

**DEPARTMENT OF LABOR****Employee Benefits Security Administration**

[Application No. D-11122]

**Notice of Proposed Individual Exemption To Replace Prohibited Transaction Exemption 97-63 (PTE 97-63) Involving State Street Bank and Trust Company (State Street) Located in Boston, MA****AGENCY:** Employee Benefits Security Administration, Department of Labor.**ACTION:** Notice of proposed individual exemption to replace PTE 97-63.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual exemption which, if granted, would replace PTE 97-63 (62 FR 66689, December 19, 1997). The exemption, as proposed, would permit securities lending transactions between State Street, its United States (U.S.) domiciled affiliates, and certain employee benefit plans (the Client Plan(s)), including commingled investment funds holding plan assets, for which State Street, through any division or U.S. affiliate of State Street or of its parent acts as securities lending agent (or sub-agent). The exemption, as proposed, would also permit receipt of compensation by an U.S. registered introducing broker affiliated with State Street (the Introducing Broker) in connection with an arrangement whereby securities are lent to an unrelated U.S. registered broker-dealer (the Clearing Broker) who in turn lends such securities to clients of the Introducing Broker; provided that certain conditions are satisfied.

In addition, State Street has requested that this exemption incorporate various modifications to specific terms and conditions of PTE 97-63. The replacement of PTE 97-63 will affect the participants and beneficiaries of the Client Plans participating in securities lending transactions and the fiduciaries with respect to such Client Plans.

**EFFECTIVE DATE:** If granted, the exemption will be effective as of the date this notice of proposed exemption (the notice) is published in the **Federal Register**.

**DATES:** Written comments and requests for a public hearing should be received by the Department on or before 45 days from the date of the publication in the **Federal Register** of this notice.

**ADDRESSES:** All written comments and requests for a public hearing (preferably, three copies) should be sent to the

Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Application No. D-11122. The application pertaining to this notice and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Ms. Angelena C. Le Blanc, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone number (202) 693-8540. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of a proposed exemption that would replace PTE 97-63. The proposed exemption has been requested in an application filed on behalf of State Street and its U.S. affiliates (the Applicants), pursuant to section 408(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1, 1995) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this proposed exemption is issued solely by the Department.

PTE 97-63 provides an exemption from certain prohibited transaction restrictions of section 406 of the Act and from the sanctions resulting from the application of section 4975 of the Code, as amended, by reason of section 4975(c)(1) of the Code. Specifically, PTE 97-63 provides relief from the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, for:

(1) The lending of securities to State Street, acting through its Financial Markets Group (FMG) (formerly the Money Market Division of the Capital Markets Area) or acting through any other division or U.S. affiliate of State Street that is a successor to the activities of FMG; and for the lending of securities to any U.S. registered broker-dealer affiliated with State Street (the Affiliated

Broker Dealer(s))<sup>1</sup> by certain Client Plans (the Client Plans or the Client Plan), including commingled investment funds holding plan assets, for which State Street, through its Master Trust Services Division, acts as directed trustee or custodian, and for which State Street, through its Global Securities Lending Division or any other similar division of State Street or U.S. affiliate of State Street or of its parent (collectively, GSL) acts as securities lending agent (or sub-agent), and (2) the receipt of compensation by GSL in connection with such securities lending transactions; provided that certain conditions are satisfied.

The Applicants have confirmed that the representations, as set forth in paragraphs 18, 19, 20, 21, 22, and 23 of the summary of facts and representations of the notice of proposed exemption relating to PTE 97-63 (62 FR 51684, at 51686, October 2, 1997) continue to accurately describe the material terms of the transactions to be consummated, pursuant to this proposed exemption, except that (i) the factual statements contained in the second and third sentences of paragraph 21 related to market conditions at the time, may not be accurate currently and should be deleted, and (ii) the provisions of paragraph 22 that contemplate that an affirmative approval or consent will be given by the Client Plan will be overridden by the negative consent procedure contained in conditions (p) and (q) of this proposed exemption to the extent that the requirements thereof have been satisfied. Accordingly, the Department, hereby, incorporates by reference such representations (as adjusted by the preceding sentence) into the preamble of this proposed exemption.

The proposed exemption would replace PTE 97-63 and expand the relief beyond that already provided, pursuant to PTE 97-63. In this regard, it is represented that one of State Street's Affiliated Broker Dealers proposes to act as a "prime broker" with respect to certain of its clients, including hedge fund clients (the Prime Brokerage Client(s)). As a prime broker, the Affiliated Broker Dealer will provide a wide range of services to its Prime Brokerage Clients, including daily trade reporting, trade break resolution, consolidated position and profit and loss reporting, custodial services, risk analytics, and performance reporting.

Because these Prime Brokerage Clients frequently engage in short sales of securities (*i.e.*, the sale of securities that are not owned by the seller), such

<sup>1</sup> FMG, any division or U.S. affiliate of State Street that becomes a successor to the activities of FMG, and U.S. registered broker-dealers affiliated with State Street (the Affiliated Broker Dealer(s)) are collectively referred to, herein, as the "SSB Group."

clients are often required to borrow the securities needed to engage in such short selling activity. Accordingly, one of the services that the Prime Brokerage Clients seek is the ability to borrow the required securities from their prime broker. This, in turn, frequently causes the prime broker to borrow the required securities on the institutional securities lending market from lenders such as the Client Plans. It is represented that a significant component of the institutional securities lending market consists of the lending of securities to broker-dealers who require such securities in order to meet the short selling needs of their prime brokerage clients.

As noted above, one of State Street's Affiliated Broker Dealers proposes to provide prime brokerage services to its Prime Brokerage Clients. Eventually, this Affiliated Broker Dealer intends to self-clear all of the securities transactions (including the securities borrowing and lending transactions) required of a prime broker. It is represented that, at that time, the Affiliated Broker Dealer anticipates that it will borrow the required securities on the institutional lending market, including borrowing such securities from the Client Plans, pursuant to PTE 97-63.<sup>2</sup>

It is represented that the Affiliated Broker Dealer will not initially have all of the administrative and back-office capability required to perform such self-clearing functions. As a result, until these functions and capabilities are developed, the Affiliated Broker Dealer will limit its role to acting as Introducing Broker for its Prime Brokerage Clients and will utilize a Clearing Broker to actually borrow securities to meet the Prime Brokerage Clients' short selling needs. It is represented that the Clearing Broker will be well-known within the industry as providing complete clearing services for introducing broker-dealers. It is further represented that the provision of such clearing services will be a core focus of such Clearing Broker's business.

It is represented that the Introducing Broker will select the Clearing Broker based on all of the relevant facts and circumstances, including such factors as the Clearing Broker's: (1) Financial stability; (2) ability to execute

effectively the trading activities of the Prime Brokerage Clients; (3) ability to meet such clients' needs for financing of margin transactions; (4) ability to meet such clients' needs to borrow securities to implement short selling strategies; (5) internal systems and controls; (6) reporting capabilities; and (7) credibility within the industry. It is represented that the Clearing Broker will be registered as a broker-dealer under the Security Exchange Act of 1934 and will satisfy all of the Securities Exchange Commission and NASD requirements for clearing brokers. In addition, the Clearing Broker will be required to have net capital at least equal to \$10 million.

As indicated above, it is anticipated that the Clearing Broker will frequently borrow securities to meet the Prime Brokerage Clients' short selling needs. To the extent that it is necessary for the Clearing Broker to borrow securities for this purpose, the Clearing Broker will act as a principal in borrowing the requisite securities from institutional lenders, such as the Client Plans. In this regard, the Applicants have requested relief that encompasses securities lending transactions, as described in PTE 97-63, and also encompasses securities lending transactions between the Client Plans and the Clearing Broker, in situations where an Affiliated Broker Dealer is acting as the Introducing Broker for the Clearing Broker, provided that certain conditions are satisfied.<sup>3</sup>

The Applicants have also requested relief for receipt of compensation by the Introducing Broker in connection with an arrangement with the Clearing Broker. In this regard, it is anticipated that the Introducing Broker will receive consideration from the Clearing Broker based upon the revenue generated by the Clearing Broker through its use of the securities borrowed from the Client Plans. The Applicants have provided the following example of how the cash flow would operate in the context of the interim transition period when both the Clearing Broker and the Introducing Broker are involved in a securities lending transaction covered by this exemption.

*Example:* Assume one of the Introducing Broker's Prime Brokerage Clients desires to borrow a particular security in order to consummate a short

sale. The Prime Brokerage Client contacts the Introducing Broker who, as agent for the Prime Brokerage Client, contacts the Clearing Broker. The Clearing Broker can satisfy the request (*i.e.*, lend the required securities) using: (A) Securities that the Clearing Broker already holds in its own inventory, (B) securities that the Clearing Broker borrows from GSL (*i.e.*, from the Client Plans) pursuant to its securities loan agreement with GSL, or (C) securities that the Clearing Broker borrows from some other securities lender.

Further, assume that the Clearing Broker elects to borrow the securities from GSL, pursuant to this proposed exemption, and that the loan is collateralized with cash. Under the applicable securities loan agreement, GSL will invest the cash collateral and will agree to pay the Clearing Broker a specified rate (the rebate rate) throughout the term of the loan. In turn, the Clearing Broker will loan the securities that it has just borrowed from GSL to the Introducing Broker's Prime Brokerage Client, will receive cash collateral from the Prime Brokerage Client, and will agree to pay the Introducing Broker, as agent for its Prime Brokerage Client, a rebate rate (typically lower than the rebate rate that the Clearing Broker will receive from GSL) with respect to the cash collateral throughout the term of the loan. The Introducing Broker will pay a portion of this rebate rate to its Prime Brokerage Client, retaining the difference as its compensation for serving as the Introducing Broker.

Utilizing hypothetical numbers for illustrative purposes, GSL might agree to pay the Clearing Broker a rebate rate of 200 basis points while the Clearing Broker in turn might pay the Introducing Broker, as agent for its Prime Brokerage Client, a rebate rate of 185 basis points of which the Introducing Broker might retain 5 basis points. Accordingly, if one assumes that GSL earns 250 basis points by investing the cash collateral during the term of the loan, GSL will pay 200 basis points to the Clearing Broker (leaving 50 basis points as the securities lending income to be split between the Client Plan and GSL). The Clearing Broker will, in turn, pay 185 basis points to the Introducing Broker, as agent for its Prime Brokerage Client, with 15 basis points remaining with the Clearing Broker as its compensation. Finally, the Introducing Broker will pay 180 basis points to its Prime Brokerage Client, with 5 basis points remaining with the Introducing Broker as its compensation.

The Applicants believe that the receipt of consideration by the

<sup>2</sup> The Department notes that the proposed exemption, if granted, will replace PTE 97-63. Accordingly, the Applicants must comply with the terms and conditions of this exemption, if granted, in order to obtain relief for securities lending transactions between Client Plans and an Affiliated Broker Dealer, acting as a prime broker for the Prime Brokerage Clients.

<sup>3</sup> The Department, herein, is not providing relief for securities lending transactions engaged in by the Clearing Broker, beyond that available, pursuant to Prohibited Transaction Exemption 81-6 (PTE 81-6) (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) and Prohibited Transaction Exemption 82-63 (PTE 82-63) (47 FR 14804, April 6, 1982); provided the condition of these class exemptions are satisfied.

Introducing Broker from the Clearing Broker could be deemed a prohibited transaction. In this regard, the decision by GSL, acting as a fiduciary of a Client Plan, to lend such securities to the Clearing Broker could be deemed to violate section 406(b) of the Act. Accordingly, the Applicants have requested relief from section 406(a), 406(b)(1), 406(b)(2), and 406(b)(3) of the Act and section 4975(c)(1)(A) through (F) of the Code for the receipt of such compensation paid to the Introducing Broker by the Clearing Broker; provided that certain conditions are satisfied.

The Applicants have also requested that the underlined phrase, below, from the opening paragraph of PTE 97-63, be deleted from the proposed exemption:

The restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the lending of securities to State Street Bank and Trust Company (State Street), acting through its Financial Markets Group (FMG) (formerly the Money Market Division of the Capital Markets Area) or acting through any other division or U.S. affiliate of State Street that is a successor to the activities of FMG; and shall not apply to the lending of securities to any U.S. registered broker-dealers affiliated with State Street (the Affiliated Broker Dealers) by employee benefit plans (the Client Plans or the Client Plan), including commingled investment funds holding plan assets for which State Street, through its Master Trust Services Division (the Trust Division) acts as directed trustee or custodian, and for which State Street, through its Global Securities Lending Division or any other similar division of State Street or U.S. affiliate of State Street or of its parent (collectively, GSL) acts as securities lending agent (or sub-agent); and shall not apply to the receipt of compensation by GSL in connection with the transactions, provided that the following conditions are met.

In this regard, the Applicants have informed the Department that State Street, in most cases, will be either the trustee or the custodian of the Client Plans. However, on occasion GSL may be retained as a securities lending agent by a Client Plan as to which State Street is neither the trustee nor the custodian. The Applicants do not believe that there is any reason to deprive such Client Plans of the opportunity to participate in securities lending transactions for which GSL acts as agent (or sub-agent). Further, the Applicants do not believe that there is any reason to impose the incremental administrative burdens on GSL that would be entailed, if such Client Plans were treated differently from all other securities lending clients in this regard. Accordingly, the Applicants request that the specified

phrase in PTE 97-63 not be included in the language of the proposed exemption in order to provide the flexibility needed to enable a non-trustee, non-custodial Client Plan to lend securities.

In connection with the expansion of PTE 97-63, the Applicants have requested relief which would permit securities lending by certain index funds (the Index Fund(s)) or model-driven funds (the Model-Driven Fund(s)) managed by State Street or one of its divisions or U.S. affiliates. Specifically, the Applicants request that the Department modify Condition (a) of PTE 97-63. In this regard, Condition (a) of PTE 97-63 precludes the lending of securities to the SSB Group, if State Street or any of its divisions or affiliates has or exercises discretionary authority or renders investment advice with respect to the assets being lent. The Applicants have acknowledged that section II(a) in this proposed exemption precludes the lending of securities to either the SSB Group or the Clearing Broker, if State Street, the Clearing Broker, or any affiliate of State Street or the Clearing Broker has discretionary authority or renders investment advice with respect to such securities.

However, the Applicants note that the management of Index Funds and Model-Driven Funds entails a very limited degree of discretionary authority. As a result, the Applicants maintain that the potential for the abuse which Condition (a), as set forth in PTE 97-63, was designed to protect against (*i.e.*, that the investment decisions relating to a portfolio will be influenced by the possibility that the securities in such portfolio will be available for loan to an affiliated borrower) is not present in the context of Index Funds and Model-Driven Funds. Accordingly, the Applicants have requested that the language of section II(a) of this proposed exemption permit the lending of securities by an Index Fund or a Model-Driven Fund, managed by State Street or one of its divisions or U.S. affiliates, to members of the SSB Group or to the Clearing Broker. In this regard, the Applicants submit that it would be in the interest of such Index Funds and Model-Driven Funds to allow such funds to lend securities, as this would increase the securities lending opportunities available to such funds and enable such funds to generate additional securities lending revenue.

In addition, the Applicants request that the proposed exemption incorporate various modifications to specific terms and conditions, as set forth in PTE 97-63, including the following:

1. Modification of the language of Condition (f), as set forth in PTE 97-63, such that any reference to PTE 81-6 and PTE 82-63 also refer to such class exemptions as they may be amended from time to time or, alternatively, refer to any superseding class exemption that may be issued to cover securities lending by employee benefit plans. The Applicants maintain that the request is consistent with the Department's approach taken in Condition (d) of PTE 97-63 with respect to eligible collateral for securities loans.

2. Modification of the language in Condition (g), as set forth in PTE 97-63, to clarify that State Street is not required to indemnify the Client Plans against any potential investment losses associated with the investment of cash collateral received by such Client Plan in connection with securities lending transactions. The Applicants maintain that the request incorporates language previously provided by the Department in an interpretive letter relating to PTE 97-63.<sup>4</sup>

3. Change in the language of Condition (j), as set forth in PTE 97-63, to modify the plan size requirement in a context of master trusts and collective investment funds. In this regard, Condition (j), as set forth in PTE 97-63, provides that only Client Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to the SSB Group. The Applicants note that in recent years the Department, in various class exemptions and individual exemptions, has recognized that the plan size requirement should be adjusted in the case of two or more Client Plans whose assets are commingled for investment purposes in a master trust or collective fund, provided certain conditions are satisfied. Accordingly, the Applicants request that the language in section II(j) of this proposed exemption address master trusts and collective funds in a comparable manner. It is represented that the specific language suggested by the Applicants for this purpose is substantially similar to that found in Prohibited Transaction Exemption 2002-45 (PTE 2002-45) granted to Deutsche Bank AG, as amended.<sup>5</sup>

(4) Modification of the language of Condition (l), as set forth in PTE 97-63, to require quarterly, rather than

<sup>4</sup> Letter from Ivan L. Strasfeld, Director, Office of Exemption Determinations, U.S. Department of Labor, to William A. Schmidt, Esq. and Eric Berger, Esq. (February 27, 2001) (C-9199).

<sup>5</sup> PTE 2002-45; granted (67 FR 59564, September 23, 2002, as corrected, 67 FR 69046, November 14, 2002); proposed (67 FR 9070, February 27, 2002); application no. D-10924.

monthly, reporting. The Applicants maintain that this request is consistent with the approach approved by the Department in PTE 2002-45, and would make the provision of such reports to all Client Plans more administratively feasible.

The Applicants also request the addition of the following conditions to the requirements of this proposed exemption:

(1) A new section II(p) which would permit certain authorizations and approvals required or contemplated by this proposed exemption to be obtained by a negative consent procedure, provided that an initial affirmative authorization and approval was obtained from an independent fiduciary of each Client Plan. In this regard, the Applicants maintain that a requirement that affirmative approval be obtained from the independent fiduciary of each Client Plan for each change in the securities lending program imposes unnecessary administrative burdens. In the opinion of the Applicants, it is appropriate for such subsequent authorizations and approvals to be obtained by means of a procedure whereby each independent fiduciary of a Client Plan receives full disclosure of all of the required information and has a reasonable opportunity to object. Failure by an independent fiduciary to object within a prescribed time period would be deemed to constitute authorization and approval; and

(2) A new section II(q) which would set forth special authorization and approval rules in the context of certain commingled Index Funds and commingled Model-Driven Funds in which Client Plans invest and for which State Street or a U.S. affiliate serves as a trustee, custodian, and/or manager (collectively, the Commingled Index Fund(s) and the Commingled Model-Driven Funds(s)). It is represented that these special rules are appropriate in order to avoid the type of administrative burden and disruption that could result from including a requirement that an independent fiduciary of each Client Plan that participates in a Commingled Index Fund or Commingled Model-Driven Fund must give affirmative authorization or approval before a securities lending program (or a change in such program) can be implemented with respect to such fund.

Further, the Applicants have requested a special rule applicable to any employee benefit plans maintained by State Street (or a U.S. affiliate) for its own employees (the State Street Plan(s)) that participate in a Commingled Index Fund or a Commingled Model-Driven Fund. In this regard, the Applicants

have requested that in the case of a State Street Plan that has invested in a Commingled Index Fund or Commingled Model-Driven Fund, the requirement that the fiduciary be independent shall not apply; provided that at all times the holdings of all State Street Plans invested in such fund in the aggregate comprise less than 10% of the assets of such fund.

In addition, the Applicants have suggested a number of definitions for terms utilized in this proposed exemption. These definitions are set forth in section III of this proposed exemption.

Finally, the Department has determined to include the following conditions to this proposed exemption which provide additional safeguards for the Client Plans:

(1) A new section II(s) and a new section II(t) concerning the requirement that the Applicants establish and maintain certain records for a period of six years; and

(2) A new section II(o) which would require that at least 50% of the dollar value of all securities lending transactions negotiated by GSL be negotiated with borrowers unrelated to both State Street and the Clearing Broker. The language of section II(o), as set forth in this proposed exemption, tracks the language that was included in the Summary of Facts and Representations relating to PTE 97-63 (62 FR 51684, at 51686, October 2, 1997), but which did not appear in the operative language or conditions of PTE 97-63.

It is represented that the proposed exemption would be administratively feasible, because it involves identifiable transactions which will require minimal on-going monitoring by the Department. Specifically, it is represented that any loans of securities made pursuant to this proposed exemption are clearly identifiable and do not raise any issues from the perspective of administrative feasibility that are any different from the issues raised by PTE 97-63. Further, the Applicants maintain that the requested exemption incorporates approaches and concepts that the Department has utilized in other comparable contexts and has determined to be administratively feasible in those contexts.

It is represented that the proposed exemption is in the interest of affected Client Plans, because the ability to lend securities to the Clearing Broker in situations where the Affiliated Broker Dealer is acting as the Introducing Broker will enable the Client Plans to have access to the additional securities lending opportunities generated by the

prime brokerage business of the Introducing Broker. Such additional securities lending opportunities will, in turn, enable the Client Plans to generate additional securities lending revenue.

The proposed exemption is protective of the Client Plans, because it provides all of the same protections for the Client Plans as does PTE 97-63, including, without limitation, the collateral requirement contained in Condition (d) of PTE 97-63 and the indemnity requirement imposed by Condition (g) of PTE 97-63.

In summary, the Applicants represent that the proposed replacement of PTE 97-63 satisfies the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

a. The proposed exemption will be as administratively feasible as PTE 97-63 and will provide all of the same benefits and protections as PTE 97-63;

b. To the extent that securities are lent to the Clearing Broker, the Client Plans will be able to look to the creditworthiness of both the Clearing Broker (as the borrower, pursuant to the terms of the securities loan agreement) and the SSB Group (as indemnitor, pursuant to section II(g) of this proposed exemption);

c. The proposed exemption will benefit Client Plans in that it will enable them to take advantage of additional securities lending opportunities that will be generated by the prime brokerage business of the Affiliated Broker Dealer during any period that the such broker-dealer acts only as an Introducing Broker which, in turn, will permit the Client Plans to generate incremental securities lending revenue; and

d. For each Client Plan, neither the SSB Group, the Clearing Broker, nor any affiliate of the SSB Group or the Clearing Broker will have or exercise discretionary investment authority or control with respect to the investment of the assets of such Client Plan involved in the transaction or render investment advice with respect to such assets, including a Client Plan's acquisition or disposition of securities available for loan, except to the extent that State Street or a division or affiliate of State Street exercises discretionary authority or control or renders investment advice in connection with an Index Fund or Model-Driven Fund in which Client Plans invest.

#### Notice to Interested Persons

Notification of the publication of the notice in the **Federal Register** will be mailed by first class mail to sponsors of the Client Plans who participate in securities lending transactions, as

described herein. Such notification will be given within 15 days of the publication of the notice in the **Federal Register**. The notification will contain a copy of the notice, as published in the **Federal Register**, and a copy of the supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2). The supplemental statement will inform interested persons of their right to comment on and/or to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 45 days of the publication of the notice in the **Federal Register**.

### 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 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 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 require, among other things, a fiduciary to discharge his or her 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 requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

(3) This proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions. 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) This proposed exemption, if granted, is subject to the express condition that the summary of facts and representations, as set forth in this notice, and the summary of facts and representations, as set forth in the notice

of proposed exemption relating to PTE 97-63, accurately describe the material terms of the transactions to be consummated pursuant to this exemption.

### Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption to the address above, within the time frame set forth above, after the publication of this proposed exemption in the **Federal Register**. All comments will be made a part of the record. Comments received will be available for public inspection with the referenced application at the address set forth above.

### Proposed Exemption

Based on the facts and representations set forth in the application, under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990), the Department of Labor (the Department) proposes to replace Prohibited Transaction Exemption 97-63 (PTE 97-63), as set forth below.

#### I. Transactions

(a) The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Employee Retirement Income Security Act of 1974 (the Act) and the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), by reason of 4975(c)(1)(A) through (E) of the Internal Revenue Code of 1986 (the Code),<sup>6</sup> shall not apply to the lending of securities:

(1) To State Street Bank and Trust Company (State Street), acting through its Financial Markets Group (FMG) (formerly the Money Market Division of the Capital Markets Area) or acting through any other division or United States (U.S.) domiciled affiliate, as defined in this exemption in section III(a)(1), below, of State Street that is a successor to the activities of FMG; or

(2) To any U.S. registered broker-dealers affiliated with State Street (the Affiliated Broker Dealer(s));<sup>7</sup> by an employee benefit plan (the Client Plan(s)), including any commingled

<sup>6</sup> For purposes of this exemption, references to specific provisions of title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

<sup>7</sup> FMG, any division or U.S. affiliate of State Street that becomes a successor to the activities of FMG, and the Affiliated Broker Dealers are collectively referred to, herein, as "the SSB Group."

investment fund holding plan assets, for which State Street, through its Global Securities Lending Division or any other similar division of State Street or U.S. affiliate of State Street or of its parent (collectively, GSL) acts as securities lending agent (or sub-agent);<sup>8</sup>

(b) The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of 4975(c)(1)(A) through (E) of the Code, shall not apply to the receipt of compensation by GSL in connection with any securities lending transaction, as described, above, in section I(a) of this exemption; and

(c) The restrictions of section 406 of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of 4975(c)(1) of the Code shall not apply to an arrangement whereby a U.S. registered broker-dealer affiliated with State Street (the Introducing Broker) receives compensation from the Clearing Broker in connection with, or as a direct or indirect result of, the lending of securities to the Clearing Broker by an employee benefit plan for which GSL acts as securities lending agent; provided that the conditions, set forth in section II, below, are satisfied.

#### II. Conditions

Section I of this exemption applies only if the conditions of section II of this exemption are satisfied.

(a) Neither State Street, the SSB Group, GSL, the Clearing Broker, nor any other division or U.S. affiliate of State Street or of the Clearing Broker has or exercises discretionary authority or control with respect to the investment of the assets of Client Plans involved in the transactions which are the subject of this exemption (other than with respect to the investment of cash collateral after securities have been loaned and collateral received), nor renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to such assets, including decisions concerning the acquisition or disposition of securities available for loan by a Client Plan.

Section II(a) of this exemption will be deemed satisfied notwithstanding the fact that State Street or any division or

<sup>8</sup> For the sake of simplicity, future references to GSL's performance of services as securities lending agent should be deemed to include its parallel performance as securities lending sub-agent, and references to Client Plans should be deemed to refer to plans for which GSL is acting as sub-agent with respect to securities lending activities, unless otherwise indicated specifically or by the context of reference.

affiliate of State Street has or exercises discretionary authority or control or renders investment advice in connection with an index fund (the Index Fund(s)), as defined, below, in section III(d) of this exemption, or a model-driven fund (the Model-Driven Fund(s)), as defined, below, in section III(e) of this exemption, managed by State Street or any division or U.S. affiliate of State Street in which Client Plans invest. An Index Fund or a Model-Driven Fund with multiple Client Plan investors is referred to herein as a commingled Index Fund or a commingled Model-Driven Fund (the Commingled Index Fund(s) or the Commingled Model-Driven Fund(s));

(b) Except as otherwise provided, below, in section II(q) of this exemption with respect to Commingled Index Funds or Commingled Model-Driven Funds, before a Client Plan participates in a securities lending program, and before any loan of securities to the SSB Group or the Clearing Broker is effected, pursuant to this exemption, the fiduciary of the plan who is independent of State Street, GSL, the SSB Group, the Clearing Broker, and any other division or affiliate of State Street or the Clearing Broker must have:

(1) Authorized and approved the securities lending authorization agreement with GSL (the Agency Agreement), where GSL is acting as the direct securities lending agent; or

(2) Authorized and approved the primary securities lending authorization agreement (the Primary Lending Agreement) with the primary lending agent, where GSL is lending securities under a sub-agency arrangement with the primary lending agent;<sup>9</sup> and

(3) Approved the general terms of the securities loan agreement (the Loan Agreement) between the plan and the SSB Group or the Clearing Broker, as applicable, the specific terms of which are negotiated and entered into by GSL;

(c)(1) Each Client Plan may terminate the Agency Agreement or the Primary Lending Agreement at any time, without penalty to such Client Plan, on five business days notice, whereupon the borrower shall deliver certificates for 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 Client

Plan within: (A) The customary delivery period for such securities, (B) five business days, or (C) the time negotiated for such delivery by the Client Plan and the borrower, whichever is lesser. With respect to a Commingled Index Fund or a Commingled Model-Driven Fund in which a Client Plan invests, termination is pursuant to the procedure, as set forth, below, in section II(q) of this exemption;

(2) If any event of default occurs (e.g., a loan is terminated and the borrower fails to return the borrowed securities or the equivalent thereof within the time described, above, in section II(c)(1) of this exemption), to the extent that (A) liquidation of the pledged collateral, or (B) additional cash received from the SSB Group or the Clearing Broker, as applicable, does not provide sufficient funds on a timely basis, a Client Plan, including a Commingled Index Fund or a Commingled Model-Driven Fund in which a Client Plan invests, will have the right under the terms of the Loan Agreement to purchase securities identical to the borrowed securities (or their equivalent as discussed above) and may apply the collateral to the payment of the purchase price, any other obligations of the borrower under the agreement, and any expenses associated with the sale and/or purchase. If the collateral is insufficient to accomplish such purchase, State Street will indemnify the Client Plan, including a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, pursuant to section II(g) of this exemption;

(d) Each Client Plan or Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan invests will receive from the SSB Group or the Clearing Broker, as applicable, (either by physical delivery, or by book entry in a securities depository, wire transfer or similar means) by the close of business on or before the day the loaned securities are delivered to the SSB Group or the Clearing Broker, as applicable, collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, an irrevocable bank letter of credit issued by a person other than State Street, the Clearing Broker, or an affiliate thereof, or any combination thereof, or other collateral permitted under PTE 81-6 (as amended from time to time or, alternatively, any superseding class exemption that may be issued to cover securities lending by employee benefit plans). The collateral will be held on behalf of a Client Plan in a manner that causes such collateral to be (i) segregated from and not commingled

with the general assets of State Street, the Clearing Broker, or any of their affiliates, and (ii) identifiable and reachable by such Client Plan;

(e) The market value of the collateral (or in the case of a letter of credit the stated amount) must, as of the close of business on the preceding business day, initially equal at least 102 percent (102%) of the market value of the loaned securities. If the market value of the collateral, on the close of trading on a business day, is less than 100 percent (100%) (or such greater percentage as agreed to by the parties) of the market value of the loaned securities at the close of business on that day, the SSB Group or the Clearing Broker, as applicable, is required to deliver by the close of business on the following day sufficient additional collateral such that the market value of the collateral will again equal at least 102 percent (102%). The applicable Loan Agreement will give Client Plans or a Commingled Index Fund or Commingled Model-Driven Funds in which a Client Plan invests a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral and a lien on the collateral. GSL will monitor the level of the collateral daily;

(f) All GSL's procedures regarding securities lending activities will at a minimum conform to PTE 81-6 and PTE 82-63 (as amended from time to time or, alternatively, any superseding class exemption that may be issued to cover securities lending by employee benefit plans);

(g) State Street will agree to indemnify and hold harmless each lending Client Plan (including the sponsor and fiduciaries of each Client Plan) and any Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund against any and all damages, losses, liabilities, costs, and expenses (including attorneys' fees) which such plans may incur or suffer directly arising out of the lending of the securities to the SSB Group or the Clearing Broker, as applicable; provided that this condition does not require State Street to indemnify a plan against any potential investment losses associated with the investment of cash collateral received by such Client Plan (or by such Commingled Index Fund or Commingled Model-Driven Fund) in connection with such securities lending transactions;

(h) Each Client Plan, including a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan invests, will receive the equivalent of all distributions made to holders of the borrowed securities during the term of any loan, including,

<sup>9</sup> The Department, herein, is not providing relief for securities lending transactions engaged in by primary lending agents, other than GSL, beyond that provided, pursuant to Prohibited Transaction Exemption 81-6 (PTE 81-6) (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) and Prohibited Transaction Exemption 82-63 (PTE 82-63) (47 FR 14804, April 6, 1982).

but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities, or other distributions;

(i) Each Client Plan, including a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, will receive prior to any approval of the lending of securities to the SSB Group or the Clearing Broker, as applicable, a copy of this notice of proposed exemption (the notice), a copy of the final exemption, if granted, a copy of PTE 97-63, and a copy of the notice of proposed exemption related to PTE 97-63 (the previous notice);

(j) Only Client Plans with total assets having an aggregate market value of at least \$50 million will be permitted to lend securities to the SSB Group or to the Clearing Broker, as applicable; 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 a securities lending arrangement with GSL, 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 a securities lending arrangement with GSL, 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 Client Plan or an employee organization whose members are covered by such Client 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.

(3) In the case of two or more Client Plans whose assets are commingled for investment purposes in an entity, whether or not through an entity described, above, in section II(j)(1) or (j)(2) of this exemption, the \$50 million requirement shall be deemed satisfied if 50 percent (50%) or more of the units of beneficial interest in such entity are held by investors each having total net assets of at least \$50 million. Such investors may include Client Plans, entities described, above, in section II(j)(1) or (j)(2) of this exemption, or other investors that are not employee benefit plans covered by section 406 of the Act, or section 4975 of the Code.

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

(k) The terms of each loan of securities by a Client Plan or by a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan invests to the SSB Group or the Clearing Broker, as applicable, will be at least as favorable to the plan as those of a comparable arm's-length transaction between unrelated parties;

(l) Each Client Plan, including a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, will receive quarterly reports with respect to the securities lending transactions which are the subject of this exemption, including but not limited to the information described in paragraph 26 of the previous notice, so that an independent fiduciary of the plan may monitor the securities lending transactions with the SSB Group and, if applicable, the Clearing Broker. In the event the identity of the Clearing Broker has changed since the issuance of the report for the immediately preceding calendar quarter, the report for the current calendar quarter must contain name of the new Clearing Broker and the most recently available audited and unaudited financial statements of such Clearing Broker;

(m) Except in the case of a Commingled Index Fund or Commingled Model-Driven Fund subject to the requirements, as set forth, below, in section II(q) of this exemption, before entering into the Loan Agreement and before a Client Plan lends any securities to the SSB Group or to the Clearing Broker, as applicable, an independent fiduciary of the Client Plan will receive sufficient information, concerning the financial condition of State Street and, if applicable, the Clearing Broker, including but not limited to the most recently available audited and unaudited financial statements of State Street's parent corporation and, if applicable, the Clearing Broker. In the event of a change in the identity of the Clearing Broker, the name of such Clearing Broker and the information required by this section (m) with respect to the new Clearing Broker must be provided to the independent fiduciary of the Client Plan before such Client Plan lends any securities to the new Clearing Broker;

(n) Except in the case of a Commingled Index Fund or Commingled Model-Driven Fund subject to the requirements, as set forth, below, in section II(q) of this exemption, the SSB Group and, if applicable, the Clearing Broker, will provide to a Client Plan prompt notice at the time of each loan by such plan of any material adverse changes in State Street's and, if applicable, the Clearing Broker's financial condition, since the date of the most recently furnished financial statements.

If any such material adverse changes have taken place, GSL will not make any further loans to the Affiliated Broker Dealers and, if applicable, the Clearing Broker, unless an independent fiduciary of the Client Plan is provided notice of the material change and approves the continuation of the lending arrangement in view of the changed financial condition.

If the independent fiduciary of a Client Plan not invested in a Commingled Index Fund or Commingled Model-Driven Fund objects to any material adverse change, as disclosed pursuant to section II(n) of this exemption, such plan may terminate its participating in the Agency Agreement or the Primary Lending Agreement, without penalty to such plan, pursuant to section II(c), above, of this exemption. In the case of a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, termination is pursuant to the procedure described, below, in section II(q)(2), of this exemption;

(o) With respect to any calendar quarter, at least 50 percent (50%) or more of the outstanding dollar value of securities loans negotiated on behalf of all securities lending clients of GSL will be to borrowers unrelated to both State Street and the Clearing Broker;

(p) If an independent fiduciary of a Client Plan has given the initial affirmative authorization and approval for such plan to engage in securities lending transactions, pursuant to the terms of PTE 97-63, or pursuant to section II(b), above, of this exemption, then any subsequent authorization or approval contemplated under this exemption shall be deemed to have been given, if such independent fiduciary has not objected in writing to GSL within 30 days following disclosure to the independent fiduciary of all material information required in connection with said authorization or approval, a statement apprizing the independent fiduciary that PTE 97-63 has been replaced by this exemption, and a copy of this notice, and a copy of the final exemption, if granted;

(q) In the case of a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan invests:

(1) The requirement, as set forth, above, in section II(b) of this exemption, shall not apply, provided that the information described in sections II(b), II(i), and II(m), above, of this exemption, including a description of the proposed securities lending arrangement, shall be furnished by GSL to a fiduciary who is independent of State Street, GSL, the SSB Group, the Clearing Broker, and any other division or affiliate of State Street or the Clearing Broker with respect to each Client Plan whose assets are invested in the Commingled Index Fund or Commingled Model-Driven Fund, not less than 30 days prior to implementation of any such securities lending arrangement, or any material changes thereto, and, thereafter, upon the reasonable request of the independent fiduciary of a Client Plan whose assets are invested in a Commingled Index Fund or Commingled Model-Driven Fund.

In the event of a material adverse change in the financial condition of the SSB Group, or the Clearing Broker, as applicable, GSL will make a decision, using the same standards of credit analysis GSL would use in evaluating unrelated borrowers, whether to terminate existing loans and whether to continue making additional loans to the SSB Group, or the Clearing Broker, as applicable.

For purposes of section II(q) of this exemption, any requirement that the fiduciary be independent of State Street

and its affiliates shall not apply in the case of an employee benefit plan sponsored and maintained by State Street and/or an affiliate for its own employees (the State Street Plan(s)), as defined, below, in section III(c) of this exemption; provided such plan is invested in a Commingled Index Fund or Commingled Model-Driven Fund, and provided further that at all times the value of the aggregate holdings of all State Street Plans in such fund comprises less than 10% of the value of the total assets of such fund;

(2) In the event that the independent fiduciary of a Client Plan whose assets are invested in the Commingled Index Fund or Commingled Model-Driven Fund submits a notice in writing within 30 days after receipt of notification of implementation of any such securities lending arrangement, or any material changes thereto, to GSL, as securities lending agent to the Commingled Index Fund or Commingled Model-Driven Fund, objecting to the implementation of, material change in, or continuation of the securities lending arrangement, the Client Plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the Commingled Index Fund or Commingled Model-Driven Fund, without penalty to such Client Plan, no later than 35 days after the notice of withdrawal is received.

In the case of a Client Plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the securities lending arrangement; but an existing securities lending arrangement need not be discontinued by reason of such Client Plan electing to withdraw. If a Client Plan's withdrawal necessitates a return of securities to the Commingled Index Fund or Commingled Model-Driven Fund, the SSB Group or the Clearing Broker, as applicable, will transfer securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, or merger of the issuer of the borrowed securities) to the Commingled Index Fund or Commingled Model-Driven Fund within:

(A) The customary delivery period for such securities;

(B) Five business days; or

(C) The time negotiated for such delivery by GSL, as lending agent to the Commingled Index Fund or Commingled Model-Driven Fund, and the SSB Group or Clearing Broker, as applicable, whichever is least; and

(3) In the case of a Client Plan whose assets are proposed to be invested in a Commingled Index Fund or

Commingled Model-Driven Fund subsequent to the implementation of the securities lending arrangement, the Client Plan's investment in a Commingled Index Fund or Commingled Model-Driven Fund shall be authorized in the manner described, above, in section II(b) of this exemption;

(4) The provisions of section II(q) of this exemption shall not apply to a Commingled Index Fund or Commingled Model-Driven Fund, if more than 10% of the ownership interests in such fund are held by State Street Plans;

(5) In the case of a Commingled Index Fund or Commingled Model-Driven Fund subject to the requirements of section II(q) of this exemption, GSL will furnish upon reasonable request to the independent fiduciary of any Client Plan invested in such fund,<sup>10</sup> the most recently available audited and unaudited financial statements of the parent corporation of State Street and, if applicable, the Clearing Broker (or any new Clearing Broker) prior to the authorization of the securities lending program, and annually after such authorization;

(r) In return for lending securities, a Client Plan, including a Client Plan invested in a Commingled Index Fund or Commingled Model-Driven Fund, 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, such plan may pay a loan rebate or similar fee to the SSB Group or the Clearing Broker, as applicable, if such fee is not greater than the fee such plan would pay in a comparable arm's length transaction with an unrelated party);

(s) State Street and/or its affiliates maintain, or cause to be maintained, within the United States for a period of six years from the date of each transaction which is subject to this exemption, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described, below, in section II(t)(1), to determine whether the conditions of

<sup>10</sup> The Department notes that it is the responsibility of the independent fiduciary for the Client Plan to periodically monitor any material changes in the securities lending program, including but not limited to a change in the Clearing Broker or in the Clearing Broker's financial status, that may occur after an initial authorization to participate in the program, pursuant to this exemption.

this exemption have been met, except that—

(1) This record-keeping condition shall not be violated if, due to circumstances beyond the control of State Street 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 State Street and its affiliates shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by section II(t)(1) of this exemption; and

(t)(1) Except as provided in section II(t)(2), below, of this exemption and notwithstanding any provisions of sections (a)(2) and (b) of section 504 of the Act, the records referred to in section II(s) of this exemption 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, a State Street Plan, or any duly authorized representative of such fiduciary;

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

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

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

### III. Definitions

For purposes of this proposed exemption, the following definition shall apply:

(a) The term, “affiliate” or “affiliates,” means:

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

(2) Any officer, director, employee, or partner in any such person; and

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

(b) The term, “control,” means the power to exercise a controlling influence over the management or

policies of a person other than an individual;

(c) The term, “State Street Plan(s),” refer to employee benefit plans covered by the Act sponsored and maintained by State Street and/or an affiliate for its own employees;

(d) The term, “Index Fund(s),” refers to any investment fund, account or portfolio sponsored, maintained, trustee, or managed by State Street or a U.S. 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, as defined, below, in section III(f) of this exemption, by either:

(A) Replicating the same combination of securities which compose such Index, or

(B) Sampling the securities which compose such Index based on objective criteria and data;

(2) For which State Street 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 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 State Street or its affiliate or any party in which State Street or its affiliate may have an interest;

(e) The term, “Model-Driven Fund(s),” refers to any investment fund, account or portfolio sponsored, maintained, trustee, or managed by State Street or a U.S. 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 State Street or an affiliate, to transform an Index;

(2) Which contains “plan assets” subject to the Act, pursuant to the 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 State Street, any affiliate of State Street, or any party in which State Street or any affiliate may have an interest;

(f) The term, “Index,” refers to 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 State Street; and

(3) The index is a generally accepted standardized index of securities which is not specifically tailored for the use of State Street; and

(g) The term, “Clearing Broker,” means a U.S. broker-dealer registered under the Securities Exchange Act of 1934 that is unrelated to State Street, that has net capital equal to at least \$10 million and that regularly serves as a clearing broker for introducing brokers in the ordinary course of its business, but only in the context, and to the extent, of its service as a clearing broker for an Affiliated Broker Dealer that is acting as introducing broker.

For a complete statement of the facts and representations supporting the Department’s decision to grant PTE 97–63, refer to the proposed exemption and the grant notice that are cited above.

Signed in Washington, DC, this 3rd day of February, 2003.

**Ivan L. Strasfeld,**

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

[FR Doc. 03–2962 Filed 2–5–03; 8:45 am]

**BILLING CODE 4510–29–P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. D–11059]

#### Notice of Proposed Individual Exemption To Replace Prohibited Transaction Exemptions (PTEs) 81–56, 85–19 and 89–5 Involving the Truman Arnold Companies Retirement Plan and Trust (the Plan) Located in Texarkana, TX

**AGENCY:** Employee Benefits Security Administration, Department of Labor.

**ACTION:** Notice of proposed individual exemption to replace PTEs 81–56, 85–19 and 89–5.

**SUMMARY:** This document contains a notice of pendency before the