New Common Stock. Thus, each Warrant entitles the holder to purchase one share of New Common Stock during the period commencing on March 19, 2002 and ending on the seventh anniversary of the Effective Date of the Second Amended POR. The Warrants are presently listed on the New York Stock Exchange (the NYSE). Participants in the Plans are not entitled to invest in additional Warrants.

The exercise price for the Warrants has been set at a price per share that is equal to the "Solvency Value." The Solvency Value is the value per share of the New Common Stock that, when multiplied by the number of shares of New Common Stock distributed to holders of old subordinated debenture claims against the Employer (and after adding such amount to the \$250 million face amount of new senior notes to be issued to holders of old senior note claims and old subordinated debenture claims), will equal the amount of old senior note claims and old subordinated debenture claims for principal, plus unpaid interest on such principal through March 19, 2002, the Effective Date of the Second Amended POR. As stated in the Warrant Agreement, the exercise price of each Warrant is \$19.23 per Warrant share.

10. All shareholders of Old Employer Common Stock, including the Plans, were treated in a similar manner with

was distributed to the Savings Plan on March 27, 2002. The cash was allocated to the participants' accounts, after settling with the transfer agent, on May 1, 2002. Similarly, the 401(k) Plan received the cash equivalent to which its participants were entitled, after applying certain conversion rates, on April 30, 2002, and the cash was allocated to the participants' accounts on the same date. The Employer had anticipated that the cash would be distributed to the Plans during the week of April 12, 2002 and allocated to participants as soon as administratively practicable thereafter. However, due to administrative complications, the cash distributions and allocations were not accomplished until the dates set forth above.

respect to the their acquisition and holding of the Warrants. No participant in the Plans paid, nor will pay, any fees or commissions in connection with the acquisition, holding, or exercise of the Warrants.

With respect to the exercise of the Warrants, the Trustees will follow the direction of the participants in accordance with the procedures set forth in the Warrant Agreement and established by the Benefits Committee. In this regard, the Trustees will not allow participants to exercise the Warrants held in such participants' individual accounts in the Plans unless the fair market value of the New Common Stock exceeds the exercise price of the Warrants. In addition, the shares of New Common Stock received upon the exercise of the Warrants (or cash in lieu of fractional shares) will be credited to participants' accounts. Moreover, the Benefits Committee is considering implementing a procedure whereby participants will be required to exercise at least 100 Warrant shares at any one time. If a participant does not own at least 100 Warrants, such participant will be required to exercise all of the Warrants held in his or her account at that time.

With respect to the sale of the Warrants, the Trustees will also follow the direction of the participants in accordance with procedures established by the Benefits Committee. All such sales will occur on the open market and in the 100 share increments described above. Following a sale transaction, the proceeds will be allocated to each affected participant's account in the Plans.<sup>14</sup>

11. The Employer represents that it analyzed the impact of each POR on the Plans. In particular, the Employer states that it analyzed the prohibited transaction implications of the automatic exchange of the Old Employer Common Stock held by the Plans for the Warrants. Accordingly, the Employer has requested exemptive relief from the Department with respect to the acquisition and holding by the Plans of the Warrants as well as with respect to the subsequent exercise of the Warrants by the participants in the Plans. If granted, the exemption would

<sup>14</sup> Because the Warrants are listed on the NYSE, the Department has determined that no exemption is necessary with respect to sales of such securities, on the open market, to non-parties in interest, at the direction of participants. In this regard, if the Warrants are sold through an exchange in an ordinary "blind transaction" where neither the buyer nor the seller (nor the agent of either) knows the identity of the other party involved, no prohibited transaction will have occurred in violation of the Act (see ERISA Advisory Opinion 85-18A, April 23, 1985).

be effective as of March 19, 2002, which is the date the Warrants were issued to the Plans.

12. The Employer represents that the shares of New Common Stock that were acquired by the participant accounts in the Plans in conjunction with the issuance of the Warrants, would constitute a "qualifying employer security" within the meaning of section 407(d)(5) of the Act and that the acquisition and holding by the Plans of such stock would be statutorily exempt under section 408(e) of the Act.<sup>15</sup> However, the Employer notes that the Warrants are "employer securities," as defined in section 407(d)(1) of the Act (as securities issued by an employer of employees covered under a plan or an affiliate of such employer), but are not "qualifying employer securities." Therefore, the Employer asserts that in the absence of an administrative exemption, the acquisition and holding of the Warrants by the Plans or the subsequent exercise of the Warrants, as directed by the Plan participants, would violate sections 406(a), 406(b) and 407(a) of the Act.

13. In summary, it is represented that the transactions have satisfied or will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The acquisition and holding of the Warrants by the Plans occurred in connection with the Employer's bankruptcy proceedings, pursuant to which all shareholders of the Old Employer Common Stock were treated in the same manner, thereby allowing certain affected Plan participants the ability to maximize the return on their shares of Old Employer Common Stock.

<sup>15</sup> Similarly, the Employer represents that the acquisition and holding by the participant accounts in the Plans of the Old Employer Common Stock would constitute a "qualifying employer security."

The term "qualifying employer security" means an employer security which is "stock," a "marketable obligation," or an "interest in a publicly-traded partnership," under section 407(d)(5) of the Act.

In relevant part, section 408(e) of the Act provides that sections 406 and 407 of the Act shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5)(1) if such acquisition is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 407(e)(1)), (2) if no commission is charged with respect thereto, and (3) if—(A) the plan is an eligible individual account plan (as defined in section 407(d)(3), or (B) in the case of an acquisition by a plan which is not an eligible individual account plan, the acquisition is not prohibited under section 407(a) of the Act.

In this proposed exemption, the Department expresses no opinion herein on whether the exchange of the Old Employer Common Stock for the New Common Stock by the individual accounts of affected participants in the Plans satisfied the terms and conditions of section 408(e) of the Act.

(b) The Plans had little, if any, ability to affect the negotiation and confirmation of either the Employer's Original POR, the First Amended POR or the Second Amended POR with respect to the bankruptcy proceedings.

(c) The Warrants were issued to the Plans automatically in connection with the Employer's bankruptcy proceedings and without any unilateral action on the part of the Plans.

(d) The Plan participants did not pay, nor will pay, any fees or commissions with respect to the acquisition, holding, or exercise of the Warrants.

(e) All shareholders, including the Plans, were treated in a like manner with respect to the issuance of the Warrants.

(f) The Warrants represented less than 25 percent of the assets of either Plan.

(g) Any decision to exercise the Warrants acquired by the Plans in connection with the Employer's bankruptcy will be made by the Plan participants, in accordance with the terms of the Warrant Agreement, as well as in accordance with the Plan provisions for individually-directed investment of participant accounts.

(h) The Trustees will not allow participants to exercise the Warrants held by their individual accounts in the Plans unless the fair market value of the New Common Stock exceeds the exercise price of the Warrants.

#### Notice to Interested Persons

The Employer will provide notice of the proposed exemption to all interested persons, including participants and beneficiaries who receive the Warrants, the Trustees, and the Benefits Committee, by first class mail within 10 days of the date of publication of the notice of proposed exemption in the **Federal Register**. The notice will include a copy of the proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which will inform interested persons of their right to comment on and/or to request a hearing with respect to the proposed exemption. Comments regarding the proposed exemption and requests for a public hearing are due within 40 days of the date of publication of the notice of pendency in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Anna M.N. Mpras of the Department, telephone (202) 693-8565. (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 13th day of June, 2002.

**Ivan Strasfeld,**

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

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**BILLING CODE 4510-29-P**

**DEPARTMENT OF LABOR****Pension and Welfare Benefits Administration****[Application No. D-11036]****Notice of Proposed Individual Exemption to Amend and Replace Prohibited Transaction Exemption (PTE) 85-131, Involving the Watkins Master Trust (the Trust), Located in Atlanta, GA****AGENCY:** Pension and Welfare Benefits Administration, Department of Labor.**ACTION:** Notice of proposed individual exemption to modify and replace PTE 85-131.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption which, if granted, would amend and replace PTE 85-131 (50 FR 32333, August 9, 1985). PTE 85-131 is an individual exemption providing relief, since March 29, 1985, for (1) the leasing of certain improved real property by the Trust to Watkins Associated Industries, Inc. (Watkins), a party in interest with respect to the plans (the Plans) participating in the Trust under the terms of a written lease (the New Lease); and (2) the possible cash purchase of the Trust's interest in the property by Watkins.

If granted, the proposed exemption would modify an option to purchase provision in the New Lease by allowing Watkins to acquire the Trust's leasehold interests in a building (the Building), the improvements (the Improvements) constructed thereon, and in a ground lease (the Ground Lease) on May 8, 2002, instead of at the end of New Lease renewal term on December 31, 2008. In addition, the proposed exemption would replace PTE 85-131, which expired by operation of law upon the consummation of the sale. If granted, the proposed exemption would affect participants and beneficiaries of, and fiduciaries with respect to the Trust.

**DATES:** Written comments and requests for a public hearing should be received by the Department on or before August 2, 2002.

**EFFECTIVE DATE:** If granted, this proposed exemption will be effective as of May 8, 2002.

**ADDRESSES:** All written comments and requests for a public hearing (preferably, three copies) should be sent to the Office of Exemption Determinations, Pension and Welfare Benefits Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington DC 20210,

(Attention: Notice of Proposed Individual Exemption to Amend and Replace Prohibited Transaction Exemption 85-131, Involving the Watkins Master Trust; Application No. D-11036).

Interested persons are also invited to submit comments and/or hearing request to the Department by facsimile to (202) 219-0204 or by electronic mail to [moffittb@pwba.dol.gov](mailto:moffittb@pwba.dol.gov) by the end of the scheduled comment period. The application pertaining to the proposed exemption and the comments received will be available for public inspection in the Public Disclosure Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW, Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, telephone (202) 693-8556. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of a proposed exemption that will amend and replace PTE 85-131. PTE 85-131 provides an exemption from certain prohibited transaction restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), as amended, by reason of section 4975(c)(1) of the Code.

The proposed exemption has been requested in an application filed on behalf of the Trust and Watkins,<sup>1</sup> pursuant to 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, August 10, 1990). 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 requested to the Secretary of Labor. Accordingly, this proposed exemption is being issued solely by the Department.

**I. Background**

As stated above, PTE 85-131 provides exemptive relief from the restrictions of

<sup>1</sup> The Department is also considering an exemption request (D-11038) that has been filed on behalf of Wilwat Properties, Inc. (Wilwat), a party in interest with respect to the employee benefit plans participating in the Trust. In their request, Wilwat and the Trust are seeking exemptive relief which is similar to that contemplated herein.

sections 406(a), 406(b)(1), 406(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, with respect to the leasing by the Trust to Watkins of certain real property and the potential cash purchase of the Trust's interest in the property by Watkins. PTE 85-131 is effective from March 29, 1985 until May 8, 2002, the date of the sale transaction described herein.

According to the Summary of Facts and Representations (50 FR 24067, June 7, 1985) underlying PTE 85-131, the Trust is a master trust which was originally established in 1984 to hold, manage and administer the assets of five defined contribution pension plans sponsored by Watkins, its affiliates and subsidiaries. Watkins, a Florida corporation engaged in diverse service and manufacturing enterprises, maintains its principal place of business in Atlanta, Georgia. At present, only three Plans participate in the Trust. They are the Watkins Associated Industries, Inc. Profit Sharing Plan, the LandSpan, Inc. Profit Sharing Plan, and the Southern Concrete Construction Company Profit Sharing Plan. Each of the participating Plans owns an undivided, *pro rata* interest in the assets of the Trust. As of December 31, 2000, the Trust held total assets of \$39,752,458. The current trustee (the Trustee) of the Trust is SunTrust Bank, N.A. (SunTrust) of Atlanta, Georgia.

Formerly included among the assets of the Trust was a leasehold interest in a commercial office building containing approximately 20,860 net square feet of space, together with parking facilities. The Building is located at 1958 Monroe Drive, Atlanta, Georgia, and is situated on a 1.34 acre parcel of commercially-zoned real land (the Land). The Building is not located in close proximity to other real property that is owned by Watkins, Wilwat or their principals.

The Land is owned by William L. Monroe, Sr., an unrelated party, and was being leased to the Trust under the provisions of the Ground Lease. As lessee under the Ground Lease, the Trust had an estate for years under Georgia law.

The Ground Lease, which was a net lease requiring the Trust to incur such expenses as utilities, real estate taxes, assessments and maintenance, was originally acquired by the McDonough Construction Company and Affiliated Companies Profit Sharing Plan (the McDonough Plan) in 1958. At the time of the acquisition, the Land had been improved with the Building which was