

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

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 14th day of January, 2008.

**Ivan Strasfeld,**

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

[FR Doc. E8-800 Filed 1-16-08; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Application Nos. and Proposed Exemptions; D-11421, Toeruna Widge IRA (the IRA); and D-11434, Credit Suisse (CS) and Its Current and Future Affiliates (Collectively the Applicant)

**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 (ERISA or 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-5700, 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: [moffitt.betty@dol.gov](mailto:moffitt.betty@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.

### Toeruna Widge IRA (the IRA)

*Located in Mertztown, Pennsylvania*

[Application No. D-11421]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of 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). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale (the Sale) of approximately 59.99 acres of unimproved real property located at Fredericksville Road and Sweitzer Road, Rockland Township, Berks County, Pennsylvania (the Property) by the IRA to Dr. Toeruna Widge (the Applicant), a disqualified person with respect to the IRA,<sup>1</sup> provided that the following conditions are satisfied:

(A) All terms and conditions of the Sale are at least as favorable to the IRA as those which the IRA could obtain in an arm's-length transaction with an unrelated party;

(B) The Sales price will be the greater of \$390,000 or the fair market value of the Property as of the date of the Sale;

(C) The fair market value of the Property has been determined by a qualified, independent appraiser;

(D) The Sale is a one-time transaction for cash; and

(E) The IRA will not pay any commissions, costs or other expenses in connection with the Sale.

#### Summary of Facts and Representations

1. The IRA is an individual retirement account established under section

<sup>1</sup> Pursuant to 29 CFR 2510.3-2(d), the IRA is not within the jurisdiction of Title I of the Employee Retirement Income Security Act of 1974 (the Act). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

408(a) of the Code. The Applicant is the sole participant of the IRA. The assets of the IRA consist of the Property as well as cash in the amount of \$2,654.89 (as of December 2006). Thus, the total amount of assets in the IRA, including the fair market value of the property, is \$392,654.89. The Property represents approximately 99.32% of the total IRA assets. The Applicant is a physician. The Applicant and her agent, Thomas M. Riddle of Valley National Investments, Inc. are the only persons who have investment discretion over the assets in the IRA.

The Property was originally held in the Allentown Anesthesia Associates, Inc. Restated Defined Contribution Pension Plan and Trust (the Plan), in which the Applicant was a participant. There were six participants in the Plan, each having their own separate account. The Property was originally purchased for \$137,000 in 1997 for Dr. Widge's individually directed account. The IRA has paid \$16,076.47 in real estate taxes from 1997 through the present date. The Plan was terminated because of a merger affecting the Plan sponsor. When the Plan was terminated in 1997, the Property was rolled over into the IRA.

2. The Applicant requests an exemption for the Sale. The Applicant represents that the proposed transaction would be feasible because it would be a one-time transaction for cash and will enable the IRA to diversify its investment portfolio. Furthermore, the Applicant states that the transaction would be in the best interest of the IRA because the Sale would enable the IRA to invest the proceeds from the Sale in assets with a high rate of return without incurring costs such as real estate taxes. Finally, the Applicant represents that the transaction will be protective of the rights of the IRA's participant because the IRA will receive the greater of \$390,000 or the fair market value of the Property, as determined by an independent, qualified appraiser on the date of the Sale, and will incur no commissions, costs, or other expenses as a result of the Sale.

3. Robert R. DeTurck (Mr. DeTurck), a qualified, independent appraiser certified by the state of Pennsylvania who is associated with Deturck Realtors Inc., located in Reading, Pennsylvania, appraised the Property on August 31, 2006. Mr. DeTurck determined the Property to have a \$390,000 fair market value. The valuation was based on the sales comparison approach.

The comparison approach determines the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale with the buyer

and seller acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.

4. In summary, the Applicant represents that the proposed transaction satisfies the statutory criteria of section 4975(c)(2) of the Code because: (A) All terms and conditions of the Sale are at least as favorable to the IRA as those which the IRA could obtain in an arm's-length transaction with an unrelated party; (B) The Sales price will be the greater of \$390,000 or the fair market value of the Property as of the date of the Sale; (C) The fair market value of the Property has been determined by an independent, qualified appraiser; (D) The Sale is a one-time transaction for cash; and (E) The IRA will not pay any commissions, costs or other expenses in connection with the Sale.

*Notice to Interested Parties:* Because the Applicant is the only participant in the IRA, it has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Khalif Ford of the Department, telephone (202) 693-8562 (this is not a toll-free number).

**Credit Suisse (CS) and Its Current and Future Affiliates (Collectively, the Applicant)**

*Located in Zurich, Switzerland, With Offices Around the World*

[Application No. D-11434]

**Proposed Exemption**

The Department of Labor (the Department) is considering granting an exemption under the authority of 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, 32847, August 10, 1990).

**Section I. Transactions**

If the proposed exemption is granted, the restrictions of section 406 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 (F) of the Code, shall not apply to the purchase of certain securities (the Securities), as defined, below in Section III(h), by an asset management affiliate of CS, as "affiliate" is defined, below, in Section III(c), from any person other than such asset management affiliate of

CS or any affiliate thereof, during the existence of an underwriting or selling syndicate with respect to such Securities, where a broker-dealer affiliated with CS (the Affiliated Broker-Dealer), as defined, below, in Section III(b), is a manager or member of such syndicate and the asset management affiliate of CS purchases such Securities, as a fiduciary:

(a) On behalf of an employee benefit plan or employee benefit plans (Client Plan(s)), as defined, below, in Section III(e); or

(b) On behalf of Client Plans, and/or In-House Plans, as defined, below, in Section III(l), which are invested in a pooled fund or in pooled funds (Pooled Fund(s)), as defined, below, in Section III(f); provided that the conditions as set forth, below, in Section II, are satisfied (An affiliated underwriter transaction (AUT)).<sup>2</sup>

**Section II. Conditions**

The proposed exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following requirements:

(a)(1) The Securities to be purchased are either—

(i) Part of an issue registered under the Securities Act of 1933 (the 1933 Act) (15 U.S.C. 77a et seq.). If the Securities to be purchased are part of an issue that is exempt from such registration requirement, such Securities:

(A) Are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States,

(B) Are issued by a bank,

(C) Are exempt from such registration requirement pursuant to a federal statute other than the 1933 Act, or

(D) Are the subject of a distribution and are of a class which is required to be registered under section 12 of the Securities Exchange Act of 1934 (the 1934 Act) (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such Securities and that has filed all reports required to be filed thereunder with the Securities and Exchange Commission (SEC) during the preceding twelve (12) months; or

(ii) Part of an issue that is an Eligible Rule 144A Offering, as defined in SEC

<sup>2</sup> For purposes of this proposed exemption an In-House Plan may engage in AUT's only through investment in a Pooled Fund.

Rule 10f-3 (17 CFR 270.10f-3(a)(4)). Where the Eligible Rule 144A Offering of the Securities is of equity securities, the offering syndicate shall obtain a legal opinion regarding the adequacy of the disclosure in the offering memorandum;

(2) The Securities to be purchased are purchased prior to the end of the first day on which any sales are made, pursuant to that offering, at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities, except that—

(i) If such Securities are offered for subscription upon exercise of rights, they may be purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(ii) If such Securities are debt securities, they may be purchased at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities and may be purchased on a day subsequent to the end of the first day on which any sales are made, pursuant to that offering, provided that the interest rates, as of the date of such purchase, on comparable debt securities offered to the public subsequent to the end of the first day on which any sales are made and prior to the purchase date are less than the interest rate of the debt Securities being purchased; and

(3) The Securities to be purchased are offered pursuant to an underwriting or selling agreement under which the members of the syndicate are committed to purchase all of the Securities being offered, except if—

(i) Such Securities are purchased by others pursuant to a rights offering; or

(ii) Such Securities are offered pursuant to an over-allotment option.

(b) The issuer of the Securities to be purchased pursuant to this proposed exemption must have been in continuous operation for not less than three years, including the operation of any predecessors, unless the Securities to be purchased are—

(1) Non-convertible debt securities rated in one of the four highest rating categories by Standard & Poor's Rating Services, Moody's Investors Service, Inc., FitchRatings, Inc., Dominion Bond Rating Service Limited, Dominion Bond Rating Service, Inc., or any successors thereto (collectively, the Rating Organizations), provided that none of the Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(2) Debt securities issued or fully guaranteed by the United States or by any person controlled or supervised by

and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States; or

(3) Debt securities which are fully guaranteed by a person (the Guarantor) that has been in continuous operation for not less than three years, including the operation of any predecessors, provided that such Guarantor has issued other securities registered under the 1933 Act; or if such Guarantor has issued other securities which are exempt from such registration requirement, such Guarantor has been in continuous operation for not less than three years, including the operation of any predecessors, and such Guarantor is:

(a) A bank; or

(b) An issuer of securities which are exempt from such registration requirement, pursuant to a Federal statute other than the 1933 Act; or

(c) An issuer of securities that are the subject of a distribution and are of a class which is required to be registered under section 12 of the 1934 Act (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such securities and that has filed all reports required to be filed thereunder with the SEC during the preceding twelve (12) months.

(d) The aggregate amount of Securities of an issue purchased, pursuant to this proposed exemption, by the asset management affiliate of CS with: (i) The assets of all Client Plans; and (ii) The assets, calculated on a pro-rata basis, of all Client Plans and In-House Plans investing in Pooled Funds managed by the asset management affiliate of CS; and (iii) The assets of plans to which the asset management affiliate of CS renders investment advice within the meaning of 29 CFR 2510.3-21(c) does not exceed:

(1) Ten percent (10%) of the total amount of the Securities being offered in an issue, if such Securities are equity securities;

(2) Thirty-five percent (35%) of the total amount of the Securities being offered in an issue, if such Securities are debt securities rated in one of the four highest rating categories by at least one of the Rating Organizations, provided that none of the Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(3) Twenty-five percent (25%) of the total amount of the Securities being offered in an issue, if such Securities are debt securities rated in the fifth or sixth highest rating categories by at least one

of the Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the sixth highest rating category; and

(4) The assets of any single Client Plan (and the assets of any Client Plans and any In-House Plans investing in Pooled Funds) may not be used to purchase any Securities being offered, if such Securities are debt securities rated lower than the sixth highest rating category by any of the Rating Organizations;

(5) Notwithstanding the percentage of Securities of an issue permitted to be acquired, as set forth in Section II(c)(1), (2), and (3), above, of this proposed exemption, the amount of Securities in any issue (whether equity or debt securities) purchased, pursuant to this proposed exemption, by the asset management affiliate of CS on behalf of any single Client Plan, either individually or through investment, calculated on a pro-rata basis, in a Pooled Fund may not exceed three percent (3%) of the total amount of such Securities being offered in such issue, and;

(6) If purchased in an Eligible Rule 144A Offering, the total amount of the Securities being offered for purposes of determining the percentages, described, above, in Section II(c)(1)–(3) and (5), is the total of:

(i) The principal amount of the offering of such class of Securities sold by underwriters or members of the selling syndicate to “qualified institutional buyers” (QIBs), as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)); plus

(ii) The principal amount of the offering of such class of Securities in any concurrent public offering.

(d) The aggregate amount to be paid by any single Client Plan in purchasing any Securities which are the subject of this proposed exemption, including any amounts paid by any Client Plan or In-House Plan in purchasing such Securities through a Pooled Fund, calculated on a pro-rata basis, does not exceed three percent (3%) of the fair market value of the net assets of such Client Plan or In-House Plan, as of the last day of the most recent fiscal quarter of such Client Plan or In-House Plan prior to such transaction.

(e) The covered transactions are not part of an agreement, arrangement, or understanding designed to benefit the asset management affiliate of CS or an affiliate.

(f) The Affiliated Broker-Dealer does not receive, either directly, indirectly, or through designation, any selling concession, or other compensation or

consideration that is based upon the amount of Securities purchased by any single Client Plan, or that is based on the amount of Securities purchased by Client Plans or In-House Plans through Pooled Funds, pursuant to this proposed exemption. In this regard, the Affiliated Broker-Dealer may not receive, either directly or indirectly, any compensation or consideration that is attributable to the fixed designations generated by purchases of the Securities by the asset management affiliate of CS on behalf of any single Client Plan or any Client Plan or In-House Plan in Pooled Funds.

(g)(1) The amount the Affiliated Broker-Dealer receives in management, underwriting, or other compensation or consideration is not increased through an agreement, arrangement, or understanding for the purpose of compensating the Affiliated Broker-Dealer for foregoing any selling concessions for those Securities sold pursuant to this proposed exemption. Except as described above, nothing in this Section II(g)(1) shall be construed as precluding the Affiliated Broker-Dealer from receiving management fees for serving as manager of the underwriting or selling syndicate, underwriting fees for assuming the responsibilities of an underwriter in the underwriting or selling syndicate, or other compensation or consideration that is not based upon the amount of Securities purchased by the asset management affiliate of CS on behalf of any single Client Plan, or on behalf of any Client Plan or In-House Plan participating in Pooled Funds, pursuant to this proposed exemption; and

(2) The Affiliated Broker-Dealer shall provide to the asset management affiliate of CS a written certification, dated and signed by an officer of the Affiliated Broker-Dealer, stating the amount that the Affiliated Broker-Dealer received in compensation or consideration during the past quarter, in connection with any offerings covered by this proposed exemption, was not adjusted in a manner inconsistent with Section II(e), (f), or (g) of this proposed exemption.

(h) The covered transactions are performed under a written authorization executed in advance by an independent fiduciary of each single Client Plan (the Independent Fiduciary), as defined, below, in Section III(g).

(i) Prior to the execution by an Independent Fiduciary of a single Client Plan of the written authorization described, above, in Section II(h), the following information and materials (which may be provided electronically) must be provided by the asset

management affiliate of CS to such Independent Fiduciary:

(1) A copy of the Notice of Proposed Exemption (the Notice) and a copy of the final exemption (the Grant) as published in the **Federal Register**, provided that the Notice and the Grant are supplied simultaneously; and

(2) Any other reasonably available information regarding the covered transactions that such Independent Fiduciary requests the asset management affiliate of CS to provide.

(j) Subsequent to the initial authorization by an Independent Fiduciary of a single Client Plan permitting the asset management affiliate of CS to engage in the covered transactions on behalf of such single Client Plan, the asset management affiliate of CS will continue to be subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Independent Fiduciary requests the asset management affiliate of CS to provide.

(k)(1) In the case of an existing employee benefit plan investor (or existing In-House Plan investor, as the case may be) in a Pooled Fund, such Pooled Fund may not engage in any covered transactions pursuant to this proposed exemption, unless the asset management affiliate of CS provides the written information, as described, below, and within the time period described, below, in this Section II(k)(2), to the Independent Fiduciary of each such plan participating in such Pooled Fund (and to the fiduciary of each such In-House Plan participating in such Pooled Fund).

(2) The following information and materials (which may be provided electronically) shall be provided by the asset management affiliate of CS not less than 45 days prior to such asset management affiliate of CS engaging in the covered transactions on behalf of a Pooled Fund, pursuant to this proposed exemption, and provided further that the information described below, in this Section II(k)(2)(i) and (iii) is supplied simultaneously:

(i) A notice of the intent of such Pooled Fund to purchase Securities pursuant to this proposed exemption, a copy of this Notice, and a copy of the Grant, as published in the **Federal Register**;

(ii) Any other reasonably available information regarding the covered transactions that the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund requests the asset management affiliate of CS to provide; and

(iii) A termination form expressly providing an election for the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund to terminate such plan's (or In-House Plan's) investment in such Pooled Fund without penalty to such plan (or In-House Plan). Such form shall include instructions specifying how to use the form. Specifically, the instructions will explain that such plan (or such In-House Plan) has an opportunity to withdraw its assets from a Pooled Fund for a period of no more than 30 days after such plan's (or such In-House Plan's) receipt of the initial notice of intent, described, above, in Section II(k)(2)(i), and that the failure of the Independent Fiduciary of such plan (or fiduciary of such In-House Plan) to return the termination form to the asset management affiliate of CS in the case of a plan (or In-House Plan) participating in a Pooled Fund by the specified date shall be deemed to be an approval by such plan (or such In-House Plan) of its participation in the covered transactions as an investor in such Pooled Fund.

Further, the instructions will identify CS, the asset management affiliate of CS, and the Affiliated Broker-Dealer and will provide the address of the asset management affiliate of CS. The instructions will state that this proposed exemption may be unavailable, unless the fiduciary of each plan participating in the covered transactions as an investor in a Pooled Fund is, in fact, independent of CS, the asset management affiliate of CS, and the Affiliated Broker-Dealer. The instructions will also state that the fiduciary of each such plan must advise the asset management affiliate of CS, in writing, if it is not an "Independent Fiduciary," as that term is defined, below, in Section III(g).

For purposes of this Section II(k), the requirement that the fiduciary responsible for the decision to authorize the transactions described, above, in Section I of this proposed exemption for each plan be independent of the asset management affiliate of CS shall not apply in the case of an In-House Plan.

(l)(1) In the case of each plan (and in the case of each In-House Plan) whose assets are proposed to be invested in a Pooled Fund after such Pooled Fund has satisfied the conditions set forth in this proposed exemption to engage in the covered transactions, the investment by such plan (or by such In-House Plan) in the Pooled Fund is subject to the prior written authorization of an Independent Fiduciary representing such plan (or the prior written authorization by the

fiduciary of such In-House Plan, as the case may be), following the receipt by such Independent Fiduciary of such plan (or by the fiduciary of such In-House Plan, as the case may be) of the written information described, above, in Section II(k)(2)(i) and (ii); provided that the Notice and the Grant, described above in Section II(k)(2)(i), are provided simultaneously.

(2) For purposes of this Section II(l), the requirement that the fiduciary responsible for the decision to authorize the transactions described, above, in Section I of this proposed exemption for each plan proposing to invest in a Pooled Fund be independent of CS and its affiliates shall not apply in the case of an In-House Plan.

(m) Subsequent to the initial authorization by an Independent Fiduciary of a plan (or by a fiduciary of an In-House Plan) to invest in a Pooled Fund that engages in the covered transactions, the asset management affiliate of CS will continue to be subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Independent Fiduciary of such plan (or the fiduciary of such In-House Plan, as the case may be) requests the asset management affiliate of CS to provide.

(n) At least once every three months, and not later than 45 days following the period to which such information relates, the asset management affiliate of CS shall furnish:

(1) In the case of each single Client Plan that engages in the covered transactions, the information described, below, in this Section II(n)(3)–(7), to the Independent Fiduciary of each such single Client Plan.

(2) In the case of each Pooled Fund in which a Client Plan (or in which an In-House Plan) invests, the information described, below, in this Section II(n)(3)–(6) and (8), to the Independent Fiduciary of each such Client Plan (and to the fiduciary of each such In-House Plan) invested in such Pooled Fund.

(3) A quarterly report (the Quarterly Report) (which may be provided electronically) which discloses all the Securities purchased pursuant to this proposed exemption during the period to which such report relates on behalf of the Client Plan, In-House Plan, or Pooled Fund to which such report relates, and which discloses the terms of each of the transactions described in such report, including:

(i) The type of Securities (including the rating of any Securities which are debt securities) involved in each transaction;

(ii) The price at which the Securities were purchased in each transaction;

(iii) The first day on which any sale was made during the offering of the Securities;

(iv) The size of the issue of the Securities involved in each transaction;

(v) The number of Securities purchased by the asset management affiliate of CS for the Client Plan, In-House Plan, or Pooled Fund to which the transaction relates;

(vi) The identity of the underwriter from whom the Securities were purchased for each transaction;

(vii) The underwriting spread in each transaction (*i.e.*, the difference, between the price at which the underwriter purchases the Securities from the issuer and the price at which the Securities are sold to the public);

(viii) The price at which any of the Securities purchased during the period to which such report relates were sold; and

(ix) The market value at the end of the period to which such report relates of the Securities purchased during such period and not sold;

(4) The Quarterly Report contains:

(i) A representation that the asset management affiliate of CS has received a written certification signed by an officer of the Affiliated Broker-Dealer, as described, above, in Section II(g)(2), affirming that, as to each AUT covered by this proposed exemption during the past quarter, the Affiliated Broker-Dealer acted in compliance with Section II(e), (f), and (g) of this proposed exemption, and

(ii) A representation that copies of such certifications will be provided upon request;

(5) A disclosure in the Quarterly Report that states that any other reasonably available information regarding a covered transaction that an Independent Fiduciary (or fiduciary of an In-House Plan) requests will be provided, including, but not limited to:

(i) The date on which the Securities were purchased on behalf of the Client Plan (or the In-House Plan) to which the disclosure relates (including Securities purchased by Pooled Funds in which such Client Plan (or such In-House Plan) invests);

(ii) The percentage of the offering purchased on behalf of all Client Plans (and the pro-rata percentage purchased on behalf of Client Plans and In-House Plans investing in Pooled Funds); and

(iii) The identity of all members of the underwriting syndicate;

(6) The Quarterly Report discloses any instance during the past quarter where the asset management affiliate of CS was precluded for any period of time from

selling Securities purchased under this proposed exemption in that quarter because of its status as an affiliate of an Affiliated Broker-Dealer and the reason for this restriction;

(7) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each single Client Plan that engages in the covered transactions that the authorization to engage in such covered transactions may be terminated, without penalty to such single Client Plan, within five (5) days after the date that the Independent Fiduciary of such single Client Plan informs the person identified in such notification that the authorization to engage in the covered transactions is terminated; and

(8) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each Client Plan (and to the fiduciary of each In-House Plan) that engages in the covered transactions through a Pooled Fund that the investment in such Pooled Fund may be terminated, without penalty to such Client Plan (or such In-House Plan), within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans, after the date that that the Independent Fiduciary of such Client Plan (or the fiduciary of such In-House Plan, as the case may be) informs the person identified in such notification that the investment in such Pooled Fund is terminated.

(o) For purposes of engaging in covered transactions, each Client Plan (and each In-House Plan) shall have total net assets with a value of at least \$50 million (the \$50 Million Net Asset Requirement). For purposes of engaging in covered transactions involving an Eligible Rule 144A Offering,<sup>3</sup> each Client Plan (and each In-House Plan) shall have total net assets of at least \$100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may

<sup>3</sup> SEC Rule 10f-3(a)(4), 17 CFR § 270.10f-3(a)(4), states that the term "Eligible Rule 144A Offering" means an offering of securities that meets the following conditions:

(i) The securities are offered or sold in transactions exempt from registration under section 4(a) of the Securities Act of 1933 [15 U.S.C. 77d(d)], rule 144A thereunder [§ 230.144A of this chapter], or rules 501–508 thereunder [§§ 230.501–230–508 of this chapter];

(ii) The securities are sold to persons that the seller and any person acting on behalf of the seller reasonably believe to include qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter; and

(iii) The seller and any person acting on behalf of the seller reasonably believe that the securities are eligible for resale to other qualified institutional buyers pursuant to § 230.144A of this chapter.

be) (the \$100 Million Net Asset Requirement).

For purposes of a Pooled Fund engaging in covered transactions, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets with a value of at least \$50 million. Notwithstanding the foregoing, if each such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets with a value of at least \$50 million, the \$50 Million Net Asset Requirement will be met if 50 percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (or by In-House Plans) each of which has total net assets with a value of at least \$50 million. For purposes of a Pooled Fund engaging in covered transactions involving an Eligible Rule 144A Offering, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets of at least \$100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be). Notwithstanding the foregoing, if each such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets of at least \$100 million in securities of issuers that are not affiliated with such Client Plan (or In-House Plan, as the case may be), the \$100 Million Net Asset Requirement will be met if 50 percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (or by In-House Plans) each of which have total net assets of at least \$100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be), and the Pooled Fund itself qualifies as a QIB, as determined pursuant to SEC Rule 144A (17 CFR 230.144A(a)(F)).

For purposes of the net asset requirements described above, in this Section II(o), where a group of Client Plans is maintained by a single employer or controlled group of employers, as defined in section 407(d)(7) of the Act, the \$50 Million Net Asset Requirement (or in the case of an Eligible Rule 144A Offering, the \$100 Million Net Asset Requirement) may be met by aggregating the assets of such Client Plans, if the assets of such Client Plans are pooled for investment purposes in a single master trust.

(p) The asset management affiliate of CS qualifies as a "qualified professional asset manager" (QPAM), as that term is defined under Section V(a) of PTE 84-14. In addition to satisfying the requirements for a QPAM under Section V(a) of PTE 84-14, the asset management affiliate of CS must also have total client assets under its

management and control in excess of \$5 billion, as of the last day of its most recent fiscal year and shareholders' or partners' equity in excess of \$1 million.

(q) No more than 20 percent of the assets of a Pooled Fund at the time of a covered transaction, are comprised of assets of In-House Plans for which CS, the asset management affiliate of CS, the Affiliated Broker-Dealer, or an affiliate exercises investment discretion.

(r) The asset management affiliate of CS, and the Affiliated Broker-Dealer, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the persons, described, below, in Section II(s), to determine whether the conditions of this proposed exemption have been met, except that—

(1) No party in interest with respect to a plan which engages in the covered transactions, other than CS, the asset management affiliate of CS, and the Affiliated Broker-Dealer, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by Section II(s); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of the asset management affiliate of CS, or the Affiliated Broker-Dealer, as applicable, such records are lost or destroyed prior to the end of the six-year period.

(s)(1) Except as provided, below, in Section II(s)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above, in Section II(r), are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the SEC; or

(ii) Any fiduciary of any plan that engages in the covered transactions, or any duly authorized employee or representative of such fiduciary; or

(iii) Any employer of participants and beneficiaries and any employee organization whose members are covered by a plan that engages in the covered transactions, or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of a plan that engages in the covered transactions, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described above, in Section II(s)(1)(i)–(iv), shall be authorized to examine trade secrets of the asset management affiliate of CS, or the Affiliated Broker-Dealer, or commercial or financial information which is privileged or confidential; and

(3) Should the asset management affiliate of CS, or the Affiliated Broker-Dealer refuse to disclose information on the basis that such information is exempt from disclosure, pursuant to Section II(s)(2) above, the asset management affiliate of CS shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

### Section III. Definitions

(a) The term, "the Applicant," means CS and its current and future affiliates.

(b) The term, "Affiliated Broker-Dealer," means any broker-dealer affiliate, as "affiliate" is defined, below, in Section III(c), of the Applicant, as "Applicant" is defined, above, in Section III(a), that meets the requirements of this proposed exemption. Such Affiliated Broker-Dealer may participate in an underwriting or selling syndicate as a manager or member. The term, "manager," means any member of an underwriting or selling syndicate who, either alone or together with other members of the syndicate, is authorized to act on behalf of the members of the syndicate in connection with the sale and distribution of the Securities, as defined below, in Section III(h), being offered or who receives compensation from the members of the syndicate for its services as a manager of the syndicate.

(c) The term "affiliate" of a person includes:

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

(2) Any officer, director, partner, employee, or relative, as defined in section 3(15) of the Act, of such person; and

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

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

(e) The term, "Client Plan(s)," means an employee benefit plan(s) that is subject to the Act and/or the Code, and for which plan(s) an asset management

affiliate of CS exercises discretionary authority or discretionary control respecting management or disposition of some or all of the assets of such plan(s), but excludes In-House Plans, as defined, below, in Section III(l).

(f) The term, "Pooled Fund(s)," means a common or collective trust fund(s) or a pooled investment fund(s):

(1) In which employee benefit plan(s) subject to the Act and/or Code invest,

(2) Which is maintained by an asset management affiliate of CS, (as the term, "affiliate" is defined, above, in Section III(c)), and

(3) For which such asset management affiliate of CS exercises discretionary authority or discretionary control respecting the management or disposition of the assets of such fund(s).

(g)(1) The term, "Independent Fiduciary," means a fiduciary of a plan who is unrelated to, and independent of CS, the asset management affiliate of CS, and the Affiliated Broker-Dealer. For purposes of this proposed exemption, a fiduciary of a plan will be deemed to be unrelated to, and independent of CS, the asset management affiliate of CS, and the Affiliated Broker-Dealer, if such fiduciary represents in writing that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for the transactions described above, in Section I of this proposed exemption, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of CS, the asset management affiliate of CS, or the Affiliated Broker-Dealer, and represents that such fiduciary shall advise the asset management affiliate of CS within a reasonable period of time after any change in such facts occur.

(2) Notwithstanding anything to the contrary in this Section III(g), a fiduciary of a plan is not independent:

(i) If such fiduciary directly or indirectly controls, is controlled by, or is under common control with CS, the asset management affiliate of CS, or the Affiliated Broker-Dealer;

(ii) If such fiduciary directly or indirectly receives any compensation or other consideration from CS, the asset management affiliate of CS, or the Affiliated Broker-Dealer for his or her own personal account in connection with any transaction described in this proposed exemption;

(iii) If any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the asset management affiliate of CS responsible for the transactions described above, in Section I of this proposed exemption, is an officer,

director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the sponsor of the plan or of the fiduciary responsible for the decision to authorize or terminate authorization for the transactions described above, in Section I.

However, if such individual is a director of the sponsor of the plan or of the responsible fiduciary, and if he or she abstains from participation in: (A) the choice of the plan's investment manager/adviser; and (B) the decision to authorize or terminate authorization for transactions described above, in Section I, then this Section III(g)(2)(iii) shall not apply.

(3) The term, "officer," means a president, any vice president in charge of a principal business unit, division, or function (such as sales, administration, or finance), or any other officer who performs a policy-making function for CS or any affiliate thereof.

(h) The term, "Securities," shall have the same meaning as defined in section 2(36) of the Investment Company Act of 1940 (the 1940 Act), as amended (15 U.S.C. 80a-2(36)(2001)). For purposes of this proposed exemption, mortgage-backed or other asset-backed securities rated by one of the Rating Organizations, as defined, below, in Section III(k), will be treated as debt securities.

(i) The term, "Eligible Rule 144A Offering," shall have the same meaning as defined in SEC Rule 10f-3(a)(4) (17 CFR 270.10f-3(a)(4)) under the 1940 Act).

(j) The term, "qualified institutional buyer," or the term, "QIB," shall have the same meaning as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)) under the 1933 Act.

(k) The term, "Rating Organizations," means Standard & Poor's Rating Services, Moody's Investors Service, Inc., FitchRatings, Inc., Dominion Bond Rating Service Limited, and Dominion Bond Rating Service, Inc., or any successors thereto.

(l) The term, "In-House Plan(s)," means an employee benefit plan(s) that is subject to the Act and/or the Code, and that is sponsored by the Applicant, as defined, above, in Section III(a) for its own employees.

## Summary of Facts and Representations

### *The Applicant*

1. The Applicant consists of CS and its current and future affiliates. CS, a business unit of Zurich-based Credit Suisse Group, is a leading global investment bank with numerous institutional and other clients. CS's

business lines include securities underwriting, sales and trading, private equity, financial advisory services, investment research and asset management. Credit Suisse Asset Management Securities, Inc. and Credit Suisse Securities (USA) LLC are registered broker-dealers (hereinafter, collectively with any other current and future broker-dealer affiliates, "the Affiliated Broker-Dealer") and are regulated by the SEC under Section 15 of the 1934 Act. Credit Suisse Asset Management, LLC (CSAM) focuses on institutional, mutual fund and private client investors, in the Americas, Asia Pacific, and Europe. CSAM is an investment adviser registered under the 1940 Act. As of December 31, 2006, CS had assets under management of approximately \$1.2 trillion and shareholder equity of approximately \$34.7 billion.

2. The Applicant is regulated by federal government agencies, such as the SEC, as well as by state government agencies, and industry self-regulatory organizations (e.g., the New York Stock Exchange and the National Association of Securities Dealers).

### *Requested Exemption*

3. The Applicant requests a prohibited transaction exemption that would permit the purchase of certain Securities by an asset management affiliate of CS (the Asset Manager), acting on behalf of Client Plans subject to the Act or Code, and acting on behalf of Client Plans and In-House Plans which are invested in certain Pooled Funds for which an Asset Manager acts as a fiduciary, from any person other than such Asset Manager or any affiliate thereof, during the existence of an underwriting or selling syndicate with respect to such Securities, where an Affiliated Broker-Dealer is a manager or member of such syndicate. Further, the Affiliated Broker-Dealer will receive no selling concessions in connection with the Securities sold to such plans.

4. The Applicant represents that if the Affiliated Broker-Dealer is a member of an underwriting or selling syndicate, the Asset Manager may purchase underwritten securities for Client Plans in accordance with Part III of Prohibited Transaction Exemption (PTE) 75-1, (40 FR 50845, October 31, 1975). Part III provides limited relief from the Act's prohibited transaction provisions for plan fiduciaries that purchase securities from an underwriting or selling syndicate of which the fiduciary or an affiliate is a member. However, such relief is not available if the Affiliated Broker-Dealer manages the underwriting or selling syndicate.

5. In addition, regardless of whether a fiduciary or its affiliate is a manager or merely a member of an underwriting or selling syndicate, PTE 75-1 does not provide relief for the purchase of unregistered securities. This includes securities purchased by an underwriter for resale to a "qualified institutional buyer" (QIB) pursuant to the SEC's Rule 144A under the 1933 Act. Rule 144A is commonly utilized in connection with sales of securities issued by foreign corporations to U.S. investors that are QIBs. Notwithstanding the unregistered nature of such shares, it is represented that syndicates selling securities under Rule 144A (Rule 144A Securities) are the functional equivalent of those selling registered securities.

6. The Applicant represents that the Affiliated Broker-Dealer regularly serves as manager of underwriting or selling syndicates for registered securities, and as a manager or a member of underwriting or selling syndicates for Rule 144A Securities. Accordingly, the Asset Manager is currently unable to purchase on behalf of the Client Plans both registered securities and Rule 144A Securities sold in such offerings, resulting in such Client Plans being unable to participate in significant investment opportunities.

7. It is represented that since 1975, there has been a significant amount of consolidation in the financial services industry in the United States. As a result, there are more situations in which a plan fiduciary may be affiliated with the manager of an underwriting syndicate. Further, many plans have expanded investment portfolios in recent years to include securities issued by foreign corporations. As a result, the exemption provided in PTE 75-1, Part III, is often unavailable for purchase of domestic and foreign securities that may otherwise constitute appropriate plan investments.

#### *Client Plan Investments in Offered Securities*

8. The Applicant represents that the Asset Manager makes its investment decisions on behalf of, or renders investment advice to, Client Plans pursuant to the governing document of the particular Client Plan or Pooled Fund and the investment guidelines and objectives set forth in the management or advisory agreement. Because the Client Plans are covered by Title I of the Act, such investment decisions are subject to the fiduciary responsibility provisions of the Act.

9. The Applicant states, therefore, that the decision to invest in a particular offering is made on the basis of price, value and a Client Plan's investment

criteria, not on whether the securities are currently being sold through an underwriting or selling syndicate. The Applicant further states that, because the Asset Manager's compensation for its services is generally based upon assets under management, the Asset Manager has little incentive to purchase securities in an offering in which the Affiliated Broker Dealer is an underwriter unless such a purchase is in the interests of Client Plans. If the assets under management do not perform well, the Asset Manager will receive less compensation and could lose clients, costs which far outweigh any gains from the purchase of underwritten securities.<sup>4</sup>

10. The Applicant states that the Asset Manager generally purchases securities in large blocks because the same investments will be made across several accounts. If there is a new offering of an equity or fixed income security that the Asset Manager wishes to purchase, it may be able to purchase the security through the offering syndicate at a lower price than it would pay in the open market, without transaction costs and with reduced market impact if it is buying a relatively large quantity. This is because a large purchase in the open market can cause an increase in the market price and, consequently, in the cost of the securities. Purchasing from an offering syndicate can thus reduce the costs to the Client Plans.

11. However, absent this proposed exemption, if the Affiliated Broker-Dealer is a manager of a syndicate that is underwriting a securities offering, the Asset Manager will be foreclosed from purchasing any securities on behalf of its Client Plans from that underwriting syndicate. This will force the Asset Manager to purchase the same securities in the secondary market. In such a circumstance, the Client Plans may incur greater costs both because the market price is often higher than the offering price, and because of transaction and market impact costs. In turn, this may cause the Asset Manager to forego other investment opportunities because the purchase price of the underwritten security in the secondary market exceeds the price that the Asset Manager would have paid to the selling syndicate.

<sup>4</sup> In fact, under the terms of the proposed exemption set forth herein, the Affiliated Broker-Dealer may receive no compensation or other consideration, direct or indirect, in connection with any transaction that would be permitted under the proposed exemption.

#### *Underwriting of Securities Offerings*

12. The Applicant represents that the Affiliated Broker-Dealer currently manages and participates in firm commitment underwriting syndicates for registered offerings of both equity and debt securities. While equity and debt underwritings may operate differently with regard to the actual sales process, the basic structures are the same. In a firm commitment underwriting, the underwriting syndicate acquires the securities from the issuer and then sells the securities to investors.

13. The Applicant represents that while, as a legal matter, a selling syndicate assumes the risk that the underwritten securities might not be fully sold, as a practical matter, this risk is reduced, in marketed deals, through "building a book" (i.e., taking indications of interest from potential purchasers) prior to pricing the securities. Accordingly, there is no incentive for the underwriters to use their discretionary accounts (or the discretionary accounts of their affiliates) to buy up the securities as a way to avoid underwriting liabilities.

14. Each selling syndicate has a lead manager, who is the principal contact between the syndicate and the issuer and who is responsible for organizing and coordinating the syndicate. The syndicate may also have co-managers, who generally assist the lead manager in working with the issuer to prepare the registration statement to be filed with the SEC and in distributing the underwritten securities. While equity syndicates typically include additional members that are not managers, more recently, membership in many debt underwriting syndicates has been limited to lead and co-managers.

15. If more than one underwriter is involved in a selling syndicate, the lead manager, who has been selected by the issuer of the underwritten securities, contacts other underwriters, and the underwriters enter into an "Agreement Among Underwriters." Most lead managers have a standing form of agreement. This document is then supplemented for the particular deal by sending an "invitation telex" or "terms telex" that sets forth particular terms to the other underwriters.

16. The arrangement between the syndicate and the issuer of the underwritten securities is embodied in an underwriting agreement, which is signed on behalf of the underwriters by one or more of the managers. In a firm commitment underwriting, the underwriting agreement provides, subject to certain closing conditions,



that the underwriters are obligated to purchase the underwritten securities from the issuer in accordance with their respective commitments. This obligation is met by using the proceeds received from the buyers of the securities in the offering, although there is a risk that the underwriters will have to pay for a portion of the securities in the event that not all of the securities are sold.

17. The Applicant represents that, generally, the risk that the securities will not be sold is small because the underwriting agreement is not executed until after the underwriters have obtained sufficient indications of interest to purchase the securities from a sufficient number of investors to assure that all the securities being offered will be acquired by investors. Once the underwriting agreement is executed, the underwriters immediately begin contacting the investors to confirm the sales, at first by oral communication and then by written confirmation. Sales are finalized within hours and sometimes minutes. In registered transactions, the underwriters are particularly anxious to complete the sales as soon as possible because until they "break syndicate," they cannot enter the market. In many cases, the underwriters will act as market-makers for the security. A market-maker holds itself out as willing to buy or sell the security for its own account on a regular basis.

18. The Applicant represents that the process of "building a book" or soliciting indications of interest occurs as follows: In a registered equity offering, after a registration statement is filed with the SEC and, while it is under review by the SEC staff, representatives of the issuer of the securities and the selling syndicate managers conduct meetings with potential investors, who learn about the company and the underwritten securities. Potential investors also receive a preliminary prospectus. The underwriters cannot make any firm sales until the registration statement is declared effective by the SEC. Prior to the effective date, while the investors cannot become legally obligated to make a purchase, they indicate whether they have an interest in buying, and the managers compile a "book" of investors who are willing to "circle" a particular portion of the issue. These indications of interest are sometimes referred to as a "soft circle" because investors cannot be legally bound to buy the securities until the registration statement is effective. However, the Applicant represents that investors generally follow through on their indications of

interest, and would be expected to do so, barring any sudden adverse developments (in which case it is likely that the offering would be withdrawn or the price range modified and the process restarted), because, if the investors that gave an indication of interest do not follow through, the underwriters may be reluctant to include them in future offerings.

19. Assuming that the marketing efforts have produced sufficient indications of interest, the Applicant represents that the issuer of the securities and the selling syndicate managers together will set the price of the securities and ask the SEC to declare the registration effective. After the registration statement becomes effective and the underwriting agreement is executed, the underwriters contact those investors that have indicated an interest in purchasing securities in the offering to execute the sales. The Applicant represents that offerings are often oversubscribed, and many have an over-allotment option that the underwriters can exercise to acquire additional shares from the issuer. Where an offering is oversubscribed, the underwriters decide how to allocate the securities among the potential purchasers. However, if an issue is a "hot issue," (i.e., it is selling in the market at a premium above its offering price) the underwriters may not hold this hot issue in their own accounts, nor sell it to their employees, officers and directors. Subject to certain exceptions, a hot issue may also not be sold to the personal accounts of those responsible for investing for others, such as officers of banks, insurance companies, mutual funds and investment advisers.

20. The Applicant represents that debt offerings may be "negotiated" offerings, "competitive bid" offerings, or "bought deals." "Negotiated" offerings, which often involve non-investment grade securities, are conducted in the same manner as an equity offering with regard to when the underwriting agreement is executed and how the securities are offered. "Competitive bid" offerings, in which the issuer determines the price for the securities through competitive bidding rather than negotiating the price with the underwriting syndicate, are performed under "shelf" registration statements pursuant to the SEC's Rule 415 under the 1933 Act (17 CFR 230.415).<sup>5</sup>

21. In a competitive bid offering, prospective lead underwriters will bid

<sup>5</sup> Rule 415 permits an issuer to sell debt as well as equity securities under an effective registration statement previously filed with the SEC by filing a post-effective amendment or supplemental prospectus.

against one another to purchase debt securities, based upon their determinations of the degree of investor interest in the securities. Depending on the level of investor interest and the size of the offering, a bidding lead underwriter may bring in co-managers to assist in the sales process. Most of the securities are frequently sold within hours, or sometimes even less than an hour, after the securities are made available for purchase.

22. The Applicant represents that, because of market forces and the requirements of Rule 415, the competitive bid process is generally available only to issuers of investment-grade securities who have been subject to the reporting requirements of the 1934 Act for at least one (1) year.

23. Occasionally, in highly-rated debt issues, underwriters "buy" the entire deal off of a "shelf registration" before obtaining indications of interest. These "bought" deals involve issuers whose securities enjoy a deep and liquid secondary market, such that an underwriter has confidence without pre-marketing that it can identify purchasers for the bonds.

#### *Structure of Diversified Financial Services Firms*

24. The Applicant represents that there are internal policies in place that restrict contact and the flow of information between investment management personnel and non-investment management personnel in the same or affiliated financial service firms. These policies are designed to protect against "insider trading," i.e., trading on information not available to the general public that may affect the market price of the securities. Diversified financial services firms must be concerned about insider trading problems because one part of the firm—e.g., the mergers and acquisitions group—could come into possession of non-public information regarding an upcoming transaction involving a particular issuer, while another part of the firm—e.g., the investment management group—could be trading in the securities of that issuer for its clients.

25. The Applicant represents that the business separation policies and procedures of CS and its affiliates are also structured to restrict the flow of any information to or from the Asset Manager that could limit its flexibility in managing client assets, and of information obtained or developed by the Asset Manager that could be used by other parts of the organization, to the detriment of the Asset Manager's clients.

26. The Applicant represents that major clients of the Affiliated Broker-Dealer include investment management firms that are competitors of the Asset Manager. Similarly, the Asset Manager deals on a regular basis with broker-dealers that compete with the Affiliated Broker-Dealer. If special consideration were shown to an affiliate, such conduct would likely have an adverse effect on the relationships of the Affiliated Broker-Dealer and of the Asset Manager with firms that compete with such affiliate. Therefore, a goal of the Applicant's business separation policies is to avoid any possible perception of improper flows of information between the Affiliated Broker-Dealer and the Asset Manager, in order to prevent any adverse impact on client and business relationships.

#### *Underwriting Compensation*

27. The Applicant represents that the underwriters are compensated through the "spread," or difference, between the price at which the underwriters purchase the securities from the issuer and the price at which the securities are sold to the public. The spread is divided into three components.

28. The first component includes the management fee, which generally represents an agreed upon percentage of the overall spread and is allocated among the lead manager and co-managers. Where there is more than one managing underwriter, the way the management fee will be allocated among the managers is generally agreed upon between the managers and the issuer prior to soliciting indications of interest. Thus, the allocation of the management fee is not reflective of the amount of securities that a particular manager sells in an offering.

29. The second component is the underwriting fee, which represents compensation to the underwriters (including the non-managers, if any) for the risks they assume in connection with the offering and for the use of their capital. This component of the spread is also used to cover the expenses of the underwriting that are not otherwise reimbursed by the issuer of the securities.

30. The first and second components of the "spread" are received without regard to how the underwritten securities are allocated for sales purposes or to whom the securities are sold. The third component of the spread is the selling concession, which generally constitutes 60 percent or more of the spread. The selling concession compensates the underwriters for their actual selling efforts. The allocation of selling concessions among the

underwriters generally follows the allocation of the securities for sales purposes. However, a buyer of the underwritten securities may designate other broker-dealers (who may be other underwriters, as well as broker-dealers outside the syndicate) to receive the selling concessions arising from the securities they purchase.

31. Securities are allocated for sales purposes into two categories. The first and larger category is the "institutional pot," which is the pot of securities from which sales are made to institutional investors. Selling concessions for securities sold from the institutional pot are generally designated by the purchaser to go to particular underwriters or other broker-dealers. If securities are sold from the institutional pot, the selling syndicate managers sometimes receive a portion of the selling concessions, referred to as a "fixed designation,"<sup>6</sup> attributable to securities sold in this category, without regard to who sold the securities or to whom they were sold. For securities covered by this proposed exemption, however, the Affiliated Broker-Dealer may not receive, either directly or indirectly, any compensation or consideration that is attributable to the fixed designation generated by purchases of securities by the Asset Manager on behalf of its Client Plans.

32. The second category of allocated securities is "retail," which are the securities retained by the underwriters for sale to their retail customers. The underwriters receive the selling concessions from their respective retail retention allocations. Securities may be shifted between the two categories based upon whether either category is oversold or undersold during the course of the offering.

33. The Applicant represents that the Affiliated Broker-Dealer's inability to receive any selling concessions, or any compensation attributable to the fixed designations generated by purchases of securities by the Asset Manager's Client Plans, removes the primary economic incentive for the Asset Manager to make purchases that are not in the interests of its Client Plans from offerings for which the Affiliated Broker-Dealer is an underwriter. The reason is that the Affiliated Broker-Dealer will not receive any additional fees as a result of such purchases by the Asset Manager.

#### *Rule 144A Securities*

34. The Applicant represents that a number of the offerings of Rule 144A Securities in which the Affiliated

Broker-Dealer participates represent good investment opportunities for the Asset Manager's Client Plans. Particularly with respect to foreign securities, a Rule 144A offering may provide the least expensive and most accessible means for obtaining these securities. However, as discussed above, PTE 75-1, Part III, does not cover Rule 144A Securities. Therefore, absent an exemption, the Asset Manager is foreclosed from purchasing such securities for its Client Plans in offerings in which the Affiliated Broker-Dealer participates.

35. The Applicant states that Rule 144A acts as a "safe harbor" exemption from the registration provisions of the 1933 Act for sales of certain types of securities to QIBs. QIBs include several types of institutional entities, such as employee benefit plans and commingled trust funds holding assets of such plans, which own and invest on a discretionary basis at least \$100 million in securities of unaffiliated issuers.

36. Any securities may be sold pursuant to Rule 144A except for those of the same class or similar to a class that is publicly traded in the United States, or certain types of investment company securities. This limitation is designed to prevent side-by-side public and private markets developing for the same class of securities and is the reason that Rule 144A transactions are generally limited to debt securities.

37. Buyers of Rule 144A Securities must be able to obtain, upon request, basic information concerning the business of the issuer and the issuer's financial statements, much of the same information as would be furnished if the offering were registered. This condition does not apply, however, to an issuer filing reports with the SEC under the 1934 Act, for which reports are publicly available. The condition also does not apply to a "foreign private issuer" for whom reports are furnished to the SEC under Rule 12g3-2(b) of the 1934 Act (17 CFR 240.12g3-2(b)), or to issuers who are foreign governments or political subdivisions thereof and are eligible to use Schedule B under the 1933 Act (which describes the information and documents required to be contained in a registration statement filed by such issuers).

38. Sales under Rule 144A, like sales in a registered offering, remain subject to the protections of the anti-fraud rules of federal and state securities laws. These rules include Section 10(b) of the 1934 Act and Rule 10b-5 thereunder (17 CFR 240.10b-5) and Section 17(a) of the 1933 Act (15 U.S.C. 77a). Through these and other provisions, the SEC may use its full range of enforcement powers to

<sup>6</sup> A fixed designation is sometimes referred to as an "auto pot split."

exercise its regulatory authority over the market for Rule 144A Securities, in the event that it detects improper practices or fraud.

39. The Applicant represents that this regulatory structure provides a considerable incentive to the issuer of the securities and the members of the selling syndicate to insure that the information contained in a Rule 144A offering memorandum is complete and accurate in all material respects. Among other things, the lead manager typically obtains an opinion from a law firm, commonly referred to as a "10b-5" opinion, stating that the law firm has no reason to believe that the offering memorandum contains any untrue statement of material fact or omits to state a material fact necessary in order to make sure the statements made, in light of the circumstances under which they were made, are not misleading.

40. The Applicant represents that Rule 144A offerings generally are structured in the same manner as underwritten registered offerings. The major difference is that a Rule 144A offering uses an offering memorandum rather than a prospectus that is filed with the SEC. The marketing process is the same in most respects, except that the selling efforts are limited to contacting QIBs and there are no general solicitations for buyers (e.g., no general advertising). In addition, the Affiliated Broker-Dealer's role in these offerings is typically that of a lead or co-manager. Generally, there are no non-manager members in a Rule 144A selling syndicate. However, the Applicant requests that the proposed exemption extend to authorization for situations where the Affiliated Broker-Dealer acts only as a syndicate member, not as a manager.

#### Summary

41. The proposed exemption is administratively feasible. In this regard, compliance with the terms and conditions of the proposed exemption will be verifiable and subject to audit.

42. The proposed exemption is in the interest of participants and beneficiaries of Client Plans that engage in the covered transactions. In this regard, it is represented that the proposed exemption will increase investment opportunities and will reduce administrative costs for Client Plans.

43. In summary, the Applicant represents that the proposed transactions will satisfy the statutory criteria for an exemption set forth in section 408(a) of the Act because:

(a) The Client Plans and In-House Plans will gain access to desirable investment opportunities;

(b) In each offering, the Asset Manager will purchase the securities for its Client Plans and In-House Plans from an underwriter or broker-dealer other than the Affiliated Broker-Dealer;

(c) Conditions similar to those of PTE 75-1, Part III, will restrict the types of securities that may be purchased, the types of underwriting or selling syndicates and issuers involved, and the price and timing of the purchases;

(d) The amount of securities that the Asset Manager may purchase on behalf of Client Plans and In-House Plans will be subject to percentage limitations;

(e) The Affiliated Broker-Dealer will not be permitted to receive, either directly, indirectly or through designation, any selling concessions with respect to the securities sold to the Asset Manager for the account of a Client Plan or an In-House Plan;

(f) Prior to any purchase of securities, the Asset Manager will make the required disclosures to an Independent Fiduciary of each Client Plan and obtain the required written authorization to engage in the covered transactions;

(g) The Asset Manager will provide regular reporting to an Independent Fiduciary of each Client Plan with respect to all securities purchased pursuant to the exemption, if granted;

(h) Each Client Plan and each In-House Plan will be subject to net asset requirements, with certain exceptions for Pooled Funds; and

(i) The Asset Manager must have total assets under management in excess of \$5 billion and shareholders' or partners' equity in excess of \$1 million, in addition to qualifying as a QPAM, pursuant to Part V(a) of PTE 84-14.

**Notice To Interested Persons:** The Applicant represents that because those potentially interested Plans proposing to engage in the covered transactions cannot all be identified, the only practical means of notifying Independent Plan Fiduciaries or Plan Participants of such affected Plans is by publication of the proposed exemption in the **Federal Register**. Therefore, any comments from interested persons must be received by the Department no later than 30 days from the publication of this notice of proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gary H. Lefkowitz of the Department, telephone (202) 693-8546. (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 14th day of January, 2008.

**Ivan Strasfeld,**

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

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**BILLING CODE 4510-29-P**

## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on Women Veterans; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92-463 (Federal Advisory Committee Act) that the Advisory Committee on Women