

**DEPARTMENT OF LABOR****Office of the Secretary****Submission for OMB Review;  
Comment Request**

March 17, 2003.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation contact Darrin King at (202) 693-4129 or by E-Mail [King.Darrin@dol.gov](mailto:King.Darrin@dol.gov).

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer VETS, Office of Management and Budget, Room 10235, Washington, DC 20503 ((202) 395-7316), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- \* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- \* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- \* Enhance the quality, utility, and clarity of the information to be collected; and

- \* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* Veterans' Employment and Training Service (VETS).

*Type of Review:* Extension of a currently approved collection.

*Title:* Federal Contractor Veterans' Employment Report VETS-100.

*OMB Number:* 1293-0005.

*Affected Public:* Business or other for-profit and Not-for-profit institutions.

*Frequency:* Annually.

*Number of Respondents:* 187,755.

*Number of Annual Responses:*

187,755.

*Estimated Time Per Response:* 45 minutes.

*Total Burden Hours:* 140,816.

*Total Annualized Capital/Startup Costs:* \$0.

*Total Annual Costs (operating/maintaining systems or purchasing services):* \$0.

*Description:* The Federal Contractor Veterans' Employment Report VETS-100, administered by the U.S.

Department of Labor, is used to facilitate Federal contractor and subcontractor reporting of their employment and new hiring activity. Title 38 U.S.C., section 4212 (d) requires the collection of information from entities holding contracts of \$25,000 or more with Federal departments or agencies to report annually on (a) the number of current employees in each job category and at each hiring location who are special disabled veterans, the number who are veterans of the Vietnam era and the number who are other veterans who served on active duty during a war or a campaign or expedition for which a campaign badge has been authorized; (b) the total number of employees hired during the report period and of those, the number of special disabled, the number who are veterans; and the maximum and minimum number of employees employed by the contractor at each hiring location.

**Darrin A. King,**

*Acting Departmental Clearance Officer.*

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

[Application Nos. D-11062, et al.]

**Proposed Exemptions; The JPMorgan  
Chase Bank**

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

**ACTION:** Notice of proposed exemptions.

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

**Written Comments and Hearing  
Requests**

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days

from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. \_\_\_ stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or fax. Any such comments or requests should be sent either by e-mail to: "[moffittb@pwba.dol.gov](mailto:moffittb@pwba.dol.gov)", or by fax to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

**Notice to Interested Persons**

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

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

exemption are issued solely by the Department.

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

### The JPMorgan Chase Bank (Located in New York, New York)

[Application No. D-11062]

#### Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).

#### Section I—Transactions

If the exemption is granted, the restrictions of sections 406(a), 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)–(E) of the Code, shall not apply as of December 31, 2000, to:

(A) The continuation of a lease (the Lease), by the Commingled Pension Trust Fund (Strategic Property) of JPMorgan Chase Bank (the Fund) with respect to which JPMorgan Chase Bank (JPMCB) is the trustee (the Trustee), of office space in a certain commercial office building (the Property) to Chase Global Funds Service Company (CGF), a party in interest with respect to employee benefit plans whose assets are invested in the Fund (Plans) and an affiliate of JPMCB; and

(B) The continued and future provision by JPMCB or its affiliates of letters of credit (Letter(s) of Credit) to guarantee the obligations of unrelated third-party tenants to pay rent to the Fund under commercial real estate leases.

This exemption is subject to the conditions set forth in Section II.

#### Section II—Conditions

(A) The Fund is represented by a fiduciary independent of JPMCB and its affiliates (the independent fiduciary) with respect to the Lease to perform the following functions:

(1) Confirm that when the Lease originally was entered into, and as modified to date, all the terms and conditions of the Lease, including those relating to renewal options and rights of

first refusal, were commercially reasonable and at least as favorable to the Plans as those terms and conditions which could have been obtained at arm's length with an unrelated third party;

(2) Determine, based upon a written appraisal report by a qualified appraiser independent of JPMCB and its affiliates, that the leasing renewal rate the Fund will charge CGF if CGF elects to exercise its renewal options under the Lease, effective in 2004 and thereafter, and that the leasing rate with respect to any space leased by CGF in the Property pursuant to any rights of first refusal CGF has under the Lease, accurately reflect at least fair market rental value;

(3) Negotiate and approve, subject to the appropriate ERISA fiduciary standards, such amendments to the Lease upon renewal(s) as it deems appropriate, including, for example: (i) A shorter renewal term than the current five year term; (ii) additional renewal period(s) (provided that the rent paid in any time periods after February 28, 2009, under any newly granted renewal option(s) would be at 100% of fair rental value, as opposed to the 95% of fair rental value that applies for periods through February 28, 2009); (iii) the lease of less square footage than the current square footage covered under the Lease; (iv) the lease of more square footage than the current square footage covered under the Lease (provided that the rent paid for any square footage in excess of the current square footage would also be leased at 100% of fair rental value, and not 95% of fair rental value); (v) using a "base year" under the Lease (upon which certain periodic increases such as taxes are calculated) updated to the year 2004, and (vi) allowing CGF to install shatter-proof glass in the space it leases; provided that all such amendments are not more favorable to the lessee than the terms generally available in arm's length transactions between unrelated parties, as determined by the independent fiduciary; and

(4) Represent the Fund and the participants (Participants) in the Plans as independent fiduciary in any circumstances in addition to those described in subsection (3) above while the Lease (including any periods of renewal) is in effect which would present a conflict of interest for the Trustee, including but not limited to: default by CGF or disagreement on an economic computation under the Lease.

(B) The Fund is represented by an independent fiduciary with respect to any existing or future Letters of Credit to perform the following functions:

(1) Monitor monthly reports of rental payments of tenants utilizing a Letter of Credit issued by JPMCB or any affiliate to guarantee their lease payments;

(2) Confirm whether an event has occurred that calls for the Letter of Credit to be drawn upon; and

(3) Represent the Fund and the Participants as an independent fiduciary in any circumstances with respect to the Letters of Credit which would present a conflict of interest for the Trustee, including but not limited to: the need to enforce a remedy against itself or an affiliate with respect to its obligations under a Letter of Credit.

(C) Future Letters of Credit are issued by JPMCB or an affiliate to guarantee the obligations of third-party tenants to pay rent to the Fund under commercial real estate leases only if the following additional conditions are met:

(1) JPMCB or its affiliate, as the issuer of a Letter of Credit, has at least an "A" credit rating by at least one nationally recognized statistical rating service at the time of the issuance of the Letter of Credit;

(2) The Letter of Credit has objective market drawing conditions and states precisely the documents against which payment is to be made;

(3) JPMCB does not "steer" the Fund's tenants to itself or its affiliates in order to obtain the Letter of Credit;

(4) Letters of Credit are issued only to tenants which are unrelated to JPMCB; and

(5) The terms of any future Letters of Credit are not more favorable to the tenants than the terms generally available in transactions with other similarly situated unrelated third-party commercial clients of JPMCB or its affiliates.

#### Section III—Definitions

(A) The term "independent fiduciary" means Aon Fiduciary Counselors, Inc. (AFC) or any successor independent fiduciary, provided that AFC or the successor independent fiduciary is: (1) Independent of and unrelated to JPMCB and its affiliates, and (2) appointed to act on behalf of the Fund for the purposes described in conditions II(A) and (B) above. For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to JPMCB if: (1) Such fiduciary directly or indirectly controls, is controlled by or is under common control with JPMCB, (2) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption, except that an independent fiduciary may receive compensation for acting as an

independent fiduciary from JPMCB in connection with the transactions contemplated herein if the amount or payment of such compensation is not contingent upon or in any way affected by the independent fiduciary's ultimate decision and (3) more than 5 percent of such fiduciary's annual gross revenue in its prior tax year will be paid by JPMCB and its affiliates in the fiduciary's current tax year.

(B) The term "affiliate" 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, relative or partner in any such person; and

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

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

*Effective Date:* The exemption, if granted, will be effective as of December 31, 2000.

#### Summary of Facts and Representations

1. The applicant, JPMorgan Chase Bank (JPMCB), is a subsidiary of J.P. Morgan Chase & Co. and is based in New York, NY. J.P. Morgan Chase & Co. is the resulting company from a merger (the Merger) of J.P. Morgan & Co. Incorporated and The Chase Manhattan Corporation, effective as of December 31, 2000. As of the date of the Merger, which was accounted for as a pooling of interests, J.P. Morgan Chase & Co. became the second largest banking institution in the United States, with approximately \$715 billion in assets and \$42 billion in stockholders' equity. J.P. Morgan Chase & Co. is now a global financial services firm with operations in over 60 countries. Prior to November 10, 2001, it had as its principal subsidiaries: The Chase Manhattan Bank and Morgan Guaranty Trust Company (MGT), each a New York banking corporation headquartered in New York City, and Chase Manhattan Bank USA, National Association, headquartered in Delaware. On November 10, 2001, MGT merged into The Chase Manhattan Bank and changed its name to JPMorgan Chase Bank.

J.P. Morgan Chase & Co. is internally organized for management reporting purposes into five major business groups: (i) Investment banking, (ii) Treasury and securities services, (iii) J.P. Morgan Partners (a private equity investment firm), (iv) retail and middle-market banking and (v) investment

management and private banking. Only the fifth business group is relevant to the applicant's exemption request.

2. JPMCB serves as trustee (the Trustee) to the Commingled Pension Trust Fund (Strategic Property) of JPMorgan Chase Bank (the Fund).<sup>1</sup> The Fund has net assets of approximately \$4.5 billion invested in 74 developed real estate properties, primarily office buildings, industrial parks, multi-family properties and retail properties. The applicant represents that approximately 126 employee benefit plans have invested in the Fund, both employee benefit plans subject to Title I of ERISA and section 4975 of the Code (Plans) and those not so subject, such as governmental plans within the meaning of section 3(32) of ERISA. The average investment per Plan is approximately \$35.3 million. Currently, no Plan has an interest exceeding 10% of the Fund. The applicant represents that one pension plan invested in the Fund is sponsored by JPMCB and its investment represents 2.2% of the Fund's interests as of December 31, 2002.

The applicant represents that prior to December 31, 2000, in order to avoid triggering prohibited transactions under section 406 of the Act or section 4975 of the Code, the trustee, as the ERISA fiduciary of the Fund, relied on Prohibited Transaction Exemption (PTE) 84-14 (49 FR 9494, March 13, 1984) or Prohibited Transaction Exemption (PTE) 91-38 (56 FR 31966, July 12, 1991), as the circumstances dictated, in order to conduct the real estate activities of the Fund. The applicant represents that the Fund is a bank collective investment fund within the meaning of PTE 91-38, and an investment fund within the meaning of PTE 84-14. The applicant further represents that the Trustee, JPMCB, is a "bank" maintaining the Fund within the meaning of PTE 91-38 and meets the definition of a qualified professional asset manager (QPAM) under PTE 84-14.

As a result of the Merger, the applicant represents that the Trustee's ability to rely on PTE 84-14 and PTE 91-38 was affected with respect to two transactions discussed herein (the Lease Transaction and the Letters of Credit), as entities which may be parties in interest with respect to Plans became affiliates of the Trustee. Therefore, the applicant represents that conditions in both exemptions requiring that the party in interest involved in the transaction not be related to the qualified professional asset manager (QPAM) of the investment fund in the case of PTE 84-

14, or the trustee of the bank collective investment fund in the case of PTE 91-38, could no longer be met.

With respect to the JPMCB plan invested in the Fund, the applicant represents that JPMCB has been, and is, operating the Fund in accordance with the conditions of PTE 91-38 except for the conditions it is unable to meet due to the Merger.

#### The Lease Transaction

3. The applicant represents that the Fund owns a rehabilitated office building located at 73 Tremont Street in Boston, Massachusetts (the Property). The Property represents 1.92% of the net asset value of the Fund. Chase Global Funds Service Company (CGF) is currently the largest tenant, occupying 136,010 square feet or 44.75% of the Property, pursuant to a lease (the Lease) executed on December 31, 1992, with a predecessor of CGF. The current Lease term commenced on March 1, 1994. CGF pays rent of \$24.50 per square foot on 131,469 square feet and \$20.50 per square foot on the remaining 4,541 square feet. CGF reimburses the Fund for a prorated share of common area maintenance, real estate taxes and property insurance over a 1994 "base year," including its share of any increases for those costs over the base year. CGF is separately metered for electricity which is not included in the rent. If CGF sublets the space, any profits earned are split 50/50 with the Fund.

The Lease currently expires on February 28, 2004, and CGF gave notice on or before December 31, 2002 of its intent to renew the Lease for a period of five years which would begin on March 1, 2004, and end on February 28, 2009, at a rent of "95% of fair market rent." The applicant represents that while the Lease renewal rate is expressed in terms of "95% of fair market rent," this rate constitutes fair market rental value for space leased pursuant to a renewal option when the terms of the original Lease were negotiated as a package. The 5% discount is intended to reflect the cost savings to the Fund for not having to grant the normal concessions to the tenant that are typically given for initial free rent, so-called "workout allowances," and the costs saved by the Fund for not having to advertise for a new tenant and pay real estate brokers. The Lease also provides that if any other space in the building occupied by another tenant becomes available, the Fund has the obligation to offer such space to CGF at the then fair market rent but otherwise pursuant to the terms of the Lease. CGF has five days from

<sup>1</sup> Prior to December 31, 2000, MGT served as trustee of the Fund.

receiving notice of the space becoming available to notify the Fund whether it will take such space and then proceed to negotiate the rental rate. The applicant represents that both the renewal option and the right of first refusal option features in the Lease are advantageous to the Fund because they provide a potential captive market for space in the building as it becomes available without the Fund having to advertise for another tenant, negotiate a new lease, incur legal fees and closing costs or risk periods of vacancy.

4. In connection with CGF's election to renew its option to extend the term of the Lease beyond February 28, 2004, it may elect to negotiate for an amendment of the Lease to permit: (a) A shorter renewal term than the current five-year term, (b) additional renewal option period(s), (c) the lease of less square footage than the current square footage covered under the Lease and/or (d) the lease of more such square footage. The rent paid by CGF for any time periods after February 28, 2009, under any newly granted renewal option, would be at 100% of fair rental value, as opposed to the 95% of fair rental value that applies for periods through February 28, 2009. Similarly, any square footage leased in excess of the current square footage would also be leased at 100% of fair rental value. (As a practical matter, any such space necessarily would become available from space given up from other tenants, so would be subject to the terms of CGF's right of first refusal which provides for rent at 100% of fair rental value.)

CGF may, in the course of electing to review its option to extend the term of the Lease beyond February 28, 2004, elect to negotiate with the independent fiduciary for other amendments to the Lease. Examples of the anticipated type of amendments to the Lease include using a "base year" under the Lease (upon which certain periodic increases such as taxes are calculated) updated to 2004 and allowing CGF to install shatter-proof glass in the space it leases.

5. The predecessor of CGF, Mutual Fund Service Company (MSFC), originally negotiated the Lease. The primary business of MSFC was to act as a third-party service provider to 401(k) plans, providing customer service personnel to answer questions to plan participants about their investment funds in 401(k) plans sponsored by their employers. MSFC also generated computerized monthly and quarterly statements as well as mailings to their customers. MSFC moved in September of 1993 and occupied the space rent free for six months, paying rent beginning on

March 1, 1994. In 1997, CGF purchased the assets of MSFC, and the Fund consented to assumption of the Lease by CGF. After the purchase, CGF retained the personnel and business activities of MSFC. Thus, the applicant represents that the original Lease was negotiated by a party unrelated to both the Trustee and CGF.

6. The applicant represents that Aon Fiduciary Counselors, Inc. (AFC) is an independent fiduciary which has been retained by the Trustee on behalf of the Fund and the Plans. AFC is an investment adviser registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940. AFC has acknowledged its duties, responsibilities and obligations to the Fund and the Plans' participants and beneficiaries as a fiduciary under the Act. AFC acts primarily as independent fiduciary for large pension plans. Nell Hennessy, President of AFC, will lead the project. Ms. Hennessy has been involved in a variety of transactions involving pension plan investment in real estate, including acquisition of individual properties, creation of real estate holding companies, and obtaining prohibited transaction exemptions for real estate syndications designed for pension plan investors. Ms. Hennessy represents that AFC is independent of J.P. Morgan Chase & Co. and its affiliates and the sponsors of the Plans. Ms. Hennessy further represents that AFC has never previously performed any services for J.P. Morgan Chase & Co. or its affiliates, and, as of the date of the applicant's submission, AFC's affiliates derived less than 1% of their annual gross income from J.P. Morgan Chase & Co. and its affiliates. Ms. Hennessy represents that no more than 5 percent of AFC's annual gross revenue in its prior tax year will be paid by JPMCB and its affiliates in AFC's current tax year. The applicant represents that AFC will remain on retainer for the entire term of the Lease; additionally, in the event that AFC terminates its services as independent fiduciary, the applicant will notify the Department, and any successor will be as independent, of equal experience, and have responsibilities similar to those of AFC and will assume its responsibilities prior to AFC's departure.

The applicant represents that AFC, as the independent fiduciary, will:

(a) Confirm that when the Lease was originally entered into, and as modified to date, all the terms and conditions of the Lease, including those relating to the renewal option and any rights of first refusal, were commercially reasonable and at least as favorable to the Plans as those terms and conditions which could

have been obtained at arm's length with an unrelated third party;

(b) Determine, based upon a written appraisal report by an independent qualified appraiser, that the leasing renewal rate the Fund will charge CGF if CGF elects to renew its option(s) under the Lease, effective in 2004 and thereafter, and the leasing rate with respect to any space taken by CGF in the Property, pursuant to any rights of first refusal that CGF has under the Lease, accurately reflect at least fair market rental value;

(c) Negotiate and approve, subject to the appropriate ERISA fiduciary standards, such amendments to the Lease upon renewal(s) as it deems appropriate, including, for example: (i) A shorter renewal term than the current five year term; (ii) additional renewal period(s) (provided that the rent paid in any time periods after February 28, 2009, under any newly granted renewal option(s) would be at 100% of fair rental value, as opposed to the 95% of fair rental value that applies for periods through February 28, 2009); (iii) the lease of less square footage than the current square footage covered under the Lease; (iv) the lease of more square footage than the current square footage covered under the Lease (provided that the rent paid for any square footage in excess of the current square footage would also be leased at 100% of fair rental value, and not 95% of fair rental value); (v) using a "base year" under the Lease (upon which certain periodic increases such as taxes are calculated) updated to the year 2004, and (vi) allowing CGF to install shatter-proof glass in the space it leases; provided that all such amendments are not more favorable to the lessee than the terms generally available in arm's length transactions between unrelated parties, as determined by AFC as independent fiduciary; and

(d) Represent the Fund and the Plans' participants as independent fiduciary in any circumstances in addition to those described immediately above while the Lease (including any periods of renewal) is in effect which would present a conflict of interest for the Trustee, including but not limited to: default by CGF or disagreement on an economic computation under the Lease.

#### *The Letters of Credit*

7. The applicant represents that prior to the Merger, The Chase Manhattan Bank issued a series of letters of credit (the Letters of Credit) to guarantee rent payment obligations of unrelated third-party tenants of buildings owned by the Fund. The tenants were not affiliates of J.P. Morgan & Co., Incorporated or The

Chase Manhattan Corporation prior to the Merger and are not affiliates of J.P. Morgan Chase & Co., post-Merger.

The applicant represents that a letter of credit is an instrument issued by a bank or other lending institution, whose function is similar to that of a guaranty and is used in commercial leasing transactions as a substitute for a security deposit. The applicant represents that the lending institution, upon issuing a letter of credit, promises that if actions of the tenant trigger certain default events set forth in the lease, such as bankruptcy of the tenant, it will make such lease payments directly to the Fund up to the face amount of the letter of credit. The beneficiary of the letter of credit, the Fund, is issued a redeemable instrument that it may take directly to the lending institution and demand payment merely by stating that payment is due pursuant to the terms of the lease. The bank is obligated to pay without further inquiry and generally cannot be sued by the tenant for having paid under the letter of credit, absent fraud on its part. The Fund is not required to have any further involvement with the tenant in order to receive payment under the letter of credit from the bank. The letters of credit automatically renew annually until their final stated expiration date, and are either cash collateralized by the tenants or, in the case of particularly creditworthy tenants, the tenants enter into a reimbursement agreement with the bank. The applicant represents that "cash collateralized" does not mean that cash is deposited as collateral. Rather, the collateral is a security interest in cash held by the bank in the name of the tenant. The applicant represents that the terms of the Letters of Credit are governed by the 1993 Uniform Customs and Practice for Documentary Credits (Customs and Practice) that contain standard provisions widely accepted in the banking industry promulgated by the International Chamber of Commerce Commission on Banking Technique and Practice which most banking institutions incorporate by reference in their letters of credit.

8. One Letter of Credit, P-398582, was issued by Chase Manhattan Bank with respect to property referred to in the application as the Glendale Plaza property. The Letter of Credit currently has an aggregate amount of \$500,000 and names Glendale Plaza Realty Holding Co., (a wholly-owned subsidiary of the Fund) as beneficiary. The Glendale Plaza property was acquired by Glendale Plaza Realty Holding Company from an unrelated third party on November 30, 2000. The tenant subsequently directed that the

Letter of Credit be transferred to Glendale Plaza Realty Holding Co., as beneficiary. The letter automatically renews, without action by JPMCB, through its final expiration date of March 22, 2004.

9. A second Letter of Credit, P-264349, was issued by Chase Manhattan Bank with respect to property referred to by the applicant as the 303 Wacker Drive property, located in Chicago, Il. The property was purchased from Metropolitan Life Insurance Co (MetLife) in December 1997 by the Fund's wholly-owned subsidiary 303 Wacker Realty, LLC. The letter of credit was purchased by the tenant in favor of the original landlord, MetLife, in an amount of \$18,845. The Letter of Credit provided that the face amount of the letter could be reduced over the course of the lease in proportion to the tenant's remaining obligations thereunder and was accordingly reduced to a face amount of \$12,563 as of October 1, 1998. The applicant represents that this type of reduction for a tenant in good standing is traditional in the real estate industry. The letter expired on September 30, 2001, and was not reissued in the name of 303 Wacker Realty, LLC and was not renewed. The applicant represents that the tenant is currently in bankruptcy and had rent in arrears discharged in the bankruptcy in the amount of \$17,733.87. On the recommendation of the independent fiduciary, the property manager has reimbursed the Fund for \$12,563, the full face amount of the Letter of Credit.

The applicant represents that on July 5, 2000, a new Letter of Credit was issued with respect to the same tenant in favor of 303 Wacker Realty, LLC, in the amount of \$6,990. This letter covers additional space leased by the tenant with final annual automatic renewal dates until June 30, 2005, the final expiration date. The applicant requests relief for both Letters of Credit associated with the property owned by 303 Wacker Realty, LLC.

10. The applicant also requests exemptive relief for any future Letters of Credit issued by JPMCB or its affiliates to third-party tenants in Fund-owned buildings. The applicant represents that such future Letters of Credit would be structured similarly to the current outstanding Letters of Credit.

The applicant represents that the Letters of Credit function to ensure continuous and timely rental payments in the case of default by one of the tenants in the buildings owned by the Fund and their use is customary in the real estate and banking industries. The applicant represents that it is generally difficult for tenants to obtain a Letter of

Credit from an institution with which they do not otherwise have a business banking relationship. Therefore, if JPMCB or its affiliate is the tenant's commercial bank, it may be the tenant's only source to obtain a Letter of Credit. In addition, the applicant represents that given the increasing number of bank mergers, there are fewer banks available from which to purchase a Letter of Credit. The applicant represents that eliminating JPMCB or its affiliates from the available pool of Letters of Credit providers would be disadvantageous to the Fund and the Plans.<sup>2</sup>

11. The applicant represents that AFC has been retained as independent fiduciary to determine whether it is appropriate to draw on any currently outstanding or future Letter of Credit. AFC will be given periodic (monthly) reports of rental payments by the tenant so it can confirm whether the Letter of Credit should be called. In addition, AFC will act in place of the Trustee in any situation which presents a conflict of interest for the Trustee, including but not limited to: the need to enforce a remedy against itself or an affiliate with respect to its obligations under a Letter of Credit.

Future Letters of Credit issued by JPMCB or its affiliates will be permitted only if: (a) JPMCB or its affiliate, as the issuer of a Letter of Credit, has at least an "A" credit rating by at least one nationally recognized statistical rating service at the time of the issuance of the Letter of Credit; (b) the Letter of Credit has objective market drawing conditions; (c) JPMCB does not "steer" the Fund's tenants to itself or its affiliates in order to obtain the Letter of Credit; (d) Letters of Credit are issued only to tenants which are unrelated to JPMCB; and (e) the terms of any future Letters of Credit are not more favorable to the tenants than the terms generally available in transactions with other similarly situated unrelated third-party commercial clients of JPMCB or its affiliates.

12. The applicant represents that prior to the Merger, affiliates of The Chase Manhattan Corporation leased space in the Park Central office complex owned by the Fund in Dallas, Texas. Since December 31, 2000, the Fund has leased

<sup>2</sup> The applicant states that several more Letters of Credit were issued to joint ventures in which the Fund has an interest. The applicant represents that such ventures constitute "real estate operating companies" within the meaning of the plan asset regulations set forth in 29 CFR section 2510.3-101. The applicant notes the existence of these other Letters of Credit to show that the ability of JPMCB and its affiliates to provide such Letters of Credit are an important source of economic protection for the Fund.

office space to J.P. Morgan Chase & Co. affiliates under four separate leases in the Park Central office complex. The

complex is comprised of Park Central Buildings VII, VIII, and IX, although all

of the space leased to J.P. Morgan Chase & Co. affiliates is located in building VII. The leases in question are as follows:

J.P. Morgan Chase & Co. Affiliate	Suite	Size (sf)	Rate (psf/yr)	Execution date	Expiration
The Chase Manhattan Bank (now JPMCB) .....	102	6,536	\$16.50	10/1/96	9/30/01
Chase Manhattan Mortgage Corp .....	1400	7,845	23.50	6/1/99	3/31/04
Chase Manhattan Mortgage Corp .....	1440	1,798	23.50	4/1/99	3/31/04
Chase Manhattan Mortgage Corp .....	750	2,500	21.00	7/9/01	( <sup>1</sup> )

<sup>1</sup> Month to month.

The applicant represents that each lease meets the conditions of Part III of PTE 84-14 for real estate leases, and therefore a prohibited transaction exemption is not necessary to cover the leases. Specifically, the applicant represents that the following conditions of PTE 84-14, Part III, are met: First, the unit of space subject to the lease is suitable (or adaptable without excessive cost) for use by different tenants. Second, at the time the transaction is entered into (and at the time of any subsequent renewal or modification that requires the consent of the Trustee as QPAM), the terms of the transaction may not be more favorable to the lessee than the terms generally available in arm's-length transactions between unrelated parties. Third, no commission or other fee is paid by the Fund in connection with the lease to the Trustee, or to any person or entity (or any affiliate) who made the decision to have, or had the direct authority to direct, any Plan to invest in the Fund. The applicant represents that the fourth condition of Part III also is met which requires that the amount of space covered by the lease does not exceed the greater of 7,500 square feet or one percent (1%) of the available space of the office building, integrated office park or commercial center in which the Fund has the investment. In this latter regard, the applicant represents that Park Central Buildings VII, VIII and IX owned by the Fund constitute one commercial center or integrated office park and that all of the leases constitute less than 1% of the square footage of the Park Central commercial center or office park.<sup>3</sup>

13. In summary, with respect to the Lease transaction, the applicant represents that the exemption will satisfy the statutory criteria under section 408(a) of the Act for the following reasons:

<sup>3</sup> The applicant is not requesting exemptive relief in this proposed exemption for the leases in the Park Central office complex, nor is the Department providing any views in this proposed exemption as to whether the conditions of PTS 84-14 would be met for such transactions.

(a) The Fund was represented by a qualified independent fiduciary (*i.e.*, the Trustee, who was not then affiliated with the tenant, CGF) when the original Lease and all amendments thereto were negotiated and executed; and

(b) The Fund at all times on or after December 31, 2000, will be represented by a qualified independent fiduciary (*i.e.*, AFC) to perform the following functions:

(i) Confirm that when the Lease was originally entered into, and as modified to date, all the terms and conditions of the Lease, including those relating to renewal options and rights of first refusal, were commercially reasonable and at least as favorable to the Plans as those terms and conditions which could have been obtained at arm's length with an unrelated third party;

(ii) Determine, based upon a written appraisal report by an independent qualified appraiser, that the leasing renewal rate the Fund will charge CGF if CGF elects to renew its option(s) under the Lease, effective in 2004 and thereafter, and the leasing rate with respect to any space leased by CGF in the Property, pursuant to any rights of first refusal CGF has under the Lease, accurately reflect at least fair market rental value;

(iii) Negotiate and approve, subject to the appropriate ERISA fiduciary standards, such amendments to the Lease upon renewal(s) as it deems appropriate, including, for example: (i) A shorter renewal term than the current five year term; (ii) additional renewal period(s) (provided that the rent paid in any time periods after February 28, 2009, under any newly granted renewal option(s) would be at 100% of fair rental value, as opposed to the 95% of fair rental value that applies for periods through February 28, 2009); (iii) the lease of less square footage than the current square footage covered under the Lease; (iv) The lease of more square footage than the current square footage covered under the Lease (provided that the rent paid for any square footage in excess of the current square footage would also be leased at 100% of fair

rental value, and not 95% of fair rental value); (v) using a "base year" under the Lease (upon which certain periodic increases such as taxes are calculated) updated to the year 2004, and (vi) allowing CGF to install shatter-proof glass in the space it leases; provided that all such amendments are not more favorable to the lessee than the terms generally available in arm's length transactions between unrelated parties, as determined by the independent fiduciary; and

(iv) Represent the Fund and the Plans' participants as an independent fiduciary in any circumstances in addition to those described above while the Lease (including any periods of renewal) is in effect which would present a conflict of interest for the Trustee, including but not limited to: default by CGF or disagreement on an economic computation under the Lease.

14. With respect to the Letters of Credit, the applicant represents that the exemption will meet the statutory criteria under section 408(a) of the Act for the following reasons:

(a) The Fund was represented by a qualified independent fiduciary (*i.e.*, the Trustee, who was not then affiliated with The Chase Manhattan Bank, the issuer of the Letters of Credit) when the existing Letters of Credit were executed;

(b) The Fund at all times on or after December 31, 2000, will be represented by a qualified independent fiduciary with respect to any existing or future Letters of Credit to perform the following functions:

(i) Monitor monthly reports of rental payments of tenants utilizing a Letter of Credit issued by JPMCB or any affiliate to guarantee their lease payments;

(ii) Confirm whether an event has occurred that calls for the Letter of Credit to be drawn upon; and

(iii) Represent the Fund and the Participants as an independent fiduciary in any circumstances with respect to the Letter of Credit which would present a conflict of interest for the Trustee, including but not limited to: the need to enforce a remedy against itself or an

affiliate with respect to its obligations under a Letter of Credit; and

(c) Future Letters of Credit may be issued by JPMCB or an affiliate only if the following additional conditions are met:

(i) JPMCB or its affiliate, as the issuer of a Letter of Credit, has at least an "A" credit rating by at least one nationally recognized statistical rating service at the time of the issuance of the Letter of Credit;

(ii) The Letter of Credit has objective market drawing conditions;

(iii) JPMCB does not "steer" the Fund's tenants to itself or its affiliates in order to obtain the Letter of Credit;

(iv) Letters of Credit are issued only to tenants which are unrelated to JPMCB; and

(v) The terms of any future Letters of Credit are not more favorable to the tenants than the terms generally available in transactions with other similarly situated unrelated third-party commercial clients of JPMCB or its affiliates.

*For Further Information Contact:*  
Karen E. Lloyd of the Department, telephone (202) 693-8540. (This is not a toll-free number).

#### **Deutsche Bank AG (Deutsche Bank)**

[Application Nos. D-11086; D-11087; D-11088; D-11089; and D-11090]

#### **Proposed Exemption**

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990).

#### **Section I: Basic Transaction**

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of 4975(c)(1)(A) through (D) of the Code, shall not apply to a transaction between a party in interest with respect to a plan (as defined in section (V)(h)) and such plan, provided that the Deutsche Bank In-house Manager (DBIM) (as defined in section IV(a)) has discretionary authority or control with respect to the plan assets involved in the transaction and the following conditions are satisfied:

(a) The terms of the transaction are negotiated on behalf of the plan by, or under the authority and general direction of, the DBIM, and either the DBIM, or (so long as the DBIM retains

full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the DBIM, makes the decision on behalf of the plan to enter into the transaction. Notwithstanding the foregoing, a transaction involving an amount of \$5,000,000 or more, which has been negotiated on behalf of the plan by the DBIM will not fail to meet the requirements of this section I(a) solely because the plan sponsor or its designee retains the right to veto or approve such transaction;

(b) The transaction is not described in—

(1) Prohibited Transaction Exemption 81-6<sup>4</sup> (relating to securities lending arrangements),

(2) Prohibited Transaction Exemption 83-1<sup>5</sup> (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Exemption 88-59<sup>6</sup> (relating to certain mortgage financing arrangements);

(c) The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest;

(d) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the DBIM, the terms of the transaction are at least as favorable to the plan as the terms generally available in arm's length transactions between unrelated parties;

(e) The party in interest dealing with the plan: (1) Is a party in interest with respect to the plan (including a fiduciary) solely by reason of providing services to the plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H), or (I) of the Act; and (2) does not have discretionary authority or control with respect to the investment of the plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(f) The party in interest dealing with the plan is neither the DBIM nor a person related to the DBIM (within the meaning of section IV(d));

(g) The DBIM adopts written policies and procedures that are designed to assure compliance with the conditions of the exemption;

(h) An independent auditor, who has appropriate technical training or experience and proficiency with ERISA's fiduciary responsibility provisions and so represents in writing,

conducts an exemption audit (as defined in section IV(f)) on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the plan presenting its specific findings regarding the level of compliance with the policies and procedure adopted by the DBIM in accordance with section I(g); and

(i) In addition to the above:

(1) The DBIM is a bank that has the power to manage, acquire or dispose of assets of a plan, which bank has, as of the last day of its most recent fiscal year, equity capital in excess of \$1,000,000 and is either supervised by a state or federal agency, or by the German Federal Banking Supervisory Authority, Bundesanstalt für Finanzdienstleistungsaufsicht (BAFin) in cooperation with the Deutsche Bundesbank (Bundesbank);

(2) Prior to entering into any transaction described in the exemption, the DBIM agrees in writing:

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

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

(C) To consent to service of process on the Process Agent;

(D) That it may be sued in the United States courts in connection with the transactions described in this proposed exemption;

(E) To comply with, and be subject to, all relevant provisions of the Act; and

(F) That enforcement of any claim arising between a plan(s) and the DBIM, resulting from a transaction described in the proposed exemption, will occur in the United States courts.

#### **Section II: Leasing of Office Space**

If the exemption is granted, the restrictions of sections 406(a), 406(b)(1), 406(b)(2) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to:

(a) The leasing of office or commercial space owned by a plan managed by a DBIM to an employer any of whose employees are covered by the plan or an affiliate of such an employer (as defined in section 407(d)(7) of the Act), if—

(1) The plan acquires the office or commercial space subject to an existing lease with an employer, or its affiliate as a result of foreclosure on a mortgage or deed of trust;

(2) The DBIM makes the decision on behalf of the plan to foreclose on the mortgage or deed of trust as part of the exercise of its discretionary authority;

(3) The exemption provided for transactions engaged in with a plan

<sup>4</sup> 46 FR 7527; January 23, 1981.

<sup>5</sup> 48 FR 895; January 7, 1983.

<sup>6</sup> 53 FR 24811; June 30, 1988.

pursuant to section II(a) is effective until the later of the expiration of the lease term or any renewal thereof which does not require the consent of the plan lessor;

(4) The amount of space covered by the lease does not exceed fifteen (15) percent of the rentable space of the office building or the commercial center; and

(5) The requirements of sections I(c), I(g), and I(h) are satisfied with respect to the transaction.

(b) The leasing of residential space by a plan to a party in interest if—

(1) The party in interest leasing space from the plan is an employee of an employer any of whose employees are covered by the plan or an employee of an affiliate of such employer (as defined in section 407(d)(7) of the Act);

(2) The employee who is leasing space does not have any discretionary authority or control with respect to the investment of the assets involved in the lease transaction and does not render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

(3) The employee who is leasing space is not an officer, director, or a ten percent (10%) or more shareholder of the employer or an affiliate of such employer;

(4) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the DBIM, the terms of the transaction are not less favorable to the plan than the terms afforded by the plan to other, unrelated lessees in comparable arm's length transactions;

(5) The amount of space covered by the lease does not exceed five percent (5%) of the rentable space of the apartment building or multi-unit residential subdivision, and the aggregate amount of space leased to all employees of the employer or an affiliate of such employer does not exceed ten percent (10%) of such rentable space; and

(6) The requirements of section I(a), I(c), I(d), I(g), and I(h) are satisfied with respect to the transaction.

### Section III: Places of Public Accommodation

If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) and 406(b) (1) and (2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the furnishing of services and facilities (and goods incidental thereto) by a place of public accommodation owned by a plan

and managed by an DBIM to a party in interest with respect to the plan, if the services and facilities (and incidental goods) are furnished on a comparable basis to the general public.

### Section IV: Definitions

For the purposes of this exemption:

(a) The term “Deutsche Bank In-house Manager” or “DBIM” means an organization which is—

(1) Deutsche Bank, or a direct or indirect wholly-owned bank or trust company subsidiary of Deutsche Bank, supervised under the laws of the United States, a State, or Germany, that (A) Has the power to manage, acquire, or dispose of assets of a plan, (B) has, as of the last day of its most recent fiscal year, equity capital (*i.e.*, common and preferred stock, surplus, undivided profits, contingency reserves, group contingency reserves, and other capital reserves) in excess of \$1,000,000,<sup>7</sup> and (C) has as of the last day of its most recent fiscal year under its management and control total assets attributable to plans maintained by affiliates of the DBIM (as defined in section IV(b)) in excess of \$50 million; provided that if it has no prior fiscal year as a separate legal entity as a result of it constituting a division or group within the employer's organizational structure, then this requirement will be deemed met as of the date during its initial fiscal year as a separate legal entity that responsibility for the management of such assets in excess of \$50 million was transferred to it from the employer.

In addition, plans maintained by affiliates of the DBIM and/or the DBIM, must have, as of the last day of each plan's reporting year, aggregate assets of at least \$250 million.

(b) For purposes of section IV(a) and section IV(h), an “affiliate” of an DBIM means a member of either: (1) a controlled group of corporations (as defined in section 414(b)) of the Code of which the DBIM is a member; or (2) a group of trades or businesses under common control (as defined in section 414(c)) of the Code of which the DBIM is a member; provided that “50 percent” shall be substituted for “80 percent” wherever “80 percent” appears in section 414(b) or 414(c) of the Code or the rules thereunder.

(c) The term “party in interest” means a person described in section 3(14) of the Act and includes a “disqualified person” as defined in section 4975(e)(2) of the Code.

<sup>7</sup> The condition in Part IV(a) of the proposed exemption that the INHAM have in excess of \$1 million in equity capital mirrors the parallel requirement in Part IV(a) of QPAM, PTE 84–14.

(d) An DBIM is “related” to a party in interest for purposes of section I(f) of this exemption if the party in interest (or a person controlling, or controlled by, the party in interest) owns a five percent (5%) or more interest in the DBIM or if the DBIM (or a person controlling, or controlled by, the DBIM) owns a five percent (5%) or more interest in the party in interest. For purposes of this definition:

(1) The term “interest” means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation.

(B) The capital interest or the profits interest of the entity if the entity is a partnership, or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise;

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose of or to direct the disposition of such interest; and

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

(e) For purposes of this exemption, the time as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after April 8, 2002, or any renewal that requires the consent of the DBIM occurs on or after April 8, 2002, and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this paragraph shall be construed as exempting a transaction entered into by a plan which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of the exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption. In determining compliance with the conditions of the exemption at the time that the transaction was entered into for purposes of the preceding sentence, section I(e) will be

deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

(f) Exemption Audit. An "exemption audit" of a plan must consist of the following:

(1) A review of the written policies and procedures adopted by the DBIM pursuant to Section I(g) for consistency with each of the objective requirements of this exemption (as described in Section IV(g)).

(2) A test of a representative sample of the plan's transactions in order to make findings regarding whether the DBIM is in compliance with (i) the written policies and procedures adopted by the DBIM pursuant to section I(g) of the exemption and (ii) the objective requirements of the exemption.

(3) A determination as to whether the DBIM has satisfied the definition of an DBIM under the exemption; and

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings.

(g) For purposes of section IV(f), the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by the DBIM to assure compliance with each of these requirements:

(1) The definition of an DBIM in section IV(a).

(2) The requirements of Part I and section I(a) regarding the discretionary authority or control of the DBIM with respect to the plan assets involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the plan to enter into the transaction.

(3) That any procedure for approval or veto of the transaction meets the requirements of section I(a).

(4) For a transaction described in section I:

(A) That the transaction is not entered into with any person who is excluded from relief under section I(e)(1), section I(e)(2), to the extent such person has discretionary authority or control over the plan assets involved in the transaction, or section I(f), and

(B) That the transaction is not described in any of the class exemptions listed in section I(b).

(5) For a transaction described in Part II:

(A) If the transaction is described in section II(a),

(i) That the transaction is with a party described in section II(a);

(ii) That the transaction occurs under the circumstances described in section II(a)(1) and (2);

(iii) That the transaction does not extend beyond the period of time described in section II(a)(3); and

(iv) That the percentage test in section II(a)(4) has been satisfied or

(B) If the transaction is described in section II(b),

(i) That the transaction is with a party described in section II(b)(1);

(ii) That the transaction is not entered into with any person excluded from relief under section II(b)(2) to the extent such person has discretionary authority or control over the plan assets involved in the lease transaction or section II(b)(3); and

(iii) That the percentage test in section II(b)(5) has been satisfied.

(h) The term "plan" means a plan maintained by the DBIM or an affiliate of the DBIM which is an employee benefit plan described in ERISA section 3(3) and/or a plan described in section 4975(e)(1) of the Code. Notwithstanding the foregoing, the term "plan" includes a plan maintained by any entity in which the DBIM, or an affiliate of the DBIM (as defined in section IV(b) of the proposal), holds more than a 20 percent equity interest, provided that such plan's assets are commingled for investment purposes in an entity the assets of which are plan assets under 29 CFR 2510.3-101 and 50 percent or more of the units of beneficial interest in such entity are held by plans maintained by the DBIM or affiliates of the DBIM.

*Effective Date of Exemption:* The effective date of this exemption is April 8, 2002.

### Summary of Facts and Representations

1. The affected plans will consist of employee benefit plans that are covered under the provisions of Title I of the Act, as amended, and/or subject to section 4975 of the Code and that are sponsored by the applicant or its affiliates.

2. Deutsche Bank, a German banking corporation and a leading commercial bank, provides a wide range of banking, fiduciary, record keeping, custodial, brokerage and investment services to corporations, institutions, governments, employee benefit plans, governmental retirement plans and private investors worldwide. Deutsche Bank has a physical presence worldwide. Deutsche Bank is currently one of the largest financial institutions in the world in terms of assets. As of 2001, total assets of Deutsche Bank were 928,994 million Euros. Shareholders equity equaled 43,683 million Euros. Deutsche Bank manages over \$585 billion in assets either through collective trusts, separately managed accounts or mutual funds.

Under PTE 84-14, which provides conditional relief for transactions with a plan that are managed by a qualified professional asset manager (QPAM), the Department explicitly provided for banks to act as QPAMs.<sup>8</sup> Deutsche Bank, which is in the business of managing assets, and supervised in that business by a variety of governmental regulators, including the German banking authorities, the Federal Reserve Board and other foreign local bank regulators, may manage the assets of its own plans, and those of its affiliates, and, therefore, seeks section 406(a) relief for dealing with parties in interest to its own plans, other than parties affiliated with it.

3. Outside the United States, Deutsche Bank, as a whole, is not supervised by a state or by the United States. However, Deutsche Bank is regulated and supervised globally by the Bundesanstalt für Finanzdienstleistungsaufsicht—BAFin (BAFin) in cooperation with the Deutsche Bundesbank, (Bundesbank).<sup>9</sup>

The BAFin is a federal institution with ultimate responsibility to the German Ministry of Finance.<sup>10</sup> The Deutsche Bundesbank is the central bank of the Federal Republic of Germany and an integral part of the European Central Banks. The BAFin supervises the operations of banks, banking groups, financial holding groups and foreign bank branches in Germany, and has the authority to (a) issue and withdraw banking licenses, (b) issue regulations on capital and liquidity requirements of banks, (c) request information and conduct

<sup>8</sup> See Section V(a)(1) of PTE 84-14, 49 FR at 9506.

<sup>9</sup> In addition, Deutsche Bank, New York Branch, is regulated and supervised by the New York State Banking Department. Certain activities of Deutsche Bank's New York branch are also regulated and supervised by the Federal Reserve Bank of New York. Bankers Trust Company, an indirect wholly owned subsidiary of Deutsche Bank, is a New York State bank and a member of the Federal Reserve System.

<sup>10</sup> Following the adoption on April 22, 2002 of the Law on Integrated Financial Services Supervision (Gesetz über die integrierte Finanzaufsicht—FinDAG), the German Financial Supervisory Authority, BAFin was established on 1 May 2002. The functions of the former offices for banking supervision (Bundesaufsichtsamt für das Kreditwesen—BAKred), insurance supervision (Bundesaufsichtsamt für das Versicherungswesen—BAV) and securities supervision (Bundesaufsichtsamt für den Wertpapierhandel—BAWe) have been combined in 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 BAFin is a federal institution governed by public law that belongs to the portfolio of the Federal Ministry of Finance and as such, has a legal personality. Its two offices are located in Bonn and Frankfurt/Main. The BAFin supervises about 2,700 banks, 800 financial services institutions and over 700 insurance undertakings.

investigations, (d) intervene in cases of inadequate capital or liquidity endangered deposits, or bankruptcy by temporarily prohibiting certain banking transactions. The BAFin ensures that Deutsche Bank has procedures for monitoring and controlling its worldwide activities through various statutory and regulatory standards. Among these standards are requirements for adequate internal controls, oversight, administration, and financial resources. The BAFin reviews compliance with these operational and internal control standards through an annual audit performed by the year-end auditor and through special audits ordered by the BAFin. The supervisory authorities require information on the condition of Deutsche Bank and its branches through periodic, consolidated financial reports and through a mandatory annual report prepared by the auditor. The supervisory authorities also require information from Deutsche Bank regarding capital adequacy, country risk exposure, and exposures. German banking law mandates penalties to ensure correct reporting to the supervisory authorities, and auditors face penalties for gross violations of their duties.

Additionally, the BAFin, in cooperation with the Bundesbank supervises all branches of Deutsche Bank, wherever located, subjecting them to announced and unannounced on-site audits, and all other supervisory controls applicable to German banks.<sup>11</sup> With respect to branches located in the member states, such audits are carried out consistent with the applicable European Directives, and with respect to branches outside the EEA, consistent with applicable international agreements, memoranda of understanding, or other arrangements with the relevant foreign supervisory authorities.<sup>12</sup>

<sup>11</sup> Deutsche Bank's branches domiciled outside the European Economic Area (EEA) are also subject to local regulation and supervision by the host country's supervisory authority, e.g., the Ministry of Finance in Japan, the Swiss Federal Banking Commission in Switzerland, the Australian Prudential Regulation Authority in Australia, and the Office of the Superintendent of Financial Institutions in Canada. For Deutsche Bank's branches domiciled in EEA member states, the BAFin is the lead supervisory authority pursuant to the rules on the "European passport", and only some aspects are subject to complementary supervision by the host country's supervisory authority (e.g., the Securities and Futures Authority in the United Kingdom supervises the conduct of the investment business of Deutsche Bank in the United Kingdom).

<sup>12</sup> As a result of meetings between the U.S. and German regulators in October 1993, the U.S. Department of Treasury has accorded national treatment to German bank branches, and the German Ministry of Finance has granted relief to

Deutsche Bank's subsidiaries that pursue banking and other financial activities (other than insurance) or activities that are closely related thereto are consolidated with Deutsche Bank and form a banking group for purposes of the capital ratios and the large exposure limits that the bank is required to meet also on a group-wide basis. In conformity with European Directives,<sup>13</sup> the BAFin supervises such banking groups (where their parent institution is domiciled in Germany) on a consolidated basis.

While oversight is less individualized for subsidiaries than for branches, the supervision extends to adequacy of equity capital of banking and financial holding groups and compliance with the regulations regarding large loans granted by such groups. Thus, Deutsche Bank is subject to comprehensive supervision and regulation on a consolidated basis by its home country supervisor.<sup>14</sup>

There are two deposit insurance programs that cover Deutsche Bank and its foreign branches. The first is a European Union required mandatory deposit insurance system established in 1998 that insures deposits denominated in the currency of an EEA member state up to the lesser of 90% of the deposit amount or 20,000 euros. This statutory deposit protection scheme is maintained, as far as private commercial banks like Deutsche Bank are concerned, by a separate institution (Entschädigungseinrichtung deutscher Banken mbH) that is subject to supervision by the BAFIN. In addition, since 1976, the Association of German Banks (Bundesverband deutscher Banken e.V.) has maintained a voluntary deposit protection program called the Deposit Protection Fund (Einlagensicherungsfonds) that safeguards liabilities in excess of the thresholds guaranteed by the European Union program, up to a protection ceiling for each creditor of 30% of the liable capital of the bank.<sup>15</sup>

branches of U.S. banks in Germany, in particular with respect to "dotation" or endowment capital requirements and capital adequacy standards. Since the German Banking Act (s. 53c) allows such exemptions only insofar as branches of German companies are afforded equal exemptions in the foreign state, this confirms indirectly the recognition of the German banking supervisory standards by the U.S. regulators.

<sup>13</sup> See, e.g., Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis, Council Directive 92/121/EEC of 21 December 1992 on the monitoring and control of large exposures of credit.

<sup>14</sup> This is also the conclusion reached by the Board of Governors of the Federal Reserve System in its Order approving Deutsche Bank's application to become a bank holding company, effective May 20, 1999.

<sup>15</sup> Liable Capital means the sum of core capital and supplementary capital as defined in section 10,

The Deposit Protection Fund was created to give assistance, in the interest of depositors, in the event of imminent or actual financial difficulties of banks, particularly when the suspension of payments is threatened, and to prevent the impairment of public confidence in private banks. The Deposit Protection Fund is funded by regular contributions paid by every German bank that has elected to participate in the Deposit Protection Fund. Participating banks may be required to make special contributions to the extent requested by the Deposit Protection Fund to enable it to fulfill its purpose.

The Deposit Protection Fund relies on the Auditing Association of German Banks (Prüfungsverband deutscher Banken e.V. or Auditing Association) to audit banks and make recommendations to the banks. Following those recommendations is a requirement for all banks covered by the Deposit Protection Fund. Banks are no longer permitted to be part of the Deposit Protection Fund if, inter alia, they give incomplete or incorrect information to the Federal Association of German Banks in connection with the Fund; if they are in default with the payment of contributions for more than two months after a written reminder; if they do not support the Auditing Association in its auditing activity or do not promptly fulfill any condition set by the Auditing Association; if they fail to make correct disclosure to depositors; or if they make incorrect statements or incorrectly advertise the deposit insurance program. Thus, the German deposit protection system protects deposits throughout the world wherever a branch of a participating German bank is located.

4. The proposed exemption is similar to PTE 96-23.<sup>16</sup> Generally, PTE 96-23 conditionally permits: (1) Plans whose assets are managed by an in-house asset manager (INHAM) to enter into transactions with parties in interest where the INHAM directs the transaction; (2) the leasing of office or commercial space owned by a plan managed by an INHAM to an employer whose employees are covered under the plan (or the employer's affiliate), where the plan acquires the office or commercial space subject to an existing

subsection (2) of the German Banking Act. However, for measurement of the protection ceiling, the supplementary capital, as defined in section 10, subsection (2b) of the German Banking Act, shall only be taken into account up to an amount of 25% of the core capital, as defined in section 10, subsection (2a) of the German Banking Act. Financial data on the date of the last published annual financial statements of the bank shall be determinative.

<sup>16</sup> 61 FR 15,975 (Apr. 10, 1996).

lease with an employer, or its affiliate, as a result of foreclosure on a mortgage or deed of trust directed by the INHAM; (3) the leasing of residential space by a plan to a party in interest who is an employee of a covered employer or affiliate thereof, but not an officer, director, or a 10% or more shareholder of the employer or affiliate or a fiduciary with respect to the leased assets; and (4) the furnishing of services and facilities (and goods incidental thereto) by a place of public accommodation owned by a plan and managed by an INHAM to a party in interest with respect to the plan, if the services and facilities (and incidental goods) are furnished on a comparable basis to the general public.

One of the requirements of PTE 96-23 is that the INHAM meet the definition of INHAM under section IV(a). In pertinent part, Part IV(a)(2) of PTE 96-23 requires an "INHAM" to be:

An investment adviser registered under the Investment Advisers Act of 1940 that, as of the last day of its most recent fiscal year, has under its management and control total assets attributable to plans maintained by affiliates of the INHAM (as defined in section IV(b)) in excess of \$50 million; provided that if it has no prior fiscal year as a separate legal entity as a result of it constituting a division or group within the employer's organizational structure, then this requirement will be deemed met as of the date during its initial fiscal year as a separate legal entity that responsibility for the management of such assets in excess of \$50 million was transferred to it from the employer.<sup>17</sup>

The registered investment adviser requirement "assure[s] that the INHAM is in the business of investment management and, thus, in a position to develop experience and sophistication in dealing with investment issues."<sup>18</sup> The requirement also assures that the INHAM is subject to government supervision. Registration of the INHAM as an investment adviser assures that the INHAM is subject to regulation under the Investment Advisers Act of 1940 and oversight by the Securities and Exchange Commission. In granting the final PTE 96-23, the Department noted that "oversight by the Securities and Exchange Commission as a result of registration as an investment adviser under the Investment Advisers Act of 1940 provides an important safeguard under the exemption."<sup>19</sup> Additionally, the Department explained that the \$50 million in plan assets requirement provides further protection by ensuring that the INHAM is well qualified:

\* \* \* INHAMs of large plans are more likely to have an appropriate level of expertise in financial and business matters. In this regard, the Department believes that the requirement that the INHAM have a significant dollar amount of assets under its management and control attributable to plans maintained by affiliates which are separately accountable for the operation of their respective plans provides an additional safeguard under the exemption.<sup>20</sup>

Like registered investment advisers, banks may also be experienced investment managers.

Domestic banks, such as Bankers Trust Company, like registered investment advisers, are also subject to government regulation. Bankers Trust Company is a bank supervised by New York State and the Federal Reserve Bank.

In developing the QPAM class exemption, the Department noted that each of the categories of asset manager [e.g., banks] is subject to regulation by Federal or State agencies.<sup>21</sup>

For these reasons, it is represented that the proposed exemption is similar to PTE 96-23. The proposed exemption treats Bankers Trust, Deutsche Bank, or any affiliated bank regulated under the laws of the United States, or Germany as an INHAM under Part IV. To this end, the following subparagraph will replace subparagraphs (1) and (2) of section IV(a) of PTE 96-23:

(1) Deutsche Bank, or a direct or indirect wholly-owned bank or trust company subsidiary of Deutsche Bank, supervised under the laws of the United States, a State, or Germany, (A) has the power to manage, acquire, or dispose of assets of a plan and (B) has, as of the last day of its most recent fiscal year, equity capital (i.e., common and preferred stock, surplus, undivided profits, contingency reserves, group contingency reserves, and other capital reserves) in excess of \$1,000,000.

5. The applicant represents that the proposed exemption would be protective of participants and beneficiaries because it essentially contains the same protective conditions found in PTE 96-23. Additionally, the proposed exemption would be protective because regulation under the laws of Germany is comparable to regulation under the laws of the United States or a State.

6. In summary, it is represented that the subject transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because the proposed exemption: (a) Will benefit in-house plans by ensuring that plans have greater flexibility in choosing

among expert, experienced investment managers; (b) will not be detrimental to plans because banks have proven expertise and experience in managing plan assets and the banking laws and regulations of Germany provide protection and oversight that is comparable to those of the United States or a State; (c) would allow plans to take greater advantage of the investment management expertise and experience of the world's largest bank in terms of assets and one of the world's largest asset managers; and (d) would allow a plan's DBIM to consider existing service providers when seeking goods, services, and facilities, thus increasing the plan's choices (which may afford greater quality at lower costs) and eliminating the compliance costs of ensuring that a counter-party is not a party in interest (i.e., as a service provider or as related to a service provider).

**Notice to Interested Persons:** The applicant represents that because those potentially interested participants and beneficiaries cannot all be identified, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by publication in the **Federal Register**. Therefore, comments and requests for a hearing must be received by the Department not later than 45 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

**For Further Information Contact:** Mr. Khalif I. Ford of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

**Law Offices of Richard D. Gorman Pension & Profit Sharing Plan (the Plan) Located in Monterey, California**

[Application No. D-11104]

### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale of unimproved real property (the Property) by the Plan to Mr. Richard Gorman (Mr. Gorman), a trustee of the Plan, and a party in interest with respect to the Plan, provided that the following conditions are satisfied:

<sup>17</sup> 61 FR at 15982.

<sup>18</sup> 60 FR at 15599.

<sup>19</sup> 61 FR at 15980.

<sup>20</sup> 61 FR at 15980.

<sup>21</sup> Preamble to Proposed PTE 84-14, 47 FR 56945, 56947 (Dec. 21, 1982).

(a) The sale is a one-time cash transaction;

(b) The Plan receives the greater of either: (i) \$290,000; or (ii) the fair market value for the Property established at the time of the sale by an independent, qualified appraiser; and

(c) The Plan pays no commissions or other expenses associated with the sale.

#### **(B) Summary of Facts and Representations**

1. The Plan is a discretionary profit sharing plan. The Plan's current trustee is Mr. Gorman. The Plan sponsor is a single practitioner law firm, with one secretary as an employee. The Plan has 2 participants. As of July 8, 2002, the Plan had approximately \$408,567.64 in total assets.

2. On August 20, 1996, the Plan purchased the Property from Bruce Munro and Shirley G. Mackintosh, unrelated third parties, for \$143,000. Mr. Gorman propose to pay the fair market value of the Property, which would be paid in full in cash at a closing to be held subsequent to the granting of the proposed exemption.

The applicant states that the Property has not been an income-producing asset and has been held for possible appreciation. The Plan has paid for taxes, insurance and maintenance on the Property since the acquisition (the Holding Costs). Specifically, the Plan has paid the following Holding Costs since its acquisition of the Property: (i) Real estate taxes, \$9,600; (ii) Insurance, \$1,500; (iii) Maintenance fees, \$3,000. The applicant states that the Holding Costs for the Property have been approximately \$14,100. Therefore, the total cost for the Property (*i.e.*, the acquisition price of \$143,000, plus the Holding Costs of approximately \$14,100) is approximately \$157,100 as of July 2002.

3. The Property is an unimproved 909 square foot parcel of land located at 19 Yankee Point Drive, Carmel, California. The Property was appraised on April 15, 2002. The appraisal was prepared by Raymond A. Elarmo (Mr. Elarmo), who is an independent, licensed real estate appraiser in the state of California.

Mr. Elarmo represents that although the Property is adjacent to the home of Mr. Gorman, the Property may or may not increase the value of Mr. Gorman's home due to concerns regarding water availability for the Property.

Mr. Elarmo states that consideration was given in the appraisal to three approaches to value, *i.e.*, the cost approach, sales comparison approach, and income approach. Mr. Elarmo relied on the sales comparison approach to determine the fair market value of the

Property. Mr. Elarmo has determined that the fair market value of the Property is \$290,000.

4. The applicant now proposes that the sale of the Property would provide liquidity to the Plan. Plan assets would then not be locked into a piece of land that has little foreseeable use. The Plan will pay no commissions or other expenses associated with the sale. The applicant will pay the Plan in cash, the greater of either: (a) \$290,000; or (b) the fair market value of the Property, as established by a qualified, independent appraiser at the time of the transaction.

5. In summary, the applicant represents that the transaction will satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) The proposed sale will be a one-time cash transaction; (b) the Plan will receive the greater of either: (i) \$290,000; or (ii) the current fair market value for the Property, as established at the time of the sale by an independent, qualified appraiser; (c) the Plan will pay no fees, commissions or other expenses associated with the sale; and (d) the sale will enable the Plan to divest itself of a non-income producing asset and acquire investments which may yield higher returns.

*Notice to Interested Persons:* Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

*For Further Information Contact:* Khalif I. Ford of the Department at (202) 693-8540. (This is not a toll-free number.)

#### **General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must

operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

Signed at Washington, DC this 18th day of March, 2003.

**Ivan Strasfeld,**

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

[FR Doc. 03-6851 Filed 3-20-03; 8:45 am]

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## **DEPARTMENT OF LABOR**

### **Employment Standards Administration Wage and Hour Division**

#### **Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions**

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified herein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary