Proposed Exemption published on November 20, 2008 at 73 FR 70372.

For Further Information Contact: Mr. Mark Judge of the Department, telephone (202) 693–8339. (This is not a toll-free number.)

Brewster Dairy, Inc. 401(k) Profit Sharing Plan (the Plan), Located in Brewster, OH

[Prohibited Transaction Exemption 2009–05; Exemption Application No. D–11450]

Exemption

The restrictions of sections 406(a)(1)(A) and (D), 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A), (D) and (E) of the Code, shall not apply to the November 18, 2008 sale (the Sale) by the Plan of 2.5 limited partnership units (the Units) in the Heartland California Clayton Limited Partnership (the Partnership) to Brewster Dairy, Inc. (Brewster), the Plan's sponsor and a party in interest with respect to the Plan, for the greater of: (1) $57,000; (2) the net proceeds for the Units in the event the Partnership sells its real estate (the Property) to a third party; or (3) the net proceeds from foreclosure for the Units in the event the Property is foreclosed to pay back real estate taxes, provided the following conditions are satisfied:

(a) The Sale of the Units was a one-time transaction for cash;

(b) The Plan paid no commissions, fees or other expenses in connection with the Sale;

(c) The terms of the transaction were at least as favorable to the Plan as those the Plan could obtain in a similar transaction with an unrelated party;

(d) The fair market value of the Units on the date of the Sale was determined by a qualified independent appraiser;

(e) The Plan fiduciaries determined whether it was in the best interest of the Plan to go forward with the Sale, reviewed and approved the methodology used in the appraisal that was relied upon, and ensured that the methodology was applied by a qualified, independent appraiser in determining the fair market value of the Units as of the date of the Sale; and

(f) The proceeds from the Sale of the Units to Brewster will be allocated only to the participants who are defined in the Consent Order and Judgment (File No. 5:98CV744, July 1, 1999) entered by the United States District Court for the Northern District of Ohio Eastern Division (the Court).

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on November 20, 2008 at 73 FR 70375.

Effective Date: This exemption is effective November 18, 2008.

Written Comments and Hearing Requests: The Department received one written comment and no hearing requests with respect to the Notice. The one comment letter was submitted by Brewster. In its letter, Brewster informed the Department that the subject Sale of the 2.5 Units was consummated on November 18, 2008, and Brewster requested that the exemption be made retroactive to that date. The Sale price was $57,000. Brewster represented that the transaction had to be completed prior to the granting of the exemption by the Department to facilitate the sale of the Property by the Partnership's General Partners prior to the county filing a foreclosure action for real estate taxes unpaid by the Partnership. Brewster further represented that it will follow the terms of the Notice in all matters including allocation and adjustment of the purchase price if the Units previously owned by the Plan are sold by Brewster for more than $57,000 (or bring more than $57,000 in proceeds from foreclosure).

The Department has considered, the entire record, including the comment letter submitted by Brewster and has determined that the subject transaction satisfied the criteria of section 408(a) of the Act on the date of the transaction. Accordingly, the Department herein grants the exemption, effective November 18, 2008.

For Further Information Contact: 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 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 19th day of February, 2009.

Ivan Strasfeld,

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

[FR Doc. E9–3998 Filed 2–24–09; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Nos. and Proposed Exemptions; D–11447, Verizon Investment Management Company; D–11470, M&T Bank Corporation Pension Plan; D–11493, Schloer Enterprises, Inc. 401(k) Profit Sharing Plan (the Plan); and D–11501, Morgan Stanley & Co. Incorporated, et al.]

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'',* 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.

Verizon Investment Management Company, Located in Basking Ridge, New Jersey

[Application No. D–11447]

Proposed Exemption

The Department of Labor (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).[1]

Section I—Transaction(s)

If the proposed 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 section 4975(c)(1)(A) through (D) of the Code,[2] shall not apply, effective for the period January 1, through December 31, 2001, and for the period January 1, through December 31, 2003, to any transaction, as described in Part I of Prohibited Transaction Exemption 96–23 (PTE 96–23),[3] between a Verizon Plan or Verizon Plans, as defined, below, in section III(h) of this proposed exemption, and a party in interest, as defined, below, in section III(c) of this proposed exemption, with respect to such Verizon Plan; provided that: VIMCO satisfied the definition of an in-house asset manager (INHAM), as defined, below, in section III(a) of this proposed exemption, and had discretionary authority or control with respect to the assets of such Verizon Plan involved in each such transaction; and the conditions, as set forth, below, in sections I(a) through (c) and section II of this proposed exemption were satisfied;

(a) all the requirements of PTE 96–23 were satisfied for the period January 1, through December 31, 2001, and the period January 1, through December 31, 2003, except with respect to the annual audit requirement, as set forth in section I(h) of PTE 96–23;

(b) an exemption audit, as defined, in Part IV(f) of PTE 96–23, for the period January 1, through December 31, 2001, must have been completed by no later than December 31, 2003, and an exemption audit for the period January 1, through December 31, 2003, must have been completed by no later than December 31, 2005; and

(c) For the period beginning on the date of the publication in the **Federal Register** of the final exemption for application D–11447 and ending on the effective date of a final amendment to PTE 96–23, an independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act and who so represents in writing, conducts an exemption audit, as defined, below, in section III(f) of this proposed exemption, on an annual basis. Following completion of such exemption audit, the auditor shall issue a written report to the Verizon Plan or Verizon Plans that engage in transactions, described in section I of this proposed exemption, presenting such auditor's specific findings regarding the level of compliance: (1) With the policies and procedures adopted by VIMCO in accordance with Part I(g) of PTE 96–23; and (2) with the objective requirements of PTE 96–23. The written report shall also contain the auditor's overall opinion regarding whether VIMCO's program complied: (1) With the policies and procedures adopted by VIMCO; and (2) with the objective requirements of PTE 96–23. The exemption audit and the written report must be completed within six (6) months following the end of the year to which the audit relates.

Section II—General Conditions

(a) VIMCO must maintain or cause to be maintained, for a period of six (6) years, such records as are necessary to enable the persons described, below, in section II(b) of this proposed exemption, to determine whether the conditions of this proposed exemption have been met, except that:

[1] For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[2] The Department, herein, is not providing any retroactive or prospective relief for a transaction between a plan (a Verizon Plan or Verizon Plans), as defined, below, in section III(h) of this proposed exemption, and a party in interest with respect to such Verizon Plan, if such transaction was entered into or is entered into in years other than 2001 and 2003, nor is the Department, herein, providing any retroactive or prospective relief for any continuing transaction, or for any subsequent renewal or modification of a transaction that required or requires the consent of Verizon Investment Management Company (VIMCO), if entry into such continuing transaction, or entry into such renewal or modification occurred or occurs in years other than 2001 and 2003. In order to obtain relief for the entry into a transaction, or the entry into a continuing transaction or a subsequent renewal or modification of a transaction, as the case may be, VIMCO must have satisfied or must satisfy at the time of each such transaction, the terms and conditions as set forth in PTE 96–23 or, if applicable, the terms and conditions of PTE 96–23 as hereafter amended.

[3] 61 FR 15975, April 10, 1996.

(1) A prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of VIMCO, such records are lost or destroyed prior to the end of the six-year period, and

(2) no party in interest with respect to a Verizon Plan which engages in a transaction, described in section I of this proposed exemption, other than VIMCO, shall be subject to a civil penalty under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination, as required, below, by section II(b) of this proposed exemption.

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

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

(ii) Any fiduciary of a Verizon Plan that engages in a transaction, described in section I of this proposed exemption, or any duly authorized employee or representative of such fiduciary, and

(iii) Any participant or beneficiary of a Verizon Plan or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described, above, in section II(b)(1)(ii) and (iii) of this proposed exemption, shall be authorized to examine trade secrets of VIMCO, or commercial or financial information which is privileged or confidential.

Section III—Definitions

For the purposes of this proposed exemption:

(a) The term ''in-house asset manager'' or ''INHAM,'' means VIMCO, provided that VIMCO on January 1, 2001, was and continued thereafter to be:

(1) either (A) a direct or indirect wholly-owned subsidiary of Verizon, or a direct or indirect wholly-owned subsidiary of a parent organization of Verizon, or (B) a membership non-profit corporation a majority of whose members are officers or directors of such an employer or parent organization; and

(2) an investment adviser registered under the Investment Advisers Act of 1940 that, as of the last day of its most recent fiscal year, had and continued thereafter to have under its management and control total assets attributable to Verizon Plans maintained by affiliates of VIMCO, as defined, below, in section III(b) of this proposed exemption, in excess of $50 million; and provided that if VIMCO had no prior fiscal year as a separate legal entity as a result of its constituting a division or group within Verizon's organizational structure, then this requirement is deemed to have been met as of the date during VIMCO's 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 Verizon.

In addition, Verizon Plans maintained by affiliates of VIMCO and/or by VIMCO, had, as of January 1, 2001, and continued thereafter to have, aggregate assets of at least $250 million, calculated as of the last day of each such Verizon Plan's reporting year.

(b) For purposes of sections III(a) and III(h) of this proposed exemption, an ''affiliate'' of VIMCO means a member of either:

(1) A controlled group of corporations, as defined in section 414(b) of the Code, of which VIMCO 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 VIMCO 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.

(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) For purposes of this proposed exemption, the time as of which any transaction occurred is the date upon which the transaction was entered into. In addition, the time as of which any renewal or modification of any transaction occurred is the date upon which the renewal or the modification of the transaction was entered into. For any transaction that required the consent of VIMCO that was entered into, renewed, or modified, as the case may be, during the period from January 1, through December 31, 2001, or during the period from January 1, through December 31, 2003, the requirements of this proposed exemption must have been satisfied at the time such transaction was entered into, or was renewed, or was modified, as the case may be. In addition, in the case of a transaction that is continuing, the transaction is deemed to occur until it is terminated.

Nothing in this paragraph shall be construed as exempting a transaction entered into by a Verizon 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 PTE 96–23 were met at the time the transaction was entered into, or at the time the transaction would have become prohibited but for PTE 96–23. In determining compliance with the conditions of PTE 96–23 at the time that the transaction was entered into for purposes of the preceding sentence, Part I(e) of PTE 96–23, will be deemed satisfied if the transaction was entered into between a Verizon Plan and a person who was not then a party in interest.

(f) Exemption Audit. An ''exemption audit'' of a Verizon Plan must consist of the following:

(1) A review by an independent auditor of the written policies and procedures adopted by VIMCO, pursuant to Part I(g) of PTE 96–23, for consistency with each of the objective requirements of PTE 96–23, as described, below, in section III(g) of this proposed exemption.

(2) A test of a sample of VIMCO's transactions during the audit period that is sufficient in size and nature to afford the auditor a reasonable basis: (A) To make specific findings regarding whether VIMCO is in compliance with (i) the written policies and procedures adopted by VIMCO, pursuant to Part I(g) of PTE 96–23 and (ii) the objective requirements of PTE 96–23, as described, below, in section III(g) of this proposed exemption and (B) to render an overall opinion regarding the level of compliance of VIMCO's program with section III(f)(2)(A)(i) and (ii) of this proposed exemption.

(3) A determination as to whether VIMCO satisfied the definition of an INHAM, as defined, above, in section III(a), of this proposed 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 III(f), above, of this proposed exemption, the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by VIMCO to assure compliance with each of these requirements:

(1) The definition of an INHAM in section III(a) of this proposed exemption.

(2) The requirements of Part I and Part I(a) of PTE 96–23 regarding the discretionary authority or control of VIMCO with respect to the assets of a Verizon Plan involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of such Verizon Plan to enter into the transaction.

(3) That any procedure for approval or veto of the transaction meets the requirements of Part I(a) of PTE 96–23.

(4) For a transaction described in Part I of PTE 96–23:

(A) that the transaction is not entered into with any person who is excluded from relief under Part I(e)(1), Part I(e)(2) of PTE 96–23, to the extent such person has discretionary authority or control over the plan assets involved in the transaction, or Part I(f) of PTE 96–23, and

(B) that the transaction is not described in any of the class exemptions listed in Part I(b) of PTE 96–23.

(h) The term, ''Verizon Plan(s),'' means a plan or plans maintained by VIMCO or an affiliate of VIMCO.

DATES: *Effective Date:* If, granted, this proposed exemption will be effective for the period from January 1, through December 31, 2001, and from January 1, through December 31, 2003.

Summary of Facts and Representations

1. VIMCO is a wholly-owned subsidiary of GTE Corporation, which in turn is a wholly-owned subsidiary of Verizon Communications Inc. (Verizon). VIMCO is registered as an investment adviser under the Investment Advisers Act of 1940. VIMCO has been delegated the authority for the investment of the assets of the employee benefit trusts of Verizon and of most of Verizon's domestic subsidiaries (excluding Verizon Wireless). In this capacity, VIMCO's primary function is to act as investment manager or adviser for these employee benefit trusts, although VIMCO also performs investment management or advisory services for other entities related to Verizon.

As of June 30, 2007, VIMCO had in excess of $68.2 billion in assets under management. The assets of the Bell Atlantic Master Trust (the BAMT) comprise 63.3 percent (63.3%) of this amount. The BAMT holds the assets of seventeen (17) Verizon pension plans (the Verizon Pension Plans) [4] and a portion of the assets of two (2) of the Verizon savings plans (the Verizon Savings Plans).[5] The Verizon Master Savings Trust (MST) holds the assets of five (5) Verizon Savings Plans, representing 26.3 percent (26.3%) of VIMCO's assets under management. In addition, VIMCO manages $5.5 billion in assets for fourteen (14) Voluntary Employees Beneficiary Associations (VEBAs), which are employee benefit trusts that hold the assets of various health, dental, life, and long-term disability plans.[6] A VIMCO subsidiary acts as a general partner to two (2) limited partnerships established by VIMCO in which two (2) VEBAs and seven (7) VEBAs, respectively, invest.

VIMCO manages these assets in part by selecting third-party investment managers. In addition, VIMCO directly manages eleven (11) accounts for the Verizon Pension Plans within the BAMT. The assets in these accounts total $8.8 billion and include actively-managed stock funds, passively-managed stock funds (*i.e.* , index funds), an international futures fund, and a short term fixed income fund. VIMCO also selects private placement fund investments (usually investment limited partnerships offered by venture capital and buy-out funds) and real estate fund and natural resources investments for the Verizon Pension Plans, which currently total $6.7 billion.

2. Mellon Bank, N.A. (Mellon) acts as trustee of the BAMT and the fourteen (14) Verizon VEBA trusts and as custodian for the two (2) VEBA investment limited partnerships. Fidelity Management Trust Company acts as trustee of the MST.

3. Since 1996, VIMCO has relied on Prohibited Transaction Exemption 96–23 (PTE 96–23) which provides exemptive relief for that portion of the assets of an employee benefit plan that is managed by an INHAM, provided that the conditions of the class exemption are met, including the completion of an annual exemption audit. Prior to 2004, VIMCO relied on an independent accounting firm to conduct the annual exemption audits. However, in 2004, VIMCO learned that the accounting firm would no longer provide PTE 96–23 exemption audit services.

In a letter to VIMCO dated October 31, 2006, the Director of the New York Regional Office of the Employee Benefits Security Administration (the Regional Office), informed VIMCO that performance of the audit did not comply with the requirements of the class exemption and that VIMCO could not rely on PTE 96–23 for exemptive relief. As a result of discussions between the Regional Office and VIMCO, it was concluded that VIMCO would seek an individual administrative exemption for the 2003 transactions.

VIMCO subsequently notified the Regional Office that based upon their good faith understanding of the audit requirement, the 2001 INHAM audit was not begun until the 2002 audit was started in July 2003, and that both audits were completed in October 2003. This delay was attributable to the merger of Bell Atlantic and GTE to form Verizon which occurred in June 2000, and which led to consolidation of the companies' respective investment management firms in late 2000 and 2001. The plan trusts also were merged at the same time, and the investment options for the savings plans were extensively redesigned. Accordingly, VIMCO included relief for 2001 in its request for an individual administrative exemption.

VIMCO seeks a retroactive individual administrative exemption from the restrictions of section 406(a)(1)(A) through (D) of the Act and section 4975(c)(1)(A) through (D) of the Code, effective for the period from January 1, through December 31, 2001, and the period from January 1, through December 31, 2003. In this regard, VIMCO requests an individual administrative exemption which would provide relief substantially identical to that provided under Part I of PTE 96–23, subject to appropriate terms and conditions.

[4] The Verizon Corporate Services Group Inc. *et.al.* Pension Plans Report covers the following defined benefit plans: (1) GTE California Incorporated Plan for Hourly-Paid Employees' Pensions; (2) GTE Florida Incorporated Plan for Hourly-Paid Employees' Pension; (3) GTE South Incorporated (Kentucky) Plan for Hourly-Paid Employees' Pensions; (4) GTE Northwest Incorporated Plan for Hourly-Paid Employees' Pensions; (5) GTE South Incorporated (Southeast) Plan for Hourly-Paid Employees' Pensions; (6) GTE Southwest Incorporated Plan for Hourly-Paid Employees' Pensions; (7) GTE North Incorporated Pension Plan for Hourly-Plan Employees of Illinois; (8) GTE North Incorporated Pension Plan for Hourly-Paid Employees of Michigan; (9) GTE North Incorporated Pension Plan for Hourly-Paid Employees of Ohio; (10) GTE North Incorporated Pension Plan for Hourly-Paid Empoyees of Pennsylvania; (11) GTE North Incorporated Pension Plan for Hourly-Paid Employees of Wisconsin; (12) Hourly Employees Retirement System of GTE Hawaiian Telephone Company Incorporated; (13) GTE Supply Pension Plan for Union Represented Employees; (14) Verizon Pension Plan for New York and New England Associates; (15) Verizon Pension Plan for Mid-Atlantic Associates; (16) Verizon Enterprizes Management Pension Plan; and (17) Verizon Management Pension Plan.

[5] The Verizon Savings Plans are: (1) Verizon Savings Plan for Management Employees; (2) Verizon Savings and Security Plan for West Region Hourly Employees; (3) Verizon Savings and Security Plan for Mid-Atlantic Associates; (4) Verizon Savings and Security Plan for New York and New England Associates.

[6] The Verizon health and welfare plans are: (1) Verizon Group Life Insurance Plan for New York & New England Associates Plan for Group Insurance; (2) Verizon Plan 550; (3) Verizon Post—1995 Collectively Bargained Retiree Health Plan—(Pre 1993 Retirees); (4) Verizon Post—1995 Collectively Bargained Retiree Health Plan —(Post 1992 Retirees).

4. VIMCO maintains that it has satisfied the Department's requirements for retroactive relief. At the time of the 2001 and 2003 transactions, VIMCO maintains that it reasonably believed in good faith that it was acting in full compliance with the requirements of PTE 96–23. In scheduling the 2001 and 2003 audits, VIMCO relied on the fact that, in the more than ten (10) years since the Department granted PTE 96–23, there has been no guidance from the Department as to the interpretation of the audit requirement. Furthermore, VIMCO points out that there is no indication in the class exemption itself or the notices of proposed and final exemptions for PTE 96–23 that there is a deadline for performing the audits, nor has there been any similar public pronouncement from the Department to this effect.

5. The requested individual administrative exemption would cover transactions entered into by VIMCO, acting as an INHAM on behalf of the Verizon Plans with persons who were parties in interest with respect to such Verizon Plans solely by reason of providing services to such Verizon Plans, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H) or (I) of the Act, for the periods from January 1, through December 31, 2001, and January 1, through December 31, 2003. The proposed exemption, if granted, would be conditioned on the following:

(a) The requirements of PTE 96–23 were met for the relevant periods, except with respect to the annual audit requirement of PTE 96–23, Part I(h), and

(b) An independent auditor, who had appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act and who so represented in writing, conducted an exemption audit for each such plan year no later than, respectively, December 31, 2003, (for plan year 2001) and December 31, 2005, (for plan year 2003). Following completion of the exemption audits, the auditor issued a written report for each audit to the Verizon Plans presenting its specific findings regarding the level of compliance with the policies and procedures adopted by VIMCO, which reports contained no adverse findings. Further, VIMCO represents that it has maintained records sufficient to permit the Department and others to determine whether the conditions of this proposed exemption have been met. In addition, the retroactive relief provided by this proposed exemption is subject to VIMCO complying with the conditions of this proposed exemption at all times during the period beginning on the date of the publication in the **Federal Register** of the final exemption for application D–11447 and ending on the effective date of a final amendment to PTE 96–23.

6. It is represented that the proposed exemption is administratively feasible, because the Department would not have to monitor implementation or enforcement. In this regard, VIMCO in managing the assets of the Verizon Plans during the years 2001 and 2003, represented that it at all times acted in good faith compliance with the terms of PTE 96–23. This included obtaining after year-end the required independent exemption audit, which found that VIMCO had been operating as an INHAM during 2001 and 2003 in accordance with the objective requirements of PTE 96–23.

7. VIMCO represents that the proposed exemption is in the interests of Verizon Plans and the participants and beneficiaries of such Verizon Plans. Like many corporations, Verizon utilizes an INHAM for its employee benefit plans, to reduce costs while retaining high-quality management devoted largely to its plans' asset management activities. In carrying out its responsibilities, VIMCO, acting as an INHAM, relied on PTE 96–23. Apart from the issue raised by the audit timing requirement, VIMCO was in full compliance with the requirements of PTE 96–23, which compliance was in the interests of the Verizon Plans and the participants and beneficiaries of such Verizon Plans.

8. VIMCO represents that the proposed exemption is protective of the rights of participants and beneficiaries of the Verizon Plans. In this regard, PTE 96–23 was designed to apply to transactions that have little, if any, potential for abuse and that would constitute only technical prohibited transactions. VIMCO maintains that the proposed exemption, which is substantially modeled on PTE 96–23, would, therefore, be protective of the rights of the participants and beneficiaries of the Verizon Plans, because: (a) The timing of the 2001 and 2003 audits caused no harm to any of the Verizon Plans that participated in the investment transactions for which VIMCO has claimed a retroactive individual administrative exemption; and (b) VIMCO was otherwise fully compliant with the requirements of PTE 96–23. In addition, VIMCO maintains that sufficient protections were in place during the effective dates of this proposed exemption, given that the 2001 annual audit completed in October 2003, and the 2003 annual audit completed in December 2005, indicated no adverse findings.

Further, it is represented that only a small percentage of the fair market value of the total assets of each affected Verizon Plan was involved in transactions covered by the proposed exemption. In this regard, approximately 3.7 percent (3.7%) of the value of the assets in the BAMT were involved in 2001 in transactions covered by the proposed exemption and approximately 5.6 percent (5.6%) of the value of the assets in the BAMT were involved in 2003 in transactions covered by the proposed exemption.

9. In summary, VIMCO represents that the proposed exemption satisfies the statutory requirements for relief under section 408(a) of the Act because:

(a) VIMCO has acted in reasonable, good faith compliance with PTE 96–23 at all relevant times;

(b) The 2001 annual audit, which was completed in October 2003, and the 2003 annual audit, which was completed in December 2005, were performed by an independent auditor who had appropriate technical training or experience and proficiency in the fiduciary responsibility provisions of the Act;

(c) The 2001 and 2003 annual audits indicated no adverse findings; and

(d) VIMCO will maintain or cause to be maintained for a period of six (6) years the records necessary to enable the Department and others to determine whether the conditions of this proposed exemption are met.

Notice to Interested Persons

Those persons who may be interested in the pendency of the proposed exemption include the named fiduciary of each of the Verizon Plans that utilized VIMCO's investment management or advisory services for the 2001 and/or 2003 plan year. It is represented that the named fiduciary of each of these Verizon Plans will be provided with a copy of the notice of this proposed exemption (the Notice), plus a copy of the supplemental statement (the Supplemental Statement), as required, pursuant to 29 CFR 2570.43(b)(2) of the Department's regulations, which will advise such named fiduciaries of the right to comment and to request a hearing. The Notice and the Supplemental Statement will be provided to all such named fiduciaries within fifteen (15) days of the publication of the Notice in the **Federal Register**. The Notice and the Supplemental Statement will be sent by first class mail to such named fiduciaries. The Department must receive written comments and requests

for a hearing no later than forty-five (45) days from the date of the publication of the Notice in the **Federal Register** .

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department, telephone (202) 693–8540 (This is not a toll-free number).

M&T Bank Corporation Pension Plan, Located in Buffalo, NY 14203–2309

[Application No. D–11470]

Proposed Exemption

The Department is considering granting an exemption as set forth below 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).

Section I—Exemption for In-Kind Redemption of Assets

Effective January 18, 2007, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (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 in-kind redemptions (the Redemptions) of shares (the Shares) held by the M&T Bank Corporation Pension Plan (the Plan) of the MTB Mid Cap Growth Fund and the MTB Large Cap Stock Fund (the Fund(s)) for which affiliates of Manufacturers and Traders Trust Company (M&T) provide investment advisory services and other services.

Section II. Conditions

This proposed exemption is subject to the following conditions:

(a) The Plan paid no sales commissions, redemption fees, or other similar fees in connection with the Redemptions (other than customary transfer charges paid to parties other than M&T and affiliates of M&T (M&T Affiliates).

(b) The assets transferable to the Plan consisted of only cash and Transferable Securities, as defined in Section III;

(c) With certain exceptions explained in Representation 6 below, the Plan received a pro rata portion of the Transferable Securities, pursuant to the Redemptions that, when added to the cash received, was equal in value to the number of Shares redeemed for such Transferable Securities, as determined in a single valuation (using sources independent of M&T and M&T affiliates) performed in the same manner and as of the close of business on the same day as the day of receipt of the Transferable Securities, in accordance with Rule 2a–4 under the Investment Company Act of 1940, as amended from time to time (the 1940 Act), and the then-existing procedures established by the Fund that are in compliance the 1940 Act;

(d) Neither M&T or any M&T Affiliate received any fees, including any fees payable pursuant to Rule 12b–1 under the 1940 Act, in connection with the Redemptions;

(e) M&T retained an Independent Fiduciary, as such term is defined in Section III. The Independent Fiduciary determined that the terms of the Redemptions were fair to the participants of the Plan and comparable to and no less favorable than terms obtainable at arm's length between unaffiliated parties, and that the Redemptions were in the best interest of the Plan and its participants and beneficiaries;

(f) M&T or the relevant Fund provided to the Independent Fiduciary a written confirmation regarding such Redemptions containing:

(1) The number of Shares held by the Plan immediately before the Redemptions (and the related per Share net asset value and the total dollar value of the Shares held),

(2) the identity (and related aggregate dollar value) of each Transferable Security provided to the Plan at the time of the Redemptions, including each Transferable Security valued in accordance with Rule 2a–4 under the 1940 Act and the then-existing procedures established by the Fund (using sources independent of M&T and M&T Affiliates) for obtaining prices from independent pricing services or market-makers,

(3) the market price of each Transferable Security received by the Plan at the time of the Redemptions, and

(4) the identity of each pricing service or market-marker consulted in determining the value of each Transferable Security at the time of the Redemptions.

(g) The value of the Transferable Securities and cash received by the Plan for each redeemed Share equaled the net asset value of such Share at the time of the transaction, and such value equaled the value that would have been received by any other investor for shares of the same class of the Fund at the time;

(h) For a period of six months following the Redemptions, MTB Investment Advisors (MTBIA), an M&T Affiliate and the investment advisor to the MTB Group of Funds (MTB Funds) reimbursed the Plan for commissions and fees incurred in connection with Transferable Securities received as a result of the Redemptions and subsequently sold;

(i) Following the Redemptions, M&T, on behalf of the Plan, has paid and will continue to pay total annual expenses, including investment management fees for the Plan's investment in the separate accounts;

(j) Subsequent to the Redemptions, the Independent Fiduciary performs a post-transaction review that includes, among other things, testing a sampling of material aspects of the Redemptions deemed in its judgment to be representative, including pricing;

(k) M&T maintains, or causes to be maintained, for a period of six years from the date the Redemptions, such records as are necessary to enable the person described in paragraph (l)(1) below to determine whether the conditions of this exemption have been met, except that

(1) If the records necessary to enable the persons described in Section II(l)(1) to determine whether the conditions of this exemption have been met are lost, or destroyed, due to circumstances beyond the control of M&T, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) no party in interest with respect to the Plan other than M&T shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if such records are not maintained or are not available for examination as required by Section II(k).

(l)(1) Except as provided in this Section II(l)(2) and notwithstanding any provision of section 504(a)(2) and (b) of the act, the records referred to in Section II(k) are unconditionally available at their customary locations for examination during normal business hours by:

(i) any duly authorized employee or representative of the United States Department of Labor, the Internal Revenue Service, or the Securities and Exchange Commission,

(ii) any fiduciary of the Plan or any duly authorized representative of such participant or beneficiary,

(iii) any participant or beneficiary of the Plan or duly authorized representative of such participant or beneficiary,

(iv) any employer whose employees are covered by the Plan, and

(v) any employee organization whose members are covered by such Plan;

(2) None of the persons described in Section II(l)(1)(ii) through (v) shall be authorized to examine trade secrets of M&T, the Funds, or the investment

advisor for the Funds, or commercial or financial information which is privileged or confidential; and

(3) Should M&T, the Funds, or the investment advisor for the Funds refuse to disclose information on the basis that such information is exempt from disclosure pursuant to Section II(l)(2) above, M&T, the Funds, or the investment advisor shall, by the close of the 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

For purposes of this proposed exemption,

(a) The term ''M & T'' means Manufacturers and Traders Trust Company which is a wholly-owned subsidiary of the M&T Bank Corporation.

(b) The term ''affiliate'' means:

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

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

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

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

(d) The term ''net asset value'' means the amount for purposes of pricing all purchases and sales calculated by dividing the value of securities, determined by a method as set forth in the Fund's prospectus and statement of additional information, and other assets belonging to the Fund, less the liabilities charged to each such Portfolio, by the number of outstanding shares.

(e) The term ''Independent Fiduciary'' means a fiduciary who is:

(1) Independent of and unrelated to M&T and its affiliates, and

(2) appointed to act on behalf of the Plan with respect to the Redemptions.

For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to M&T if:

(3) Such fiduciary directly or indirectly controls, is controlled by or is under common control with M&T;

(4) 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 from M&T in connection with the transactions discussed 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); or

(5) such fiduciary receives, in its current fiscal year, from M&T or its affiliates, an amount that would have exceeded one percent (1%) of such fiduciary's gross income in the prior fiscal year.

(f) the term ''Transferable Securities'' shall mean securities

(1) for which market quotations are readily available from persons independent of M&T as determined pursuant to procedures established by the Funds under Rule 2a–4 of the 1940 Act; and

(2) which are not

(i) Securities which, if publicly offered or sold, would require registration under the Securities Act of 1933;

(ii) Securities issued by entities in countries which (A) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the Funds, or (B) permit transfers of ownership of securities to be effected only by transactions conducted on a local stock exchange;

(iii) Certain portfolio positions (such as forward foreign currency contracts, futures and options contracts, swap transactions, certificates of deposit and repurchase agreements) that, although they may be liquid and marketable, involve the assumption of contractual obligations, require trading facilities or can only be traded with the counter-party to the transaction to effect a change in beneficial ownership;

(iv) Cash equivalents (such as certificates of deposit, commercial paper and repurchase agreements);

(v) Other assets which are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable); and

(vi) Securities subject to ''stop transfer'' instructions or similar contractual restrictions on transfer.

Summary of Facts and Representations

1. M&T is a New York state chartered bank headquartered in Buffalo, New York. M&T is a wholly-owned subsidiary of M&T Bank Corporation, a regulated bank holding company and financial holding company under the Bank Holding Company Act of 1956, as amended, and is subject to the supervision of the Governors of the Federal Reserve System.

2. M&T sponsors the Plan which is a defined benefit plan maintained by M&T to provide retirement benefits to eligible employees of M&T and its subsidiaries, and is intended to satisfy the qualification requirements of section 401(a) of the Code. As of January 1, 2007, the number of participants, beneficiaries and others entitled to benefits under the Plan total 22,837. Based on unaudited financial statements, as of December 31, 2007, the Plan had total assets of $617,811,222. M&T makes contributions to the Plan as required by government regulation or deemed appropriate by management after considering the fair value of Plan assets, expected returns on such assets, and the present value of the Plan's benefit obligations. Contributions under the Plan are deductible to the extent permitted by section 404 of the Code. Participants are not permitted to make contributions to the Plan or to direct investments under the Plan. M&T serves as trustee of the Plan and manages the Plan.

3. Effective April 1, 2003, M&T acquired Allfirst Financial, Inc. (Allfirst). Allfirst's defined benefit plan merged into the Plan. The Allfirst defined benefit plan had been invested in Allfirst's proprietary mutual fund (the Ark Funds), open-end investment companies registered under the 1940 Act, pursuant to the terms and conditions of Prohibited Transaction Exemption 77–3, 42 FR 18734 (1977). In August 2003, M&T merged the Ark Funds and its own Vision Group of Funds into a new proprietary mutual fund family called the MTB Group of Funds, as a result of which the Plan investments in the Ark Funds were transferred to the MTB Funds.[7] As of September 30, 2006, the Plan held approximately $486 million in investments, of which approximately 30% was invested in the MTB Funds.

[7] M&T represents that no exemptive relief was necessary for the merger itself because the merger was conducted between the Ark Funds and the Vision Group of Funds—which as investment companies registered under the 1940 Act were not subject to the Act pursuant to Section 401(b)(1) of the Act. M&T also represents that the Plan's continued investment in the MTF funds following the merger was covered by PTE 77–3. The Department is offering no view as to whether the merger was not subject to the Act pursuant to section 401(b)(1) of the Act and whether the Plan's continued investment in the MTB Funds satisfied the conditions of PTE 77–3.

4. The Plan was invested in several MTB Fund portfolios described graphically as follows showing the Plan's investments in the MTB Funds before and after the Redemptions on January 18, 2007:

The MTB fund name	The plan's investment in the MTB fund before 1/17/07 (million)	The plan's investment in the MTB fund after 1/19/07 (million)
Small Cap Growth	$17.6	$17.5
Small Cap Stock	$24.2	$24.1
Equity Income	$3.8	$3.9
Large Cap Value	$11.1	$11.2
Multi Cap Growth	$5.1	$5.1
Intl Equity Inst I	$60.8	$61.2
Mid Cap Growth	$12.3	$0
Large Cap Stock	$19.8	$0
Total MTB Investment	$154.8	$122.8

In 2006, M&T began considering redemptions of the Plan's investments in the Small Cap Growth Fund, the Multi Cap Growth Fund, the Mid Cap Growth Fund and the Large Cap Stock Fund in order to reduce investment fees for asset classes that the Plan could manage through separately managed accounts.

5. The board of the MTB Funds exercised its right, as stated in the prospectus, to make payments in securities rather than cash. M&T determined that the Plan's investments in the Funds were large enough so that an all-cash redemption would adversely impact the Funds and to proceed with the Redemptions. On January 18, 2007, the Plan's investment in the MTB Mid Cap Growth Fund and the Large Cap Stock Fund, which are the subject of this proposed exemption, were redeemed for approximately $32 million. M&T represents that the Small Cap Redemption will occur pursuant to a prospective exemption from the Department at a later date. The Plan's Multi Cap Growth Fund was redeemed for approximately $5,505,000 in cash in July 2007.[8]

6. M&T represents that the Redemptions were done pursuant to all applicable regulatory requirements and M&T and its affiliates were not able to use their influence or control with respect to the Redemptions. The Redemptions were carried out on a pro rata basis as to the number and kind of Transferable Securities transferred to the Plan. The Transferable Securities transferred in-kind from the mutual funds were a pro rata portion of the Funds' holdings to the extent possible, subject to adjustments for odd lots and securities that could not be transferred including fractional shares, as determined in accordance with the Funds' valuation and in-kind redemption procedures that are designed to be objective and to comply with the requirements of the 1940 Act.

7. M&T represents that the board of the MTB Funds adopted procedures for the fulfillment of in-kind redemptions requests in conformity with the Securities and Exchange Commission (SEC) no-action letter to Signature Financial Group.[9] Pursuant to these procedures, the value of each Transferable Security was determined as of the close of trading on the New York Stock Exchange for a particular day,[10] using market prices such as the last sale price or the most recent bid and asked quotations. Following completion of the Redemptions, the Funds confirmed in writing:

(a) The number of Fund shares held by the Plan immediately before the Redemptions (and the related per share net asset value and the aggregate dollar value of the shares held);

(b) the identity (and related aggregate dollar value) of each Transferable Security provided to the Plan at the time of the Redemptions, including each Transferable Security valued in accordance with Rule 2a–4 under the 1940 Act and the then-existing procedures established by the board of the MTB Fund (using sources independent of M&T and M&T Affiliates) for obtaining current prices from independent pricing services and market-makers;

(c) the price of such Transferable Security at the time of such Redemptions; and

(d) the identity of each pricing service or market-maker consulted in determining the value of such Transferable Securities.

8. M&T represents that at the time of the Redemptions, it was unaware that they had engaged in a prohibited transaction. Shortly thereafter, the Redemptions came to the attention of M&T's internal counsel, who consulted

[8] M&T represents that to the extent exemptive relief may have been necessary, PTE 77–3 would have provided such relief because the transaction involved an in-house plan of the Funds' investment advisor and its affiliates. The Department is offering no view as to whether the in-kind cash redemption satisfied the conditions of PTE 77–3.

[9] In the no action letter to Signature Financial Group, Inc. (Dec. 28, 1999), the Division of Investment Management of the SEC states that it will not recommend enforcement action pursuant to section 17(a) of the 1940 Act for certain in-kind distributions of portfolio securities to an affiliate of a mutual fund. Funds seeking to use this ''safe harbor'' must value the securities to be distributed to an affiliate in an in-kind distribution ''in the same manner as they are valued for purposes of computing the distributing fund's net asset value.'' M&T represents that it has adopted procedures in accordance with the Signature Financial Letter for use in affiliated transactions, and those procedures must be followed for transactions with the Plan, as the Plan is treated as an affiliate under the 1940 Act of the funds whose shares are being redeemed. Those procedures are reflected in the terms and conditions of the requested exemption.

The Signature Financial letter does not address the marketability of the securities distributed in-kind. The range of securities distributed pursuant to this safe harbor may therefore be broader than that range of securities covered by SEC Rule 17a–7, 17 CFR 270.17a–7. In granting past exemptive relief with respect to in-kind transactions involving mutual funds, the Department has required that the securities being distributed in-kind fall within Rule 17a–7. One of the requirements of Rule 17a–7 is that the securities are those for which ''market quotations are readily available.'' Under the requested exemption, exemptive relief also would be limited to in-kind distribution of securities for which market quotations were readily available. The value of any other security would be paid to the plan in cash. In addition, consistent with the Signature Financial letter, the procedures adopted by the MTB Funds require pro rata distribution for any in-kind redemptions.

[10] A common point in time each day is needed for valuing the Fund shares, (*i.e.,* for determining the value of all the securities held by the Fund to arrive at the Funds' net asset value for the day. Even if the Funds hold Transferable Securities that are traded on exchanges that close at different times, or remain open 24 hours, their values are determined as of the close of trading on the New York Stock Exchange (normally 4 p.m. Eastern Standard Time) for purposes of calculating Fund share value as of that time, and that value is then used for processing all orders to purchase and redeem shares of the Funds that were received before that time.

outside counsel. After further discussions and review of the details of the Redemptions, M&T decided to pursue a request for a retroactive individual exemption and retain an independent fiduciary.

9. In an engagement letter dated May 25, 2007, U.S. Trust Company, N.A. (U.S. Trust), a national bank, agreed to serve as the Independent Fiduciary for purposes of this exemption. U.S. Trust confirmed to M&T its qualifications to serve as a fiduciary and acknowledged it is a fiduciary to the Plan, as defined in section 3(21) of Act, and it has represented to M&T that it understands and accepts the duties, responsibilities and liabilities in acting as a fiduciary under the Act for the Plan. U.S. Trust confirmed it is independent from M&T because it is not controlled by or under common control with M&T, does not control M&T, and that U.S. Trust receives, in its current fiscal year, from M&T or its affiliates, an amount that would not have exceeded one percent (1%) of such fiduciary's gross income in the prior fiscal year.

10. In its report dated February 1, 2008, U.S. Trust compared a hypothetical cash redemption with the Redemptions. U.S. Trust found that because of the size of the Plan's investment in the Funds, a large cash redemption would be time consuming. This time lag would impose opportunity costs on the Plan because the Plan would not be invested in Transferable Securities that have the potential to match the Plan's stated objectives for this portion of the Plan's assets. Therefore, U.S. Trust represents that an in kind redemption would avoid such problems.

11. U.S. Trust was provided the Pre-Trade Analysis which detailed the holdings of each of the Funds and the calculation of the pro rata portion of the securities and cash due to the Plan for the Redemptions. U.S. Trust found that the Pre-Trade Analysis was consistent with the proposed transfer methodology. The pro rata share of the Funds due to the Plan was calculated by multiplying the Plan's ownership interest in each of the Funds by the total market value of each of the Funds. Securities that were excluded from the pro rata distribution included restricted securities, odd lots, fractional shares, and securities that traded in markets that restrict in-kind redemptions (Ineligible Securities). Ineligible Securities were identified and offsetting adjustments were made to the Plan's pro rata share of the Fund's cash position.

U.S. Trust reviewed a sample of the securities listed in the Pre-Trade Analysis. The sample was randomly selected and represented approximately 20% of the securities within each of the Funds. In addition, U.S. Trust confirmed that the pro rata share due to the Plan and the offsetting adjustments for Ineligible Securities were calculated properly for this sample.

12. According to U.S. Trust, for a period of six months immediately commencing after the Redemptions, MTBIA agreed to reimburse the Plan for commissions and fees incurred in connection with Transferable Securities received as a result of the Redemptions and subsequently sold. Accordingly, the Plan was reimbursed $9,832 for brokerage and SEC fees from sales of Transferable Securities in the separate accounts over this period.

13. U.S. Trust represents that the Redemptions resulted in significant savings for the Plan. Prior to the Redemptions, the Plan paid the on-going investment management fees and other expenses charged by the Funds. According to U.S. Trust, the investment management fees and other expenses for the Mid Cap Growth Fund and Large Cap Stock Fund were 113 and 109 basis points respectively. As a result of the Redemptions, the Plan will no longer be paying these fees.

Further, the separate accounts have annual operating expenses including investment management fees and other expenses of 40 basis points per annum charged internally to M&T. Because M&T will pay for these annual operating expenses generated by the separate accounts, the Plan will no longer pay any operating expenses.

14. U.S. Trust has determined that:

(a) The Redemptions were fair to participants of the Plan and no less favorable than the terms that would be reached at arm's length between unaffiliated parties;

(b) the method used to conduct the Redemptions was comparable to, and no less favorable than, a similar in-kind redemption reached at arm's length between unaffiliated parties;

(c) the Plan did not pay any commissions or fees in connection with the Redemptions; and

(d) The Plan will no longer pay annual operating expenses including investment fees with respect to its investment in the separate accounts.

15. In summary, the M&T represents that the transaction satisfies the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (a) The Independent Fiduciary reviewed the Redemptions and determined that the Redemptions were in the best interest of the Plan's participants and beneficiaries; (b) The Independent Fiduciary reviewed the Redemptions and comparing them to a hypothetical cash-only redemption determined the Redemptions were more favorable than a cash-only redemption; (c) Subsequent to the Redemptions, the Independent Fiduciary performed a post-transaction sampling of the material aspects of the Redemption including pricing; (d) For a period of six months following the Redemptions, MTBIA reimbursed the Plan for commissions and fees incurred in connection with Transferable Securities received as a result of the Redemptions and subsequently sold; and (e) M&T, on behalf of the Plan, has paid and will continue to pay the total annual expenses including investment management fees for the separate accounts.

Notice to Interested Persons

Notice of the proposed exemption will be given to interested persons within 30 days of the publication of the notice of proposed exemption in the **Federal Register**. The notice will be given to interested persons by first class mail. Such notice will contain a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2). The supplemental statement will inform interested persons of their right to comment on and/or to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within 15 days of the publication of the notice of proposed exemption in the **Federal Register**.

For Further Information Contact: Mr. Anh-Viet Ly of the Department, telephone 202–693–8648. (This is not a toll-free number.)

Schloer Enterprises, Inc., 401(k) Profit Sharing Plan (the Plan), Located in Pottstown, PA

[Application No. D–11493]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and 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 proposed exemption is granted, the restrictions in sections 406(a)(1)(A), 406(a)(1)(D), and 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (c)(1)(D) through (E) of the Code, shall not apply to the sale of a certain parcel of real property (the Property) by the Plan to Craig J. Schloer, a party in

interest with respect to the Plan, provided that the following conditions are satisfied:

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

(b) The terms and conditions of the sale are at least as favorable to the Plan as those that the Plan could obtain in an arm's length transaction with an unrelated party;

(c) The sales price is the greater of $381,991 or the fair market value of the Property as of the date of the transaction, as determined by a qualified, independent appraiser;

(d) The Plan pays no commissions, costs, or other expenses in connection with the sale; and

(e) The Plan fiduciary will review and approve the methodology used by the qualified, independent appraiser, ensure that such methodology is properly applied in determining the Property's fair market value, and will also determine whether it is prudent to go forward with the proposed transaction.

Summary of Facts and Representations

1. The Plan is a defined contribution profit sharing plan. Schloer Enterprises, Inc. (the Employer), located in Pottstown, Pennsylvania, is the Plan sponsor. As of June 30, 2008, the Plan had approximately 20 participants and total assets of approximately $853,000.

2. The Property is an 80,000 square foot parcel of real property located at 1442 Hollow Road, Collegeville, Pennsylvania 19426. On December 30, 1999, the Plan purchased the Property from Fred Olinick, the executor of the estate of Stanley P. Olinick, an unrelated third party, for the purchase price of $145,000. At that time, the Property included a 1,630 square foot, four-bedroom dwelling in fair to poor condition, which has since been demolished. It is represented that the Property was purchased solely for investment purposes.[11]

The Plan has spent $106,352 in connection with renovations to the Property since it was acquired by the Plan. The cost of demolishing the dwelling was included in the $106,352 spent on renovations. The Plan has paid additional holding expenses of approximately $3,000 per annum in real estate taxes on the Property. The Property has generated no income for the Plan.

The applicant proposes the sale of the Property by the Plan to Mr. Schloer, who serves as the CEO/President of the Employer and the Plan fiduciary. The Property is adjacent to Mr. Schloer's current residence at 1436 Hollow Road, Collegeville, Pennsylvania 19426. It is represented that neither Mr. Schloer, nor his relatives, nor any other party in interest have used or benefited from the Property.

3. The Property was twice recently appraised by Robin S. Bowers, RM, SRA, a qualified, independent appraiser with The Appraisal Group, located in Lansdale, Pennsylvania. The applicant commissioned the two appraisals valuing the Property with and without the dwelling in order to demonstrate that demolishing the dwelling maximized the value of the Property. Both appraisals were performed after the dwelling was already demolished. In the first appraisal, Ms. Bowers valued the Property by examining comparable properties with no structures or buildings on them. Ms. Bowers determined that the fair market value of the Property as of May 12, 2008 was $320,000.

For purposes of the second appraisal, Ms. Bowers assumed that the dwelling had not been demolished and was still in existence. Under this assumption, she valued the Property using the Sales Comparison Approach and the Cost Approach. Ms. Bowers compared the Property to six other similar properties having building improvements, based on style, quality, age, and market area. She determined that, as of November 10, 2008, the fair market value of the Property (assuming that the demolished dwelling was still in existence), was $260,000.

Ms. Bowers also determined that no premium is due to the Plan, as a term of the proposed sale of the Property, for any assemblage value resulting from the adjacency of Mr. Schloer's residence to the Property. The lots are zoned as single dwelling residential lots, and Ms. Bowers opined that, because the best use of the Property was to demolish the dwelling and to erect a new one, no assemblage value would be created even if the Property and the adjacent lot, currently owned by Mr. Schloer, are combined into a single lot.

4. Mr. Schloer proposes to pay the Plan $381,991 for the Property, calculated as the sum of the following: (a) $260,000, the fair market value of the Property as of November 10, 2008 (assuming the absence of renovations), (b) $106,352, the cost of renovations to the Property paid by the Plan, and (c) $15,639, for lost earnings attributable to the cost of the renovations, using the Department's online VFCP (Voluntary Fiduciary Compliance Program) Calculator.

The Property constitutes approximately 37.5% of the total assets of the Plan (based on the May 12, 2008 valuation). The applicant represents that the sale of the Property to Mr. Schloer is in the best interests of the Plan because it will enable the Plan to recoup its initial investment in the Property and the cost of renovations, as well as realize a reasonable gain on its investment. It is intended that the proceeds be re-invested in other investments yielding a higher rate of return. As the Plan fiduciary, Mr. Schloer represents that, in the current real estate market, a sale of the Property on the open market would yield less than the amount that he is willing to pay to the Plan.

5. The applicant represents that the sale of the Property will be a one-time transaction for cash and that the Plan will incur no fees, commissions, or other expenses in connection with the sale. The Employer is bearing the costs of the exemption application and of notifying interested persons.

6. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) The sale will be a one-time transaction for cash;

(b) The terms and conditions of the sale will be at least as favorable to the Plan as those that the Plan could obtain in an arm's length transaction with an unrelated party;

(c) The sales price will be the greater of $381,991 or the fair market value of the Property as of the date of the transaction, as determined by a qualified, independent appraiser;

(d) The Plan will pay no commissions, costs, or other expenses in connection with the sale; and

(e) The Plan fiduciary will review and approve the methodology used by the qualified, independent appraiser, ensure that such methodology is properly applied in determining the Property's fair market value, and will also determine whether it is prudent to go forward with the proposed transaction.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 693–8557. (This is not a toll-free number.)

Morgan Stanley & Co. Incorporated, Located in New York, New York

[Exemption Application Number D–11501]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security

[11] The Department expresses no opinion herein as to whether the acquisition and holding of the Property by the Plan violated any of the provisions of Part 4 of Title I in the Act.

Act of 1974 (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[12]

Section I. Sales of Auction Rate Securities from Plans to Morgan Stanley: Unrelated to a Settlement Agreement

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan (as defined in section V(e)) of an Auction Rate Security (as defined in section V(c)) to Morgan Stanley & Co. Incorporated (Morgan Stanley), where such sale (an Unrelated Sale) is unrelated to, and not made in connection with, a Settlement Agreement (as defined in section V(f)), provided that the conditions set forth in section II have been met.

Section II. Conditions Applicable to Transactions Described in Section I

(a) The Plan acquired the Auction Rate Security in connection with brokerage or advisory services provided by Morgan Stanley to the Plan;

(b) The last auction for the Auction Rate Security was unsuccessful;

(c) Except in the case of a Plan sponsored by Morgan Stanley for its own employees (a Morgan Stanley Plan), the Unrelated Sale is made pursuant to a written offer by Morgan Stanley (the Offer) containing all of the material terms of the Unrelated Sale, including, but not limited to: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available). Notwithstanding the foregoing, in the case of a pooled fund maintained or advised by Morgan Stanley, this condition shall be deemed met to the extent each Plan invested in the pooled fund (other than a Morgan Stanley Plan) receives advance written notice regarding the Unrelated Sale, where such notice contains all of the material terms of the Unrelated Sale, including, but not limited to, the material terms described in the preceding sentence;

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends;

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

(g) The decision to accept the Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or IRA owner who is Independent (as defined in section V(d)) of Morgan Stanley. Notwithstanding the foregoing: (1) In the case of an individual retirement account (an IRA, as described in section V(e) below) which is beneficially owned by an employee, officer, director or partner of Morgan Stanley, the decision to accept the Offer or retain the Auction Rate Security may be made by such employee, officer, director or partner; or (2) in the case of a Morgan Stanley Plan or a pooled fund maintained or advised by Morgan Stanley, the decision to accept the Offer may be made by Morgan Stanley after Morgan Stanley has determined that such purchase is in the best interest of the Morgan Stanley Plan or pooled fund; [13]

(h) Except in the case of a Morgan Stanley Plan or a pooled fund maintained or advised by Morgan Stanley, neither Morgan Stanley nor any affiliate exercises investment discretion or renders investment advice [within the meaning of 29 CFR 2510.3–21(c)] with respect to the decision to accept the Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) Morgan Stanley and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(i), to determine whether the conditions of this exemption, if granted, have been met, except that—

(i) No party in interest with respect to a Plan which engages in an Unrelated Sale, other than Morgan Stanley and its affiliates, 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 paragraph (l)(i); and

(ii) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Morgan Stanley or its affiliates, as applicable, such records are lost or destroyed prior to the end of the six-year period;

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

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

(B) Any fiduciary of any Plan, including any IRA owner, that engages in a Sale, or any duly authorized employee or representative of such fiduciary; or

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

(ii) None of the persons described above in paragraph (l)(i)(B)–(C) shall be authorized to examine trade secrets of Morgan Stanley, or commercial or financial information which is privileged or confidential; and

(iii) Should Morgan Stanley refuse to disclose information on the basis that such information is exempt from disclosure, Morgan Stanley 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.

[12] For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[13] The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things, the decision to sell the Auction Rate Security to Morgan Stanley for the par value of the Auction Rate Security. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the proposed transactions, to fully understand the risks associated with this type of transaction following disclosure by Morgan Stanley of all relevant information.

Section III. Sales of Auction Rate Securities from Plans to Morgan Stanley: Related to a Settlement Agreement

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code, shall not apply, effective August 1, 2008, to the sale by a Plan of an Auction Rate Security to Morgan Stanley, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement Agreement, provided that the conditions set forth in section IV have been met.

Section IV. Conditions Applicable to Transactions Described in Section III

(a) The terms and delivery of the Offer are consistent with the requirements set forth in the Settlement Agreement;

(b) The Offer specifically describes, among other things:

(1) How a Plan may determine: The Auction Rate Securities held by the Plan with Morgan Stanley; the number of shares and par value of the Auction Rate Securities; the interest or dividend amounts that are due with respect to the Auction Rate Securities; purchase dates for the Auction Rate Securities; and (if reliable information is available) the most recent rate information for the Auction Rate Securities;

(2) The background of the Offer;

(3) That neither the tender of Auction Rate Securities nor the purchase of any Auction Rate Securities pursuant to the Offer will constitute a waiver of any claim of the tendering Plan;

(4) The methods and timing by which Plans may accept the Offer;

(5) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Offer;

(6) The timing for acceptance by Morgan Stanley of tendered Auction Rate Securities;

(7) The timing of payment for Auction Rate Securities accepted by Morgan Stanley for payment;

(8) The methods and timing by which a Plan may elect to withdraw tendered Auction Rate Securities from the Offer;

(9) The expiration date of the Offer;

(10) The fact that Morgan Stanley may make purchases of Auction Rate Securities outside of the Offer and may otherwise buy, sell, hold or seek to restructure, redeem or otherwise dispose of the Auction Rate Securities;

(11) A description of the risk factors relating to the Offer as Morgan Stanley deems appropriate;

(12) How to obtain additional information concerning the Offer; and

(13) The manner in which information concerning material amendments or changes to the Offer will be communicated to the Plan.

(c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and

(d) All of the conditions in section II have been met.

V. Definitions

For purposes of this exemption:

(a) The term ''affiliate'' means: any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term ''control'' means: the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term ''Auction Rate Security'' means a security:

(1) that is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and

(2) with an interest rate or dividend that is reset at specific intervals through a Dutch auction process;

(d) A person is ''Independent'' of Morgan Stanley if the person is: (1) not Morgan Stanley or an affiliate; and (2) not a relative (as defined in ERISA section 3(15)) of the party engaging in the transaction;

(e) The term ''Plan'' means: an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of ERISA; or an entity holding plan assets within the meaning of 29 CFR 2510.3–101, as modified by ERISA section 3(42); and

(f) The term ''Settlement Agreement'' means: a legal settlement involving Morgan Stanley and a U.S. state or federal authority that provides for the purchase of an ARS by Morgan Stanley from a Plan.

Summary of Facts and Representations

1. The Applicant is Morgan Stanley & Co. Incorporated and its affiliates (hereinafter, either Morgan Stanley or the Applicant). Morgan Stanley is a global financial services firm headquartered in New York, New York. Among other things, Morgan Stanley is both a registered investment advisor subject to the Investment Advisers Act of 1940 and a broker-dealer registered with the U.S. Securities and Exchange Commission. In this last regard, Morgan Stanley acts as a broker and dealer with respect to the purchase and sale of securities, including Auction Rate Securities.

2. The Applicant describes Auction Rate Securities and the arrangement by which ARS are bought and sold as follows. Auction Rate Securities (or ARS) are securities (issued as debt or preferred stock) with an interest rate or dividend that is reset at periodic intervals pursuant to a process called a Dutch Auction. Investors submit orders to buy, hold, or sell a specific ARS to a broker-dealer selected by the entity that issued the ARS. The broker-dealers, in turn, submit all of these orders to an auction agent. The auction agent's functions include collecting orders from all participating broker-dealers by the auction deadline, determining the amount of securities available for sale, and organizing the bids to determine the winning bid. If there are any buy orders placed into the auction at a specific rate, the auction agent accepts bids with the lowest rate above any applicable minimum rate and then successively higher rates up to the maximum applicable rate, until all sell orders and orders that are treated as sell orders are filled. Bids below any applicable minimum rate or above the applicable maximum rate are rejected. After determining the clearing rate for all of the securities at auction, the auction agent allocates the ARS available for sale to the participating broker-dealers based on the orders they submitted. If there are multiple bids at the clearing rate, the auction agent will allocate securities among the bidders at such rate on a pro-rata basis.

3. The Applicant states that, under a typical Dutch Auction process, Morgan Stanley is permitted, but not obligated, to submit orders in auctions for its own account either as a bidder or a seller and routinely does so in the auction rate securities market in its sole discretion. Morgan Stanley may place one or more bids in an auction for its own account to acquire ARS for its inventory, to prevent: (1) A failed auction (*i.e.* , an event where there are insufficient clearing bids which would result in the auction rate being set at a specified rate, resulting in no ARS being sold through the auction process); or (2) an auction from clearing at a rate that Morgan Stanley believes does not reflect the market for the particular ARS being auctioned.

4. The Applicant states that for many ARS, Morgan Stanley has been appointed by the issuer of the securities to serve as a dealer in the auction and is paid by the issuer for its services. Morgan Stanley is typically appointed to serve as a dealer in the auctions pursuant to an agreement between the

issuer and Morgan Stanley. That agreement provides that Morgan Stanley will receive from the issuer auction dealer fees based on the principal amount of the securities placed through Morgan Stanley.

5. The Applicant states further that Morgan Stanley may share a portion of the auction rate dealer fees it receives from the issuer with other broker-dealers that submit orders through Morgan Stanley, for those orders that Morgan Stanley successfully places in the auctions. Similarly, with respect to ARS for which broker-dealers other than Morgan Stanley act as dealer, such other broker-dealers may share auction dealer fees with Morgan Stanley for orders submitted by Morgan Stanley.

6. According to the Applicant, since February 2008, only a minority of auctions have cleared, particularly involving municipalities. As a result, Plans holding ARS may not have sufficient liquidity to make benefit payments, mandatory payments and withdrawals and expense payments when due.[14]

7. The Applicant represents that, in certain instances, Morgan Stanley may have previously advised or otherwise caused a Plan to acquire and hold an Auction Rate Security.[15] In connection with Morgan Stanley's role in the acquisition and holding of ARS by various Morgan Stanley clients, including the Plans, Morgan Stanley entered into Settlement Agreements with certain U.S. states and federal authorities. Pursuant to these Settlement Agreements, among other things, Morgan Stanley was required to send a written offer to certain Plans that held ARS in connection with the advice and/or brokerage services provided by Morgan Stanley. As described in further detail below, eligible Plans that accepted the Offer were permitted to sell the ARS to Morgan Stanley for cash equal to the par value of such securities, plus any accrued interest and/or dividends. According to the Applicant, as of January 28, 2009, approximately $227 million dollars in ARS have been sold by Plans to Morgan Stanley in connection with Offers issued by Morgan Stanley pursuant to a Settlement Agreement. The Applicant states that, prospectively, additional shares of ARS may be tendered by Plans to Morgan Stanley pursuant to an Offer issued by Morgan Stanley pursuant to a Settlement Agreement. Accordingly, the Applicant is requesting retroactive and prospective relief for the Settlement Sales. With respect to Unrelated Sales, the Applicant states that to the best of its knowledge, as of January 28, 2009, no Unrelated Sale has occurred. However, the Applicant is requesting retroactive relief (and prospective relief) for Unrelated Sales in the event that a sale of Auction Rate Securities by a Plan to Morgan Stanley has occurred outside the Settlement process.

8. The Applicant is requesting relief for the sale of Auction Rate Securities under two different circumstances: (1) where Morgan Stanley initiates the sale by sending to a Plan a written Offer to acquire the ARS (*i.e.*, an Unrelated Sale), notwithstanding that such Offer is not required under a Settlement Agreement; and (2) where Morgan Stanley is required under a Settlement Agreement to send to Plans a written Offer to acquire the ARS (*i.e.*, a Settlement Sale). The Applicant states that the Unrelated Sales and Settlement Sales (hereinafter, either, a Covered Sale) are in the interests of Plans. In this regard, the Applicant states that the Covered Sales would permit Plans to normalize Plan investments. The Applicant represents that each Covered Sale will be for no consideration other than cash payment against prompt delivery of the ARS, and such cash will equal the par value of the ARS, plus any accrued but unpaid interest or dividends. The Applicant represents further that Plans will not pay any commissions or transaction costs with respect to any Covered Sale.

9. The Applicant represents that the proposed exemption is protective of the Plans. The Applicant states that, with very narrowly tailored exceptions: Each Covered Sale will be made pursuant to a written Offer; and the decision to accept the Offer or retain the ARS will be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Morgan Stanley. Additionally, each Offer will be delivered in a manner designed to alert a Plan fiduciary that Morgan Stanley intends to purchase ARS from the Plan. Offers made in connection with an Unrelated Sale will include all of the material terms of the Unrelated Sale, including: The identity and par value of the Auction Rate Security; the interest or dividend amounts that are due with respect to the Auction Rate Security; and the most recent rate information for the Auction Rate Security (if reliable information is available). Offers made in connection with a Settlement Agreement will specifically include, among other things: The background of the Offer; the method and timing by which a Plan may accept the Offer; the expiration date of the Offer; a description of certain risk factors relating to the Offer; how to obtain additional information concerning the Offer; and the manner in which information concerning material amendments or changes to the Offer will be communicated. The Applicant states that, with very narrowly tailored exceptions, neither Morgan Stanley nor any affiliate will exercise investment discretion or render investment advice with respect to a Plan's decision to accept the Offer or retain the ARS.[16] In the case of a Morgan Stanley Plan or a pooled fund maintained or advised by Morgan Stanley, the decision to engage in a Covered Sale may be made by Morgan Stanley after Morgan Stanley has determined that such purchase is in the best interest of the Morgan Stanley Plan or pooled fund. The Applicant represents further that Plans will not waive any rights or claims in connection with any Covered Sale.

10. The Applicant represents that the proposed exemption, if granted, would be administratively feasible. In this regard, the Applicant notes that each Covered Sale will occur at the par value of the affected ARS, and such value is readily ascertainable. The Applicant represents further that Morgan Stanley will maintain the records necessary to enable the Department and Plan fiduciaries, among others, to determine whether the conditions of this exemption, if granted, have been met.

11. In summary, the Applicant represents that the transactions described herein satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because, among other things:

(a) With only very narrow exceptions, each Covered Sale shall be made pursuant to a written Offer;

(b) Each Covered Sale shall be for no consideration other than cash payment against prompt delivery of the ARS;

(c) The amount of each Covered Sale shall equal the par value of the ARS, plus any accrued but unpaid interest or dividends;

[14] The Department notes that Class Exemption 80–26 (45 FR 28545 (Apr. 29, 1980), as amended at 71 FR 17917 (Apr. 7, 2006)) permits interest-free loans or other extensions of credit from a party in interest to a plan if, among other things, the proceeds of the loan or extension of credit are used only—(1) for the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or (2) for a purpose incidental to the ordinary operation of the plan.

[15] The relief contained in this proposed exemption does not extend to the fiduciary provisions of section 404 of the Act.

[16] The Applicant states that while there may be communication between a Plan and Morgan Stanley subsequent to an Offer, such communication will not involve advice regarding whether the Plan should accept the Offer.

(d) Plans will not waive any rights or claims in connection with any Covered Sale;

(e) With only very narrow exceptions:

(1) The decision to accept an Offer or retain the ARS shall be made by a Plan fiduciary or Plan participant or IRA owner who is Independent of Morgan Stanley; and

(2) Neither Morgan Stanley nor any affiliate shall exercise investment discretion or render investment advice [within the meaning of 29 CFR 2510.3–21(c)] with respect to the decision to accept the Offer or retain the ARS;

(f) Plans shall not pay any commissions or transaction costs with respect to any Covered Sale;

(g) A Covered Sale shall not be part of an arrangement, agreement or understanding designed to benefit a party in interest to the affected Plan;

(h) With respect to any Settlement Sale, the terms and delivery of the Offer, and the terms of Settlement Sale, shall be consistent with the requirements set forth in the Settlement Agreement;

(i) Each Offer made in connection with an Unrelated Sale shall describe all of the material terms of the Unrelated Sale, including:

(1) The identity and par value of the Auction Rate Security;

(2) the interest or dividend amounts that are due with respect to the Auction Rate Security; and

(3) the most recent rate information for the Auction Rate Security (if reliable information is available);

(j) Each Offer made in connection with a Settlement Agreement shall describe all of the material terms of the Settlement Sale, including:

(1) How the Plan can determine: The ARS held by the Plan with Morgan Stanley; the number of shares and par value of the ARS; interest or dividend amounts; purchase dates for the ARS; and (if reliable information is available) the most recent rate information for the ARS;

(2) The background of the Offer;

(3) That neither the tender of ARS nor the purchase of ARS pursuant to the Offer will constitute a waiver of any claim of the tendering Plan;

(4) The methods and timing by which the Plan may accept the Offer; and

(5) The purchase dates, or the manner of determining the purchase dates, for ARS pursuant to the Offer and the timing for acceptance by Morgan Stanley of tendered ARS for payment.

Notice To Interested Persons

The Applicant represents that the potentially interested participants and beneficiaries cannot all be identified and therefore the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**. 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: Chris Motta of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions 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 19th day of February 2009.

Ivan Strasfeld,

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

[FR Doc. E9–3997 Filed 2–24–09; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of an Extended Benefit (EB) Period for Washington

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: This notice announces a change in benefit period eligibility under the EB Program for Washington.

The following change has occurred since the publication of the last notice regarding the State's EB status:

• Based on data reported by the Bureau of Labor Statistics on January 27, 2009, Washington's 3-month seasonally adjusted total unemployment rate was 6.6 percent and equals or exceeds 110 percent of the corresponding rate in both prior years. This causes Washington to be triggered ''on'' to an EB period beginning February 15, 2009.

Information for Claimants

The duration of benefits payable in the EB Program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13(c)(1)).

Persons who believe they may be entitled to EB, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

FOR FURTHER INFORMATION CONTACT: Scott Gibbons, U.S. Department of Labor, Employment and Training Administration, Office of Workforce Security, 200 Constitution Avenue NW., Frances Perkins Bldg., Room S–4231, Washington, DC 20210, telephone number (202) 693–3008 (this is not a toll-free number) or by e-mail: *gibbons.scott@dol.gov*.