

SUPPLEMENTARY INFORMATION: In the **Federal Register** of January 18, 2001 (66 FR 4865), PWBA announced its intent to request renewal of its current OMB approval for the information collection provisions in a regulation pertaining to participant directed individual account plans under section 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA). In accordance with the PRA 95, OMB has renewed its approval for the ICR under OMB control number 1210-0090. The approval expires December 31, 2002.

In the **Federal Register** of January 18, 2001 (66 FR 4864), the Agency announced its intent to request renewal of its current OMB approval for the information collection provisions of Technical Release 91-1, related to the transfer of excess assets from a defined benefit plan to a retiree health benefits account. In accordance with PRA 95, OMB has renewed its approval for the ICR under OMB control number 1210-0084. The approval expires December 31, 2002.

Under 5 CFR 1320.5 (b), an Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Dated: August 28, 2001.

Gerald B. Lindrew,

Deputy Director, Office of Policy and Research, Pension and Welfare Benefits Administration.

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Exemption Application No. D-10926, et al.]

Prohibited Transaction Exemption 2001-32; Grant of Individual Exemptions; Development Company Funding Corporation, 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, 5 U.S.C. App. 1 (1996), 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.

Development Company Funding Corporation, Located in the District of Columbia

[Prohibited Transaction Exemption 2001-32; Application No. D-10926]

Exemption

Section I. Transactions

A. Effective August 25, 2000, the restrictions of sections 406(a) and 407(a) 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 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 Underwriter of the Certificates and an employee benefit plan when the SBA, the Fiscal Agent, the Selling Agent, the Central Servicing Agent, the Trustee, the Underwriter, 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 of the Act 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.¹

B. Effective August 25, 2000, the restrictions of 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)(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 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 the 504 Program Loans underlying the Debentures related to that Series of Certificates, 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 Series 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 Series is acquired by persons independent of the Restricted Group.

(iii) A plan's investment in each Series of Certificates does not exceed 25 percent of all of the Certificates of that Series 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

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

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.² For purposes of this subparagraph (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 described in paragraph B.(1) in the secondary market for such Certificates, provided that 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. Effective August 25, 2000, the restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the sanctions resulting from the application of section 4975 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 Trust Agreement; and

(2) The Trust Agreement is provided to, or described in all material respects in the offering circular or other disclosure document provided to the investing plans before they purchase Certificates issued by the Trust.³

D. Effective August 25, 2000, the restrictions of sections 406(a) and 407(a) 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 to any transaction to which those restrictions or sanctions 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

² 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.

³ The offering circular or other disclosure document 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 offering circular or other disclosure document must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

described in section 3(14)(F), (G), (H), or (I) of the Act or section 4975(e)(2)(F), (G), (H), (I) of the Code), solely because of the plan's ownership of Certificates.

Section II. Conditions

The relief provided under Section I is available only if the following conditions are met:

A. The acquisition of Certificates by a plan is on terms (including the Certificate price) that are at least as favorable to the plan as such terms would be in an arm's-length transaction with an unrelated party;

B. The rights and interests evidenced by the Certificates are not subordinated to the rights and interests evidenced by other Certificates in the same Series;

C. The Certificates and Debentures are guaranteed as to the timely payment of principal and interest by the SBA, and are therefore backed by the full faith and credit of the United States;

D. The Trustee is not an affiliate of any other member of the Restricted Group.

Section III. Definitions

For purposes of this exemption:

A. "Certificate" means a certificate:

(1) That represents a beneficial ownership interest in a discrete pool of Debentures and all payments thereon, held in Trust by the Trustee pursuant to the Trust Agreement;

(2) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the discrete pool of Debentures held as part of such Trust; and

(3) That is issued by the Trustee as agent for the SBA and guaranteed by the SBA as to timely payment of principal and interest pursuant to section 505 of the Small Business Investment Act of 1958, as amended (the Small Business Investment Act).

B. "Trust" means the trust created pursuant to the Trust Agreement, under which, with respect to each Series of Certificates, the Trustee holds in Trust for the benefit of the certificateholders of the Series the following property:

(1) The discrete pool of Debentures related to the Series;

(2) A debenture guarantee agreement executed by the SBA pursuant to section 503 of the Small Business Investment Act pursuant to which the SBA guarantees timely payment of principal and interest on the Debentures related to the Series; and

(3) The certificate account maintained by the Central Servicing Agent for such Series into which the Central Servicing Agent deposits payments due in respect of the Debentures on each semiannual debenture payment date.

C. "Debentures" means debentures issued by a certified development company and guaranteed as to timely payment of principal and interest by the SBA pursuant to section 503 of the Small Business Investment Act.

D. "504 Program Loans" means loans made by a certified development company to a small business concern and funded with the proceeds of a Debenture pursuant to section 503 of the Small Business Investment Act.

E. "SBA" refers to the U.S. Small Business Administration.

F. "Underwriter" means an entity which has received an individual prohibited transaction exemption from the Department that provides relief for the operation of asset pool investment trusts that issue "asset-backed" pass-through securities to plans, that is similar in format and structure to this exemption (the Underwriter Exemptions);⁴ any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such entity; and any member of an underwriting syndicate or selling group of which such firm or person described above is a manager or co-manager with respect to the Certificates.

G. "Fiscal Agent" means the entity that has contracted with the SBA to assess the financial markets, arrange for the production of required documents, and monitor the performance of the Trustee and the Underwriter.

H. "Selling Agent" means the entity appointed by a certified development company to select Underwriters, negotiate the terms and conditions of Debenture offerings with the Underwriters, and direct and coordinate Debenture sales.

I. "Central Servicing Agent" means the entity that has entered into a master servicing agreement with the SBA to support the orderly flow of funds among borrowers, certified development companies and the SBA.

J. "Trustee" means an entity that is the trustee of the Trust.

K. "Obligor" means any person that is obligated to make payments under a Section 504 Loan related to a Debenture contained in the Trust.

L. "Excluded Plan" means any employee benefit 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.

M. "Restricted Group" with respect to a class of Certificates means:

⁴ For a listing of the Underwriter Exemptions, see the description provided in footnote 1 of Prohibited Transaction Exemption 2000-58 (65 FR 67765, November 13, 2000).

- (1) Each Underwriter;
- (2) The Fiscal Agent;
- (3) The Selling Agent;
- (4) The Trustee;
- (5) The Central Servicing Agent;
- (6) Any Obligor with respect to loans relating to Debentures 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;
- (7) The SBA; or
- (8) Any affiliate of a person described in (1)–(7) above.

N. "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), brother, sister, or 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.

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

P. 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 that has investment management authority or renders investment advice with respect to assets of such person.

Q. "Sale" includes the entrance into a Forward Delivery Commitment, 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 offering circular or other disclosure document 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.

R. "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).

S. "Trust Agreement" means that trust agreement by and among the SBA, the Fiscal Agent and the Trustee, as amended, establishing the Trust and, with respect to each Series of Certificates, the supplement to the trust agreement pertaining to such Series.

T. "Series" means any particular series of Certificates issued pursuant to the Trust Agreement that, in the aggregate, represent the entire beneficial interest in a discrete pool of Debentures held by the Trustee pursuant to the Trust Agreement.

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 July 10, 2001 at 66 FR 36005.

For Further Information Contact: Karen Lloyd of the Department, telephone (202) 219-8194. (This is not a toll-free number.)

Merganser Capital Management LP (Merganser), Located in Cambridge, Massachusetts

[Prohibited Transaction Exemption 2001-33 Application No. D-10951]

Exemption

Section I. Transaction

Merganser shall not be precluded from functioning as a "qualified professional asset manager" pursuant to Prohibited Transaction Exemption 84-14 (49 Fed. Reg. 9494, Mar. 13, 1984) (PTE 84-14) for the period between April 6, 2000 and December 31, 2006, solely because of its failure to satisfy the shareholders' or partners' equity requirement under section V(a)(4) of PTE 84-14, provided that the conditions set forth in Section II are met.

Section II. Conditions

(a) Merganser shall obtain an irrevocable Letter of Credit, which shall be reduced only by ERISA Claims paid on behalf of ERISA Clients.

(b) The amount available under the Letter of Credit shall be at least \$750,000 as of the first day of each fiscal year during which the Letter of Credit is maintained.

(c) Merganser shall cause the Letter of Credit to be issued to an Agent to be held for the benefit of all ERISA Clients.

(d) Merganser shall notify current and future ERISA Clients in writing of: (i) Their status as beneficiaries of the Letter of Credit; (ii) their right to make a draw against the Letter of Credit by presenting the Agent with the documentation described in (g) below; and (iii) the U.S.

address of the Agent at which an ERISA Client may present such documentation. Merganser shall promptly notify all ERISA Clients of any changes in the information as to how to contact the Agent.

(e) Merganser shall provide current and future ERISA Clients with a copy of the proposed and final exemption as published in the **Federal Register**.

(f) Merganser shall provide the Agent with a complete list of all ERISA Clients, which shall be updated each time Merganser obtains a new ERISA Client.

(g) The Letter of Credit shall be payable on demand solely to any ERISA Client (or its agent) if the ERISA Client provides the Agent with:

(i)(A) a certified copy of the final judgment against Merganser based on an ERISA Claim of such client, entered by a court of competent jurisdiction with all rights of appeal having expired or having been exhausted, or (B) a true copy of a settlement agreement between the ERISA Client and Merganser providing for damages to the ERISA Client with respect to an ERISA Claim;

(ii) in the case of a final court judgment, a certified true copy of a Sheriff's or Marshall's levy and execution on the judgment, returned unsatisfied, or such other documentation, certified by an officer of the court in which the judgment was entered, stating that the judgment remains unsatisfied following attempts to collect the judgment in accordance with local court rules; and

(iii) a certificate of an authorized representative of the ERISA Client stating the amount of the judgment or settlement which remains unsatisfied.

(h)(i) The Letter of Credit shall be maintained until the earlier of December 31, 2006 or Merganser's satisfaction of the partners' equity requirement under section V(a)(4) of PTE 84-14.

(ii) Notwithstanding subparagraph (i), in the event that one or more ERISA Clients has a Pending ERISA Claim on December 31, 2006, Merganser shall either (A) cause the Letter of Credit to be maintained until the earlier of December 31, 2008 or a final judgment or settlement disposing of all such Pending ERISA Claims, or (B) cause a bond to be purchased which fully insures all such Pending ERISA Claims in the total amount equal to the amount of such Pending ERISA claims but not to exceed \$750,000.

Section III. Definitions

(a) "Agent" shall mean a commercial bank, trust company or other financial institution subject to federal or state

banking regulation that is independent of Merganser.

(b) "Claim" shall mean a civil proceeding for monetary relief which is commenced by the filing or service of a civil complaint or similar pleading, or a request for monetary relief which could have been the subject of such a complaint or pleading but for a settlement agreement.

(c) "ERISA Claim" shall mean a Claim filed against Merganser or with respect to which a settlement is reached with Merganser prior to December 31, 2006, by reason of Merganser's alleged breach or violation of a duty described in sections 404 or 406 of the Act.

(d) "ERISA Client" shall mean any employee benefit plan covered by Title I of ERISA to which Merganser provides or provided investment management services on or before December 31, 2006.

(e) "Letter of Credit" shall mean a standby letter of credit in the amount of \$750,000 issued by a commercial bank, trust company or other financial institution subject to federal or state banking regulation that is independent of Merganser.

(f) "Pending ERISA Claim" shall mean an ERISA Claim that: (i) has been filed in court and is not the subject of a final judgment or settlement; or (ii) has been the subject of a final judgment or settlement which remains unsatisfied.

(g) A person will be "independent" of another person only if:

(i) For purposes of this exemption, such person is not an affiliate of that other person; and

(ii) The other person, or an affiliate thereof, is not a fiduciary that has investment management authority or renders investment advice with respect to assets of such person.

(h) 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.

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 June 4, 2001 at 66 FR 30012.

For Further Information Contact:

Karen Lloyd of the Department, telephone (202) 219-8194. (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 accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 4th day of September, 2001.

Ivan Strasfeld,

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

[FR Doc. 01-22478 Filed 9-6-01; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-10946]

Notice of Proposed Individual Exemption To Amend Prohibited Transaction Exemption (PTE) 99-45, Involving Donaldson, Lufkin & Jenrette Securities Corporation (DLJ), Located in New York, NY

AGENCY: Pension and Welfare Benefits Administration, U.S. Department of Labor.

ACTION: Notice of proposed individual exemption to modify PTE 99-45.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual exemption which, if granted, would amend PTE 99-45 (64 FR 61138, November 9, 1999), an exemption granted to DLJ. PTE 99-45, which is effective as of September 24, 1999, relates to the (1) purchase or sale of a security between certain affiliates of DLJ which are foreign broker-dealers (the Foreign Affiliates) and employee benefit plans (the Plans) with respect to which the Foreign Affiliates are parties in interest, including options written by a Plan, DLJ or the Foreign Affiliates; (2) the extension of credit to the Plans by the Foreign Affiliates to permit the settlement of securities transactions that are effected on either an agency or a principal basis, or in connection with the writing of options contracts; and (3) the lending of securities to the Foreign Affiliates by the Plans.

If granted, the proposed exemption would incorporate by reference many of the facts, representations and conditions contained in PTE 99-45. However, the proposed exemption would expand the scope of PTE 99-45 to apply not only to current and future Foreign Affiliates of DLJ that are located in the United Kingdom and Australia, and which are subject to the securities regulatory entities within these jurisdictions, but to current and future Foreign Affiliates of Credit Suisse First Boston Corporation (CSFB), also located in the United Kingdom and Australia. CSFB, a Massachusetts-based broker-dealer registered with the U.S. Securities and Exchange Commission (the SEC), is an indirect, wholly owned subsidiary of Credit Suisse Group (CSG). As of December 31, 1999, CSFB had approximately \$97.8 billion in assets on a consolidated basis. CSG is the current parent of DLJ.