

followed despite the change in the relevant parties.

8. The Applicant represents that, prior to investing a Plan's assets in a Fund, Fifth Third will obtain the advance approval of an independent second fiduciary of the Plan, who will generally be the Plan's named fiduciary, trustee, or sponsoring employer (the Second Fiduciary). Fifth Third will provide the Second Fiduciary with a current prospectus for the Funds, a statement describing the fees to be charged to or paid by the Plan and by the Funds (including fees for investment advisory or similar services and any Secondary Services), a statement of the reasons why Fifth Third considers the investment to be appropriate for the Plan, and a statement describing any applicable limitation with respect to which assets of the Plan may be invested in the Funds.

9. Under section 408(a) of ERISA, the Department may not grant an exemption unless a determination is made that such exemption is (i) administratively feasible; (ii) in the interests of the plan and of its participants and beneficiaries, and (iii) protective of the rights of the plan's participants and beneficiaries.

Fifth Third asserts that the exemption would be administratively feasible because it is substantially similar to FAN 99-25E, except for changes to the parties and limited additional relief provided on a prospective basis to allow the maximum permitted time for rebating Funds-level fees to Plans to increase to two business days. The Applicant does not believe that these changes will significantly affect the protective nature of the exemption. The exemption establishes objective criteria for its application, and compliance with such criteria can be readily determined and audited. Fifth Third states that the proposed exemption is in the interests of investing plans and their participants and beneficiaries since investing assets of a Plan in mutual funds such as the Funds provides the Plans, and their participants and beneficiaries, with certain advantages which are not available through investment in commingled investment trusts (CITs), the alternative collective investment vehicle in which Fifth Third invests assets of employee benefit plans. Fifth Third notes that, because mutual funds share prices are published in daily newspapers, individuals are able to track the performance of their accounts on a daily basis. The daily deposit and redemption features of mutual funds allow for investment of new monies without delay and allow assets of the Plan to realize investment returns up to the date of redemption. Additionally,

the various Portfolios offered by the Funds allow the investment managers or participants to transfer their investments between Portfolios with different investment objectives more promptly than could be done using CITs. Distributions can also be made in Funds shares, which eliminates any cost that might be associated with reinvesting cash distributions into new forms of investments. In sum, the Funds are an efficient alternative for the collective investment of assets, and the Plans will benefit from these efficiencies.

If the exemption is not granted, Plans for which Fifth Third serves as a fiduciary with investment discretion will be precluded from investing their assets in the Funds using the rebate mechanism. Fifth Third believes that the Funds represent appropriate investment vehicles that should be made available to the Plans.

10. On February 25, 2003, Fifth Third informed the Department that the Applicant recently discovered that an inadvertent error was made in processing rebates of investment advisory fees to certain retirement accounts. The system Fifth Third has installed for processing rebates involves assigning a code to each asset (*i.e.*, each Fifth Third Fund) held in an account. The assigned code establishes the factor based on which the rebate is accrued and paid. The account itself is then coded to identify if that account is or is not to receive rebates. Fifth Third discovered that although each account was correctly coded, the system identified certain asset codes as ineligible to pay rebates to the accounts. As a result, accounts holding assets with those asset codes did not receive the full rebate to which they were entitled.

Fifth Third states that this error appears to have initially occurred at the time of the merger of the Kent Funds into the Fifth Third Funds effective October 26, 2001. Thus, the rebate of the fees paid for October 2001 was the first rebate affected by the error. Both the number of plans and IRAs affected and the dollar amounts involved are relatively small. Fifth Third has determined that 44 tax-qualified plans and 32 IRAs are involved. The amounts that should have been rebated and were not are \$39,736.08 for tax-qualified plans and \$8,120.09 for IRAs.

Fifth Third provides that it is correcting this error by returning the principal amount of the rebates to the applicable plans and IRAs plus earnings to the date of correction. The earnings will be calculated using the method set forth in the Department of Labor's Voluntary Fiduciary Correction ("VFC")

Program. Thus, the earnings added to each rebated amount will be the greater of "Lost Earnings" or the "Restoration of Profits," both as defined in the VFC Program. See Sections 5(b)(5) and 5(b)(6) of the VFC Program. Fifth Third represents that the rebates are now functioning properly for all of the Fifth Third Funds. Thus, the fee rebates shown on the account statements for the tax-qualified plans and the IRAs will be correct going forward, beginning with the posting in early March for the fees paid in February 2003.

Fifth Third represents that within sixty (60) days of the date of publication in the **Federal Register** of the notice granting this exemption, Fifth Third will file Form 5330 with the Internal Revenue Service and pay the excise taxes applicable under section 4975(a) of the Code in connection with the error in processing rebates of investment advisory fees during the period beginning October 26, 2001 and ending on March 1, 2003.

11. In summary, First Third represents that the transactions described herein will satisfy the statutory criteria of section 408(a) of ERISA and section 4975(c)(2) of the Code for the following reasons: (a) The transactions will allow the Plans to continue to enjoy the advantages of investment in mutual Funds, including more ready access to information regarding performance, thus enabling Plan fiduciaries and participants to make more informed decisions regarding their investments; (b) prior to the initial investment of Plan assets in the Funds, a second, independent fiduciary of each Plan will receive full disclosure regarding the proposed investment and the fees to be received by Fifth Third, and has the opportunity to approve or disapprove the investment; (c) no sales commissions or redemption fees will be paid by the Plans in connection with the acquisition or sale of shares of the Funds; and (d) all dealings among the Plans, the Funds, and Fifth Third will be on a basis no less favorable to the Plans than such dealings with the other shareholders of the Funds.

*Notice to Interested Persons:* Fifth Third will furnish a copy of the notice of the proposed exemption along with the supplemental statement described at 29 CFR 2570.43(b)(2) to the named fiduciary of any affected Plan that Fifth Third serves as a fiduciary with investment discretion over such Plan's assets. The notice will be delivered by first class mail within 15 days of the date of publication of the proposed exemption in the **Federal Register**.