

Retirement Accounts described in section 408(p) of the Code. The Department notes that all conditions contained in PTE 93-33 still must be met pursuant to the amendment.

### General Information

The attention of interested persons is directed to the following:

(1) In accordance with section 408(a) of ERISA and section 4975(c)(2) of the Code, and based upon the entire record, the Department finds that the amendment is administratively feasible, in the interests of the IRAs and Keogh Plans and their participants and beneficiaries and protective of the rights of the participants and beneficiaries of such plans.

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

(3) The exemption is applicable to a transaction only if the conditions specified in the class exemption are met.

### Exemption

Accordingly, PTE 93-33 is amended under the authority of section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990).

### Section I: Covered Transactions

Effective January 1, 1998, the restrictions of sections 406(a)(1)(D) and 406(b) of ERISA and the sanctions resulting from the application of section 4975 of the Code, including the loss of exemption of an individual retirement account (IRA) pursuant to section 408(e)(2)(A) of the Code, by reason of section 4975(c)(1)(D), (E) and (F) of the Code, shall not apply to the receipt of services at reduced or no cost by an individual for whose benefit an IRA, or, if self-employed, a Keogh Plan, is established or maintained, or by members of his or her family, from a bank pursuant to an arrangement in which the account balance in the IRA or Keogh Plan is taken into account for purposes of determining eligibility to receive such services, provided that each condition of Section II of this exemption is satisfied.

### Section II: Conditions

(a) The IRA or Keogh Plan, the balance of which is taken into account for purposes of determining eligibility to receive services at reduced or no cost, is established and maintained for the exclusive benefit of the participant covered under the IRA or Keogh Plan, his or her spouse or their beneficiaries.

(b) The services must be of the type that the bank itself could offer consistent with applicable federal and state banking law.

(c) The services are provided by the bank (or an affiliate of the bank) in the ordinary course of the bank's business to customers who qualify for reduced or no cost banking services but do not maintain IRAs or Keogh Plans with the bank.

(d) For the purpose of determining eligibility to receive services at reduced or no cost, the account balance required by the bank for the IRA or Keogh Plan is equal to the lowest balance required for any other type of account which the bank includes to determine eligibility to receive reduced or no cost services.

(e) The rate of return on the IRA or Keogh Plan investment is no less favorable than the rate of return on an identical investment that could have been made at the same time at the same branch of the bank by a customer of the bank who is not eligible for (or who does not receive) reduced or no cost services.

### Section III: Definitions

The following definitions apply to this exemption:

(a) The term bank means a bank described in section 408(n) of the Code.

(b) The term IRA means an individual retirement account described in Code section 408(a) or an education individual retirement account described in section 530 of the Code. For purposes of this exemption, the term IRA shall not include an IRA which is an employee benefit plan covered by Title I of ERISA, except for a Simplified Employee Pension (SEP) described in section 408(k) of the Code or a Simple Retirement Account described in section 408(p) of the Code which provides participants with the unrestricted authority to transfer their balances to IRAs or Simple Retirement Accounts sponsored by different financial institutions.

(c) The term Keogh Plan means a pension, profit sharing, or stock bonus plan qualified under Code section 401(a) and exempt from taxation under Code section 501(a) under which some or all of the participants are employees described in section 401(c) of the Code.

For purposes of this exemption, the term Keogh Plan shall not include a Keogh Plan which is an employee benefit plan covered by title I of ERISA.

(d) The term account balance means deposits as that term is defined under 29 CFR 2550.408b-4(c)(3), or investments in securities for which market quotations are readily available. For purposes of this exemption, the term account balance shall not include investments in securities offered by the bank (or its affiliate) exclusively to IRAs and Keogh Plans.

(e) An affiliate of a bank includes any person directly or indirectly controlling, controlled by, or under common control with a bank. 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 members of his or her family refers to beneficiaries of the individual for whose benefit the IRA or Keogh Plan is established or maintained, who would be members of the family as that term is defined in Code section 4975(e)(6), or a brother, a sister, or spouse of a brother or a sister.

(g) The term service includes incidental products of a de minimis value provided by third persons pursuant to an arrangement with the bank, which are directly related to the provision of banking services covered by the exemption.

Signed at Washington, DC this 26th day of February 1999.

**Alan D. Lebowitz,**

*Deputy Assistant Secretary for Program Operations, Pension and Welfare Benefits Administration, U.S. Department of Labor.*

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 99-10; Exemption Application No. D-10630, et al.]

**Grant of Individual Exemptions; Genito-Urinary Surgeons, Inc. Profit Sharing Plan (GUS Plan) Michael J. Rosenberg Money Purchase Pension Plan (Rosenberg Plan); Robert Savage Qualified Retirement Plan (Savage Plan), et al.**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) 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).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

#### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

- (a) The exemptions are administratively feasible;
- (b) They are in the interests of the plans and their participants and beneficiaries; and
- (c) They are protective of the rights of the participants and beneficiaries of the plans.

**Genito-Urinary Surgeons, Inc. Profit Sharing Plan (GUS Plan); Michael J. Rosenberg Money Purchase Pension Plan (Rosenberg Plan); Robert Savage Qualified Retirement Plan (Savage Plan); Located in Toledo, Ohio**

[Prohibited Transaction Exemption Number 99-10; Application Numbers D-10630, D-10631 and D-10632, respectively]

#### Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, do not apply to: (1) the cash sale of certain shares of preferred stock (the Preferred Stock) issued by TTC Holdings Inc. (TTC) to TTC, by the individually-directed account of Dr. Gregor Emmert in the GUS Plan, by the individually-directed account of Mr. Michael J. Rosenberg in the Rosenberg Plan, and by the individually-directed account of Mr. Robert Savage in the Savage Plan (collectively, the Accounts); and (2) the subsequent purchase of certain shares of common stock (the Common Stock) issued by TTC by Messrs. Emmert, Rosenberg and Savage (collectively; the Participants), in their own name, from TTC pursuant to an agreement with TTC that the purchase of the Common Stock was to occur immediately after the sale of the Preferred Stock by the Plans; provided that the following conditions were met:

- (a) The sale of the Preferred Stock to TTC by the Accounts and the purchase of the Common Stock from TTC by the Participants, acting in their individual capacity, were one-time transactions for cash;
- (b) The transactions described in (a) above took place on the same business day;
- (c) The amount paid to the Accounts by TTC was the fair market value of the Preferred Stock, as determined by a qualified independent appraiser at the time of the sale;
- (d) The Participants, in their individual capacity, purchased from TTC shares of the Common Stock which were equal in number and value to the shares of Preferred Stock sold by the Accounts to TTC;
- (e) A qualified independent fiduciary (the Independent Fiduciary) determined that the transactions described herein were in the best interests and protective of the Accounts at the time of the transactions; and
- (f) The Independent Fiduciary supervised the transactions; assured that the conditions of this proposed exemption were met; and took whatever actions necessary to protect the interests

of the Accounts, including reviewing amounts paid by TTC for the Preferred Stock.

**EFFECTIVE DATE:** The effective date of this exemption is December 1, 1998.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on January 21, 1999, at 64 FR 3342.

**FOR FURTHER INFORMATION CONTACT:** James Scott Frazier of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

**Mellon Financial Markets, Inc. (Mellon); Located in Pittsburgh, Pennsylvania**

[Prohibited Transaction Exemption 99-11; Exemption Application No. D-10695]

#### Exemption

##### I. Transactions

A. The restrictions of sections 406(a) and 407(a) 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 the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.A.(1) or (2).

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.<sup>1</sup>

B. The restrictions of sections 406(b)(1) and 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section

<sup>1</sup> Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3-21(c).

4975(c)(1)(E) of the Code, shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) the plan is not an Excluded Plan;  
 (ii) solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) a plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.<sup>2</sup> For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that the conditions set forth in paragraphs B.(1)(i), (iii) and (iv) are met; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.B.(1) or (2).

C. The restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the

servicing, management and operation of a trust, provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) The pooling and servicing agreement is provided to, or described in all material respects in, the prospectus or private placement memorandum provided to investing plans before they purchase certificates issued by the trust.<sup>3</sup>

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act, or from the taxes imposed by reason of section 4975(c) of the Code, for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in section III.S.

D. The restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975(a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

## II. General Conditions

A. The relief provided under Part I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as they would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating from a rating

agency (as defined in section III.W.) at the time of such acquisition that is in one of the three highest generic rating categories;

(4) The trustee is not an affiliate of any other member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith;

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933; and

(7) In the event that the obligations used to fund a trust have not all been transferred to the trust on the closing date, additional obligations as specified in subsection III.B.(1) may be transferred to the trust during the pre-funding period (as defined in section III.BB.) in exchange for amounts credited to the pre-funding account (as defined in section III.Z.), provided that:

(a) The pre-funding limit (as defined in section III.AA.) is not exceeded;

(b) All such additional obligations meet the same terms and conditions for eligibility as those of the original obligations used to create the trust corpus (as described in the prospectus or private placement memorandum and/or pooling and servicing agreement for such certificates), which terms and conditions have been approved by a rating agency. Notwithstanding the foregoing, the terms and conditions for determining the eligibility of an obligation may be changed if such changes receive prior approval either by a majority of the outstanding certificateholders or by a rating agency;

<sup>2</sup>For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

<sup>3</sup>In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

(c) The transfer of such additional obligations to the trust during the pre-funding period does not result in the certificates receiving a lower credit rating from a rating agency upon termination of the pre-funding period than the rating that was obtained at the time of the initial issuance of the certificates by the trust;

(d) The weighted average annual percentage interest rate (the average interest rate) for all of the obligations in the trust at the end of the pre-funding period will not be more than 100 basis points lower than the average interest rate for the obligations which were transferred to the trust on the closing date;

(e) In order to ensure that the characteristics of the receivables actually acquired during the pre-funding period are substantially similar to those which were acquired as of the closing date, the characteristics of the additional obligations will either be monitored by a credit support provider or other insurance provider which is independent of the sponsor, or an independent accountant retained by the sponsor will provide the sponsor with a letter (with copies provided to the rating agency, the underwriter and the trustees) stating whether or not the characteristics of the additional obligations conform to the characteristics of such obligations described in the prospectus, private placement memorandum and/or pooling and servicing agreement. In preparing such letter, the independent accountant will use the same type of procedures as were applicable to the obligations which were transferred as of the closing date;

(f) The pre-funding period shall be described in the prospectus or private placement memorandum provided to investing plans; and

(g) The trustee of the trust (or any agent with which the trustee contracts to provide trust services) will be a substantial financial institution or trust company experienced in trust activities and familiar with its duties, responsibilities and liabilities as a fiduciary under the Act. The trustee, as the legal owner of the obligations in the trust, will enforce all the rights created in favor of certificateholders of such trust, including employee benefit plans subject to the Act.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, nor any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Part I, if the provision of subsection II.A.(6) above is not

satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

### III. Definitions

For purposes of this exemption:

A. *Certificate* means:

(1) a certificate—

(a) that represents a beneficial ownership interest in the assets of a trust; and

(b) that entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) a certificate denominated as a debt instrument—

(a) that represents an interest in a Real Estate Mortgage Investment Conduit (REMIC) or a Financial Asset Securitization Investment Trust (FASIT) within the meaning of section 860D(a) or section 860L, respectively, of the Internal Revenue Code of 1986; and

(b) That is issued by, and is an obligation of, a trust; with respect to certificates defined in (1) and (2) above for which Mellon or any of its affiliates is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this exemption, references to "certificates representing an interest in a trust" include certificates denominated as debt which are issued by a trust.

B. *Trust* means an investment pool, the corpus of which is held in trust and consists solely of:

(1)(a) Secured consumer receivables that bear interest or are purchased at a discount (including, but not limited to, home equity loans and obligations secured by shares issued by a cooperative housing association); and/or

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes

secured by leases, as defined in section III.T); and/or

(c) Obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property (including obligations secured by leasehold interests on commercial real property); and/or

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in section III.U); and/or

(e) "Guaranteed governmental mortgage pool certificates," as defined in 29 CFR 2510.3-101(i)(2); and/or

(f) Fractional undivided interests in any of the obligations described in clauses (a)–(e) of this section B.(1);

(2) Property which had secured any of the obligations described in subsection B.(1);

(3)(a) Undistributed cash or temporary investments made therewith maturing no later than the next date on which distributions are to be made to certificateholders; and/or

(b) Cash or investments made therewith which are credited to an account to provide payments to certificateholders pursuant to any yield supplement agreement or similar yield maintenance arrangement to supplement the interest rates otherwise payable on obligations described in subsection III.B.(1) held in the trust, provided that such arrangements do not involve swap agreements or other notional principal contracts; and/or

(c) Cash transferred to the trust on the closing date and permitted investments made therewith which:

(i) Are credited to a pre-funding account established to purchase additional obligations with respect to which the conditions set forth in clauses (a)–(g) of subsection II.A.(7) are met and/or;

(ii) Are credited to a capitalized interest account (as defined in section III.X.); and

(iii) Are held in the trust for a period ending no later than the first distribution date to certificateholders occurring after the end of the pre-funding period.

For purposes of this clause (c) of subsection III.B.(3), the term "permitted investments" means investments which are either: (i) Direct obligations of, or obligations fully guaranteed as to timely payment of principal and interest by the United States, or any agency or instrumentality thereof, provided that such obligations are backed by the full faith and credit of the United States or (ii) have been rated (or the obligor has

been rated) in one of the three highest generic rating categories by a rating agency; are described in the pooling and servicing agreement; and are permitted by the rating agency; and

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any insurance policies, third-party guarantees, contracts of suretyship, yield supplement agreements described in clause (b) of subsection III.B.(3) and other credit support arrangements with respect to any obligations described in subsection III.B.(1).

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) the investment pool consists only of assets of the type described in clauses (a) through (f) of subsection III.B.(1) which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by a rating agency for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. *Underwriter* means:

- (1) Mellon;
- (2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with Mellon; or
- (3) Any member of an underwriting syndicate or selling group of which Mellon or a person described in (2) is a manager or co-manager with respect to the certificates.

D. *Sponsor* means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. *Master Servicer* means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. *Subservicer* means an entity which, under the supervision of and on behalf of the master servicer, services obligations contained in the trust, but is not a party to the pooling and servicing agreement.

G. *Servicer* means any entity which services obligations contained in the trust, including the master servicer and any subservicer.

H. *Trustee* means the trustee of the trust, and in the case of certificates which are denominated as debt

instruments, also means the trustee of the indenture trust.

I. *Insurer* means the insurer or guarantor of, or provider of other credit support for, a trust. Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. *Obligor* means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. *Excluded Plan* means any plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

L. *Restricted Group* with respect to a class of certificates means:

- (1) each underwriter;
- (2) each insurer;
- (3) the sponsor;
- (4) the trustee;
- (5) each servicer;
- (6) any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or
- (7) any affiliate of a person described in (1)–(6) above.

M. *Affiliate* of another person includes:

- (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), a brother, a sister, or a spouse of a brother or sister of such other person; and
- (3) Any corporation or partnership of which such other person is an officer, director or partner.

N. *Control* means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be *independent* of another person only if:

- (1) such person is not an affiliate of that other person; and
- (2) the other person, or an affiliate thereof, is not a fiduciary who has

investment management authority or renders investment advice with respect to any assets of such person.

P. *Sale* includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's-length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. *Forward delivery commitment* means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party).

R. *Reasonable compensation* has the same meaning as that term is defined in 29 CFR 2550.408c-2.

S. *Qualified Administrative Fee* means a fee which meets the following criteria:

- (1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;
- (2) The servicer may not charge the fee absent the act or failure to act referred to in (1);
- (3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and
- (4) The amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. *Qualified Equipment Note Secured By A Lease* means an equipment note:

- (1) Which is secured by equipment which is leased;
- (2) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and
- (3) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as would be the case if the equipment note were secured only by the equipment and not the lease.

U. *Qualified Motor Vehicle Lease* means a lease of a motor vehicle where:

(1) the trust owns or holds a security interest in the lease;

(2) the trust owns or holds a security interest in the leased motor vehicle; and

(3) the trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as would be the case if the trust consisted of motor vehicle installment loan contracts.

V. *Pooling and Servicing Agreement* means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, "Pooling and Servicing Agreement" also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

W. *Rating Agency* means Standard & Poor's Structured Rating Group (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Credit Rating Co. (D & P) or Fitch IBCA, Inc. (Fitch), or their successors.

X. *Capitalized Interest Account* means a trust account: (i) which is established to compensate certificateholders for shortfalls, if any, between investment earnings on the pre-funding account and the pass-through rate payable under the certificates; and (ii) which meets the requirements of clause (c) of subsection III.B. (3).

Y. *Closing Date* means the date the trust is formed, the certificates are first issued and the trust's assets (other than those additional obligations which are to be funded from the pre-funding account pursuant to subsection II.A. (7)) are transferred to the trust.

Z. *Pre-Funding Account* means a trust account: (i) which is established to purchase additional obligations, which obligations meet the conditions set forth in clauses (a)-(g) of subsection II.A. (7); and (ii) which meets the requirements of clause (c) of subsection III.B. (3).

AA. *Pre-Funding Limit* means a percentage or ratio of the amount allocated to the pre-funding account, as compared to the total principal amount of the certificates being offered which is less than or equal to 25 percent.

BB. *Pre-Funding Period* means the period commencing on the closing date and ending no later than the earliest to occur of: (i) the date the amount on deposit in the pre-funding account is less than the minimum dollar amount specified in the pooling and servicing agreement; (ii) the date on which an event of default occurs under the pooling and servicing agreement; or (iii) the date which is the later of three months or 90 days after the closing date.

CC. *Mellon* means Mellon Financial Markets, Inc. and its affiliates.

The Department notes that this exemption is included within the meaning of the term "Underwriter Exemption" as it is defined in section V(h) of Prohibited Transaction Exemption 95-60 (60 FR 35925, July 12, 1995), the Class Exemption for Certain Transactions Involving Insurance Company General Accounts (see 60 FR at 35932).

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on January 21, 1999 at 64 FR 3344.

**WRITTEN COMMENTS:** The only written comments received by the Department were submitted by the applicant.

The applicant's first comment relates to Sections III.F. and III.G. of the proposed exemption, which contain the definition of the terms "Subservicer" and "Servicer", respectively. Mellon's application, which was based on prior exemption applications requesting similar relief for other entities, had used the term "obligations" in place of "loans" in these definitions. The applicant's comment states that the term "obligations", which is broader than the term "loans", is more consistent with the framework of the requested exemption. In this regard, the definition of the term "Trust" in Section III.B. of the exemption, which lists the assets that may be held in a trust of the type described in the exemption, refers to "receivables" and "obligations", among other things, but uses the term "loans" only in subparagraph (1)(a) therein as an example of a type of secured consumer receivable. Therefore, to avoid any implication that the terms "Subservicer" and "Servicer", as defined in Sections III.F. and III.G. of the proposed exemption, relate only to a narrow class of loan assets included within a Trust, the applicant requests that the term "loans" in those definitions be replaced by the term "obligations" in order to make clearer that the definitions cover a servicer with respect to any serviced assets held in the trust.

The applicant's second comment related to Section III.U. of the proposed exemption, which defines the term "Qualified Motor Vehicle Lease". In listing the requirements for such a lease, Subparagraph (1) of Section III.U. of the proposed exemption requires that the trust "owns or holds" the security interest in the lease, whereas Subparagraph (2) therein requires that the trust only "hold" a security interest in the leased motor vehicle. The applicant's comment states that the

phrase "owns or holds" should also be used in Subparagraph (2) of Section III.U. The applicant notes that this usage would avoid any implication that the exemption intends to draw a distinction between the trust's rights in the security interest in the lease versus the trust's rights in the security interest in the motor vehicle. Therefore, the applicant requests that the phrase "owns or holds" replace the word "holds" in Subparagraph (2) of Section III.U.

The Department has considered the entire record, including the comments filed by the applicant, and has determined to grant the exemption as proposed, with the two modifications requested in the applicant's comment letter.

**FOR FURTHER INFORMATION CONTACT:** Gary Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

**State Street Bank and Trust Company (State Street) Located in Boston, Massachusetts**

[Prohibited Transaction Exemption 99-12; Exemption Application Number D-10701]

*Exemption*

Section I. Transactions

The restrictions of section 406(a)(1)(A) through (D) and section 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale (the Sale) of fractional amounts of certain fixed-income instruments (Fractional Amounts) to State Street and its affiliates by plans for which State Street or its affiliates provide fiduciary or other services (Client Plans), as well as employee benefit plans established and maintained by State Street or its affiliates (State Street Plans; collectively, the Plans), provided that the following conditions are met:

(a) Each Sale involves a one time transaction for cash;

(b) The terms of each Sale are at least as favorable to the Plan as those terms which would be available in an arm's-length transaction with an unrelated party;

(c) The Plans receive an amount which is not less than the par value for each of the Fractional Amounts;

(d) In the case of single Client Plans,

(1) each Sale is subject to the prior consent of an independent plan fiduciary;

(2) the independent fiduciary of each Plan is furnished with notice within 90 days of the proposed Sale, providing information necessary for the

independent fiduciary to determine whether to approve the Sale transaction. If the fixed-income instruments are not redenominated within a year of provision of this notice, additional notice will be provided to the independent fiduciaries of each Plan each year notifying them of their right not to participate in this program of Sales; and

(3) each independent fiduciary who determines to participate in the Sale receives written confirmation of the decision to participate and written confirmation of the transaction and its terms.

(e) In the case of Client Plans participating in collective funds for which State Street serves as trustee or investment manager,

(1) each Sale engaged in by the collective fund is subject to the prior approval of each independent plan fiduciary of Plans participating in the fund;

(2) the independent fiduciary of each Plan is furnished notice within 90 days of the proposed Sale, containing information necessary for the independent fiduciary to determine whether to approve the Sale transaction or withdraw from the collective fund prior to the Sale. If the fixed-income instruments are not redenominated within a year of provision of this notice, additional notice will be provided to the independent fiduciaries each year notifying them of their right to withdraw from the collective fund;

(3) each independent fiduciary of a plan participating in a collective fund who determines to participate in the Sale receives written confirmation of the decision to participate and written confirmation of the transaction and its terms;

(f) In the case of the Plans, State Street must engage in the Sale within 30 days of the date that the Fractional Amounts are received by State Street as custodian or trustee for the Plans from the issuers of the fixed-income security;

(g) The Plans do not incur any commissions or other expenses in connection with the Sales; and

(h) (1) State Street or an affiliate maintains or causes to be maintained within the United States, for a period of six years from the date of such transaction, the records necessary to enable the persons described in this section to determine whether the conditions of this exemption have been met; except that a party in interest with respect to an employee benefit plan, other than State Street or its affiliates, shall not be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) or (b)

of the Code, if such records are not maintained, or are not available for examination, as required by this section, and a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of State Street or its affiliates, such records are lost or destroyed prior to the end of such six year period;

(2) The records referred to in subsection (1) above are unconditionally available for examination during normal business hours by duly authorized employees of (a) the Department, (b) the Internal Revenue Service, (c) plan participants and beneficiaries, (d) any employer of plan participants and beneficiaries, and (e) any employee organization whose members are covered by such plan; except that none of the persons described in (c) through (e) of this subsection shall be authorized to examine trade secrets of State Street or its affiliates or any commercial or financial information which is privileged or confidential.

#### Section II. Definitions

(a) The term *affiliate* of State Street means any other bank or similar financial institution directly or indirectly controlling, controlled by, or under common control with State Street.

(b) The term *Euro* means the single European currency introduced on January 1, 1999 in eleven Member States of the European Union.

(c) The term *Fractional Amount* means, with respect to any fixed-income instrument, an amount less than one Euro.

(d) The term *independent plan fiduciary* means a plan fiduciary independent of State Street and any of its affiliates.

(e) The term *par value* means the face value of the fixed-income instrument.

(f) The term *Plan* includes all employee benefit plans to which State Street or an affiliate acts as a service provider, including a fiduciary, and all plans established and maintained by State Street and its affiliates, which have net assets of at least \$25,000,000.

**EFFECTIVE DATE:** This exemption is effective for the period beginning on January 1, 1999 and ending three years from the date on which each country joining the European Economic and Monetary Union converts to the Euro.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published in the **Federal Register** on January 27, 1999 at 64 FR 4144.

**FOR FURTHER INFORMATION:** Contact James Scott Frazier of the Department, phone number (202) 219-8881 (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 to which the exemptions 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 3rd day of March, 1999.

**Ivan Strasfeld,**

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

[FR Doc. 99-5573 Filed 3-5-99; 8:45 am]

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