DEPARTMENT OF LABOR

Employee Benefits Security Administration

Application Nos. and Proposed Exemptions: D–11336, Camino Medical Group, Inc. Employee Retirement Plan (the Retirement Plan); D–11458, The Bank of New York Mellon Corporation (the Applicant); and D–11465, United States Steel and Carnegie Pension Fund (the Applicant), et al.

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (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.

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.

Camino Medical Group, Inc. Employee Retirement Plan (the Retirement Plan)

Located in Sunnyvale, CA

[Application No. D–11336]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[1] If the exemption is granted, the restrictions of sections 406(a), 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, effective July 1, 2003 until December 14, 2007, to (1) the leasing (the 2003 Leases) of a medical facility (the Urgent Care Facility) and a single family residence converted to an office (the Residence) by the Retirement Plan to CMG, the sponsor of the Retirement Plan and a party in interest with respect to such plan; and (2) the exercise, by CMG, of options to renew the 2003 Lease with respect to the Residence for one year and the 2003 Lease with respect to the Urgent Care Facility for three years, provided that the following conditions were or will be met:

(a) The terms and conditions of each 2003 Lease were no less favorable to the Retirement Plan than those obtainable by the Retirement Plan under similar circumstances when negotiated at arm's length with unrelated third parties.

(b) The Retirement Plan was represented for all purposes under the 2003 Leases, and during each renewal term, by a qualified, independent fiduciary.

(c) The independent fiduciary negotiated, reviewed, and approved the terms and conditions of the 2003 Leases and the options to renew such leases on behalf of the Retirement Plan and determined that the transactions were appropriate investments for the Retirement Plan and were in the best interests of the Retirement Plan and its participants and beneficiaries.

(d) The rent paid to the Retirement Plan under each 2003 Lease, and during each renewal term, was no less than the fair market rental value of the Urgent Care Facility and the Residence, as established by a qualified, independent appraiser.

(e) The rent was subject to adjustment at the commencement of the second year of each 2003 Lease and each year thereafter by way of an independent appraisal. A qualified, independent appraiser was selected by the independent fiduciary to conduct the appraisal. If the appraised fair market rent of the Urgent Care Facility or the Residence was greater than that of the current base rent, then the base rent was revised to reflect the appraised increase in fair market rent. If the appraised fair market rent of the Urgent Care Facility or the Residence was less than or equal to the current base rent, then the base rent remained the same.

(f) Each 2003 Lease was triple net, requiring all expenses for maintenance, taxes, utilities and insurance to be paid by CMG, as lessee.

(g) The independent fiduciary —

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

(1) Monitored CMG's compliance with the terms of each 2003 Lease and the conditions of the exemption throughout the duration of such leases and the renewal terms, and was responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of CMG under the terms of such leases.

(2) Expressly approved the renewals of the 2003 Leases beyond their initial terms.

(3) Determined whether the rent had been paid on a monthly basis and in a timely manner based on documentation provided by CMG.

(4) Determined whether CMG owed the Camino Medical Group, Inc. Matching 401(k) Plan (the 401(k) Plan) or the Retirement Plan [2] additional rent by reason of CMG's leasing of the Urgent Care Facility and/or the Residence from such plans prior to July 1, 2003 and ensured that CMG made such payments to the Plans, including reasonable interest.

(h) At all times throughout the duration of each 2003 Lease and each respective renewal term, the fair market value of the Urgent Care Facility and the Residence did not exceed 25 percent of the value of the total assets of the Retirement Plan.

(i) Within 90 days of the publication of the grant notice in the **Federal Register**, Palo Alto Medical Foundation (PAMF), the successor in interest to CMG, files a Form 5330 with the Internal Revenue Service (the Service) and pays all applicable excise taxes that are due with respect to the leasing of the Urgent Care Facility and the Residence to CMG by the 401(k) Plan and/or the Retirement Plan prior to July 1, 2003.

DATES: *Effective Date:* If granted, this proposed exemption will be effective from July 1, 2003 until December 14, 2007.

Summary of Facts and Representations

CMG

1. CMG, formerly known as the ''Sunnyvale Medical Clinic, Inc.'' (Sunnyvale), was one of northern California's largest physician-governed multi-specialty medical groups, with more than 190 primary care and specialist physicians, nurse practitioners and physician assistants. CMG was a for-profit, community-based organization that contracted with most leading Health Maintenance Organization and Preferred Provider Organization insurance plans. While maintaining 12 California patient care sites in Cupertino, San Jose, Los Altos, Mountain View, Santa Clara and Sunnyvale, CMG was focused on the delivery of health care services, patient education and health care research, and it offered 28 medical specialties.

2. In June 2000, CMG signed an agreement (the Agreement) providing that PAMF, a not-for-profit organization and an unrelated party, would become the legal operating entity of CMG's facilities. Under the Agreement, CMG agreed to provide medical services to patients at these facilities for an amount to be negotiated with PAMF on an annual basis. CMG maintained and operated the facilities as it had prior to the Agreement, including hiring its own medical and non-medical staff and administering its own retirement plans and benefits system. Under this arrangement, PAMF negotiated contracts with insurance companies on behalf of CMG. Because PAMF had a similar arrangement with another medical group, PAMF patients could choose to receive their care from CMG physicians or from physicians in the other group.

The Agreement between CMG and PAMF related to the business relationship between these entities only rather than to an ''ownership or control'' relationship. In this regard, PAMF had no ownership interest in CMG, which was physician-owned. Similarly, CMG had no ownership interest in PAMF, although several CMG employees were members of PAMF's Board of Directors over the years. The CMG members constituted a small minority and they did not have a controlling vote. Of the 50 members of PAMF's Board of Directors, 8 were CMG representatives. Essentially, CMG and PAMF remained separate and independent entities with separate employee benefit plans. Also, PAMF and CMG were not parties in interest with respect to the other's respective plans.

3. On October 17, 2007, the Executive Committee of the PAMF Board of Directors voted on the issue of purchasing the Residence and the Urgent Care Facility (together, the Buildings) from the Retirement Plan. The Executive Committee had 14 members of which 2 were CMG employees. Both CMG employee/members recused themselves from the vote on the purchase of the Buildings. At no time did PAMF or CMG exercise any indirect or direct control over each other.

On December 14, 2007, the Retirement Plan sold the Residence to PAMF for $725,000 and the Urgent Care Facility for $5,400,000.[3] The fair market value of the Buildings was established on the basis of an independent appraisal of the properties as of October 1, 2007 in an October 2, 2007 appraisal report that was prepared by Walter D. Carney, MAI and Larry W. Hulberg, Certified-General Appraiser. Messrs. Carney and Hulberg are qualified, independent appraisers who are affiliated with real estate appraisal firm Hulberg & Associates of San Jose, California. In addition, Thomas Nault of Northwest Fiduciary Services, Inc. of Redmond, Washington, the independent fiduciary for the Retirement Plan, reviewed the Purchase Agreement, discussed the offering price and valuation with Mr. Hulberg and others, and concluded that it would be in the best interest of the Retirement Plan to sell the Buildings to PAMF in accordance with the Purchase Agreement.[4]

Just prior to the sale, the appraisers indicated that there had been no change in the fair market value of the Buildings. Thus, on the date of the sale, PAMF paid the consideration for the Buildings in cash. The Retirement Plan did not pay any real estate fees or commissions in connection with such transaction. As a result of the sale, the 2003 Leases between the Retirement Plan and CMG were terminated, including the Treatment Center lease between the Retirement Plan and CMG that was covered by PTE 2004–21.

On January 1, 2008, all non-physician employees of CMG became employees of PAMF and CMG physicians joined with two other physician groups to form a new physician entity. The primary reason for the merger was to centralize operations. CMG and PAMF decided that it would be appropriate to have all non-physician employees in one organization and all physicians in another organization. The new physician entity currently negotiates with PAMF for physician services required by PAMF to service its health care contracts, as CMG did in the past. The significant difference is that in the past, CMG provided PAMF with all personnel needed to run the CMG-designated facilities, not just physicians.

[2] The Retirement Plan and the 401(k) Plan are together referred to herein as the ''Plans.''

[3] PAMF also purchased a medical treatment center (the Treatment Center) from the Retirement Plan for $2,030,000. The Treatment Center was the subject of Prohibited Transaction Exemption (PTE) 2004–21, 69 FR 68401 (November 24, 2004). This exemption permitted the leasing of the Treatment Center by the Retirement Plan to CMG. PTE 2004–21 also allowed CMG to exercise options to renew the lease for two additional terms.

[4] For a further discussion of the appraisal credentials of Messrs. Carney and Hulberg, see Representation 10 of this proposed exemption. For a further discussion of Mr. Nault's independent fiduciary qualifications see Representation 12 of this proposed exemption.

Plan History

4. Following the January 2008 merger, CMG ceased to exist. The two defined contribution plans CMG sponsored, the Retirement Plan, a money purchase pension plan, and the 401(k) Plan, a profit sharing plan, are currently in the process of being liquidated. CMG made no contributions to either Plan after December 31, 2007. Once liquidated, the accounts of Plan participants in the Retirement Plan who were hired by PAMF were transferred to a PAMF qualified plan. The remaining physician accounts were transferred to a plan sponsored by a new physician group. With respect to the 401(k) Plan, for those participant accounts that were not distributed, the residual assets in such plan were also rolled into PAMF qualified plans.

5. The history of CMG's Plans is characterized by many mergers and restatements. Originally, in the mid-1970s, CMG established the Sunnyvale Medical Clinic, Inc. Employee Retirement and Profit Sharing Plan (the ERPS Plan), which was a single plan with two trusts. The retirement portion of the ERPS Plan was a money purchase pension plan and the profit sharing portion of the ERPS Plan was a profit sharing plan. Each portion of the ERPS Plan had its own separate trust.

On or about December 31, 1989, the ERPS Plan was restated as two separate plans, the ''Sunnyvale Medical Clinic, Inc. Employee Profit Sharing Plan'' (the Sunnyvale Profit Sharing Plan) for the profit sharing portion of the ERPS Plan and the ''Sunnyvale Medical Clinic, Inc. Retirement Plan'' (the Sunnyvale Retirement Plan) for the money purchase pension portion of the ERPS Plan. The Sunnyvale Retirement Plan subsequently became the Retirement Plan that is the subject of this exemption request.

On January 1, 1992, the Sunnyvale Profit Sharing Plan was merged into the Camino Medical Group, Inc. Matching 401(k) Plan (the 401(k) Plan), which had been established effective January 1, 1989 for employees of CMG who were ineligible to participate in the ERPS Plan as well as for certain CMG physicians. As a result of the merger, the 401(k) Plan received the Sunnyvale Profit Sharing Plan's assets and the flow of income deriving from those assets. The Retirement Plan and the 401(k) Plan are not parties in interest with respect to each other.

6. As of November 30, 2007, the Retirement Plan had total assets having a fair market value of $82,099,079. As of December 14, 2007, the Retirement Plan had 1,100 participants. As of December 31, 2007, the 401(k) Plan had net assets totaling $80,656,857 and 1,320 participants. The directed trustee of the Retirement Plan was Wells Fargo Bank, N.A. (Wells Fargo). The directed trustee of the 401(k) Plan was the T. Rowe Price Trust Company (T. Rowe Price), which succeeded Wells Fargo as the directed trustee for this plan in 1999. The administration of the Retirement Plan and the 401(k) Plan was carried out by the Administrative Committee, whose physician members were shareholders of CMG.

Acquisition of the Buildings

7. Formerly included among the assets of the Retirement Plan were the Residence and the Urgent Care Facility.[5] The ERPS Plan purchased these properties in February 1987 for $3.4 million from the Sunnyvale Medical Building Company, Inc. (SMBC), a California corporation and a party in interest with respect to the ERPS Plan under the terms and conditions of PTE 87–13 (52 FR 2630, January 23, 1987. The Urgent Care Facility, which is located at 201 Old San Francisco Road, Sunnyvale, California, was designed as a standalone medical office building with two stories and a finished basement. The Residence is located at 558 South Sunnyvale Avenue, Sunnyvale, California. It was formerly a single-family residence, but presently serves as an office. The Residence is situated on 8,000 square feet of property and has gross building area of approximately 1,230 square feet. The Urgent Care Facility is contiguous to the Residence and the Treatment Center. In addition, the Urgent Care Facility and the Residence are located in close proximity to certain real property that is owned by CMG.

Of the purchase price paid for the Urgent Care Facility and the Residence, 76.5 percent came from the trust established for the profit sharing portion of the ERPS Plan and the other 23.5 percent came from the trust setup for the money purchase pension plan portion of the ERPS Plan.

PTE 87–13 and the Department's Information Letter

8. PTE 87–13 permitted the ERPS Plan to lease the Urgent Care Facility and the Residence to Sunnyvale (including its successors) under the provisions of separate, but identical written triple net leases (the 1987 Leases). Each 1987 Lease was for an initial term of ten years, commencing on February 2, 1987 and ending on December 31, 1996. Each 1987 Lease contained two renewal extensions, both of which were of five years' duration. The 1987 Leases were signed on behalf of the ERPS Plan by Barclays Bank of California (Barclays), in the capacity as directed trustee and landlord.

The combined initial rental under the 1987 Leases, as determined by qualified, independent appraisers, was $28,216 per month. Such rental income from the properties was allocated between the two trusts comprising the ERPS Plan in accordance with the proportions described above.

Moreover, each 1987 Lease provided for an annual rental increase based on the fair market rental value of the Urgent Care Facility and the Residence as determined by an independent real estate appraiser appointed by Barclays. The qualified, independent appraiser was also required to have at least five years full-time commercial real estate experience. To represent the interests of the ERPS Plan with respect to the 1987 Leases, Barclays reviewed, approved, and agreed to monitor such transactions as the independent fiduciary.

In an information letter dated May 29, 1996, the Department concluded that PTE 87–13 was still effective. The letter was requested as a result of (a) the merger of the Sunnyvale Profit Sharing Plan into the 401(k) Plan and the 401(k) Plan's receipt of rent; (b) the renaming of Sunnyvale to CMG; and (c) the substitution of Barclays with Wells Fargo, as the new directed trustee, into which Barclays had merged. Thus, the 401(k) Plan and the Retirement Plan were the owners of proportionate interests in the Urgent Care Facility and the Residence of 76.5 percent and 23.5 percent, respectively.

The 1997 Leases

9. In March 1999, Wells Fargo, the successor directed trustee for the Plans signed new leases for the Urgent Care Facility and the Residence for the period commencing January 1, 1997 and ending December 31, 2006 (the 1997 Leases). Wells Fargo signed the 1997 Leases as directed trustee for both the 401(k) Plan and the Retirement Plan. The base rent for the Urgent Care Facility was established at $32,417 per month and $2,069 for the Residence. At the expiration of the initial term, each 1997 Lease granted CMG the option to extend such lease for two additional five year terms. The 1997 Leases also contained a provision stating that the 401(k) Plan would sell its 76.5 percent interest in the Urgent Care Facility and the Residence to the Retirement Plan

[5] As stated previously, the Treatment Center, which was also included among the Retirement Plan's assets, is described in PTE 2004–21.

and that the same lease terms would continue to apply after the sale.

Like the 1987 Leases, the 1997 Leases continued to provide that the rent for each succeeding year would be determined on the basis of an independent appraisal. However, a new provision was added to each 1997 Lease which stated that if the independent appraiser determined that the fair rental value of the Residence or the Urgent Care Facility was less than the existing annual rent, the rent would not be lowered, but would remain the same as the rent then in effect.

Inter-Plan Sale of Interests in the Buildings and the Treatment Center

10. In 1998, the Administrative Committee decided that it was in the best interests of the 401(k) Plan and its participants and beneficiaries to switch the 401(k) Plan's investment program and plan administration to a family of mutual funds, and to allow the participants and beneficiaries to make their own portfolio selections from a ''menu'' offered by the mutual fund provider. The Administrative Committee determined that savings would be realized if the same provider provided the investment options, the administrative services and the trustee services. After examination and consideration was given, the Administrative Committee chose T. Rowe Price as the provider for all such services.

11. Because T. Rowe Price would only serve as the trustee of mutual fund assets, the firm decided it would not serve as the trustee for the 401(k) Plan's real estate interests, which included its 76.5 percent interests in the Urgent Care Facility, the Residence, as well as its 100 percent ownership interest in the Treatment Center. In order to maintain the efficiency and cost effectiveness of the ''one-stop shop,'' and thus avoid a second trustee for the 401(k) Plan to hold only the real estate assets, the Administrative Committee determined that the 401(k) Plan should dispose of its interests in the real estate. On the other hand, since the real estate interests had proven to be a good source of income and a good vehicle for investment diversification for the Plans, the Administrative Committee chose to transfer the 401(k) Plan's interests to the Retirement Plan rather than dispose of them entirely.

On the erroneous advice of the Plans' legal counsel, who indicated that the transaction would not be prohibited under the Act, the Administrative Committee determined to cause the 401(k) Plan to sell its 76.5 percent interest in the Urgent Care Facility, its 23.5 percent interest in the Residence, and its 100 percent interest in the Treatment Center to the Retirement Plan.

In advance of the sale, CMG commissioned Messrs. Carney and Hulberg to perform an appraisal of the fair market value and the fair market rental value of the Buildings, including the Treatment Center. Mr. Carney, a Principal and Executive Vice President, who has been associated with Hulberg & Associates since November 1984 and Mr. Hulberg, an appraiser with the firm since 1997, stated that they had extensive experience in conducting commercial, industrial, residential and agricultural appraisals. Both appraisers also certified that they had no present or contemplated future interest in the Buildings and that they had no personal interest or bias with respect to such properties or the parties involved. In addition, the appraisers certified that their compensation was not contingent upon the reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value estimate, the attainment of a stipulated result, or the occurrence of a subsequent event.

In an appraisal report dated December 20, 1998, Messrs. Carney and Hulberg placed the combined fair market value of the Residence, the Urgent Care Facility and the Treatment Center at $4,965,000 as of November 24, 1998. The combined figure represented a fair market value of $3,430,000 for the Urgent Care Facility, $1,210,000 for the Treatment Center and $325,000 for the Residence. Of the combined figure, the 401(k) Plan's ownership interest in the Buildings and the Treatment Center totaled $4,082,575. This amount represented approximately 8.97 percent of the 401(k) Plan's assets and approximately 14.16 percent of the Retirement Plan's assets.

On June 17, 1999, in an all cash transaction, the 401(k) Plan sold its real estate interests to the Retirement Plan for $4,081,471.[6] The 401(k) Plan received $2,622,942 for the Urgent Care Facility, $248,529 for the Residence and $1,210,000 for the Treatment Center. No fees or commissions were paid by either the 401(k) Plan or the Retirement Plan and the expenses associated with the transaction were borne exclusively by CMG.

The Plans' legal counsel also advised the Administrative Committee that PTE 87–13 would continue to apply to any leasing of the Urgent Care Facility and the Residence by the Retirement Plan to CMG. Nevertheless, the Plan's legal counsel informed CMG that a prohibited transaction exemption would be required in connection with any leasing of the Treatment Center to CMG. Therefore, on November 24, 2004, the Department granted PTE 2004–21, which provided retroactive exemptive relief to permit Retirement Plan to lease the Treatment Center to CMG under the provisions of a new lease (the New Lease). PTE 2004–21 also allowed CMG to exercise options to renew the New Lease for two additional five year terms.

Prohibited Transactions

12. In the view of the Department, the leasing arrangements between CMG and the Plans under the 1987 Leases and the 1997 Leases reflected a lack of continuous oversight by qualified, independent fiduciaries with full investment discretion to review, approve and monitor the terms of such leases. In addition, there were no contemporaneous independent appraisals (or other objective means) to establish the fair market value or the fair market rental value of the Residence and the Urgent Care Facility at the inception of each lease, at the time the rent was adjusted annually, or at the time of the sale of the 401(k) Plan's interests in the Residence, the Urgent Care Facility, and the Treatment Center to the Retirement Plan.[7] Because of these failures, the Department is of the opinion that the exemptive relief originally provided under PTE 87–13 would no longer be available. The Department is also not prepared to provide retroactive exemptive relief with respect to such past leases and the June 17, 1999 sale transaction. Therefore, within 90 days of the publication in the **Federal Register** of the notice granting this exemption, PAMF, as successor in interest to CMG, will file a Form 5330 with the Service

[6] The $1,104 difference between the total amount of the 401(k) Plan's interest in the Buildings and the amount paid by the Retirement Plan is due to rounding the 401(k) Plan's ownership percentage interest upward to 76.5%. For example, both the Residence and the Urgent Care Facility represented 76.470461% of the 401(k) Plan's ownership interest before rounding.

[7] According to the exemption application, both the Retirement Plan and the 401(k) Plan had independent fiduciaries in 1998 and 1999 that had full discretion to review, approve and monitor the leasing arrangements between the Plans. The independent fiduciaries selected Messrs. Carney and Hulberg to determine the fair market rental value of the Buildings under the 1997 Leases and the fair market value of the Buildings and the Treatment Center for purposes of the June 17, 1999 sale. However, the appraisal reports were not prepared during the same time period as the 1997 Leases or the sale. The independent fiduciaries were not engaged after 1999.

and pay all applicable excise taxes that are due prior to July 1, 2003.

Independent Fiduciary for the Retirement Plan

13. On March 3, 2003, Mr. Nault was appointed to serve as the Retirement Plan's independent fiduciary. He served in this capacity until his resignation on January 1, 2008. At this time of his appointment, Mr. Nault replaced Wells Fargo, the Retirement Plan's directed trustee, as the independent fiduciary. Mr. Nault represented that he was qualified to act as an independent fiduciary for the Retirement Plan because he had considerable experience in managing assets of all types, including performing settlement work for the Department, intellectual property, limited partnerships, raw land development, joint venture agreements, asset recovery and liquidation, assigning and evaluating asset managers, and ESOP, profit sharing and 401(k) plans. Mr. Nault further represented that he had been acting as a court-appointed trustee of tax-qualified plans since 1994, that he had replaced trustees who were removed in connection with ERISA violations, and that in two recent cases he had been responsible for evaluating and deciding the disposition of real estate assets. In his statement, Mr. Nault confirmed that he had no prior contact or any past or current relationship with any interested party in this matter. Mr. Nault also confirmed that he was never related to CMG or its principals in any way, and that he derived less than 3 percent of his gross annual income (base upon each preceding calendar year) from CMG during the time he served as independent fiduciary for the Retirement Plan. Moreover, Mr. Nault acknowledged and accepted his fiduciary responsibilities and liabilities in acting as an independent fiduciary on behalf of the Retirement Plan.

As the Retirement Plan's independent fiduciary, Mr. Nault agreed, in pertinent part, to (a) determine whether the lease provisions between the 401(k) Plan and CMG were reasonable under the 1997 Leases and whether the 401(k) Plan had received fair market value rent; (b) determine if the 401(k) Plan received fair market value from the Retirement Plan upon the sale of the 401(k) Plan's interests in the Residence and the Urgent Care Facility in 1999; (c) analyze the 1997 Leases of the Urgent Care Facility and the Residence after the transfer of these properties to the Retirement Plan from the 401(k) Plan to determine if the provisions of such leases were reasonable and if the rental was at, or better than, market value; (d) examine the Retirement Plan's investment portfolio and investment policy to determine if the ownership of the Urgent Care Facility and the Residence was prudent and in compliance with such investment policy; and (e) negotiate and/or monitor the 2003 Leases on behalf of the Retirement Plan.

The 2003 Leases/Request for Exemptive Relief

14. On or about July 1, 2003 and after receiving approval from Mr. Nault, Wells Fargo signed separate new leases in order to continue the Retirement Plan's leasing arrangement with CMG for the Urgent Care Facility and the Residence. The Buildings represented 11.83% of the Retirement Plan's assets. Both 2003 Leases were triple net and required CMG to pay all real estate taxes with respect to the Urgent Care Facility and the Residence on behalf of the Retirement Plan, as well as all expenses that were associated with insurance, maintenance and utilities.

The initial term of each 2003 Lease commenced on July 1, 2003 and expired on December 31, 2006. The base rent for the Urgent Care Facility was set at $38,325 per month and was $2,069 per month for the Residence. Although each 2003 Lease allowed CMG the option to extend such lease for two additional five year terms, the renewal provisions were subsequently modified. In this regard, the 2003 Lease of the Residence could be extended by CMG for one year or until December 31, 2007. With respect to leasing of the Urgent Care Facility, that 2003 Lease could be extended for three years or until December 31, 2009. The 2003 Leases also provided that the annual rent would be the greater of the rent provided in the lease or the fair market value rental of the real estate as determined by an independent appraiser and required that CMG provide Mr. Nault with documentation that the rent had been paid on a monthly basis.

15. PAMF requests an administrative exemption from the Department, with respect to the leasing of the Urgent Care Facility and the Residence to CMG from the Retirement Plan under the 2003 Leases. In addition, PAMF requests exemptive relief with respect to the exercise of the renewal options under the 2003 Leases. If granted, the exemption would be effective from July 1, 2003 until December 14, 2007.

Independent Appraisals of the Buildings

16. On October 18, 2002, Messrs. Carney and Hulberg prepared a formal appraisal report of the subject properties. The appraisers used the Income Approach to valuation because of that methodology's reasonable support of rent, overall capitalization data, widespread use and understandability to investors. As of October 15, 2002, the appraisers placed the fair market rental value of the Urgent Care Facility at $28,676 per month and the Residence at $1,845 per month. The appraisers also noted that the rent CMG was paying to the Retirement Plan was well above the market rate.[8] The appraisers further determined that the Urgent Care Facility and the Residence were of no unique or special value to CMG by reason of their proximity to other real property owned by CMG.

17. Because the appraisers did not update the 2002 appraisal until October 1, 2003, there was no contemporaneous appraisal of the Buildings at the inception of the 2003 Leases. So, Mr. Nault stated that he relied on ''other objective means'' to establish the fair market rental value of the Residence and the Urgent Care Facility and to ensure that adequate independent safeguards were in place when the 2003 Leases became effective. The objective means that were undertaken by Mr. Nault included his having discussions primarily with Mr. Hulberg to ascertain the fair market rental value of the Buildings and conducting due diligence from the time of his independent fiduciary appointment onward. Mr. Nault explained that during his discussions with Mr. Hulberg, he reviewed rental statistics for the Sunnyvale-San Jose area showing that the rent being paid for the Buildings was above market. Further, as part of his due diligence, Mr. Nault stated that he physically inspected the vacancy information he received from Mr. Hulberg, conducted an online analysis of rents and market conditions to determine rental levels in the area, and researched the effect of the 2001 implosion of Dot-Com businesses on the office vacancy rate in the area. Mr. Nault stated that his findings at the time the 2003 Leases were executed indicated that CMG was paying above market rent. He noted that the rental amounts paid by CMG under the 2003 Leases would be changed only if such amounts fell below market value.

With respect to annual adjustments to the rent under the 2003 Leases, each year, as of October 1, Messrs. Carney

[8] The applicant represents that, to the best of its knowledge, to the extent that the rent paid by CMG to the Retirement Plan under the 2003 Leases exceeded fair market rental value, such excess rent (if treated as an employer contribution) did not cause the annual additions to the Retirement Plan to exceed the limitations prescribed by section 415 of the Code.

and Hulberg determined the fair market rental value of the Buildings. Three months later, on January 1, Mr. Nault would determine the fair market rental value of the Buildings for that year.[9] In making his rental determinations, Mr. Nault frequently visited the San Jose, California area and maintained close ties with real estate professionals, besides Mr. Hulberg, who were familiar with real estate values in that area. Each year, he inquired about the fair market rental value of the Buildings with these professionals prior to determining whether the fair market rental value of the Buildings had not increased and whether the rent would remain at the existing level.

Other Determinations Made by the Independent Fiduciary

18. Following his analysis of the transactions, Mr. Nault concluded that the 401(k) Plan had received fair market value on the sale of its interests in the Residence and the Urgent Care Facility to the Retirement Plan. After reviewing the Purchase and Sale Agreement and comparing it to the appraisals between 1998 and 1999, Mr. Nault noted that the selling price appeared to be slightly above market value, but that the difference in value was not significant. Due to the lack of a contemporaneous appraisal at the time of the actual sale, Mr. Nault stated that it was possible that the value was exactly correct on the date of the sale. Further, Mr. Nault advised that it would have been more appropriate to have updated the appraisal to occur much closer to the date of the actual transfer of the interests in the Buildings and if another appraisal had been conducted on the exact date of the sale, the outcome would not be any different.

In addition, Mr. Nault explained that he had reviewed the real estate valuations beginning with the 1998 appraisal of the Buildings by Messrs. Carney and Hulberg. He indicated that this objective was to identify the relative differences from year to year in between the various appraisals to understand the trend and volatility of the market. Mr. Nault stated that he was trying to determine whether the Retirement Plan had been receiving lower than market rental compensation at any time since 1998. He further explained that he checked current rental prices in the Sunnyvale area to see if they were consistent with the appraisals. He said he also compared a list of the rents paid by CMG during May 2003 for sixteen buildings within its medical group that included the subject Buildings, with Collier International Published rates, to see how the Urgent Care Facility (at $2.46 per square foot) and the Residence (at $1.69 per square foot) compared with other rents paid by CMG to unrelated parties. According to Mr. Nault, the analysis of average rents corroborated his previous finding that CMG was paying above average rent for the Urgent Care Facility, while CMG was paying below average rent with respect to the Residence when compared in the same group. Mr. Nault indicated that the Residence was not comparable to other properties on the list because it is a converted residence in somewhat average to below average condition, and is not desirable as a residence. However, when compared to other converted residences, the rental amount paid by CMG for the Residence was above average rent for the market.

19. With respect to the 2003 Leases, Mr. Nault confirmed that the terms and conditions of such leases were more favorable to the Retirement Plan than those obtainable by the Retirement Plan in an arm's length transaction with unrelated third parties.

Mr. Nault attributed this observation to the timing of the 2003 Leases and the decline in the real estate market at the contemplated inception of such leases. In reaching this conclusion, Mr. Nault stated that he considered the terms of similar leases between unrelated parties, the Retirement Plan's overall investment portfolio, the Retirement Plan's liquidity and diversification requirements.

In addition, Mr. Nault certified that the exemption transactions were appropriate investments for the Retirement Plan and were in the best interests of the Retirement Plan and its participants and beneficiaries. Mr. Nault based his statement on all data at his disposal, discussions with Messrs. Carney and Hulberg, as well as reviews of the performance of the Urgent Care Facility and the Residence.

Further, Mr. Nault represented that he monitored, on behalf of the Retirement Plan, compliance with the terms of each 2003 Lease throughout the duration of such lease, and each extension, and, if necessary, he indicated that he would take appropriate actions to enforce the payment of the rent and the proper performance of all other obligations of CMG under the terms of each 2003 Lease.

Finally, Mr. Nault indicated that he expressly approved the renewal of each 2003 Lease beyond the initial term. He explained that he ensured that the rent paid to the Retirement Plan under the 2003 Leases and during each renewal term was no less than the fair market rental value of the Urgent Care Facility and the Residence and that such rentals were adjusted annually according to an annual independent appraisal, if required.

Department's Investigation

20. In a letter to CMG dated March 17, 2005, the San Francisco Regional Office (SFRO) of the Department concluded its investigation of the Retirement Plan and the 401(k) Plan. Based on the facts gathered during the investigation, the SFRO noted that the fiduciaries of the Plans may have violated several provisions of the Act with respect to the leasing of the Treatment Center by the Plans to CMG and the sale of the 401(k) Plan's ownership interests in the Buildings and Treatment Center to the Retirement Plan. Because the fiduciaries of the Plans had obtained exemptive relief from the Department with respect to the leasing of the Treatment Center (PTE 2004–21), the SFRO said it would take no further action with regard to these issues.

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

(a) The terms and conditions of each 2003 Lease were no less favorable to the Retirement Plan than those obtainable by the Retirement Plan under similar circumstances when negotiated at arm's length with unrelated third parties.

(b) The Retirement Plan was represented for all purposes under the 2003 Leases, and during each renewal term, by a qualified, independent fiduciary.

(c) The independent fiduciary negotiated, reviewed, and approved the terms and conditions of the 2003 Leases and the options to renew such leases on

[9] The 2003 Leases provided in a Lease Addendum (paragraph 2, Rent Escalation) for an independent appraisal of the Buildings prior to the end of the ''lease year.'' The Lease Addendum further provided that if the appraisal was not completed before the end of the lease year, an upward adjustment in rent would commence immediately upon completion of the appraisal.

Each year, Mr. Nault used three data points to determine the fair market rental value of the Buildings: (1) The independent appraisal in October of the lease year, (2) an analysis in January of that lease year, and (3) the independent appraisal in October of the next lease year. This allowed him to analyze market trends as well as specific valuations on a given date. If the appraisal in October of the lease year or the evaluation in January of the lease year had shown that the market value had increased to equal or greater than the valuations of such properties in 2001 (when such valuations were at their peak), Mr. Nault would have immediately adjusted the rent upward and pro-rated the rent over the lease period to reflect the higher value. The independent appraisal in October of the following lease year was used by Mr. Nault to confirm whether the fair market rental value for the duration of the prior the lease year had exceeded 2001 values. It is represented that neither the market trends nor the valuations ever showed an increase over the 2001 market values for the duration of the 2003 Leases.

behalf of the Retirement Plan and has determined that the transactions were appropriate investments for the Retirement Plan and are in the best interests of the Retirement Plan and its participants and beneficiaries.

(d) The rent paid to the Retirement Plan under each 2003 Lease, and during each renewal term, was no less than the fair market rental value of the Urgent Care Facility and the Residence, as established by a qualified, independent appraiser.

(e) The rent was subject to adjustment at the commencement of the second year of each 2003 Lease and each year thereafter by way of an independent appraisal. A qualified, independent appraiser was selected by the independent fiduciary to conduct the appraisal. If the appraised fair market rent of the Urgent Care Facility or the Residence was greater than that of the current base rent, then the base rent was revised to reflect the appraised increase in fair market rent. If the appraised fair market rent of the Urgent Care Facility or the Residence was less than or equal to the current base rent, then the base rent remained the same.

(f) Each 2003 Lease was triple net, requiring all expenses for maintenance, taxes, utilities and insurance to be paid by CMG, as lessee.

(g) The independent fiduciary (1) monitored CMG's compliance with the terms of each 2003 Lease and the conditions of the exemption throughout the duration of such leases and the renewal terms, and was responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of CMG under the terms of such leases; (2) expressly approved the renewals of the 2003 Leases beyond their initial terms;

(3) determined whether the rent was paid in a timely manner based on documentation provided by CMG; and (4) determined whether CMG owed the 401(k) Plan or the Retirement Plan additional rent by reason of the past leasing of the Urgent Care Facility and/or the Residence, including the payment of reasonable interest.

(h) At all times throughout the duration of each 2003 Lease and each respective renewal term, the fair market value of the Urgent Care Facility and the Residence did not exceed 25 percent of the value of the total assets of the Retirement Plan.

(i) Within 90 days of the publication of the grant notice in the **Federal Register**, PAMF will file a Form 5330 with the Service and pay all applicable excise taxes that are due with respect to the leasing of the Urgent Care Facility and the Residence to CMG by the 401(k) Plan and/or the Retirement Plan prior to July 1, 2003.

Tax Consequences Of The Transactions

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the sponsoring employer to the plan and, therefore, must be examined under applicable provisions of the Internal Revenue Code, including sections 401(a)(4), 404 and 415.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 693–8556. (This is not a toll-free number.)

The Bank of New York Mellon Corporation (the Applicant), Located in New York, New York [Exemption Application Number: D–11458]

Proposed Exemption

The Department of Labor (the Department) is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA, or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (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 proposed exemption is granted, effective as of the date of issuance of this proposed exemption, the restrictions of section 406 of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the purchase of certain securities (the Securities), as defined below in Section III(h), by an asset management affiliate of The Bank of New York Mellon Corporation (BNYMC), as ''affiliate'' is defined below in Section III(c), from any person other than such asset management affiliate of BNYMC or any affiliate thereof, during the existence of an underwriting or selling syndicate with respect to such Securities, where a broker-dealer affiliated with BNYMC (the Affiliated Broker-Dealer), as defined below in Section III(b), is a manager or member of such syndicate (an ''affiliated underwriter transaction'' (AUT [10])) and/or where an Affiliated Trustee, as defined below in Section III(m), serves as trustee of a trust that issued the Securities (whether or not debt securities) or serves as indenture trustee of Securities that are debt Securities (an ''affiliated trustee transaction'' (ATT [11])) and the asset management affiliate of BNYMC, as a fiduciary, purchases such Securities:

(a) On behalf of an employee benefit plan or employee benefit plans (Client Plan(s)), as defined below in Section III(e); or

(b) On behalf of Client Plans, and/or In-House Plans, as defined below in Section III(l), which are invested in a pooled fund or in pooled funds (Pooled Fund(s)), as defined below in Section III(f).

Section II—Conditions

The proposed exemption, if granted, is conditioned upon adherence to the facts and representations described herein and upon satisfaction of the following conditions:

(a)(1) The Securities to be purchased are either—

(i) Part of an issue registered under the Securities Act of 1933 (the 1933 Act) (15 U.S.C. 77a *et seq.*) or, if the Securities to be purchased are part of an issue that is exempt from such registration requirement, such Securities:

(A) Are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States,

(B) Are issued by a bank,

(C) Are exempt from such registration requirement pursuant to a federal statute other than the 1933 Act, or

(D) Are the subject of a distribution and are of a class which is required to be registered under section 12 of the Securities Exchange Act of 1934 (the 1934 Act) (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such Securities and that has filed all reports required to be filed thereunder with the Securities and Exchange Commission (SEC) during the preceding twelve (12) months; or

(ii) Part of an issue that is an Eligible Rule 144A Offering, as defined in SEC Rule 10f–3 (17 CFR 270.10f–3(a)(4)). Where the Eligible Rule 144A Offering of the Securities is of equity securities,

[10] For purposes of this proposed exemption, an In-House Plan may engage in AUTs only through investment in a Pooled Fund.

[11] For purposes of this proposed exemption, an In-House Plan may engage in ATTs only through investment in a Pooled Fund.

the offering syndicate shall obtain a legal opinion regarding the adequacy of the disclosure in the offering memorandum;

(2) The Securities to be purchased are purchased prior to the end of the first day on which any sales are made, pursuant to that offering, at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities, except that—

(i) If such Securities are offered for subscription upon exercise of rights, they may be purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(ii) If such Securities are debt securities, they may be purchased at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities and may be purchased on a day subsequent to the end of the first day on which any sales are made, pursuant to that offering, provided that the interest rates, as of the date of such purchase, on comparable debt securities offered to the public subsequent to the end of the first day on which any sales are made and prior to the purchase date are less than the interest rate of the debt Securities being purchased; and

(3) The Securities to be purchased are offered pursuant to an underwriting or selling agreement under which the members of the syndicate are committed to purchase all of the Securities being offered, except if—

(i) Such Securities are purchased by others pursuant to a rights offering; or

(ii) Such Securities are offered pursuant to an over-allotment option.

(b) The issuer of the Securities to be purchased pursuant to this proposed exemption must have been in continuous operation for not less than three years, including the operation of any predecessors, unless the Securities to be purchased—

(1) Are non-convertible debt securities rated in one of the four highest rating categories by Standard Poor's Rating Services, Moody's Investors Service, Inc., FitchRatings, Inc., Dominion Bond Rating Service Limited, Dominion Bond Rating Service, Inc., or any successors thereto (collectively, the Rating Organizations), provided that none of the Rating Organizations rates such securities in a category lower than the fourth highest rating category; or

(2) Are debt securities issued or fully guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States; or

(3) Are debt securities which are fully guaranteed by a person (the Guarantor) that has been in continuous operation for not less than three years, including the operation of any predecessors, provided that such Guarantor has issued other securities registered under the 1933 Act; or if such Guarantor has issued other securities which are exempt from such registration requirement, such Guarantor has been in continuous operation for not less than three years, including the operation of any predecessors, and such Guarantor is:

(i) A bank; or

(ii) An issuer of securities which are exempt from such registration requirement, pursuant to a Federal statute other than the 1933 Act; or

(iii) An issuer of securities that are the subject of a distribution and are of a class which is required to be registered under Section 12 of the Securities Exchange Act of 1934 (the 1934 Act) (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such securities and that has filed all reports required to be filed thereunder with the Securities and Exchange Commission (SEC) during the preceding twelve (12) months.

(c) The aggregate amount of Securities of an issue purchased, pursuant to this exemption, by the asset management affiliate of BNYMC with: (i) The assets of all Client Plans; (ii) The assets, calculated on a pro-rata basis, of all Client Plans and In-House Plans investing in Pooled Funds managed by the asset management affiliate of BNYMC; and (iii) The assets of plans to which the asset management affiliate of BNYMC renders investment advice within the meaning of 29 CFR 2510.3–21(c)) does not exceed:

(1) Ten percent (10%) of the total amount of the Securities being offered in an issue, if such Securities are equity securities;

(2) Thirty-five percent (35%) of the total amount of the Securities being offered in an issue, if such Securities are debt securities rated in one of the four highest rating categories by at least one of the Rating Organizations, provided that none of the Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(3) Twenty-five percent (25%) of the total amount of the Securities being offered in an issue, if such Securities are debt securities rated in the fifth or sixth highest rating categories by at least one of the Rating Organizations, provided that none of the Rating Organizations rates such Securities in a category lower than the sixth highest rating category; and

(4) The assets of any single Client Plan (and the assets of any Client Plans and any In-House Plans investing in Pooled Funds) may not be used to purchase any debt securities being offered, if such securities are rated lower than the sixth highest rating category by any of the Rating Organizations;

(5) Notwithstanding the percentage of Securities of an issue permitted to be acquired, as set forth in Section II(c)(1), (2), and (3) above of this proposed exemption, the amount of Securities in any issue (whether equity or debt securities) purchased, pursuant to this proposed exemption, by the asset management affiliate of BNYMC on behalf of any single Client Plan, either individually or through investment, calculated on a pro-rata basis, in a Pooled Fund may not exceed three percent (3%) of the total amount of such Securities being offered in such issue; and

(6) If purchased in an Eligible Rule 144A Offering, the total amount of the Securities being offered for purposes of determining the percentages, described above in Section II(c)(1)–(3) and (5), is the total of:

(i) The principal amount of the offering of such class of Securities sold by underwriters or members of the selling syndicate to ''qualified institutional buyers'' (QIBs), as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)); plus

(ii) The principal amount of the offering of such class of Securities in any concurrent public offering.

(d) The aggregate amount to be paid by any single Client Plan in purchasing any Securities which are the subject of this proposed exemption, including any amounts paid by any Client Plan or In-House Plan in purchasing such Securities through a Pooled Fund, calculated on a pro-rata basis, does not exceed three percent (3%) of the fair market value of the net assets of such Client Plan or In-House Plan, as of the last day of the most recent fiscal quarter of such Client Plan or In-House Plan prior to such transaction.

(e) The covered transactions are not part of an agreement, arrangement, or understanding designed to benefit the asset management affiliate of BNYMC or an affiliate.

(f) If the transaction is an AUT, the Affiliated Broker-Dealer does not receive, either directly, indirectly, or through designation, any selling concession, or other compensation or consideration that is based upon the amount of Securities purchased by any single Client Plan, or that is based on the amount of Securities purchased by Client Plans or In-House Plans through Pooled Funds, pursuant to this proposed exemption. In this regard, the Affiliated Broker-Dealer may not receive, either directly or indirectly, any compensation or consideration that is attributable to the fixed designations generated by purchases of the Securities by the asset management affiliate of BNYMC on behalf of any single Client Plan or any Client Plan or In-House Plan in Pooled Funds.

(g) If the transaction is an AUT,

(1) The amount the Affiliated Broker-Dealer receives in management, underwriting, or other compensation or consideration is not increased through an agreement, arrangement, or understanding for the purpose of compensating the Affiliated Broker-Dealer for foregoing any selling concessions for those Securities sold pursuant to this proposed exemption. Except as described above, nothing in this Section II(g)(1) shall be construed as precluding the Affiliated Broker-Dealer from receiving management fees for serving as manager of the underwriting or selling syndicate, underwriting fees for assuming the responsibilities of an underwriter in the underwriting or selling syndicate, or other compensation or consideration that is not based upon the amount of Securities purchased by the asset management affiliate of BNYMC on behalf of any single Client Plan, or on behalf of any Client Plan or In-House Plan participating in Pooled Funds, pursuant to this proposed exemption; and

(2) The Affiliated Broker-Dealer shall provide, on a quarterly basis, to the asset management affiliate of BNYMC a written certification, signed by an officer of the Affiliated Broker-Dealer, stating that the amount that the Affiliated Broker-Dealer received in compensation or consideration during the past quarter, in connection with any offerings covered by this exemption, was not adjusted in a manner inconsistent with Section II(e), (f), or (g) of this proposed exemption.

(h) The covered transactions are performed under a written authorization executed in advance by an independent fiduciary of each single Client Plan (the Independent Fiduciary), as defined below in Section III(g).

(i) Prior to the execution by an Independent Fiduciary of a single Client Plan of the written authorization described above in Section II(h), the following information and materials (which may be provided electronically) must be provided by the asset management affiliate of BNYMC to such Independent Fiduciary;

(1) A copy of the Notice of Proposed Exemption (the Notice) and, if the requested exemption is granted, a copy of the final exemption as published in the **Federal Register**; and

(2) Any other reasonable available information regarding the covered transactions that such Independent Fiduciary requests the asset management affiliate of BNYMC to provide.

(j) Subsequent to the initial authorization by an Independent Fiduciary of a single Client Plan permitting the asset management affiliate of BNYMC to engage in the covered transactions on behalf of such single Client Plan, the asset management affiliate of BNYMC will continue to be subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Independent Fiduciary requests the asset management affiliate of BNYMC to provide.

(k)(1) In the case of an existing employee benefit plan investor (or existing In-House Plan investor, as the case may be) in a Pooled Fund, such Pooled Fund may not engage in any covered transactions pursuant to this proposed exemption, unless the asset management affiliate of BNYMC provides the written information, as described below and within the time period described below in this Section II(k)(2), to the Independent Fiduciary of each such plan participating in such Pooled Fund (and to the fiduciary of each such In-House Plan participating in such Pooled Fund).

(2) The following information and materials (which may be provided electronically) shall be provided by the asset management affiliate of BNYMC not less than 45 days prior to such asset management affiliate of BNYMC engaging in the covered transactions on behalf of a Pooled Fund, pursuant to this proposed exemption, and provided further that the information described below in this section II(k)(2)(i) and (iii) is supplied simultaneously:

(i) A notice of the intent of such Pooled Fund to purchase Securities pursuant to this exemption, a copy of this Notice, and, if the requested exemption is granted, a copy of the final exemption, as published in the **Federal Register**;

(ii) Any other reasonably available information regarding the covered transaction that the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund requests the asset management affiliate of BNYMC to provide; and

(iii) A termination form expressly providing an election for the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund to terminate such plan's (or In-House Plan's) investment in such Pooled Fund without penalty to such plan (or In-House Plan). Such form shall include instructions specifying how to use the form. Specifically, the instructions must explain that such plan (or such In-House Plan) has an opportunity to withdraw its assets from a Pooled Fund for a period of no more than 30 days after such plan's (or such In-House Plan's) receipt of the initial notice of intent, described above in Section II(k)(2)(i), and that the failure of the Independent Fiduciary of such plan (or fiduciary of such In-House Plan) to return the termination form to the asset management affiliate of BNYMC in the case of a plan (or In-House Plan) participating in a Pooled Fund by the specified date shall be considered as an approval by such plan (or such In-House Plan) of its participation in the covered transactions as an investor in such Pooled Fund.

Further, the instructions will identify BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer and/or Affiliated Trustee and will provide the address of the asset management affiliate of BNYMC. The instructions will state that the exemption will not be available, unless the fiduciary of each plan participating in the covered transactions as an investor in a Pooled Fund is, in fact, independent of BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, and the Affiliated Trustee. The instructions will also state that the fiduciary of each such plan must advise the asset management affiliate of BNYMC, in writing, if it is not an ''Independent Fiduciary,'' as that term is defined below in Section III(g) of this proposed exemption.

For purposes of this Section II(k)(1) and (2), the requirement that the fiduciary responsible for the decision to authorize the transactions described, above, in Section I of this proposed exemption for each plan be independent of the asset management affiliate of BNYMC shall not apply in the case of an In-House Plan.

(3) Notwithstanding the requirement described in Section II(h), the written authorization requirement for an existing single Client Plan shall be

satisfied solely with respect to covered ATT transactions (where the asset management affiliate of BNYMC or any affiliate thereof is not a manager or member of an underwriting or selling syndicate) if the asset management affiliate provides to the Independent Fiduciary of such existing single Client Plan the written information and materials described below in Section II(k)(4), and the Independent Fiduciary does not return the termination form required to be provided by Section II(k)(4)(iii) within the time period specified therein.

(4) The following information and materials (which may be provided electronically) shall be provided by the asset management affiliate of BNYMC not less than 45 days prior to such asset management affiliate of BNYMC engaging in the covered ATT transactions on behalf of such existing single Client Plan pursuant to this proposed exemption:

(i) A notice of the intent of such asset management affiliate to purchase Securities pursuant to this exemption, a copy of this Notice, and, if the requested exemption is granted, a copy of the final exemption, as published in the **Federal Register**;

(ii) Any other reasonably available information regarding the covered ATT transactions that the Independent Fiduciary of such existing single Client Plan requests the asset management affiliate of BNYMC to provide; and

(iii) A termination form expressly providing an election for the Independent Fiduciary of an existing single Client Plan to deny the asset management affiliate of BNYMC from engaging in covered ATT transactions on behalf of such Client Plan. Such form shall include instructions specifying how to use the form. Specifically, the instructions must explain that the existing single Client Plan has an opportunity to deny the asset management affiliate of BNYMC from engaging in covered ATT transactions of behalf of such Client Plan for a period of no more than 30 days after such Client Plan's receipt of the initial notice of intent, described above in Section II(k)(4)(i), and that the failure of the Independent Fiduciary of such existing single Client Plan to return the form to the asset management affiliate of BNYMC by the specified date shall be considered an approval by such Client Plan of its participation in the covered ATT transactions.

Further, the instructions will identify BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer and/or Affiliated Trustee and will provide the address of the asset management affiliate of BNYMC. The instructions will state that the exemption will not be available, unless the Independent Fiduciary of such existing single Client Plan is, in fact, independent of BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, and the Affiliated Trustee. The instructions will also state that the fiduciary of each such existing single Client Plan must advise the asset management affiliate of BNYMC, in writing, if it is not an ''Independent Fiduciary,'' as that term is defined, below, in Section III(g).

(l)(1) In the case of each plan (and in the case of each In-House Plan) whose assets are proposed to be invested in a Pooled Fund after such Pooled Fund has satisfied the conditions set forth in this proposed exemption to engage in the covered transactions, the investment by such plan (or by such In-House Plan) in the Pooled Fund is subject to the prior written authorization of an Independent Fiduciary representing such plan (or the prior written authorization by the fiduciary of such In-House Plan, as the case may be), following the receipt by such Independent Fiduciary of such plan (or by the fiduciary of such In-House Plan, as the case may be) of the written information described above in Section II(k)(2)(i) and (ii).

(2) For purposes of this Section II(l), the requirement that the fiduciary responsible for the decision to authorize the transactions described, above, in Section I of this exemption for each plan proposing to invest in a Pooled Fund be independent of BNYMC and its affiliates shall not apply in the case of an In-House Plan.

(m) Subsequent to the initial authorization by an Independent Fiduciary of a plan (or by a fiduciary of an In-House Plan) to invest in a Pooled Fund that engages in the covered transactions, the asset management affiliate of BNYMC will continue to be subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Independent Fiduciary of such plan (or the fiduciary of such In-House Plan, as the case may be) request the asset management affiliate of BNYMC to provide.

(n) At least once every three months, and not later than 45 days following the period to which such information relates, the asset management affiliate of BNYMC shall furnish:

(1) In the case of each single Client Plan that engages in the covered transactions, the information described below in this Section II(n)(3)–(7), to the Independent Fiduciary of each such single Client Plan;

(2) In the case of each Pooled Fund in which a Client Plan (or in which an In-House Plan) invests, the information described below in this Section (II)(n)(3)–(6) and (8), to the Independent Fiduciary of each such Client Plan (and to the fiduciary of each such In-House Plan) invested in such Pooled Fund;

(3) A quarterly report (the Quarterly Report) (which may be provided electronically) which discloses all the Securities purchased pursuant to the proposed exemption during the period to which such report relates on behalf of the Client Plan, In-House Plan or Pooled Fund to which such report relates, and which discloses the terms of each of the transactions described in such report, including:

(i) The type of Securities (including the rating of any Securities which are debt securities) involved in each transaction;

(ii) The price at which the Securities were purchased in each transaction;

(iii) The first day on which any sale was made during the offering of the Securities;

(iv) The size of the issue of the Securities involved in each transaction, so that the Independent Fiduciary may verify compliance with section II(c);

(v) The number of Securities purchased by the asset management affiliate of BNYMC for the Client Plan, In-House Plan or Pooled Fund to which the transaction relates;

(vi) The identity of the underwriter from whom the Securities were purchased for each transaction;

(vii) In the case of an AUT, the underwriting spread in each transaction (*i.e.*, the difference between the price at which the underwriter purchases the Securities from the issuer and the price at which the Securities are sold to the public);

(viii) In the case of an ATT, the basis upon which the Affiliated Trustee is compensated in each transaction;

(ix) The price at which any of the Securities purchased during the period to which such report relates were sold; and

(x) The market value at the end of the period to which such report relates of the Securities purchased during such period and not sold;

(4) The Quarterly Report contains:

(i) In the case of AUTs, a representation that the asset management affiliate of BNYMC has received a written certification signed by an officer of the Affiliated Broker-Dealer, as described above in Section II(g)(2), affirming that, as to each AUT covered by this exemption during the past quarter, the Affiliated Broker-Dealer acted in compliance with Section II(e), (f) and (g) of this proposed exemption;

(ii) In the case of ATTs, a representation by the asset management affiliate of BNYMC affirming that, as to each ATT, the transaction was not part of an agreement, arrangement of understanding designed to benefit the Affiliated Trustee; and

(iii) A statement that copies of such certifications will be provided upon request;

(5) A disclosure in the Quarterly Report that states that any other reasonably available information regarding a covered transaction that an Independent Fiduciary (or fiduciary of an In-House Plan) requests will be provided, including but not limited to:

(i) The date on which the Securities were purchased on behalf of the Client Plan (or the In-House Plan) to which the disclosure relates (including Securities purchased by the Pooled Funds in which such Client Plan (or such In-House Plan) invests);

(ii) The percentage of the offering purchase on behalf of all Client Plans (and the pro-rata percentage purchased on behalf of Client Plans and In-House Plans investing in Pooled Funds); and

(iii) The identity of all members of the underwriting syndicate;

(6) The Quarterly Report discloses any instance during the past quarter where the asset management affiliate of BNYMC was precluded for any period of time from selling Securities purchased under this proposed exemption in that quarter because of its status as an affiliate of an Affiliated Broker-Dealer or an Affiliated Trustee and the reason for this restriction;

(7) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each single Client Plan that engages in the covered transactions, that the authorization to engage in such covered transactions may be terminated, without penalty to such single Client Plan, within five (5) days after the date that the Independent Fiduciary of such single Client Plan informs the person identified in such notification that the authorization to engage in the covered transactions is terminated; and

(8) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each Client Plan (and to the fiduciary of each In-House Plan) that engages in the covered transactions through a Pooled Fund, that the investment in such Pooled Fund may be terminated without penalty to such Client Plan (or such In-House Plan), within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans, after the date that the Independent Fiduciary of such Client Plan (or the fiduciary of such In-House Plan, as the case may be) informs the person identified in such notification that the investment in such Pooled Fund is terminated.

(o) For purposes of engaging in covered transactions, each Client Plan (and each In-House Plan) shall have total net assets with a value of at least $50 million (the $50 Million Net Asset Requirement). For purposes of engaging in covered transactions involving an Eligible Rule 144A Offering,[12] each Client Plan (and each In-House Plan) shall have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be) (the $100 Million Net Asset Requirement).

For purposes of a Pooled Fund engaging in covered transactions, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets with a value of at least $50 million. Notwithstanding the foregoing, if each such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets with a value of at least $50 million, the $50 Million Net Asset Requirement will be met if fifty percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (or by In-House Plans) each of which has total net assets with a value of at least $50 million.

For purposes of a Pooled Fund engaging in covered transactions involving an Eligible Rule 144A Offering, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be). Notwithstanding the foregoing, if each such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or In-House Plan, as the case may be), the $100 Million Net Asset Requirement will be met if fifty percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (or by In-House Plans) each of which have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be), and the Pooled Fund itself qualifies as a QIB, as determined pursuant to SEC Rule 144A (17 CFR 230.144A(a)(F)).

For purposes of the net asset requirements described above in this Section II(o), where a group of Client Plans is maintained by a single employer or controlled group of employers, as defined in section 407(d)(7) of the Act, the $50 Million Net Asset Requirement (or in the case of and Eligible Rule 144A Offering, the $100 Million Net Asset Requirement) may be met by aggregating the assets of such Client Plans, if the assets of such Client Plans are pooled for investment purposes in a single master trust.

(p) The asset management affiliate of BNYMC is a ''qualified professional asset manager'' (QPAM), as that term is defined under Part V(a) of PTE 84–14, as amended from time to time, or any successor exemption thereto. In addition to satisfying the requirements for a QPAM under Section V(a) of PTE 84–14, the asset management affiliate of BNYMC also must have total client assets under its management and control in excess of $5 billion as of the last day of its most recent fiscal year, and shareholders' or partners' equity in excess of $1 million.

(q) No more than twenty percent (20%) of the assets of a Pooled Fund at the time of a covered transaction are comprised of assets of In-House Plans for which BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, the Affiliated Trustee or an affiliate exercises investment discretion.

(r) The asset management affiliate of BNYMC, the Affiliated Broker-Dealer, and the Affiliated Trustee, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the persons, described below in Section II(s), to determine whether the conditions of this exemption have been met, except that—

(1) No party in interest with respect to a plan which engages in the covered

[12] SEC Rule 10f–3(a)(4), 17 CFR 270.10f–3(a)(4), states that the term ''Eligible Rule 144A Offering'' means an offering of securities that meets the following conditions:

(i) The securities are offered or sold in transactions exempt from registration under section 4(2) of the Securities Act of 1933 [15 U.S.C. 77d(d)], rule 144A thereunder [Sec. 230.144A of this chapter], or rules 501–508 thereunder [Sec. 230.501–230–508 of this chapter];

(ii) The securities are sold to persons that the seller and any person acting on behalf of the seller reasonable believe to include qualified institutional buyers, as defined in Sec. 230.144A(a)(1) of this chapter; and

(iii) The seller and any person acting on behalf of the seller reasonably believe that the securities are eligible for resale to other qualified institutional buyers pursuant to Sec. 230.144A of this chapter.

transactions, other than BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer or the Affiliated Trustee, 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 Section II(s); and

(2) A separate prohibited transaction shall not be considered to have occurred if, due to circumstances beyond the control of the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, or the Affiliated Trustee, as applicable, such records are lost or destroyed prior to the end of the six-year period.

(s) (1) Except as provided below in Section II(s)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in Section II(r) 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 SEC; or

(ii) Any fiduciary of any plan that engages in the covered transactions, or any duly authorized employee or representative of such fiduciary; or

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

(iv) Any participant or beneficiary of a plan that engages in the covered transactions, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described above in Section II(s)(1)(ii)–(iv) shall be authorized to examine trade secrets of the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, or the Affiliated Trustee, or commercial or financial information which is privileged or confidential; and

(3) Should the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, or the Affiliated Trustee refuse to disclose information on the basis that such information is exempt from disclosure, pursuant to Section II(s)(2) above, the asset management affiliate of BNYMC 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.

(t) An indenture trustee whose affiliate has, within the prior 12 months, underwritten any Securities for an obligor of the indenture Securities must resign as indenture trustee if a default occurs upon the indenture Securities within a reasonable amount of time of such default.

SECTION III—DEFINITIONS

(a) The term, ''the Applicant,'' means BNYMC and its current and future affiliates.

(b) The term, ''Affiliated Broker-Dealer,'' means any broker-dealer affiliate, as ''affiliate'' is defined below in Section III(c), of the Applicant, as ''Applicant'' is defined above in Section III(a), that meets the requirements of this proposed exemption. Such Affiliated Broker-Dealer may participate in an underwriting or selling syndicate as a manager or member. The term, ''manager,'' means any member of an underwriting or selling syndicate who, either alone or together with other members of the syndicate, is authorized to act on behalf of the members of the syndicate in connection with the sale and distribution of the Securities, as defined below in Section III(h), being offered or who receives compensation from the members of the syndicate for its services as a manager of the syndicate.

(c) The term ''affiliate'' of a person includes:

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

(2) Any officer, director, partner, employee, or relative, as defined in section 3(15) of the Act, of such person; and

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

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

(e) The term, ''Client Plan(s),'' means an employee benefit plan(s) that is subject to the Act and/or the Code, and for which plan(s) an asset management affiliate of BNYMC exercises discretionary authority or discretionary control respecting management or disposition of some or all of the assets of such plan(s), but excludes In-House Plans, as defined below in Section III(l).

(f) The term, ''Pooled Fund(s),'' means a common of collective trust funds(s) or a pooled investment fund(s): (i) In which employee benefit plan(s) subject to the Act and/or Code invest; (ii) Which is maintained by an asset management affiliate of BNYMC, (as the term, ''affiliate'' is defined above in Section III(c)); and (iii) For which such asset management affiliate of BNYMC exercises discretionary authority or discretionary control respecting the management or disposition of the assets of such fund(s).

(g) (1) The term, ''Independent Fiduciary,'' means a fiduciary of a plan who is unrelated to, and independent of, BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer and the Affiliated Trustee. For purposes of this exemption, a fiduciary of a plan will be deemed to be unrelated to, and independent of, BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer and the Affiliated Trustee, if such fiduciary represents in writing that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for the transactions described above in Section I of this exemption, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer or the Affiliated Trustee and represents that such fiduciary shall advise the asset management affiliate of BNYMC within a reasonable period of time after any change in such facts occur.

(2) Notwithstanding anything to the contrary in this Section III(g), a fiduciary of a plan is not independent:

(i) If such fiduciary directly or indirectly controls, is controlled by, or is under common control with BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer or the Affiliated Trustee;

(ii) If such fiduciary directly or indirectly receives any compensation or other consideration from BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer or the Affiliated Trustee for his or her own personal account in connection with any transaction described in this exemption;

(iii) If any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the asset management affiliate of BNYMC responsible for the transactions described above in Section I of this exemption, is an officer, director or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the sponsor of the plan or of the fiduciary responsible for the decision to authorize or terminate authorization for the transactions described in Section I. However, if such individual is a director of the sponsor of the plan or of the responsible fiduciary, and if he or she abstains from participation in: (A) The choice of the plan's investment manager/adviser; and (B) The decision to authorize or terminate authorization for transactions described above in Section I, then Section III(g)(2)(iii) shall not apply.

(3) The term, ''officer'' means a president, any vice president in charge of a principal business unit, division, or function (such as sales, administration, or finance), or any other officer who performs a policy-making function for BNYMC or any affiliate thereof.

(h) The term, ''Securities,'' shall have the same meaning as defined in section 2(36) of the Investment Company Act of 1940 (the 1940 Act), as amended (15 U.S.C. 80a–2(36)). For purposes of this exemption, mortgage-backed or other asset-backed securities rated by one of the Rating Organizations, as defined, below, in Section III(k), will be treated as debt securities.

(i) The term, ''Eligible Rule 144A Offering,'' shall have the same meaning as defined in SEC Rule 10f–3(a)(4) (17 CFR 270.10f–3(a)(4)) under the 1940 Act.

(j) The term, ''qualified institutional buyer,'' or the term, ''QIB,'' shall have the same meaning as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)) under the 1933 Act.

(k) The term, ''Rating Organizations,'' means Standard & Poor's Rating Services, Moody's Investors Service, Inc., FitchRatings, Inc., Dominion Bond Rating Service Limited, and Dominion Bond Rating Service, Inc.; or any successors thereto.

(l) The term, ''In-House Plan(s),'' means an employee benefit plan(s) that is subject to the Act and/or the Code, and that is, respectively, sponsored by the Applicant as defined above in Section III(a) or by any affiliate, as defined above in Section III(b), of the Applicant, for its own employees.

(m) The term, ''Affiliated Trustee,'' means the Applicant and any bank or trust company affiliate of the Applicant (as ''affiliate'' is defined above in Section III(c)(1)), that serves as trustee of a trust that issues Securities which are asset-backed securities or as indenture trustee of Securities which are either asset-backed securities or other debt securities that meet the requirements of this proposed exemption. For purposes of this proposed exemption, other than Section II(t), performing services as custodian, paying agent, registrar or in similar ministerial capacities is, in each case, also considered serving as trustee or indenture trustee.

This proposed exemption is available to BNYMC for as long as the terms and conditions of the exemption are satisfied with respect to each Client Plan.

Summary of Facts and Representations

1. The Applicant is the The Bank of New York Mellon Corporation (''BNYMC'', or the ''Applicant''), which is headquartered in New York, New York. The Applicant is a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (the ''BHC Act''), and is incorporated under the laws of the state of Delaware. BNYMC was established as a result of the July 2, 2007 merger of The Bank of New York Company, Inc. and Mellon Financial Corporation. As a bank holding company, the Applicant is subject to regulation and oversight by the Board of Governors of the Federal Reserve System. The Applicant is also a financial holding company within the meaning of the BHC Act.

2. The Applicant has a number of affiliates that are involved in the asset management business and may in the future have additional such affiliates (collectively, the ''asset management affiliates''). In some cases, the asset management affiliate is an investment adviser registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). Each such registered asset management affiliate would be subject to regulation and oversight by the Securities and Exchange Commission (the ''SEC'') pursuant to the ''Advisers Act''. In other cases, the asset management affiliate is a bank, trust company or broker-dealer. Each such other asset management affiliate would be subject to regulation and oversight by the applicable Federal and/or state banking regulator, in the case of a bank or trust company, or the SEC, in the case of a broker-dealer. As of September 30, 2007, the aggregate assets under the management of the asset management affiliates were in excess of $1 trillion, of which more than $400 billion consisted of plan assets subject to the Act.

In addition, the Applicant has a number of affiliates that are broker-dealers involved in the underwriting of securities and may in the future have additional broker-dealer affiliates (collectively, the ''Affiliated Broker-Dealers''). Each such Affiliated Broker-Dealer is registered under Section 15 of the Securities Exchange Act of 1934 (the ''1934 Act'') and is subject to regulation and oversight by the SEC.

The Applicant also has a number of affiliates that are involved in the provision of (i) trustee and indenture trustee services as well as (ii) custodian, paying agent, registrar and similar ministerial services, in each case to issuers of securities and may in the future have additional such affiliates.

3. The Applicant seeks an exemption permitting an asset management affiliate of BNYMC to purchase securities as a fiduciary on behalf of Client Plans and In-House Plans (collectively, ''Plans'', including those Plans invested in pooled funds maintained by the asset manager or an affiliate) from any person other than the asset manager or an affiliate during the existence of an underwriting or selling syndicate with respect to such securities: (i) Where the asset manager's broker-dealer affiliate participates as a manager or syndicate member of the underwriting syndicate for such securities (AUT transactions); and/or (ii) Where an affiliate of BNYMC serves as trustee (including custodian or similar functionary) of a trust that issued the securities (whether or not debt securities) or serves as indenture trustee (including custodian or similar functionary) of securities that are debt securities (ATT transactions). The Affiliated Broker-Dealer will receive no selling concessions with respect to the securities sold to Plans in connection with the transactions described in this paragraph.

4. The Applicant represents that in accordance with Prohibited Transaction Class Exemption 75–1, 40 FR 50845 (October 31, 1975) (PTE 75–1), an asset management affiliate of BNYMC may purchase underwritten securities for Plans, where an Affiliated Broker-Dealer is a member of an underwriting or selling syndicate. In this regard, Part III of PTE 75–1 provides limited relief from the prohibited transaction provisions of the Act for plan fiduciaries that purchase securities from an underwriting or selling syndicate of which the fiduciary or an affiliate is a member. However, such relief is not available if the Affiliated Broker-Dealer manages the underwriting or selling syndicate.

5. Further, the Applicant notes that PTE 75–1 does not provide relief for the purchase of unregistered securities. This includes those securities purchased by an underwriter for resale to a ''qualified institutional buyer'' (QIB) pursuant to the SEC's Rule 144A under the Securities Act of 1933 (the ''1933 Act''). It is represented that, for example, Rule 144A is commonly utilized in connection with sales of securities issued by foreign corporations to U.S. investors that are QIBs. Notwithstanding the unregistered nature of such shares, it is represented that syndicates selling securities under Rule 144A (Rule 144A Securities) are the functional equivalent of those selling registered securities.

6. The Applicant represents that the Affiliated Broker-Dealer may regularly serve as a manager of underwriting or selling syndicates for registered securities, and as a manager or a member of underwriting or selling syndicates for Rule 144A Securities. Accordingly, the asset management affiliate of BNYMC is currently unable to purchase on behalf of Plans securities sold in a Rule 144A Offering (defined below), resulting in such Plans being unable to participate in significant investment opportunities.

7. The Applicant represents that there has been considerable consolidation in the nation's financial services industry since 1975, resulting in more situations where a plan fiduciary may be affiliated with the manager of an underwriting syndicate. In addition, many plans have expanded their investment portfolios in recent years to include foreign securities. As a result, the exemption provided in PTE 75–1, Part III, is often unavailable for purchases of certain securities that may be appropriate plan investments.

8. The Applicant states that PTE 2000–25, PTE 2000–27, PTE 2007–03 and FAN 2001–19E expanded the relief afforded under PTE 75–1 to, among other things, situations where the Affiliated Broker-Dealer is a manager of the underwriting or selling syndicate. In addition, the Applicant notes that PTE 2003–24 and FAN 05–09E expanded the relief afforded under PTEs 2000–25 and 2000–27 and FAN 2001–19E to those situations where a fiduciary or its affiliate serves as trustee with respect to a trust that is the issuer of the securities. Such trusts are frequently associated with so-called asset-backed securities (ABS). ABS are usually issued as certificates representing an undivided interest in a trust which holds a portfolio of assets (*e.g.*, secured consumer receivables or credit instruments that bear interest). These exemptions generally cover situations where an affiliate of the asset management affiliate also may serve as a (i) trustee or indenture trustee, or (ii) custodian, paying agent, registrar or other similar ministerial capacities.

9. The Applicant represents that the asset management affiliate of BNYMC makes its investment decisions on behalf of, or renders investment advice to, Plans pursuant to the governing document of the particular Plan or Pooled Fund and the investment guidelines and objectives set forth in the management or advisory agreement. Because the Plans are covered by Title I of the Act, such investment decisions are subject to the fiduciary responsibility provisions of the Act.[13]

10. The Applicant states, therefore, that the decision to invest in a particular offering is made on the basis of price, value, and a Plan's investment criteria, not on whether the securities are currently being sold through an underwriting or selling syndicate. The Applicant further states that, because the compensation paid to the asset management affiliate of BNYMC for its services is generally based upon assets under management, the asset management affiliate of BNYMC has little incentive to purchase securities in an offering in which the Affiliated Broker-Dealer is an underwriter unless such a purchase is in the interests of Plans. If the assets under management do not perform well, the asset management affiliate of BNYMC will receive less compensation and could lose clients, costs which far outweigh any gains from the purchase of underwritten securities. The Applicant points out that under the terms of the proposed exemption, the Affiliated Broker-Dealer would receive no compensation or other consideration, direct or indirect, in connection with any transaction that would be permitted under the proposed exemption.

11. The Applicant states that the asset management affiliates generally purchase securities in large blocks because the same investments will be made across several of their Client accounts. If there is a new offering of an equity or fixed income security that an asset management affiliate had otherwise intended to purchase, it may be able to purchase the security through the offering syndicate at a lower price than it would pay in the open market, without transaction costs and with a reduced market impact if it is buying a relatively large quantity. This is because a large purchase in the open market can cause an increase in the market price and, consequently, result in an increase in the cost of the securities. Purchasing from an offering syndicate can thus reduce the costs to the Plans.

12. The Applicant represents that, absent an individual exemption, if an Affiliated Broker-Dealer is a manager of the syndicate underwriting the offering, the asset management affiliates are currently foreclosed from purchasing any securities from that underwriting syndicate. The Applicant maintains that, if an asset management affiliate then purchases the same securities in the secondary market, the Plans may incur greater costs because the market price is often higher than the offering price, and because of transaction and market impact costs. The Applicant also represents that, due to the reluctance of many purchasers of such securities to sell them on the secondary market, the Plans may be foreclosed from purchasing any such securities if those securities are not purchased directly from an underwriting syndicate. Alternatively, the asset management affiliate may have foregone other investment opportunities because of its decision to purchase in the offering, and these opportunities, if still available, may have become more expensive.

13. The Applicant represents that the Affiliated Broker-Dealers may manage and participate in firm commitment underwriting syndicates for registered offerings of both equity and debt securities. While equity and debt underwritings may operate differently with regard to the actual sales process, the basic structures are the same. In a firm commitment underwriting, the underwriting syndicate acquires the securities from the issuer and then sells the securities to investors.

14. The Applicant represents that while, as a legal matter, the syndicate assumes the risk that the securities might not be distributable, as a practical matter, this risk is reduced, in marketed deals, through ''building a book'' (*i.e.*, taking indications of interest, as further described below at Representation 19) prior to pricing the securities. The Applicant asserts that, consequently, there is little incentive for the underwriters to use their discretionary accounts (or the discretionary accounts of their affiliates) to buy up the securities as a way to avoid underwriting liabilities.

15. The Applicant represents that each syndicate has a ''book-running lead manager'', who is the principal contact between the syndicate and the issuer and who is responsible for organizing and coordinating the syndicate. The Applicant further represents that the book-running lead manager (also called the managing underwriter or syndicate manager) works with an issuer to prepare a new issue of securities and, if necessary, register that issue with the Securities and Exchange Commission. The book-running lead manager manages all aspects of the transaction,

[13] By proposing this exemption, the Department is not expressing an opinion regarding whether any investment decisions or other actions taken by an asset manager regarding the acquisition or holding of ABS or other securities in an ATT would be consistent with its fiduciary obligations under part 4 of Title I of the Act. In this regard, section 404 of the Act requires, among other things, that a Plan fiduciary act prudently, solely in the interest of the Plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making decisions on behalf of a Plan.

such as pricing, sales distribution, allocation of orders, and other administrative functions, such as making appropriate filings and hiring outside counsel to assist all syndicate members in meeting their due diligence obligations. The book-running lead manager maintains the central record (or ''book'') of all orders to purchase in the offering. The syndicate may also have co-leads or co-managers, who generally assist the book-running lead manager in working with the issuer to prepare the registration statement to be filed with the SEC and in distributing the underwritten securities.

16. The Applicant represents that where more than one underwriter is involved, the book-running lead manager, who has been selected by the issuer, contacts other underwriters, and the underwriters enter into, or have previously entered into, an Agreement Among Underwriters. Most book-running lead managers have a form of agreement. This document is then supplemented for the particular deal by sending an ''invitation telex'' setting forth particular terms to the other underwriters.

17. The Applicant represents that the arrangement between the syndicate and the issuer is embodied in an underwriting agreement, which is signed on behalf of the underwriters by one or more of the managers. The underwriting agreement provides, subject to certain closing conditions, that the underwriters are obligated to purchase the underwritten securities from the issuer in accordance with their respective commitments. The Applicant states that this obligation is met by using the proceeds received from the buyers of the securities in the offering, although there is a risk that the underwriters will have to pay for a portion of the securities, in the event that not all of the securities are sold.

18. However, the Applicant represents that, generally, the risk that the securities will not be sold is small because the underwriting agreement is not executed until after the underwriters have obtained indications of interest in purchasing the securities from a sufficient number of investors to acquire all the securities being offered. Once the underwriting agreement is executed, the underwriters immediately begin contacting the investors to confirm the sales, first orally and then by written confirmation, and sales are finalized within hours and sometimes minutes. The Applicant states that the underwriters are anxious to complete the sales as soon as possible because until they ''break syndicate,'' they cannot enter the market. In many cases, the underwriters will act as market-makers for the security. A market-maker holds itself out as willing to buy or sell the security for its own account on a regular basis.

19. The Applicant represents that the process of ''building a book'' or soliciting interest occurs as follows. In an equity offering, after a registration statement is filed with the SEC and while it is under review by the SEC staff, representatives of the issuer and the managers conduct meetings with potential investors, who learn about the company and the securities and receive a preliminary prospectus. The underwriters cannot make any firm sales until the registration statement is declared effective by the SEC. Prior to the effective date, while the investors cannot become legally obligated to make a purchase, they indicate whether they have an interest in buying, and the managers compile a ''book'' of investors who are willing to ''circle'' a particular portion of the issue. These indications of interest are sometimes referred to as a ''soft circle'' because investors are not legally bound to buy the securities until the registration statement is effective. However, the Applicant represents that investors generally follow through on their indications of interest, and would be expected to do so, barring any sudden adverse developments (in which case it is likely that the offering would be withdrawn), because if they do not follow through, the underwriters will be reluctant to sell to them in future offerings.

20. Assuming that the meetings have produced sufficient indications of interest, the Applicant represents that the issuer and the book-running lead manager together will set the price of the securities and ask the SEC to declare the registration effective. After the registration statement becomes effective and the underwriting agreement is executed, the underwriters contact those investors who have indicated an interest in purchasing securities in the offering to execute the sales. The Applicant represents that offerings are often oversubscribed, and many have an over-allotment option that the underwriters can exercise to acquire additional shares from the issuer. Where an offering is oversubscribed, the underwriters decide how to allocate the securities among the potential purchasers. However, rules administered by the Financial Industry Regulatory Authority (FINRA) [14] mandate that certain IPO shares may not be sold to the personal accounts of those responsible for investing for others, such as officers of banks, insurance companies, mutual funds, and investment advisers.

21. The Applicant represents that debt offerings may be ''negotiated'' offerings, ''competitive bid'' offerings, or ''bought deals.'' ''Negotiated'' offerings are conducted in the same manner as an equity offering with regard to when the underwriting agreement is executed and how the securities are offered. ''Competitive bid'' offerings are ones in which the issuer determines the price for the securities through competitive bidding rather than negotiating the price with the underwriting syndicate.

22. The Applicant represents that in a competitive bid offering, prospective lead underwriters will bid against one another to purchase debt securities, based upon their determinations of the degree of investor interest in the securities. Depending on the level of investor interest and the size of the offering, the Applicant states that a bidding lead underwriter may bring in co-managers to assist in the sales process. Most of the securities are frequently sold within hours, or sometimes even less than an hour, after the securities are made available for purchase.

23. Occasionally, in highly-rated debt issues, the Applicant represents that underwriters ''buy'' the entire deal off of a ''shelf registration'' before obtaining indications of interest. These ''bought'' deals involve issuers whose securities enjoy a deep and liquid secondary market, such that an underwriter has confidence without pre-marketing that it can identify purchasers for the bonds.

24. The Applicant represents that there are internal policies in place that restrict contact and the flow of information between investment management personnel and non-investment management personnel. These policies are designed to protect against ''insider trading,'' *i.e.*, trading on information not available to the general public that may affect the market price of the securities. Diversified financial services firms are concerned about insider trading problems because one part of the firm—*e.g.*, the mergers and acquisitions group—could come into possession of non-public information regarding an upcoming transaction involving a particular issuer, while another part of the firm—*e.g.*, the investment management group—could

[14] FINRA was created in July, 2007 through the consolidation of the National Association of Securities Dealers (NASD) and the member regulation, enforcement and arbitration functions of the New York Stock Exchange (NYSE). The purpose of FINRA is to promote investor protection and market integrity through effective and efficient regulation and complementary compliance and technology-based services.

be trading in the securities of that issuer for its clients.

25. The Applicant states that its business separation policies and procedures are also designed to restrict the flow of any information to or from the asset management affiliates that could limit their flexibility in managing client assets, and of information obtained or developed by the asset management affiliates that could be used by other parts of the organization, to the detriment of the asset management affiliates' clients.

26. The Applicant states that the asset management affiliates deal on a regular basis with broker-dealers that compete with the Affiliated Broker-Dealers. If special consideration were shown to an affiliate, such conduct would likely adversely affect the relationships of the Affiliated Broker-Dealers and of the asset management affiliates with firms that compete with that affiliate. Therefore, a goal of the Applicant's business separation policy or policies is to avoid any possible perception of improper flows of information between the Affiliated Broker-Dealers and the asset management affiliates, in order to prevent any adverse impact on client and business relationships.

27. The applicant represents that the underwriters are compensated through the ''spread,'' or difference, between the price at which the underwriters buy the securities from the issuer and the price at which the securities are sold to the public. The Applicant represents that this spread is comprised of three components: the management fee, the underwriting fee, and the selling concession.

28. The first component of the spread includes the management fee, which, according to the Applicant, generally represents an agreed upon percentage of the overall spread and is allocated among the book-running lead manager and co-managers. Where there is more than one managing underwriter, they way the management fee will be allocated among the managers is generally agreed upon prior to soliciting indications of interest (the process of ''building a book''). Thus, according to the Applicant, such management fee allocations are not reflective of the amount of securities that particular manager sell in an offering.

29. The second component of the spread is the underwriting fee, which, according to the Applicant, represents compensation to the underwriters (including the non-managers, if any) for the risks they assume in connection with the offering and for the use of their capital. This component of the spread is also used to cover the expenses of the underwriting that are not otherwise reimbursed by the issuer. The first and second components are received without regard to how the underwritten securities are allocated for sales purposes or to whom the securities are sold.

30. The third component of the spread is the selling concession, which, according to the Applicant, generally constitutes 60 percent or more of the spread. The selling concession compensates the underwriters for their actual selling efforts. The Applicant represents that the allocation of selling concessions among the underwriters follows the allocation of the securities for sales purposes, except to the extent that buyers designate other broker-dealers (who may be other underwriters as well as broker-dealers outside the syndicate) to receive the selling concessions from the securities they purchase.

31. According to the Applicant, securities are allocated for sales purposes into two categories. The first (and larger) category is the ''institutional pot,'' which is the pool of securities from which sales are made to institutional investors. Selling concessions for securities sold from the institutional pot are generally designated by the purchaser for particular underwriters or broker-dealers. When securities are sold from the institutional pot, the managers sometimes receive a portion of the selling concessions, referred to as a ''fixed designation,'' attributable to securities sold in this category, without regard to who sold the securities or to whom they were sold. For securities covered by this proposed exemption, however, the Affiliated Broker-Dealers may not receive, either directly or indirectly, any compensation that is attributable to the fixed designation generated by purchases of securities by the asset management affiliates on behalf of their Plans.

32. The second category of allocated securities is ''retail,'' which, according to the Applicant, are the securities retained by the underwriters for sale to their retail customers. The Applicant represents that the underwriters receive the selling concessions from their respective retail retention allocations. Securities may be shifted between the two categories based upon whether either category is oversold or undersold during the course of the offering.

33. The Applicant represents that the Affiliated Broker-Dealers' inability to receive any selling concessions, or any compensation attributable to the fixed designations, generated by purchases of securities by the asset management affiliates' Plans, removes the primary economic incentive for the asset management affiliates to make purchases that are not in the interests of their Plans from offerings for which an Affiliated Broker-Dealer is an underwriter. The reason is that the Affiliated Broker-Dealer will not receive any additional fees as a result of such purchases by the asset management affiliates.

34. The Applicant represents that a number of the offerings of Rule 144A Securities in which the Affiliated Broker-Dealers may participate represent good investment opportunities for the asset management affiliates' Plans. Particularly with respect to foreign securities, a Rule 144A offering may provide the least expensive and most accessible means for obtaining the securities. However, as discussed above, PTE 75–1, Part III, does not cover Rule 144A Securities. Therefore, absent an individual exemption, the asset management affiliates are foreclosed from purchasing such securities for their Plans in offerings in which an Affiliated Broker-Dealer participates.

35. The Applicant states that Rule 144A, which was adopted in 1990, acts as a ''safe harbor'' exemption from the registration provisions of the 1933 Act for sales of certain types of securities to QIBs. QIBs include several types of institutional entities, such as employee benefit plans and commingled trust funds holding assets of such plans, which own and invest on a discretionary basis at least $100 million in securities of unaffiliated issuers.

36. The Applicant represents that any securities may be sold pursuant to Rule 144A except for those of the same class or similar to a class that is publicly traded in the United States, or certain types of investment company securities. This limitation is designed to prevent side-by-side public and private markets developing for the same class of securities.

37. The Applicant states that buyers of Rule 144A Securities must be able to obtain, upon request, basic information concerning the business of the issuer and the issuer's financial statements, much of the same information as would be furnished if the offering were registered. The Applicant represents that this condition does not apply, however, to an issuer filing reports with the SEC under the 1934 Act, for which reports are publicly available. The condition also does not apply to a ''foreign private issuer'' for whom reports are furnished to the SEC under Rule 12g3–2(b) of the 1934 Act (17 CFR 240.12g3–2(b)), or to issuers who are foreign governments or political

subdivisions thereof and are eligible to use Schedule B under the 1933 Act (which describes the information and documents required to be contained in a registration statement filed by such issuers).

38. The Applicant represents that sales under Rule 144A, like sales in a registered offering, remain subject to the protections of the anti-fraud rules of federal and state securities laws. These rules include Section 10(b) of the 1934 Act and Rule 10b–5 thereunder (17 CFR 240.10b–5) and Section 17(a) of the 1933 Act (15 U.S.C. 77a). Through these and other provisions, the SEC may use its full range of enforcement powers to exercise its regulatory authority over the market for Rule 144A Securities, in the event that it detects improper practices.

39. The Applicant represents that this potential liability for fraud provides a considerable incentive to the issuer and offering syndicate to ensure that the information contained in a Rule 144A offering memorandum is complete and accurate in all material respects. Among other things, the book-running lead manager typically obtains an opinion from a law firm, commonly referred to as a ''10b–5'' opinion, stating that the law firm has no reason to believe that the offering memorandum contains any untrue statement of material fact or omits any material fact necessary to conclude that, under the circumstances, the statements made are not misleading.

40. The Applicant represents that Rule 144A offerings generally are structured in the same manner as underwritten registered offerings. The major difference is that a Rule 144A offering uses an offering memorandum rather than a prospectus that is filed with the SEC. The marketing process is the same in most respects, except that the selling efforts are generally limited to contacting QIBs and there are no general solicitations for buyers (*e.g.*, no general advertising). While, generally, there are no non-manager members in the syndicate, the Applicant also requests relief for situations where an Affiliated Broker-Dealer acts only as a syndicate member, not as a manager.

41. With respect to ATTs and the types of trustees that would be covered by the proposed exemption, the Applicant states that in asset-backed securities transactions (ABS) there is generally a trustee who is the legal owner of the receivables held by the trust. In more traditional public debt offerings, there is generally only an indenture trustee, who holds the debt obligation of the obligor, holds any assets pledged as collateral to secure payment of the debt obligation, makes required payments and keeps records, and in the event of a default, acts for the note holders. The Applicant represents that the functions and obligations of an indenture trustee are aligned with the interests of the note holders because such a trustee is generally appointed only to perform ministerial functions (*i.e.*, hold collateral, maintain records, and make payments when due). In this regard, the proposed exemption would also cover situations where the affiliate of the asset management affiliate serves as a custodian, paying agent, registrar or other similar ministerial capacities.

42. The Applicant states that the Affiliated Broker-Dealer is frequently involved in underwriting offerings of ABS and other securities where an affiliate of the asset management affiliate serves as a trustee for the trust which issues such securities. The inability of the asset management affiliate to purchase ABS or other securities for its Plans in such cases can be detrimental to those accounts because the accounts can lose important fixed income investment opportunities that are relatively less expensive or qualitatively better than other available opportunities in such securities.

43. The Applicant represents that the frequency of such offerings of ABS or other securities results from consolidation in the bank industry and the attendant reduction in the number of banks participating in the corporate trust business. Many factors that have made participation in the trust business less attractive to banks have contributed to this trend. On the income side, these factors include competitive pressure on pricing corporate trust services and loss of transactional fees and traditional ''float'' income due to the growth in book entry securities. On the expense side, the Applicant represents that the cost of entry into the corporate trust business and the cost of remaining competitive in the business have dramatically increased. This increase includes both technological and personnel costs which are necessary to remain competitive. The cost increase is particularly acute in the structured finance sector of the corporate trust business, where both systems and staff need to have the capability of supporting increasingly complex transactions.

44. The Applicant states that the trustee in a structured finance transaction for ABS, while involved in complex calculations and reporting, typically does not perform any discretionary functions. Such a trustee operates as a stakeholder and strictly in accordance with the explicit terms of the governing agreements, so that the intent of the crafters of the transaction may be honored. These functions are essentially ministerial and include establishing accounts, receiving funds, making payments, and issuing reports, all in a predetermined manner. Unlike trustees for corporate or municipal debt, trustees in structured finance transactions for ABS need not assume discretionary functions to protect the interests of debt holders in the event of default or bankruptcy because structured finance entities are designed to be bankruptcy remote vehicles. The Applicant represents that there is no ''issuer'' outside the structured transaction to pursue for repayment of the debt. The trustee's role is defined by a contract-explicit structure that spells out the actions to be taken upon the happening of specified events. The Applicant states that there is no opportunity (or incentive) for the trustee in a structured finance transaction, by reason of its affiliation with an underwriter, asset manager, or otherwise, to take or not to take actions that might benefit the underwriter or asset manager to the detriment of plan investors.

With respect to offerings of more traditional public debt securities that are not part of a structured finance transaction, the Applicant states that an indenture trustee may have more discretion when the issuer of the securities is not bankruptcy remote.[15] In such instances, indenture trustees generally exercise meaningful discretion only in the context of a default, at which time the indenture trustee has the duty to act for the bondholders, in a manner consistent with the interests of investing plans (and other investors) and not with the interests of the issuer. In such situations, an indenture trustee may be an affiliate of an underwriter for the securities. In the event of a default, the duty of an indenture trustee in pursuing the bondholders' rights against the issuer might conflict with the indenture trustee's other business interests. However, the Applicant represents that under the Trust Indenture Act of 1939 (the ''Trust Indenture Act''), which applies to many, but not all, trust debt offerings,[16] an indenture trustee whose

[15] The Applicant represents that the amount of discretion possessed by an indenture trustee will depend on the terms of the particular indenture, and factual issues, such as whether a default has occurred.

[16] In connection with the applicability of the Trust Indenture Act to trust debt offerings, the Applicant further represents that market practice with respect to certain types of non-registered securities offerings is to structure the offering to include both an indenture and an indenture trustee, despite the fact that such offerings are not required to use the indenture structure mandated by the Trust Indenture Act. In such instances, the

affiliate has, within the prior 12 months, underwritten any securities for an obligor of the indenture securities generally must resign as indenture trustee if a default occurs upon the indenture securities. Thus, the Applicant maintains that this requirement and other provisions of the Trust Indenture Act are designed to protect bondholders from conflicts of interest to which an indenture trustee may be subject.

45. According to the Applicant, the role of the underwriter in a structured financing for a series of ABS involves, among other things, assisting the sponsor or originator of the applicable receivables or other assets in structuring the contemplated transaction. The trustee becomes involved later in the process, after the principal parties have agreed on the essential components, to review the proposed transaction from the limited standpoints of technical workability and potential trustee liability. After the issuance of securities to plan investors in a structured financing, while the trustee performs its role as trustee over the life of the transaction, the underwriter of the securities has no further role in the transaction (unless it is a continuous offering, such as for a commercial paper conduit).[17] In addition, the trustee has no opportunity to take or not take action, or to use information in ways that might advantage the underwriter to the detriment of plan investors. The Applicant states that an underwriter, in order to protect its reputation, clearly wants the transaction to succeed as it was structured, which includes the trustee performing in a manner independent of the underwriter.

46. The Applicant represents that, in many offerings of ABS or other securities, the trustee's fee is a fixed dollar amount that does not depend on the size of the offering. In such cases, the asset management affiliate has no conflict of interest because it cannot increase the trustee's fee by causing Plans to participate in the offering. Where the trustee's fee is a portion of the principal amount of outstanding securities to be offered, the asset management affiliate could conceivably cause Plans to participate to affect the size of the offering and thus the trustee's fee.[18] The Applicant further represents that the protective conditions of the requested exemption (*e.g.*, the requirement of advance approval by an independent fiduciary and reporting of the basis for the trustee's fee) render this possibility remote.

In this regard, the Applicant states that the conditions of the proposed exemption, which are based on the prior individual exemptions granted by the Department for an ''AUT'', impose adequate safeguards as well for an ''ATT'' in order to prevent possible abuse. First, there are significant limitations on the quantity of securities that an asset management affiliate may acquire for Plans, meaning not only that there will be significant limitations on the ability of the asset management affiliate to affect the fees of its affiliate, but also insuring that significant numbers of independent investors also decided that the securities were an appropriate purchase. Second, the asset management affiliate must obtain the consent of an independent fiduciary to engage in these transactions. Third, regular reporting of the subject transactions to an independent fiduciary will take place. Fourth, an independent fiduciary must be provided information on how securities purchased actually performed. Finally, the consent of the independent fiduciary may be revoked if, for example, it suspects that purchases by the asset management affiliate have been motivated by a desire to generate fees for its affiliate.

47. 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) The Plans will gain access to desirable investment opportunities;

(b) In each offering, the asset management affiliate(s) will purchase the securities for its Plans from an underwriter or broker-dealer other than an Affiliated Broker-Dealer;

(c) Conditions similar to those of PTE 75–1, part III, will restrict the types of securities that my be purchased, the types of underwriting or selling syndicates and issuers involved, and the price and timing of the purchases;

(d) The amount of securities that the asset management affiliates may purchase on behalf of Plans will be subject to percentage limitations;

(e) The Affiliated Broker-Dealers will not be permitted to receive, either directly or indirectly, any compensation attributable to fixed designation, or through any selling concessions with respect to the securities sold to the Plans;

(f) Prior to engaging in any of the covered transactions, an Independent Fiduciary of each of the Plans (or the fiduciary of each In-House Plan) will receive certain disclosures and will be given an opportunity to consent to the covered transactions, either through affirmative or negative consent;

(g) The asset management affiliate will provide regular reporting to an Independent Fiduciary of each Plan with respect to all securities purchased pursuant to the exemption, if granted;

(h) Each Plan participating in these transactions will be subject to a minimum size requirement of at least $50 million ($100 million for ''Eligible Rule 144A Offerings''), with certain exceptions for Pooled Funds;

(i) The asset management affiliate must have total assets under management in excess of $5 billion and shareholders' or partners' equity in excess of $1 million; and

(j) The Affiliated Trustee will be unable to subordinate the interests of the Client Plans to those of the asset manager or its affiliates.

Notice To Interested Persons: The Applicant represents that the class of persons interested in this exemption is comprised of the relevant independent fiduciaries of the existing Client Plans (including those Client Plans that are invested solely in Pooled Funds) that are served by those asset management affiliates of BNYMC that currently intend to rely upon the exemption. Accordingly, the Applicant represents that it shall ensure that the foregoing asset management affiliates provide such interested persons with a copy of this Notice of Proposed Exemption (the Notice), accompanied by a copy of the supplemental statement (the Supplemental Statement) required pursuant to 29 CFR 2570.43(b)(2), within fifteen (15) days of the date of the publication of the Notice in the **Federal Register**.

In this connection, the relevant independent fiduciaries of the existing

Applicant represents, it is typically the case that the various requirements of the Trust Indenture Act (including the default provision references in Representation 44) will be incorporated (either expressly or by reference) in the trust indenture.

[17] The Applicant further represents that, in a limited number of situations where the offering of the security is ongoing or continuous, the underwriter will have a continuing role in selling the additional securities that are sold over time.

[18] The Applicant represents that this theoretical conflict is directly addressed by the protective conditions in the so-called ''Underwriter Exemption'' listed in PTE 2002–41 and in this proposed exemption. In this regard, the Applicant states that the exemption (if granted) will apply only to firm commitment underwritings, where, by definition, the entire issue of securities will be purchased, either by the public or the underwriters. Thus, where the trustee's fee would be a fixed percentage of the total dollar amount of the securities issued in the offering, the amount of the trustee's fee would be, in fact, a fixed dollar amount that would be known to plan investors as part of disclosures made relating to the offering (*e.g.*, the prospectus or private placement memorandum). In this connection, the Department notes that plan fiduciaries would have a duty to adequately review, and effectively monitor, all fees paid to service providers, including those paid to parties affiliated with an asset management affiliate.

Client Plans shall receive copies of the Notice and the Supplemental Statement from the following asset management affiliates of BNYMC: (1) Alcentra Inc.; (2) Mellon Capital Management Corporation; (3) Newton Capital Management Limited; (4) Standish Mellon Asset Management Company LLC; and (5) The Bank of New York Mellon. The Department must receive all written comments and requests for a hearing no later than forty-five (45) days after publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Judge of the Department, telephone (202) 693–8339. (This is not a toll-free number).

United States Steel and Carnegie Pension Fund (the Applicant)

Located in New York, NY

[Exemption Application No. D–11465]

Proposed Exemption

The Department of Labor 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 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[19]

I. Retroactive Relief

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply, for the period beginning February 15, 2003 through December 31, 2007, to a transaction between a party in interest with respect to the Former U.S. Steel Related Plans, as defined in Section IV(e), below, and an investment fund in which such plans have an interest (the Investment Fund), as defined in Section IV(l), below, provided that United States Steel and Carnegie Pension Fund or its successor (collectively, UCF) has discretionary authority or control with respect to the plan assets involved in the transaction, and the following conditions are satisfied:

(a) UCF is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total client assets, including in-house assets (In-house Plan Assets), as defined in Section IV(h), below, under its management and control in excess of $100,000,000 and equity, as defined in Section IV(k), below, in excess of $750,000;

(b) At the time of the transaction, as defined in Section IV(n), below, the party in interest or its affiliate, as defined in Section IV(a), below, does not have, and during the immediately preceding one (1) year has not exercised, the authority to—

(1) Appoint or terminate UCF as a manager of any of the Former U.S. Steel Related Plans' assets, or

(2) Negotiate the terms of the management agreement with UCF (including renewals or modifications thereof) on behalf of the Former U.S. Steel Related Plans;

(c) The transaction is not described in—

(1) Prohibited Transaction Exemption 81–6 (PTE 81–6) [20], relating to securities lending arrangements, (as amended or superseded);

(2) Prohibited Transaction Exemption 83–1 (PTE 83–1) [21], relating to acquisitions by plans of interests in mortgage pools, (as amended or superseded), or

(3) Prohibited Transaction Exemption 88–59 (PTE 88–59) [22], relating to certain mortgage financing arrangements, (as amended or superseded);

(d) The terms of the transaction are negotiated on behalf of the Investment Fund by, or under the authority and general direction of UCF, and either UCF, or (so long as UCF retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by UCF, makes the decision on behalf of the Investment Fund to enter into the transaction;

(e) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of UCF, the terms of the transaction are at least as favorable to the Investment Fund as the terms generally available in arm's-length transactions between unrelated parties;

(f) Neither UCF nor any affiliate thereof, as defined in Section IV(b), below, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in UCF is a person who, within the ten (10) years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of:

(1) Any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization;

(2) any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(3) income tax evasion;

(4) any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or

(5) any other crimes described in section 411 of the Act.

For purposes of this Section I(f), a person shall be deemed to have been ''convicted'' from the date of the judgment of the trial court, regardless of whether the judgment remains under appeal;

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

(h) The party in interest dealing with the Investment Fund:

(1) Is a party in interest with respect to the Former U.S. Steel Related Plans (including a fiduciary) solely by reason of providing services to the Former U.S. Steel Related Plans, or solely by reason of a relationship to a service provider described in section 3(14)(F),(G),(H), or (I) of the Act;

(2) Does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR § 2510.3–21(c)) with respect to those assets; and

(3) Is neither UCF nor a person related to UCF, as defined in Section IV(j), below;

(i) UCF adopts written policies and procedures that are designed to assure compliance with the conditions of the proposed exemption;

(j) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act and who so represents in writing, conducts an exemption audit, as defined in Section IV(f), below, on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the Former U.S. Steel Related Plans presenting its specific findings regarding the level of

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

[20] FR 7527, January 23, 1981. PTE 81–6 was amended and replaced by PTE 2006–16 (71 FR 63786, October 31, 2006). The effective date of PTE 2006–16 was January 2, 2007, and PTE 81–6 was revoked as of that date.

[21] FR 895, January 7, 1983.

[22] FR 24811, June 30, 1988.

compliance: (1) with the policies and procedures adopted by UCF in accordance with Section I(i), above, of this proposed exemption; and (2) with the objective requirements of this proposed exemption.

(k)(1) UCF or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the persons described in Section I(k)(2) to determine whether the conditions of this proposed exemption have been met, except that (A) a separate prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of UCF and/or its affiliates, the records are lost or destroyed prior to the end of the six (6) year period, and (B) no party in interest or disqualified person other than UCF 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 have not been maintained or are not maintained, or have not been available or are not available for examination as required by Section I(k)(2), below, of this proposed exemption.

(2) Except as provided in Section I(k)(3),below, and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in Section I(k)(1), above, of this proposed exemption are unconditionally available for examination at their customary location during normal business hours by:

(A) any duly authorized employee or representative of the Department or of the Internal Revenue Service;

(B) any fiduciary of any of the Former U.S. Steel Related Plans investing in the Investment Fund or any duly authorized representative of such fiduciary;

(C) any contributing employer to any of the Former U.S. Steel Related Plans investing in the Investment Fund or any duly authorized employee representative of such employer;

(D) any participant or beneficiary of any of the Former U.S. Steel Related Plans investing in the Investment Fund, or any duly authorized representative of such participant or beneficiary; and,

(E) any employee organization whose members are covered by such Former U.S. Steel Related Plans;

(3) None of the persons described in Section I(k)(2)(B) through (E), above, of this proposed exemption shall be authorized to examine trade secrets of UCF or its affiliates or commercial or financial information which is privileged or confidential; and

(l) With respect to the transactions described in Section II and Section III of this proposed exemption, the conditions contained in those Sections are satisfied.

II. Interim Relief

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply, for the period beginning January 1, 2008 through the date of the publication of this proposed exemption in the **Federal Register**, to a transaction between a party in interest with respect to the Former U.S. Steel Related Plans, as defined in Section IV(e), below, and the Investment Fund, as defined in Section IV(l), below, provided that UCF has discretionary authority or control with respect to the plan assets involved in the transaction, and the following conditions are satisfied:

(a) Each of the conditions contained in paragraphs (a) through (l) of Section I are met; and

(b) With respect to the exemption audit and written report by the independent auditor described in Section I(j), the independent auditor must complete each such exemption audit and must issue such written report to the administrators, or other appropriate fiduciary of the Former U.S. Steel Related Plans within six (6) months following the end of the year to which each such exemption audit and report relates.

III. Prospective Relief

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply, for the period beginning with the date of the publication of the final exemption in the **Federal Register**, and expiring five years from that date, to a transaction between a party in interest with respect to the Former U.S. Steel Related Plans, as defined in Section IV(e), below, and the Investment Fund, as defined in Section IV(l), below, provided that UCF has discretionary authority or control with respect to the plan assets involved in the transaction, and the following conditions are satisfied:

(a) UCF is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total client assets, including In-house Plan Assets, under its management and control in excess of $100,000,000 and equity, as defined in Section IV(k), below, in excess of $1,000,000 (as measured yearly on UCF's most recent balance sheet prepared in accordance with generally accepted accounting principles);

(b) Each of the conditions contained in paragraphs (b) through (i), and (k) of Section I are met; and

(c) An independent auditor, who has appropriate technical training, or experience and proficiency with the fiduciary responsibility provisions of the Act, and who so represents in writing, conducts an exemption audit, as defined, below, in Section IV(g) of this proposed exemption, on an annual basis. In conjunction with the completion of each such exemption audit, the independent auditor must issue a written report to the Former U.S. Steel Related Plans that engaged in such transactions, presenting its specific findings with respect to the audited sample regarding the level of compliance with the policies and procedures adopted by UCF, pursuant to Section I(i) of this proposed exemption, and with the objective requirements of the proposed exemption. The written report also shall contain the auditor's overall opinion regarding whether UCF's program as a whole complied with the policies and procedures adopted by UCF and with the objective requirements of this proposed exemption. The independent auditor must complete each such exemption audit and must issue such written report to the administrators, or other appropriate fiduciary of the Former U.S. Steel Related Plans within six (6) months following the end of the year to which each such exemption audit and report relates.

IV. Definitions

(a) For purposes of Section I(b) of this proposed exemption, an ''affiliate'' of a person means—

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

(2) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, 5 percent (5%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the

custody, management, or disposition of plan assets.

A named fiduciary (within the meaning of section 402(a)(2) of the Act) of a plan, and an employer any of whose employees are covered by the plan will also be considered affiliates with respect to each other for purposes of Section I(b), above, if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(b) For purposes of Section I(f), above, of this proposed exemption, an ''affiliate'' of a person means—

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

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent (5%) or more partner or owner, and

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent (10%) or more of the yearly wages of such person) or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management, or disposition of plan assets.

(c) For purposes of Section IV(e) and (h), below, of this proposed exemption, an ''affiliate'' of UCF includes a member of either:

(1) a controlled group of corporations, as defined in section 414(b) of the Code, of which United States Steel Corporation or its successor (collectively, U.S. Steel) is a member, or

(2) a group of trades or businesses under common control, as defined in section 414(c) of the Code, of which U.S. Steel is a member; provided that ''50 percent'' shall be substituted for ''80 percent'' wherever ''80 percent'' appears in section 414(b) or 414(c) of the rules thereunder.

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

(e) ''Former U.S. Steel Related Plans'' mean:

(1) Retirement Plan of Marathon Oil Company, Marathon Petroleum LLC Retirement Plan and the Speedway SuperAmerica LLC Retirement Plan (the Marathon Plans);

(2) Pension Plan of RMI Titanium Company (RMI), Pension Plan of Eligible Employees of RMI Titanium Company, Pension Plan for Eligible Salaried Employees of RMI Titanium Company, and Tradco Pension Plan (the RTI Plans);

(3) Any plan the assets of which include or have included assets that were managed by UCF as an in-house asset manager (INHAM) pursuant to Prohibited Transaction Class Exemption 96–23 (PTE 96–23) [23] but as to which PTE 96–23 is no longer available because such assets are not held under a plan maintained by an affiliate of UCF (as defined in Section IV(c) of this proposed exemption); and

(4) Any plan (an Add-On Plan) that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of UCF, (as defined in Section IV(c), above, of this proposed exemption); provided that:

(A) the assets of the Add-On Plan are invested in a commingled fund (the Commingled Fund), as defined in Section IV(o) of this proposed exemption, with the assets of a plan or plans (the Commingled Plans), described in Section IV(e)(1)–(3), above; and

(B) the assets of the Add-On Plan in the Commingled Fund do not comprise more than 25 percent (25%) of the value of the aggregate assets of such fund, as measured on the day immediately following the initial commingling of their assets (the 25% Test).

For purposes of the 25% Test, as set forth in Section IV(e)(4):

(i) in the event that less than all of the assets of an Add-On Plan are invested in a Commingled Fund on the date of the initial transfer of such Add-On Plan's assets to such fund, and if such Add-On Plan subsequently transfers to such Commingled Fund some or all of the assets that remain in such plan, then for purposes of compliance with the 25% Test, the sum of the value of the initial and each additional transfer of assets of such Add-On Plan shall not exceed 25 percent (25%) of the value of the aggregate assets in such Commingled Fund, as measured on the day immediately following the addition of each subsequent transfer of such Add-On Plan's assets to such Commingled Fund;

(ii) where the assets of more than one Add-On Plan are invested in a Commingled Fund with the assets of plans described in Section IV(e)(1)–(3), above, of the proposed exemption, the 25% Test will be satisfied, if the aggregate amount of the assets of such Add-On Plans invested in such Commingled Fund do not represent more than 25 percent (25%) of the value of all of the assets of such Commingled Fund, as measured on the day immediately following each addition of Add-On Plan assets to such Commingled Fund;

(iii) if the 25% Test is satisfied at the time of the initial and any subsequent transfer of an Add-On Plan's assets to a Commingled Fund, as provided in Section IV(e), above, this requirement shall continue to be satisfied notwithstanding that the assets of such Add-On Plan in the Commingled Fund exceed 25 percent (25%) of the value of the aggregate assets of such fund solely as a result of:

(AA) a distribution to a participant in a Former U.S. Steel Related Plan;

(BB) periodic employer or employee contributions made in accordance with the terms of the governing plan documents;

(CC) the exercise of discretion by a Former U.S. Steel Related Plan participant to re-allocate an existing account balance in a Commingled Fund managed by UCF or to withdraw assets from a Commingled Fund; or

(DD) an increase in the value of the assets of the Add-On Plan held in such Commingled Fund due to investment earnings or appreciation;

(iv) if, as a result of a decision by an employer or a sponsor of a plan described in Section IV(e)(1)–(3) of the proposed exemption to withdraw some or all of the assets of such plan from a Commingled Fund, the 25% Test is no longer satisfied with respect to any Add-On Plan in such Commingled Fund, then the proposed exemption will immediately cease to apply to all of the Add-On Plans invested in such Commingled Fund; and

(v) where the assets of a Commingled Fund include assets of plans other than Former U.S. Steel Related Plans, as defined in Section IV(e), above, of this proposed exemption, the 25% Test will be determined without regard to the assets of such other plans in such Commingled Fund.

(f) For purposes of Sections I and II of this proposed exemption, ''Exemption Audit'' of any of the Former U.S. Steel Related Plans must consist of the following:

(1) A review by an independent auditor of the written policies and procedures adopted by UCF, pursuant to Section I(i) of this proposed exemption, for consistency with each of the objective requirements of this proposed exemption, as described, below, in Section IV(f)(5) of this proposed exemption; and

[23] 61 FR 15975, April 10, 1996.

(2)(i) A test by an independent auditor of a representative sample of the Plan's transactions in order to make findings regarding whether UCF is in compliance with:

(I) the written policies and procedures adopted by UCF pursuant to Section I(i) of this proposed exemption, and

(II) the objective requirements described in Section I of this proposed exemption;

(3) A determination as to whether UCF has satisfied the requirements of Section I(a), above, of this proposed exemption;

(4) The issuance by an independent auditor of a written report describing the steps performed by such independent auditor during the course of its review and such independent auditor's findings.

(5) For purposes of Section IV(f) of this proposed exemption, the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by UCF to assure compliance with each of these requirements:

(A) The requirements of Section I(a), above, of this proposed exemption regarding registration under the Investment Advisers Act of 1940, total assets under management, and equity;

(B) The requirements of Section I of this proposed exemption, regarding the discretionary authority or control of UCF with respect to the assets of the Former U.S. Steel Related Plans involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the Former U.S. Steel Related Plans to enter into the transaction;

(C) The transaction is not entered into with any person who is excluded from relief under Section I(h)(1), above, of this proposed exemption, or Section I(h)(2) to the extent that such person has discretionary authority or control over the plan assets involved in the transaction, or Section I(h)(3); and

(D) The transaction is not described in any of the class exemptions listed in Section I(c), above, of this proposed exemption.

(g) For purposes of Section III of this proposed exemption, ''Exemption Audit'' of any of the Former U.S. Steel Related Plans must consist of the following:

(1) A review by an independent auditor of the written policies and procedures adopted by UCF pursuant to section I(i) for consistency with each of the objective requirements of this proposed exemption (as described in section IV(f)(5)(A)–(D).

(2) A test of a sample of UCF's transactions during the audit period that is sufficient in size and nature to afford the auditor a reasonable basis: (A) to make specific findings regarding whether UCF is in compliance with (i) the written policies and procedures adopted by UCF pursuant to section I(i) of the proposed exemption and (ii) the objective requirements of the exemption; and (B) to render an overall opinion regarding the level of compliance of UCF's program with this section IV(g)(2)(A)(i) and (ii) of the proposed exemption;

(3) A determination as to whether UCF has satisfied the requirements of Section III(a), above, of this proposed exemption;

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings; and

(5) For purposes of this section IV(g), the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by UCF to assure compliance with each of these requirements:

(A) The requirements of Section III(a), above, of this proposed exemption regarding registration under the Investment Advisers Act of 1940, total assets under management, and equity;

(B) The requirements of Section I(d) of this proposed exemption, regarding the discretionary authority or control of UCF with respect to the assets of the Former U.S. Steel Related Plans involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the Former U.S. Steel Related Plans to enter into the transaction;

(C) The transaction is not entered into with any person who is excluded from relief under Section I(h)(1), above, of this proposed exemption, or Section I(h)(2) to the extent that such person has discretionary authority or control over the plan assets involved in the transaction, or Section I(h)(3); and

(D) The transaction is not described in any of the class exemptions listed in Section I(c), above, of this proposed exemption.

(h) ''In-house Plan Assets'' means the assets of any plan maintained by an affiliate of UCF, as defined in Section IV(c), above, of this proposed exemption and with respect to which UCF has discretionary authority or control.

(i) The term, ''party in interest,'' means a person described in section 3(14) of the Act and includes a ''disqualified person,'' as defined in section 4975(e)(2) of the Code.

(j) UCF is ''related'' to a party in interest for purposes of Section I(h)(3) of this proposed exemption, if the party in interest (or a person controlling, or controlled by, the party in interest) owns a 5 percent (5%) or more interest in U.S. Steel, or if UCF (or a person controlling, or controlled by UCF) owns a 5 percent (5%) or more interest in the party in interest. For purposes of this definition:

(1) the term, ''interest,'' means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation,

(B) The capital interest or the profits interest of the entity if the entity is a partnership; or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest.

(k) For purposes of Section I(a) of this proposed exemption, the term, ''equity'' means the equity shown on the most recent balance sheet prepared within the two (2) years immediately preceding a transaction undertaken pursuant to this proposed exemption, in accordance with generally accepted accounting principles.

(l) ''Investment Fund'' includes single customer and pooled separate accounts maintained by an insurance company, individual trust and common collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of UCF) is subject to the discretionary authority of UCF.

(m) The term, ''relative,'' means a relative as that term is defined in section 3(15) of the Act, or a brother, sister, or a spouse of a brother or sister.

(n) The ''time'' as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after the date when the grant of this proposed exemption is published in the **Federal Register** or a renewal that requires the consent of UCF occurs on or after such publication date and the requirements of this proposed exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this subsection shall be construed as exempting a transaction entered into by an Investment Fund which becomes a transaction described in section 406(a) of the Act or section 4975(c)(1)(A) through (D) of the Code while the transaction is continuing, unless the conditions of this proposed exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this proposed exemption. In determining compliance with the conditions of the exemption at the time that the transaction was entered into for purposes of the preceding sentence, Section I(h) of this proposed exemption will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

(o) ''Commingled Fund'' means a trust fund managed by UCF containing assets of some or all of the plans described in Section IV(e)(1)–(3) of this proposed exemption, plans other than Former U.S. Steel Related Plans, and if applicable, any Add-On Plan, as to which the 25% Test provided in Section IV(e)(4) of this proposed exemption have been satisfied; provided that:

(1) where UCF manages a single sub-fund or investment portfolio within such trust, the sub-fund or portfolio will be treated as a single Commingled Fund; and

(2) where UCF manages more than one sub-fund or investment portfolio within such trust, the aggregate value of the assets of such sub-funds or portfolios managed by UCF within such trust will be treated as though such aggregate assets were invested in a single Commingled Fund.

If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified herein.

Temporary Nature of Exemption

The Department has determined that the relief provided by this proposed exemption is temporary in nature. The exemption, if granted, will be effective February 15, 2003, and will expire on the day which is five (5) years from the date of the publication of the final exemption in the **Federal Register**. Accordingly, the relief provided by this proposed exemption will not be available upon the expiration of such five-year period for any new or additional transactions, as described herein, after such date, but would continue to apply beyond the expiration of such five-year period for continuing transactions entered into before the expiration of the five-year period. Should the Applicant wish to extend, beyond the expiration of such five-year period, the relief provided by this proposed exemption to new or additional transactions, the Applicant may submit another application for exemption.

Summary of Facts and Representations

1. UCF is a Pennsylvania non-profit, non-stock membership corporation created in 1914 to manage the pension plan of the United States Steel Corporation (US Steel) and an endowment fund created by Andrew Carnegie for the benefit of that company's employees.[24] Because UCF is a non-stock membership corporation, UCF has no shareholders and is governed by its members a majority of whom are employees of U.S. Steel. Currently, UCF has 12 members with any vacancy in the membership being filled by the vote of the majority of the remaining members. Its principal office is in New York, New York. UCF currently serves as the plan administrator and trustee of several employee benefit plans sponsored by U.S. Steel, the successor to the original United States Steel Corporation (which for many years was USX Corporation (USX)), and by U.S. Steel affiliates and joint ventures, as well as certain former affiliates of U.S. Steel. It is registered as an investment adviser under the Investment Advisers Act of 1940.

2. As of December 31, 2006, UCF had total assets under its management with an aggregate market value of approximately $10 billion. The majority of these assets, $7.5 billion, was held in a group trust for the defined benefit plan for the employees of the steel business of U.S. Steel, and another $594 million was managed for funds used to provide the steelworkers with welfare benefits. UCF also managed $1.9 million for the U.S. Steel Foundation, a tax-exempt organization not subject to the Act; $97 million for pension plans of RMI; and $1.7 billion for pension plans of Marathon Oil. Investments managed by UCF include domestic and international equities, fixed-income securities, real estate, mortgage-backed loans and options and futures.

3. The current U.S. Steel reflects the remaining businesses after a series of spin-offs and divestitures by USX of several of its business lines. The major divestitures related to this proposed exemption are:

(a) *RTI International Metals, Inc.*

RMI is a leading U.S. producer of titanium mill and, through its affiliates, fabricated metal products for the global market. RMI is a subsidiary of RTI International Metals, Inc. (RTI), a publicly-traded holding company formed in 1998.

Prior to 1990, RMI was owned by USX and Millennium Petrochemicals, Inc. (Millennium). That year, Millennium's shares of RMI stock were sold to the public, while USX retained an approximately 50% interest. During the period from 1994 through 2000, USX took steps towards disposing of its holdings of RMI stock, publicly offering a series of notes in 1996 that were exchangeable in February 2000 for its remaining RMI shares. RMI reorganized into the current RTI holding company structure in 1998. In 1999, USX terminated its ownership interest in RTI by irrevocably depositing its shares of RTI stock with an independent trust company, in full satisfaction of its obligations under the exchangeable notes; the note holders received the shares in exchange for their notes in February 2000.

UCF began managing the assets of the RTI Plans in 1994. Despite USX's divestment of its equity interest in RTI, UCF continued to manage the assets of the RTI Plans through a group trust.

(b) *Marathon Oil Company*

Prior to its 2001 reorganization, USX had two principal lines of business, divided into two business units. The first was the U.S. Steel Group, which was primarily engaged in the production and sale of steel mill products, coke and taconite pellets. The second was the Marathon Group, which was primarily engaged in the exploration for, and the production, transportation and marketing of, crude oil and natural gas and the refining transportation and marketing of petroleum products. Parallel to this structure, USX had outstanding two classes of common stock, each tracking one of its business units.

The U.S. Steel Group was spun off from USX on December 31, 2001. Following the spin-off, the business of the U.S. Steel Group has been owned and operated by the new U.S. Steel, which is an independent, publicly traded company. The business of the Marathon Group remained owned and operated by USX, which changed its name to Marathon Oil Corporation (Marathon Oil).

UCF took over management of the assets of the Marathon Plans in 1986. Following the December 2001 spin-off, the affiliation that UCF had with USX, in the form of majority ownership on the UCF Board, was continued through U.S. Steel rather than Marathon Oil. Nevertheless, UCF has continued to

[24] UCF is not itself a pension fund. It is an entity that manages pension funds.

manage the assets of the Marathon Plans.

4. The assets of both the RTI and Marathon Plans had been managed by UCF for several years preceding their respective sponsors' separation from the former USX corporate group. Based on their past experience with UCF, both companies were familiar and comfortable with UCF's management style, and believed it prudent to continue to have their plans' assets invested in that manner. In addition, because UCF is a non-profit organization, it is able to provide its services at relatively low cost. Except with respect to the RTI Plans, UCF charges only for the amount of the costs and expenses it incurs in providing its services, allocated based on proportionate assets, or where appropriate, the direct out-of-pocket costs that relate to the particular plan. In the case of the RTI Plans, an additional fee is charged to reflect the higher administrative expense of managing the assets of a smaller plan.

5. PTE 96–23 provides an exemption from certain of the prohibited transaction rules for transactions involving plans whose assets are managed by an INHAM. Section IV(a) of PTE 96–23 specifically contemplates that an INHAM may be a membership nonprofit corporation a majority of whose members are officers or directors of * * * an employer or parent organization [of an employer]. Because a majority of the members of UCF were officers or directors of USX, UCF relied upon PTE 96–23 in connection with the management of the assets of the plans of USX and USX affiliates.

6. As noted above, following the spin-off of the U.S. Steel Group from USX at the end of 2001, the majority of the UCF members are employees of U.S. Steel, and not Marathon Oil. Therefore, as Marathon Oil is no longer an affiliate of the parent organization whose officers and directors constitute a majority of UCF's members, UCF no longer qualifies as an INHAM with respect to the Marathon Plans. UCF has not been able to qualify as an INHAM with respect to the RTI Plans for the same reason.

7. Prohibited Transaction Exemption 84–14 (PTE 84–14, 70 FR 49305, August 23, 2005), as restated to reflect various amendments, provides an exemption from transactions involving plan assets, if among other conditions, the assets are managed by a qualified professional asset manager (QPAM) who is independent of the parties in interest engaging in the transactions. The exemptive relief provided by PTE 96–23 for transactions involving assets of plans managed by in-house managers is similar to the exemptive relief provided by the Department for QPAMs under PTE 84–14.

Except for the diverse clientele standard referred to in Facts and Representations No. 8 in this proposed exemption, UCF met all the requirements to qualify as a QPAM for certain of its clients through December 30, 2006. In this regard, UCF met the capitalization requirement, which required an investment adviser seeking to qualify as a QPAM to have either (i) equity in excess of $750,000 or (ii) payment of all its liabilities unconditionally guaranteed by an affiliate if the investment adviser and affiliate together have equity in excess of $750,000.[25] UCF otherwise continues to qualify as a QPAM for certain of its clients. It is registered as an investment adviser under the Investment Advisers Act of 1940. UCF also meets the assets-under-management test in Section V(a) of PTE 84–14, which requires an investment adviser to have (as of the last day of its most recent fiscal year) total client assets under its management and control in excess of $85 million. UCF currently manages assets of the Marathon and RTI Plans with a value in excess of $1.7 billion, which are in addition to the assets of the U.S. Steel-sponsored plans that exceed $7.5 billion.

8. The Applicant has requested the relief proposed herein because UCF did not satisfy the diverse clientele test found in Section I(e) of PTE 84–14 with respect to the Marathon and the RTI Plans. The diverse clientele test provides that a QPAM may not enter into a transaction with a party in interest with respect to any plan whose assets managed by the QPAM, when combined with the assets of other plans maintained by the same employer (or its affiliates), represent more than 20% of the total client assets managed by the QPAM at the time of the transaction. Although the assets of the Marathon and the RTI Plans managed by UCF comprise less than 20% of the assets under its management, the vast majority of the remaining assets consist of plan assets for which UCF acts as an INHAM. Under the Department's interpretation that the assets of U.S. Steel-sponsored plans (the U.S. Steel Assets) are not ''client assets'' for purposes of PTE 84–14, the diverse clientele test would be based solely on non-US Steel Assets, even though the assets of such plans were insignificant in relation to the total assets managed by UCF.

9. Accordingly, UCF requested and received an authorization in 2003 (Final Authorization Number (FAN) 2003–03E, February 15, 2003) that afforded it the relief provided under Part I of PTE 84–14 for transactions involving the assets of (i) the Marathon and RTI Plans and (ii) any other plan that fails to meet the conditions of Section I(e) of PTE 84–14 solely because U.S. Steel Assets are not included as client assets under management for the purpose of that section. The authorization in FAN 2003–03E was for a five-year period.

10. FAN 2003–03E required that an exemption audit be conducted on an ''annual basis.'' The report for the exemption audit for the year 2003 was not completed until November 15, 2007, more than three and a half years after the period being audited, and because a similar question has been raised for the years 2004–2006, the Applicant has requested relief retroactive to February 15, 2003. The Applicant represents that the exemption audit report for the year 2007 was completed and issued on June 27, 2008.

11. The Applicant represents that it complied with all the conditions of FAN 2003–03E, except for the exemption audit condition as described above. The Applicant represents that the reason for the delay in conducting the audits was the failure of the internal procedure for tracking this task, and the failure of the then-current auditor (also its independent auditor for reviewing its financial statements) to identify the oversight. The Applicant represents that it has now implemented additional procedures to assure that the exemption audit is conducted in the year after the end of the audit period. For example, the Applicant has added the exemption audit requirement to its automated reminder system. In early January of

[25] The QPAM capitalization requirement discussed herein was amended and was made effective as of the last day of the first fiscal year beginning after August 23, 2005. The amendment increased the shareholders' or partners' equity requirement from $750,000 to $1,000,000. UCF currently has equity above $750,000 but below $1,000,000. For purposes of the Applicant's prohibited transaction exemption request, the Department is proposing to require that UCF meet the $1,000,000 capitalization requirement effective with the date of publication of the final exemption in the **Federal Register**.

The proposed exemption uses the term ''equity'' rather than the term ''shareholders' or partners' equity'' as defined in PTE 84–14, because UCF is a non-stock corporation with no shareholders or partners. Like shareholders' or partners' equity as defined in Section V(m) of PTE 84–14, UCF's equity will be the equity shown on its most recent balance sheet, as prepared within the two immediately preceding years in accordance with generally accepted accounting principles. UCF's equity is held in an account designated as Capital-Equity.

UCF's status as a non-stock corporation also affects the definition of ''affiliate'' to the extent it involves ownership relationships. The term has been modified herein to be based on percentage ownership of U.S. Steel, the corporation whose officers and/or directors constitute a majority of the members of UCF, rather than of UCF itself.

each year, the system will automatically send an e-mail to the person responsible for initiating the audit process and to other individuals who work with that person on these audits, indicating the tasks that need to be completed as well as their required completion date. After the initial reminder to start the process in January, periodic reminders are sent to the work group for this task to monitor the progress, until the system is informed that the task is complete.

12. The Applicant has requested an effective date for the exemption proposed herein retroactive to February 15, 2003, the effective date of FAN 2003–03E. It is noted that the independent auditors, in their audit reports for the years 2003 through 2007 did not find any non-compliance with the Applicant's policies and procedures or with the objective conditions of FAN 2003–03E. Because the Applicant has agreed to meet a higher standard with regard to future audit reports, and because no incidents of non-compliance for past years were found, the Department is proposing that the relief contained in Section I of this proposed exemption retroactively apply to the effective date of FAN 2003–03E.

13. Given the large number of service providers (particularly financial institutions) engaged by the Former U.S. Steel Related Plans, the breadth of the definition of ''party in interest'' under 3(14) of the Act, and the wide array of investment and related services offered by UCF, it would not be uncommon for UCF, as investment manager, to recommend transactions that involve parties in interest to one or more Former U.S. Steel Related Plans.[26] In this regard, the transactions for which the Applicant seeks an exemption include, but are not limited to, sale and exchange transactions, leasing and other real estate transactions, and foreign currency trading transactions. Without the requested relief, UCF would be unable to offer the full range of investment opportunities offered to the Former U.S. Steel Related Plans by such transactions, which could substantially reduce UCF's overall effectiveness and adversely affect the Former U.S. Steel Related Plans' investment returns. In the absence of the exemption, it would be necessary to examine each transaction to determine whether it might involve a party in interest. Such examinations could prove burdensome for UCF, because of the myriad of persons that may be parties in interest as service providers to large plans, such as the Marathon and RTI Plans.

14. UCF represents that the proposed exemption incorporates safeguards that the Department has previously found to be protective of the rights of the participants and beneficiaries of affected plans, because the Applicant would be subject to the requirements of PTE 84–14 and certain procedural requirements of PTE 96–23. As under PTE 96–23, the Applicant would be required to maintain written policies and procedures designed to ensure compliance with the exemption proposed herein and to retain an independent auditor which would evaluate the Applicant's compliance with such policies and procedures and the objective requirements of the exemption, and would report its findings on an annual basis.

In addition, the Applicant has agreed to meet a higher standard with regard to future audit reports due after the publication in the **Federal Register** of the grant of the exemption proposed herein. It is the Department's understanding that the representative sample analyzed by the independent auditor will be based on an objective, comprehensive, and consistent methodology. The written report issued by such independent auditor for each exemption audit will include the following items:

(i) A description of the universe of the Plan's transactions (expressed in numbers);

(ii) A description of the process, methodology, and criteria used to select the Plan's transactions which comprise the sample selected for review by the independent auditor and an explanation how the sample was objectively determined and representative of the Plan's transactions consummated during the year;

(iii) The resultant number of the Plan's transactions which comprise the representative sample;

(iv) A detailed description of the results of the independent auditor's findings, without condition, qualification, caveat or limitation, identifying each instance where there is a specific finding of noncompliance with any of the objective requirements contained in Section IV(f)(5) of this proposed exemption;

(v) An explanation, why the number of transactions comprising the sample selected for review by the independent auditor was appropriate, taking into account, among other things, each instance where there was a specific finding of noncompliance with any of the objective requirements of the proposed exemption;

(vi) An explanation, to the extent that there is any finding of non-compliance, of the independent auditor's determination whether there is a general failure by UCF to satisfy the requirements of this proposed exemption, and a determination on the adequacy of the Plan's written policies and procedures, described in Section I(i), and their administration by UCF;

(vii) Where there is any finding of non-compliance, an identification of the specific policies, procedures or exemption conditions that were not satisfied, as well as the steps taken by UCF, if any, to remedy the transactions that did not comply with the objective requirements of the proposed exemption; and

(viii) An explanation how the requirements of Section I(c) are satisfied.

15. Except for the Diverse Clientele Test, UCF represents that it will comply with the remaining conditions, as set forth in Part I of PTE 84–14. Moreover, UCF, although no longer considered to be an INHAM with respect to the assets of the Former U.S. Steel Related Plans, will remain subject to the procedural requirements of the INHAM class exemption, as set forth in PTE 96–23. In this regard, UCF will be required to maintain written policies and procedures designed to ensure compliance with the objective requirements of the exemption and to retain an independent auditor experienced and proficient with the fiduciary provisions of the Act to conduct an exemption audit. It is the responsibility of the independent auditor to evaluate UCF's compliance with such policies and procedures and to report annually its findings to each of the Former U.S. Steel Related Plans.

16. Furthermore, the proposed exemption contains conditions which are designed to ensure the presence of adequate safeguards for the Former U.S. Steel Related Plans and their participants and beneficiaries. First, the transactions which are the subject of this exemption cannot be part of an agreement, arrangement, or understanding designed to benefit a party in interest. Second, neither UCF nor a person related to UCF may engage in transactions with the Investment Fund. Further, a party in interest (including a fiduciary) which deals with the Investment Fund, may only be a party in interest by reason of providing services to the Former U.S. Steel Related Plans, or by having a relationship to a service provider, and such party in interest may not have discretionary

[26] The Applicant represents that the applicability of the statutory exemption contained in section 408(b)(17) of the Act to the transactions described in this proposed exemption is problematic because there is uncertainty how to value assets other than publicly-traded securities or securities not traded on an exchange.

authority or control with respect to the investment of plan assets involved in the transaction nor render investment advice with respect to those assets.

17. In summary, the Applicant represents that the transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act and section 4975(c)2) of the Code for the following reasons:

With respect to the retroactive relief provided in this proposed exemption,

(a) UCF is an investment adviser registered under the Investment Advisers Act of 1940 that had under its management and control total client assets in excess of $100,000,000, and had equity in excess of $750,000;

(b) The independent auditors, in their audit reports for the years 2003 through 2007, did not find any non-compliance with the Applicant's policies and procedures or with the objective conditions of FAN 2003–03E; and

(c) The Applicant represents that the only reason it needed retroactive relief was the lack of timeliness of the independent auditor reports. The Applicant has agreed to meet a higher standard with regard to future audit reports, and such audit reports will be completed and issued within six months following the end of the year to which each such exemption audit and report relates. The audit report for the year 2007 was completed and issued within six months following the end of the year.

With respect to the prospective relief provided in this proposed exemption,

(a) UCF is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total client assets, including In-house Plan Assets, under its management and control in excess of $100,000,000 and equity, as defined in Section IV(i), above, in excess of $1,000,000;

(b) At the time of the transaction and during the year preceding, the party in interest or its affiliate dealing with the Investment Fund, does not have and has not exercised, the authority to appoint or terminate UCF as a manager of any of the Former U.S. Steel Related Plans' assets, or to negotiate the terms on behalf of the Former U.S. Steel Related Plans (including renewals or modifications) of the management agreement with UCF;

(c) The transactions that are the subject of the proposed exemption are not described in PTE 81–6 (as amended or superseded); PTE 83–1 (as amended or superseded); or PTE 88–59 (as amended or superseded);

(d) The terms of the transaction are negotiated on behalf of the Investment Fund by, or under the authority and general direction of, UCF, and either UCF, or a property manager acting in accordance with written guidelines established and administered by UCF, makes the decision on behalf of the Investment Fund to enter into the transaction;

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

(f) At the time the transaction is entered into, renewed, or modified, the terms of the transaction are at least as favorable to the Investment Fund as the terms generally available in arm's-length transactions between unrelated parties;

(g) Neither UCF nor any affiliate, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in UCF is a person who, within the ten (10) years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of any felony, as set forth in Section I(f) of this proposed exemption;

(h) The party in interest with respect to the Former U.S. Steel Related Plans that deals with the Investment Fund is a party in interest (including a fiduciary) solely by reason of being a service provider to the Former U.S. Steel Related Plans, or having a relationship to a service provider and such party in interest does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice with respect to those assets;

(i) Neither UCF nor a person related to UCF engages in the transactions which are the subject of this exemption;

(j) UCF adopts written policies and procedures that are designed to assure compliance with the conditions of the exemption;

(k) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act and who so represents in writing, conducts an exemption audit on an annual basis and issues a written report to the Former U.S. Steel Related Plans presenting specific findings regarding compliance with the policies and procedures adopted by UCF within six (6) months following the end of the year to which the audit relates;

(l) UCF or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the Department, the IRS, and other persons to determine whether the conditions of this exemption have been met.

Notice To Interested Persons

UCF will furnish a copy of the Notice of Proposed Exemption (the Notice) along with the supplemental statement described at 29 CFR § 2570.43(b)(2) to the investment committee or trustees of each of the Former U.S. Steel Related Plans to inform them of the pendency of the exemption, by hand delivery or first class mailing, within fifteen (15) days of the publication of the Notice in the **Federal Register**. Comments and requests for a hearing are due on or before 45 days from the date of publication of the Notice in the **Federal Register**. A copy of the final exemption, if granted, will also be provided to the Former U.S. Steel Related Plans. Further, UCF will furnish a copy of the final exemption to any other Former U.S. Steel Related Plans at the time the exemption becomes applicable to the management of the assets of such plans.

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

General Information

The attention of interested persons is directed to the following:

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

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

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative

exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 18th day of December, 2008.

Ivan Strasfeld,

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

[FR Doc. E8–30513 Filed 12–23–08; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Extension of the Approval of Information Collection Requirements

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning its proposal to extend the Office of Management and Budget (OMB) approval of the Information Collection: Request for Earnings Information (LS–426). A copy of the proposed information collection request can be obtained by contacting the office listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before February 23, 2009.

ADDRESSES: Mr. Steven D. Lawrence, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0292, fax (202) 693–1451, E-mail *Lawrence.Steven@dol.gov*. Please use only one method of transmission for comments (mail, fax, or E-mail).

SUPPLEMENTARY INFORMATION:

I. *Background:* The Office of Workers' Compensation Programs (OWCP) administers the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. 901 et seq), and its extensions the Nonappropriated Fund Instrumentalities Act, the Outer Continental Shelf Lands Act and the Defense Base Act. These Acts provide compensation benefits to injured workers. The Secretary of Labor is authorized, under the Act, to make rules and regulations to administer the Act and its extensions. Pursuant to the LHWCA, injured employees shall receive compensation in an amount equal to 66–2/3 per centum of their average weekly wage. Form LS–426, Request for Earnings Information is used by district offices to collect wage information from injured workers to assure payment of compensation benefits to injured workers at the proper rate. This information is needed for determination of compensation benefits in accordance with Section 10 of the LHWCA. This information collection is currently approved for use through June 30, 2009.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor seeks the approval of the extension of this information collection in order to carry out its responsibility to assure payment of compensation benefits to injured workers at the proper rate.

Type of Review: Extension.

Agency: Employment Standards Administration.

Titles: Request for Earnings Information.

OMB Number: 1215–0112.

Agency Numbers: LS–426.

Affected Public: Individuals or households.

Total Respondents: 1,600.

Total Annual Responses: 1,600.

Estimated Total Burden Hours: 400.

Estimated Time per Response: 15 minutes.

Frequency: On Occasion.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $720.00.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 18, 2008.

Hazel Bell,

Acting Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.

[FR Doc. E8–30524 Filed 12–23–08; 8:45 am]

BILLING CODE 4510–CF–P

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Extension to the Approval of Information Collection Requirements

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning its