

(g) The Plan's independent fiduciary has monitored, and will continue to monitor, compliance with the terms of the Lease throughout the duration of the Lease and each renewal term, and is responsible for legally enforcing the payment of the rent and the proper performance of all other obligations of the Employer under the terms of the Lease.

(h) The Plan's independent fiduciary will expressly approve any renewal of the Lease beyond the initial term.

(i) The fair market value of the Property has not exceeded, and will not exceed, 25 percent of the value of the total assets of the Plan.

Tax Consequences of the Transactions

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

Notice to Interested Persons

The Employer will provide notice of the proposed exemption to all interested persons by first class mail within three days of the date of publication of the notice of proposed exemption in the **Federal Register**. The notice will include a copy of the proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which will inform interested persons of their right to comment on and/or to request a hearing with respect to the proposed exemption. Comments regarding the proposed exemption and requests for a public hearing are due within 33 days of the date of publication of the notice of pendency in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Anna M.N. Mpras of the Department, telephone (202) 693-8565. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction

provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, DC, this 18th day of September, 2002.

Ivan Strasfeld,

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

[FR Doc. 02-24135 Filed 9-20-02; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2002-45; Exemption Application No. D-10924 et al.]

Grant of Individual Exemptions; Deutsche Bank AG (DB)

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).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is 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 exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Deutsche Bank AG (DB) Located in Germany, With Affiliates in New York, New York and Other Locations

[Prohibited Transaction Exemption 2002-45; Exemption Application No. D-10924]

Exemption

Section I—Transactions

The restrictions of section 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act, section 8477(c)(2)(A) and (B) of FERSA, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to:

(a) The lending of securities to:

(1) Deutsche Bank Securities, Inc. (formerly DB Alex. Brown, Inc.), its successors or affiliates;

(2) Any current or future affiliate of DB,¹ that is a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940, that is supervised by the U.S. or a state, any broker-dealer registered under the Securities Exchange Act of 1934 (the “1934 Act”), or any foreign affiliate that is a bank or broker-dealer that is supervised by (i) the Securities and Futures Authority (“SFA”) in the United Kingdom; (ii) the Bundesanstalt für Finanzdienstleistungsaufsicht (the “BAFin”) in Germany; (iii) the Ministry of Finance (“MOF”) and/or the Tokyo Stock Exchange in Japan; (iv) the Ontario Securities Commission, the Investment Dealers Association and/or the Office of Superintendent of Financial Institutions in Canada; (v) the Swiss Federal Banking Commission in Switzerland; and (vi) the Reserve Bank of Australia or the Australian Securities and Investments Commission and/or Australian Stock Exchange Limited in Australia (the branches and/or affiliates in the six enumerated foreign countries hereinafter referred to as the “Foreign Affiliates”) and together with the U.S. branches or affiliates (individually, “Affiliated Borrower” and collectively, “Affiliated Borrowers”), by employee benefit plans, including commingled investment funds holding plan assets (the Client Plans or Plans)², for which DB or an affiliate acts as securities lending agent or subagent (the “DB

Lending Agent”),³ and also may serve as trustee, custodian or investment manager of securities being lent, or for which a subagent is appointed by a DB Lending Agent, which subagent is either (I) a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 or a broker-dealer registered under the Securities Exchange Act of 1934, (i) which has, as of the last day of its most recent fiscal year, equity capital in excess of \$100 million and (ii) which annually exercises discretionary authority to lend securities on behalf of clients equal to at least \$1 billion; or (II) an investment adviser registered under the Investment Advisers Act of 1940, (i) which has, as of the last day of its most recent fiscal year, equity capital in excess of \$1 million and (ii) which annually exercises the authority to lend securities equal to at least \$1 billion (each, a “Lending Subagent”); and

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

Section II—Conditions

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

(a) For each Client Plan, neither the DB Lending Agent nor any affiliate (except as expressly permitted herein) has or exercises discretionary authority or control with respect to the investment of the assets of Client Plans involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to such assets, including decisions

³ DB or an affiliate may be retained by primary securities lending agents to provide securities lending services in a sub-agent capacity with respect to portfolio securities of clients of such primary securities lending agents. As a securities lending sub-agent, DB's role parallels that under the lending transactions for which DB or an affiliate acts as a primary securities lending agent on behalf of its clients. References to DB's performance of services as securities lending agent should be deemed to include its parallel performance as a securities lending sub-agent and references to the Client Plans should be deemed to include those plans for which the DB Lending Agent is acting as a sub-agent with respect to securities lending, unless otherwise specifically indicated or by the context of the reference.

concerning a Client Plan's acquisition or disposition of securities available for loan.

This paragraph (a) will be deemed satisfied notwithstanding that the DB Lending Agent exercises discretionary authority or control or renders investment advice in connection with an Index Fund or Model-Driven Fund managed by the DB Lending Agent in which Client Plans invest.

(b) Any arrangement for the DB Lending Agent to lend securities is approved in advance by a Plan fiduciary who is independent of the DB Lending Agent (the Independent Fiduciary).

(c) The specific terms of the securities loan agreement (the Loan Agreement) are negotiated by the DB Lending Agent which acts as a liaison between the Lender and the Affiliated Borrower to facilitate the securities lending transaction. In the case of a Separate Account, the Independent Fiduciary of a Client Plan approves the general terms of the Loan Agreement between the Client Plan and the Affiliated Borrower as well as any material change in such Loan Agreement. In the case of a Commingled Fund, approval is pursuant to the procedure described in paragraph (i), below.

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

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

(1) The customary delivery period for such securities;

(2) Five business days; or

(3) The time negotiated for such delivery by the Client Plan, in a Separate Account, or by the DB Lending

¹ Any reference to DB shall be deemed to include any successors thereto.

² The common and collective trust funds trustee, custodied, and/or managed by DB or an affiliate, and in which Client Plans invest, are referred to herein as “Commingled Funds.” The Client Plan separate accounts trustee, custodied, and/or managed by DB or an affiliate are referred to herein as “Separate Accounts.” Commingled Funds and Separate Accounts are collectively referred to herein as “Lender” or “Lenders.”

Agent, as lending agent to a Commingled Fund, and the Affiliated Borrowers, whichever is least.

(f) The Separate Account, Commingled Fund or another custodian designated to act on behalf of the Client Plan, receives from each Affiliated Borrower (either by physical delivery, book entry in a securities depository located in the United States, wire transfer or similar means) by the close of business on or before the day the loaned securities are delivered to the Affiliated Borrower, collateral consisting of U.S. currency, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank, other than DB (or any subsequent parent corporation of the DB Lending Agent) or an affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption 81-6 (46 FR 7527, January 23, 1981) (PTE 81-6) (as it may be amended or superseded) (collectively, the Collateral). The Collateral will be held on behalf of a Client Plan in a depository account separate from the Affiliated Borrower.

(g) The market value (or in the case of a letter of credit, a stated amount) of the Collateral on the close of business on the day preceding the day of the loan is initially at least 102 percent of the market value of the loaned securities. The applicable Loan Agreement gives the Separate Account or the Commingled Fund in which the Client Plan has invested a continuing security interest in, and a lien on or title to, the Collateral. The level of the Collateral is monitored daily by the DB Lending Agent. If the market value of the Collateral, on the close of trading on a business day, is less than 100 percent of the market value of the loaned securities at the close of business on that day, the Affiliated Borrower is required to deliver, by the close of business on the next day, sufficient additional Collateral such that the market value of the Collateral will again equal 102 percent.

(h)(1) For a Lender that is a Separate Account, prior to entering into a Loan Agreement, the applicable Affiliated Borrower furnishes its most recently available audited and unaudited statements to the DB Lending Agent which will, in turn, provide such statements to the Client Plan before the Client Plan approves the terms of the Loan Agreement. The Loan Agreement contains a requirement that the applicable Affiliated Borrower must give prompt notice at the time of a loan of any material adverse changes in its financial condition since the date of the

most recently furnished financial statements. If any such changes have taken place, the DB Lending Agent will not make any further loans to the Affiliated Borrower unless an Independent Fiduciary of the Client Plan in a Separate Account is provided notice of any material change and approves the continuation of the lending arrangement in view of the changed financial condition.

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

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

In the event any such Independent Fiduciary submits a notice in writing within the 30 day period provided in the preceding paragraph to the DB Lending Agent, as lending fiduciary, objecting to the implementation of, material change in, or continuation of the arrangement, the Plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the Commingled Fund, without penalty to the Plan, no later than 35 days after the notice of withdrawal is received. In the case of a Plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a Plan electing to withdraw. In the case of a Plan whose assets are proposed to be invested in the Commingled Fund

subsequent to the implementation of the arrangement, the Plan's investment in the Commingled Fund shall be authorized in the manner described in paragraph (c).

(j) In return for lending securities, the Lender either—

(1) Receives a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan; or

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

(k) Except as otherwise expressly provided herein, all procedures regarding the securities lending activities will, at a minimum, conform to the applicable provisions of PTE 81-6 and Prohibited Transaction Exemption 82-63 (46 FR 14804, April 6, 1982) (PTE 82-63), both as amended or superseded, as well as to applicable securities laws of the United States, the United Kingdom, Canada, Australia, Switzerland, Japan and Germany.

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

(m) The Lender receives the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including but not limited to all interest and dividends on the loaned securities,

shares of stock as a result of stock splits and rights to purchase additional securities, or other distributions.

(n) Prior to any Client Plan's approval of the lending of its securities to any Affiliated Borrower, a copy of this exemption and the notice of proposed exemption (67 FR 9070, February 27, 2002) (the Notice) is provided to the Client Plan.

(o) The Independent Fiduciary of each Client Plan that is invested in a Separate Account is provided with (including by electronic means) quarterly reports with respect to the securities lending transactions, including, but not limited to, the information described in Representation 24 of the Summary of Facts and Representations of the Notice, so that the Independent Fiduciary may monitor such transactions with the Affiliated Borrower. The Independent Fiduciary invested in a Commingled Fund is provided with (including by electronic means) quarterly reports with respect to the securities lending transactions, including, but not limited to, the information described in Representation 24 of the Summary of Facts and Representations of the Notice, so that the Independent Fiduciary may monitor such transactions with the Affiliated Borrower. The DB Lending Agent may, in lieu of providing the quarterly reports described in this paragraph (o) to each Independent Fiduciary of a Client Plan invested in a Commingled Fund, provide such Independent Fiduciary with the certification of an auditor selected by the DB Lending Agent who is independent of the DB Lending Agent (but who may or may not be independent of the Client Plan) that the loans appear no less favorable to the Lender than the pricing established in the schedule described in Representation 16 of the Notice. Where the Independent Fiduciary of a Client Plan invested in a Commingled Fund is provided the certification of an auditor, such Independent Fiduciary shall be entitled to receive the quarterly reports upon request.

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

(1) In the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities

lending arrangement with the DB Lending Agent, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

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

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

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

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

(q) With respect to any calendar quarter, at least 50 percent or more of the outstanding dollar value of securities loans negotiated on behalf of Lenders will be to borrowers unrelated to the DB Lending Agent.

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

(1) The foreign Affiliated Borrower is a bank, supervised either by a state or the United States, a broker-dealer registered under the Securities

Exchange Act of 1934 or a bank or broker-dealer that is supervised by (1) the SFA in the United Kingdom; (2) the BAFin in Germany; (3) the MOF and/or the Tokyo Stock Exchange in Japan; (4) the Ontario Securities Commission, the Investment Dealers Association and/or the Office of Superintendent of Financial Institutions in Canada; (5) the Swiss Federal Banking Commission in Switzerland; and (6) the Reserve Bank of Australia or the Australian Securities and Investments Commission and/or Australian Stock Exchange Limited in Australia;

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

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

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

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

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

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

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

(D) Agrees that enforcement by a Client Plan of the indemnity provided by the Borrower may occur in the United States courts.

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

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the DB Lending Agent and/or its affiliates, the records are lost or

destroyed prior to the end of the six-year period; and

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

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

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

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

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

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

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

Section III—Definitions

(a) *DB Plan*: An ERISA covered employee benefit plan sponsored and maintained by the DB Lending Agent and/or an affiliate for its own employees.

(b) *Index Fund*: Any investment fund, account or portfolio sponsored, maintained, trusted or managed by the DB Lending Agent or an affiliate, in which one or more investors invest, and—

(1) which is designed to track the rate of return, risk profile and other characteristics of an Index by either (i) replicating the same combination of securities which compose such Index or (ii) sampling the securities which compose such Index based on objective criteria and data;

(2) for which the DB Lending Agent or its affiliate does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) that contains “plan assets” subject to the Act, pursuant to the Department’s Plan Asset Regulation; and,

(4) that involves no agreement, arrangement, or understanding regarding the design or operation of the Fund which is intended to benefit the DB Lending Agent or its affiliate or any party in which the DB Lending Agent or its affiliate may have an interest.

(c) *Model-Driven Fund*: Any investment fund, account or portfolio sponsored, maintained, trusted or managed by the DB Lending Agent or an affiliate, in which one or more investors invest, and—

(1) which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third-party data, not within the control of the DB Lending Agent or an affiliate, to transform an Index;

(2) which contains “plan assets” subject to the Act, pursuant to the Department’s Plan Asset Regulation; and

(3) that involves no agreement, arrangement or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria which is intended to benefit the DB Lending Agent, any affiliate of the DB Lending Agent, or any party in which the DB Lending Agent or any affiliate may have an interest.

(d) *Index*: a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) The organization creating and maintaining the index is—

(A) Engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients,

(B) A publisher of financial news or information, or

(C) A public stock exchange or association of securities dealers;

(2) The index is created and maintained by an organization independent of DB; and

(3) The index is a generally accepted standardized index of securities which is not specifically tailored for the use of the DB Lending Agent or an affiliate.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption, refer to the Notice.

Written Comments

The Department received one comment letter, which was submitted

by DB, with respect to the Notice. In the comment letter, DB requested several clarifications and changes to the proposed exemption.

DB requested that the Department amend section II(l) concerning the requirement for an indemnification of a Client Plan in the event of a default by the Borrower, to make it conform to other recent exemptions issued by the Department.⁴ The Department has amended section II(l) and (r) accordingly. DB also requested that the Department make clear that there will be no indemnification from the DB Lending Agent where to do so would violate banking laws.⁵ The Department notes that, since section II(l) of the final exemption has been changed so that only the Borrower will be required to indemnify the Client Plans, the comment is no longer relevant. However, the language of the exemption has been modified to clarify that the Borrower’s indemnification must enable the Client Plan to collect on any indemnification from a U.S.-domiciled affiliate of DB.

DB also requested in its comment letter that the Department clarify that the exemption applies when DB or an affiliate is the Lending Agent or subagent, as well as when DB is the Lending Agent and a third party is the subagent. In this regard, the third party subagent would have to follow all of the requirements of the exemption and be either a broker-dealer registered under the 1934 Act, an investment adviser registered under the Investment Advisers Act of 1940, or a bank as defined in section 202(a)(2) of the Investment Advisers Act of 1940. Any such third party subagent would also be subject to certain dollar minimums of equity capital and of value of securities loaned for which the subagent exercises authority. The Department has adopted this comment and has amended section I(a)(2) of the exemption accordingly.

DB also requested a change to the independent audit requirement in section II(o). DB believes that the requirement that the Independent Fiduciary of each Client Plan be provided with the certification of an

⁴ For example, see Prohibited Transaction Exemption (PTE) 99–50, 65 FR 534 (January 5, 2000), regarding Bankers Trust Company; and PTE 2001–41, 66 FR 53449 (October 22, 2001) regarding Barclays Bank PLC and Barclays Capital, Inc. (see section II(m), 66 FR at 53451).

⁵ See PTE 99–50, section II(j) and Footnote 2, 65 FR at 535, column 1, wherein the applicant stated that the DB Lending Agent would provide an indemnification to the extent permitted by law and that where the law prohibits such an indemnification by the DB Lending Agent, the Affiliated Borrower would provide the identical indemnification.

independent auditor, in addition to quarterly reports for the securities lending transactions, would be duplicative and administratively burdensome for DB with respect to Client Plans invested in Separate Accounts. Accordingly, the Department has modified section II(o) to permit the DB Lending Agent to provide an Independent Fiduciary of a Client Plan invested in a Separate Account only with quarterly reports. In addition, the Independent Fiduciary of each Client Plan invested in a Commingled Fund can be provided with the certification of an independent auditor in lieu of the provision of quarterly reports. However, as indicated in the Notice, such Independent Fiduciaries would be entitled to receive the quarterly reports upon request.

Finally, DB informed the Department that certain entities within DB have recently changed their names. Bankers Trust Company is now Deutsche Bank Trust Company Americas. DB Alex. Brown Securities, Inc. is now Deutsche Bank Securities, Inc., and Deutsche Banc Alex. Brown, Inc. is now also named Deutsche Bank Securities, Inc.

The Department has also been informed that there has been a change in the identity of the governmental regulatory authority in Germany. According to the applicant, following the adoption of the Law on Integrated Financial Services Supervision (Gesetz über die integrierte Finanzaufsicht—FinDAG), the Federal Authority for Financial Services Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht—“BAFin”) was established in Germany on May 1, 2002. The functions of the former offices for banking supervision (Bundesaufsichtsamt für das Kreditwesen—“the BAK”), along with other governmental authorities for insurance and securities supervision, have been combined into a single state regulator that supervises banks, financial services institutions and insurance undertakings across the entire financial market and comprises all the key functions of consumer protection and solvency supervision. The new Federal Authority for Financial Services Supervision has been created to ensure a consistent regulation and supervision of the financial services and markets in Germany through one single governmental authority.

Accordingly, based upon the information contained in the entire record, the Department has determined to grant the proposed exemption as modified herein.

For Further Information Contact: Gary Lefkowitz of the Department, telephone

(202) 693–8546. (This is not a toll-free number).

**Barclays Global Investors, N.A. (BGI)
Located in San Francisco, California**

[Prohibited Transaction Exemption 2002–46; Exemption Application No. D–10925]

Exemption

Section I—Transactions

The restrictions of section 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act, section 8477(c)(2)(A) and (B) of FERSA, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to:

(a) The lending of securities to:

- (1) Barclays Capital Inc., its successors or affiliates (BC NY);
- (2) Barclays Capital Securities Limited, its successors or affiliates (BC UK);
- (3) Barclays Global Investors Services, its successors or affiliates (BGIS);
- (4) Barclays Global Investors Services Canada Limited, its successors or affiliates (BGIS Canada); and
- (5) Any future affiliate of BGI,⁶ subject to the regulatory requirements applicable to BC NY, BC UK, BGIS and/or BGIS Canada (individually, “Borrower” and collectively, “Borrowers”), which are domestic or foreign broker-dealers, by employee benefit plans, including commingled investment funds holding plan assets (the Client Plans or Plans),⁷ for which BGI, an affiliate of the proposed Borrowers, acts as securities lending agent or subagent⁸ and also may serve as trustee, custodian or investment manager of securities being lent; and

⁶ Any reference to BGI shall be deemed to include any successors thereto.

⁷ The common and collective trust funds trustee, custodied, and/or managed by BGI, and in which Client Plans invest, are referred to herein as “Commingled Funds.” The Client Plan separate accounts trustee, custodied, and/or managed by BGI are referred to herein as “Separate Accounts.” Commingled Funds and Separate Accounts are collectively referred to herein as “Lender” or “Lenders.”

⁸ BGI may be retained by primary securities lending agents to provide securities lending services in a sub-agent capacity with respect to portfolio securities of clients of such primary securities lending agents. As a securities lending sub-agent, BGI’s role parallels that under the lending transactions for which BGI acts as a primary securities lending agent on behalf of its clients. References to BGI’s performance of services as securities lending agent should be deemed to include its parallel performance as a securities lending sub-agent and references to the Client Plans should be deemed to include those plans for which BGI is acting as a sub-agent with respect to securities lending, unless otherwise specifically indicated or by the context of the reference.

(b) The receipt of compensation by BGI in connection with these transactions.

Section II—Conditions

Section I of this exemption applies only if the conditions of Section II are satisfied. For purposes of this exemption, any requirement that the approving fiduciary be independent of BGI or the Borrower shall not apply in the case of a Barclays Plan invested in a Commingled Fund, provided that at all times, the holdings of all Barclays Plans in the aggregate comprise less than 10% of the assets of the Commingled Fund.

(a) For each Client Plan, neither BGI nor any affiliate (except as expressly permitted herein) has or exercises discretionary authority or control with respect to the investment of the assets of Client Plans involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets, including decisions concerning a Client Plan’s acquisition or disposition of securities available for loan.

This paragraph (a) will be deemed satisfied notwithstanding that BGI exercises discretionary authority or control or renders investment advice in connection with an Index Fund or Model-Driven Fund managed by BGI in which Client Plans invest.

(b) Any arrangement for BGI to lend securities is approved in advance by a Plan fiduciary who is independent of BGI (the Independent Fiduciary).

(c) The specific terms of the securities loan agreement (the Loan Agreement) are negotiated by BGI which acts as a liaison between the Lender and the Borrower to facilitate the securities lending transaction. In the case of a Separate Account, the Independent Fiduciary of a Client Plan approves the general terms of the Loan Agreement between the Client Plan and the Borrower as well as any material change in such Loan Agreement. In the case of a Commingled Fund, approval is pursuant to the procedure described in paragraph (i), below.

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

(e) A Client Plan, in the case of a Separate Account, may terminate the lending agency or sub-agency arrangement at any time, without penalty, on five business days notice. A Client Plan in the case of a Commingled Fund may terminate its participation in the lending arrangement by terminating

its investment in the Commingled Fund no later than 35 days after the notice of termination of participation is received, without penalty to the Plan, in accordance with the terms of the Commingled Fund. Upon termination, the Borrowers will transfer securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Separate Account or, if the Plan's withdrawal necessitates a return of securities, to the Commingled Fund, within:

(1) The customary delivery period for such securities;

(2) Five business days; or

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

(f) The Separate Account, Commingled Fund or another custodian designated to act on behalf of the Client Plan, receives from each Borrower (either by physical delivery, book entry in a securities depository located in the United States, wire transfer or similar means) by the close of business on or before the day the loaned securities are delivered to the Borrower, collateral consisting of U.S. currency, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank, other than Barclays Bank PLC (Barclays) (or any subsequent parent corporation of BGI, BC NY, BC UK, BGIS and BGIS Canada) or an affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption 81-6 (46 FR 7527, January 23, 1981) (PTE 81-6) (as it may be amended or superseded) (collectively, the Collateral). The Collateral will be held on behalf of a Client Plan in a depository account separate from the Borrower.

(g) The market value (or in the case of a letter of credit, a stated amount) of the Collateral on the close of business on the day preceding the day of the loan is initially at least 102 percent of the market value of the loaned securities. The applicable Loan Agreement gives the Separate Account or the Commingled Fund in which the Client Plan has invested a continuing security interest in and a lien on or title to the Collateral. The level of the Collateral is monitored daily by BGI. If the market value of the Collateral, on the close of trading on a business day, is less than 100 percent of the market value of the loaned securities at the close of business on that day, the Borrower is required to

deliver, by the close of business on the next day, sufficient additional Collateral such that the market value of the Collateral will again equal 102 percent.

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

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

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

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

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

(j) In return for lending securities, the Lender either—

(1) Receives a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan; or

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

(k) Except as otherwise expressly provided herein, all procedures regarding the securities lending activities will, at a minimum, conform to the applicable provisions of PTE 81-6 and Prohibited Transaction Exemption 82-63 (46 FR 14804, April 6, 1982) (PTE 82-63), both as amended or superseded, as well as to applicable securities laws of the United States, the United Kingdom and Canada.

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

properly indemnify the Client Plan. The Borrower's indemnification will enable the Client Plan to collect on any indemnification from a U.S.-domiciled BGI affiliate.

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

(n) Prior to any Client Plan's approval of the lending of its securities to any Borrower, a copy of this exemption and the notice of proposed exemption (67 FR 9082, February 27, 2002) (the Notice) is provided to the Client Plan.

(o) The Independent Fiduciary of each Client Plan that is invested in a Separate Account is provided with (including by electronic means) quarterly reports with respect to the securities lending transactions, including but not limited to, the information described in Representation 24 of the Summary of Facts and Representations of the Notice, so that the Independent Fiduciary may monitor such transactions with the Borrower. The Independent Fiduciary of a Client Plan invested in a Commingled Fund is provided with (including by electronic means) quarterly reports with respect to the securities lending transactions, including but not limited to, the information described in Representation 24 of the Summary of Facts and Representations of the Notice, so that the Independent Fiduciary may monitor such transactions with the Borrower. BGI may, in lieu of providing the quarterly reports described in this paragraph (o) to each Independent Fiduciary of a Client Plan invested in a Commingled Fund, provide such Independent Fiduciary with the certification of an auditor selected by BGI who is independent of BGI (but who may or may not be independent of the Client Plan) that the loans appear no less favorable to the Lender than the pricing established in the schedule described in Representation 16 of the Notice. Where the Independent Fiduciary of a Client Plan invested in a Commingled Fund is provided the certification of an auditor, such Independent Fiduciary shall be entitled to receive the quarterly reports upon request.

(p) Only Client 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 Client Plans which are maintained by the same

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

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

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

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

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

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

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

(1) The foreign Borrower is registered as a broker-dealer subject to regulation by the Securities and Futures Authority of the United Kingdom (the SFA) or the Ontario Securities Commission of Ontario, Canada (the OSC);

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

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

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

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

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

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

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

(D) Agrees that enforcement by a Client Plan of the indemnity provided by the foreign Borrower may occur in the United States courts.

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

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

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

examination as required below by paragraph (t)(1).

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

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

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

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

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

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

Section III—Definitions

(a) *Barclays Plan*: An ERISA covered employee benefit plan sponsored and maintained by BGI and/or an affiliate for its own employees.

(b) *Index Fund*: Any investment fund, account or portfolio sponsored, maintained, trustee or managed by BGI or an affiliate, in which one or more investors invest, and—

(1) Which is designed to track the rate of return, risk profile and other characteristics of an Index by either (i) replicating the same combination of securities which compose such Index or (ii) sampling the securities which compose such Index based on objective criteria and data;

(2) For which BGI or its affiliate does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That contains “plan assets” subject to the Act, pursuant to the Department’s Plan Asset Regulation; and,

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund which is intended to benefit BGI or its affiliate or any party in which BGI or its affiliate may have an interest.

(c) *Model-Driven Fund*: Any investment fund, account or portfolio sponsored, maintained, trustee or managed by BGI or an affiliate, in which one or more investors invest, and—

(1) Which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third-party data, not within the control of BGI or an affiliate, to transform an Index;

(2) Which contains “plan assets” subject to the Act, pursuant to the Department’s Plan Asset Regulation; and

(3) That involves no agreement, arrangement or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria which is intended to benefit BGI, any affiliate of BGI, or any party in which BGI or any affiliate may have an interest.

(d) *Index*: a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) The organization creating and maintaining the index is—

(A) Engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients,

(B) A publisher of financial news or information, or

(C) A public stock exchange or association of securities dealers;

(2) The index is created and maintained by an organization independent of Barclays; and

(3) The index is a generally accepted standardized index of securities which is not specifically tailored for the use of BGI.

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 February 27, 2002 at 67 FR 9082.

Written Comments

The Department received two comment letters, both submitted by the applicants, with respect to the Notice. In the comment letters, the applicants requested several changes to the proposed exemption.

The applicants requested that the Department amend section II(l) concerning the requirement for indemnification of a Client Plan in the event of a default by the Borrower, to make it conform to other recent exemptions issued by the Department.⁹

⁹For example, see Prohibited Transaction Exemption (PTE) 99–50, 65 FR 534 (January 5, 2000), regarding Bankers Trust Company; and PTE 2001–41, 66 FR 53449 (October 22, 2001), regarding

The Department has amended section II(l) accordingly.

The applicants also requested that the Department amend section II(l) to state that indemnification would be provided only by the Borrower of securities and not by BGI, as lending agent. The applicants’ position is that the proper indemnitor is the Borrower of the securities. The applicants noted that, in the case of a foreign Borrower, the exemption would require the Borrower to agree to submit to the jurisdiction of the United States and that any enforcement of the indemnity would occur in the United States courts. The Department concurs with the applicants’ request provided that the Client Plans would not have to sue overseas to enforce any judgment obtained. The language of section II(l) has been revised to clarify that the indemnification provided by the Borrower must permit the Client Plan to collect on any indemnification from a U.S.-domiciled BGI affiliate. The language of section II(r)(5)(D) likewise has been revised to reflect that indemnification would be provided by the Borrower.

The applicants additionally requested a change to the independent audit requirement in section II(o). The applicants requested relief similar to that sought by Deutsche Bank AG (Deutsche Bank) in its comment with respect to Exemption Application No. D–10924. Deutsche Bank stated that the requirement that the Independent Fiduciary of each Client Plan be provided with the certification of an independent auditor, in addition to quarterly reports for securities lending transactions, would be duplicative and administratively burdensome for Deutsche Bank with respect to Client Plans invested in Separate Accounts. The Department concurred with Deutsche Bank’s comment and modified section II(o) of the final exemption granted to Deutsche Bank. Accordingly, the Department has determined to modify section II(o) of this exemption as well.

As modified, section II(o) permits BGI to provide an Independent Fiduciary of a Client Plan invested in a Separate Account only with quarterly reports. In addition, the Independent Fiduciary of each Client Plan invested in a Commingled Fund can be provided with the certification of an independent auditor in lieu of the provision of quarterly reports. However, as indicated in the Notice, such Independent

Fiduciaries would be entitled to receive the quarterly reports upon request.

Finally, BGI requested that the proposed exemption be amended and expanded to include a new affiliate, Barclays Global Investors Services Canada Limited (BGIS Canada), as an additional Borrower.

In this regard, BGI requested that the following be added to Item 1 of the Summary of Facts and Representations of the Notice with regard to BGIS Canada:

BGIS Canada is a broker-dealer located in Toronto, Ontario, Canada. BGIS Canada is subject to regulation in Canada by the Ontario Securities Commission (OSC) and the oversight of the Investment Dealers Association (IDA). BGIS Canada anticipates that in the future it will borrow securities in the ordinary course of its business.

BGI also requested the following representation be added to Item 27 of the Summary of Facts and Representations of the Notice:

BGIS Canada is subject to regulation in Canada by the OSC and the oversight of the IDA, a self-regulatory organization, and is, therefore, authorized to conduct an investment banking business in and from Canada as a broker-dealer. The applicants note that the Department has previously concluded, in connection with PTE 99-04 issued to Salomon Smith Barney, Inc. that the regulatory scheme applicable to broker-dealers in Canada is sufficiently similar to the regulatory scheme applicable to broker-dealers in the United States. The applicants make the following representation, substantially similar to the representation set forth in paragraph (2) of the Summary of Facts and Representations of the published application number D-10288 (63 FR 53703, October 6, 1998) submitted to the Department by Salomon Brothers, Inc. and granted to Salomon Smith Barney, Inc. as PTE 99-04.

The applicants represent that BGIS Canada is subject to regulation by the OSC, a Canadian governmental agency and the oversight of the IDA, which oversees BGIS Canada's operation on a day to day basis and monitors compliance with capital adequacy and record keeping requirements on a regular basis. The applicants further represent that registration of BGIS Canada with the OSC addresses regulatory concerns similar to those concerns addressed by registration of a broker-dealer with the SEC under the 1934 Act. The rules and regulations set forth by the OSC and the SEC share a common objective: the protection of the investor by the regulation of securities markets. Canada 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 counterparties. All such records must be produced at the request of the OSC or IDA at any time. The OSC's registration requirements for broker-dealers

are enforced by fines and penalties and thus constitute a comprehensive disciplinary system for the violation of such rules.

BGI further requests that the Department amend the first two sentences of Item 28 of the Summary of Facts and Representations of the Notice to read as follows:

In addition to the protections afforded by registration with the SFA or the OSC, as applicable, the applicants represent that BC UK and BGIS Canada will comply with the applicable provisions of Rule 15a-6 (described below). The applicants represent that compliance by BC UK and BGIS Canada with the requirements of Rule 15a-6 will offer additional protections in lieu of registration with the SEC.

Finally, BGI requests that the Department reference BGIS Canada in the following sections of the proposed exemption: section II(a), section II(f), (k) and (r) and Items 1, 3, 12, 20, 21 and 29(e) and (g) of the Summary of Facts and Representations of the Notice. BGI states that in most cases this involves only the addition of "BGIS Canada" to the text. However, BGI requests that section II(r)(1) be amended to read as follows:

The foreign Borrower is registered as a broker-dealer subject to regulation by the Securities and Futures Authority of the United Kingdom (the SFA) or the Ontario Securities Commission of Ontario, Canada (the OSC);

BGI also requests that the reference to the SFA in Item 29(h) of the Summary of Facts and Representations of the Notice be modified to read "the SFA or the OSC, as applicable."

The Department concurs with BGI's comments with regard to BGIS Canada and has made the requested revisions to the language of the final exemption.

Accordingly, after giving full consideration to the entire record, including the comments, the Department has determined to grant the exemption as modified above. For further information regarding the comments and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10925) the Department is maintaining in this case. The complete application file, as well as the comments and all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington DC 20210.

For Further Information Contact:
Karen Lloyd 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 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) This exemption is 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 this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 18th day of September, 2002.

Ivan Strasfeld,

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

[FR Doc. 02-24136 Filed 9-20-02; 8:45 am]

BILLING CODE 4510-29-P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. RM 2002-1B]

Notice and Recordkeeping for Use of Sound Recordings Under Statutory Licenses

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice requesting written proposals and announcing status conference.
