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General Wage Determination Publication

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Signed at Washington, D.C. this 21st day of March 2002.

Carl J. Poleskey,
Chief, Branch of Construction Wage Determinations.

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DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration**

[Application No. D-11002, et al.]

Proposed Exemptions; Deutsche Bank AG

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration (PWBA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. ___, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to PWBA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffittb@pwba.dol.gov", or by FAX to (202) 219-0204 by the end of the scheduled comment period. The

applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Deutsche Bank AG, Located in Frankfurt/Main, Germany

[Exemption Application No.: D-11002]

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 in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).¹

I. General Exemption

Effective for the period from June 12, 2001, through July 27, 2009, the

restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to a transaction between a party in interest with respect to an employee benefit plan and an investment fund (as defined in section V(b)), in which the plan has an interest, and which is managed by Deutsche Bank AG (Deutsche Bank or the Applicant)(as defined in section V(a)), if the following conditions are satisfied:

(a) At the time of the transaction (as defined in section V(i)), the party in interest, or its affiliate (as defined in section V(c)), does not have, and during the immediately preceding one (1) year has not exercised, the authority to—

(1) Appoint or terminate Deutsche Bank as a manager of any of the plan's assets, or

(2) Negotiate the terms of the management agreement with Deutsche Bank (including renewals or modifications thereof) on behalf of such plan;

(b) The transaction is not described in—

(1) Prohibited Transaction Class Exemption 81-6 (PTCE 81-6)² (relating to securities lending arrangements);

(2) Prohibited Transaction Class Exemption 83-1 (PTCE 83-1)³ (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Class Exemption 82-87 (PTCE 82-87)⁴ (relating to certain mortgage financing arrangements);

(c) The terms of the transaction are negotiated on behalf of the investment fund by, or under the authority and general direction of Deutsche Bank, and either Deutsche Bank, or (so long as Deutsche Bank retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by Deutsche Bank, makes the decision on behalf of the investment fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(d) The party in interest dealing with the investment fund is neither Deutsche Bank nor a person related to Deutsche Bank (within the meaning of section V(h));

(e) The transaction is not entered into with a party in interest with respect to any plan whose assets managed by

Deutsche Bank, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof described in section V(c)(1) of this exemption) or by the same employee organization, and managed by Deutsche Bank, represent more than 20 percent (20%) of the total client assets managed by Deutsche Bank at the time of the transaction;

(f) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of Deutsche Bank, 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)(1) Neither Deutsche Bank nor any affiliate thereof (as defined in section V(d)), nor any owner, direct or indirect, of a 5 percent (5%) or more interest in Deutsche Bank 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 involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; income tax evasion; 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 any other crime described in section 411 of the Act.

(2) The relief provided by this exemption is available to Deutsche Bank (as defined in section V(a)), notwithstanding the guilty plea on March 11, 1999, of Deutsche Bank's affiliate, Bankers Trust Company (Bankers Trust), to three counts of violations of 18 U.S.C. § 1005, provided that neither Deutsche Bank nor any affiliate, nor any owner, direct or indirect of a 5 percent (5%) or more interest in Deutsche Bank is convicted of any of the crimes (described in section I(g)(1)), and provided that Bankers Trust is not subsequently convicted of any crimes (described in section I(g)(1)).

(3) For purposes of this section I(g), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of

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

² 46 FR 7527, January 23, 1981.

³ 48 FR 895, January 7, 1983.

⁴ 47 FR 21331, May 18, 1982.

whether that judgment remains under appeal.

(h) Prior to entering into a transaction covered by this exemption Deutsche Bank must agree in writing with a plan:

(1) That the transaction is governed by the laws of the United States and that Deutsche Bank is a fiduciary of the plan pursuant to the provisions of the Act;

(2) To submit to the jurisdiction of the United States district courts;

(3) To appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent); and

(4) To consent to service of process on the Process Agent.

(i) Upon request, Deutsche Bank provides to each plan affected by this exemption copies of the Notice of Proposed Exemption (the Notice) and the final exemption, if granted;

(j) Deutsche Bank provides each plan affected by this exemption with a written consent to service of process in the United States and to the jurisdiction of the courts of the United States for any civil action or proceeding brought against Deutsche Bank with respect to the subject transactions, which consent provides that process may be served on Deutsche Bank through service on Deutsche Bank's New York branch (or any other branch or affiliate of Deutsche Bank that is domiciled in the United States);

(k) Deutsche Bank and/or its affiliates (as defined in section V(c)(1)), maintains or causes to be maintained within the United States for a period of six (6) years from the date of each transaction covered by this exemption, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable persons (as described in section I(l)) to determine whether the conditions of the exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Deutsche Bank and/or its affiliates (as defined in section V(c)(1)), records are lost or destroyed prior to the end of the six (6) year period; and

(2) No party in interest other than Deutsche Bank and/or its affiliates shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination (as required by section I(l)(1));

(l)(1) Except as provided in section I(l)(2) and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to, above, in section I(k) are unconditionally available at their

customary location during normal business hours to: (i) Any duly authorized employee or representative of the Department, the Internal Revenue Service or the Securities and Exchange Commission; (ii) any fiduciary of a plan affected by this exemption or any duly authorized representative of such fiduciary; (iii) any contributing employer to any plan affected by this exemption or any duly authorized employee representative of such employer; and (iv) any participant or beneficiary of any plan affected by this exemption, or any duly authorized representative of such participant or beneficiary;

(2) None of the persons described above in section I(l)(1)(ii)–(iv) are authorized to examine the trade secrets of Deutsche Bank or commercial or financial information which is privileged or confidential;

(m) Upon request, Deutsche Bank discloses to the plan sponsor and/or the named fiduciary of each plan affected by this exemption information concerning the nature and extent of Deutsche Bank's regulation by German governmental authorities.

II. Specific Exemptions for Employers

Effective for the period from June 12, 2001, through July 27, 2009, the restrictions of sections 406(a), 406(b)(1) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of Code section 4975(c)(1)(A) through (E), shall not apply to:

(a) The sale, leasing, or servicing of goods (as defined in section V(j)), or to the furnishing of services, to an investment fund managed by Deutsche Bank, by a party in interest with respect to a plan having an interest in the investment fund, if—

(1) The party in interest is an employer any of whose employees are covered by the plan or is a person who is a party in interest by virtue of a relationship to such an employer described in section V(c),

(2) The transaction is necessary for the administration or management of the investment fund,

(3) The transaction takes place in the ordinary course of a business engaged in by the party in interest with the general public,

(4) Effective for taxable years of the party in interest furnishing goods and services after the date this exemption is granted, the amount attributable in any taxable year of the party in interest to transactions engaged in with an investment fund pursuant to section II(a) of this exemption does not exceed one percent (1%) of the gross receipts

derived from all sources for the prior taxable year of such party in interest, and

(5) The requirements of sections I(c) through (n) are satisfied with respect to the transaction;

(b) The leasing of office or commercial space by an investment fund managed by Deutsche Bank to a party in interest with respect to a plan having an interest in the investment fund, if—

(1) The party in interest is an employer any of whose employees are covered by such plan or is a person who is a party in interest by virtue of a relationship to such an employer described in section V(c),

(2) No commission or other fee is paid by the investment fund to Deutsche Bank or to the employer, or to an affiliate of Deutsche Bank or the employer (as defined in section V(c)), in connection with the transaction,

(3) Any unit of space leased to the party in interest by the investment fund is suitable (or adaptable without excessive cost) for use by different tenants;

(4) The amount of space covered by the lease does not exceed fifteen (15) percent of the rentable space of the office building, integrated office park, or of the commercial center (if the lease does not pertain to office space),

(5) In the case of a plan that is not an eligible individual account plan (as defined in section 407(d)(3) of the Act), immediately after the transaction is entered into, the aggregate fair market value of employer real property and employer securities held by investment funds of Deutsche Bank in which such plan has an interest does not exceed 10 percent (10%) of the fair market value of the assets of such plan held in those investment funds. In determining the aggregate fair market value of employer real property and employer securities as described herein, a plan shall be considered to own the same proportionate undivided interest in each asset of the investment fund or funds as its proportionate interest in the total assets of the investment fund(s). For purposes of this requirement, the term, "employer real property," means real property leased to, and the term, "employer securities," means securities issued by, an employer any of whose employees are covered by such plan or a party in interest of the plan by reason of a relationship to the employer described in subparagraphs (E) or (G) of section 3(14) of the Act, and

(6) The requirements of sections I(c) through (n) are satisfied with respect to the transaction.

III. Specific Lease Exemption for Deutsche Bank

Effective for the period from June 12, 2001, through July 27, 2009, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall not apply to the leasing of office or commercial space by an investment fund managed by Deutsche Bank to Deutsche Bank, a person who is a party in interest of a plan by virtue of a relationship to Deutsche Bank described in subparagraphs (G), (H), or (I) of section 3(14) of the Act, or a person not eligible for the General Exemption of Part I of this exemption by reason of section I(a), if—

(a) The amount of space covered by the lease does not exceed the greater of 7500 square feet or one percent (1%) of the rentable space of the office building, integrated office park or of the commercial center in which the investment fund has the investment,

(b) The unit of space subject to the lease is suitable (or adaptable without excessive cost) for use by different tenants,

(c) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of Deutsche Bank, the terms of the transaction are not more favorable to the lessee than the terms generally available in arm's length transactions between unrelated parties, and

(d) No commission or other fee is paid by the investment fund to Deutsche Bank, any person possessing the disqualifying powers described in section I(a), or any affiliate of such persons (as defined in section V(c)), in connection with the transaction.

IV. Transactions Involving Places of Public Accommodation

Effective for the period from June 12, 2001, through July 27, 2009, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the furnishing of services and facilities (and goods incidental thereto) by a place of public accommodation owned by an investment fund managed by Deutsche Bank to a party in interest with respect to a plan having an interest in the investment fund, if the services and facilities (and incidental goods) are furnished on a comparable basis to the general public.

V. Definitions

For purposes of this exemption:

(a) The term, "Deutsche Bank" means Deutsche Bank AG, provided that Deutsche Bank AG: (i) has the power to manage, acquire or dispose of assets of a plan affected by this exemption; (ii) has, as of the last day of its most recent fiscal year, equity capital (as defined in section V(k)) in excess of \$10,000,000; (iii) has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained Deutsche Bank AG to manage the assets of the plan; and (iv) is subject to regulation by the German federal banking supervisory authority, known as the Bundesaufsichtsamt fuer das Kreditwesen (the BAK).

(b) An "investment fund" includes individual trusts 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 Deutsche Bank) is subject to the discretionary authority of Deutsche Bank.

(c) For purposes of section I(a), section I(k), and Part II, 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 a 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 such plan will also be considered affiliates with respect to each other for purposes of section I(a), 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.

(d) For purposes of section I(g), 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 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 described 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.

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

(f) 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.

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

(h) Deutsche Bank is "related" to a party in interest for purposes of section I(d) of this 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 Deutsche Bank or if Deutsche Bank (or a person controlling, or controlled by, Deutsche Bank) 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.

(i) 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 effective date of this exemption, or a renewal that requires the consent of Deutsche Bank occurs on or after such effective date, and the requirements of this 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. Notwithstanding the foregoing, this exemption shall cease to apply to a transaction exempt by virtue of Part I or Part II at such time as the percentage requirement contained in section I(e) is exceeded, unless no portion of such excess results from an increase in the assets transferred for discretionary management to Deutsche Bank. For this purpose, assets transferred do not include the reinvestment of earnings attributable to those plan assets already under the discretionary management of Deutsche Bank. Nothing in this paragraph shall be construed as exempting a transaction entered into by an investment fund which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of this 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 exemption.

(j) The term, "goods" includes all things which are movable or which are fixtures used by an investment fund but does not include securities, commodities, commodities futures, money, documents, instruments, accounts, chattel paper, contract rights, and any other property, tangible or intangible, which, under the relevant facts and circumstances, is held primarily for investment.

(k) For purposes of section V(a) of this exemption, the term "equity capital" means stock (common and preferred), surplus, undivided profits, contingency reserves and other capital reserves.

Temporary Nature of Exemption

The Department has determined that the relief provided by this exemption, if granted, will be effective retroactively but will be temporary in nature. In this regard, Deutsche Bank, AG, among others, on July 27, 1999, obtained Prohibited Transaction Exemption 99-29 (PTE 99-29)⁵ which provided that it would not be precluded from functioning as a "qualified professional asset manager" (a QPAM), pursuant to

Prohibited Transaction Class Exemption 84-14 (PTCE 84-14),⁶ solely because of a failure to satisfy section I(g) of PTCE 84-14, as a result of a guilty plea filed by an affiliate on March 11, 1999, to three counts of a felony. The relief provided by PTE 99-29 was limited to a period of ten (10) years from July 27, 1999, the date of the publication of the final exemption for PTE 99-29 in the **Federal Register**. The Department in proposing the subject exemption does not intend that, if granted, the relief, as described herein, be available beyond the time remaining in the ten (10) year period established by PTE 99-29. Accordingly, the relief provided by this exemption, if granted, will be retroactive, effective as of June 12, 2001, the date when the application for exemption was filed with the Department, and will continue to be available through July 27, 2009, the date that is ten (10) years from the publication in the **Federal Register** of the final exemption for PTE 99-29.

In the case of a transaction that continues beyond July 27, 2009, the transaction shall be deemed to occur until it is terminated. Although the relief provided by this exemption will not be available after July 27, 2009, for any new, or other transactions that require the consent of Deutsche Bank, as described herein, such relief will continue to apply beyond July 27, 2009, for continuing transactions entered into prior to that date, provided such transactions satisfied the conditions of this exemption. In this regard, see section V(i) regarding continuing transactions.

Should the Applicant wish to extend, beyond July 27, 2009, the relief provided by this exemption to new or additional transactions, or should the Applicant wish for any reason to amend the conditions of this exemption, the Applicant may submit another application for exemption. In this regard, the Department expects that prior to filing another exemption application seeking relief for new or additional transactions or to amend this exemption, the Applicant should be prepared to demonstrate compliance with the conditions of this exemption.

Summary of Facts and Representations

1. The request for relief from the prohibited transaction provisions of the Act and Code was filed on behalf of Deutsche Bank and, if granted, will be applicable to Deutsche Bank, as that term is defined in Section V(a) of this proposed exemption. Deutsche Bank is

a bank organized under the laws of the Federal Republic of Germany. In this regard, Deutsche Bank provides a broad variety of banking, fiduciary, record keeping, custodial, brokerage, and investment services to corporations, institutions, governments, employee benefit plans, governmental retirement plans, and private investors worldwide.

As of December 31, 2000, Deutsche Bank held 697,306 million Euros in assets and 19,807 million Euros in stockholder equity. Deutsche Bank manages over \$585 billion in assets either through collective trusts, separately managed accounts, or mutual funds. It is represented that, as of the last day of its most recent fiscal year, Deutsche Bank has equity capital in excess of \$10,000,000.

2. It is anticipated that plans, particularly large plans, with hundreds or thousands of known and unknown parties in interest may enter into the transactions described in this proposed exemption. Deutsche Bank anticipates that such transactions would include derivatives, repurchase agreements with foreign banks or broker dealers, foreign exchange transactions, and other transactions not exempted by other individual or class exemptions.⁷

3. The exemption requested by Deutsche Bank would permit: (1) Transactions between parties in interest with respect to a plan and an investment fund in which such plan has an interest, if the assets in such fund are managed by Deutsche Bank; (2) the sale, leasing, servicing of goods, or the furnishing of services to an investment fund managed by Deutsche Bank by an employer or an affiliate, and the leasing of office or commercial space by such investment fund to an employer or an affiliate where plans sponsored by such employer or an affiliate have an interest in such fund; (3) the leasing of office or commercial space by an investment fund managed by Deutsche Bank to Deutsche Bank or a person who is a

⁷ The Department notes that the general standards of fiduciary conduct under the Act would apply to the investment transactions permitted by this proposed exemption, and that satisfaction of the conditions of this proposed exemption should not be viewed as an endorsement of any particular investment by the Department. Section 404 of the Act requires, among other things, that a fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Accordingly, the manager or other plan fiduciary must act prudently with respect to the decision to enter into an investment transaction, as well as to the negotiation of the specific terms under which the plan will engage in such transaction. In addition, the plan's named fiduciary must act prudently and solely in the interest of the plan's participants and beneficiaries in selecting Deutsche Bank to manage plan assets and in periodically monitoring Deutsche Bank's performance.

⁵ 64 FR 40623, July 27, 1999

⁶ 49 FR 9494 (March 13, 1984), as corrected, 50 FR 41430 (October 10, 1985).

party in interest of a plan by virtue of a relationship to Deutsche Bank, as described in 3(14)(G) (H), or (I) of the Act, or a person not eligible for the general exemption of Part I of this proposed exemption by reason of section I(a); and (4) the furnishing of services and facilities (and goods incidental thereto) by a place of public accommodation owned by an investment fund which is managed by Deutsche Bank to a party in interest with respect to a plan having an interest in such fund; provided certain condition are satisfied. The Applicant represents that these transactions have not been consummated, nor will such transactions be consummated without an exemption.

Relief is requested from the prohibitions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) of the Act and section 4975(c)(1)(A)-(E) of the Code. According to the Applicant, the transactions described in Parts I, II, III, and IV of this proposed exemption may violate section 406(a)(1)(A)-(D) of the Act, because a party in interest is involved or may be benefitted. Further, in the opinion of the Applicant, the transactions described in Parts II, III, and IV of this proposed exemption would arguably violate 406(b)(1) of the Act, because such transactions may benefit a sponsoring employer, investment manager, or other plan fiduciaries. Further, the transactions described in section II(b) of the proposed exemption may violate section 407(a) of the Act, because such transactions involve the leasing of fund real property to sponsoring employers. Finally, the transactions described in sections III and IV of this proposed exemption could violate section 406(b)(2) of the Act and section 4975(c)(1)(E) of the Code to the extent that Deutsche Bank, the employer, or other fiduciary with authority or control over plan assets is involved in the transactions.

4. With regard to each of the transactions described in paragraph 3 above, Deutsche Bank has requested relief from the prohibited transaction provisions of the Act and Code which is identical to the relief granted in PTCE 84-14. PTCE 84-14 provides conditional relief for various parties in interest to engage in transactions involving plan assets if, among other conditions, such assets are managed by a QPAM, who is independent of such parties in interest.

PTCE 84-14 does not permit a foreign bank to act as a QPAM. In this regard, section V(a)(1) of PTCE 84-14 requires that, in order to qualify as a QPAM, a bank must be a banking institution

organized under the laws of the United States, as defined in section 202(a)(1) of the Investment Advisers Act of 1940. As Deutsche Bank is organized under the laws of the Federal Republic of Germany, rather than the laws of the United States, Deutsche Bank does not qualify as a QPAM, and cannot rely on the relief provided by PTCE 84-14. Accordingly, Deutsche Bank has submitted an application for administrative exemption and requested the relief proposed herein.

In the opinion of the Applicant, the fact that Deutsche Bank is not a U.S.-chartered bank carries little, if any significance in terms of the ability of Deutsche Bank to operate independently or to manage plan assets efficiently and effectively. Given Deutsche Bank's size, global geographic distribution, financial strength, and experience managing assets, the Applicant maintains that Deutsche Bank is better qualified than many U.S. banks to act as an independent asset manager.

5. Deutsche Bank believes that its operations are regulated as much as U.S.-chartered banks. In this regard, Deutsche Bank's operations are regulated not only by the supervisory authorities of various host countries, but by German authorities, as well. Specifically, Deutsche Bank is subject globally to comprehensive supervision and regulation on a consolidated basis by the German federal banking supervisory authority, referred to herein as the BAK. The BAK is a federal institution with ultimate responsibility to the German Ministry of Finance. The BAK supervises the operations of banks, banking groups, financial holding groups and foreign bank branches in Germany and has the authority to: (a) Issue and withdraw banking licenses, (b) issue regulations on capital and liquidity requirements of banks, (c) request information and conduct investigations, (d) intervene in cases of inadequate capital or liquidity, endangered deposits, or bankruptcy by temporarily prohibiting certain banking transactions.

The BAK ensures that Deutsche Bank has procedures for monitoring and controlling its worldwide activities through various statutory and regulatory standards. Among these standards are requirements for adequate internal controls, oversight, administration, and financial resources. The BAK reviews compliance with these operational and internal control standards through an annual audit performed by the year-end auditor and through special audits ordered by the BAK. The supervisory authorities require information on the condition of Deutsche Bank and its

branches through periodic consolidated financial reports and through a mandatory annual report prepared by the auditor.

Additionally, the BAK in cooperation with the Deutsche Bundesbank (Bundesbank) supervises all branches of Deutsche Bank, wherever located. The Bundesbank is the central bank of the Federal Republic of Germany and is an integral part of the European Central Banks. For Deutsche Bank's branches domiciled in European Economic Area (EEA) member states, the BAK is the lead supervisory authority pursuant to the rule on the "European Passport," and only some aspects are subject to complementary supervision by supervisory authority of the host country.

It is represented that Deutsche Bank is subject to announced and unannounced on-site audits, and all other supervisory controls applicable to German Banks. With respect to branches located in EEA member states, such audits are carried out consistent with applicable European directives. With respect to branches outside the EEA, such audits are carried out consistent with applicable international agreements, memoranda of understanding, or other arrangements with the relevant foreign supervisory authorities.

Deutsche Bank's branches domiciled outside the EEA are also subject to local regulation and supervision by the supervisory authority of the host country. In this regard, for example, Deutsche Bank AG, New York Branch, is regulated and supervised by the New York State Banking Department. Certain activities of Deutsche Bank AG, New York Branch are also regulated and supervised by the Federal Reserve Bank of New York.

There are two deposit insurance programs that cover Deutsche Bank. The first is a European Union required mandatory deposit insurance system established in 1998 that insures deposits denominated in the currency of an EEA member state up to the lesser of 90 percent (90%) of the deposit amount or 20,000 euros. This statutory deposit protection scheme is maintained, as far as private commercial banks like Deutsche Bank are concerned, by a separate institution and is subject to supervision by the BAK. In addition since 1976, the Association of German Banks has maintained a voluntary deposit protection program called the Deposit Protection Fund that safeguards liabilities in excess of the thresholds guaranteed by the European Union program, up to a protection ceiling for each creditor of 30 percent (30%) of the liable capital of the bank. The Deposit

Protection Fund is funded by regular contributions paid by every German bank which has elected to participate in the Deposit Protection Fund.

Participating banks may be required to make special contributions to the extent requested by the Deposit Protection Fund to enable it to fulfill its purpose. It is represented that Deutsche Bank has elected to participate in the Deposit Protection Fund.

Upon request, Deutsche Bank will disclose to the plan sponsor and/or the named fiduciary of each plan affected by this exemption information concerning the nature and extent of Deutsche Bank's regulation by German governmental authorities, as described above and in the application for exemption. In addition, Deutsche Bank will provide to each plan affected by this exemption, if granted, copies of the proposed and the final exemption.

6. The Applicant maintains that the proposed exemption is administratively feasible because, the requested exemption would not impose any administrative burden on the Department which is not already imposed by PTCE 84-14. In this regard, no action would be necessary on the part of the Department to effect the transactions other than by granting the exemption. As a condition of this exemption, Deutsche Bank or an affiliate must maintain or cause 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.

7. The Applicant believes that the proposed exemption is in the best interest of the participants and beneficiaries of the affected plans. In this regard, the Applicant maintains that the proposed transaction would broaden the choice of qualified independent assets managers available to such plans, would increase transactional efficiencies, and would afford greater opportunities to such plans to diversify through international investments. With a physical presence in 27 different countries and with access to 90 markets worldwide, the Applicant maintains that Deutsche Bank can provide more informed and cost-efficient asset management services for international investments than most U.S. banks.

8. Without the proposed exemption, plans might lose opportunities to enter into beneficial financial transactions with parties in interest that would enhance the return to such plans. In this regard, restricting plans to domestic banks which may have little or no

expertise or connections with a given target market may result in inefficient execution, investment decisions based on imperfect information, or missed investment opportunities.

9. In the absence of the proposed exemption, the Applicant must undertake costly and time consuming steps to examine each transaction to ensure that a given transaction on behalf of a plan investor does not involve or benefit the many parties in interest that may exist with respect to such plan. These efforts encompass not only a plan's primary investments, but also collateral investments and investment-related transactions, including, *e.g.*, sweep investments necessary for cash management, foreign exchange transactions necessary for investments denominated in foreign currencies, securities lending, and the use of brokers and agents to execute the foregoing. In this regard, the Applicant points out that the costs of these efforts are ultimately borne by the plan investors, as reflected in higher asset management fees, higher transaction costs, and opportunity costs.

10. The proposed exemption contains conditions which are designed to ensure the presence of adequate safeguards to protect the interests of the participants and beneficiaries of plans regarding the subject transactions. Except for the fact that Deutsche Bank is not a U.S.-chartered bank, as required by section V(a)(1) of PTCE 84-14, the proposed exemption contains conditions substantially similar to those which are set forth in PTCE 84-14.

In addition to the requirements of the PTCE 84-14, Deutsche Bank has agreed to additional conditions, as set forth in section I(h) through (m), which are designed to ensure that the plans are protected. In this regard, Deutsche Bank will indemnify and hold harmless each plan affected by this exemption against any harm, damage, or injury (including interest and attorney's fees) arising from any fiduciary breach or other wrongdoing of Deutsche Bank acting in its capacity as asset manager for such plan. Further, Deutsche Bank has agreed that enforcement by a Plan of the indemnity provided by Deutsche Bank will occur in the United States district courts.

It is represented that there are adequate safeguards to minimize the risks associated with the Deutsche Bank's foreign nationality. Deutsche Bank will comply with the indicia of ownership of plan assets requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1. To ensure that a plan will not have to litigate in a foreign

country, Deutsche Bank has consented to the appointment of an agent for service of process in the United States; has consented to service of process on such agent; and to the jurisdiction of the district courts of the United States for any civil action or proceeding brought against Deutsche Bank with respect to the subject transactions. Such consent provides that process may be served on Deutsche Bank through service on Deutsche Bank's New York branch (or other branch of Deutsche Bank that is domiciled in the United States).

11. In summary, the Applicant represents that the subject transactions will satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) Deutsche Bank has, as of the last day of its most recent fiscal year, equity capital in excess of \$10,000,000;

(b) Except for the fact that Deutsche Bank is not a U.S.-chartered bank, as required by section V(a)(1) of PTCE 84-14, the proposed exemption contains conditions substantially similar to those which are set forth in PTCE 84-14;

(c) The requested exemption will not impose any administrative burden on the Department which is not already imposed by PTCE 84-14;

(d) In addition to the requirements of the PTCE 84-14, Deutsche Bank has agreed to conditions, as set forth in section I(h) through (m), which are designed to ensure that the affected plans are protected;

(e) Deutsche Bank's operations are subject to significant regulation, not only by the supervisory authorities of various host countries, but by German authorities, as well;

(f) Upon request, Deutsche Bank will disclose to the plan sponsor and/or the named fiduciary of each plan affected by this exemption information concerning the nature and extent of Deutsche Bank's regulation by German governmental authorities;

(g) Upon request, Deutsche Bank will provide to each plan affected by this exemption copies of the proposed and the final exemption, if granted;

(h) The proposed exemption will broaden the choice of qualified independent assets managers available to the affected plans, will increase transactional efficiencies, and will afford greater opportunities to such plans to diversify through international investments; and

(i) Without the proposed exemption, plans might lose opportunities to enter into beneficial financial transactions with parties in interest that would enhance the return to such plans.

Notice to Interested Persons

Deutsche Bank will furnish a copy of the Notice of Proposed Exemption (the Notice) along with the supplemental statement (the Supplemental Statement), as described at 29 CFR § 2570.43(b)(2), to the an independent fiduciary for each plan to which Deutsche Bank currently provides investment management services to inform such persons of the pendency of this proposed exemption. A copy of the Notice, as it appears in the **Federal Register**, and a copy of the Supplemental Statement, will be provided, by 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 from interested persons on or before 45 days from the date of the publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693-8551 (this is not a toll-free number).

EquiLend LLC (EquiLend), Located in New York, New York

[Exemption Application No.: D-11026]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act, section 8477(c)(3) of the Federal Employees' Retirement System Act of 1986 (FERSA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I. Sale of EquiLend Products to Plans

If the exemption is granted, the restrictions of section 406(a)(1)(A) and (D) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) and (D) of the Code, shall not apply to the sale or licensing of certain data and/or analytical tools to an employee benefit plan by EquiLend, a party in interest with respect to such plan, if the following conditions are met:

(a) The terms of any such sale or licensing are at least as favorable to the plan as the terms generally available in an arm's-length transaction involving an unrelated party;

(b) Any data sold/licensed to the plan will be limited to:

(1) Current and historical data related to transactions proposed or occurring on EquiLend's electronic securities lending platform (the Platform) or,

(2) Data derived from current and historical data using statistical or computational techniques; and

(c) Each analytical tool sold/licensed to the plan will be an objective statistical or computational tool designed to permit the evaluation of securities lending activities.

Section II. Use of Platform by Owner Lending Agent/ Sale of EquiLend Products to Plans Represented by Owner Lending Agent

If the exemption is granted, the restrictions of sections 406(a) and 406(b) of the Act, section 8477(c)(2) of FERSA, and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to: (1) The participation in the Platform by an equity owner of EquiLend (an Equity Owner), in its capacity as a securities lending agent for a plan (an Owner Lending Agent); and (2) the sale or licensing of certain data and/or analytical tools by EquiLend to a plan for which an Equity Owner acts as a securities lending agent, if the following conditions are met:

(a) In the case of participation in the Platform on behalf of a plan, to the extent applicable the procedures regarding the securities lending activities conform to the provisions of Prohibited Transaction Class Exemption (PTE) 81-6 (46 FR 7527 (Jan. 23, 1981)), PTE 82-63 (46 FR 14804 (Apr. 6, 1982)), and/or any applicable individual exemption;

(b) None of the fees imposed by EquiLend for securities lending transactions conducted through the use of the Platform at the direction of an Owner Lending Agent will be charged to a plan;

(c) Each securities lender and securities borrower participating in a securities lending transaction through EquiLend will be notified by EquiLend as to its responsibilities with respect to compliance, as applicable, with the Act, the Code, and FERSA;

(d) EquiLend will not act as a principal in any securities lending transaction involving plan assets;

(e) Each Owner Lending Agent will provide prior written notice to its plan clients of its intention to participate in EquiLend;

(f) (1) Except as otherwise provided in paragraph (i), the arrangement pursuant to which the Owner Lending Agent utilizes the services of EquiLend on behalf of a plan for securities lending;

(A) Is subject to the prior written authorization of an independent fiduciary ("an authorizing fiduciary" as defined in paragraph (b) of section III).

For purposes of subparagraph (f)(1), the requirement that the authorizing fiduciary be independent shall not apply in the case of a plan of an Equity Owner (Equity Owner Plan);

(B) May be terminated by the authorizing fiduciary, without penalty to the plan, within the lesser of: (i) The time negotiated for such notice of termination by the plan and the Owner Lending Agent, or (ii) five business days.

Notwithstanding the foregoing, the requirement for prior written authorization will be deemed satisfied in the case of any plan for which the authorizing fiduciary has previously provided written authorization to the Owner Lending Agent pursuant to PTE 82-63, unless such authorizing fiduciary objects to participation in the Platform in writing to the Owner Lending Agent within 30 days following disclosure of the information described in paragraphs (e) and (g) of this section to such authorizing fiduciary; and

(2) Except as otherwise provided in paragraph (i), each purchase or license of a securities lending-related product from EquiLend on behalf of a plan by an Owner Lending Agent:

(A) Is subject to the prior written authorization of an authorizing fiduciary. For purposes of subparagraph (f)(2), the requirement for prior written authorization shall not apply to any purchase or licensing of an EquiLend securities lending-related product by an Equity Owner Plan if the fee or cost associated with such purchase or licensing is not paid by the Equity Owner Plan; and

(B) May be terminated by the authorizing fiduciary within (i) the time negotiated for such notice of termination by the plan and the Owner Lending Agent or (ii) five business days, whichever is lesser, in either case without penalty to the plan, provided that, such authorizing fiduciary shall be deemed to have given the necessary authorization in satisfaction of this paragraph (f)(2) with respect to each specific product purchased or licensed pursuant thereto unless such authorizing fiduciary objects to the Owner Lending Agent within 15 days after the delivery of information regarding such specific product to the authorizing fiduciary in accordance with paragraph (g) of this exemption;

(g) The authorization described in paragraph (f) of this section shall not be deemed to have been made unless the Owner Lending Agent has furnished the authorizing fiduciary with any reasonably available information that the Owner Lending Agent reasonably believes to be necessary for the

authorizing fiduciary to determine whether such authorization should be made, and any other reasonably available information regarding the matter that the authorizing fiduciary may reasonably request. This includes, but is not limited to: (1) A statement that the Equity Owner, as securities lending agent, has a financial interest in the successful operation of EquiLend, and (2) a statement, provided on an annual basis, that the authorizing fiduciary may terminate the arrangement(s) described in (f) above at any time;

(h) Any purchase or licensing of data and/or analytical tools with respect to securities lending activities by a plan pursuant to this section complies with the relevant conditions of section I and will be authorized in advance by an authorizing fiduciary in accordance with the applicable procedures of paragraphs (f), (g) and (i);

(i) (Special Rule for Commingled Investment Funds) In the case of a pooled separate account maintained by an insurance company qualified to do business in a state or a common or collective trust fund maintained by a bank or trust company supervised by a state or federal agency (Commingled Investment Fund), the requirements of paragraph (f) of this section shall not apply, provided that—

(1) The information described in paragraph (g) (including information with respect to any material change in the arrangement) of this section and a description of the operation of the Platform (including a description of the fee structure paid by securities lenders and borrowers), shall be furnished by the Owner Lending Agent to the authorizing fiduciary (described in paragraph (b) of section III) with respect to each plan whose assets are invested in the account or fund, not less than 30 days prior to implementation of any such arrangement or material changes thereto, or, not less than 15 days prior to the purchase or license of any specific securities lending-related product, and, where requested, upon the reasonable request of the authorizing fiduciary. For purposes of this subparagraph, the requirement that the authorizing fiduciary be independent shall not apply in the case of an Equity Owner Plan;

(2) In the event any such authorizing fiduciary notifies the Owner Lending Agent that it objects to participation in the Platform, or to the purchase or license of any EquiLend securities lending-related tool or product, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the account

or fund, without penalty to the 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. In the case of a plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement or purchase or license, but any existing arrangement need not be discontinued by reason of a plan electing to withdraw; and

(3) In the case of a plan whose assets are proposed to be invested in the pooled account or fund subsequent to the implementation of the arrangements and which has not authorized the arrangements in the manner described in paragraphs (i)(1) and (i)(2), the plan's investment in the account or fund shall be authorized in the manner described in paragraph (f);

(j) The Equity Owner, together with its affiliates (as defined in paragraph (a) of section III), does not own at the time of the execution of a securities lending transaction on behalf of a plan by the Equity Owner (i.e., in its capacity as Owner Lending Agent) through EquiLend or at the time of the purchase, or commencement of licensing, of data and/or analytical tools by the plan, more than 20% of:

(1) If EquiLend is a corporation, including a limited liability company taxable as a corporation, the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of EquiLend, or

(2) If EquiLend is a partnership, including a limited liability company taxable as a partnership, the capital interest or the profits interest of EquiLend;

(k) Any information, authorization, or termination of authorization may be provided by mail or electronically; and

(l) No Equity Owner Plan, as defined in section III(e) below, will participate in the Platform, other than through a Commingled Investment Fund in which the aggregate investment of all Equity Owner Plans at the time of the transaction constitutes less than 20% of the total assets of such fund.

Notwithstanding the foregoing, this prohibition shall not apply to the participation by an Equity Owner Plan as of the date that the aggregate loan balance of all securities lending transactions entered into through EquiLend by all participants outstanding on such date (excluding transactions entered into on behalf of Equity Owner Plans) is equal to or greater than \$10 billion; provided that if

such aggregate loan balance is later determined to be less than \$10 billion, no additional participation by an Equity Owner Plan (other than through a Commingled Investment Fund) shall occur until such time as the \$10 billion threshold amount is again met.

Section III. Definitions

For purposes of this exemption:

(a) An "affiliate" of another person means:

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

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

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

For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(b) The term "authorizing fiduciary" means, with respect to an Owner Lending Agent, a plan fiduciary who is unrelated to, and independent of, such Owner Lending Agent. In this regard, an authorizing fiduciary will not be considered independent of an Owner Lending Agent if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Owner Lending Agent; or

(2) Such fiduciary directly or indirectly receives any compensation or other consideration from the Owner Lending Agent or an affiliate for his or her own personal account in connection with any securities lending transaction described herein.

For purposes of section II, no Equity Owner or any affiliate may be an authorizing fiduciary. Notwithstanding the foregoing, the requirements for consent by an authorizing fiduciary with respect to participation in the Platform, and the annual right of such fiduciary to terminate such participation, shall be deemed met to the extent that the Owner Lending Agent's proposed utilization of the services of EquiLend on behalf of a plan for securities lending has been approved by an order of a United States district court.

(c) The term "Owner Lending Agent" means a fiduciary of a plan acting as securities lending agent in connection with loans of plan assets that are securities.

(d) The term "Equity Owner" means an entity that either directly or through an affiliate owns an equity ownership interest in EquiLend.

(e) The term "Equity Owner Plan" means an employee benefit plan, as defined under section 3(3) of the Act, which is established or maintained by an Equity Owner of EquiLend, as defined in section III(d) above, as an employer of employees covered by such plan, or by its affiliate.

(f) The terms "employee benefit plan" and/or "plan" means:

(1) An "employee benefit plan" within the meaning of section 3(3) of the Act subject to Part 4 of Subtitle B of Title I of the Act,

(2) A "plan" (within the meaning of section 4975(e)(1) of the Code) subject to section 4975 of the Code, or

(3) The Federal Thrift Savings Fund.

Summary of Facts and Representations

1. EquiLend is a Delaware limited liability company established on May 16, 2001. As of October 17, 2001, the Equity Owners of EquiLend were as follows: Barclays California Corporation; Bear Stearns Securities Corp.; JP Morgan Strategic Securities Lending Corp. (a wholly owned subsidiary of The Chase Manhattan Bank); LB I Group Inc. (a wholly owned subsidiary of Lehman Brothers Inc.); Merrill Lynch, Pierce, Fenner & Smith Inc.; SSB Investments, Inc. (a wholly owned subsidiary of State Street Corporation); Strategic Investments I, Inc. (a wholly owned subsidiary of Morgan Stanley Dean Witter & Co.); The Goldman Sachs Group, Inc.; Northern Trust Corporation and UBS (USA) Inc., or affiliates of the foregoing entities. The applicant represents that, as of October 17, 2001, each Equity Owner owned 10 percent of EquiLend.

2. EquiLend intends to provide the Platform, a common electronic platform for the negotiation of securities lending and borrowing transactions.⁸ The applicant represents that securities lending transactions involving the use of the Platform will not change the fundamental nature of how securities lending transactions are currently conducted. In this regard, the applicant states that most securities owners use a custodian bank, asset manager, or non-custodian lending agent to lend

securities. The lending agent is typically responsible for, among other things, identifying borrowers, negotiating loan transactions, maintaining the appropriate records, marking to market all outstanding loans, ensuring the maintenance of collateral, and monitoring the delivery and control of the collateral.

The applicant represents that the Platform will provide a tool for lending agents to fulfil the above-mentioned responsibilities. In this regard, the Platform will include:

(A) An interactive screen;

(B) Screens for trade negotiations, auctions, auto-borrowing, rate posting, loan returns, recalls by lenders, and inventory broadcasts (posting of securities available for lending);

(C) Additional services such as the comparison of a transaction as reflected on lender and borrower books with the underlying contract and the identification of the differences between lender and borrower records, including mark to market comparisons and fee billing comparisons;

(D) The disclosure of the identity of counterparties to a transaction whereby members will have the ability to direct trades and control inventory broadcasts;

(E) The reflection of agreed transaction terms on a shared electronic trade ticket in a form for automated input to members' systems; and

(F) The creation of securities lending indices to assist in the benchmarking of the performance of securities lending agents.

3. The applicant states that, in providing these services, EquiLend will not be a principal in any securities lending transaction and will not guarantee any transaction executed through the Platform. In addition, the applicant states that employee benefit plans will not pay any fees to EquiLend in connection with securities lending transactions conducted through the use of the Platform. In this regard, the fees charged by EquiLend will be paid by, and will be the same for, securities lending agents and securities borrowers.

The fees charged by EquiLend are expected to include an annual fee and a one-time initiation fee; both of which will be structured on a tiered basis to allow for the participation in EquiLend by entities of varying sizes. Each level of the annual fees will entitle the member to a certain number of transactions and, thereafter, excess transactions will be subject to additional charges. The applicant represents that, although the Equity Owners will pay the same annual fees as non-owners, no such owner will pay the initiation fee.

4. The applicant states that, in addition to compliance with the terms of this proposed exemption, lenders and borrowers utilizing EquiLend services will remain responsible for compliance with other relevant laws and exemptions. In this regard, each securities lending transaction involving the use of the Platform by an Equity Owner as Owner Lending Agent will remain subject to all relevant provisions of the Act, the Code, and FERSA, as well as any applicable individual or class exemption (including but not limited to PTEs 81-6 and 82-63). In the event that a particular securities lending transaction does not comply with any applicable law and/or exemption, the relief contained in this exemption, if granted, will no longer be available with respect to such transaction.

5. The applicant anticipates that many of the entities currently conducting securities lending and borrowing transactions, including banks, broker-dealers and investment managers, will become members of EquiLend. The applicant anticipates that an entity participating in EquiLend and/or its Platform must, among other things:

(A) Be qualified in its jurisdiction to engage in securities lending transactions through EquiLend and be subject to an appropriate level of regulatory supervision (as determined by EquiLend);

(B) Execute a "User Agreement" which shall set forth the terms and conditions for access to, and use of, EquiLend's platform and which shall contain appropriate representations, warranties and indemnities from the participant, including those typically provided by users of electronic trading platforms; and

(C) Have the ability to pay all applicable EquiLend fees;

(D) Have the ability to originate a certain number of loans per month having a certain aggregate US dollar nominal value (which number and nominal value will be set prior to EquiLend's launch at levels designed to ensure that the applicant is a legitimate participant in the securities lending marketplace); and

(E) In order to remain a member in good standing, meet or exceed the levels described in (D) of this paragraph. The applicant notes that no Equity Owner Plan will participate in the Platform except to the extent that such Plan participates in a commingled fund having less than 20% of its assets comprised of one or more Equity Owner Plans.

6. The applicant represents that an Equity Owner may be a party to transactions involving EquiLend sales

⁸ The proposed exemption does not provide relief under Section I from section 406(a) of the Act with respect to the use of the Platform on behalf of a plan by a lending fiduciary which is not an Equity Owner. In this regard, based on the representations made by the applicant, any relief from section 406(a) that may be necessary in such a situation is provided by the statutory exemption for the provision of services to a plan by a party in interest contained in section 408(b)(2) of the Act.

and/or services. In this regard, each Equity Owner may conduct securities lending transactions on behalf of a plan, in its capacity as an Owner Lending Agent, through EquiLend to the extent that such Equity Owner does not own more than 20% of EquiLend. The applicant represents that plans will not incur any incremental cost as a result of an Owner Lending Agent conducting such transactions through EquiLend.

The applicant states that to the extent an Owner Lending Agent lends plan-owned securities through EquiLend, plan participants will be adequately protected. In this regard, the applicant represents that prior to such an arrangement, each Owner Lending Agent will disclose to a plan's authorizing fiduciary (who is independent of the Owner Lending Agent and EquiLend) that such Owner Lending Agent intends to participate in the Platform. In addition, each Owner Lending Agent will disclose all of the information that the Owner Lending Agent believes is necessary for the authorizing fiduciary to determine whether the arrangement should be approved.⁹ Thereafter, the applicant states, the plan's authorizing fiduciary must authorize the Owner Lending Agent's use of the Platform to lend securities on behalf of such plan. This authorization may be terminated by the authorizing fiduciary, the applicant states, without penalty to the plan, within the lesser of: (i) The time negotiated for such notice of termination by the plan and the Owner Lending Agent, or (ii) five business days.¹⁰

⁹ The Department notes that the Act's general standards of fiduciary conduct also would apply to the proposed service and compensation arrangements. In this regard, section 404 requires, among other things, a fiduciary to discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, an independent plan fiduciary must act prudently with respect to: (1) The decision to enter into an above-described arrangement; and (2) the negotiation of the terms of such arrangement including any payment of compensation. The Department further emphasizes that it expects plan fiduciaries, prior to entering into any of the proposed service and compensation arrangements, to fully understand the extent of the services to be provided, the fee structure and the risks associated with these types of arrangements following disclosure by the service provider of all relevant information. In addition, the Department notes that such plan fiduciaries are responsible for periodically monitoring the services provided.

¹⁰ However, with respect to any plan for which the authorizing fiduciary has previously given written authorization to the Owner Lending Agent pursuant to PTE 82-63, the applicant requests that such authorizing fiduciary be deemed to have given the required authorization unless such authorizing fiduciary objects in writing to participation in the Platform to the Owner Lending Agent within 30 days after disclosure of the information described above.

7. In addition to providing the Platform discussed above, EquiLend intends to sell and/or license data. In this regard, the applicant represents that such data: (A) Will be historical in nature and will relate to transactions proposed or occurring on the system; or (B) will be derived from current and historical data utilizing statistical or computational techniques. EquiLend also intends to sell or license certain analytical tools. Such analytical tools, the applicant states, will be objective statistical or computational tools that will permit users to use data provided to evaluate securities lending activities.

The applicant represents that EquiLend seeks to sell and/or license such data and tools to various types of entities, including employee benefit plans. In this regard, the applicant states that, if this proposed exemption is granted, to the extent EquiLend sells or licenses data and/or analytical tools to a plan with respect to which EquiLend is a party in interest, the terms of such sale or licensing will be at least as favorable to such plan as the terms associated with an arm's-length transaction involving unrelated parties. In addition, the applicant represents that if EquiLend sells or licenses a product to a plan with respect to which an Equity Owner acts as an Owner Lending Agent, such sale or licensing will be authorized in advance by a fiduciary who is independent of both EquiLend and the Owner Lending Agent upon such fiduciary's receipt from the Owner Lending Agent of all of the information that the Owner Lending Agent believes is necessary for the authorizing fiduciary to approve the purchase or license.

8. The applicant represents that the proposed exemption, if granted, will benefit plans. In this regard, the applicant states that the use of the Platform by lending fiduciaries will enable plans to, among other things, communicate with multiple borrowers, devise and implement more efficient lending strategies, and monitor ongoing securities loan activities. In turn, affected plans may benefit from more efficient pricing, reduced execution costs, streamlined front and back-office activities, less failed trades and more on-going information regarding lending activities. In addition, according to the applicant, if EquiLend sells or licenses data related to securities lending activities and provides related analytical tools to plans, plans will have access to information that will permit the enhanced evaluation of the performance of lending agents and the returns on lending portfolios.

9. In summary, the applicant represents that the requirements of section 408(a) of ERISA will be met with respect to the sale or licensing of certain data and/or analytical tools to employee benefit plans by EquiLend since: the terms of any such sale or licensing will be at least as favorable to a plan as the terms generally available in an arm's-length transaction involving an unrelated party; any data sold/licensed to a plan will be current and historical data related to transactions proposed or occurring on the Platform; and any tool sold/licensed will be objective and designed to permit the evaluation of securities lending transactions.

In addition, the applicant represents that the requirements of section 408(a) of ERISA will be met with respect to: (1) The participation in the Platform by an Equity Owner, in its capacity as an Owner Lending Agent; and (2) the sale or licensing of certain data and/or analytical tools by EquiLend to a plan for which an Equity Owner acts as a securities lending agent because, among other things:

(A) In the case of participation in the Platform on behalf of a plan, to the extent applicable the procedures regarding the securities lending activities conform to the provisions of PTE 81-6, PTE 82-63, and/or any applicable individual exemption;

(B) None of the fees imposed by EquiLend for securities lending transactions conducted through the use of the Platform at the direction of an Owner Lending Agent will be charged to a plan;

(C) Each securities lender and securities borrower participating in a securities lending transaction through EquiLend will be notified by EquiLend as to its responsibilities with respect to compliance, as applicable, with the Act, the Code, and FERSA;

(D) Each Equity Owner will provide prior written notice to its plan clients of its intention to participate in EquiLend;

(E) With certain exceptions described above, the arrangement pursuant to which the Equity Owner utilizes the services of EquiLend on behalf of a plan:

(1) Is subject to the prior written authorization of an authorizing fiduciary;

(2) May be terminated by the authorizing fiduciary, without penalty to the plan, within the lesser of: (i) The time negotiated for such notice of termination by the plan and the Equity Owner, or (ii) five business days;

(F) With certain exceptions described above, each purchase or license of a securities lending-related product from EquiLend is subject to the prior

authorization of an authorizing fiduciary;

(G) The Equity Owner will furnish each authorizing fiduciary with any reasonably available information which the Equity Owner reasonably believes to be necessary to determine whether such authorization should be made or renewed; and

(H) The Equity Owner, together with its affiliates, does not own at the time of the execution of a securities lending transaction on behalf of a plan by the Equity Owner through EquiLend or at the time of the purchase, or commencement of licensing, of data and/or analytical tools by the plan, more than 20% of EquiLend.

Notice to Interested Persons: The applicant represents that the potentially interested participants and beneficiaries cannot all be identified and therefore the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than 35 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Christopher Motta of the Department, telephone (202) 693-8544. (This is not a toll-free number.)

**Morgan Stanley Dean Witter & Co.,
Located in New York, New York**

[Exemption Application No.: D-11048]

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 as set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).¹¹

Section I—Transactions

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective November 13, 2001, to:

(a) The lending of securities by an employee benefit plan, including a commingled investment fund holding assets of such plan(the Plan(s)) with

respect to which Morgan Stanley Dean Witter & Co. (Morgan Stanley) or any of its affiliates is a party in interest, under certain exclusive borrowing arrangements with:

(1) Morgan Stanley;

(2) Morgan Stanley & Co. Incorporated (MS&Co); MS Securities Services Inc. (MSSSI); and any other affiliate of Morgan Stanley that, now or in the future, is a U.S. registered broker-dealer or a government securities broker or dealer (collectively, the MS US Broker-Dealers);

(3) Morgan Stanley & Co. International Limited (MSIL), which is subject to regulation by the Financial Services Authority (FSA) in the United Kingdom;¹²

(4) Morgan Stanley Japan Limited (MSJL), which is subject to regulation by the Ministry of Finance, Financial Services Agency, the Tokyo Stock Exchange, and the Osaka Stock Exchange in Japan; and

(5) Any broker-dealer that, now or in the future, is an affiliate of Morgan Stanley which is subject to regulation by the FSA in the United Kingdom or which is subject to regulation by the Ministry of Finance, the Financial Services Agency, the Tokyo Stock Exchange, and the Osaka Stock Exchange in Japan;¹³ and

(b) The receipt of compensation by Morgan Stanley or any of its affiliates in connection with securities lending transactions; provided that for the transactions, set forth in section I(a) and (b), above, the conditions set forth in section II, below, are satisfied.

Section II—Conditions

(a) For each Plan, neither the Borrower nor any affiliate has or exercises discretionary authority or control over such Plan's investment in the securities available for loan, nor do they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

(b) The party in interest dealing with the Plan is a party in interest with respect to such Plan (including a fiduciary) solely by reason of providing services to such Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H), or (I) of the Act.

(c) The Borrower directly negotiates an exclusive borrowing agreement (the

Borrowing Agreement) with the Plan fiduciary which is independent of the Borrower and its affiliates.

(d) The terms of each loan of securities by the Plan to the Borrower are at least as favorable to such Plan as those of a comparable arm's-length transaction between unrelated parties, taking into account the exclusive arrangement.

(e) In exchange for granting the Borrower an exclusive right to borrow certain securities, the Plan receives from such Borrower either (i) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement from time to time), (ii) a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii) (collectively, the Exclusive Fee). If the Borrower pledges cash collateral, all the earnings generated by such cash collateral shall be returned to such Borrower; provided that such Borrower may, but shall not be obligated to, agree with the independent fiduciary of the Plan that a percentage of the earnings on the collateral may be retained by such Plan, or the Plan may agree to pay the Borrower a rebate fee and retain the earnings on the collateral (the Shared Earnings Compensation). If the Borrower pledges non-cash collateral, all earnings on the non-cash collateral shall be returned to such Borrower; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a lending fee (the Lending Fee, and together with the Shared Earnings Compensation, is referred to as the Transaction Lending Fee). The Transaction Lending Fee, if any, shall be either in addition to the Exclusive Fee or an offset against the Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula and may be different for different securities or different groups of securities subject to the Borrowing Agreement. Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of such Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change,

¹¹ For the 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.

¹² As of December 1, 2001, the FSA replaced the United Kingdom Securities and Futures Authority.

¹³ Each affiliated foreign broker-dealer is referred to herein, individually, as a Foreign Borrower or collectively, as Foreign Borrowers. The Foreign Borrowers together with Morgan Stanley and the MS US Broker-Dealers are referred to, herein, collectively as Borrowers or Applicants, and individually, as the Borrower.

prior to the effective time of such change.

(f) The Borrower may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to the Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage or other percentage determined pursuant to an objective formula.

(g) By the close of business on or before the day on which the loaned securities are delivered to the Borrower, the Plan receives from such Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank, other than the Borrower or any affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption 81-6 (as amended or superseded)(PTE 81-6).¹⁴

Such collateral will be deposited and maintained in an account which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of the Plan by an affiliate of the Borrower that is the trustee or custodian of the Plan.

(h) The market value (or in the case of a letter of credit, the stated amount) of the collateral initially equals at least 102 percent (102%) of the market value of the loaned securities on the close of business on the day preceding the day of the loan and, if the market value of the collateral at any time falls below 100 percent (100%) (or such higher percentage as the Borrower and the independent fiduciary of the Plan may agree upon) of the market value of the loaned securities, the Borrower delivers additional collateral on the following day to bring the level of the collateral back to at least 102 percent (102%). The level of the collateral is monitored daily by the Plan or its designee, which may be Morgan Stanley or any of its affiliates

which provides custodial or trustee services in respect of the securities covered by the Borrowing Agreement for the Plan. The applicable Borrowing Agreement shall give the Plan a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral and a lien on the collateral.

(i) Before entering into a Borrowing Agreement, the Borrower furnishes to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether such Plan should enter into or renew the Borrowing Agreement.

(j) The Borrowing Agreement contains a representation by the Borrower that, as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

(k) The Plan receives the equivalent of all distributions made during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities, that such Plan would have received (net of tax withholdings)¹⁵ had it remained the record owner of the securities.

(l) The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty (except for, if the Plan has terminated its Borrowing Agreement, the return to the Borrower of a *pro-rata* portion of the Exclusive Fee paid by the Borrower to the Plan) whereupon the Borrower delivers securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five (5) business days of written notice of termination or the customary settlement period for such securities.

(m) In the event that the Borrower fails to return securities in accordance with the Borrowing Agreement, the Plan will have the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the

purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the U.S. with respect to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default, together with expenses incurred by the Plan plus applicable interest at a reasonable rate, including reasonable attorneys' fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly indemnify the Plan.

(n) Except as otherwise provided herein, all procedures regarding the securities lending activities, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as to applicable securities laws of the United States, the United Kingdom and/or Japan, as appropriate.

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

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

(2) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement is satisfied if such trust or other entity has

¹⁴ 46 FR 7527, Jan. 23 1981, as amended at 52 FR 18754, May 19, 1987). PTE 81-6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to a U.S. broker-dealer registered under the Securities Exchange Act of 1934 (the 1934 Act) (or exempted from registration under the 1934 Act as a dealer in exempt Government securities, as defined therein) or to a U.S. bank, that is a party in interest with respect to such plan.

¹⁵ The Department notes the Applicants' representation that dividends and other distributions on foreign securities payable to a lending Plan are subject to foreign tax withholdings and that the Borrower will always put the Plan back in at least as good a position as it would have been had it not loaned securities.

aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

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

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above are formed for the sole purpose of making loans of securities.)

(p) Prior to any Plan's approval of the lending of its securities to the Borrowers, a copy of the notice of proposed exemption, and a copy of the final exemption, if granted, is provided to the Plan, and the Borrower informs the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.¹⁶

(q) The independent fiduciary of the Plan receives monthly reports with respect to the securities lending transactions, including but not limited to the information set forth in this paragraph, so that an independent Plan fiduciary may monitor such transactions with the Borrowers. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the security is loaned, and the number of days the security has been on loan. At the request of the Plan, such a report will be provided on a daily or weekly basis, rather than a monthly basis. Also,

upon request of the Plan, the Borrower will provide the Plan with daily confirmations of securities lending transactions.

(r) In addition to the above conditions, all loans involving Foreign Borrowers must satisfy the following supplemental requirements:

(1) Such Foreign Borrower is a registered broker-dealer subject to regulation by the FSA in the United Kingdom or is subject to regulation in Japan by the Ministry of Finance, the Financial Services Agency, the Tokyo Stock Exchange, and the Osaka Stock Exchange;

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

(3) All collateral is maintained in United States dollars or in U.S. dollar-denominated securities or letters of credit or such other collateral as may be permitted under PTE 81-6 (as amended or superseded) from time to time;

(4) All collateral is held in the United States and the situs of the Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 C.F.R. 2550.404(b)-1; and

(5) Prior to entering into a transaction involving a Foreign Borrower, the Foreign Borrower must:

(i) Agree to submit to the jurisdiction of the United States;

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

(iii) Consent to the service of process on the Process Agent; and

(iv) Agree that enforcement by a Plan of the indemnity provided by the Foreign Borrower will occur in the United States courts.

(s) The Borrower maintains, or causes to be maintained, within the United States for a period of six (6) years from the date of each transaction, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described in paragraph (t)(1) to determine whether the conditions of the exemption have been met, except that—

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

(2) No party in interest other than the Borrower shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required below by paragraph (t)(1).

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

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

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

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

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

(2) None of the persons described above in subparagraphs (t)(1)(ii)–(t)(1)(iv) are authorized to examine the trade secrets of Morgan Stanley or its affiliates or commercial or financial information which is privileged or confidential.

Section III—Definitions

(a) An “affiliate” of a person means:

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

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

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

(b) The terms, “Foreign Borrower” or “Foreign Borrowers,” includes MSIL and any broker-dealer that, now or in the future, is an affiliate of Morgan Stanley which is subject to regulation by the FSA in the United Kingdom, and MSJL, and any broker-dealer that, now or in the future, is an affiliate of Morgan

¹⁶ The Department notes the Applicants' representation that, under the proposed exclusive borrowing arrangements, neither the Borrower nor any of its affiliates will perform the essential functions of a securities lending agent, *i.e.*, the Applicants will not be the fiduciary who negotiates the terms of the Borrowing Agreement on behalf of the Plan, the fiduciary who identifies the appropriate borrowers of the securities or the fiduciary who decides to lend securities pursuant to an exclusive arrangement. However, the Applicants or their affiliates may monitor the level of collateral and the value of the loaned securities.

Stanley which is subject to regulation by the Ministry of Finance, Financial Services Agency, the Tokyo Stock Exchange, and the Osaka Stock Exchange in Japan.

(c) The term, "Borrower," includes Morgan Stanley, MS&Co, MSSSI, the Foreign Borrowers, and any other affiliate of Morgan Stanley that, now or in the future, is a U.S. registered broker-dealer or a government securities broker or dealer.

Effective Date: This proposed exemption, if granted, will be effective as of November 11, 2001, the date the application was received by the Department.

Summary of Facts and Representations

1. Morgan Stanley, a publicly traded Delaware corporation and a registered investment adviser, is a full-line investment services firm. As of November 30, 2000, Morgan Stanley had approximately \$426.8 billion in total assets and \$19.3 billion in stockholders' equity.

Morgan Stanley has several affiliates which are broker-dealers. MS&Co, a subsidiary of Morgan Stanley, is a financial services firm which is a member of the New York Stock Exchange and other principal securities exchanges in the United States and is a member of the National Association of Securities Dealers (NASD). MS&Co is incorporated under the laws of the State of Delaware and is registered with and regulated by the SEC as a U.S. broker-dealer under section 15 of the 1934 Act. As of May 31, 2001, MS&Co had approximately \$299 billion in assets.

MSSSI, a subsidiary of MS&Co, is a financial services company which is incorporated under the laws of the state of Delaware and is registered with and regulated by the SEC as a broker-dealer under the 1934 Act, as amended, and is also a member of the NASD. As of November 20, 2000, MSSSI had approximately \$47 billion in assets.

The Foreign Borrowers and their respective regulating entities, are as follows: (a) MSIL, located in London and subject to regulation by the FSA in the United Kingdom, and (b) MSJL, located in Tokyo, and subject to regulation by the Ministry of Finance, Financial Services Agency, the Tokyo Stock Exchange, and the Osaka Stock Exchange in Japan. As of November 30, 2000, MSIL had approximately \$194 million in assets. As of March 31, 2001, MSJL Tokyo Branch had approximately ¥5,560 billion in assets.

2. The Borrowers, acting as principal, actively engage in the borrowing and lending of securities. The Borrowers utilize borrowed securities either to

satisfy their own trading requirements or to re-lend to other broker-dealers and entities which need a particular security for a certain period of time. The Applicants represent that in the United States, as described in the Federal Reserve Board's Regulation T, borrowed securities are often used in short sales, for non-purpose loans to exempted borrowers, or in the event of a failure to receive securities that a broker-dealer is required to deliver.

The Applicants wish to enter into exclusive borrowing arrangements with Plans for which Morgan Stanley or any affiliate of Morgan Stanley may be an investment manager for the assets of such Plans that are unrelated to the assets involved in the transaction. Morgan Stanley or any of its affiliates may provide securities custodial services, trustee services, clearing and/or reporting functions in connection with securities lending transactions, or other services to such Plans.

3. The Applicants represent that although MSIL or any other foreign broker-dealer of Morgan Stanley in the United Kingdom will not be registered with the SEC, their activities are governed by the rules, regulations, and membership requirements of the FSA. In this regard, the Applicants state that these broker-dealers are subject to the FSA rules relating to, among other things, minimum capitalization, reporting requirements, periodic examinations, client money and safe custody rules, and books and records requirements with respect to client accounts. The Applicants represent that the rules and regulations set forth by the FSA and the SEC share a common objective—the protection of the investor by the regulation of the securities industry. The Applicants represent that the FSA rules require each firm which employs registered representatives or registered traders to have positive tangible net worth and to be able to meet its obligations as they may fall due, and that the FSA rules set forth comprehensive financial resource and reporting/disclosure rules regarding capital adequacy. In addition, to demonstrate capital adequacy, the Applicants state that the FSA rules impose reporting/disclosure requirements on broker-dealers with respect to risk management, internal controls, and transaction reporting and record-keeping requirements. In this regard, required records must be produced at the request of the FSA at any time. The Applicants further state that the rules and regulations of the FSA for broker-dealers are backed up by potential fines and penalties as well as a comprehensive disciplinary system.

4. Japan has comprehensive financial resource and reporting/disclosure rules concerning broker-dealers. Broker-dealers are required to demonstrate their capital adequacy. The reporting/disclosure rules impose requirements on broker-dealers with respect to risk management, internal controls, and records relating to counter-parties. All such records must be produced at the request of the agency at any time. The agencies' registration requirements for broker-dealers are enforced by fines and penalties and thus constitute a comprehensive disciplinary system.

5. The Applicants represent that in addition to the protections afforded by the FSA, the Ministry of Finance, Financial Services Agency, the Tokyo Stock Exchange, or the Osaka Stock Exchange, compliance by the Applicants with the requirements of Rule 15a-6 of the 1934 Act (and the amendments and interpretations thereof) will offer further protections to the Plans.¹⁷ Rule 15a-6 provides an exemption from U.S. registration requirements for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a "U.S. institutional investor" or a "major U.S. institutional investor," provided that the foreign broker-dealer, among other things, enters into these transactions through a U.S. registered broker-dealer intermediary. The term "U.S. institutional investor," as defined in Rule 15a-6(b)(7), includes an employee benefit plan within the meaning of the Act if: (a) The investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company, or registered

¹⁷ According to the Applicants, section 3(a)(4) of the 1934 Act defines "broker," to mean "any person engaged in the business of effecting transactions in securities for the account of others, but it does not include a bank." Section 3(a)(5) of the 1934 Act provides a similar exclusion for "banks" in the definition of the term, "dealer." However, section 3(a)(6) of the 1934 Act defines "bank" to mean a banking institution organized under the laws of the United States or a State of the United States. Further, Rule 15a-6(b)(3) provides that the term, "foreign broker-dealer," means "any non-U.S. resident person * * * whose securities activities, if conducted in the United States, would be described by the definition of 'broker' or 'dealer' in sections 3(a)(4) or 3(a)(5) of the [1934] Act." Therefore, the test of whether an entity is a "foreign broker" or "dealer" is based on the nature of such foreign entity's activities and, with certain exceptions, only banks that are regulated by either the United States or a State of the United States are excluded from the definition of the term, "broker" or "dealer." Thus, for purposes of this exemption request, the Applicants are willing to represent that they will comply with the applicable provisions and relevant SEC interpretations and amendments of Rule 15a-6.

investment advisor, or (b) the employee benefit plan has total assets in excess of \$5 million, or (c) the employee benefit plan is a self-directed plan with investment decisions made solely by persons that are "accredited investors," as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended. The term, "major U.S. institutional investor," is defined as a person that is a U.S. institutional investor that has, or has under management, total assets in excess of \$100 million or an investment adviser registered under section 203 of the Investment Advisers Act of 1940 that has total assets under management in excess of \$100 million.¹⁸ The Applicants represent that the intermediation of the U.S. registered broker-dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

The Applicants represent that under Rule 15a-6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major U.S. institutional investor in accordance with Rule 15a-6¹⁹ must, among other things:

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

(b) Provide the SEC with any information or documents within its possession, custody or control, any testimony of any such foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to the transactions effected pursuant to the Rule;

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

(1) Effect the transactions, other than negotiating the terms;

(2) Issue all required confirmations and statements;

(3) As between the foreign broker-dealer and the U.S. registered broker-

dealer, extend or arrange for the extension of credit in connection with the transactions;

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

(5) Receive, deliver, and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or major U.S. institutional investor in compliance with Rule 15c3-3 of the 1934 Act (Customer Protection—Reserves and Custody of Securities);²⁰ and

(6) Participate in certain oral communications (e.g., telephone calls) between the foreign associated person and the U.S. institutional investor (not the major U.S. institutional investor), and accompany the foreign associated person on certain visits with both U.S. institutional and major U.S. institutional investors. The Applicants represent that, under certain circumstances, the foreign associated person may have direct communications and contact with the U.S. Institutional Investor.²¹ (See April 9, 1997, No-Action Letter.)

6. An institutional investor, such as a pension fund, lends securities in its portfolio to a broker-dealer or bank in order to earn a fee while continuing to enjoy the benefits of owning the securities (e.g., from the receipt of any interest, dividends, or other distributions due on those securities and from any appreciation in the value of the securities). The lender requires that the securities loan be fully collateralized, and the collateral usually is in the form of cash or high quality liquid securities, such as U.S. Government or Federal Agency obligations or irrevocable bank letters of credit. If the borrower deposits cash collateral, the lender invests the collateral, and the borrowing agreement may provide that the lender pay the

borrower a previously-agreed upon amount or a rebate fee and keep the earnings on the collateral. If the borrower deposits government securities, the borrower is entitled to the earnings on its deposited securities and may pay the lender a lending fee. If the borrower deposits irrevocable bank letters of credit as collateral, the borrower pays the lender a fee as compensation for the loan of its securities. These fees, referred to above, as the Transaction Lending Fee, may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement.

7. The Borrowers request an exemption for the lending of securities, under certain exclusive borrowing arrangements, by Plans with respect to which Morgan Stanley or any of its affiliates is a party in interest (including a fiduciary) solely by reason of providing services to such Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H) or (I) of the Act. For each Plan, neither the Borrowers nor any of its affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan, nor will they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets. The Applicants represent that because the Borrowers, by exercising their contractual rights under the proposed exclusive borrowing arrangements, will have discretion with respect to whether there is a loan of particular Plan securities to the Borrowers, the lending of securities to the Borrowers may be outside the scope of relief provided by PTE 81-6.²²

8. For each Plan, the Borrowers will directly negotiate a Borrowing Agreement with a Plan fiduciary which is independent of the Borrowers. Under the Borrowing Agreement, the Borrowers will have exclusive access for a specified period of time to borrow certain securities of the Plan pursuant to certain conditions. The form of the Borrowing Agreement to be used in foreign jurisdictions will reflect appropriate local industry or market standards.²³ The Borrowing Agreement

¹⁸ Note that the categories of entities that qualify as "major U.S. institutional investors" has been expanded by a Securities and Exchange Commission No-action letter. See SEC No-Action Letter issued to Cleary, Gottlieb, Steen & Hamilton on April 9, 1997, (April 9, 1997 No-Action Letter).

¹⁹ If it is determined that applicable regulation under the 1934 Act does not require Morgan Stanley or the Borrower to comply with Rule 15a-6, both entities will nevertheless comply with subparagraphs (a) and (b) of Representation 5.

²⁰ Under certain circumstances described in the April 9, 1997, No-Action Letter (e.g., clearance and settlement transactions), there may be direct transfers of funds and securities between a Plan and Morgan Stanley or between a Plan and the Foreign Borrower. The Applicants note that in such situations, the U.S. registered broker-dealer will not be acting as principal with respect to any duties it is required to undertake pursuant to Rule 15a-6.

²¹ The term "foreign associated person" as defined in Rule 15a-6(b)(2) means any natural person domiciled outside the United States who is an associated person, as defined in section 3(a)(18) of the 1934 Act, of the foreign broker-dealer, and who participates in the solicitation of a U.S. institutional investor or a major U.S. institutional investor under Rule 15a-6(a)(3).

²² PTE 81-6 requires in part that neither the borrower nor an affiliate of the borrower may have discretionary authority or control over the investment of the plan assets involved in the transaction.

²³ For example, the form of the Borrowing Agreement to be used in the United Kingdom differs from the standard U.S. Borrowing Agreement. Under the form Borrowing Agreement

will specify all material terms of the agreement, including the basis for compensation to the Plan under each category of securities available for loan. The Borrowing Agreement will also contain a requirement that the Borrowers pay all transfer fees and transfer taxes relating to the securities loans. The terms of each loan of securities by a Plan to a Borrower will be at least as favorable to such Plan as those of a comparable arm's-length transaction between unrelated parties, taking into account the exclusive arrangement.

9. The Borrowers may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to the Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage or other percentage determined pursuant to an objective formula.

10. In exchange for granting the Borrower the exclusive right to borrow certain securities, the Plan receives an Exclusive Fee from the Borrower. If the Borrower deposits cash collateral, all the earnings generated by such cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the Plan to Shared Earnings Compensation. If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a Lending Fee. The Lending Fee, together with the Shared Earnings Compensation, is called the Transaction Lending Fee.

The Transaction Lending Fee, if any, may be in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. For example, in addition to the Borrower paying different fees for different portfolios of securities (*i.e.*, the fee for a domestic securities portfolio may be different than the fee for a foreign securities portfolio), the Borrower may also pay different fees for securities of issuers in different foreign countries (*i.e.*, there may be a different fee for German securities than for French securities). In addition, with respect to, for example, the French

securities, there may be different fees for liquid securities than for illiquid securities.

Any change in, or a change in the method of determining, the Exclusive Fee or the Transaction Lending Fee that the Applicants pay to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

The Plan is entitled to the equivalent of all distributions made to holders of the borrowed securities during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities that the Plan would have received (net of tax withholdings in the case of foreign securities), had it remained the record owner of the securities.

11. By the close of business on or before the day on which the loaned securities are delivered to the Borrower, the Plan will receive from the Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by U.S. banks, or other collateral permitted under PTE 81-6 (as amended or superseded). Such collateral will be deposited and maintained in an account on behalf of the Plan which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of the Plan by an affiliate of the Borrower that is the trustee or custodian of the Plan.

The market value (or in the case of a letter of credit, a stated amount) of the collateral on the close of business on the day preceding the day of the loan will be at least 102 percent of the market value of the loaned securities. The Plan, its independent fiduciary or its designee, which may be Morgan Stanley or any of its affiliates which provides custodial or trustee services in respect of the securities covered by the

Borrowing Agreement for the Plan, will monitor the level of the collateral daily and, if the market value of the collateral on the close of a business day falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of the Plan may agree upon) of the market value of the loaned securities at the close of business on such day, the Borrower will deliver additional collateral by the close of business on the following day to bring the level of the collateral back to at least 102 percent. The applicable Borrowing Agreement will give the Plan a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral and a lien on the collateral.

If the Borrower pledges cash collateral, the Plan invests the collateral, and all earnings on such cash collateral shall be returned to the Borrower; provided that the Borrowing Agreement may provide that the Plan receive Shared Earnings Compensation, which, as discussed above, may be a percentage of the earnings on the collateral which may be retained by the Plan or the Plan may agree to pay the Borrower a rebate fee and retain the earnings on the collateral. The terms of the rebate fee for each loan will be at least as favorable to the Plan as those of comparable arm's length transactions between unrelated parties taking into account the exclusive arrangement, and will be based upon an objective methodology which takes into account several factors, including potential demand for the loaned securities, the applicable benchmark cost of fund indices (typically, the U.S. Federal Funds rate established by the U.S. Federal Reserve System (the Federal Funds), the overnight REPO²⁴ rate, or the like) and the anticipated investment return on overnight investments permitted by the independent fiduciary of the Plan.

If the Borrower pledges non-cash collateral, such as government securities or irrevocable bank letters of credit, the Borrower shall be entitled to the earnings on its non-cash collateral; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a Lending Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and

²⁴ An overnight REPO is an overnight repurchase agreement that is an arrangement whereby securities dealers and banks finance their inventories of Treasury bills, notes and bonds. The dealer or bank sells securities to an investor with a temporary surplus of cash, agreeing to buy them back the next day. Such transactions are settled in immediately available Federal Funds, usually at a rate below the Federal Funds rate (the rate charged by banks lending funds to each other).

to be used in the United Kingdom, the Plan receives title to (rather than a pledge of or a security interest in) the collateral.

may be different for different securities or different groups of securities subject to the Borrowing Agreement.

The Borrower will provide a monthly report to the independent fiduciary of the Plan which includes the following information. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the security is loaned, and the number of days the security has been on loan. At the request of the Plan, such a report will be provided on a daily or weekly basis, rather than a monthly basis. Also, upon request of the Plan, the Borrower will provide the Plan with daily confirmations of securities lending transactions.

12. Before entering into a Borrowing Agreement, the Borrower will furnish to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement. Further, the Borrowing Agreement will contain a representation by the Borrower that as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished financial statements.

13. Prior to any Plan's approval of the lending of its securities to the Borrowers, a copy of the notice of proposed exemption and a copy of the final exemption, if granted, will be provided to the Plan, and the Borrower will inform the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.

14. With regard to those Plans for which Morgan Stanley or any of its affiliates provides custodial, trustee, clearing and/or reporting functions relative to securities loans, Morgan Stanley and a Plan fiduciary independent of Morgan Stanley and its affiliates will agree in advance and in writing to any fees that Morgan Stanley or any of its affiliates is to receive for such services. Such fees, if any, would be fixed fees (e.g., Morgan Stanley or any of its affiliates might negotiate to receive a fixed percentage of the value of the assets with respect to which it performs these services or to receive a stated dollar amount) and any such fee would be in addition to any fee Morgan

Stanley or any of its affiliates has negotiated to receive from any such Plan for standard custodial or other services unrelated to the securities lending activity. The arrangement for Morgan Stanley or any of its affiliates to provide such functions relative to securities loans to the Borrowers will be terminable by the Plan within five (5) business days of the receipt of written notice without penalty to the Plan, except for the return to the Borrowers of a *pro-rata* portion of the Exclusive Fee paid by the Borrowers to the Plan, if the Plan has also terminated its exclusive borrowing arrangement with the Borrowers.

15. The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty. Upon termination of any securities loan, the Borrower will deliver securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five (5) business days of written notice of termination or the customary settlement period for such securities.

16. In the event that the Borrower fails to return securities in accordance with the Borrowing Agreement, the Plan will have the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the U.S. with respect to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default, together with expenses incurred by the Plan plus applicable interest at a reasonable rate, including reasonable attorneys' fees incurred by the Plan for legal action arising out of default on the loans or failure by the Borrower to properly indemnify the Plan.

17. Except as provided herein, all the procedures under the Borrowing Agreement will, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as to applicable securities laws of the United States, the United Kingdom and/or Japan, as appropriate. In addition, in order to ensure that the independent fiduciary representing a Plan has the experience, sophistication, and resources necessary to adequately review the Borrowing Agreement and the fee arrangements thereunder, only Plans with total assets having an

aggregate market value of at least \$50 million are permitted to lend securities to the Borrowers; provided, however, that—

(a) In the case of the Related Plans, whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

(b) In the case of the Unrelated Plans, whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

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

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above are formed for the sole purpose of making loans of securities.)

18. It is represented that the lending of securities is an attractive investment opportunity because it enables the owner of the securities to earn additional income from the securities while continuing to receive the dividends, interest payments, and other

distributions made with respect to the loaned securities. The Applicants represent that the opportunity for the Plans to enter into exclusive borrowing arrangements with the Borrowers under the flexible fee structures described herein is in the interests of the Plans because the Plans will then be able to choose among an expanded number of competing exclusive borrowers, as well as maximizing the volume of securities lent and the return on such securities.

19. The proposed transaction contain safeguards sufficient to protect the Plans and the participants and beneficiaries of such Plans. In this regard, in addition to the above conditions, all loans involving Foreign Borrowers must satisfy the following supplemental requirements:

(i) Such Foreign Borrower is a registered broker-dealer subject to regulation by the FSA or the Ministry of Finance, Financial Services Agency, the Tokyo Stock Exchange, or the Osaka Stock Exchange;

(ii) Such Foreign Borrower is in compliance with all applicable provisions of Rule 15a-6 (17 CFR 240.15a-6) under the 1934 Act which provides foreign broker-dealers a limited exception from United States registration requirements;

(iii) All collateral is maintained in United States dollars or in U.S. dollar-denominated securities or letters of credit or such other collateral as may be permitted under PTE 81-6 from time to time;

(iv) All collateral is held in the United States and the situs of the Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1; and

(v) Prior to entering into a transaction involving a Foreign Borrower, the Foreign Borrower must:

(1) Agree to submit to the jurisdiction of the United States;

(2) Agree to appoint a Process Agent for service of process in the United States, which may be an affiliate;

(3) Consent to the service of process on the Process Agent; and

(4) Agree that enforcement by a Plan of the indemnity provided by the Foreign Borrower will occur in the United States courts.

20. In addition to the protections cited above, the Borrower will maintain, or cause to be maintained, within the United States for a period of six years from the date of a transaction, such records as are necessary to enable the Department and other persons (as specified herein in section II(t)(1)) to

determine whether the conditions of the exemption have been met.

21. The requested exemption is administratively feasible because the conditions to which the Applicants have consented to be subject are comparable to those described in PTE 81-6. The proposed exemption requires the review and approval of the borrowing arrangement by a fiduciary of the Plan that is independent of Morgan Stanley and its affiliates and does not require any further action by the Department.

22. In summary, the Applicants represent that the described transactions satisfy the statutory criteria of section 408(a) of the Act because:

(a) The Borrower will directly negotiate a Borrowing Agreement with an independent fiduciary of each Plan;

(b) The Plans will be permitted to lend to the Borrower, a major securities borrower who will be added to an expanded list of competing exclusive borrowers, enabling the Plans to earn additional income from the loaned securities on a secured basis, while continuing to enjoy the benefits of owning the securities;

(c) In exchange for granting the Borrower the exclusive right to borrow certain securities, the Borrower will pay the Plan the Exclusive Fee, which as discussed above may be either (i) a flat fee (which may be a percentage of the value of the total securities subject to the Borrowing Agreement), (ii) a percentage of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii);

(d) Any change in the Exclusive Fee or Shared Earnings Compensation that the Borrower pays to the Plan with respect to any securities loan will require the prior written consent of the independent fiduciary, except that consent will be presumed where the Exclusive Fee or Shared Earnings Compensation changes pursuant to an objective formula specified in the Borrowing Agreement and the independent fiduciary is notified at least 24 hours in advance of such change and does not object in writing thereto, prior to the effective time of such change;

(e) The Borrower will provide sufficient information concerning its financial condition to a Plan before a Plan lends any securities to the Borrower;

(f) The collateral posted with respect to each loan of securities to the Borrower initially will be at least 102 percent of the market value of the loaned securities and will be monitored daily by the independent fiduciary;

(g) The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty, except for the return to the Borrower of a *pro-rata* portion of the Exclusive Fee paid by the Borrower to the Plan, and whereupon the Borrower will return any borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five (5) business days of written notice of termination or the customary settlement period for such securities;

(h) Neither the Borrower nor any of its affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan;

(i) The minimum Plan size requirement (as specified in section II(o)) will ensure that the Plans will have the resources necessary to adequately review and negotiate all aspects of the exclusive borrowing arrangements; and

(j) All the procedures will, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as applicable securities laws of the United States, the United Kingdom and/or Japan, as appropriate.

Notice to Interested Persons

Included among those persons who may be interested in the pendency of the proposed exemption are: (1) The independent fiduciaries of the Plans that the Applicants can identify as being currently interested in lending securities to the Borrowers under circumstances described in the proposed exemption; and (2) Plans which may be potentially interested in the proposed transactions but cannot be identified at the time the Notice is published in the **Federal Register**. These two classes of interested persons will be notified as follows.

With respect to Plans that the Applicants can identify as being currently interested in lending securities to the Borrowers, the Applicants represent that they 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 independent fiduciary of such Plan either by hand delivery or first class mailing, within fifteen (15) days following the publication of the Notice in the **Federal Register**. In addition, the Applicants represent that they will provide the independent fiduciary of such Plans a copy of the final exemption, if granted, within fifteen (15) days following the

publication of such final exemption in the **Federal Register**.

With respect to the Plans which may be potentially interested in the proposed transactions but cannot be identified at the time the Notice is published in the **Federal Register**, the only practical means of notifying the fiduciaries of such Plans of the pendency of the Notice is by publication of the Notice in the **Federal Register**.

The Applicants also represent that a copy of the Notice and a copy of the final exemption, if granted, will be provided by hand delivery or first class mailing to the independent fiduciary of a Plan prior to entering into any exclusive borrowing arrangement with such Plan involving securities lending covered by this exemption.

Written comments and/or requests for a hearing on the proposed exemption must be received by the Department on or before 45 days from the date following publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Angelena C. Le Blanc of the Department, telephone (202) 693-8540. (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 25th day of March, 2002.

Ivan Strasfeld,

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

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**MORRIS K. UDALL SCHOLARSHIP
AND EXCELLENCE IN NATIONAL
ENVIRONMENTAL POLICY
FOUNDATION**

**The United States Institute for
Environmental Conflict Resolution;
Agency Information Collection
Activities: Submission for OMB
Review; Comment Request; Program
Evaluation Instruments for Five of the
Institute's Program Areas**

AGENCY: Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, U.S. Institute for Environmental Conflict Resolution.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act and supporting regulations, this document announces that the U.S. Institute for Environmental Conflict Resolution (the Institute), part of the Morris K. Udall Foundation, has forwarded to the Office of Management and Budget (OMB) the following five Information Collection Requests (ICRs): (1) Program Evaluation Instruments—Environmental Conflict Resolution Services, (2) Program Evaluation Instruments—Conflict Assessment Services, (3) Program Evaluation Instruments—National Roster of Environmental Dispute Resolution and Consensus Building Professionals, (4) Program Evaluation Instruments—Environmental Conflict Resolution Training, (5) Program Evaluation Instruments—Meeting Facilitation. Each ICR describes the

authority and need for program evaluation, the nature and use of the information to be collected, the expected burden and cost to respondents and the Institute, and how the evaluation results will be made available. The ICRs also contain the specific questionnaires that will be used to collect the information for each program area. Approval is being sought for each ICR separately, and information collection will begin for each program area once the respective ICR has been approved by OMB. The Institute published a **Federal Register** notice on December 26, 2001, at 66 FR 66455, to solicit public comments for a 60-day period. The Institute received three comments. The comments and the Institute's responses are included in the ICRs. The purpose of this notice is to allow an additional 30 days for public comments regarding these ICRs.

DATES: Comments must be submitted on or before April 29, 2002.

ADDRESSES: Direct comments to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Amy Farrell, Desk Officer for The Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, U.S. Institute for Environmental Conflict Resolution.

Amy L. Farrell@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT:

Technical details of the Institute's evolving program evaluation system are contained in a December 2001 draft report entitled *Applying Program Evaluation Methods at the U.S. Institute for Environmental Conflict Resolution*. Paper copies of this report can be obtained by contacting the Institute; an electronic copy can be downloaded from the Institute's Web site: www.ecr.gov/techdoc.htm. For further information or a copy of the ICR, contact: Dale Keyes, Senior Program Manager, U.S. Institute for Environmental Conflict Resolution, 110 South Church Avenue, Suite 3350, Tucson, Arizona 85701. Fax: 520-670-5530. Phone: 520-670-5653. E-mail: keyes@ecr.gov.

SUPPLEMENTARY INFORMATION:

A. Title for the Collection of Information

Program Evaluation Instruments for Five of the U.S. Institute for Environmental Conflict Resolution's Program Areas

B. Potentially Affected Persons

You are potentially affected by this action if you are or could be a dispute resolution professional (in particular, if