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Employee Benefits Security Administration

Application Numbers and Proposed Exemptions; Notice

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[D–11502, D–11518, D–11521, D–11425, D–11448, D–11495]

Application Numbers and Proposed Exemptions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemptions.

[Application Nos. and Proposed Exemptions; Putnam Fiduciary Trust Company (PFTC), The PNC Financial Services Group, Inc.; Deutsche Asset Management (UK) Limited (the Applicant); UBS Financial Services Inc. and Its Affiliates; Deutsche Bank AG and Its Affiliates (together, Deutsche Bank of the Applicant); Morgan Stanley & Co. Inc. and its current and future affiliates and subsidiaries (Morgan Stanley) and Union bank, N.A. and its affiliates (Union Bank), et al.]

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 (ERISA or 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 Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5700, 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 EBSA via e-mail or Fax. Any such comments or requests should be sent either by e-mail to: "*moffitt.betty@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 Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Warning: If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

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.

Putnam Fiduciary Trust Company (PFTC), Located in Boston, Massachusetts, [Application No. D–11425].

Proposed Exemption

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 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Proposed Exemption

Effective as of January 19, 2010, the restrictions of section 406(a) and (b) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to either (a) the purchase or sale by a Collective Fund (as defined in Section III(b) below) of shares of a Mutual Fund (as defined in Section III(d) below) where Putnam Fiduciary Trust Company ("PFTC" or the "Applicant") or its affiliate (PFTC and its affiliates are referred to herein as "Putnam") is the investment advisor of the Mutual Fund as well as a fiduciary with respect to the Collective Fund (or an affiliate of such fiduciary) or (b) the receipt of fees by Putnam from a Mutual Fund for acting as an investment advisor for the Mutual Fund and/or for providing other services to the Mutual Fund which are Secondary Services (as defined in Section III(g) below) in connection with the investment by the Collective Fund in shares of the Mutual Fund, provided that the following conditions and the general conditions of Section II are met: (a) Each Collective Fund satisfies either (but not both) of the following:

(1) The Collective Fund receives a cash credit equal to such Collective Fund's proportionate share of all fees charged to the Mutual Fund by Putnam for investment advisory services. Such credit shall be paid to the Collective Fund no later than the same day on which such investment advisory fees are paid to Putnam. The crediting of all such fees to the Collective Funds by Putnam is audited by an independent accounting firm on at least an annual basis to verify the proper crediting of the fees to each Collective Fund. The audit report shall be completed not later than six months after the period to which it relates; or

(2) No management fees, investment advisory fees, or similar fees are paid to Putnam with respect to any of the assets of such Collective Fund that are invested in shares of the Mutual Fund. This condition does not preclude the payment of investment advisory or similar fees by the Mutual Fund to Putnam under the terms of an investment management agreement adopted in accordance with section 15

of the Investment Company Act of 1940 (the 1940 Act), nor does it preclude the payment of fees for Secondary Services to Putnam pursuant to a duly adopted agreement between Putnam and the Mutual Fund if the conditions of this proposed exemption are otherwise met.

(b) The price paid or received by a Collective Fund for shares in the Mutual Fund is the net asset value (NAV) per share (as defined in Section III (h)) and is the same price that would have been paid or received for the shares by any other investor in the Mutual Fund at that time, and all other dealings between the Collective Funds and the Mutual Fund will be on a basis no less favorable to the Collective Fund than such dealings will be with the other shareholders of the Mutual Fund.

(c) Putnam, including any officer or director of Putnam, does not purchase or sell shares of the Mutual Fund from or to any Collective Fund; provided that this condition shall not preclude the purchase or redemption of such shares between a Collective Fund and an affiliate of PFTC acting solely in its capacity as underwriter for the Mutual Fund, if such affiliate acts as a riskless principal, the purchase or redemption is at NAV at the time of the transaction, and the affiliate does not receive any direct or indirect compensation, spread or other consideration in connection with such purchase or redemption.

(d) No sales commissions, redemption fees, or other similar fees are paid by the Collective Funds in connection with the purchase or sale of shares of the Mutual Fund.

(e) For each Collective Fund, the combined total of all fees received by Putnam for the provision of services to the Collective Fund, and in connection with the provision of services to the Mutual Fund in which the Collective Fund may invest, are not in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(f) Putnam does not receive any fees payable pursuant to Rule 12b–1 under the 1940 Act in connection with the transactions covered by this proposed exemption.

(g) The Second Fiduciary (as defined in Section III (f) below) with respect to each plan having an interest in a Collective Fund (a "Client Plan") receives in writing, in advance of any investment by the Collective Fund in the Mutual Fund, full and detailed disclosure of information concerning the Mutual Fund, including but not limited to: (1) A current prospectus issued by the Mutual Fund; (2) a statement describing the fees for investment advisory or similar services, any Secondary Services and all other fees to be charged to or paid by (or with respect to) the Collective Fund and by the Mutual Fund, including the nature and extent of any differential between the rates of such fees; (3) the reasons why PFTC may consider such investment to be appropriate for the Collective Fund; (4) a statement describing whether there are any limitations applicable to PFTC with respect to which Collective Fund assets may be invested in shares of the Mutual Fund and, if so, the nature of such limitations; and (5) upon request of the Second Fiduciary, a copy of both the notice of proposed exemption and a copy of the final exemption once it is published in the **Federal Register**, and any other reasonably available information regarding the transactions covered by this proposed exemption.

(h) On the basis of the information described in paragraph (g) above, the Second Fiduciary authorizes in writing the investment of assets of the Collective Fund in the Mutual Fund and the fees to be paid by the Mutual Fund to Putnam.

(i) On an annual basis, Putnam will provide to the Second Fiduciary of each Client Plan having an interest in the Collective Fund: (1) A current prospectus issued by the Mutual Fund in which the Collective Fund invests, and, upon the Second Fiduciary's request, a copy of the Statement of Additional Information for such Mutual Fund that contains a description of all fees paid by the Mutual Fund to Putnam; (2) a copy of the annual financial disclosure report prepared by Putnam that includes information about the Mutual Fund portfolios, as well as audit findings of an independent auditor, within 60 days of the preparation of the report; (3) oral or written responses to inquiries of the Second Fiduciary as they arise; (4) a statement (i) of the approximate percentage (which may be in the form of a range) of the assets of the Collective Fund that were invested in the Mutual Fund during the year and (ii) that, if the Second Fiduciary objects to the continued investment by the Collective Fund in the Mutual Fund, the Client Plan should withdraw from the Collective Fund; and (5) a form (Termination Form) expressly providing an election to withdraw from the Collective Fund, together with instructions on the use of such form. The instructions will inform the Second Fiduciary that: (i) The prior written authorization is terminable at will by the Plan, without penalty to the Plan, upon receipt by Putnam of written notice from the Second Fiduciary, and (ii) failure to return the form will result in continued authorization of Putnam to engage in the transactions described above on behalf of the Plan.

However, if the Termination Form has been provided to the Second Fiduciary pursuant to Section I(j), the Termination Form need not be provided again for an annual reauthorization pursuant to this Section I(i) unless at least six months has elapsed since the form was previously provided.

(j) Except as provided in Section I(j)(E), paragraph (h) of this Section I does not apply if:

(A) The purchase, holding and sale of Mutual Fund shares by the Collective Fund is performed subject to the prior and continuing authorization, in the manner described in this paragraph (j), of a Second Fiduciary with respect to each Client Plan whose assets are invested in the Collective Fund.

(B)(1) For each Collective Fund using the fee structure described in paragraph (a)(2) above with respect to investments in the Mutual Fund, in the event of an increase in the rate of fees paid by the Mutual Fund to Putnam regarding any investment management services, investment advisory services, or similar services that Putnam provides to the Mutual Fund over an existing rate for such services that had been authorized by a Second Fiduciary in accordance with paragraph (h) above or this paragraph (j); or

(2) For each Collective Fund under this exemption (regardless of whether the fee structure described in paragraph (a)(1) or (a)(2) is used), in the event an additional Secondary Service is provided by Putnam to the Mutual Fund for which a fee is charged, or an increase in the rate of any fee paid by the Mutual Fund to Putnam for any Secondary Service that results either from an increase in the rate of such fee or from a decrease in the number or kind of services performed by Putnam for such fee over an existing rate for such Secondary Service that had been authorized by a Second Fiduciary in accordance with paragraph (h) above or this paragraph (j):

Putnam will, at least 30 days in advance of the implementation of such additional service for which a fee is charged or for which there is a fee increase, provide a written notice (which may take the form of a letter or similar communication that is separate from the prospectus of the Fund and that explains the nature and amount of the additional service for which a fee is charged or of the increase in the rate of fee) to the Second Fiduciary of each Client Plan having an interest in the Collective Fund. Such written notice will include a Termination Form expressly providing an election to withdraw from the Collective Fund, together with instructions on the use of such form.

(C) In the event a Second Fiduciary submits a notice in writing to PFTC objecting to the initial investment by the Collective Fund in the Mutual Fund or the implementation of such additional service for which a fee is charged or such rate of fee increase, whichever is applicable, the Client Plan on whose behalf the objection was intended is given the opportunity to terminate its investment in the Collective Fund, without penalty to such Client Plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing Client Plans and to the non-withdrawing Client Plans. In the case of a Client Plan that elects to withdraw under this subparagraph (C), the withdrawal shall be effected prior to the initial investment by the Collective Fund in the Mutual Fund or the implementation of such additional service for which a fee is charged or such rate of fee increase, whichever is applicable.

(D) Notwithstanding the foregoing subparagraphs (B) and (C), Putnam may commence providing an additional Secondary Service for a fee or implement any increase in the rate of fee paid by the Mutual Fund to Putnam prior to providing the notice referred to in subparagraph (B) above or prior to the withdrawal of an objecting Client Plan, whichever is applicable, provided that, in either such event, the Collective Fund receives a cash credit equal to the Collective Fund's proportionate share of the fee for the additional Secondary Service or such fee increase charged to the Mutual Fund by Putnam, whichever is applicable, for the period from the date of such commencement or implementation to the later of the date that is 30 days after the notice referred to in subparagraph (B) above has been provided or, if applicable, the date on which any Client Plan that objects to the provision of such additional Secondary Service or to such fee increase has withdrawn from the Collective Fund pursuant to subparagraph (C) above. Any such cash credits shall be paid to the Collective Fund, with interest thereon at the prevailing Federal funds rate plus two percent (2%), no later than the fifth business day following the receipt of the increased fee by Putnam.[1] The crediting of all such fees to the Collective Fund by Putnam will be audited by an independent accounting firm on at least an annual basis to verify the proper crediting of the fees and interest to the Collective Fund. The audit report shall be completed not later than six months after the period to which it relates.

(E) In the case of a Client Plan whose assets are proposed to be invested in the Collective Fund subsequent to the implementation of the arrangement and that has not authorized the investment of assets of the Collective Fund in the Mutual Fund, the Client Plan's investment in the Collective Fund is subject to: (1) The receipt by a Second Fiduciary of the full and detailed disclosures concerning the Mutual Fund pursuant to Section I(g), above, and (2) the prior written authorization of a Second Fiduciary pursuant to Section I(h), above (*i.e.*, the authorization must be provided by such new Client Plan investor in advance of the initial investment).

(k) For each Collective Fund using the fee structure described in paragraph (a)(1) above with respect to investments in the Mutual Fund, the Second Fiduciary of the Client Plan receives full written disclosure in a Fund prospectus or otherwise of any increases in the rates of fees charged by Putnam to the Mutual Fund for investment advisory services, or of a decrease in the number or kind of services performed by Putnam.

Section II—General Conditions

(a) PFTC maintains for a period of six years the records necessary to enable the persons described in paragraph (b) below to determine whether the conditions of this exemption have been met, except that:

(1) A separate prohibited transaction will not be considered to have occurred if, solely because of circumstances beyond the control of PFTC, the records are lost or destroyed prior to the end of the six-year period; and

(2) No party in interest other than Putnam shall be subject to the civil penalty that may be assessed under Section 502(i) of the Act or to the taxes imposed by Section 4975(a) and (b) of the Code, if the records are not maintained or are not available for examination as required by paragraph (b) below.

(b)(1) Except as provided in paragraph (b)(2) below and notwithstanding any provisions of Section 504(a)(2) of the Act, the records referred to in paragraph (a) above are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities & Exchange Commission,

(ii) Any fiduciary of a Client Plan who has authority to acquire or dispose of the interest in the Collective Fund owned by such Client Plan, or any duly authorized employee or representative of such fiduciary, and

(iii) Any participant or beneficiary of a Client Plan having an interest in the Collective Fund or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraph (b)(1)(ii) or (iii) above shall be authorized to examine trade secrets of Putnam, or commercial or financial information that is privileged or confidential.

Section III—Definitions

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

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

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

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

(b) The term "Collective Fund" means any common or collective trust fund maintained by PFTC.

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

(d) The term "Mutual Fund" means the Putnam Prime Money Market Fund and any other money market fund that is a diversified open-end investment company registered under the 1940 Act and operated in accordance with Rule 2a–7 under the 1940 Act as to which Putnam serves as an investment adviser. Putnam may also serve as a custodian, dividend disbursing agent, shareholder servicing agent, transfer agent, fund accountant, or provider of some other "Secondary Service" (as defined below in paragraph (g) below).

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

(f) The term "Second Fiduciary" means a fiduciary of a Client Plan who is independent of, and unrelated to, Putnam. For purposes of this exemption, the Second Fiduciary will

[1] Putnam will pay interest on any such amounts from the date it receives such incremental amounts to the date it makes the rebate payment to the Collective Fund.

not be deemed to be independent of an unrelated to Putnam if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with Putnam;

(2) Such fiduciary, or any officer, director, partner, employee, or relative of the fiduciary is an officer, director, partner or employee of Putnam (or is a relative of such persons); or

(3) Such fiduciary directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this exemption.

If an officer, director, partner or employee of Putnam (or a relative of such a person), is a director of such Second Fiduciary, and if he or she abstains from participation in (i) the decision of the Client Plan to invest in, and remain invested in, the Collective Fund and (ii) the granting of any authorization contemplated by Section I(h) or any deemed authorization contemplated by Section I(i) and (j) with respect to the Collective Fund, then paragraph (f)(2) above shall not apply.

(g) The term "Secondary Service" means a service other than an investment management, investment advisory, or similar service, which is provided by Putnam to the Mutual Fund, including but not limited to custodial, accounting, administrative, or any other service.

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

Summary of Facts and Representations

1. The applicant is Putnam Fiduciary Trust Company (PFTC), a Massachusetts trust company subject to supervision by the Massachusetts Division of Banks. PFTC is a wholly-owned subsidiary of Putnam, LLC (together with PFTC and its other wholly-owned subsidiaries, collectively referred to herein as "Putnam"). Putnam is a majority-owned subsidiary of Great-West Lifeco U.S. Inc. Putnam is a global financial services firm primarily involved in the investment management business including the management of registered, open-end investment companies ("mutual funds"), other collective investment vehicles and single-client separate accounts. As of May 31, 2009, Putnam's total assets under management were approximately $102 billion.

2. PFTC manages assets held in both collective investment vehicles (other than mutual funds) and single-client separate accounts. As of May 31, 2009, 2006, PFTC managed approximately $9 billion in assets.

3. In particular, PFTC maintains a number of collective investment funds, the assets of which are managed by PFTC on a discretionary basis (the "Collective Funds"). The Collective Funds are common or collective trust funds of a bank within the meaning of DOL Regulation 2510.3–101(h)(1)(ii) and, as such, the assets of the Collective Funds are "plan assets" subject to Title I of the Act to the extent of the interests of ERISA Plans therein.

4. Each of the Collective Funds generally has some level of cash balances and/or other assets to be invested in short-term, money market instruments. In the past, PFTC has typically invested such amounts in the short-term investment fund (the "STIF") made available by the custodian of the particular Collective Fund's assets or some other similar money market instrument or vehicle unrelated to Putnam.

5. Putnam acts as the advisor of the Putnam Prime Money Market Fund (the "Mutual Fund"), a money market mutual fund designed to serve as a short-term investment vehicle. The Mutual Fund is registered under the Investment Company Act of 1940 and is operated in accordance with the Securities & Exchange Commission (SEC) rules relating to money market funds (see, Rule 2a–7 under the Investment Company Act of 1940, as amended). The Applicant represents that since January 2006, the yield generated by the Mutual Fund has generally been superior to the yield generated by the STIF. Accordingly, PFTC believes it would be desirable for the Collective Funds to have the flexibility to invest in the Mutual Fund when such investment is prudent and in the best interest of the Collective Funds.[2] Putnam further believes that it would be desirable to have the same flexibility to invest the assets of the Collective Funds in other money market mutual funds managed by Putnam when it is in the interest of the Collective Funds to do so.[3]

[2] In order to achieve the benefits of this higher yield as soon as practicable, PFTC requests that the exemption, if granted, be retroactive to the date the proposed exemption is published in the **Federal Register**.

[3] References to the Mutual Fund in this Summary of Facts and Representations should be read to include such other money market mutual funds where the context so requires.

6. Given that an affiliate of PFTC receives investment management or advisory fees from the Mutual Fund, a decision by PFTC to cause assets of a Collective Fund to be invested in the Mutual Fund could constitute a self-dealing prohibited transaction under Section 406(b)(1) of ERISA, absent an available exemption. Putnam may also receive fees from the Mutual Fund for services provided to the Mutual Fund other than investment management, investment advisory or similar services ("Secondary Services") in which event any increase in such fees as a result of PFTC's decision to invest assets of the Collective Funds in the Mutual Fund or the engagement of Putnam to perform an additional Secondary Service for which a fee is charged could constitute prohibited self-dealing, absent an exemption. Prohibited Transaction Exemption 77–4 (PTE 77–4, 42 FR 18732, April 8, 1977) is designed to provide exemptive relief in such situations. However, one of the conditions of PTE 77–4 is that an independent plan fiduciary approve in writing the investment of plan assets in the affiliated mutual fund.

7. In the case at hand, PFTC has not sought, and the relevant independent fiduciaries of existing ERISA Plan investors in the Collective Funds have not provided, any such written approval. Since the Collective Funds generally have numerous ERISA Plan investors (in many cases, a very large number of ERISA Plan investors), PFTC does not believe it is feasible, as a practical matter, to obtain the affirmative written approval of the relevant independent fiduciary of each and every ERISA Plan investor in the Collective Funds. Without such unanimous written approval, the exemption provided by PTE 77–4 will not be available and the Collective Funds will be precluded from investing in the Mutual Fund.

8. Similarly, in the event that Putnam is engaged to render an additional Secondary Service or any of the fees paid by the Mutual Fund is changed, PTE 77–4 would require PFTC to obtain the affirmative written approval of the relevant independent fiduciary of each ERISA Plan having an interest in the Collective Funds at the time of such engagement or change. Again, given the large number of ERISA Plans involved and the practical difficulty of obtaining an affirmative written approval from each and every one of them, it is unlikely that the requirements of PTE 77–4 would be able to be satisfied in the context of such an engagement or change.

9. No sales commissions are charged in connection with the purchase of any shares of the Mutual Fund. In addition, no 12b–1 fees are charged by the Mutual Fund with respect to any class of shares of the Mutual Fund to be purchased by the Collective Funds pursuant to the exemption transactions, nor will any redemption fees be charged in connection with any sale of shares of the Mutual Fund by the Collective Funds. Putnam, including any officer or director of Putnam, will not purchase or sell shares of the Mutual Fund from or to any Collective Fund. However, there may be purchases or redemptions of such shares between a Collective Fund and an affiliate of PFTC acting solely in its capacity as underwriter for the Mutual Fund, if the sale is at NAV, and such affiliate acts as a riskless principal and does not receive any compensation, spread or other consideration in connection with such purchase or redemption.

10. The Applicant represents that Putnam will not be providing any brokerage services for the acquisition or sale of securities by any Mutual Fund involved in this proposed exemption.

11. Prior to investing the assets of any Collective Fund in shares of the Mutual Fund, PFTC will provide advance notice to the relevant independent fiduciary of each ERISA Plan then having an interest in such Collective Fund. Such notice will include a current prospectus for the Fund and a written statement giving full disclosure of the fee structure under which either Putnam's investment advisory fees will be credited back to the Collective Fund or the investment management fees applicable to the Collective Fund with respect to the assets invested in the Mutual Fund will be waived. The notice will also describe why PFTC believes the investment of the Collective Fund's assets in the Mutual Fund may be appropriate. In the case of a Client Plan whose assets are proposed to be invested in the Collective Fund subsequent to the implementation of the arrangement and that has not authorized the investment of assets of the Collective Fund in the Mutual Fund, the Client Plan's investment in the Collective Fund is subject to the prior written authorization of a Second Fiduciary.

12. In the event the fee credit approach is utilized, the credit will not include any fees received by Putnam for Secondary Services rendered to the Mutual Fund because any such Secondary Services will not be duplicative of any services being provided by PFTC to the Collective Funds.

13. PFTC represents that, for each ERISA Plan having an interest in a Collective Fund that engages in transactions described in this proposed exemption, the combined total of all fees that Putnam will receive, directly or indirectly, with respect to such ERISA Plan's interest in the Collective Fund for the provision of services to the Collective Fund and/or to the Mutual Fund will not be in excess of "reasonable compensation" within the meaning of Section 408(b)(2) of the Act.

14. Prior to either the addition of any Secondary Service that will result in the payment of a fee by the Mutual Fund to Putnam or any increase in the rate of any fee paid to Putnam by the Mutual Fund, PFTC will provide advance notice to the relevant independent fiduciary of each ERISA Plan then having an interest in a Collective Fund as to which the utilization of the Mutual Fund has been approved. Such notice will include a description, as applicable, of the (i) additional Secondary Service to be provided by Putnam and the resultant fee payable to Putnam or (ii) increase in the rate of any such fee payable to Putnam by the Mutual Fund or from a decrease in the number or kind of services performed by Putnam. Such written notice will also include a form (the Termination Form) expressly providing an election to withdraw from the Collective Fund, together with instructions on the use of such form.

The advance notice described in this representation 13 need not be furnished 30 days in advance of the effective date for a fee increase provided an amount equal to the Collective Fund's proportionate share of the fee for such additional Secondary Service or the fee increase, whichever is applicable, for the period from the date of commencement of the additional Secondary Service or implementation of the fee increase, whichever is applicable, to the date that is 30 days after the delivery of the required notice or the date of the withdrawal of any objecting Client Plan, whichever is later, is credited to the Collective Fund with interest thereon at the prevailing Federal funds rate plus two percent (2%) ("the Applicable Interest Rate").[4]

15. PFTC will maintain a system of internal accounting controls for the crediting or waiving of all relevant fees. In addition, PFTC proposes to retain Ernst & Young or another independent accounting firm to audit annually the crediting of such fees. Such audits will provide independent verification of the proper crediting of such fees. In the event an error is identified, it will be promptly corrected. If the correction requires a payment by PFTC, such payment shall include interest at the money market rate earned by the Mutual Fund. An independent accounting firm will also audit the crediting of fees and interest at the Applicable Interest Rate for the scenario described in paragraph 13, above.

16. The information described above (including (a) the information to be provided prior to the initial utilization of the Mutual Fund and (b) the information to be provided in connection with any additional Secondary Service or any increase in the rate of any fee payable by the Mutual Fund to Putnam (unless an amount equal to the Collective Fund's proportionate share of the fee for such additional Secondary Service or fee increase, whichever is applicable, is credited to the Collective Fund with interest at the Applicable Interest Rate thereon)), will be furnished to the relevant independent fiduciary of each ERISA Plan then investing in the Collective Fund not less than 30 days prior to the initiation of investment in the Mutual Fund by such Collective Fund or the implementation of the additional Secondary Service or the increase in the rate of any such fee payable to Putnam.[5]

17. In the event any such independent fiduciary submits a notice in writing to PFTC objecting to the initial utilization, additional Secondary Service or increased rate of fee, including a decrease in the number or kind of services performed by Putnam (unless an amount equal to the Collective Fund's share of the fee for such additional service or fee increase, whichever is applicable, is credited to the Collective Fund with interest at the Applicable Interest Rate thereon), the

[4] As an example, assume the Mutual Fund fee increase becomes effective on June 1, Putnam provides notice of the fee increase on May 16 and one (and only one) participating Plan objects to the fee increase on June 10, and the sole objecting Plan withdraws from the Collective Fund on June 20. In this case, Putnam will pay a rebate to the Collective Fund equal to the allocable portion of the fee increase for the period from June 1 (*i.e.,* the effective date of the fee increase) to June 20 (*i.e.,* the date that one objecting Plan withdrew, (with interest at the Applicable Interest Rate) because that date is later than the expiration of the 30-day notice period).

[5] The requested exemption would not apply to any plans maintained by Putnam or any of its affiliates for their own employees. The Applicant represents that to the extent any such plans have an interest in a Collective Fund, the investment of such Collective Fund's assets attributable to such plans in the Mutual Fund would be covered by Prohibited Transaction Exemption 77–3 (42 FR 18734, April 8, 1977). The Department expresses no opinion herein on whether such transactions would qualify for exemptive relief under PTE 77–3.

ERISA Plan on whose behalf the objection was tendered will be given the opportunity to withdraw its investment in the Collective Fund, without penalty to such ERISA Plan, within such time as may be necessary to effect such withdrawal in an orderly manner that is equitable to all withdrawing ERISA Plans and all non-withdrawing ERISA Plans. In the case of an ERISA Plan that elects to withdraw pursuant to the preceding sentence, such withdrawal shall be effected prior to (a) the initial utilization of the Mutual Fund, or (b) the implementation of the additional Secondary Service or the increase in the rate of fee (unless an amount equal to the fee for such additional Secondary Service or fee increase, whichever is applicable, for the period from the date of such implementation to the date on which the objecting Client Plan has withdrawn from the Collective Fund is credited to the Collective Fund with interest at the Applicable Interest Rate thereon); provided, however, that the Collective Fund's existing investment in the Mutual Fund need not be discontinued by reason of an ERISA Plan electing to withdraw. Putnam confirms that it will not receive any "float" with respect to its receipt of incremental fees for Secondary Services that become effective before the requisite negative consent has been obtained and that, as a result, must be credited to the Collective Fund. This is because Putnam will credit interest on any such amounts from the date it receives such incremental amounts to the date they are actually credited to the Collective Fund. Putnam emphasizes that the amount credited to the Collective Fund would not be limited to the portion of the fee increase that is allocable to the objecting Client Plan(s), but rather will be equal to the portion of the fee increase that is allocable to the Collective Fund's entire position in the Mutual Fund. Putnam represents that any such cash credits will be paid to the Collective Fund, with interest thereon at the Applicable Interest Rate, no later than the fifth business day following the receipt of the increased fee by Putnam.[6] Putnam further confirms that if a Client Plan objects to a Mutual Fund fee increase at a time when, due to extraordinary circumstances, withdrawals from the Collective Fund are suspended, then Putnam would continue to credit the allocable amount of the fee increase to the Collective Fund, with interest, until the objecting Client Plan is able to withdraw. To summarize, if Putnam were to implement an additional Secondary Service or increase the rate of fee for any Secondary Service before the expiration of the 30-day period after notice has been given to Plans, and a Plan objects and wishes to withdraw from the Collective Fund, Putnam will pay a rebate to the Collective Fund, with interest at the Applicable Interest Rate thereon, from the effective date of the fee increase to the later of the expiration of the 30-day period or the date on which the objecting Plan withdraws from the Collective Fund. Such rebate will be paid by Putnam within five business days of the date that Putnam actually receives the increased fee from the Mutual Fund.

18. On an annual basis, Putnam will provide notice to the relevant independent fiduciary of each ERISA Plan having an interest in the Collective Fund, which notice will include: (a) The approximate percentage (which may be in the form of a range) of the Collective Fund's assets that were invested in the Mutual Fund during the year; and (b) a statement that, if the fiduciary objects to the continued investment by the Collective Fund in the Mutual Fund, the ERISA Plan should withdraw from the Collective Fund, and (c) a Termination Form[7] expressly providing an election to withdraw from the Collective Fund, together with instructions on the use of such form. Specifically, the instructions will explain that the Client Plan has the opportunity to withdraw from the Collective Fund by submitting the completed Termination Form to PFTC. Further, the instructions will provide the PFTC address to which the form must be submitted. The form will further provide that upon receipt thereof, the Client Plan's interest in the Collective Fund that is the subject of such withdrawal election will be redeemed as of the next regularly scheduled withdrawal date of the Collective Fund, following whatever advance notice period is applicable to the particular Collective Fund (assuming, of course, that such Collective Fund is not subject to a suspension of withdrawals due to extraordinary events). PFTC represents that, consistent with standard practice in the industry with respect to collective funds, the governing documents of Putnam's Collective Funds contain provisions that allow for the suspension of withdrawals in extraordinary and unusual circumstances, such as market shutdowns, etc.

19. All other dealings between the Collective Funds and the Mutual Fund will be on a basis no less favorable to the Collective Fund than such dealings will be with the other shareholders of the Mutual Fund.

20. In summary, PFTC represents that the exemption transactions described herein will satisfy the statutory criteria of Section 408(a) of the Act because (a) the ability to invest in the Mutual Fund will provide the Collective Funds the opportunity to enhance the yield on their cash balances and other short-term investments; (b) PFTC will require annual audits by an independent accounting firm to verify the proper crediting of the relevant fees and interest due, if applicable; (c) PFTC will provide written notice to the relevant independent fiduciary of each affected ERISA Plan in advance of (i) the initial utilization by the Collective Fund of the Mutual Fund, (ii) the commencement of an additional Secondary Service by Putnam (unless an amount equal to the Collective Fund's proportionate share of the fee for such additional Secondary Service is credited to the Collective Fund with interest at the Applicable Interest Rate thereon) or (iii) the effective date of any increase in the rate of any fee payable to Putnam by the Mutual Fund (unless an amount equal to the Collective Fund's proportionate share of the fee increase is credited to the Collective Fund with interest at the Applicable Interest Rate thereon); (d) prior to any such initial utilization, commencement or increase, such independent fiduciary will have an opportunity to express an objection and to cause the Client Plan to withdraw from the Collective Fund, provided that Putnam may commence providing an

[6] As an example, assume the mutual fund fee increase is effective on June 1, Putnam provides notice of the fee increase to the participating Plans on May 31, one (and only one) participating Plan objects to the fee increase on June 25, and the sole objecting Plan withdraws from the Collective Fund on July 10. In this case, the aggregate rebate amount would be equal to the allocable portion of the fee increase for the period from June 1 (*i.e.,* the effective date of the fee increase) to July 10 (*i.e.,* the date that the sole objecting Plan withdraws, given that it is later than the expiration of the 30-day notice period). Further, assuming that Putnam receives payments of the increased fee from the Mutual Fund on the fifth day of each month, Putnam would receive a payment that includes the fee increase for the month of June on July 5 and would rebate the entire allocable portion of that fee increase to the Collective Fund within 5 business days of July 5, with interest at the Applicable Interest Rate. Moreover, on August 5, Putnam would receive another payment from the Mutual Fund that includes the fee increase for the month of July. The allocable portion of the fee increase for the period from July 1 to July 10 (*i.e.,* the date that the sole objecting Plan withdrew) would be rebated to the Collective Fund within 5 business days of August 5, with interest at the Applicable Interest Rate.

[7] However, if the Termination Form has been provided to the Second Fiduciary pursuant to Section I(j), the Termination Form need not be provided again for an annual reauthorization pursuant to this Section I(i) unless at least six months has elapsed since the form was previously provided.

additional Secondary Service for a fee or implement an increase in the rate of fee paid by the Mutual Fund to Putnam prior to the withdrawal of the objecting Client Plan as long as the amount described in (c) above is credited to the Collective Fund; (e) no commissions or redemption fees will be paid by an ERISA Plan in connection with either the purchase or sale of shares of the Mutual Fund; (f) Putnam will not receive any 12b–1 fees as a result of the Collective Fund's purchase or holding of shares of the Mutual Fund; and (g) all dealings between the Collective Funds and the Mutual Fund will be on a basis that is at least as favorable to the ERISA Plans as such dealings are with other shareholders of the Mutual Fund.

FOR FURTHER INFORMATION CONTACT: Mr. Gary H. Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

The PNC Financial Services Group, Inc., Located in Pittsburgh, Pennsylvania, [Application No. D–11448].

Proposed Exemption

Section I—Exemption for In-Kind Redemption of Assets

The Department is considering granting an exemption under the authority of section 408(a) of the Act and 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570 Subpart B (55 FR 32836, 32847, August 10, 1990). If the proposed exemption is granted, the restrictions in sections 406(a)(1)(A) through (D) and 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply [8] to certain in-kind redemptions (the Redemption(s)) by The Employees' Thrift Plan of Mercantile Bankshares Corporation and Participating Affiliates (the Mercantile Plan) that occurred overnight on October 31, 2007, of shares (the Shares) of proprietary mutual funds (the Funds) for which The PNC Financial Services Group, Inc. (PNC) or an affiliate thereof provides investment advisory and other services, provided that the following conditions were satisfied:

(A) No sales commissions, redemption fees, or other similar fees were paid in connection with the Redemptions (other than customary transfer charges paid to parties other than PNC and any affiliates of PNC (PNC Affiliates));

(B) The assets transferred to the Mercantile Plan pursuant to the Redemptions consisted entirely of cash and Transferable Securities, as such term is defined in Section II, below;

(C) In each Redemption, the Mercantile Plan received its pro rata portion of the securities with respect to the Capital Opportunities Fund, and certain securities, selected pursuant to a verifiable methodology, that were approved by an independent fiduciary (Independent Fiduciary, as such term is defined in Section II) with respect to the other four Funds covered by this proposed exemption, such that the securities received were equal in value to that of the number of Shares redeemed, as determined in a single valuation (using sources independent of PNC and PNC Affiliates) performed in the same manner and as of the close of business on the same day, in accordance with Rule 2a–4 under the Investment Company Act of 1940, as amended (the 1940 Act) and the then-existing procedures adopted by the Board of Directors of PNC Funds, Inc., which were in compliance with all applicable securities laws;

(D) Neither PNC nor any PNC Affiliate received any direct or indirect compensation or any fees, including any fees payable pursuant to Rule 12b–1 under the 1940 Act, in connection with any Redemption of the Shares;

(E) Prior to a Redemption, the Independent Fiduciary received a full written disclosure of information regarding the Redemption;

(F) Prior to a Redemption, the Independent Fiduciary communicated its approval for such Redemption to PNC;

(G) Prior to a Redemption, based on the disclosures provided to the Independent Fiduciary, the Independent Fiduciary determined that the terms of the Redemption were fair to the Mercantile Plan, and comparable to and no less favorable than terms obtainable at arm's length between unaffiliated parties, and that the Redemption was in the best interests of the Mercantile Plan and its participants and beneficiaries;

(H) Not later than thirty (30) business days after the completion of a Redemption, the Independent Fiduciary received a written confirmation regarding such Redemption containing:

(i) The number of Shares held by the Mercantile Plan immediately before the Redemption (and the related per Share net asset value and the total dollar value of the Shares held) for each Fund;

(ii) The identity (and related aggregate dollar value) of each security provided to the Mercantile Plan pursuant to the Redemption, including each security valued in accordance with Rule 2a–4 under the 1940 Act and procedures adopted by the Board of Directors of PNC Funds, Inc. (using sources independent of PNC and PNC Affiliates);

(iii) The current market price of each security received by the Mercantile Plan pursuant to the Redemption; and

(iv) If applicable, the identity of each pricing service or market maker consulted in determining the value of such securities;

(I) The value of the securities received by the Mercantile Plan for each redeemed Share equaled the net asset value of such Share at the time of the transaction, and such value equaled the value that would have been received by any other investor for shares of the same class of the Fund at that time;

(J) Subsequent to a Redemption, the Independent Fiduciary performed a post-transaction review that included, among other things, a random sampling of the pricing information it received;

(K) Each of the Mercantile Plan's dealings with the Funds, the investment advisors to the Funds, the principal underwriter for the Funds, or any affiliated person thereof, were on a basis no less favorable to the Mercantile Plan than dealings between the Funds and other shareholders holding shares of the same class as the Shares;

(L) Within sixty (60) days of the date of publication of this notice of proposed exemption, PNC reimburses The PNC Financial Services Group, Inc. Incentive Savings Plan (the PNC Plan), into which the Mercantile Plan was merged on November 1, 2007, for all brokerage costs incurred by the Mercantile Plan on November 1, 2007 to liquidate the securities that the Mercantile Plan received in kind pursuant to a Redemption;

(M) PNC maintains, or causes to be maintained, for a period of six years from the date of any covered transaction such records as are necessary to enable the persons described in paragraph (N) below to determine whether the conditions of this exemption have been met, except that (i) a separate prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of PNC, the records are lost or destroyed prior to the end of the six-year period and (ii) no party in interest with respect to the Mercantile Plan other than PNC shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if such records are not maintained or are not available for examination as required by paragraph (N) below;

[8] For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(N)(1) Except as provided in subparagraph (2) of this paragraph (N), and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (M) above are unconditionally available at their customary locations for examination during normal business hours by (i) any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission (SEC), (ii) any fiduciary of the PNC Plan as the successor to the Mercantile Plan or any duly authorized representative of such fiduciary, (iii) any participant or beneficiary of the PNC Plan as the successor to the Mercantile Plan or duly authorized representative of such participant or beneficiary, and (iv) any employer whose employees are covered by the PNC Plan as the successor to the Mercantile Plan and any employee organization whose members are covered by such plan;

(2) None of the persons described in paragraphs (N)(1)(ii), (iii) and (iv) shall be authorized to examine trade secrets of PNC or the Funds, or commercial or financial information which is privileged or confidential;

(3) Should PNC or the Funds refuse to disclose information on the basis that such information is exempt from disclosure pursuant to paragraph (N)(2) above, PNC or the Funds shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section II—Definitions

For purposes of this exemption—

(A) The term “affiliate” means:

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

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

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

(B) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

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

(D) The term “Independent Fiduciary” means a fiduciary who is: (i) Independent of and unrelated to PNC and its affiliates, and (ii) appointed to act on behalf of the Mercantile Plan with respect to the in-kind transfer of assets from one or more Funds to, or for the benefit of, the Mercantile Plan. For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to PNC if: (i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with, PNC; (ii) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption (except that an independent fiduciary may receive compensation from PNC in connection with the transactions contemplated herein if the amount or payment of such compensation is not contingent upon, or in any way affected by, the independent fiduciary’s decision); and (iii) an amount equal to more than one percent (1%) of such fiduciary’s gross income (for federal income tax purposes, in its prior tax year), is paid by PNC and its affiliates to the fiduciary in 2007, the tax year at issue.

(E) The term “Transferable Securities” means securities (1) for which market quotations are readily available (as determined under Rule 2a–4 of the 1940 Act) from persons independent of PNC and (2) which are not:

(i) Securities that, if publicly offered or sold, would require registration under the Securities Act of 1933;

(ii) Securities issued by entities in countries which (a) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the Funds, or (b) permit transfers of ownership of securities to be effected only by transactions conducted on a local stock exchange;

(iii) Certain portfolio positions (such as forward foreign currency contracts, futures and options contracts, swap transactions, certificates of deposit, and repurchase agreements) that, although liquid and marketable, involve the assumption of contractual obligations, require special trading facilities, or can only be traded with the counter-party to the transaction to effect a change in beneficial ownership;

(iv) Cash equivalents (such as certificates of deposit, commercial paper, and repurchase agreements);

(v) Other assets that are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable); and

(vi) Securities subject to “stop transfer” instructions or similar contractual restrictions on transfer.

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

Effective Date: The exemption, if granted, will be effective as of October 31, 2007.[9]

Summary of Facts and Representations

1. The PNC Financial Services Group, Inc. (PNC) is a bank holding company that owns or controls two principal banks, (i) PNC Bank, National Association (PNC Bank, N.A.) and (ii) PNC Bank, Delaware, as well as a number of non-bank subsidiaries. In addition, on March 2, 2007, PNC acquired Mercantile Bankshares Corporation (Mercantile), the parent company of eleven subsidiary banks. PNC merged the Mercantile subsidiary banks with, and into, PNC Bank, N.A. on September 14, 2007, pursuant to an application filed with, and approved by, the Office of the Comptroller of the Currency. Immediately after consummation of that merger, PNC Bank, N.A. transferred to PNC Bank, Delaware nine Delaware branches previously held by two of the Mercantile subsidiary banks, pursuant to a Bank Merger Act application filed

[9] As a general matter, it is the Department’s view that the model practice to effect an in-kind redemption by a mutual fund to a shareholder-pension plan, subject to Title I of ERISA, is through a pro rata distribution because the adoption of such a method ensures that the individual stocks selected for the in-kind redemption are objectively determined. The Department recognizes that the in-kind redemption described in this notice of proposed exemption involves unique circumstances because, among other things, it facilitated the transfer of plan assets and the merger of The Employees’ Thrift Plan of Mercantile Bankshares Corporation and Participating Affiliates (the Mercantile Plan) with The PNC Financial Services Group, Inc. Incentive Savings Plan (the PNC Plan). *See also* Facts and Representations #12, which summarizes the basis for satisfying the section 408(a) statutory criteria for providing exemptive relief. In this regard, an important condition contained in this notice of proposed exemption is that PNC will pay all brokerage commissions associated with the Mercantile Plan’s sale of the securities received in the Redemptions. Further, the Department encourages applicants, their advisers and counsel to confer, in advance, with EBSA’s Office of Exemption Determinations as to whether a contemplated non-*pro rata* in-kind redemption involving plan assets may qualify for prohibited transaction exemptive relief. Although the applicant requested both retroactive and prospective exemptive relief, the Department is proposing only retroactive exemptive relief relating to the October 31, 2007 Redemptions.

with, and approved by, the Federal Reserve Bank of Cleveland.

PNC provides, through its subsidiaries, a wide variety of trust and banking services to individuals, corporations, and institutions. Through its banking subsidiaries, PNC provides investment management, fiduciary, and trustee services to employee benefit plans and charitable and endowment assets, as well as non-discretionary services and investment options for defined contribution plans. PNC also provides a range of tailored investment, trust, and private banking products to affluent individuals and families.

PNC, through its affiliates, also provides various types of administrative services to mutual funds, including acting as transfer and disbursing agent and providing custodial and accounting services.

2. In connection with PNC's acquisition of Mercantile, PNC assumed sponsorship of The Employees' Thrift Plan of Mercantile Bankshares Corporation and Participating Affiliates (the Mercantile Plan), a qualified defined contribution retirement plan, and PNC Bank, N.A. became the Mercantile Plan's trustee. PNC Bank, N.A. is also the trustee of The PNC Financial Services Group, Inc. Incentive Savings Plan (the PNC Plan), a qualified defined contribution plan sponsored by PNC.

The applicant represents that the Administrative Committee of PNC (the Committee), the named fiduciary for plan investments for the PNC Plan, acting in its fiduciary capacity, initiated a study of how best to integrate the investment options under the two Plans, which had different investment platforms. The Mercantile Plan used eight proprietary mutual funds, each of which is a series of PNC Funds, Inc.[10] (*i.e.,* the Funds),[11] while the PNC Plan used an "open" platform that includes non-proprietary funds.[12]

The Committee was advised by its investment consultant Wilshire Associates (Wilshire), who is also the Independent Fiduciary for the Mercantile Plan in the subject Redemptions, to transition the Mercantile Plan participants to the PNC Plan investment platform as soon as it would be prudent to do so. Wilshire's recommendation considered, among other things, the additional costs to the PNC Plan to maintain two separate investment platforms, the appropriateness of the funds on the PNC Plan investment platform, and the upcoming administrative costs associated with the transition of Mercantile employees to the PNC payroll. On this basis, the Committee determined that it would be prudent, and in the best interests of the Mercantile Plan participants and beneficiaries, to transfer out of such plan's investment options as soon as possible.

Effective November 1, 2007, the Mercantile Plan was merged into the PNC Plan. In connection therewith, Mercantile Plan assets invested in shares of the Funds (the Shares) were redeemed in order to acquire shares of mutual funds available as investment options under the PNC Plan.

3. According to the applicant, each of the eight Funds is a registered investment company subject to the 1940 Act and constitutes a distinct investment vehicle, which has a joint prospectus with the other Funds. The overall management of the Funds, including the negotiation of investment advisory contracts, rests with the Board of Directors of the Funds (the Fund Board); the Fund Board is elected by the shareholders of the Funds and includes a majority of individuals who are not "interested persons" (as defined in the 1940 Act) of the Funds and are represented to be independent directors.

PNC, through its affiliate PNC Capital Advisors, Inc. (PCA),[13] serves as the investment adviser, within the meaning of section 2(20) of the 1940 Act, to each Fund. In certain instances, the investment adviser may pay fees to sub-advisers, which may also be PNC affiliates.

PCA also serves as administrator for the Funds. As administrator, PCA maintains the Fund's offices, coordinates preparation of reports to shareholders, prepares filings with state securities commissions, and coordinates federal and state tax returns, among other administrative functions.

The other service providers to the Funds, including the additional sub-advisers, the distributor, the fund accountant, the transfer agent, and the custodian, are all independent of, and unaffiliated with, PNC.

The Funds charge a Rule 12b–1 distribution fee that is between 0.50% and 1.00% with respect to their Class A and Class C shares. However, Institutional Shares, the class offered to plan investors, are not subject to 12b–1 fees.

4. In accordance with the procedures of the Funds, the Fund Board, including a majority of the directors who are represented to be unaffiliated and independent of PNC and Mercantile, determined that the redemption of Shares by the Mercantile Plan with respect to five of the eight Funds should be effected in kind and in cash. The Funds elected to be governed by the provisions of Rule 18f–1 under the 1940 Act. This election committed each Fund, during any ninety-day period for any one shareholder, to redeem its shares solely in cash up to the lesser of $250,000 or 1% of the Fund's net asset value at the beginning of such period. Accordingly, the redemption with respect to each Fund included a cash redemption of $250,000.

The applicant notes that PTE 77–3 provides exemptive relief for the sale of shares of a mutual fund by an employee benefit plan covering employees of the investment adviser for the mutual fund and its affiliates, subject to certain conditions. However, in previous published exemptions involving the in-kind redemption of shares by plans sponsored by the investment advisers of mutual funds, the notices describe PTE 77–3 as being available for a redemption of shares for cash, implying that PTE 77–3 would not be available for an in-kind redemption. See, *e.g.,* PTE 2003–01 (68 FR 6194, February 6, 2003) granted to the Northern Trust Company and Affiliates; PTE 2002–20 (67 FR 4986, March 28, 2002) granted to the Union Bank of California; and PTE 2001–46 (66 FR 64280, December 12, 2001) granted to Bank of America Corporation.[14]

The Redemptions commenced after the close of the financial markets on October 31, 2007. In its application dated November 1, 2007, PNC requests retroactive exemptive relief for the in-kind Redemption of the Mercantile Plan's investments in the Funds. PNC asserts that it meets the standards for a retroactive exemption set forth in ERISA

[10] Prior to October 1, 2007, the name of the Fund family was "Mercantile Funds, Inc."

[11] It is represented that the Mercantile Plan's assets were invested in the Funds in accordance with Prohibited Transaction Exemption (PTE) 77–3. PTE 77–3 (42 FR 18734, April 8, 1977) is a class exemption that permits, under certain conditions, the acquisition or sale of shares of a registered, open-end investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter. The Department expresses no opinion herein as to whether the terms and conditions of PTE 77–3 were satisfied.

[12] The applicant has disclosed that several of these third-party mutual funds included among the PNC Plan investment options are advised by BlackRock, Inc., in which PNC has a significant minority interest (approximately 34%).

[13] Prior to September 17, 2007, PCA was named "Mercantile Capital Advisors, Inc."

[14] The most recent examples are PTE 2008–4 (73 FR 13585, March 13, 2008) granted to GE Asset Management Incorporated and 2007–04 (72 FR 13126, March 20, 2007) granted to Mellon Financial Corporation.

Technical Release 85–1 because it acted in good faith, *i.e.,* PNC identified the potential prohibited transactions, sought legal counsel prior to the execution of the Redemptions, and structured the Redemption transactions in a manner to ensure that the necessary safeguards were in place, including review and approval by a qualified, independent fiduciary (as described further in Item 10, below).

The five of the eight Funds involved in the in-kind Redemption transactions were: the Growth & Income Fund, the Equity Growth Fund, the Equity Income Fund, the Capital Opportunities Fund, and the International Equity Fund. It is represented that, as of October 30, 2007, the Mercantile Plan's approximate percentages of ownership for each of these Funds were as follows.

Fund	Estimated mercantile plan assets	Approximate percentage of fund held by mercantile plan
Growth & Income Fund	$87,622,519.81	21.22
Equity Growth Fund	12,285,590.58	23.43
Equity Income Fund	11,246,725.44	12.52
Capital Opportunities Fund	11,154,446.73	5.39
International Equity Fund	29,540,576.94	3.58

5. *Fund Redemption Procedures.* The applicant represents that neither the Mercantile Plan nor the Committee had any control over the manner in which the Redemptions were consummated. The Fund Board had the authority, pursuant to the Funds' procedures, to decide the manner in which the Redemptions were effected, and the counsel to the Funds has represented that the Redemptions were effected in compliance with federal securities laws.

Because the Mercantile Plan's investment in some of the Funds exceeded 5% of Fund assets, the Fund's pre-established redemption procedures required a determination by the Fund Board whether the redemption should be made in kind rather than in cash. The Funds' "Procedures for Redemptions In Kind to Affiliated Shareholders" (adopted by the Fund Board on May 19, 2006) were designed to comply with the 1940 Act rules governing transactions with affiliated entities and, in particular, with the SEC no-action letter issued to *Signature Financial Group, Inc.* (the *Signature* letter).[15] These redemption procedures require the Fund Board to consider the following factors:

(b) The percentage of the Fund's shares that are being redeemed and over what time period the transactions will occur;

(c) The tax impact to remaining shareholders;

(d) Portfolio transaction costs, including associated commission and transfer fees, and potential market impact;

(e) Other direct expenses, including custody transaction charges and fund accounting charges; and

e. Effect on the Fund's investment policies. For example, would the Fund temporarily be out of compliance with stated investment objectives due to the need to increase cash holdings, and if so for what period of time?

Further, the pre-established redemption procedures require that the Fund Board, including a majority of its members who are not "interested persons" (as defined in the 1940 Act), determine that (1) the redemption will not favor the redeeming shareholder to the detriment of any other shareholder; and (2) the redemption will be in the best interests of the Fund. If the distribution of securities from the Fund in the redemption is *pro rata – i.e.,* of each security in the Fund's portfolio in proportion to the redeeming shareholder's interest in the overall Fund—prior approval of the Fund Board is not required; however, if the distribution is not pro rata, then the Fund Board must approve the redemption in advance of the redemption date, in conformity with the conditions of the *Signature* letter.

In late July 2007, the Fund Board, including a majority of its independent Directors, determined, in accordance with the Fund procedures, not only that the Redemptions should be effected in kind for five of the eight Funds but also that the distribution of securities from four of those five Funds (all except the Capital Opportunities Fund) would be made on a non-*pro rata* basis, and approved conducting the Redemptions in this manner. The distribution of securities from the Capital Opportunities Fund would be made on a pro rata basis, except for those not meeting the definition of "Transferable Securities" as defined in Section II(E) of this notice. The Fund Board's determinations regarding the Redemptions were based upon the conclusions reached by the Chief Compliance Officer (CCO) of the Funds.

6. *Non-pro rata Exemptions.* The applicant acknowledges that similar individual exemptions involving in-kind redemptions previously granted by the Department contained a condition requiring that the distribution of securities be pro rata. The applicant distinguishes the instant exemption request—involving the in-kind Redemption of shares from five Funds, four on a non-pro rata basis—by noting that the prior cases involved an in-kind transfer of the distributed securities to another proprietary fund of the fiduciary or an affiliate or to a separate account managed by the fiduciary or an affiliate, with a similar portfolio of investments. The applicant points out that, as a general matter, the Mercantile Plan had no intention of holding the securities received. Thus, the focus was on the ability of the Mercantile Plan to immediately sell the securities received rather than to continue to manage those securities, based upon Wilshire's advice for the Mercantile Plan to replace its investment platform. The Redemptions in the instant case were immediately followed by liquidation of the vast majority of the distributed securities

[15] According to the applicant, the *Signature* letter (Dec. 28, 1999) permits in-kind redemptions by an affiliated shareholder under certain conditions set forth in the letter. Those conditions are designed to address the fact that, in many instances, the affiliate may have the ability and pecuniary incentive to influence the actions of the mutual fund, which presents the affiliate with an opportunity to inappropriately influence the mutual fund. To this end, the *Signature* letter requires a mutual fund's Board of Directors to adopt procedures designed to ensure that the affiliated shareholder does not influence the selection of the securities to be redeemed in kind. The SEC staff made clear its view that a pro rata security selection process essentially eliminated the affiliated shareholder's ability to influence or control the security selection process and, therefore, the SEC staff would not recommend enforcement action under the 1940 Act with respect to a pro rata in-kind redemption to an affiliate. However, also according to the applicant, the SEC staff also made clear that a mutual fund's Board of Directors could use any other method for selecting the securities to be redeemed in kind, provided that such selection process addressed the affiliate's ability to influence or control the security selection process.

and reinvestment of the sale proceeds in third-party mutual funds available under the PNC Plan.[16] The Committee, in consultation with Wilshire, determined that it was in the Mercantile Plan's best interests to receive a smaller number of highly liquid securities in larger blocks in order to facilitate an easier and less costly liquidation, a goal that could be achieved only by means of a non-*pro rata* redemption. For example, in the case of the International Equity Fund, the implementation of a pro rata redemption would have resulted in the receipt of over 480 different securities.

7. *Security Selection Criteria.* The applicant represents that the selection of the particular securities to be distributed was made in accordance with the established procedures of the Funds, pursuant to the methodology described below, and was reviewed and approved in advance by the CCO, who is represented by the applicant to be "independent" of, and not affiliated with, PNC. The CCO reviewed the securities selected for the Redemptions and the method of selection. The CCO concluded in his report of October 29, 2007 to the Fund Board that the selection of the securities was made so as not to harm either the Mercantile Plan or the shareholders remaining in the Funds.

When the Committee learned that the Funds planned to make several of the distributions in kind, it communicated to the Funds the Mercantile Plan's preference for large blocks of highly liquid securities. It is represented that the Funds took the Mercantile Plan's preferences into consideration in determining the security selection criteria used for the Redemptions.

Ultimately, following review of the proposed selection methodology by the Funds' CCO, the Funds used three criteria for the selection of the securities to be distributed in the Redemptions. As memorialized in an October 29, 2007 memorandum by the CCO, who was required to review the methodology to assure that Fund procedures were satisfied and that there was no overreaching in favor of either the redeeming shareholder or the non-redeeming shareholder, those criteria were:

- A minimum detriment to the remaining shareholders in the fund (*i.e.* tax and other expenses).
- A minimum number of securities transferred and, therefore, a minimum in associated transaction costs [*i.e.,* for the Mercantile Plan as the redeeming shareholder receiving the securities].
- A preference for liquid securities.

Large Cap Domestic Funds. For the three domestic equity Funds involved in the non-*pro rata* Redemptions—the Equity Income Fund, the Equity Growth Fund and the Growth and Income Fund—liquidity was not an issue, as all of their security holdings were liquid. It was decided that the other two criteria could best be met by delivering those tax lots in each fund that represented the greatest percentage appreciation over their cost, because that would minimize the tax impact on the remaining shareholders while reducing the number of securities distributed to the redeeming shareholder. The CCO noted in his report that the Funds' investment adviser, and Citi Fund Services, Inc., the Funds' sub-administrator and an independent party, both verified that the selection methodology properly identified the tax lots with the greatest increases and ranked the tax lots accordingly.

The applicant represents that the Funds would have used the same approach of allocating by tax lot even in conducting an in-kind redemption with a taxable shareholder because the redeeming shareholder is indifferent to the tax basis of the received securities. According to the applicant, the reason is that the shareholder, if subject to tax, recognizes gain or loss equal to the difference between the fair market value of the assets distributed and the shareholder's adjusted tax basis in its fund shares—the tax basis of the distributed assets is not a factor. At the same time, a mutual fund that qualifies as a regulated investment company (a RIC) under the Code does not recognize gain on the distribution of securities to a redeeming shareholder.

International Equity Fund. For the International Equity Fund, the Fund's independent sub-adviser, Morgan Stanley,[17] consistent with the criteria described in the CCO's memorandum, followed the objective of selecting as small a number of securities as possible and limiting the selections to tradable issues in tradable volumes, as preferred by the Committee, while also avoiding an adverse effect on the remaining shareholders. The Fund Board had concerns about the transferability of many of the securities in the International Equity Fund and, if transferable, the associated transfer costs, as some foreign jurisdictions require that their domestic securities be held under special custody arrangements within the respective jurisdiction. On this basis, it recommended redeeming out the securities of ten large companies whose highly liquid securities were freely traded on European stock exchanges. In addition to avoiding the issue of custody costs and delays on transfer noted above, this also avoided the problem of trying to allocate multiple small positions, as the Fund held approximately 482 different investment securities at the time.

While the CCO was concerned that this approach would not encompass the tax lots with the most profit, as under the equity fund methodology, he found that 72 of the 91 most profitable tax lots would be included. Because of changes in the Fund's portfolio and market values during the period between the initial selection date (in August or September 2007) and the Redemption date, Morgan Stanley determined that the Redemption amount could be satisfied using only eight of the ten securities on the list. The applicant represents that many of the International Equity Fund's other freely transferable foreign securities were relatively less liquid, and including those securities in the Redemption would have taken a longer time to sell them.

8. According to the applicant, the procedures utilized in the valuation of securities in the in-kind Redemptions were protective of the rights of the Mercantile Plan and its participants and beneficiaries. The Redemptions were accomplished by transferring, in exchange for Shares of the Funds held by the Mercantile Plan, a selection of the securities held by each Fund as determined by the Funds in accordance with the Funds' redemption policies. The Fund assets transferred to the Mercantile Plan consisted entirely of cash and securities for which market quotations were readily available. Securities not meeting the definition of "Transferable Securities" as defined in Section II(E) of this notice were excluded, *i.e.,* (i) Securities that, if publicly offered or sold, would require registration under the Securities Act of 1933; (ii) Securities issued by entities in countries which (a) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the Funds, or (b) permit transfers of ownership of securities to be effected only by

[16] According to the applicant, the only securities not liquidated were those accepted in kind by two of the third-party receiving funds; those securities were immediately transferred to the new funds within one business day from the date of the Mercantile Plan's receipt.

[17] Morgan Stanley was one of two sub-advisers for the International Equity Fund, managing approximately 80% of the Fund's assets. The Mercantile Plan's proportionate interest in the portfolio of the other sub-adviser was distributed in cash.

transactions conducted on a local stock exchange; (iii) Certain portfolio positions (such as forward foreign currency contracts, futures and options contracts, swap transactions, certificates of deposit, and repurchase agreements) that, although liquid and marketable, involve the assumption of contractual obligations, require special trading facilities, or can only be traded with the counter-party to the transaction to effect a change in beneficial ownership; (iv) Cash equivalents (such as certificates of deposit, commercial paper, and repurchase agreements); (v) Other assets that are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable); and (vi) Securities subject to "stop transfer" instructions or similar contractual restrictions on transfer.

In addition, the Redemptions did not include securities that were odd lots, fractional shares, and accruals on such securities. The applicant also represents that no Rule 144A securities were involved in the Redemptions.

For purposes of the in-kind Redemptions, the value of the securities in the Funds generally were determined based on their market value as of the close of business on the Redemption date (using sources independent of PNC and PNC Affiliates), in accordance with the requirements of the 1940 Act and the procedures adopted by the Fund Board, in conformity with the *Signature* letter.[18] The pricing methodology to be applied with respect to an in-kind redemption under these procedures complies with Rule 2a–4 under the 1940 Act, the general rule that governs the valuation process for purposes of determining the current price of mutual fund shares. The value for the types of securities held by the Funds was determined as follows.

(i) Securities primarily traded on a domestic securities exchange are valued at the last price on that exchange or, if there were no sales during the day, at the current quoted bid price. Securities traded through the National Association of Securities Dealers Automated Quotations (NASDAQ) National Market System are valued at the NASDAQ Official Closing Price;

(ii) Securities primarily traded on foreign exchanges are valued at the closing values of such securities on their respective exchanges, provided that if such securities are not traded on the valuation date, they will be valued at the preceding closing values;

(iii) Over-the-counter domestic securities and securities listed or traded on foreign exchanges with operations similar to the U.S. over-the-counter market are valued at the closing price of the primary exchange for which the security is traded; or

(iv) With respect to the International Equity Fund, the Fund Board determined that movements in relevant indices or other appropriate market indicators, after the close of the foreign securities exchanges, may demonstrate that market quotations no longer represent the fair value of the foreign securities held by the International Equity Fund and may require fair value pricing. Therefore, the Fund Board adopted written policies and procedures requiring that, when there is a market movement greater than 50 basis points in the Russell 1000 Index from the open and close of the U.S. market, the securities in the International Equity Fund are priced utilizing a fair value determined by an independent pricing service, Investment Technology Group, Inc. (ITG).[19]

9. The Redemptions occurred after the close of the markets on Wednesday, October 31, 2007, at which time the five Funds distributed to the Mercantile Plan a combination of securities and a small amount of cash.[20] The securities previously identified as acceptable by two of the receiving funds in the PNC Plan were transferred to those funds in kind, and the remaining securities that were received pursuant to the Redemptions were liquidated to cash on November 1, 2007.

The Committee had arranged for the liquidation of the securities with two brokers (the Liquidation Arrangements)—one for the domestic securities and one for the foreign securities. To help minimize the time during which the Mercantile Plan participants' accounts would remain uninvested, the Liquidation Arrangements provided for the brokers to accept the securities at the close of the markets on October 31, 2007 at their closing prices so that the brokers assumed the market risk involved in liquidating the securities. In the view of the Committee, a factor in the brokers' willingness to accept this risk was the limited number of securities involved, because it would be more difficult for the brokers to arrange buyers for a significantly larger number of positions. According to the applicant, it is unlikely the Committee could have secured such a commitment if the larger number of securities resulting from a *pro rata* Redemption of all five Funds had been involved. The Committee further entered into agreements with the receiving funds to accept the new investments on the next business day, November 1, 2007, with an extended settlement date (up to three days later in most instances) to cover the possibility of a delay in payment of the liquidation proceeds, at no additional cost to the Mercantile Plan so that the Mercantile Plan participants would not lose the benefit of being fully invested in their chosen investment options (through the respective successor options on the PNC Plan platform) for more than one day.[21]

10. No brokerage commissions or other fees or expenses (other than customary transfer charges paid to parties other than PNC's affiliates) were charged to the Mercantile Plan as part of the Redemptions. Third-party brokerage costs, however, were incurred in connection with the liquidation of the securities that the Mercantile Plan received in kind pursuant to the Redemptions. The liquidation of all such securities was completed on

[18] In the *Signature* letter, the Division of Investment Management of the SEC states that it will not recommend enforcement action pursuant to section 17(a) of the 1940 Act for certain in-kind distributions of portfolio securities to an affiliate of a mutual fund. Funds seeking to use this "safe harbor" must value the securities to be distributed to an affiliate in an in-kind distribution "in the same manner as they are valued for purposes of computing the distributing fund's net asset value." As explained in Item 5, "Fund Redemption Procedures," the Funds had pre-established procedures for conducting affiliated transactions in accordance with the *Signature* letter.

The *Signature* letter does not address the marketability of the securities distributed in kind. The range of securities distributed pursuant to this "safe harbor" may therefore be broader than the range of securities covered by SEC Rule 17a–7, 17 CFR 270.17a–7. In granting past exemptive relief with respect to in-kind transactions involving mutual funds, the Department has required that the securities being distributed in-kind fall within Rule 17a–7. One of the requirements of Rule 17a–7 is that the securities are those for which "market quotations are readily available." SEC Rule 17a–7(a). Under this exemption request, exemptive relief also would be limited to in-kind distribution of securities for which market quotations are readily available.

[19] Securities of non-U.S. issuers may be traded on U.S. exchanges or NASDAQ, directly or in the form of ADRs, or may be acquired on foreign exchanges or foreign over-the-counter markets. In the latter case, valuation is in accordance with (iv).

[20] In accordance with the provisions of Rule 18f–1 under the 1940 Act, the Funds were obligated to redeem in cash the lesser of $250,000 or 1% of their net asset value. Consequently, each of the non-*pro rata* Funds distributed $250,000 in cash, and the *pro rata* distribution from the Capital Opportunities Fund included a *pro rata* portion of the Fund's cash holdings and the cash value of any non-transferable securities, in an amount that exceeded $250,000.

[21] According to the applicant, this arrangement created an additional benefit for the Mercantile Plan participants. Because there was a market decline on November 1, 2007, the participants were able to receive the higher October 31, 2007 closing prices on the liquidation of the distributed securities, and were able to reinvest those proceeds at the lower November 1, 2007 share prices of the receiving funds. The overall benefit to the participants was approximately $3 million.

November 1, 2007, and those brokerage costs were paid from the PNC Plan's forfeiture account, which held forfeitures accumulated from prior plan mergers. As a condition of this proposed exemption, PNC will reimburse the PNC Plan, into which the Mercantile Plan was merged on November 1, 2007, for all brokerage costs that the Mercantile Plan incurred on November 1, 2007.

During the process leading up to the Redemption date, the Funds provided the Mercantile Plan trustee with lists of the securities that were likely to be included in the Redemptions, to permit the Mercantile Plan fiduciaries to determine in advance how best to dispose of the securities. The Mercantile Plan trustee passed those lists along to the funds on the PNC Plan investment platform that were to receive the proceeds of the respective Redemptions. Two of the receiving funds—a Vanguard fund and a Harbor Capital fund (neither affiliated with PNC)—informed the Mercantile Plan trustee that they would be willing to accept certain securities from the lists in kind. As a result, on the Redemption date, those securities were not liquidated, but rather were transferred in kind to the receiving funds.

Because the Committee was not able to lock in the October 31, 2007 values of the securities that were transferred in kind to the new funds, the shares acquired with those securities on November 1st were less in value than the value of the distributed securities the previous day. The applicant represents that the Plan participants were in the same financial position that they would have been in had they remained invested in the Funds, because their investments in the Funds would have suffered a corresponding decrease. Nevertheless, the Committee decided that it would be appropriate under the unique circumstances of the Redemptions to insulate the participants' accounts from the impact of this brief period of negative investment performance, by making up the difference from the PNC Plan's forfeiture account.[22]

11. As previously noted in Item 2, the applicant appointed Wilshire, also located in Pittsburgh, Pennsylvania, to serve as the Independent Fiduciary on behalf of the Mercantile Plan in regard to the subject Redemptions. It is represented that, as of the end of 2007, all fees paid by PNC to Wilshire equaled less than 1% of Wilshire's annual gross income.

[22] The Department is not opining herein as to whether this use of the forfeiture account is permitted under Title I of ERISA.

Prior to the Redemptions, Wilshire received a full written disclosure of information regarding the Redemptions and communicated in writing its approval of the Mercantile Plan's participation in such Redemptions. In a letter dated November 1, 2007, Wilshire opined,

> Based on our review of the proposed procedure and methodology for the in-kind redemption, and discussions with members of The Administrative Committee, PNC staff, and legal counsel for the [Mercantile] Plan, it is Wilshire's opinion that an in-kind redemption of Mercantile Plan participants' assets in certain funds is in their best interests. As you know, a redemption of fund interests is necessary to transition participant assets from the funds currently available in the Mercantile Plan into the funds available in the PNC Incentive Savings Plan. * * * Based on the process set forth, participants in funds for which redemption is completed in kind are not exposed to greater market risk, security specific risk, investment management or other costs, than they would be in any other arms-length transaction between unaffiliated parties.

No later than thirty (30) business days after the completion of the Redemptions, Wilshire received a written confirmation regarding such Redemptions containing: (i) The number of Shares held by the Mercantile Plan immediately before the Redemption (and the related per Share net asset value and the total dollar value of the Shares held); (ii) The identity (and related aggregate dollar value) of each security provided to the Mercantile Plan pursuant to the Redemption, including each security valued in accordance with Rule 2a–4 under the 1940 Act and procedures adopted by the Board of Directors of PNC Funds, Inc. (using sources independent of PNC and PNC Affiliates); (iii) The current market price of each security received by the Mercantile Plan pursuant to the Redemption; and (iv) The identity of each pricing service or market maker consulted in determining the value of such securities.

Subsequent to the Redemptions, Wilshire performed a post-transaction review, which is summarized in its letter dated December 21, 2007, to determine whether or not the Redemptions were effected at a fair market price. In the letter, Wilshire confirmed that the Redemptions were conducted in accordance with the conditions of this proposed exemption as described in PNC's exemption application of November 1, 2007.[23] Wilshire downloaded the "Committee on Uniform Security Identification Procedures" of each individual security from the Funds (totaling nearly 300 equity securities) into Atlas, Wilshire's proprietary security database to independently review the prices for securities received by the Mercantile Plan from the Funds. Wilshire wrote:

[23] It is noted that the condition in Section I(L) of this notice was not contained therein.

> The prices received by Mercantile Plan participants for their investments in these funds were equal to the closing market price as of October 31, 2007, with the exception of the investments in the International Equity Fund. According to the policies utilized by the Board of Directors of PNC Funds, a fair value pricing methodology is employed if, subsequent to the closing of foreign securities exchanges, the U.S. equity market, as measured by the Russell 1000 stock index, closes at a value that differs from its opening value by more than 0.5%. On October 31, 2007, the Russell 1000 Index increased by 1.22% from its opening price. This increase was large enough to trigger the fair value pricing policy employed by the Funds. Investors in the International Equity Fund received prices through the in-kind redemption that were higher than the closing prices of these securities on their local exchanges. The use of prices that were greater than the closing prices on the local exchanges indicates that the fair value adjustment was made in the International Equity Fund.

At the Department's request, Wilshire provided a supplemental letter dated August 28, 2009, which addressed the methodologies for selecting the securities to be distributed on a non-pro rata basis and the securities liquidation process.

First, Wilshire noted:

> Because the [Mercantile] Plan did not intend to continue to hold the securities it received in the redemptions, but rather immediately to reinvest the proceeds of their sale in other mutual funds, * * * it was in the Mercantile Plan's best interest to receive a limited number of investment positions that were highly liquid, to facilitate an easier and less costly sale and liquidation to cash.

Wilshire also stated, "[W]e reviewed the securities selected for the redemptions, based on lists provided in advance of the redemption date, to confirm that they were highly liquid."

Regarding the International Equity Fund, Wilshire stated:

> By contrast, a pro rata redemption from this fund would have caused the [Mercantile] Plan to receive a much larger number of smaller investment positions (the fund held over 480 different securities at the time), which would have required a more difficult, costly and time consuming liquidation process—particularly for those foreign jurisdictions that would have required the [Mercantile] Plan to set up special custody arrangements to hold the securities pending their disposition.

Finally, Wilshire noted:

The [Mercantile] Plan entered into arrangements for brokers to acquire the distributed securities from the [Mercantile] Plan at their closing prices on October 31, 2007, and to assume the risk of future price changes. In addition, the [Mercantile] Plan arranged for the receiving funds to accept the proceeds from the sale of the securities on November 1.[24] These arrangements were in the best interests of the [Mercantile] Plan because they (1) locked in the values at which the securities were distributed to the [Mercantile] Plan and (2) reduced the time during which the [Mercantile] Plan participants were out of the market to one day. In our view, a positive factor in the brokers' willingness to accept the risk of selling the securities was the limited number of securities involved, because it would be more difficult for the brokers to arrange buyers for a significantly larger number of positions.

12. In summary, the applicant represents that the Redemptions satisfied the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (i) The Mercantile Plan received its pro rata portion of the securities with respect to the Capital Opportunities Fund; (ii) the absence of a pro rata distribution for four of the other Funds benefited the Mercantile Plan by permitting the distribution of securities that could be more easily and quickly liquidated to cash, consistent with the Mercantile Plan's objective to reinvest the proceeds as soon as possible in the PNC Plan's "open" investment platform that included non-proprietary funds; (iii) the security selection criteria used were determined by parties independent of PNC, namely, the Fund Board, the Fund CCO and (in the case of the International Equity Fund) an unaffiliated sub-adviser; (iv) the transaction was overseen by an Independent Fiduciary and written authorization was provided by the Independent Fiduciary based on its determination, following full and detailed disclosure of information regarding the transaction, that the terms of the Redemptions were fair and reasonable to the Mercantile Plan, and comparable to and no less favorable than terms obtainable at arm's length between unaffiliated parties, and that the Redemptions were in the best interests of the Mercantile Plan and its participants and beneficiaries; and (v) the Independent Fiduciary conducted a post-transaction analysis of the securities selected for the Redemptions based upon the lists provided in advance of the Redemption date and confirmed that the in-kind Redemptions were effected at a fair market value price. It is also noted that condition I(L) requires PNC to reimburse the PNC Plan for all brokerage costs incurred to liquidate the securities that the Mercantile Plan received in kind pursuant to the Redemptions so that, in combination with the methodology used in the selection of stocks for the non-pro rata Redemptions, the distribution of such stocks was economically equivalent to a cash Redemption.

[24] In the interests of clarity, Wilshire is referring here to the Mercantile Plan's broker agreements regarding the distributed securities that were liquidated; however, as previously noted in Item 9, the receiving funds agreed to accept a small percentage of the distributed securities in kind.

Notice to Interested Persons

The applicant represents that notice to interested persons shall be furnished to the Independent Fiduciary, inactive participants and beneficiaries of the Mercantile Plan by first-class mail, and by e-mail to Mercantile Plan participants who are actively employed (provided that such active participants have effective access to electronic documents at work—otherwise, the active participants must receive such notice by first-class mail), within 30 days of the date of publication of this notice of pendency in the **Federal Register**. The notice shall inform interested persons of their right to comment and/or request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 30 days following completion of notice to interested persons.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 693–8557. (This is not a toll-free number.)

Deutsche Asset Management (UK) Limited (the Applicant), Located in London, England, a Wholly-Owned Subsidiary of Deutsche Bank AG, Located in Frankfurt, Germany, and Throughout the World, [Exemption Application Number D–11495].

Proposed Exemption

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).

Section I—Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(B), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(A), (B), (D), and (E) of the Code, shall not apply to certain foreign exchange hedging transactions that occurred between November 30, 2007 and May 30, 2008, inclusive, between the DB Torus Japan Master Portfolio (the Master Fund), in which the assets of certain client employee benefit plans (the Client Plans) were invested, and Deutsche Asset Management (UK) Ltd. or its affiliates (collectively, Deutsche Bank), a party in interest with respect to the Client Plans, provided that the conditions contained herein are satisfied.

Section II—General Conditions

(a) The foreign exchange transactions were executed solely in connection with the Master Fund's hedging of the Japanese yen currency risk for its share classes denominated in U.S. dollars (USD);

(b) At the time that the foreign exchange transactions were entered into, the terms of the foreign exchange transactions were not less favorable to the Fund than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties;

(c) Any foreign exchange transactions authorized or executed by Deutsche Bank or its affiliates were not part of any agreement, arrangement, or understanding, written or otherwise, designed to benefit Deutsche Bank, its affiliates, or any other party in interest;

(d) Prior to investing in the Master Fund, the fiduciary of each Client Plan received the offering memorandum for the DB Torus Japan Fund Ltd., the feeder fund (Feeder Fund) through which investments in the Master Fund are effected;

(e) The exchange rate used for a particular foreign exchange transaction did not deviate by more than three percent (above or below) the interbank bid and ask rate for such currency at the time of the foreign exchange transaction, as displayed on an independent, nationally-recognized service that reports rates of exchange in the foreign currency market for such currency;

(f) Prior to the granting of an exemption concerning the subject foreign exchange transactions, Deutsche Bank shall reimburse each such Client Plan for its pro-rata share of: (1) The spread on each foreign exchange transaction subject to this proposed exemption; and (2) Any fees charged by financial institutions for executing the subject foreign exchange transaction(s), plus interest at the applicable Internal Revenue Service underpayment penalty rate, up to the date of reimbursement;

(g) Within 30 days of taking the corrective action described in Section II(f) above, Deutsche Bank provides the independent fiduciaries of each Client

Plan whose assets were involved in the foreign exchange transactions with: (1) Written information, formulas, and/or other documentation sufficient to enable such fiduciaries to independently verify that the Plans have been reimbursed in accordance with the requirements of Section II(f) above; and (2) a copy of this notice of proposed exemption (the Notice);

(h) Within 30 days of taking the corrective action described in Section II(f) above, Deutsche Bank provides the Department with written documentation demonstrating that the foregoing reimbursements to each Client Plan were correctly computed and paid;

(i) Effective May 31, 2008, Deutsche Bank, in conjunction with the administrator of both the Master Fund and the Feeder Fund (together, the Funds), continuously monitors the percentage of total assets invested by benefit plan investors in the Funds so that, as of each acquisition or redemption of equity interests, Deutsche Bank and the administrator of the Funds are able to verify whether equity participation in the Funds by benefit plan investors is not significant pursuant to section 3(42) of the Act and 29 CFR 2510.3–101;

(j) Deutsche Bank maintains, or causes to be maintained, for a period of six years from the date of the transactions that are the subject of this proposed exemption, the following records, as well as any other records necessary to enable the persons described in Section II(l) of this exemption, to determine whether the conditions of this exemption have been met:

(1) The account name;

(2) The trade and settlement dates of the subject foreign exchange hedging transactions;

(3) The USD/Japanese yen currency exchange rates on the trade and settlement dates;

(4) The high and low currency prices on Bloomberg or similar independent service on the dates of the subject transactions;

(5) The identification of the type of currency trade undertaken (whether spot or forward);

(6) The amount of Japanese yen sold or purchased in the hedging transactions; and

(7) The amount of U.S. dollars exchanged for Japanese yen in the hedging transactions.

(k) The following are exceptions to the requirements of Section II(j):

(1) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Deutsche Bank or its affiliates, the records necessary to enable the persons described in Section II(l) to determine whether the conditions of the exemption have been met or lost or destroyed prior to the end of the six-year period; and

(2) No party in interest, other than Deutsche Bank and its affiliates, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the excise taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained for examination as required by Section II(l) below.

(l)(1) Except as provided in paragraph (2) of this Section II(l) and notwithstanding the provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in Section II(j) are unconditionally available for examination during normal business hours at their customary location to the following persons or an authorized representative thereof:

(i) Any duly authorized employee or representative of the Department or of the Internal Revenue Service (the Service);

(ii) The independent fiduciary of each Client Plan (or a duly authorized employee or representative of such fiduciary), or

(iii) Any participant or beneficiary of such Client Plans or any duly authorized employee or representative of a participant or beneficiary in such Client Plans.

(2) None of the persons described above in paragraphs (ii) and (iii) of Section II(l)(1) shall be authorized to examine trade secrets of Deutsche Bank or its affiliates, or any commercial or financial information, which is privileged or confidential.

Section III—Definitions

For purposes of this proposed exemption:

(a) An "affiliate" of the Applicant means: (1) Any person or entity directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person or entity; (2) Any officer, director, partner, employee, or relative (as defined in section 3(15) of the Act) of such other person or entity; and (3) Any corporation or partnership of which such other person or entity is an officer, director, partner, or employee.

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

(c) The term "client plan" means an employee benefit plan, other than a plan sponsored by the Applicant and its affiliates, as described in section 3(3) of the Act or section 4975(e)(1) of the Code that invested in the Master Fund and the Feeder Fund, and for which the Applicant or its affiliate served as an investment advisor

(d) The term "foreign exchange transaction" means the exchange of the currency of one nation for the currency of another nation.

(e) The term "hedging" means a strategy used to offset the investment risk of future gains or losses resulting from anticipated fluctuations in the value of currency, such as an investor's decision to exchange foreign currency in anticipation of upward or downward movement in the value of that currency.

Summary of Facts and Representations

1. Deutsche Asset Management (UK) Limited (DeAM UK) is a wholly-owned subsidiary of Deutsche Bank AG. DeAM UK (the Applicant) is an investment adviser domiciled in the United Kingdom with approximately $2.2 billion is assets under management, and is registered in the United States under the Investment Advisers Act of 1940. The Applicant also represents that it is regulated by the Financial Services Authority (FSA), an independent non-governmental body, which was granted statutory powers by the United Kingdom Financial Services and Markets Act 2000.

The Applicant is a sub-advisor to both the DB Torus Japan Master Portfolio (the Master Fund), a Cayman Islands exempted company, and the DB Torus Japan Master Portfolio Ltd. (the Feeder Fund), also a Cayman Islands exempted company. The adviser to both the Master Fund and the Feeder Fund is Deutsche Bank Trust Company Americas (DBTCA), a New York banking corporation, which also is wholly-owned by Deutsche Bank AG.

2. Deutsche Bank AG (together with its affiliates, Deutsche Bank), a German banking corporation and a leading commercial bank, provides a wide range of global banking, fiduciary, record keeping, custodial, brokerage, and investment services to corporations, institutions, employee benefit plans, and private investors. Through its numerous affiliates, subsidiaries, and branches, Deutsche Bank has a worldwide physical presence. As of December 31, 2007, Deutsche Bank had approximately $1.19 trillion in assets under management and had approximately $54.09 billion in shareholder equity.

The Applicant represents that Deutsche Bank is subject to a comprehensive system of regulatory oversight and a mandatory insurance program. The Applicant also represents that Deutsche Bank, its branches, and its subsidiary banks worldwide are subject to regulatory requirements and protections that are, qualitatively, at least equal to those imposed on U.S.-domiciled banks.[25] Within the United States, the Applicant represents that both the New York branch of Deutsche Bank and DBTCA are regulated and supervised by the New York State Banking Department. In addition, the Applicant represents that certain activities of Deutsche Bank's New York branch and DBTCA are regulated and supervised by the Federal Reserve Bank of New York.

3. The Applicant represents that the Master Fund invests in Japanese equity and equity-related securities. Client investment is effected through the Feeder Fund. The Feeder Fund, in turn, has invested all of its assets in the Master Fund, with the exception of cash reserves maintained, for example, for the payment of fees and expenses. The "base" currency in which both the Master Fund and the Feeder Fund maintain their books, records, and financial statements (and in which they charge applicable fees) is the Japanese yen. The Feeder Fund offers distinct share classes denominated in U.S. dollars (USD) for the convenience of investors wishing to invest with USD (USD Investors). Among the investors in the USD share class of the Feeder Fund are client employee benefit plans (the Client Plans).

4. As disclosed in the Feeder Fund's offering memorandum, which is distributed to all potential investors (including potential Client Plan investors) prior to investment, the managing member of the Master Fund is charged with maintaining a continuous dollar/yen hedge with respect to investments in its USD share class in order to disaggregate the impact of currency fluctuations on the performance of a USD Investor's investment. The currency hedge offers USD Investors exposure to the portfolio of the Master Fund while reducing exposure to fluctuations in relative value of yen to the USD. Thus, the Applicant represents that an investor investing in the USD share class of the Feeder Fund necessarily expects that its investments will, as fully as possible, hedge the USD against the yen. The Applicant represents that it has investment discretion over the assets involved in the exemption transactions described herein. In addition, the Applicant represents that it is affiliated with the counterparty to those transactions.

The Applicant represents that the currency hedging activity was fully disclosed to Client Plans and other investors in the Feeder Fund's offering memorandum, and it would have occurred regardless of the identity of the counterparty. The Applicant further represents that, by investing in the USD share class of the Feeder Fund, the independent fiduciaries of the investing employee benefit plans consented to the hedging transactions. The Applicant also states that, in investing in the Feeder Fund, each Client Plan's independent fiduciary necessarily approved the execution of currency trades through DeAM UK as principal.

5. The foregoing hedge is effected each month through the following transactions: (1) A foreign exchange "forward trade"[26] that settles on the last business day of the month; (2) A foreign exchange spot trade[27] that settles on the last business day of the month (which closes out the forward trade); and (3) Another foreign exchange forward trade. The Applicant represents that this currency hedging activity is largely automatic and ministerial in nature. Since the inception of the Master Fund, the Applicant represents, hedging transactions have been consistently effected each month at particular times and in mechanically determined amounts, which are specified in the operating procedures of the Master Fund. The Applicant further represents that, since all gains and losses resulting from the currency hedging activity are "reversed out" from the performance of the USD share classes prior to calculation of the performance fee and the "high water mark"[28], the hedging transactions are canceled out for purposes of the performance fees paid to the investment manager.

6. From their inception, both the Master Fund and the Feeder Fund were intended to operate as "non-plan asset" vehicles. In particular, the Applicant represents that the Master Fund intended to limit the aggregate investment by benefit plan investors in each class of its equity to less than 25%, so that the quantity of assets in each class would not be deemed to constitute significant equity participation by benefit plan investors within the meaning of the Department's "plan asset regulation" at 29 CFR 2510.3–101.[29]

7. Effective May 1, 2006, the Master Fund and the Feeder Fund (together, the Funds) entered into an administrative services agreement with International Fund Services (Ireland) Limited (hereinafter IFS or the Administrator). The Applicant represents that IFS is not related to or affiliated with Deutsche Bank, and provides fund accounting, fund administration, and risk services to asset management groups with trading operations throughout the world. Under the agreement, IFS was responsible for, among other things, monitoring the percentage investment by benefit plan investors in each share class of the Funds and reporting such percentage on a monthly basis to the Funds. The agreement also required IFS to report the percentage of investment by benefit plan investors "on such other dates as [a] Fund accepts subscriptions and/or effects redemptions and delivering such

[25] The Applicant represents that the U.S. Department of the Treasury has accorded national treatment to German bank branches, and the German Ministry of Finance has granted relief to branches of U.S. banks in Germany, in particular with respect to "dotation" or endowment capital requirements and capital adequacy standards.

[26] A foreign exchange "forward" is an agreement to purchase or sell a fixed amount of foreign currency at a fixed price and on a predetermined future date (or within a predetermined range of dates).

[27] A foreign exchange "spot" trade is a purchase of one currency with a different currency for immediate delivery. These trades typically settle within two days from the date of execution. See also the Notice of Proposed Exemption preceding the final grant of PTE 94–20 at 56 FR 11757, 11759, n.3 (March 20, 1991).

[28] "High water mark" is a reference point by which a hedge fund manager's performance compensation is calculated. When a high water mark formula applies, the manager receives performance compensation only if the value of the fund is greater than its previous greatest value (*i.e.*, the high water mark). If the value of the fund falls below the high water mark, the manager receives no performance fees until the value rises above the high water mark.

[29] This regulation generally defines what constitutes assets of a plan with respect to a plan's investment in another entity for purposes of Subtitle A, and Parts 1 and 4 of Subtitle B, of Title I of the Act and section 4975 of the Code. Generally, the plan asset regulation states that when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940, its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that, among other things, equity participation in the entity by benefit plan investors is not significant.

According to 29 CFR 2510.3–101(f)(1), "[e]quity participation in an entity by benefit plan investors is 'significant' on any date if, immediately after the most recent acquisition of any equity interest in the entity, 25 percent or more of the value of any class of equity interests in the entity is held by benefit plan investors." A "benefit plan investor" is defined in section 3(42) of the Act as "an employee benefit plan subject to part 4 [of the Act], any plan to which section 4975 of the [Code] applies, and any entity whose underlying assets include plan assets by reason of a plan's investment in such entity." For a discussion of the general scope and construction of the term "acquisition" as referenced in 29 CFR 2510.3–101(f)(1), including a benefit plan investor's redemption of an equity interest in an investment entity, see Advisory Opinion 89–05 (Apr. 6, 1989).

calculation to the Fund or to the Fund's counsel for approval." The agreement also states that, "[f]or the avoidance of doubt, each Fund shall instruct IFS [as to] the method of determining class of shares for the purpose of the calculation of percentages contemplated in this clause."

The Applicant represents that in December of 2007, IFS, through an error in its recordkeeping, failed to notify DeAM UK that the percentage of plan assets in one of the USD-denominated share classes may have exceeded 25% of the assets maintained in that corporate class. The Applicant has specifically identified the U.S. dollar-denominated nominal share class with respect to which the subject hedging transaction occurred (and in which redemptions may have caused benefit plan investor participation to equal or exceed the 25% limitation) as Class A of the Feeder Fund.[30] For a period of time after the redemptions, the Applicant represents, the Master Fund continued to execute hedging transactions with its DeAM UK-affiliated counterparty, the London branch of Deutsche Bank AG. The Applicant further represents that DeAM UK was not aware that redemptions associated with the foregoing currency hedging transactions caused a breach of the 25% limitation until approximately April 15, 2008. In this connection, the Applicant initiated communication with the Department with respect to the foregoing hedging transactions shortly after DeAM UK became aware of the problem, and has met with representatives from the Department concerning this matter.

8. The Applicant additionally represents that Bloomberg screen prints of the currency prices at the time of the subject currency hedging transactions demonstrate that the trades did not deviate by more than three percent (above or below) the interbank bid and ask rate for such currencies at the time of the foreign exchange transaction. In this connection, the Applicant represents that Bloomberg is an independent, nationally-recognized quotation service that reports rates of exchange in the foreign currency market for widely-traded currencies, including the Japanese yen. The Applicant further represents that, because it knows both the precise rate at which the Master Fund executed each of the subject currency hedging transactions and the best rate available on these trades based on the aforementioned Bloomberg screen prints, it will calculate the difference between these rates and give any positive difference to the Client Plan, based on its ownership percentage in the Feeder Fund.

The Applicant also represents that, with respect to the assessment of fees, commissions, and related transactional expenses, any Client Plan whose assets were involved in the foreign exchange transactions that are the subject of this proposed exemption were treated the same as all other investors with assets invested in the Master Fund and the Feeder Fund that engaged in the subject hedging transactions.

9. The Applicant represents that, after discovering the foreign exchange hedging transactions that gave rise to the current exemption application, it revised its compliance procedures in May of 2008 to minimize the risk that such a situation may recur. These updated procedures include, among other things, the following elements: (i) On a monthly basis, the Deutsche Bank sales team will notify the Deutsche Bank shareholder services team of any prospective Client Plan who will be making an investment in the Master Fund or the Feeder Fund in the coming month(s); (ii) All Client Plan investments must be approved by the Office of the Chief Operating Officer (COO) of the DB Advisors Hedge Fund Group before the investment is accepted; (iii) The Administrator of the Master Fund and the Feeder Fund will provide the Deutsche Bank shareholder services team a copy of all subscription agreements for those flagged investments upon receipt for review. The Administrator also will provide to the Deutsche Bank shareholder services team copies of the subscription documents of all incoming U.S. tax-exempt investors, to perform a duplicate check to ensure that none are in fact plan assets (for example, to identify any incorrectly completed documents); (iv) The Administrator of the Master Fund and the Feeder Fund will add to its monthly "ERISA Executive Summary" (a report of the current plan asset totals in each Deutsche Bank Advisors Hedge Fund through the most recent dealing date for subscriptions and redemptions) a column which calculates the month-to-month change in plan asset percentages for both the Master Fund and the Feeder Fund; and (v) When the total plan assets percentage of either the Master Fund or the Feeder Fund reaches 10%, it is placed on a "watch list." Investments by benefit plan investors into any funds on the watch list require additional approval by the office of the COO before they can be accepted. The office of the COO may decide to close a Fund to any future investments by a benefit plan investor when the Fund's total plan assets percentage exceeds 10%.

According to the offering memorandum of the Feeder Fund, an investor generally may redeem all or a portion of its shares in the Fund at the close of business on the last business day of any calendar month by submitting to the administrator of the Fund a redemption request at least thirty days prior to the end of such month. An investor redeeming all or a portion of its shares will receive an amount equal to the net asset value per share for the relevant series of shares at the close of business on the redemption date. The Fund also may, upon five days notice, cause the involuntary redemption of any or all of an investor's shares at the end of any calendar month.

In addition, the offering memorandum of the Feeder Fund states that, in general, the directors of the Fund intend to restrict, through utilization of a "test" that is "ongoing", the aggregate investment by benefit plan investors to under 25% of the total capital of each class of shares in order to achieve compliance with the requirements of section 3(42) of the Act and 29 CFR § 2510.3–101. As a consequence of this ongoing test, not only may additional investments by benefit plan investors be restricted, but existing benefit plan investors may be required by the directors of the Fund to redeem their shares from the Fund in the event that other investors redeem.

10. The Applicant represents that the requested exemption is administratively feasible because correction of the prohibited transaction would occur pursuant to an objective, independently verifiable pricing mechanism (namely, the Bloomberg currency exchange data for the time period described in this proposed exemption). The Applicant also represents that the exemption would be in the interest of the participants and beneficiaries of each of the affected Plans because the correction will place each affected Plan in a better position than it would have been in had the currency hedging been executed through an unrelated third party in the first instance. The Applicant further represents that the exemption would be protective of the rights of participants and beneficiaries of the affected Plans because: (i) The correction will negate any benefit received by the Applicant (or its affiliate) in connection with the subject transactions; and (ii) The proposed conditions for exemptive relief are consistent with the safeguards generally required by the Department

[30] In its exemption application, the Applicant represents that the Master Fund may have held plan assets during the period between November 30, 2007 and May 30, 2008, inclusive, as a consequence of net redemptions involving Class A of the Feeder Fund.

for foreign exchange transactions of this nature.

11. In summary, the past transactions for which exemptive relief is sought meet the statutory criteria of section 408(a) of the Act because: (a) The foreign exchange transactions were executed solely in connection with the Master Fund's hedging of the Japanese yen currency risk for its share classes denominated in U.S. dollars (USD); (b) At the time that the foreign exchange transactions were entered into, the terms of the foreign exchange transactions were not less favorable to the Fund than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties; (c) Any foreign exchange transactions authorized or executed by Deutsche Bank or its affiliates were not part of any agreement, arrangement, or understanding, written or otherwise, designed to benefit Deutsche Bank, its affiliates, or any other party in interest; (d) Prior to investing in the Master Fund, the fiduciary of each Client Plan received the offering memorandum for the DB Torus Japan Fund Ltd., the feeder fund (Feeder Fund) through which investments in the Master Fund are effected; (e) The exchange rate used for a particular foreign exchange transaction did not deviate by more than three percent (above or below) the interbank bid and ask rate for such currency at the time of the foreign exchange transaction, as displayed on an independent, nationally-recognized service that reports rates of exchange in the foreign currency market for such currency; (f) Prior to the granting of an exemption concerning the subject foreign exchange transactions, Deutsche Bank shall reimburse each such Client Plan for its pro-rata share of: (1) The spread on each foreign exchange transaction subject to this proposed exemption; and (2) Any fees charged by financial institutions for executing the subject foreign exchange transaction(s), plus interest at the applicable Internal Revenue Service underpayment penalty rate; (g) Within 30 days of taking the corrective action described in Section II(f) above, Deutsche Bank provides the independent fiduciaries of each Client Plan whose assets were involved in the foreign exchange transactions with: (1) Written information, formulas, and/or other documentation sufficient to enable such fiduciaries to independently verify that the Plans have been reimbursed in accordance with the requirements of Section II(f) above; and (2) a copy of this notice of proposed exemption (the Notice); (h) Within 30 days of taking the corrective action described in Section II(f) above, Deutsche Bank provides the Department with written documentation demonstrating that the foregoing reimbursements to each Client Plan were correctly computed and paid; (i) Effective May 31, 2008, Deutsche Bank, in conjunction with the administrator of both the Master Fund and the Feeder Fund (together, the Funds), continuously monitors the percentage of total assets invested by benefit plan investors in the Funds so that, as of each acquisition or redemption of equity interests, Deutsche Bank and the administrator of the Funds are able to verify whether equity participation in the Funds by benefit plan investors is not significant pursuant to section 3(42) of the Act and 29 CFR 2510.3–101; and (j) Deutsche Bank generally maintains records that are sufficient for regulatory authorities and independent third parties to determine whether the conditions of this exemption have been met.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Judge of the Department, telephone (202) 693–8550. (This is not a toll-free number.)

UBS Financial Services Inc. and Its Affiliates (UBS), Located in Weehawken, New Jersey, [Application No. D–11502].

Proposed Exemption

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).[31]

Section I. Transactions Involving Plans Described in Both Title I and Title II of ERISA

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) and section 406(b) of the Act, and the taxes imposed by sections 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply, effective February 1, 2008, to the following transactions, if the conditions set forth in Section III have been met:

(a) The sale or exchange of an Auction Rate Security (as defined in Section IV(b)) by a Plan (as defined in Section IV(h)) to the Sponsor (as defined in Section IV(g)) of such Plan; or

(b) A lending of money or other extension of credit to a Plan in connection with the holding of an Auction Rate Security by the Plan, from: (1) UBS; (2) an Introducing Broker (as defined in Section IV(f)); or (3) a Clearing Broker (as defined in Section IV(d)); where the loan is: (i) repaid in accordance with its terms; and (ii) guaranteed by the Sponsor.

Section II. Transactions Involving Plans Described in Title II of ERISA Only

If the proposed exemption is granted, the sanctions resulting from the application of sections 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply, effective February 1, 2008, to the following transactions, if the conditions set forth in Section III have been met:

(a) The sale or exchange of an Auction Rate Security by a Title II Only Plan (as defined in Section IV(i)) to the Beneficial Owner (as defined in Section IV(c)) of such Plan; or

(b) A lending of money or other extension of credit to a Title II Only Plan in connection with the holding of an Auction Rate Security by the Title II Only Plan, from: (1) UBS; (2) an Introducing Broker; or (3) a Clearing Broker; where the loan is: (i) repaid in accordance with its terms and; (ii) guaranteed by the Beneficial Owner.

Section III. Conditions

(a) UBS acted as a broker or dealer, non-bank custodian, or fiduciary in connection with the acquisition or holding of the Auction Rate Security that is the subject of the transaction;

(b) For transactions involving a Plan (including a Title II Only Plan) not sponsored by UBS for its own employees, the decision to enter into the transaction is made by a Plan fiduciary who is independent (as defined in Section IV(e)). For transactions involving a Plan sponsored by UBS for its own employees, UBS may direct such Plan to engage in a transaction described in Section I if all of the other conditions of this Section III have been met. Notwithstanding the foregoing, an employee of UBS who is the Beneficial Owner of a Title II Only Plan may direct such Plan to engage in a transaction described in Section II, if all of the other conditions of this Section III have been met;

(c) The last auction for the Auction Rate Security was unsuccessful;

(d) The Plan does not waive any rights or claims in connection with the loan or sale as a condition of engaging in the above-described transaction;

(e) The Plan does not pay any fees or commissions in connection with the transaction;

[31] For purposes of this proposed exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

(f) The transaction is not part of an arrangement, agreement or understanding designed to benefit a party in interest;

(g) With respect to any sale described in Section I(a) or Section II(a):

(1) The sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security; and

(2) For purposes of the sale, the Auction Rate Security is valued at par, plus any accrued but unpaid interest; [32]

(h) With respect to an in-kind exchange described in Section I(a) or Section II(a), the exchange involves the transfer by a Plan of an Auction Rate Security in return for a Delivered Security, as such term is defined in Section IV(j), where:

(1) The exchange is unconditional;

(2) For purposes of the exchange, the Auction Rate Security is valued at par, plus any accrued but unpaid interest;

(3) The Delivered Security is valued at fair market value, as determined at the time of the in-kind exchange by a third party pricing service or other objective source;

(4) The Delivered Security is appropriate for the Plan and is a security that the Plan is otherwise permitted to hold under applicable law; [33] and

(5) The total value of the Auction Rate Security (*i.e.,* par plus any accrued but unpaid interest) is equal to the fair market value of the Delivered Security;

(i) With respect to a loan described in Sections I(b) or II(b):

(1) The loan is documented in a written agreement that contains all of the material terms of the loan, including the consequences of default;

(2) The Plan does not pay an interest rate that exceeds one of the following three rates as of the commencement of the loan:

(A) The coupon rate for the Auction Rate Security;

(B) The Federal Funds Rate; or

(C) The Prime Rate;

(3) The loan is unsecured; and

(4) The amount of the loan is not more than the total par value of the Auction Rate Securities held by the Plan.

Section IV. Definitions

(a) The term "affiliate" means: any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term "Auction Rate Security" or "ARS" means a security:

(1) That is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and

(2) With an interest rate or dividend that is reset at specific intervals through a Dutch auction process;

(c) The term "Beneficial Owner" means: the individual for whose benefit the Title II Only Plan is established and includes a relative or family trust with respect to such individual;

(d) The term "Clearing Broker" means: a member of a securities exchange that acts as a liaison between an investor and a clearing corporation and that helps to ensure that a trade is settled appropriately, that the transaction is successfully completed and that is responsible for maintaining the paper work associated with the clearing and executing of a transaction;

(e) The term "independent" means a person who is: (1) Not UBS or an affiliate; and (2) not a relative (as defined in section 3(15) of the Act) of the party engaging in the transaction;

(f) The term "Introducing Broker" means: a registered broker that is able to perform all the functions of a broker except for the ability to accept money, securities, or property from a customer;

(g) The term "Sponsor" means: a plan sponsor as described in section 3(16)(B) of the Act and any affiliates;

(h) The term "Plan" means: any plan described in section 3(3) of the Act and/or section 4975(e)(1) of the Code;

(i) The term "Title II Only Plan" means: any plan described in section 4975(e)(1) of the Code which is not an employee benefit plan covered by Title I of the Act;

(j) The term "Delivered Security" means a security that is: (1) Listed on a national securities exchange (excluding OTC Bulletin Board-eligible securities and Pink Sheets-quoted securities); (2) a US Treasury obligation; (3) a fixed income security that has a rating at the time of the exchange that is in one of the two highest generic rating categories from an independent nationally recognized statistical rating organization (*e.g.*, a highly rated municipal bond or a highly rated corporate bond); or (4) a certificate of deposit insured by the Federal Deposit Insurance Corporation. Notwithstanding the above, the term "Delivered Security" shall not include any Auction Rate Security, or any related Auction Rate Security, including derivatives or securities materially comprised of Auction Rate Securities or any illiquid securities.

Effective Date: If granted, this proposed exemption will be effective as of February 1, 2008.

Summary of Facts and Representations

1. The Applicant is UBS Financial Services Inc. and its affiliates (hereinafter, either "UBS" or the "Applicant"). UBS is a financial institution whose businesses provide a wide range of financial services to both consumer and corporate customers around the world. As of December 31, 2007, UBS Wealth Management US and its subsidiaries had total consolidated assets of approximately $741 billion. UBS has approximately 8,220 financial advisors, located in approximately 484 offices across the United States, who serve approximately 2 million client relationships. In the ordinary course of its business, UBS provides a range of financial services to Title II Only Plans and pension, profit sharing, and 401(k) plans qualified under section 401(a) of the Code under which some or all of the participants are employees described in section 401(c) of the Code. Among other things, UBS acts as a broker and dealer with respect to the purchase and sale of securities, including Auction Rate Securities. The Applicant describes Auction Rate Securities and the arrangement by which ARS are bought and sold as follows. Auction Rate Securities are securities (issued as debt or preferred stock) with an interest rate or dividend that is reset at periodic intervals pursuant to a process called a Dutch Auction. Investors submit orders to buy, hold, or sell a specific ARS to a broker-dealer selected by the entity that issued the ARS. The broker-dealers, in turn, submit all of these orders to an auction agent. The auction agent's functions include collecting orders from all participating broker-dealers by the auction deadline, determining the amount of securities available for sale,

[32] This proposed exemption does not address tax issues. The Department has been informed by the Internal Revenue Service (the Service) and the Department of the Treasury that they are considering providing limited relief from the requirements of sections 72(t)(4), 401(a)(9), and 4974 of the Code with respect to retirement plans that hold Auction Rate Securities. The Department has also been informed by the Service that if Auction Rate Securities are purchased from a Plan in a transaction described in Sections I and II at a price that exceeds the fair market value of those securities, then the excess value would be treated as a contribution for purposes of applying applicable contribution and deduction limits under sections 219, 404, 408, and 415 of the Code.

[33] The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 of the Act requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a Plan fiduciary must act prudently with respect to, among other things: (1) The decision to exchange an Auction Rate Security for a Delivered Security; and (2) the negotiation of the terms of such exchange (or a cash sale or loan described above), including the pricing of such securities. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the proposed transactions, to fully understand the risks associated with these types of transactions following disclosure by UBS of all relevant information.

and organizing the bids to determine the winning bid. If there are any buy orders placed into the auction at a specific rate, the auction agent accepts bids with the lowest rate above any applicable minimum rate and then successively higher rates up to the maximum applicable rate, until all sell orders and orders that are treated as sell orders are filled. Bids below any applicable minimum rate or above the applicable maximum rate are rejected. After determining the clearing rate for all of the securities at auction, the auction agent allocates the ARS available for sale to the participating broker-dealers based on the orders they submitted. If there are multiple bids at the clearing rate, the auction agent will allocate securities among the bidders at such rate on a pro-rata basis.

2. The Applicant states that UBS is permitted, but not obligated, to submit orders in auctions for its own account either as a bidder or a seller and routinely does so in the auction rate securities market in its sole discretion. UBS may routinely place one or more bids in an auction for its own account to acquire ARS for its inventory, to prevent: (a) A failed auction (*i.e.*, an event where there are insufficient clearing bids which would result in the auction rate being set at a specified rate); or (b) an auction from clearing at a rate that UBS believes does not reflect the market for the particular ARS being auctioned.

3. The Applicant states that for many ARS, UBS has been appointed by the issuer of the securities to serve as a dealer in the auction and is paid by the issuer for its services. UBS is typically appointed to serve as a dealer in the auctions pursuant to an agreement between the issuer and UBS. That agreement provides that UBS will receive from the issuer auction dealer fees based on the principal amount of the securities placed through UBS.

4. The Applicant states further that UBS may share a portion of the auction rate dealer fees it receives from the issuer with other broker-dealers that submit orders through UBS, for those orders that UBS successfully places in the auctions. Similarly, with respect to ARS for which broker-dealers other than UBS act as dealer, such other broker-dealers may share auction dealer fees with UBS for orders submitted by UBS.

5. According to the Applicant, since February 2008, a minority of auctions have cleared, particularly involving municipalities. As a result, Plans holding Auction Rate Securities may not have sufficient liquidity to make benefit payments, mandatory payments and withdrawals and expense payments when due.[34]

6. The Applicant represents that, in certain instances, UBS may have previously advised or otherwise caused a Plan to acquire and hold an Auction Rate Security and thus may be considered a fiduciary to the Plan so that a loan to the Plan by UBS may violate sections 406(a) and (b) of the Act; in addition, a sale between a Plan and its sponsor or a Title II Only Plan and its Beneficial Owner violates section 406 of the Act and/or section 4975(c)(1) of the Code.[35] The Applicant is therefore requesting relief for the following transactions, involving all Plans, effective February 1, 2008: (a) The sale or exchange of an Auction Rate Security from a Plan to the Plan's Sponsor; and (b) a lending of money or other extension of credit to a Plan in connection with the holding of an Auction Rate Security from: UBS, an Introducing Broker, or a Clearing Broker, where the subsequent repayment of the loan is made in accordance with its terms and is guaranteed by the Sponsor.

7. The Applicant is requesting similar relief for Title II Only Plans, also effective February 1, 2008. In this regard, the Applicant is requesting relief for: (a) The sale or exchange of an Auction Rate Security from a Title II Only Plan to the Beneficial Owner of such Plan; and (b) a lending of money or other extension of credit to a Title II Only Plan in connection with the holding of an Auction Rate Security from: UBS; an Introducing Broker; or a Clearing Broker; where the subsequent repayment of the loan is made in accordance with its terms and is guaranteed by the Beneficial Owner.

8. The Applicant represents that the transactions have been or will be in the interests of the Plans. In this regard, the Applicant states that the exemption, if granted, will provide Plan fiduciaries with liquidity notwithstanding changes that occurred in the Auction Rate Securities markets. The Applicant also notes that, other than for Plans sponsored by the Applicant, the decision to enter into a transaction described herein has been made or will be made by a Plan fiduciary which is independent of UBS.

9. The proposed exemption contains a number of safeguards designed to protect the interests of each Plan. With respect to the sale of an Auction Rate Security by a Plan, the Plan must receive cash equal to the par value of the Security, plus any accrued interest. The sale must also be unconditional, other than being for payment against prompt delivery. For in-kind exchanges covered by the proposed exemption, the security delivered to the Plan (*i.e.*, the Delivered Security) must be: (a) Listed on a national securities exchange (excluding OTC Bulletin Board-eligible securities and Pink Sheets-quoted securities); (b) a US Treasury obligation; (c) a fixed income security that has a rating at the time of the exchange that is in one of the two highest generic rating categories from an independent nationally recognized statistical rating organization (*e.g.*, a highly rated municipal bond or a highly rated corporate bond); or (d) a certificate of deposit insured by the Federal Deposit Insurance Corporation. The Delivered Security must also be appropriate for the Plan, and a security that the Plan is permitted to hold under applicable law. The proposed exemption further requires that the Delivered Security be valued at its fair market value, as determined at the time of the exchange from a third party pricing service or other objective source, and must equal the total value of the Auction Rate Security being exchanged (*i.e.*, par value, plus any accrued interest).

10. With respect to a loan to a Plan holding an Auction Rate Security, such loan must be documented in a written agreement containing all of the material terms of the loan, including the consequences of default. Further, the Plan may not pay an interest rate that exceeds one of the following three rates as of the commencement of the loan: The coupon rate for the Auction Rate Security; the Federal Funds Rate; or the Prime Rate. Additionally, such loan must be unsecured and for an amount that is no more than the total par value of Auction Rate Securities held by the affected Plan.

11. Additional conditions apply to each transaction covered by the exemption, if granted. Among other things, the Plan may not pay any fees or commissions in connection with the transaction and the transaction may not be part of an arrangement, agreement, or understanding designed to benefit a party in interest. The exemption expressly prohibits any waiver of rights

[34] The Department notes that Prohibited Transaction Exemption 80–26 (45 FR 28545 (April 29, 1980), as amended at 71 FR 17917 (April 7, 2006)) permits interest-free loans or other extensions of credit from a party in interest to a Plan if, among other things, the proceeds of the loan or extension of credit are used only: (1) For the payment of ordinary operating expenses of the Plan, including the payment of benefits in accordance with the terms of the Plan and periodic premiums under an insurance or annuity contract, or (2) for a purpose incidental to the ordinary operation of the Plan.

[35] The relief contained in this proposed exemption does not extend to the fiduciary provisions of section 404 of the Act.

or claims by a Plan in connection with the sale or exchange of an Auction Rate Security by such Plan, or a lending of money or other extension of credit to a Plan holding an Auction Rate Security.

12. In summary, the Applicant represents that the transactions described herein have satisfied or will satisfy the statutory criteria for an exemption set forth in section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) Any sale has been or will be:

(1) For no consideration other than cash payment against prompt delivery of the Auction Rate Security; and

(2) At par, plus any accrued but unpaid interest;

(b) Any in-kind exchange has been or will be unconditional, other than being for payment against prompt delivery, and has involved or will involve Delivered Securities that are:

(1) Appropriate for the Plan;

(2) Listed on a national securities exchange (but not OTC Bulletin Board-eligible securities and Pink Sheets-quoted securities); U.S. Treasury obligations; fixed income securities; or certificates of deposit; and

(3) Securities that the Plan is permitted to hold under applicable law; and,

(c) Any loan has been or will be:

(1) Documented in a written agreement containing all of the material terms of the loan, including the consequences of default;

(2) At an interest rate not in excess of: The coupon rate for the Auction Rate Security, the Federal Funds Rate, or the Prime Rate;

(3) Unsecured; and

(4) For an amount that is not more than the total par value of Auction Rate Securities held by the affected Plan.

Notice to Interested Persons

The Applicant represents that the potentially interested participants and beneficiaries cannot all be identified, and, therefore, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Brian Shiker of the Department, telephone (202) 693–8552. (This is not a toll-free number.)

Deutsche Bank AG and Its Affiliates (together, Deutsche Bank or the Applicant), Located in New York, New York, [Application Number D–11518].

Proposed Exemption

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).[36]

Section I. Sales of Auction Rate Securities From Plans to Deutsche Bank: Unrelated to a Settlement Agreement

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan (as defined in Section V(e)) of an Auction Rate Security (as defined in Section V(c)) to Deutsche Bank, where such sale (an Unrelated Sale) is unrelated to, and not made in connection with, a Settlement Agreement (as defined in Section V(f)), provided that the conditions set forth in Section II have been met.

Section II. Conditions Applicable to Transactions Described in Section I

(a) The Plan acquired the Auction Rate Security in connection with brokerage or advisory services provided by Deutsche Bank;

(b) The last auction for the Auction Rate Security was unsuccessful;

(c) Except in the case of a Plan sponsored by Deutsche Bank for its own employees (a Deutsche Bank Plan), the Unrelated Sale is made pursuant to a written offer by Deutsche Bank (the Offer) containing all of the material terms of the Unrelated Sale, including, but not limited to the most recent rate information for the Auction Rate Security (if reliable information is available). Either the Offer or other materials available to the Plan provide the identity and par value of the Auction Rate Security. Notwithstanding the foregoing, in the case of a pooled fund maintained or advised by Deutsche Bank, this condition shall be deemed met to the extent each Plan invested in the pooled fund (other than a Deutsche Bank Plan) receives written notice regarding the Unrelated Sale, where such notice contains the material terms of the Unrelated Sale (including, but not limited to, the material terms described in the preceding sentence);

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends;

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

(g) The decision to accept the Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or IRA owner who is independent (as defined in Section V(d)) of Deutsche Bank. Notwithstanding the foregoing: (1) In the case of an individual retirement account (an IRA, as described in Section V(e) below) which is beneficially owned by an employee, officer, director or partner of Deutsche Bank, the decision to accept the Offer or retain the Auction Rate Security may be made by such employee, officer, director or partner; or (2) in the case of a Deutsche Bank Plan or a pooled fund maintained or advised by Deutsche Bank, the decision to accept the Offer may be made by Deutsche Bank after Deutsche Bank has determined that such purchase is in the best interest of the Deutsche Bank Plan or pooled fund;[37]

(h) Except in the case of a Deutsche Bank Plan or a pooled fund maintained or advised by Deutsche Bank, neither Deutsche Bank nor any affiliate exercises investment discretion or renders investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to the decision to accept the Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) Deutsche Bank and its affiliates, as applicable, maintain, or cause to be

[36] For purposes of this proposed exemption, references to section 406 of ERISA should be read, unless otherwise specified, to refer to the corresponding provisions of ection 4975 of the Code.

[37] The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things, the decision to sell the Auction Rate Security to Deutsche Bank for the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the proposed transactions, to fully understand the risks associated with this type of transaction following disclosure by Deutsche Bank of all relevant information.

maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(1), to determine whether the conditions of this exemption, if granted, have been met, except that—

(1) No party in interest with respect to a Plan which engages in an Unrelated Sale, other than Deutsche Bank and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(1); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Deutsche Bank or its affiliates, as applicable, such records are lost or destroyed prior to the end of the six-year period;

(l)(1) Except as provided below in paragraph (l)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (k) are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the U.S. Securities and Exchange Commission; or

(B) Any fiduciary of any Plan, including any IRA owner, that engages in a Sale, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the Unrelated Sale, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraph (l)(1)(B)–(C) shall be authorized to examine trade secrets of Deutsche Bank, or commercial or financial information which is privileged or confidential; and

(3) Should Deutsche Bank refuse to disclose information on the basis that such information is exempt from disclosure, Deutsche Bank shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section III. Sales of Auction Rate Securities From Plans to Deutsche Bank: Related to a Settlement Agreement

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan of an Auction Rate Security to Deutsche Bank, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement Agreement, provided that the conditions set forth in Section IV have been met.

Section IV. Conditions Applicable to Transactions Described in Section III

(a) The terms and delivery of the Offer are consistent with the requirements set forth in the Settlement Agreement;

(b) The Offer or other documents available to the Plan specifically describe, among other things:

(1) How a Plan may determine: The Auction Rate Securities held by the Plan with Deutsche Bank, the purchase dates for the Auction Rate Securities, and (if reliable information is available) the most recent rate information for the Auction Rate Securities;

(2) The number of shares and par value of the Auction Rate Securities available for purchase under the Offer;

(3) The background of the Offer;

(4) That participating in the Offer will not result in or constitute a waiver of any claim of the tendering Plan;

(5) The methods and timing by which Plans may accept the Offer;

(6) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Offer;

(7) The timing for acceptance by Deutsche Bank of tendered Auction Rate Securities;

(8) The timing of payment for Auction Rate Securities accepted by Deutsche Bank for payment;

(9) The methods and timing by which a Plan may elect to withdraw tendered Auction Rate Securities from the Offer;

(10) The expiration date of the Offer;

(11) The fact that Deutsche Bank may make purchases of Auction Rate Securities outside of the Offer and may otherwise buy, sell, hold or seek to restructure, redeem or otherwise dispose of the Auction Rate Securities;

(12) A description of the risk factors relating to the Offer as Deutsche Bank deems appropriate;

(13) How to obtain additional information concerning the Offer; and

(14) The manner in which information concerning material amendments or changes to the Offer will be communicated to affected Plans.

(c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and

(d) All of the conditions in Section II have been met.

Section V. Definitions

For purposes of this proposed exemption:

(a) The term "affiliate" means: Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

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

(c) The term "Auction Rate Security" means a security that:

(1) Is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and

(2) Has an interest rate or dividend that is reset at specific intervals through a Dutch auction process;

(d) A person is "independent" of Deutsche Bank if the person is: (1) Not Deutsche Bank or an affiliate; and (2) not a relative (as defined in ERISA section 3(15)) of the party engaging in the transaction;

(e) The term "Plan" means: An individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of ERISA; or an entity holding plan assets within the meaning of 29 CFR 2510.3–101, as modified by ERISA section 3(42); and

(f) The term "Settlement Agreement" means: A legal settlement involving Deutsche Bank and a U.S. state or federal authority that provides for the purchase of an Auction Rate Security by Deutsche Bank from a Plan.

Effective Date: If granted, this proposed exemption will be effective as of February 1, 2008.

Summary of Facts and Representations

1. Deutsche Bank AG is a German banking corporation and commercial bank that provides a wide range of services to various types of entities worldwide. Deutsche Bank AG's clients include a number of employee benefit plans. As of June 30, 2008, Deutsche Bank AG had 1.991 trillion euros ($2.95 trillion) in assets and 31.9 billion euros ($17.3 billion) in stockholder's equity.

Deutsche Bank AG is subject to a comprehensive system of regulatory oversight and a mandatory insurance program. With respect to regulatory and supervisory requirements, Deutsche Bank AG, its branches, and its subsidiary banks worldwide are subject to regulatory requirements and protections that are, qualitatively, at least equal to those imposed on U.S.-domiciled banks. Within the United States, the New York branch of Deutsche Bank AG and Deutsche Bank Trust Company Americas are regulated and supervised by the New York State Banking Department. In addition, certain activities of Deutsche Bank AG's New York branch and Deutsche Bank Trust Company Americas (the trustee of ERISA-covered bank collective trusts) are regulated and supervised by the Federal Reserve Bank of New York. With respect to Deutsche Bank AG itself, globally, the bank is regulated and supervised by the BaFin, in cooperation with the Bundesbank. The BaFin is a federal institution with ultimate responsibility to the German Ministry of Finance. The Bundesbank, in turn, is the central bank of the Federal Republic of Germany and a part of the European System of Central Banks. The applicant notes that the U.S. Department of Treasury has accorded national treatment to German bank branches, and the German Ministry of finance has granted relief to branches of U.S. banks in Germany, in particular with respect to "dotation" or endowment capital requirements and capital adequacy standards.

2. The Applicant describes Auction Rate Securities (ARS) and the arrangement by which ARS are bought and sold as follows. ARS are securities (issued as debt or preferred stock) with an interest rate or dividend that is reset at periodic intervals pursuant to a process called a Dutch Auction. Investors submit orders to buy, hold, or sell a specific ARS to a broker-dealer selected by the entity that issued the ARS. The broker-dealers, in turn, submit all of these orders to an auction agent. The auction agent's functions include collecting orders from all participating broker-dealers by the auction deadline, determining the amount of securities available for sale, and organizing the bids to determine the winning bid. If there are any buy orders placed into the auction at a specific rate, the auction agent accepts bids with the lowest rate above any applicable minimum rate and then successively higher rates up to the maximum applicable rate, until all sell orders and orders that are treated as sell orders are filled. Bids below any applicable minimum rate or above the applicable maximum rate are rejected. After determining the clearing rate for all of the securities at auction, the auction agent allocates the ARS available for sale to the participating broker-dealers based on the orders they submitted. If there are multiple bids at the clearing rate, the auction agent will allocate securities among the bidders at such rate on a pro-rata basis.

3. The Applicant states that, under a typical Dutch Auction process, Deutsche Bank AG is permitted, but not obligated, to submit orders in auctions for its own account either as a bidder or a seller and routinely does so in the auction rate securities market in its sole discretion. Deutsche Bank AG may place one or more bids in an auction for its own account to acquire ARS for its inventory, to prevent: (a) A failed auction (*i.e.,* an event where there are insufficient clearing bids which would result in the auction rate being set at a specified rate, resulting in no ARS being sold through the auction process); or (b) an auction from clearing at a rate that Deutsche Bank AG believes does not reflect the market for the particular ARS being auctioned.

4. The Applicant states that for many ARS, Deutsche Bank AG has been appointed by the issuer of the securities to serve as a dealer in the auction and is paid by the issuer for its services. Deutsche Bank AG is typically appointed to serve as a dealer in the auctions pursuant to an agreement between the issuer and Deutsche Bank AG. That agreement provides that Deutsche Bank AG will receive from the issuer auction dealer fees based on the principal amount of the securities placed through Deutsche Bank AG.

5. The Applicant states further that Deutsche Bank AG may share a portion of the auction rate dealer fees it receives from the issuer with other broker-dealers that submit orders through Deutsche Bank AG, for those orders that Deutsche Bank AG successfully places in the auctions. Similarly, with respect to ARS for which broker-dealers other than Deutsche Bank AG act as dealer, such other broker-dealers may share auction dealer fees with Deutsche Bank AG for orders submitted by Deutsche Bank AG.

6. Since February 2008, the Applicant knows of no auctions that have been successful. According to the Applicant, the current state of the ARS market is virtually nonexistent. As a result, Plans holding ARS may not have sufficient liquidity to make benefit payments, mandatory payments and withdrawals and expense payments when due.[38]

7. The Applicant represents that, in certain instances, Deutsche Bank AG may have previously advised or otherwise caused a Plan to acquire and hold an ARS.[39] In connection with Deutsche Bank AG's role in the acquisition and holding of ARS by various Deutsche Bank AG clients, including the Plans, Deutsche Bank AG entered into Settlement Agreements with certain U.S. states and federal authorities. Pursuant to these Settlement Agreements, among other things, Deutsche Bank AG was required to send a written offer to certain Plans that held ARS in connection with the advice and/or brokerage services provided by Deutsche Bank AG. As described in further detail below, eligible Plans that accepted the Offer were permitted to sell the ARS to Deutsche Bank AG for cash equal to the par value of such securities, plus any accrued interest and/or dividends. According to the Applicant, as of Monday, October 26, 2009, in connection with Offers issued by Deutsche Bank AG pursuant to the Settlement Agreement, Deutsche Bank AG has purchased approximately $4,750,000 dollars in ARS from IRAs and $725,000 in ARS from Plans subject to Title I of ERISA. The Applicant states that, prospectively, additional shares of ARS may be tendered by Plans to Deutsche Bank AG pursuant to an Offer issued by Deutsche Bank AG pursuant to a Settlement Agreement.

Accordingly, the Applicant is requesting retroactive and prospective relief for the Settlement Sales. With respect to Unrelated Sales, the Applicant states that to the best of its knowledge, as of June 30, 2009, no Unrelated Sale has occurred. However, the Applicant is requesting retroactive relief (and prospective relief) for Unrelated Sales in the event that a sale of ARS by a Plan to Deutsche Bank AG has occurred outside the Settlement process. If granted, the exemption would be effective as of February 1, 2008.

8. Specifically, the Applicant is requesting exemptive relief for the sale of ARS under two different circumstances: (a) Where Deutsche Bank AG initiates the sale by sending to a Plan a written Offer to acquire the ARS,

[38] The Department notes that Prohibited Transaction Exemption 80–26 (45 FR 28545 (April 29, 1980), as amended at 71 FR 17917 (April 7, 2006)) permits interest-free loans or other extensions of credit from a party in interest to a plan if, among other things, the proceeds of the loan or extension of credit are used only: (1) For the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or (2) for a purpose incidental to the ordinary operation of the plan.

[39] The relief contained in this proposed exemption does not extend to the fiduciary provisions of section 404 of the Act.

notwithstanding that such Offer is not required under a Settlement Agreement (*i.e.,* an Unrelated Sale); and (b) where Deutsche Bank AG is required under a Settlement Agreement to send to Plans a written Offer to acquire the ARS (*i.e.,* a Settlement Sale). The Applicant states that the Unrelated Sales and Settlement Sales (hereinafter, either, a Covered Sale) are in the interests of Plans. In this regard, the Applicant states that the Covered Sales would permit Plans to normalize Plan investments. The Applicant represents that each Covered Sale will be for no consideration other than cash payment against prompt delivery of the ARS, and such cash will equal the par value of the ARS, plus any accrued but unpaid interest or dividends. The Applicant represents further that Plans will not pay any commissions or transaction costs with respect to any Covered Sale.

9. The Applicant represents that the proposed exemption is protective of the Plans. The Applicant states that, except in the case of a Plan sponsored by Deutsche Bank AG for its own employees (a Deutsche Bank AG Plan): Each Covered Sale will be made pursuant to a written Offer; and the decision to accept the Offer or retain the ARS will be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Deutsche Bank AG.

Additionally, each Offer will be delivered in a manner designed to alert a Plan fiduciary that Deutsche Bank AG intends to purchase ARS from the Plan. In connection with an Unrelated Sale, the Offer will describe the material terms of the Unrelated Sale, including the most recent rate information for the ARS (if reliable information is available). Either the Offer or other materials available to the Plan will provide the identity and par value of the ARS. Offers made in connection with a Settlement Agreement will specifically include, among other things: the background of the Offer; the method and timing by which a Plan may accept the Offer; the expiration date of the Offer; a description of certain risk factors relating to the Offer; how to obtain additional information concerning the Offer; and the manner in which information concerning material amendments or changes to the Offer will be communicated to affected Plans. The Applicant states that, except in the case of a Deutsche Bank AG Plan or a pooled fund maintained or advised by Deutsche Bank AG, neither Deutsche Bank AG nor any affiliate will exercise investment discretion or render investment advice with respect to a Plan's decision to accept the Offer or retain the ARS.[40] In the case of a Deutsche Bank AG Plan or a pooled fund maintained or advised by Deutsche Bank AG, the decision to engage in a Covered Sale may be made by Deutsche Bank AG after Deutsche Bank AG has determined that such purchase is in the best interest of the Deutsche Bank AG Plan or pooled fund. The Applicant represents further that Plans will not waive any rights or claims in connection with any Covered Sale.

10. The Applicant represents that the proposed exemption, if granted, would be administratively feasible. In this regard, the Applicant notes that each Covered Sale will occur at the par value of the affected ARS, plus any accrued but unpaid interest or dividends, and such value is readily ascertainable. The Applicant represents further that Deutsche Bank AG will maintain the records necessary to enable the Department and Plan fiduciaries, among others, to determine whether the conditions of this exemption, if granted, have been met.

11. In summary, the Applicant represents that the transactions described herein satisfy the statutory criteria of section 408(a) of the Act because, among other things:

(a) Except in the case of a Deutsche Bank AG Plan, each Covered Sale shall be made pursuant to a written Offer;

(b) Each Covered Sale shall be for no consideration other than cash payment against prompt delivery of the ARS;

(c) The amount of each Covered Sale shall equal the par value of the ARS, plus any accrued but unpaid interest or dividends;

(d) Plans will not waive any rights or claims in connection with any Covered Sale;

(e) Except in the case of a Deutsche Bank AG Plan or a pooled fund maintained or advised by Deutsche Bank AG:

(1) The decision to accept an Offer or retain the ARS shall be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Deutsche Bank AG; and

(2) Neither Deutsche Bank AG nor any affiliate shall exercise investment discretion or render investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to the decision to accept the Offer or retain the ARS;

(f) Plans shall not pay any commissions or transaction costs with respect to any Covered Sale;

(g) A Covered Sale shall not be part of an arrangement, agreement or understanding designed to benefit a party in interest to the affected Plan;

(h) With respect to any Settlement Sale, the terms and delivery of the Offer, and the terms of Settlement Sale, shall be consistent with the requirements set forth in the Settlement Agreement;

(i) Deutsche Bank AG shall make available in connection with an Unrelated Sale the material terms of the Unrelated Sale, including the most recent rate information for the ARS (if reliable information is available), and the identity and par value of the ARS;

(j) Each Offer made in connection with a Settlement Agreement shall describe the material terms of the Settlement Sale, including the following:

(1) Information regarding how the Plan can determine: The ARS held by the Plan with Deutsche Bank AG, the number of shares and par value of the ARS, purchase dates for such ARS, and (if reliable information is available) the most recent rate information for the ARS;

(2) The background of the Offer;

(3) That participating in the Offer will not result in or constitute a waiver of any claim of the tendering Plan;

(4) The methods and timing by which the Plan may accept the Offer;

(5) The purchase dates, or the manner of determining the purchase dates, for ARS pursuant to the Offer;

(6) The timing for acceptance by Deutsche Bank AG of tendered ARS;

(7) The timing of payment for ARS accepted by Deutsche Bank AG for payment;

(8) The methods and timing by which a Plan may elect to withdraw tendered ARS from the Offer;

(9) The expiration date of the Offer;

(10) The fact that Deutsche Bank AG may make purchases of ARS outside of the Offer and may otherwise buy, sell, hold or seek to restructure, redeem or otherwise dispose of the ARS;

(11) A description of the risk factors relating to the Offer as Deutsche Bank AG deems appropriate;

(12) How to obtain additional information concerning the Offer; and

(13) The manner in which information concerning material amendments or changes to the Offer will be communicated to affected Plans.

Notice to Interested Persons

The Applicant represents that the potentially interested participants and beneficiaries cannot all be identified and therefore the only practical means of notifying such participants and beneficiaries of this proposed

[40] The Applicant states that while there may be communication between a Plan and Deutsche Bank subsequent to an Offer, such communication will not involve advice regarding whether the Plan should accept the Offer.

exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Warren Blinder of the Department, telephone (202) 693–8553. (This is not a toll-free number.)

Morgan Stanley & Co. Inc. and its current and future affiliates and subsidiaries (Morgan Stanley) and Union Bank, N.A. and its affiliates (Union Bank), located in New York, NY and San Francisco, CA., [Application No. D–11521].

Proposed Exemption

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).

Section I—Transactions

If the exemption is granted, effective October 1, 2008, the restrictions of section 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to:

(a) The lending of securities to:

(1) Morgan Stanley & Co. Incorporated, and its successors (MS&Co.) and Union Bank, N.A., and its successors (UB);

(2) Any current or future affiliate of MS&Co. or UB,[41] that is a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940, that is supervised by the U.S. or a state, any broker-dealer registered under the Securities Exchange Act of 1934 (the "1934 Act"), or any foreign affiliate that is a bank or broker-dealer that is supervised by (i) the Securities and Futures Authority ("SFA") in the United Kingdom; (ii) the Bundesanstalt fur Finanzdienstleistungsaufsicht (the "BAFin") in Germany; (iii) the Ministry of Finance ("MOF") and/or the Tokyo Stock Exchange in Japan; (iv) the Ontario Securities Commission, the Investment Dealers Association and/or the Office of Superintendent of Financial Institutions in Canada; (v) the Swiss Federal Banking Commission in Switzerland; (vi) the Reserve Bank of Australia or the Australian Securities and Investments Commission and/or Australian Stock Exchange Limited in Australia; (vii) the Commission Bancaire ("CB"), the Comite des Establissements de Credit et des Enterprises d'Investissement (CECEI) and the Autorite des Marches Financiers ("AMF") in France; and (viii) the Swedish Financial Supervisory Authority ("SFSA") in Sweden (the branches and/or affiliates in the enumerated foreign countries hereinafter referred to as the "Foreign Affiliates") and together with their U.S. branches or U.S. affiliates (individually, "Affiliated Borrower" and collectively, "Affiliated Borrowers"), by employee benefit plans, including commingled investment funds holding plan assets (the Client Plans or Plans),[42] for which MS&Co., UB or an affiliate of either acts as securities lending agent or subagent (the "Lending Agent"),[43] and also may serve as directed trustee or custodian of securities being lent, or for which a subagent is appointed by the Lending Agent, which subagent is either (I) a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 or a broker-dealer registered under the 1934 Act, (i) which has, as of the last day of its most recent fiscal year, equity capital in excess of $100 million and (ii) which annually exercises discretionary authority to lend securities on behalf of clients equal to at least $1 billion; or (II) an investment adviser registered under the Investment Advisers Act of 1940, (i) which has, as of the last day of its most recent fiscal year, equity capital in excess of $1 million and (ii) which annually exercises discretionary authority to lend securities on behalf of clients equal to at least $1 billion (each, a "Lending Subagent"); and

(b) The receipt of compensation by the Lending Agent and the Lending Subagent in connection with these transactions.

Section II—Conditions

Section I of this exemption applies only if the conditions of Section II are satisfied. For purposes of this exemption, any requirement that the approving fiduciary be independent of MS&Co., UB, and their affiliates shall not apply in the case of an employee benefit plan sponsored and maintained by the Lending Agent and/or an affiliate for its own employees (an Affiliated Plan) invested in a Commingled Fund, provided that at all times the holdings of all Affiliated Plans in the aggregate comprise less than 10% of the assets of the Commingled Fund.

(a) For each Client Plan, neither MS&Co., UB, nor any of their affiliates has or exercises discretionary authority or control with respect to the investment of the assets of Client Plans involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets, including decisions concerning a Client Plan's acquisition or disposition of securities available for loan.

(b) Any arrangement for the Lending Agent to lend securities is approved in advance by a Plan fiduciary who is independent of MS&Co., UB, and their affiliates (the Independent Fiduciary). Notwithstanding the foregoing, section II(b) shall be deemed satisfied with respect to loans of securities by Client Plans to MS&Co. or a U.S. affiliate (Morgan Stanley Affiliated Borrower) by UB as Lending Agent or Lending Subagent that were outstanding as of October 1, 2008 (the Existing Loans), provided (i) no later than April 1, 2009, UB provided to Client Plans with Existing Loans a description of the general terms of the securities loan agreements between such Client Plans and the Morgan Stanley Affiliated Borrowers, and (ii) at the time of providing such information, UB notified each such Client Plan that if the Client Plan did not approve the continued lending of securities to Morgan Stanley by May 11, 2009, UB would terminate the loans and cease to make any new securities loans on behalf of that Client Plan to Morgan Stanley.

(c) The specific terms of the securities loan agreement (the Loan Agreement) are negotiated by the Lending Agent which acts as a liaison between the Lender and the Affiliated Borrower to facilitate the securities lending transaction. In the case of a Separate Account, the Independent Fiduciary of a Client Plan approves the general terms of the Loan Agreement between the

[41] Any reference to MS&Co. or UB shall be deemed to include any successors thereto.

[42] The common and collective trust funds for which MS&Co., UB or an affiliate act as directed trustee or custodian, and in which Client Plans invest, are referred to herein as "Commingled Funds." The Client Plan separate accounts for which MS&Co., UB or an affiliate act as directed trustee or custodian are referred to herein as "Separate Accounts." Commingled Funds and Separate Accounts are collectively referred to herein as "Lender" or "Lenders."

[43] MS&Co., UB or an affiliate may be retained by primary securities lending agents to provide securities lending services in a sub-agent capacity with respect to portfolio securities of clients of such primary securities lending agents. As a securities lending sub-agent, MS&Co.'s or UB's role parallels that under the lending transactions for which MS&Co., UB or an affiliate acts as a primary securities lending agent on behalf of its clients. References to MS&Co.'s or UB's performance of services as securities lending agent should be deemed to include its parallel performance as a securities lending sub-agent and references to the Client Plans should be deemed to include those plans for which the Lending Agent is acting as a sub-agent with respect to securities lending, unless otherwise specifically indicated or by the context of the reference.

Client Plan and the Affiliated Borrower as well as any material change in such Loan Agreement. In the case of a Commingled Fund, approval is pursuant to the procedure described in paragraph (i), below.

(d) The terms of each loan of securities by a Lender to an Affiliated Borrower are at least as favorable to such Separate Account or Commingled Fund as those of a comparable arm's-length transaction between unrelated parties.

(e) A Client Plan, in the case of a Separate Account, may terminate the lending agency or sub-agency arrangement at any time, without penalty, on five business days notice. A Client Plan in the case of a Commingled Fund may terminate its participation in the lending arrangement by terminating its investment in the Commingled Fund no later than 35 days after the notice of termination of participation is received, without penalty to the Plan, in accordance with the terms of the Commingled Fund. Upon termination, the Affiliated Borrowers will transfer securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Separate Account or, if the Plan's withdrawal necessitates a return of securities, to the Commingled Fund within:

(1) The customary delivery period for such securities;

(2) Five business days; or

(3) The time negotiated for such delivery by the Client Plan, in a Separate Account, or by the Lending Agent, as lending agent to a Commingled Fund, and the Affiliated Borrowers, whichever is least.

(f) The Separate Account, Commingled Fund or another custodian designated to act on behalf of the Client Plan, receives from each Affiliated Borrower (either by physical delivery, book entry in a securities depository located in the United States, wire transfer or similar means) by the close of business on or before the day the loaned securities are delivered to the Affiliated Borrower, collateral consisting of U.S. currency, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank, other than Morgan Stanley or Union Bank (or any subsequent parent corporation of the Lending Agent) or an affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption (PTE) 2006–16 (71 FR 63786, October 31, 2006) (as it may be amended or superseded) (collectively, the Collateral).[44] The Collateral will be held on behalf of a Client Plan in a depository account separate from the Affiliated Borrower.

(g) The market value (or in the case of a letter of credit, a stated amount) of the Collateral on the close of business on the day preceding the day of the loan is initially equal at least to the percentage required by PTE 2006–16 (as amended or superseded) but in no case less than 102 percent of the market value of the loaned securities. The applicable Loan Agreement gives the Separate Account or the Commingled Fund in which the Client Plan has invested a continuing security interest in, and a lien on or title to, the Collateral. The level of the Collateral is monitored daily by the Lending Agent. If the market value of the Collateral, on the close of trading on a business day, is less than 100 percent of the market value of the loaned securities at the close of business on that day, the Affiliated Borrower is required to deliver, by the close of business on the next day, sufficient additional Collateral such that the market value of the Collateral will again equal 102 percent or the percentage otherwise required by PTE 2006–16 (as amended or superseded).

(h)(1) For a Lender that is a Separate Account, prior to entering into a Loan Agreement, the applicable Affiliated Borrower furnishes its most recently available audited and unaudited financial statements to the Lending Agent which will, in turn, provide such statements to the Client Plan before the Client Plan approves the terms of the Loan Agreement. The Loan Agreement contains a requirement that the applicable Affiliated Borrower must give prompt notice at the time of a loan of any material adverse changes in its financial condition since the date of the most recently furnished financial statements. If any such changes have taken place, the Lending Agent will not make any further loans to the Affiliated Borrower unless an Independent Fiduciary of the Client Plan in a Separate Account is provided notice of any material change and approves the continuation of the lending arrangement in view of the changed financial condition.

Notwithstanding the foregoing, section II(h)(1) shall be deemed satisfied with respect to the Existing Loans provided (i) UB provided to such Client Plans no later than April 1, 2009, the most recently available audited and unaudited financial statements of the Morgan Stanley Affiliated Borrower and notice of any material adverse change in financial condition since the date of the most recent financial statement being furnished to the Client Plans, and (ii) at the time of providing such information, UB notified each Client Plan that if the Client Plan did not approve the continued lending of securities to Morgan Stanley by May 11, 2009, UB would terminate the loans and cease to make any new securities loans on behalf of that Client Plan to Morgan Stanley.

(h)(2) For a Lender that is a Commingled Fund, the Lending Agent will furnish upon reasonable request to an Independent Fiduciary of each Client Plan invested in the Commingled Fund the most recently available audited and unaudited financial statements of the applicable Affiliated Borrower prior to authorization of lending, and annually thereafter.

(i) In the case of Commingled Funds, the information described in paragraph (c) (including any information with respect to any material change in the arrangement) shall be furnished by the Lending Agent as lending fiduciary to the Independent Fiduciary of each Client Plan whose assets are invested in the Commingled Fund, not less than 30 days prior to implementation of the arrangement or material change to the lending arrangement as previously described to the Client Plan, and thereafter, upon the reasonable request of the Client Plan's Independent Fiduciary. In the event of a material adverse change in the financial condition of an Affiliated Borrower, the Lending Agent will make a decision, using the same standards of credit analysis the Lending Agent would use in evaluating unrelated borrowers, whether to terminate existing loans and whether to continue making additional loans to the Affiliated Borrower.

In the event any such Independent Fiduciary submits a notice in writing within the 30-day period provided in the preceding paragraph to the Lending Agent, as lending fiduciary, objecting to the implementation of, material change in, or continuation of the arrangement, the Plan on whose behalf the objection was tendered is given the opportunity to

[44] PTE 2006–16 permits the use of certain types of foreign collateral if the lending fiduciary is a U.S. Bank or U.S. Broker-Dealer (as defined in the exemption) and such fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs which a plan may incur or suffer directly arising out of a borrower default. See PTE 2006–16, Section V(f)(5). The Department notes that the requirements of Section V(f)(5) of PTE 2006–16 must be satisfied in order for those types of collateral to be used in connection with this proposed exemption, if granted.

terminate its investment in the Commingled Fund, without penalty to the Plan, no later than 35 days after the notice of withdrawal is received. In the case of a Plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a Plan electing to withdraw. In the case of a Plan whose assets are proposed to be invested in the Commingled Fund subsequent to the implementation of the arrangement, the Plan's investment in the Commingled Fund shall be authorized in the manner described in paragraph (c).

(j) In return for lending securities, the Lender either—(1) Receives a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan; or

(2) Has the opportunity to derive compensation through the investment of cash Collateral. (Under such circumstances, the Lender may pay a loan rebate or similar fee to the Affiliated Borrowers, if such fee is not greater than the fee the Lender would pay in a comparable arm's-length transaction with an unrelated party.)

(k) Except as otherwise expressly provided herein, all procedures regarding the securities lending activities will, at a minimum, conform to the applicable provisions of PTE 2006–16, as amended or superseded, as well as to applicable securities laws of the United States, the United Kingdom, Canada, Australia, Switzerland, Japan, France, Sweden and Germany.

(l) If any event of default occurs, to the extent that (i) liquidation of the pledged Collateral or (ii) additional cash received from the Affiliated Borrower does not provide sufficient funds on a timely basis, the Client Plan will have the right to purchase securities identical to the borrowed securities (or their equivalent as discussed in paragraph (e) above) and apply the Collateral to the payment of the purchase price. If the Collateral is insufficient to accomplish such purchase, the Affiliated Borrower will indemnify the Client Plan invested in a Separate Account or Commingled Fund in the United States with respect to the difference between the replacement cost of the borrowed securities and the market value of the Collateral on the date the loan is declared in default, together with expenses incurred by the Client Plan plus applicable interest at a reasonable rate, including reasonable attorney's fees incurred by the Client Plan for legal action arising out of default on the loans, or failure by the Affiliated Borrower to properly indemnify the Client Plan. The Affiliated Borrower's indemnification will enable the Client Plan to collect on any indemnification from a U.S.-domiciled affiliate of the Affiliated Borrower.

(m) The Lender receives the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including but not limited to all interest and dividends on the loaned securities, shares of stock as a result of stock splits and rights to purchase additional securities, or other distributions.

(n) Prior to any Client Plan's approval of the lending of its securities to any Affiliated Borrower, a copy of the final exemption (if granted) and this notice of proposed exemption is provided to the Client Plan.

Notwithstanding the foregoing, effective October 1, 2008, through the publication date of the grant of this exemption in the **Federal Register**, section II(n) shall be deemed satisfied with respect to the Existing Loans, provided (i) UB provides to such Client Plans that have consented to securities lending prior to such publication date, a copy of the requested exemption and (ii) UB advises each such Client Plan that unless the Client Plan notifies UB to the contrary within 30 days, its consent to make loans to Morgan Stanley will be presumed.

(o) The Independent Fiduciary of each Client Plan that is invested in a Separate Account is provided with (including by electronic means) quarterly reports with respect to the securities lending transactions, including, but not limited to, the information described in Representation 40 of the Summary of Facts and Representations, so that the Independent Fiduciary may monitor such transactions with the Affiliated Borrower. The Independent Fiduciary invested in a Commingled Fund is provided with (including by electronic means) quarterly reports with respect to the securities lending transactions, including, but not limited to, the information described in Representation 40 of the Summary of Facts and Representations, so that the Independent Fiduciary may monitor such transactions with the Affiliated Borrower. The Lending Agent may, in lieu of providing the quarterly reports described in this paragraph (o) to each Independent Fiduciary of a Client Plan invested in a Commingled Fund, provide such Independent Fiduciary with the certification of an auditor selected by the Lending Agent who is independent of MS&Co, UB and their affiliates (but who may or may not be independent of the Client Plan) that the loans appear no less favorable to the Lender than the pricing established in the schedule described in the paragraph 29 of the Summary of Facts and Representations. Where the Independent Fiduciary of a Client Plan invested in a Commingled Fund is provided the certification of an auditor, such Independent Fiduciary shall be entitled to receive the quarterly reports upon request.

Notwithstanding the foregoing, section II(o) shall be deemed satisfied with respect to the Existing Loans provided UB provides to such Client Plans no later than July 31, 2009, the material described in section II(o) with respect to the period from October 1, 2008, through June 30, 2009.

(p) Only Client Plans with total assets having an aggregate market value of at least $50 million are permitted to lend securities to the Affiliated Borrowers; provided, however, that—

(1) In the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3–101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangement with the Lending Agent, the foregoing $50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of $50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million.

(2) In the case of two or more Client Plans which are not maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Lending Agent, the foregoing $50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of $50 million (excluding the assets of any Client Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of

corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(A) Has full investment responsibility with respect to plan assets invested therein; and

(B) Has total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million.

In addition, none of the entities described above are formed for the sole purpose of making loans of securities.

(q) With respect to any calendar quarter, at least 50 percent or more of the outstanding dollar value of securities loans negotiated on behalf of Lenders will be to borrowers unrelated to MS&Co., UB and their affiliates.

(r) In addition to the above, all loans involving foreign Affiliated Borrowers have the following requirements:

(1) The foreign Affiliated Borrower is a bank, supervised either by a state or the United States, a broker-dealer registered under the Securities Exchange Act of 1934 or a bank or broker-dealer that is supervised by (i) the SFA in the United Kingdom; (ii) the BAFin in Germany; (iii) the MOF and/or the Tokyo Stock Exchange in Japan; (iv) the Ontario Securities Commission, the Investment Dealers Association and/or the Office of Superintendent of Financial Institutions in Canada; (v) the Swiss Federal Banking Commission in Switzerland; and (vi) the Reserve Bank of Australia or the Australian Securities and Investments Commission and/or Australian Stock Exchange Limited in Australia; (vii) the CB, the CECEI, and the AMF in France; and (viii) the SFSA in Sweden;

(2) The foreign Affiliated Borrower is in compliance with all applicable provisions of Rule 15a–6 under the Securities Exchange Act of 1934 (17 CFR 240.15a–6) (Rule 15a–6) which provides foreign broker-dealers a limited exemption from United States registration requirements;

(3) All Collateral is maintained in United States dollars or U.S. dollar-denominated securities or letters of credit (unless an applicable exemption provides otherwise);

(4) All Collateral is held in the United States and the situs of the securities lending agreements is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)–1 related to the lending of securities; and

(5) Prior to a transaction involving a foreign Affiliated Borrower, the foreign Affiliated Borrower—

(A) Agrees to submit to the jurisdiction of the United States;

(B) Agrees to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent);

(C) Consents to service of process on the Process Agent; and

(D) Agrees that enforcement by a Client Plan of the indemnity provided by the Affiliated Borrower will, at the option of the Client Plan, occur exclusively in the United States courts.

(s) The Lending Agent maintains, or causes to be maintained, within the United States for a period of six years from the date of such transaction, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described in paragraph (t)(1) to determine whether the conditions of the exemption have been met, except that—(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Lending Agent and/or its affiliates, the records are lost or destroyed prior to the end of the six-year period; and (2) No party in interest other than the Lending Agent or its affiliates shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required below by paragraph (t)(1).

(t)(1) Except as provided in subparagraph (t)(2) of this paragraph and notwithstanding any provisions of sections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (s) are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service or the Securities and Exchange Commission;

(B) Any fiduciary of a participating Client Plan or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any participating Client Plan or any duly authorized employee or representative of such employer; and

(D) Any participant or beneficiary of any participating Client Plan, or any duly authorized representative of such participant or beneficiary.

(t)(2) None of the persons described above in paragraphs (t)(1)(B)–(t)(1)(D) are authorized to examine the trade secrets of the Lending Agent or its affiliates or commercial or financial information which is privileged or confidential.

(t)(3) Should the Lending Agent refuse to disclose information on the basis that such information is exempt from disclosure, the Lender shall, by the close of the thirtieth (30th) day following the request, provide written notice advising that person of the reason for the refusal and that the Department may request such information.

Summary of Facts and Representations

1. Morgan Stanley is a global financial services firm headquartered in New York. Its corporate parent is a bank holding company. Morgan Stanley, with its affiliates, serves a large and diversified group of clients and customers, including corporations, governments, financial institutions and individuals around the world. Morgan Stanley offers investment-related services, including securities research, brokerage, execution, asset allocation, financial planning, investment advice, discretionary asset management services, sweep and trust/custody services. In its Institutional Securities business segment, Morgan Stanley provides financial advisory and capital-raising services to a diverse group of institutional clients globally, primarily through wholly owned subsidiaries that include Morgan Stanley & Co. Incorporated (MS&Co.), Morgan Stanley & Co. International plc, Morgan Stanley Japan Securities Co., Ltd. and Morgan Stanley Asia Limited. These and other subsidiaries also conduct sales and trading activities worldwide, as principal and agent, and provide related financing services on behalf of institutional investors. MS&Co. is both a registered investment adviser subject to the Investment Advisers Act of 1940 and an SEC-registered broker dealer subject to the supervision of various governmental and self-regulatory bodies. As of November 30, 2007, Morgan Stanley employed over 48,000 employees in over 600 offices operating in 33 countries. In the ordinary course of its business, Morgan Stanley provides a range of financial services to IRAs and pension, profit sharing and 401(k) plans qualified under section 401(a) of the Code under which some or all of the participants are employees described in section 401(c) of the Code.

2. Mitsubishi UFJ Financial Group, Inc. ("MUFG"), Japan's largest financial group and the world's second largest bank holding company with $1.1 trillion

in bank deposits, on October 13, 2008, made a $9 billion equity investment in Morgan Stanley that gives MUFG approximately a 21 percent ownership interest in Morgan Stanley on a fully diluted basis. The investment is part of a previously announced global strategic alliance. Under the terms of the transaction, MUFG has acquired $7.8 billion of perpetual non-cumulative convertible preferred stock with a 10 percent dividend and a conversion price of $25.25 per share, and $1.2 billion of perpetual non-cumulative non-convertible preferred stock with a 10 percent dividend. Half of the convertible preferred stock automatically converts after one year into common stock when Morgan Stanley's stock trades above 150 percent of the conversion price for a certain period and the other half converts on the same basis after year two. The non-convertible preferred stock is callable after year three at 110 percent of the purchase price. MUFG is entitled to nominate one member of Morgan Stanley's twelve-member board of directors and to have an additional "observer" present at meetings of Morgan Stanley's board.

3. UnionBanCal Corporation, headquartered in San Francisco, CA, is a financial holding company with assets of $70.1 billion as of December 31, 2008. Its primary subsidiary, Union Bank, N.A. (UB), is a full-service commercial bank providing an array of financial services to individuals, small businesses, middle-market companies and major corporations. UB is California's fifth largest bank by deposits. The bank has 335 banking offices in California, Oregon and Washington, and two international offices. Effective November 4, 2008, UnionBanCal Corp. became a wholly owned subsidiary of The Bank of Tokyo-Mitsubishi UFJ, Ltd., which is a subsidiary of MUFG.

4. To the best of Morgan Stanley's knowledge and belief, the current status of the investment in Morgan Stanley by Union Bank's indirect, ultimate corporate parent, MUFG, does not make, as of the date of the application, Union Bank and Morgan Stanley affiliates of each other under the definition of affiliate in 29 CFR 2510.3–21(e) for purposes of ERISA.[45] However, Morgan Stanley filed this exemption request because (a) Union Bank might be viewed currently as having an interest in Morgan Stanley that could affect each entity's judgment as lending agent for Client Plans by reason of Union Bank's indirect parent's ownership interest in Morgan Stanley and (b) Morgan Stanley and Union Bank both believe that, at some future date, the status of MUFG's investment and future joint business initiatives may ultimately deem Union Bank and Morgan Stanley to be "affiliates" for purposes of 29 CFR 2510.3–21(e).

5. Morgan Stanley seeks an exemption to permit a securities lending agent affiliated with MS&Co. or UB (the Lending Agent) to lend securities of an account covered by ERISA or the Code to a broker-dealer or bank affiliated with MS&Co. or UB, including foreign broker-dealers and banks in Canada, Germany, Japan, the United Kingdom, Switzerland, France, Sweden and Australia (each, an Affiliated Borrower). The exemption would amend and supersede PTE 98–40, granted to MS&Co. and Morgan Stanley Trust Company, and EXPRO 99–01E, granted to MS&Co.

6. As of the closing of the MUFG/Morgan Stanley transaction, eight Client Plans for which UB served as securities lending agent or sub agent had loans outstanding to MS&Co. or a U.S. affiliate (the Existing Loans). As of March 9, 2009, the total amount of the Existing Loans from these Plans totaled $8,196,460.29, compared to the amount outstanding to all borrowers from these funds which exceeded $1.005 billion. Thus the total Existing Loans to Morgan Stanley affiliates were approximately 1% of the total loans for these Plans. The range of percentages for the eight plans was between .5% and 3.7% of plan assets. The Applicant requests that the exemption, if granted, apply retroactively to the Existing Loans. The Applicant has proposed certain conditions applicable to the Existing Loans, as described herein.

7. The Applicant represents that, for each Client Plan, neither MS&Co., UB, nor any affiliate will have or exercise discretionary authority or control with respect to the investment of the assets of Client Plans involved in the transaction, or render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets, including decisions concerning a Client Plan's acquisitions or dispositions of securities available for loan.

8. Any arrangement for the Lending Agent to lend securities will be approved in advance by a Client Plan fiduciary who is independent of MS&Co, UB, and their affiliates (other than in the case of a Plan sponsored by MS&Co., UB, or any of their affiliates (Affiliated Plan) invested in a commingled fund, provided that at all times holdings of all Affiliated Plans in the aggregate comprise less than 10% of the assets of the commingled fund). Notwithstanding the foregoing, this condition will be deemed satisfied with respect to the Existing Loans provided (i) UB provided to Client Plans with Existing Loans no later than April 1, 2009, a description of the general terms of the securities loan agreements between such Client Plans and borrowers, including any conditions with respect to MS that differ from other borrowers, and (ii) at the time of providing such information, UB notified each such Client Plan that if the Client Plan did not approve the continued lending of securities to Morgan Stanley by May 11, 2009, UB would terminate the loans and cease to make any new securities loans on behalf of the Client Plan to Morgan Stanley.

9. When acting as a securities lending agent, the Lending Agent, pursuant to approval by the independent Plan fiduciary, will negotiate the terms of loans to Affiliated Borrowers and otherwise act as a liaison between the Lender and the Affiliated Borrower. The Lending Agent will have the responsibility for monitoring receipt of all collateral required under the exemption, marking such collateral to market daily to ensure adequate levels of collateral can be maintained, monitoring and evaluating the performance and creditworthiness of borrowers, and, if authorized by a lending plan, holding and investing cash collateral pursuant to given investment guidelines. The Lending Agent may also act as directed trustee or custodian for the Client Plan.

10. The Lending Agent, as securities lending agent for the Lenders, will negotiate a master securities borrowing agreement with a schedule of modifications attached thereto ("Loan Agreement") with the Affiliated Borrowers, as is the case with all borrowers. The Loan Agreement will specify, among other things, the right of the Lender to terminate a loan at any time and the Lender's rights in the event of any default by the Affiliated Borrowers. The Loan Agreement will set forth the basis for compensation to the Lender for lending securities to the Affiliated Borrowers under each category of collateral. The Loan

[45] An affiliate is defined in 29 CFR 2510.3–21(e) as including: "(i) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; (ii) Any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and (iii) Any corporation or partnership of which such person is an officer, director or partner." The term control is defined therein as "the power to exercise a controlling influence over the management or policies of a person other than an individual."

Agreement will also contain a requirement that the Affiliated Borrowers must pay all transfer fees and transfer taxes related to the securities loans.

11. With respect to Lenders that are Separate Accounts, as direct lending agent, the Lending Agent will, prior to lending the Client Plan's securities, enter into an agreement ("Client Agreement") with the Client Plan, signed by a fiduciary of the Client Plan who is independent of MS&Co., UB, and their affiliates (other than in the case of an Affiliated Plan, as discussed above in paragraph 8). The Client Agreement will, among other things, describe the operation of the lending program, disclose the form of the securities loan agreement to be entered into on behalf of the Client Plan with borrowers, identify generally the securities which are available to be lent, and identify the required collateral guidelines and the required daily marking-to-market of the loaned securities. The Client Agreement will also set forth the basis and rate of the Lending Agent's compensation for the performance of securities lending and cash collateral investment services. The Client Plan may terminate the Client Agreement with respect to any or all Affiliated Borrowers at any time, without penalty, on no more than five business days notice.

12. The Client Agreement will contain provisions to the effect that if any Affiliated Borrower is designated by the Client Plan as an approved borrower, the Client Plan will acknowledge the relationship between the Affiliated Borrower and the Lending Agent. The Lending Agent will represent to the Client Plan that each and every loan made to the Affiliated Borrower on behalf of the Client Plan will be effected at arm's-length terms, and such terms will be in no case less favorable to the Client Plan than the pricing established according to the schedule described in paragraph 29.

13. When the Lending Agent is lending agent with respect to a Commingled Fund, the Lending Agent will, prior to the investment of a Client Plan's assets in such Commingled Fund or prior to the first use of this exemption, obtain from the Client Plan approval to lend any securities held by the Commingled Fund to brokers and other approved borrowers, including the Affiliated Borrowers. Prior to obtaining such approval, the Lending Agent will provide a written description of the operation of the lending program (including the basis and rate of the Lending Agent's compensation for the performance of securities lending and cash collateral investment services), disclose the form of the securities loan agreement to be entered into on behalf of the Commingled Fund with the borrowers, generally identify the securities which are available to be lent, and identify the required collateral and the required daily marking-to-market of loaned securities.[46] If the Client Plan is already invested in the Commingled Fund and objects to the arrangement, it will be permitted to withdraw from the Commingled Fund, without penalty, no later than 35 days after the notice of withdrawal is received in accordance with the terms of the Commingled Fund.

14. In addition, the Client Plan will be advised of the relationship between the Lending Agent and the Affiliated Borrowers, and the Lending Agent will represent that each and every loan made to the Affiliated Borrowers by the Commingled Fund will be effected at arm's-length terms, and such terms will be in no case less favorable to the Client Plan than the pricing established according to the schedule described in paragraph 29.

15. When the Lending Agent is lending securities under a sub-agency arrangement, before the Client Plan participates in the securities lending program, the primary lending agent will enter into a securities lending agency agreement (Primary Lending Agreement) with a fiduciary of the Client Plan who is independent of such primary lending agent, MS&Co., UB and their affiliates (other than in the case of an Affiliated Plan, as described in paragraph 8). The primary lending agent also will be unrelated to MS&Co., UB, and their affiliates. The Primary Lending Agreement will contain provisions substantially similar to those in the Client Agreement relating to: The description of the lending program, use of an approved form of securities loan agreement, specification of the securities to be lent, specification of the required collateral margin and the requirement of daily marking-to-market, and provision of a list of approved borrowers (which will include one or more of the Affiliated Borrowers). The Primary Lending Agreement will specifically authorize the primary lending agent to appoint sub-agents (including the Lending Agent) to facilitate performance of securities lending agency functions. The Primary Lending Agreement will expressly disclose that the Lending Agent is to act in a sub-agency capacity. The Primary Lending Agreement will also set forth the basis and rate for the primary lending agent's compensation from the Client Plan for the performance of securities lending services and/or cash collateral investment services and will authorize the primary lending agent to pay a portion of its fee, as the primary lending agent determines in its sole discretion, to any sub-agent(s) it retains (including the Lending Agent) pursuant to the authority granted under such agreement.

16. Pursuant to its authority to appoint sub-agents, the primary lending agent will enter into a securities lending sub-agency agreement (Sub-Agency Agreement) with the Lending Agent under which the primary lending agent will retain and authorize the Lending Agent, as sub-agent, to lend securities of the primary lending agent's Client Plans, subject to the same terms and conditions specified in the Primary Lending Agreement. The Lending Agent represents that the Sub-Agency Agreement will contain provisions that are in substance comparable to those described above in connection with a Client Agreement in situations where the Lending Agent is the primary lending agent. The Lending Agent will make in the Sub-Agency Agreement the same representations described above in paragraph 12 with respect to arm's-length dealing with the Affiliated Borrowers. The Sub-Agency Agreement will also set forth the basis and rate for the Lending Agent's compensation to be paid by the primary lending agent.

17. In all cases, the Lending Agent will maintain transactional and market records sufficient to assure compliance with its representation that all loans to the Affiliated Borrowers are effected at arm's-length terms, and in no case less favorable to the Client Plan than the pricing established according to the schedule described in paragraph 29. Such records will be made available upon reasonable request and without charge to the Client Plan fiduciary, who (other than in the case of an Affiliated Plan as described in paragraph 8) is independent of MS&Co., UB, and their affiliates, in the manner and format agreed to by the Client Plan fiduciary and the Lending Agent.

18. A Lender, in the case of a Separate Account, will be permitted to terminate the lending agency or sub-agency arrangement with respect to any or all Affiliated Borrowers at any time without penalty, on five business days notice. A Client Plan in the case of a Commingled Fund will be permitted to terminate its participation in the lending arrangement

[46] The Lending Agent may make transmittals required by the exemption to Client Plan fiduciaries via authorized recordkeepers. The Lending Agent represents that all decisions reserved to Client Plan fiduciaries under the terms of the exemption will be made by such fiduciaries and not by the recordkeeper on behalf of the Client Plan fiduciary.

by terminating its investment in the Commingled Fund no later than 35 days after the notice of termination of participation is received, without penalty to the Plan, in accordance with the terms of the Commingled Fund. Upon a termination, the Affiliated Borrower will be contractually obligated to return securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Lender within one of the following time periods, whichever is least: the customary delivery period for such securities, five business days of written notification of termination, or the time negotiated for such delivery by the Client Plan, in a Separate Account, or by the Lending Agent, as lending agent to a Commingled Fund, and the Affiliated Borrowers.

19. The Lender, or another custodian designated to act on its behalf, will receive collateral from each Affiliated Borrower by physical delivery, book entry in a U.S. securities depository, wire transfer or similar means by the close of business on or before the day the loaned securities are delivered to the Affiliated Borrower. All collateral will be received by the Lender or other custodian in the United States. The collateral will consist of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank other than Morgan Stanley, Union Bank (or any subsequent parent corporation of the Lending Agent) or an affiliate thereof, or any combination thereof, or other collateral permitted under PTE 2006–16 (as amended or superseded). The collateral will be held on behalf of a Client Plan in a depository account or other investment account or vehicle separate from the Affiliated Borrower.

20. The market value (or, in the case of a letter of credit, a stated amount) of the posted collateral on the close of business on the day preceding the day of the loan will be at least 102 percent of the market value of the loaned securities unless required to be at a higher level under PTE 2006–16. The Loan Agreement will give the Lender a continuing security interest in and a lien on or title to the collateral. The Lending Agent will monitor the level of the collateral daily. If the market value of the collateral, on the close of trading on a business day, is less than 100 percent (or such greater percentage as agreed to by the parties) of the market value of the loaned securities at the close of business on that day, the Lending Agent will require the Affiliated Borrowers to deliver by the close of business on the next day sufficient additional collateral to bring the level back to at least 102 percent or such higher percentage as is required under PTE 2006–16.

21. Prior to making any loans under the Loan Agreement from Separate Accounts, the Affiliated Borrowers will furnish their most recent available audited and unaudited financial statements to the Lending Agent, which will provide such statements to the Client Plan invested in such Separate Account before the authorizing fiduciary of the Client Plan is asked to approve the proposed lending to the Affiliated Borrowers. The terms of the Loan Agreement will contain a requirement that the Affiliated Borrowers must give prompt notice to the Lending Agent at the time of any loan, of any material adverse change in their financial condition since the date of the most recently furnished financial statements. If any such material adverse change has taken place, the Lending Agent will request that the independent fiduciary of the Client Plan, if invested in a Separate Account, approve continuation of the lending arrangement in view of the changed financial conditions.

22. Notwithstanding the foregoing, this condition will be satisfied with respect to the Existing Loans provided (i) UB provided to such Client Plans no later than April 1, 2009, the most recently available audited and unaudited financial statements of the Affiliated Borrower and notice of any material adverse change in financial condition since the date of the most recent financial statement being furnished to the Client Plan, and (ii) at the time of providing such information, UB notified each Client Plan that if the Client Plan did not approve the continued lending of securities to Morgan Stanley by May 11, 2009, UB would terminate the loan and cease to make any new securities loans on behalf of that Client Plan to Morgan Stanley.

23. In addition, upon request, the Lending Agent will provide the audited financial statements of the applicable Affiliated Borrowers to Client Plans invested in Commingled Funds on an annual basis.

24. In the case of Client Plans currently invested in Commingled Funds, approval of lending to the Affiliated Borrowers will be accomplished by the following special procedure for Commingled Funds. The information described in paragraph 13 will be furnished by the Lending Agent as lending fiduciary to an independent fiduciary of each Client Plan invested in Commingled Funds not less than 30 days prior to implementation of the lending arrangement, and thereafter, upon the reasonable request of the authorizing fiduciary. In the event any such authorizing fiduciary submits a notice in writing within the 30-day period to the Lending Agent, in its capacity as the lending fiduciary, objecting to the implementation of or continuation of the lending arrangement with the Affiliated Borrowers, the Plan on whose behalf the objection was tendered will be given the opportunity to terminate its investment in the Commingled Fund, without penalty to the Plan, no later than 35 days after the notice of withdrawal is received in accordance with the terms of the Commingled Fund. In the case of a Plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of the arrangement; but an existing arrangement need not be discontinued by reason of a Plan electing to withdraw. In the case of a Plan whose assets are proposed to be invested in a Commingled Fund subsequent to the implementation of the arrangement, the Plan's investment in the Commingled Fund shall be authorized in the manner described in paragraph 13.

25. In the case of loans made by Commingled Funds, upon notice by the Affiliated Borrower to the Lending Agent of a material adverse change in its financial conditions, the Lending Agent will make a decision whether to terminate existing loans and whether to continue making additional loans to the Affiliated Borrower, using the same standards of credit analysis the Lending Agent would use in evaluating unrelated borrowers. In the event the Plan invested in a Commingled Fund has any objection to the continuation of lending to an Affiliated Borrower, it may withdraw from the fund as described above.

26. With respect to material changes in the lending arrangement with the Affiliated Borrowers after approval by Client Plans, the Lending Agent will obtain approval from Client Plans (whether in Separate Accounts or Commingled Funds) prior to implementation of any such change. For those Client Plans invested in Commingled Funds, approval of the proposed material change will be by the procedure described in paragraph 24.

27. In return for lending securities, the Lender either will receive a reasonable fee which is related to the value of the borrowed securities and the duration of the loan, or will have the opportunity to derive compensation through the investment of cash

collateral or a combination of both. In the case of a Lender investing the cash collateral, the Lender may pay a loan rebate or similar fee to the Affiliated Borrowers, if such fee is not greater than the fee the Lender would pay in a comparable arm's-length transaction with an unrelated party.

28. In this regard, each time a Lender loans securities to an Affiliated Borrower pursuant to the Loan Agreement, the Lending Agent will reflect in its records the material terms of the loan, including the securities to be loaned, the required level of collateral, and the fee or rebate payable. The fee or rebate payable for each loan will be effected at arm's-length terms, and such terms will be in no case less favorable to the Client Plan than the pricing established according to the schedule described below. The rebate rates, which are established for cash collateralized loans made by the Lender, will take into account the potential demand for the loaned securities, the applicable benchmark cost of funds (typically the U.S. Federal Funds rate established by the Federal Reserve System), the overnight "repo" rate, or the like and the anticipated investment returns on the investment of cash collateral. Further, the lending fees with respect to loans collateralized by other than cash will be set daily to reflect conditions as influenced by potential market demand. The Applicant represents that the securities lending agent fee paid to the Lending Agent will comply with the requirements of PTE 2006–16 Part IV or another applicable exemption.

29. The Lending Agent will establish each day a written schedule of lending fees [47] and rebate rates [48] with respect to new loans of designated classes of securities, such as U.S. Government securities, U.S. equities and corporate bonds, international fixed income securities and non-U.S. equities, in order to assure uniformity of treatment among borrowers and to limit the discretion the Lending Agent would have in negotiating securities loans to Affiliated Borrowers. Loans to all borrowers of a given security on that day will be made at rates or lending fees on the relevant daily schedules or at rates or lending fees which are more advantageous to the Lenders. The Applicant represents that in no case will loans be made to Affiliated Borrowers at rates or lending fees that are less advantageous to the Lenders than those on the relevant schedules. In addition, it is represented that the method of determining the daily securities lending rates (fees and rebates) will be disclosed to each Client Plan, whether in Separate Accounts or Commingled Funds. For those Client Plans invested in Commingled Funds, disclosure will be by the special procedure described in paragraph 24.

30. When a loan of securities by a Lender is collateralized with cash, the Lending Agent will transfer such cash to an investment vehicle that the Client Plan has authorized, and will rebate a portion of the earnings on such collateral to the appropriate Affiliated Borrower as agreed to in the securities lending agreement between Lender and the Borrower. The Lending Agent will share with the Client Plan the income earned on the investment of cash collateral for the Lending Agent's provision of lending services, which will reduce the income earned by the Client Plans (whether in a Commingled Fund or Separate Account) from the lending of securities. The Lending Agent may receive a separate management fee for providing cash collateral investment services. Where collateral other than cash is used, the Affiliated Borrower will pay a fee to the Lender based on the value of the loaned securities. These fees will also be shared between the Client Plans (whether in a Commingled Fund or Separate Account) and the Lending Agent. Any income or fees shared will be net of cash collateral management fees and borrower rebate fees. The sharing of income and fees will be in accordance with the arrangements authorized by the Client Plan in advance of commencement of the lending program.

31. The Lending Agent will negotiate rebate rates for cash collateral payable to each borrower, including Affiliated Borrowers, on behalf of a Lender. The fees or rebate rates negotiated will be effected at arm's-length terms, and in no case will be less favorable to the Client Plan than the pricing established according to the schedule described in paragraph 29.

32. With respect to any loan to an Affiliated Borrower, the Lending Agent, at the inception of such loan, will not negotiate and agree to a rebate rate with respect to such loan which it expects would produce a zero or negative return to the Lender over the life of the loan (assuming no default on the investments made by the Lending Agent where it has investment discretion over the cash collateral or on investments expected to be made by the Client Plan's designee, where the Lending Agent does not have investment discretion over cash collateral).

33. The Lending Agent may, depending on market conditions, reduce the lending fee or increase the rebate rate on any outstanding loan to an Affiliated Borrower, or any other borrower. Except in the case of a change resulting from a change in the value of any third party independent index with respect to which the fee or rebate is calculated, such reduction in lending fee or increase in rebate shall not establish a lending fee below the minimum or a rebate above the maximum set in the schedule of fees and rebates described in paragraph 29. If the Lending Agent reduces the lending fee or increases the rebate rate on any outstanding loan from a Separate Account to an Affiliated Borrower (except in the case of a change resulting from a change in the value of any third party independent index with respect to which the fee or rebate is calculated), the Lending Agent, by the close of business on the date of such adjustment, will provide the independent fiduciary of the Client Plan invested in the Separate Account with notice (including by electronic means) that it has reduced such fee or increased the rebate rate to such Affiliated Borrower and that the Client Plan may terminate such loan at any time.

34. Except as otherwise expressly provided in the exemption, the Applicant represents that all procedures regarding the securities lending activities will, at a minimum, conform to the applicable provisions of PTE 2006–16 or another applicable exemption, as amended or superseded.

[47] The Lending Agent will adopt minimum daily lending fees for non-cash collateral payable by Affiliated Borrowers to the Lending Agent on behalf of a Lender. Separate minimum daily lending fees will be established with respect to loans of designated classes of securities. With respect to each designated class of securities, the minimum lending fee will be stated as a percentage of the principal value of the loaned securities. The Lending Agent will submit the method for determining such minimum daily lending fees to an authorizing fiduciary of the Client Plan, in the case of a Separate Account, for approval before initially lending any securities to Affiliated Borrowers on behalf of such Client Plan. The Lending Agent will submit the method for determining such minimum daily lending fees to an authorizing fiduciary of each Client Plan involved in or planning to invest in a Commingled Fund pursuant to the procedure described in paragraph 24, above.

[48] Separate maximum daily rebate rates will be established with escribed in paragraph 24, above. Separate respect to loans of securities within the designated classes identified above. Such rebate rates will be based upon an objective methodology which takes into account several factors, including potential demand for loaned securities, the applicable benchmark cost of fund indices, and anticipated investment return on overnight investments permitted by the Client Plan's independent fiduciary. The Lending Agent will submit the method for determining such maximum daily rebate rates to such fiduciary before initially lending any securities to an Affiliated Borrower on behalf of the Client Plan.

35. Under the Loan Agreement, an Affiliated Borrower domiciled in the U.S. agrees to indemnify and hold harmless the Client Plans in the United States (including the sponsor and fiduciaries of such Client Plans) for any transactions covered by this exemption with a foreign Affiliated Borrower so that the Client Plan may collect on any indemnification from a U.S. domiciled affiliate of MS&Co or UB. Such indemnification will be against any and all reasonably foreseeable losses, costs and expenses (including reasonable attorneys fees, disbursements, transfer taxes and stamp duties), excluding any indirect or consequential damages which the Lender may incur or suffer arising from any impermissible use by an Affiliated Borrower of the loaned securities, from an event of default arising from the failure of an Affiliated Borrower to deliver loaned securities when due in accordance with the provisions of the Loan Agreement or from an Affiliated Borrower's other failure to comply with the terms of the Loan Agreement, except to the extent that such losses are caused by the Client Plan's own negligence.

36. If any event of default occurs, to the extent that (i) liquidation of the pledged Collateral or (ii) additional cash received from the Affiliated Borrower does not provide sufficient funds on a timely basis, the Client Plan will have the right to purchase securities identical to the borrowed securities (or their equivalent as discussed above) and apply the Collateral to the payment of the purchase price. If the Collateral is insufficient to accomplish such purchase, the Affiliated Borrower will indemnify the Client Plan invested in a Separate Account or Commingled Fund in the United States with respect to the difference between the replacement cost of securities and the market value of the Collateral on the date the loan is declared in default, together with expenses incurred by the Client Plan plus applicable interest at a reasonable rate, including reasonable attorney's fees incurred by the Client Plan for legal action arising out of default on the loans, or failure by the Affiliated Borrower to properly indemnify the Client Plan. The Affiliated Borrower's indemnification will enable the Client Plan to collect on any indemnification from a U.S.-domiciled affiliate of the Affiliated Borrower.

37. The "market value" of any securities listed on a national securities exchange in the United States will be the last sales price on such exchange on the preceding business day or, if there is no sale on that day, the last sale price on the next preceding business day on which there is a sale on such exchange, as quoted on the consolidated tape. If the principal market for securities to be valued is the over-the-counter market, the securities' market value will be the closing sale price as quoted on the National Association of Securities Dealers Automated Quotation System (NASDAQ) on the preceding business day or the opening price on such business day if the securities are issues for which last sale prices are not quoted on NASDAQ. If the securities to be valued are not quoted on NASDAQ, their market value shall be the highest bid quotation appearing in The Wall Street Journal, National Quotation Bureau pink sheets, quotation sheets of registered market makers and, if necessary, independent dealers' telephone quotations on the preceding business day. (In each case, if the relevant quotation does not exist on such day, then the relevant quotation on the next preceding business day in which there is such a quotation would be the market value.)

38. The Lender will be entitled to receive the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including but not limited to, interest and dividends, shares of stock as a result of a stock split and rights to purchase additional securities, or other distributions during the loan period.[49]

39. Prior to a Client Plan's authorization of a securities lending program, the Lending Agent will provide a Plan fiduciary with a copy of the proposed exemption until the final exemption is granted, and then the proposed and final exemption. With respect to the Existing Loans, prior to the publication date of the grant of this exemption, this condition will be satisfied provided: (i) UB provides to such Client Plans that have consented to securities lending prior to such publication date, a copy of the requested exemption and (ii) UB advises each such Client Plan that unless the Client Plan notifies UB to the contrary within 30 days, its consent to make loans to Morgan Stanley will be presumed.

40. In order to provide the means for monitoring lending activity in Separate Accounts and Commingled Funds, a quarterly report will be provided to each Client Plan. This report will show the fees or rebates (as applicable) on loans to Affiliated Borrowers compared with loans to other borrowers, as well as the level of collateral on the loans. The Applicant represents that the quarterly report will show, on a daily basis, the market value of all outstanding security loans to Affiliated Borrowers and to other borrowers as compared to the total collateral held for both categories of loans. Further, the quarterly report will state the daily fees where collateral other than cash is utilized and will specify the details used to establish the daily rebate payable to all borrowers where cash is used as collateral. The quarterly report also will state, on a daily basis, the rates at which securities are loaned to Affiliated Borrowers compared with those at which securities are loaned to other borrowers. In the event an authorizing fiduciary of a Plan invested in a Commingled Fund submits a notice in writing to the Lending Agent objecting to the continuation of the lending program to the Affiliated Borrowers, the Plan on whose behalf the objection was tendered will be given the opportunity to terminate its investment in the Commingled Fund, without penalty to the Plan, no later than 35 days after the notice of withdrawal is received in accordance with the terms of the Commingled Fund.

41. Notwithstanding the foregoing, this condition will be satisfied with respect to the Existing Loans, provided: (i) UB provides to such client Plans no later than July 31, 2009, the material described in paragraph 40 above with respect to the period from October 1, 2008, through June 30, 2009.

42. To ensure that any lending of securities to an Affiliated Borrower will be monitored by an authorizing fiduciary of above average experience and sophistication in matters of this kind, only Client Plans with total assets having an aggregate market value of at least $50 million will be permitted to lend securities to the Affiliated Borrowers. However, in the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3–101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangement with the Lending Agent, the foregoing $50 million requirement will be deemed satisfied if such trust or other entity has aggregate assets which are in excess of $50 million; provided that if the fiduciary responsible for

[49] The Applicant represents that dividends and other distributions on foreign securities payable to a Lender may be subject to foreign tax withholdings. Under the circumstances, the applicable Affiliated Borrower, where necessary, will gross-up the in-lieu-of-payment (in respect of such dividend or distribution it makes) to the Lender so that the Lender will receive back what it otherwise would have received (by way of dividend or distribution) had it not loaned the securities.

making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary must have total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million. In the case of two or more Client Plans which are not maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Lending Agent, the foregoing $50 million requirement will be satisfied if such trust or other entity has aggregate assets which are in excess of $50 million (excluding the assets of any Client Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity must have full investment responsibility with respect to plan assets invested therein, and must have total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million. In addition, none of the entities described above may be formed for the sole purpose of making loans of securities.

43. With respect to any calendar quarter, at least 50 percent or more of the outstanding dollar value of securities loans negotiated on behalf of Lenders by the Lending Agent will be to borrowers unrelated to MS&Co., UB, and their affiliates. Thus, the competitiveness of the loan fee will be continuously tested in the marketplace. Accordingly, the Applicant believes that loans to Affiliated Borrowers should result in competitive fee income to the Lenders.

44. With respect to foreign Affiliated Borrowers, the Applicant represents that each such entity is regulated by the host country's supervisory authority (*e.g.*, the UK FSA) and is, therefore, authorized to conduct an investment banking business in and from the host country (*e.g.*, the United Kingdom) as a broker-dealer. The proposed exemption will be applicable only to transactions effected by a Lending Agent with an Affiliated Borrower which is registered as a broker-dealer with the host country's supervisory authority (the Foreign Authority) and in compliance with Rule 15a–6 under the Securities Exchange Act of 1934 (Rule 15a–6). The Applicant represents that the role of a broker-dealer in a principal transaction in each of the foreign countries is substantially identical to that of a broker-dealer in a principal transaction in the United States. The Applicant further represents that registration of a broker-dealer with the Foreign Authority is equivalent to registration of a broker-dealer with the SEC under the 1934 Act. The Applicant maintains that the Foreign Authority has promulgated rules for broker-dealers which are equivalent to SEC rules relating to registration requirements, minimum capitalization, reporting requirements, periodic examinations, fund segregation, client protection, and enforcement. The Applicant represents that the rules and regulations set forth by the Foreign Authority and the SEC share a common objective: the protection of the investor by the regulation of securities markets. The Applicant explains that under each Foreign Authority's rules, a person who manages investments or gives advice with respect to investments must be registered as a "registered representative". If a person is not a registered representative and, as part of his duties, makes commitments in market dealings or transactions, that person must be registered as a "registered trader". The Applicant represents that the Foreign Authority's rules require each firm which employs registered representatives or registered traders to have positive tangible net worth and to be able to meet its obligations as they fall due, and that the Foreign Authority's rules set forth comprehensive financial resource and reporting/disclosure rules regarding capital adequacy. In addition to demonstration of capital adequacy, the Applicant states that the Foreign Authority's rules impose reporting/disclosure requirements on broker-dealers with respect to risk management, internal controls, and all records relating to a counterparty, and that all records must be produced at the request of the Foreign Authority at any time. The Applicant states that Foreign Authority's registration requirements for broker-dealers are backed up by potential fines and penalties and rules which establish a comprehensive disciplinary system.

45. In addition to the protections afforded by registration with the Foreign Authority, the Applicant represents that the Affiliated Borrower will comply with the applicable provisions of Rule 15a–6 (described below). The Applicant represents that compliance by the Affiliated Borrower with the requirements of Rule 15a–6 will offer additional protections in lieu of registration with the SEC. The Applicant represents that Rule 15a–6 provides an exemption from U.S. broker-dealer registration for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a "U.S. institutional investor" or a "major U.S. institutional investor", provided that the foreign broker-dealer, among other things, enters into these transactions through a U.S. registered broker-dealer intermediary. The term "U.S. institutional investor", as defined in Rule 15a–6(b)(7), includes an employee benefit plan within the meaning of the Act if (a) the investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company or registered investment advisor, (b) the employee benefit plan has total assets in excess of $5,000,000, or (c) the employee benefit plan is a self-directed plan with investment decisions made solely by persons that are "accredited investors" as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended. The term "major U.S. institutional investor" is defined as a person that is a U.S. institutional investor that has, or has under management, total assets in excess of $100 million, or is an investment adviser registered under section 203 of the Investment Advisers Act of 1940 that has total assets under management in excess of $100 million. The Applicant represents that the intermediation of the U.S. registered broker-dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

46. The Applicant represents that, under Rule 15a–6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major U.S. institutional investor in accordance with Rule 15a–6 must, among other things:

a. Consent to service of process for any civil action brought by, or proceeding before, the SEC or any self-regulatory organization;

b. Provide the SEC with any information or documents within its possession, custody or control, any testimony of any foreign associated persons,[50] and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to transactions effected pursuant to Rule 15a–6; and

c. Rely on the U.S. registered broker-dealer through which the transactions with the U.S. institutional and major U.S. institutional investors are effected to (among other things):

1. Effect the transactions, other than negotiating their terms;

2. Issue all required confirmations and statements;

3. As between the foreign broker-dealer and the U.S. registered broker-dealer, extend or arrange for the extension of credit in connection with the transactions;

4. Maintain required books and records relating to the transactions, including those required by Rules 17a–3 (Records to be Made by Certain Exchange Members) and 17a–4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act;

5. Receive, deliver and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or major U.S. institutional investor in compliance with Rule 15c3–3 of the 1934 Act (Customer Protection-Reserves and Custody of Securities); and

6. Participate in all oral communications (*e.g.*, telephone calls) between a foreign associated person and the U.S. institutional investor (other than a major U.S. institutional investor), and accompany the foreign associated person on all visits with both U.S. institutional and major U.S. institutional investors. By virtue of this participation, the U.S. registered broker-dealer would become responsible for the content of all these communications.

47. All collateral will be maintained in United States dollars or U.S. dollar-denominated securities or letters of credit or other collateral permitted under PTE 2006–16 (as amended or superseded). All collateral will be held in the United States and the Lending Agent will maintain the situs of the Loan Agreements (evidencing the Lender's right to return of the loaned securities and the continuing interest in and lien on or title to the collateral) in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)–1.

48. Prior to a transaction involving a foreign Affiliated Borrower, the foreign Affiliated Borrower will (a) agree to submit to the jurisdiction of the courts of the United States; (b) agree to appoint a Process Agent for service of process in the United States, which may be an affiliate; (c) consent to service of process on the Process Agent; and (d) agree that enforcement by a Client Plan of the indemnity provided by U.S. Affiliated Borrower may occur in the United States Courts.

49. In summary, the Applicant represents that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

a. For each Client Plan, neither the MS&Co, UB, nor any affiliate will have or exercise discretionary authority or control with respect to the investment of the assets of Client Plans involved in the transaction or will render investment advice with respect to such assets, including decisions concerning a Client Plan's acquisition or disposition of securities available for loan.

b. Any arrangement for the Lending Agent to lend securities will be approved in advance by a Plan fiduciary who (except in the case of an Affiliated Plan as described above in paragraph 8) is independent of MS&Co., UB, and their affiliates.

c. The terms of each loan of securities by a Lender to an Affiliated Borrower will be at least as favorable to such Separate Account or Commingled Fund as those of a comparable arm's-length transaction between unrelated parties.

d. Upon termination of a loan, the Affiliated Borrowers will transfer securities identical to the borrowed securities (or the equivalent thereof) to the Lender within one of the following time periods, whichever is least: (1) The customary delivery period for such securities; (2) five business days; or (3) the time negotiated for such delivery by the Client Plan, in a Separate Account, or by the Lending Agent, as lending agent to a Commingled Fund, and the Affiliated Borrowers.

e. The Lender will receive from each Affiliated Borrower collateral consisting of U.S. currency, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank (other than Morgan Stanley, Union Bank or any subsequent parent corporation of the Lending Agent, or an affiliate thereof, or any combination thereof) or other collateral permitted under PTE 2006–16 (as amended or superseded), which will be held in a depository account separate from the Affiliated Borrower.

f. In return for lending securities, the Lender either will receive a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan, or will have the opportunity to derive compensation through the investment of cash collateral.

g. A U.S. Affiliated Borrower agrees to indemnify and hold harmless the Client Plans in the United States (including the sponsor and fiduciaries of such Client Plans) for any transactions covered by this exemption with an Affiliated Borrower so that the Client Plans do not have to litigate, in the case of a foreign Affiliated Borrower, in a foreign jurisdiction nor sue to realize on the indemnification.

h. All loans involving foreign Affiliated Borrowers will involve Affiliated Borrowers that are registered as broker-dealers subject to regulation by the Foreign Authority and that are in compliance with all applicable provisions of Rule 15a–6.

i. Prior to a transaction involving a foreign Affiliated Borrower, the foreign Affiliated Borrower will: agree to submit to the jurisdiction of the United States; agree to appoint a Process Agent in the United States; consent to service of process on the Process Agent; and agree that enforcement by a Client Plan of the indemnity provided by Morgan Stanley or Union Bank may occur in the United States courts.

Notice to Interested Persons

Written notice will be provided to all interested parties by first class mail within 15 calendar days of publication of this Notice in the **Federal Register**. Any written comments and/or requests for a hearing must be received by the Department from interested persons within 30 days of the publication of this proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Karen E. Lloyd of the Department, 202–693–8554. (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

[50] A foreign associated person is defined in Rule 15a–6(b)(2) as any natural person domiciled outside the United States who is an associated person, as defined in section 3(a)(18) of the 1934 Act, of the foreign broker or dealer, and who participates in the solicitation of a U.S. institutional investor or a major U.S. institutional investor under Rule 15a–6(a)(3).

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.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department Of Labor.

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