DEPARTMENT OF LABOR

Employee Benefits Security Administration

Grant of Individual Exemptions and Prohibited Transaction Exemptions Involving: PNC Financial Services Group, Inc. (PNC Financial), PTE 2009–22; Verizon Investment Management Corporation, PTE 2009–23; United States Steel and Carnegie Pension Fund (the Applicant), PTE 2009–24; and Barclays Global Investors, N.A. and Its Affiliates and Successors (BGI) and Barclays Capital Inc. and Its Affiliates and Successors (BarCap) (Collectively the Applicants), PTE 2009–25

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

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

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

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

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

PNC Financial Services Group, Inc. (PNC Financial), Located in Pittsburgh, Pennsylvania.

[Prohibited Transaction Exemption 2009–22 Application No. D–11397.]

Exemption

Section I—Exemption for Receipt of Fees

In connection with the investment in an open-end investment company (a Fund or Funds), as defined, below, in Section IV(e), by certain employee benefit plans (Client Plan or Client Plans) for which PNC, as defined, below, in Section IV(a), serves as a fiduciary and is a party in interest with respect to such Client Plan(s), the restrictions of sections 406(a) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(A) through (F) [1] of the Code, shall not apply, effective September 29, 2006, to:

(a) The receipt of fees by PNC from a Fund where BlackRock, as defined, below, in Section IV(b), acts as the investment adviser for such Fund, and the receipt of fees by BlackRock for the provision of investment advisory services, or similar services, to such Fund;

(b) The receipt of fees by PNC from a Fund for providing certain service(s) (Secondary Service(s)), as defined, below, in Section IV(i), to such Fund; and

(c) The receipt of fees by PNC from BlackRock in connection with administrative service(s) (Mutual Fund Administration Service(s)), as defined, below, in Section IV(l), provided to a Fund in which a Client Plan invests; provided that the conditions, as set forth in Section II and Section III, below, were satisfied, as of the effective date of this exemption and thereafter.

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

Section II—Specific Conditions

(a) PNC, serving as a fiduciary for a Client Plan, satisfies any one (but not all) of the following:

(1) A Client Plan invested in a Fund does not pay any plan-level investment management fee, investment advisory fee, or similar fee (Plan-Level Fee(s)) to PNC with respect to any of the assets of such Client Plan which are invested in shares of such Fund for the entire period of such investment (the Offset Fee Method). This condition does not preclude the payment of investment advisory fees or similar fees (Fund-Level Fee(s)) by a Fund to BlackRock under the terms of an investment advisory agreement adopted in accordance with section 15 of the Investment Company Act of 1940 (the Investment Company Act);

(2) A Client Plan invested in a Fund pays an investment management fee or similar fee based on total assets of such Client Plan from which a credit has been subtracted representing such Client Plan's *pro rata* share of investment advisory fees or similar fees paid by such Fund to BlackRock (the Subtraction Fee Method). If, during any fee period for which a Client Plan has prepaid its investment management or similar fee, such Client Plan purchases shares of such Fund, the requirement of this Section II(a)(2) shall be deemed met with respect to such prepaid fee if, by a method reasonably designed to accomplish the same, the amount of the prepaid fee that constitutes the fee with respect to the assets of such Client Plan invested in shares of such Fund: (i) Is anticipated and subtracted from the prepaid fee at the time of payment of such fee, (ii) is returned to such Client Plan no later than during the immediately following fee period, or (iii) is offset against the prepaid fee for the immediately following fee period or for the fee period immediately following thereafter. For purposes of this Section II(a)(2), a fee shall be deemed to be prepaid for any fee period, if the amount of such fee is calculated as of a date not later than the first day of such period; or

(3) A Client Plan invested in a Fund receives a ''a credit'' [2] (the Credit Fee Method) of such Client Plan's proportionate share of all fees charged to such Fund by BlackRock for

[2] PNC Financial represents that it would be accurate to describe ''the credit'' as a ''credited dollar amount'' to cover situations in which the credited amount is used to acquire additional shares of a Fund, rather than being held by a Client Plan in the form of cash. It is represented that the standard practice is to reinvest the ''credited dollar amount'' in additional shares of the same Fund with respect to which the fees were credited.

investment advisory services or similar services for a particular month: (1) Effective for the period, September 29, 2006, through December 31, 2008, on the *earlier* of either: (a) The same day as PNC receives a fee from BlackRock for Mutual Fund Administration Services provided for that month to such Fund by PNC, or (b) the fifth business day before the end of the month following the month in which fees for investment advisory services, or similar services, accrued, or (2) effective for the period beginning, January 1, 2009, and continuing thereafter, on a date which is no later than one business day after BlackRock receives fees from the Fund for investment advisory services, or similar services, provided for that month to such Fund by BlackRock. The crediting of all such fees to such Client Plan by PNC is audited by an independent accounting firm (the Auditor) on at least an annual basis to verify the proper crediting of such fees to such Client Plan.

(b) The price paid or received by a Client Plan for shares in a Fund is the net asset value per share, as defined, below, in Section IV(f), at the time of the transaction, and is the same price which would have been paid or received for such shares by any other investor in such Fund at that time;

(c) PNC, including any officer or director of PNC, does not purchase shares of a Fund from any Client Plan or sell shares of a Fund to any Client Plan;

(d) A Client Plan does not pay sales commissions in connection with any purchase or sale of shares of a Fund, and a Client Plan does not pay redemption fees in connection with any sale of shares to a Fund, unless

(1) Such redemption fee is paid only to a Fund, and

(2) The existence of such redemption fee is disclosed in the prospectus for such Fund in effect both at the time of any purchase of such shares and at the time of such sale;

(e) The combined total of all fees received by PNC for services provided by PNC:

(1) To Client Plans, and

(2) To Funds in which Client Plans invest is not in excess of reasonable compensation within the meaning of section 408(b)(2) of the Act;

(f) PNC does not receive any fees payable pursuant to Rule 12b–1 under the Investment Company Act in connection with the subject transactions;

(g) A Client Plan is not an employee benefit plan sponsored or maintained by PNC;

(h) A second fiduciary (Second Fiduciary), as defined, below, in Section IV(h), who is acting on behalf of a Client Plan receives, in advance of any initial investment by a Client Plan in a Fund, full and detailed written disclosure of information concerning such Fund, including but not limited to:

(1) A current prospectus for each Fund in which such Client Plan is considering investing;

(2) A statement describing the fees, including the nature and extent of any differential between the rates of such fees for:

(i) Any investment advisory or similar services to be paid by such Fund to BlackRock,

(ii) Any Secondary Services to be paid by such Fund to PNC,

(iii) Any Mutual Fund Administration Services to be paid by BlackRock to PNC, and

(iv) All other fees to be charged to or paid by a Client Plan and by such Fund;

(3) The reasons why PNC, acting as fiduciary for such Client Plan, may consider investment in such Fund to be appropriate for such Client Plan;

(4) A statement describing whether there are any limitations applicable to PNC with respect to which assets of a Client Plan that may be invested in such Fund, and if so, the nature of such limitations; and

(5) Upon the request of the Second Fiduciary, acting on behalf of a Client Plan, a copy of the proposed exemption and a copy of the final exemption, once such documents are published in the **Federal Register.**

(i) On the basis of the information described, above, in Section II(h), a Second Fiduciary, acting on behalf of a Client Plan, authorizes in writing: (1) The investment of the assets of such Client Plan in shares of each particular Fund; and (2) the fees received by PNC and by BlackRock in connection with services provided by PNC and by BlackRock to such Fund. Such authorization by a Second Fiduciary must be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(j)(1) All authorizations, described, above, in Section II(i), made by a Second Fiduciary, regarding: (i) Investments by a Client Plan in a Fund, (ii) fees paid for investment advisory services or similar services provided by BlackRock to such Fund, (iii) fees paid for Secondary Services provided by PNC to such Fund, and (iv) fees paid by BlackRock to PNC for Mutual Fund Administration Services provided by PNC to such Fund, shall be terminable at will by the Second Fiduciary, acting on behalf of such Client Plan, without penalty to such Client Plan, upon receipt by PNC of a written notice of termination. A form (the Termination Form), as defined, below, in Section IV(j), expressly providing an election to terminate the authorizations, described, above, in Section II(i), with instructions on the use of such Termination Form must be provided to such Second Fiduciary at least annually. However, if a Termination Form has been provided to such Second Fiduciary, pursuant to Section II(k) and (l), below, then a Termination Form need not be provided again, pursuant to this Section II(j), unless at least six (6) months but no more than twelve (12) months have elapsed, since a Termination Form was provided, pursuant to Section II(k) and (l), below.

(2) The instructions for the Termination Form must include the following statements:

(i) The authorization, described, above, in Section II(i), is terminable at will by the Second Fiduciary, acting on behalf of a Client Plan, without penalty to such Client Plan, upon receipt by PNC of written notice from such Second Fiduciary.

(ii) Failure by such Second Fiduciary to return the Termination Form on behalf of such Client Plan will be deemed to be an approval by the Second Fiduciary and will result in the continuation of the authorization, as described, above, in Section II(i), of PNC to engage in the transactions which are the subject of this exemption.

(k) For a Client Plan invested in a Fund which uses one of the fee methods described, above, in Section II(a)(1), (a)(2), or (a)(3), in the event of a proposed change from one of the fee methods to another or in the event of a proposed increase in the rate of any fee paid by a Fund to BlackRock for any investment advisory service, or similar service that BlackRock provides to such Fund over an existing rate for such services or method of determining the fee for such services, which had been authorized, in accordance with Section II(i), above, by the Second Fiduciary for such Client Plan, at least thirty (30) days in advance of the implementation of such change from one of the fee methods to another or such increase in a fee, PNC will provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of such Fund and which explains the nature and amount of such change from one of the fee methods to another or increase in fee) to the Second Fiduciary of each Client Plan affected by such change from one of the fee

methods to another or increased fee. Such notice shall be accompanied by a Termination Form, with instructions on the use of such Termination Form, as described, above, in Section II(j).[3]

(l) In the event of:

(i) A proposed addition of a Secondary Service for which an additional fee is charged; or

(ii) A proposed addition of a Mutual Fund Administration Service provided by PNC to a Fund in which a Client Plan invests and for which an additional fee is charged; or

(iii) A proposed increase in the rate of any fee paid by a Fund to PNC for any Secondary Service, or

(iv) A proposed increase in the rate of any fee paid by BlackRock to PNC for Mutual Fund Administration Services provided to such Fund, or

(v) A proposed increase in the rate of any fee paid for Secondary Services or for Mutual Fund Administration Services that results from the decrease in the number or kind of services performed by PNC for such fee over an existing rate for services which had been authorized, in accordance with Section II(i), by the Second Fiduciary for a Client Plan invested in such Fund, PNC, at least thirty (30) days in advance of the implementation of such fee increase or additional service for which an additional fee is charged, will provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of such Fund and which explains the nature and amount of the additional service for which an additional fee is charged or the nature and amount of the increase in fees) to the Second Fiduciary of each Client Plan invested in such Fund which is proposing to increase fees or add services for which an additional fee is charged. Such notice shall be accompanied by a Termination Form, with instructions on the use of such Termination Form, as described, above in Section II(j).

(m) On an annual basis, PNC, serving as fiduciary to a Client Plan, provides the Second Fiduciary of such Client Plan invested in a Fund with:

(1) A copy of the current prospectus for such Fund in which such Client Plan invests;

(2) Upon the request of such Second Fiduciary, a copy of the Statement of Additional Information for such Fund which contains a description of all fees paid by such Fund to PNC and all fees paid by BlackRock to PNC for Mutual Fund Administration Services;

(3) A copy of the annual financial disclosure report which includes information about Fund portfolios, within sixty (60) days of the preparation of such report;

(4) Oral or written responses to inquiries of the Second Fiduciary of such Client Plan, as such inquiries arise; and

(5) A copy of the audit findings prepared by the independent Auditor, as required by Section II(a)(3), is provided by PNC at least annually within sixty (60) days of the completion of the report of such audit findings, to the Second Fiduciary of those Client Plans using the Credit Fee Method, as described in Section II(a)(3).

(n) All dealings between a Client Plan and a Fund are on a basis no less favorable to such Client Plan than dealings between such Fund and other shareholders invested in such Fund.

Section III—General Conditions

(a) PNC maintains for a period of six (6) years the records necessary to enable the persons described, below, in Section III(b) to determine whether the conditions of this exemption have been met, except that:

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

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

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

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

(ii) Any fiduciary of a Client Plan who has authority to acquire or dispose of shares of a Fund owned by such Client Plan, or any duly authorized employee or representative of such fiduciary, and

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

(2) None of the persons described in Section III(b)(1)(ii) and (iii) shall be authorized to examine trade secrets of PNC, or commercial or financial information which is privileged or confidential.

Section IV—Definitions

For purposes of this exemption:

(a) The term, ''PNC,'' means PNC Financial, and any affiliate thereof, as defined, below in Section IV(c).

(b) The term, ''BlackRock,'' means BlackRock, Inc., and any affiliate thereof, as defined, below in Section IV(c).

(c) An ''affiliate'' of a person includes:

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

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

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

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

(e) The term, ''Fund(s),'' shall mean any diversified open-end investment company or companies registered with the Securities and Exchange Commission under the Investment Company Act, as amended, for which BlackRock serves as an investment adviser (but not sub-adviser).

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

(g) The term, ''relative,'' means a relative as that term is defined in section 3(15) of the Act (or a member of the family as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(h) The term, ''Second Fiduciary,'' means a fiduciary of a Client Plan who is independent of and unrelated to PNC

[3] It is represented that PNC furnished only disclosure, not advanced notice, of a mid-2007 advisory fee change to the Second Fiduciaries of Client Plans invested in Funds using the Credit Fee Method. The change, which resulted in increased fees to BlackRock of 0.5 basis points, (which it is represented was credited back to the Client Plans) occurred effective June 1, 2007, with the disclosure being provided in October 2007, after the effective date of such change. As the Second Fiduciaries of the Client Plans did not receive notification of such increase at least thirty (30) days in advance of the implementation of such increase, the Department, herein, is not providing relief for the receipt of such fee increase by BlackRock.

and BlackRock. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to PNC and BlackRock if:

(1) Such fiduciary, directly or indirectly controls, through one or more intermediaries, is controlled by, or is under common control with PNC or with BlackRock;

(2) Such fiduciary, or any officer, director, partner, employee, or relative of the fiduciary, is an officer, director, partner, or employee of PNC or of BlackRock (or is a relative of such persons); or

(3) Such fiduciary, directly or indirectly, receives any compensation or other consideration for his or her personal account in connection with any transaction described in this exemption.

If an officer, director, partner, or employee of PNC or of BlackRock (or relative of such persons) is a director of such Second Fiduciary, and if he or she abstains from participation in:

(i) The choice of such Client Plan's investment adviser,

(ii) The approval of any such purchase or sale between such Client Plan and a Fund, and

(iii) The approval of any change in fees or fee method, as described, above, in Section II (k) or (l), charged to or paid by such Client Plan in connection with any of the transactions described in Section I above, then Section IV(h)(2), above, shall not apply.

(i) The term, ''Secondary Service(s),'' means a service or services which is/are provided by PNC to a Fund, including but not limited to custodial, accounting, or administrative services. The fees for providing Secondary Services to a Fund are paid to PNC by such Fund.

(j) The term, ''Termination Form,'' means the form supplied to a Second Fiduciary which expressly provides an election to such Second Fiduciary to terminate on behalf of a Client Plan the authorization described, above, in Section II(i).

(k) The term, ''business day,'' means any day that

(i) PNC Financial is open for conducting all or substantially all of its banking functions, and

(ii) the New York Stock Exchange (or any successor exchange) is open for trading.

(l) The term, ''Mutual Fund Administration Services,'' means a service or services which is/are provided by PNC to, or on behalf of, a Fund, including PNC's maintaining records of investments by Client Plans in such Fund, processing Fund transactions for Client Plans, transmitting account statements and shareholder communications, responding to inquiries from Client Plans regarding account balances and dividends, and providing information to such Fund on sales and assisting in monitoring possible market timing. The fees for providing Mutual Fund Administration Services to a Fund are paid to PNC by BlackRock, rather than by such Fund.

DATES: *Effective Date:* This exemption is effective as of September 29, 2006.

Written Comments

In the Notice of Proposed Exemption (the Notice), the Department of Labor (the Department) invited all interested persons to submit written comments and requests for a hearing on the proposed exemption within forty-five (45) days of the date of the publication of the Notice in the **Federal Register** on March 26, 2009. The deadline for providing notice to all interested persons was April 10, 2009. All comments and requests for a hearing from interested persons were due by May 11, 2009. The Department received no requests for a hearing. However, three (3) commentators informed the Department that the mailing to them was not complete.

In this regard, the first commentator did not receive a copy of the Notice. In response, the applicant indicated that the Notice had been inadvertently omitted from the initial mailing, dated April 3, 2009, to one group of interested persons, and that the mailing was resent to that group, including the Notice, before the deadline on April 10, 2009, for providing notice to interest persons. The second commentator indicated that certain enclosures were not included. In response, the applicant indicated that this commentator was part of the group that had received the mailing without the Notice, and that he should have subsequently received the second mailing, before the deadline on April 10, 2009, for providing notice to interest persons.

The third commentator indicated that he had received only the Notice and no cover letters. The applicant was unable to explain how this error could have occurred, because this part of the mailing was assembled by a machine designed to confirm that the inserts in each envelope were of the correct thickness. Accordingly, the applicant confirmed through a sampling of other packages that were part of this group that there were no other apparent instances of this error. In any event, the applicant mailed a complete package to the third commentator.

During the comment period, the Department received 24 telephone inquiries from commentators seeking an explanation of the contents of the Notice. In response, the staff of the Office of Exemption Determinations spoke to each commentator and provided an explanation ''in plain English'' of the proposed exemption.

In addition, eight (8) commentators wrote to the Department requesting a further explanation of the proposed exemption. In response to these commentators, the applicant states that the notice to interested persons provided by PNC contained all the information required by the Department's exemption procedures, and also included an additional cover page that was intended to help the recipients understand the contents of the Notice. The applicant maintains that no further written explanation on PNC's part was either required or permitted. Further, the applicant maintains that in any event, these comments do not raise any substantive issues on the proposed exemption itself.

The Department concurs.

During the comment period, the Department also received via e-mail, facsimile, and mail comments from three (3) commentators who raised substantive issues. Copies of these letters were posted on the Web site regulations.gov. At the close of the comment period, the Department forwarded a copy of these comments to the applicant for response. The comments and the applicant's response thereto are summarized in the numbered paragraphs below.

1. One commentator, identified as an IRA trustee, in an e-mail, dated April 20, 2009, took the view that the requested exemption ''appears to be an effort to modify the existing ERISA law to allow a corporate 'sweetheart deal' of two interlocked corporations (PNC and BLACKROCK),'' and says that a change to the existing law ''would be a step backward.'' The commentator further characterizes the described arrangement as appearing ''to have an intended benefit for the two corporations at the likely eventual expense of perhaps thousands of individuals with IRAs.'' In addition, the commentator expresses concern that the costs of implementing the proposed exemption would be paid by either taxpayers or ''The IRA owner who gets clobbered with higher and higher fees to pay the costs.''

In response to this comment, the applicant maintains that the proposed exemption is not a modification to existing law, but rather an exception to certain provisions under existing law pursuant to a procedure contemplated by the statute. The applicant represents that PNC's goal in requesting the relief

is not to favor BlackRock, but rather to preserve existing investments in plan and IRA accounts that may no longer be permitted after the changes in the ownership of BlackRock, and also to ensure that BlackRock Funds continue to be available as investments to accounts managed by PNC to the extent that investment in those funds is prudent and meets an account's investment needs. Investments in BlackRock Funds under the exemption are not expected to increase IRA fees, as the structure for complying with the exemption is already in place.

Furthermore, the applicant points out that to the extent the commentator objects to her IRA investing in BlackRock Funds, she can exercise her right under the proposed exemption to withhold her authorization of such investments or, if BlackRock Fund investments have previously been authorized, to terminate that authorization.

Therefore, the applicant concludes that the commentator's comment does not provide any reason why the exemption should not be granted.

The Department concurs.

2. One commentator, in an e-mail, dated April 28, 2009, argued that granting the exemption would be wrong because there is an inherent conflict of interest, giving the following reasons:

(a) No amount of explanation, adjustment/manipulation of fees or documentation of facts can cancel out that conflict.

(b) The very fact that PNC is requesting the exemption shows it is in their interest.

(c) A massive mailing and disgorgement of data does not show this is good for investors. The commentator further argues that it must clearly be convenient and remunerative for PNC to utilize an ''in-house organization'' to control, invest and report on client money, but there is no claim or promise that BlackRock is or would be the best option. The commentator says that because of the bank being placed in conflict with its clients, a PNC manager, when faced with a choice, will opt for BlackRock. Therefore, the commentator concludes, the proposal should be withdrawn.

In response, the applicant represents that the conditions of the exemption are designed to address the potential conflict, namely by requiring fee offsets or credits, disclosures and independent approvals. In the opinion of the applicant, the potential conflict in this case is attenuated in that PNC is a minority owner in BlackRock as a result of the transaction with Merrill Lynch, currently holding only a 33% interest (down slightly from the 34% interest described in the application). Any decisions by PNC portfolio managers to invest in the BlackRock Funds for plans are subject to fiduciary obligations imposed by section 404(a)(1) of the Act, including the duty to act solely in the interest of the plan and its participants and beneficiaries and to act in a prudent manner, and any investment decisions for IRA accounts are subject to similar obligations under State law. PNC's objective is to have BlackRock Funds available in the event it would be prudent to use them, and PNC portfolio managers commonly use other fund families as well.

Further, the applicant points out that if the commentator is concerned about these conflicts, he has the right under the proposed exemption to either withhold his authorization of PNC investing his account in BlackRock Funds or, if he has previously given his authorization, he can exercise his right to terminate that authorization at any time without penalty.

Therefore, the applicant maintains that this comment by the commentator has not provided any reason why the proposed exemption should not be granted.

The Department concurs.

3. One commentator indicated her opposition to any exemption that would authorize additional fees to be charged by PNC Bank. The commentator did not give any further reason.

In response, the applicant notes that the proposed exemption contains a series of protections to deal with the potential for PNC receiving additional fees, including fee offsets and credits. Furthermore, if the commentator continues to be concerned about PNC Bank charging additional fees, she would have the right under the exemption to withhold or terminate authorization of the investment of her account in BlackRock Funds. Therefore, the applicant maintains that the commentator has not provided any reason why the proposed exemption should not be granted.

The Department concurs.

In addition to the comments described above, the Department received, on May 8, 2009, an e-mail from the applicant, requesting certain changes to the operating language of the exemption. The applicant's comment was also posted on the Web site regulation.gov. The applicant's comments are summarized in the numbered paragraphs, below.

1. Fee Disclosure and Differential Language—Section II(h)(2)

Section II(h)(2)(iv), as set forth in the Notice on page 13243, column 2, line 67, requires disclosure of, ''All other fees to be charged to or paid by a Client Plan and by such Fund.'' The applicant believes that disclosure of all Fund fees are within the scope of the exemption, but is not clear that all Client Plan fees should be subject to disclosure. The applicant believes that the focus on the fees charged to or paid by the Client Plan should only be those fees that are related to the investment in a Fund by a Client Plan. Accordingly, the applicant requests that the language of Section II(h)(2)(iv) should be amended to read as follows: ''All other fees to be charged to or paid by a Client Plan in connection with its investment in such Fund and by such Fund.''

In addition, the applicant has requested an amendment to Section II(h)(2), as set forth in the Notice on page 13243, column 2, lines 54–57. Section II(h)(2) requires: ''A statement describing the fees, including the nature and extent of any differential between the rates of such fees'' for: (i) Any investment advisory or similar services to be paid by a Fund to BlackRock, (ii) any Secondary Services to be paid by a Fund to PNC, (iii) any Mutual Fund Administration Services to be paid by BlackRock to PNC, and (iv) all other fees to be charges to or paid by a Client Plan and by a Fund. The applicant believes that the disclosure of the nature and extent of any differential between the rates of such fees should be limited to the fees paid for investment advisory or similar services. In this regard, the applicant request that the phrase, ''including the nature and extent of any differential between the rates of such fees,'' be deleted from Section II(h)(2) and moved to the end of Section II(h)(2)(i) following the word, ''BlackRock.'' Accordingly, the applicant has requested that Section II(h)(2)(i) be amended to read as follows: ''Any investment advisory or similar services to be paid by such Fund to BlackRock, including the nature and extent of any differential between the rates of such fees.''

The limitations suggested by the applicant do not conform to the requirements as set forth in Prohibited Transaction Exemption 77–4 (PTE 77–4).[4] In this regard, PTE 77–4 deals with the receipt of fees by a fiduciary of a plan in connection with the purchase or sale by a plan of shares of a registered, open-end investment company when

[4] 42 FR 18732, April 8, 1977.

such fiduciary or an affiliate is also the investment adviser for such investment company. Section II(d) of PTE 77–4 requires that a second fiduciary with respect to such plan, who is independent of and unrelated to the fiduciary/investment adviser or any affiliate thereof, receive full and detailed written disclosure of the investment advisory and other fees charged to or paid by such plan and by such investment company, including the nature and extent of any differential between the rates of such fees. Accordingly, the Department does not concur with the applicant's request to alter the language of Section II(h)(2) and has not amended Section II(h)(2) in the final exemption. Nor does the Department concur with the applicant's request to alter the language of Section II(h)(2)(iv) and has not amended Section II(h)(2)(iv) in the final exemption.

2. Reference to Part 4 of Title I of the Act—Section II(i)

Section II(i), as set forth in the Notice, requires that on the basis of certain disclosure, a Second Fiduciary, acting on behalf of the Client Plan, authorizes in writing: (1) The investment of the assets of a Client Plan in shares of a particular Fund and (2) the receipt of fees by PNC and by BlackRock in connection with services provided by PNC and by BlackRock to such Fund. The last sentence in Section II(i), as set forth in the Notice on page 13243, column 3, lines 25–29, requires that ''Such authorization by a Second Fiduciary must be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.'' The applicant maintains that ''whether the Second Fiduciary violates its fiduciary duties in providing the authorization is outside the control of PNC and should not affect whether PNC has coverage under the exemption.'' Further, the applicant notes that this language was not included in prior individual exemption providing analogous relief. Therefore, the applicants request that the sentence in Section II(i) referring to the Second Fiduciary's responsibilities under Part 4 of Title I of the Act should be deleted from the final exemption.

The Department does not concur with the applicant's request and has not deleted the last sentence from Section II(i) in the final exemption. In this regard, PTE 77–4 contains language similar to that set forth Section II(i) of the Notice. In this regard, Section II(e) of PTE 77–4, states that ''On the basis of the prospectus and disclosure referred to in paragraph (d), the second fiduciary referred to in paragraph (d) approves such purchase and sales consistent with the responsibilities obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act.''

3. Statement of Additional Information Disclosure—Section II(m)(2)

Section II(m)(2), as set forth in the Notice on page 13244, column 2, lines 49–52, requires on an annual basis that PNC, serving as fiduciary to a Client Plan, provide the Second Fiduciary of such Client Plan with certain disclosures. Such disclosures should include a copy of a Statement of Additional Information for a Fund, upon request by the Second Fiduciary. Further, such Statement of Additional Information should contain a description of all fees paid to PNC by a Fund and by BlackRock for services provided by PNC to such Fund. The applicant notes that while Statements of Additional Information for Funds do, in fact, describe the Mutual Fund Administration Services fees, such document does not specify the rate of such fees. The applicant argues that such disclosure should be sufficient because the rate of such fees would have been described in the initial disclosure to the Client Plan and cannot be changed without prior notice.

The Department concurs with the applicant's comment.

4. Independent Audit Disclosure—Section II(m)(3)

Section II(m)(3), as set forth in the Notice on page 13244, column 2, lines 56–59, requires that PNC provide the Second Fiduciary of a Client Plan with ''a copy of the annual financial disclosure report which includes information about Fund portfolios, as well as the audit findings of the independent Auditor, within sixty (60) days of the preparation of such report.'' The audit findings referred to in Section II(m)(3) are those required under Section II(a)(3) of the exemption in connection with the audit of the Credit Fee Method. The applicant suggests that the requirement to disclose a copy of the audit finding be deleted from Section II(m)(3) and be made a separate requirement, in a new Section II(m)(5) in the final exemption. Accordingly, the applicant requests that the requirement in Section II(m)(5) apply only to those Client Plans using the Credit Fee Method, described in Section II(a)(3) of the final exemption.

The Department concurs with the applicant's request and has amended Section II(m)(3) to delete the phrase, ''as well as the audit findings of the independent Auditor.'' Further, the Department has included in the final exemption a new Section II(m)(5) which reads, as follows:

> A copy of the audit findings prepared by the independent Auditor, as required by Section II(a)(3), is provided by PNC at least annually within sixty (60) days of the completion of the report of such audit findings, to the Second Fiduciary of those Client Plans using the Credit Fee Method, as described in Section II(a)(3).

5. Change in Fee Method—Section IV(h)(3)(iii)

Section IV(h), as set forth in the Notice on page 13245, column 1, lines 33–68, and column 2, lines 1–4, defines the term, ''Second Fiduciary,'' as a fiduciary of a Client Plan who is independent of and unrelated to PNC and BlackRock. Section IV(h)(2) provides that a Second Fiduciary will not be deemed to be independent if such fiduciary, or any officer, director, partner, employee, or relative of the fiduciary is an officer, director, partner, or employee of PNC or of BlackRock (or is a relative of such person). However, Section IV(h)(3) provides an exception to the requirement, set forth in Section IV(2). In this regard, a director of a Second Fiduciary of a Client Plan who is also an officer, director, partner, or employee of PNC or of BlackRock (or a relative of such persons) is permitted to abstain from: (1) The selection of the Client Plan's investment adviser; (2) the approval of any purchase or sale between a Client Plan and a Fund; and (3) ''the approval of any change in fees, as described, above, in Section II (k) or (l), charged to or paid by such Client Plan in connection with any of the transactions described in Section I above.''

The applicant requests that the language of Section IV(h)(3)(iii), as set forth in the Notice on page 13245, column 1, lines 67–68, be revised to insert the phrase, ''or fee method,'' after the phrase, ''any change in fees,'' in order to be consistent with other provisions in the exemption where references to changes of fees also apply to changes in fee methods.

The Department concurs with the applicant's suggestions, and accordingly, has amended the language of Section IV(h)(3)(iii) in the final exemption.

After giving full consideration to the entire record, including the written comment from the applicant and from the commentators, the Department has decided to grant the exemption, as described and amended, above. In this regard, the comment letters from the applicant and from the commentators which were submitted to the

Department have been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption published on March 26, 2009, at 74 FR 13242.

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

Verizon Investment Management Corporation, Located in Basking Ridge, New Jersey.

[Prohibited Transaction Exemption 2009–23, Exemption Application No. D–11447.]

Exemption

Section I—Transaction(s)

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,[5] 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),[6] between a Verizon Plan or Verizon Plans, as defined, below, in section III(h) of this exemption, and a party in interest, as defined, below, in section III(c) of this exemption, with respect to such Verizon Plan; provided that: during the period January 1, through December 31, 2001, and during the period January 1, through December 31, 2003, VIMCO satisfied the definition of an in-house asset manager (INHAM), as defined, below, in section III(a) of this 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 section I(a) through (b) and section II of this exemption were satisfied and, the conditions, as set forth, below, in section I(c) and section II of this exemption are 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) If VIMCO, satisfies the definition of an INHAM, as defined, below, in section III(a) of this exemption, at any time 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, then 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, must conduct an exemption audit, as defined, below, in section III(f) of this 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 Part I of PTE 96–23, 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 exemption, to determine whether the conditions of this exemption have been met, except that:

(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 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 exemption.

(b)(1) Except as provided, below, in section II(b)(2) of this exemption, and notwithstanding any provisions of section 504(a)(2) of the Act, the records referred to, above, in section II(a) of this 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 of Labor (the Department) or the Internal Revenue Service,

(ii) Any fiduciary of a Verizon Plan that engages in a transaction, described in Part I of PTE 96–23, 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 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 exemption:

(a) The term, ''in-house asset manager'' or ''INHAM,'' means VIMCO, provided that VIMCO is:

(1) Either (A) a direct or indirect wholly-owned subsidiary of Verizon Communications, Inc. (Verizon), or a direct or indirect wholly-owned subsidiary of a parent organization of Verizon, or (B) a membership non-profit

[5] 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 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 Corporation (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.

[6] 61 FR 15975, April 10, 1996.

corporation a majority of whose members are officers or directors of Verizon or a 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, has 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 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, 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 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 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 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 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 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 exemption.

(3) A determination as to whether VIMCO satisfied the definition of an INHAM, as defined, above, in section III(a), of this 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 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 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.

Effective Date: This exemption is effective for the period from January 1, through December 31, 2001, and for the period from January 1, through December 31, 2003.

Written Comments

In the Notice of Proposed Exemption (the Notice), the Department invited all interested persons to submit written comments and requests for a hearing on the proposed exemption within forty-five (45) days of the date of the publication of the Notice in the **Federal Register** on February 25, 2009. All comments and requests for a hearing were due by April 13, 2009.

During the comment period, the Department received no requests for a hearing. However, the Department received, on April 9, 2009, a facsimile from the applicant, informing the Department of a correction to the language of the exemption, as proposed in the Notice. In this regard, the references to ''Verizon Investment Management Company,'' as set forth in the heading of the Notice on page 8571, in the heading of the Proposed Exemption on page 8572, and in the language in footnote no. 2 on page 8572, should be revised to read ''Verizon Investment Management Corporation.''

The Department acknowledges the correction, as requested by the applicant, and in the final exemption has amended the references to Verizon Investment Management Corporation.

In addition to the correction described above, the applicant requested: (1) An amendment to the exemption audit conditions of section I(c); (2) a change of the effective date of section I(c); and (3) a change in the definition of an INHAM, in section III(a), as set forth in the Notice. The applicant's comments are sumarized in the paragraphs, below.

Timing of Exemption Audit

Section I(c) of the Notice, as set forth on page 8572, column 3, in lines 56–59, requires that the exemption audit and the written audit report must be completed within six (6) months following the end of the year to which such audit relates.

In its comment, VIMCO states that it understands the appropriateness of imposing a timing condition on future audits. However, VIMCO maintains that six (6) months after the end of the plan year is a relatively short period considering the volume of corporate and employee benefit activities that VIMCO engages in at that time of year. Accordingly, VIMCO requests that this deadline should be one (1) year following the end of the year to which such audit relates, rather than six (6) months. In this regard, VIMCO maintains that a one-year deadline would be consistent with the requirement that an exemption audit be performed annually and would avoid the unintended loss of the exemption due to inadvertent delays in the exemption audit process.

The Department does not concur with the applicant's request and has not amended the six (6) month audit requirement, set forth in section I(c) of this exemption. In this regard, it is the Department's view that the six (6) month audit requirement is reasonable. The Department believes that extending the audit requirement beyond the six (6) month requirement would result in audit reports which would not be timely.

Exemption Audit Conditions

Section I(c), as set forth on page 8572, column 3, in lines 50–55, also requires that that the written report of the exemption audit must 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 applicant believes that the requirement imposed in section I(c) of the Notice goes beyond the frameowrk envisioned by PTE 96–23. In this regard, VIMCO notes that in the preamble to PTE 96–23, the auditor was not required to reach any opinion regarding compliance. The auditor was simply to make the findings based on its review. In the opinion of the applicant, the requirement set forth in section I(c) of the Notice, would cause additional review and expense. In addition, the applicant points out that this requirement may trigger issues for accounting firms and law firms under their respective professional standards. The applicant suggests that, if the Department intends to impose this requirement generally on INHAMs in the course of amending PTE 96–23, then the Department should do so in that proceeding, at which time this requirement can be subject to a broader range of comments that would better define the issues.

The Department does not concur with the applicant's request and has not amended this requirement, as set forth in section I(c) of this exemption. It is the Department's view that it is not unreasonable to require an auditor to issue a written report which presents such auditor's specific findings regarding the level of compliance with the policies and procedures adopted by VIMCO, and with the objective requirements of PTE 96–23. Further, the Department believes that it is reasonable to require the auditor's written report to contain such auditor's overall opinion regarding whether VIMCO's program complied with the policies and procedures adopted by VIMCO, and with the objective requirements of PTE 96–23, based on a representative sample of the transactions.

Effective Date for Condition I(c) of the Exemption

The effective date for section I(c), as set forth in the Notice at page 8572, column 3, in lines 25–30, is stated as follows:

> (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 the final amendment to PTE 96–23, * * *.

The applicant points out that the final exemption will not necessarily be published at the beginning or end of a calendar year or at the beginning or end of an audit period. Accordingly, the applicant is concerned that if an exemption audit covers an annual period which straddles the effective date, as set forth in section I(c) of the exemption, the exemption audit could be subject to two different sets of standards. To avoid this problem, the applicant requests that the effective date for section I(c) of the exemption should be changed to the beginning of the first fiscal year of VIMCO after publication of the final exemption in the **Federal Register**.

The Department does not concur with the applicant's request and has not amended the effective date, as set forth in section I(c) of this exemption. In this regard, the Department notes that satisfaction of the exemption audit requirement, as set forth in this exemption, will also satisfy the exemption audit requirements, as set forth in PTE 96–23 if the audit period straddles both this final exemption and PTE 96–23. Accordingly, any exemption audit covering an annual period that straddles the effective date, as set forth in section I(c) of this exempiton, will not be subject to two different sets of standards.

Definition of an INHAM

Section III(a) of the exemption, as set forth in the Notice on page 8573, column 1, in lines 50–68, and continuing on page 8573, column 2, in lines 1–21, defines the term, ''in-house asset manager'' or ''INHAM.'' The definition of an ''in-house asset manager'' or ''INHAM,'' as set forth in the Notice, requires that an INHAM must satisfy certain criteria on January 1, 2001, and at all times thereafter. Specifically, section III(a) of the exemption reads as follows:

> (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 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.

The applicant is concerned that the definition of an INHAM, as set forth in the proposed exemption, would require

that VIMCO continue to meet certain criteria at all times after January 1, 2001. According to the applicant, ''this raises the question of whether VIMCO would lose all relief under the exemption in the event that it ceases at some point in the future to meet those criteria.'' Accordingly, the applicant requests that ''to avoid this problem, the exemption should provide that in the event VIMCO ceases to meet the terms of the definition, it ceases to be an INHAM only prospectively, and therefore does not lose relief for prior transactions.''

The Department concurs with the applicant's request. In this regard, the Department notes that the retroactive exemptive relief effective for the period from January 1, through December 31, 2001, and from January 1, through December 31, 2003, will continue to apply, even if in the future, VIMCO ceases to satisfy the definition of an INHAM, as set forth in section III(a) of this exemption. However, if VIMCO, satisfies the definition of an INHAM, as defined, above, in section III(a) of this exemption, at any time 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, then retroactive exemptive relief effective for the period from January 1, through December 31, 2001, and from January 1, through December 31, 2003, will *not* continue to apply, unless the conditions, as set forth, in section I(a) through (b) and section II of this exemption, were satisfied during the period January 1, through December 31, 2001, and during the period January 1, through December 31, 2003, and the conditions, as set in section I(c) and section II of this exemption, are satisfied, 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. Accordingly, the Department has amended this exemption, as follows:

(1) In section III(a) to delete the phrase, ''on January 1, 2001, was and continued thereafter to be,'' as set forth in the Notice on page 8573, column 1, in lines 52–53, and to insert the word, ''is,'' after the phrase, ''provided that VIMCO,''

(2) In section III(a)(2) to delete the phrase, ''had and continued thereafter to have,'' as set forth in the Notice on page 8573, column 1, in lines 64–66, and to add the word, ''has,'' after the word, ''year,''

(3) In the last paragraph of section III(a)(2), as set forth in the Notice on page 8573, column 2, in lines 17–18, to delete the phrase, ''had, as of January 1, 2001, and continued thereafter to have,'' and to add the word, ''have,'' after the word, ''VIMCO,''

(4) In section I, as set forth in the Notice on page 8572, column 2, in line 45, to add the phrase, ''during the period January 1, through December 31, 2001, and during the period January 1, through December 31, 2003,'' after the phrase, ''provided that:,''

(5) In section I, as set forth in the Notice on page 8572, column 3, in lines 6–8, to delete the phrase, ''in sections I(a) through (c) and section II of this proposed exemption were satisfied,'' and to add the phrase, ''in section I(a) through (b) and section II of this exemption were satisfied and, the conditions, as set forth, below, in section I(c) and section II of this exemption are satisfied,'' and

(6) To amend the first sentence in section I(c), as set forth in the Notice on page 8572, column 3, in lines 25–38 to read as follows:

If VIMCO, satisfies the definition of INHAM, as defined, below, in section III(a) of this exemption, at any time 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, then 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, must conduct an exemption audit, as defined, below, in section III(f) of this exemption, on an annual basis.

Further, the Department wishes to make the following clarifying amendments to this exemption:

(1) To amend the second sentence in section I(c), as set forth in the Notice on page 8572, column 3, in lines 42–43, to delete the phrase, ''in section I of this proposed exemption,'' and to substitute instead the phrase, ''in Part I of PTE 96–23,''

(2) To amend section II(b)(1)(ii), as set forth in the Notice on page 8573, column 1, in line 33, to delete the phrase, ''in section I of this exemption,'' and add the phrase, ''in Part I of PTE 96–23,''

(3) To amend section III(a)(1), as set forth in the Notice on page 8573, column 1, in line 55, to delete the word, ''Verizon,'' and substitute instead, the phrase, ''Verizon Communications, Inc. (Verizon),'' and

(4) To amend section III(a)(1), as set forth in the Notice on page 8573, column 1, in lines 60–61, to delete the phrase, ''such an employer,'' and substutite instead, the word, ''Verizon.''

Request for an Extension of Time

In addition to the applicant's comment on the language of the final exemption, the applicant seeks a ninety (90) day extension of time to complete the audit for 2008, as set forth under section I(c) of this exemption. In this regard, section I(c) of this exemption requires the following, ''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.'' The applicant is concerned that VIMCO will not be able to meet a June 30, 2009, deadline for the 2008 audit, as required pursuant to section I(c) of this exemption. In this regard, it is represented that the attorneys who have performed all of VIMCO's audits, pursuant to PTE 96–23, beginning with the 2003 audit have moved to a new law firm early in 2009. Notwithstanding that VIMCO sent in the audit materials for 2008, and notwithstanding negotiations over a period of several months, VIMCO and the new law firm have thus far been unable to agree upon terms of an engagement letter. This result was not anticipated by VIMCO or the attorneys. It is represented that VIMCO is confident that it will be able to complete the audit within the requested extension period, including hiring new auditors who are qualified to conduct the audit should that be necessary.

The Department concurs with the applicant's request and will permit VIMCO a 90 day extension of time from the date of the publication in the **Federal Register** of the grant of this exemption to complete the exemption audit and the written report for 2008.

After giving full consideration to the entire record, including the written comment from the applicant and the applicant's request for an extension of time to complete the exemption audit and written report for 2008, the Department has decided to grant the exemption, as described and amended, above. In this regard, the comment letter and the request for an extension of time to complete the exemption audit and written report for 2008 which the applicant submitted to the Department have been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on February 25, 2009, at 74 FR 8572.

For Further Information Contact: Angelena C. Le Blanc of the Department, telephone (202) 693–8540 (This is not a toll-free number).

United States Steel and Carnegie Pension Fund (the Applicant), Located in New York, NY.

[Prohibited Transaction Exemption 2009–24; Exemption Application No. D–11465.]

Exemption

I. Retroactive Relief

The restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply, for the period beginning February 15, 2003 through December 31, 2007, to a transaction between a party in interest with respect to the Former U.S. Steel Related Plans, as defined in Section IV(e), below, and an investment fund in which such plans have an interest (the Investment Fund), as defined in Section IV(l), below, provided that United States Steel and Carnegie Pension Fund or its successor (collectively, UCF) has discretionary authority or control with respect to the plan assets involved in the transaction, and the following conditions are satisfied:

(a) UCF is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total client assets, including in-house assets (In-house Plan Assets), as defined in Section IV(h), below, under its management and control in excess of $100,000,000 and equity, as defined in Section IV(k), below, in excess of $750,000;

(b) At the time of the transaction, as defined in Section IV(n), below, the party in interest or its affiliate, as defined in Section IV(a), below, does not have, and during the immediately preceding one (1) year has not exercised, the authority to—

(1) Appoint or terminate UCF as a manager of any of the Former U.S. Steel Related Plans' assets, or

(2) Negotiate the terms of the management agreement with UCF (including renewals or modifications thereof) on behalf of the Former U.S. Steel Related Plans;

(c) The transaction is not described in—

(1) Prohibited Transaction Exemption 81–6 (PTE 81–6),[7] relating to securities lending arrangements (as amended, superseded or replaced);

(2) Prohibited Transaction Exemption 83–1 (PTE 83–1),[8] relating to acquisitions by plans of interests in mortgage pools (as amended or superseded), or

(3) Prohibited Transaction Exemption 88–59 (PTE 88–59),[9] relating to certain mortgage financing arrangements (as amended or superseded);

(d) The terms of the transaction are negotiated on behalf of the Investment Fund by, or under the authority and general direction of UCF, and either UCF, or (so long as UCF retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by UCF, makes the decision on behalf of the Investment Fund to enter into the transaction;

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

(f) Neither UCF nor any affiliate thereof, as defined in Section IV(b), below, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in UCF is a person who, within the ten (10) years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of:

(1) Any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization;

(2) Any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(3) Income tax evasion;

(4) Any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or

(5) Any other crimes described in section 411 of the Act.

For purposes of this Section I(f), a person shall be deemed to have been ''convicted'' from the date of the judgment of the trial court, regardless of whether the judgment remains under appeal;

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

(h) The party in interest dealing with the Investment Fund:

(1) Is a party in interest with respect to the Former U.S. Steel Related Plans (including a fiduciary) solely by reason of providing services to the Former U.S. Steel Related 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;

(2) Does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets; and

(3) Is neither UCF nor a person related to UCF, as defined in Section IV(j), below;

(i) UCF adopts written policies and procedures that are designed to assure compliance with the conditions of this exemption;

(j) 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 in Section IV(f), below, on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the Former U.S. Steel Related Plans presenting its specific findings regarding the level of compliance: (1) With the policies and procedures adopted by UCF in accordance with Section I(i), above, of this exemption; and (2) with the objective requirements of this exemption.

(k)(1) UCF or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the persons described in Section I(k)(2) to determine whether the conditions of this exemption have been met, except that (A) a separate prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of UCF and/or its affiliates, the records are lost or destroyed prior to the end of the six (6) year period, and (B) no party in interest

[7] 46 FR 7527, January 23, 1981. PTE 81–6 was amended and replaced by PTE 2006–16 (71 FR 63786, October 31, 2006). The effective date of PTE 2006–16 was January 2, 2007, and PTE 81–6 was revoked as of that date.

[8] 48 FR 895, January 7, 1983.

[9] 53 FR 24811, June 30, 1988.

or disqualified person other than UCF shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records have not been maintained or are not maintained, or have not been available or are not available for examination as required by Section I(k)(2), below, of this exemption.

(2) Except as provided in Section I(k)(3), below, and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in Section I(k)(1), above, of this exemption are unconditionally available for examination at their customary location during normal business hours by:

(A) Any duly authorized employee or representative of the Department or of the Internal Revenue Service;

(B) Any fiduciary of any of the Former U.S. Steel Related Plans investing in the Investment Fund or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any of the Former U.S. Steel Related Plans investing in the Investment Fund or any duly authorized employee representative of such employer;

(D) Any participant or beneficiary of any of the Former U.S. Steel Related Plans investing in the Investment Fund, or any duly authorized representative of such participant or beneficiary; and

(E) Any employee organization whose members are covered by such Former U.S. Steel Related Plans;

(3) None of the persons described in Section I(k)(2)(B) through (E), above, of this exemption shall be authorized to examine trade secrets of UCF or its affiliates or commercial or financial information which is privileged or confidential; and

(l) With respect to the transactions described in Section II and Section III of this exemption, the conditions contained in those Sections are satisfied through the date which is five (5) years from the date of the publication of this final exemption in the **Federal Register**.

II. Interim Relief

The restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply, for the period beginning on January 1, 2008 and ending on the day preceding the first day of the first fiscal year of UCF beginning after the date of the publication of this final exemption in the **Federal Register**, to a transaction between a party in interest with respect to the Former U.S. Steel Related Plans, as defined in Section IV(e), below, and the Investment Fund, as defined in Section IV(l), below, provided that UCF has discretionary authority or control with respect to the plan assets involved in the transaction, and the following conditions are satisfied:

(a) Each of the conditions contained in paragraphs (a) through (k) of Section I are met; and

(b) With respect to the exemption audit and written report by the independent auditor described in Section I(j), the independent auditor must complete each such exemption audit and must issue such written report to the administrators, or other appropriate fiduciary of the Former U.S. Steel Related Plans within six (6) months following the end of the year to which each such exemption audit and report relates.

III. Prospective Relief

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply, for the period beginning with the first day of the first fiscal year of UCF after the date of the publication of this final exemption in the **Federal Register**, and expiring five years from that date, to a transaction between a party in interest with respect to the Former U.S. Steel Related Plans, as defined in Section IV(e), below, and the Investment Fund, as defined in Section IV(l), below, provided that UCF has discretionary authority or control with respect to the plan assets involved in the transaction, and the following conditions are satisfied:

(a) UCF is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total client assets, including In-house Plan Assets, under its management and control in excess of $100,000,000 and equity, as defined in Section IV(k), below, in excess of $1,000,000 (as measured yearly on UCF's most recent balance sheet prepared in accordance with generally accepted accounting principles);

(b) Each of the conditions contained in paragraphs (c) through (i), and (k) of Section I are met;

(c) 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 IV(g) of this exemption, on an annual basis. In conjunction with the completion of each such exemption audit, the independent auditor must issue a written report to the Former U.S. Steel Related Plans that engaged in such transactions, presenting its specific findings with respect to the audited sample regarding the level of compliance with the policies and procedures adopted by UCF, pursuant to Section I(i) of this exemption, and with the objective requirements of the exemption. The written report also shall contain the auditor's overall opinion regarding whether UCF's program as a whole complied with the policies and procedures adopted by UCF and with the objective requirements of this exemption. The independent auditor must complete each such exemption audit and must issue such written report to the administrators, or other appropriate fiduciary of the Former U.S. Steel Related Plans within six (6) months following the end of the year to which each such exemption audit and report relates; and

(d) At the time of the transaction, as defined in Section IV(n), below, the party in interest or its affiliate, as defined in Section IV(p), below, does not have the authority to—

(1) Appoint or terminate UCF as a manager of any of the plan assets of the Former U.S. Steel Related Plans involved in the transaction, or

(2) Negotiate the terms of the management agreement with UCF (including renewals or modifications thereof) on behalf of the Former U.S. Steel Related Plans with respect to the plan assets involved in the transaction.

IV. Definitions

(a) For purposes of Section I(b) of this exemption, an ''affiliate'' of a person means—

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

(2) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, 5 percent (5%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets.

A named fiduciary (within the meaning of section 402(a)(2) of the Act) of a plan, and an employer any of whose employees are covered by the plan will also be considered affiliates with respect

to each other for purposes of Section I(b), above, if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(b) For purposes of Section I(f), above, of this exemption, an ''affiliate'' of a person means—

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

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent (5%) or more partner or owner, and

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent (10%) or more of the yearly wages of such person) or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management, or disposition of plan assets.

(c) For purposes of Section IV(e) and (h), below, of this exemption, an ''affiliate'' of UCF includes a member of either:

(1) A controlled group of corporations, as defined in section 414(b) of the Code, of which United States Steel Corporation or its successor (collectively, U.S. Steel) 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 U.S. Steel 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 rules thereunder.

(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) ''Former U.S. Steel Related Plans'' mean:

(1) Retirement Plan of Marathon Oil Company, Marathon Petroleum LLC Retirement Plan and the Speedway SuperAmerica LLC Retirement Plan (the Marathon Plans);

(2) Pension Plan of RMI Titanium Company (RMI), Pension Plan of Eligible Employees of RMI Titanium Company, Pension Plan for Eligible Salaried Employees of RMI Titanium Company, and Tradco Pension Plan (the RTI Plans);

(3) Any plan the assets of which include or have included assets that were managed by UCF as an in-house asset manager (INHAM) pursuant to Prohibited Transaction Class Exemption 96–23 (PTE 96–23) [10] but as to which PTE 96–23 is no longer available because such assets are not held under a plan maintained by an affiliate of UCF (as defined in Section IV(c) of this exemption); and

(4) Any plan (an Add-On Plan) that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of UCF (as defined in Section IV(c), above, of this exemption); provided that:

(A) The assets of the Add-On Plan are invested in a commingled fund (the Commingled Fund), as defined in Section IV(o) of this exemption, with the assets of a plan or plans (the Commingled Plans), described in Section IV(e)(1)–(3), above; and

(B) The assets of the Add-On Plan in the Commingled Fund do not comprise more than 25 percent (25%) of the value of the aggregate assets of such fund, as measured on the day immediately following the initial commingling of their assets (the 25% Test).

For purposes of the 25% Test, as set forth in Section IV(e)(4):

(i) In the event that less than all of the assets of an Add-On Plan are invested in a Commingled Fund on the date of the initial transfer of such Add-On Plan's assets to such fund, and if such Add-On Plan subsequently transfers to such Commingled Fund some or all of the assets that remain in such plan, then for purposes of compliance with the 25% Test, the sum of the value of the initial and each additional transfer of assets of such Add-On Plan shall not exceed 25 percent (25%) of the value of the aggregate assets in such Commingled Fund, as measured on the day immediately following the addition of each subsequent transfer of such Add-On Plan's assets to such Commingled Fund;

(ii) Where the assets of more than one Add-On Plan are invested in a Commingled Fund with the assets of plans described in Section IV(e)(1)–(3), above, of the exemption, the 25% Test will be satisfied, if the aggregate amount of the assets of such Add-On Plans invested in such Commingled Fund do not represent more than 25 percent (25%) of the value of all of the assets of such Commingled Fund, as measured on the day immediately following each addition of Add-On Plan assets to such Commingled Fund;

(iii) If the 25% Test is satisfied at the time of the initial and any subsequent transfer of an Add-On Plan's assets to a Commingled Fund, as provided in Section IV(e), above, this requirement shall continue to be satisfied notwithstanding that the assets of such Add-On Plan in the Commingled Fund exceed 25 percent (25%) of the value of the aggregate assets of such fund solely as a result of:

(AA) A distribution to a participant in a Former U.S. Steel Related Plan;

(BB) Periodic employer or employee contributions made in accordance with the terms of the governing plan documents;

(CC) The exercise of discretion by a Former U.S. Steel Related Plan participant to re-allocate an existing account balance in a Commingled Fund managed by UCF or to withdraw assets from a Commingled Fund; or

(DD) An increase in the value of the assets of the Add-On Plan held in such Commingled Fund due to investment earnings or appreciation;

(iv) If, as a result of a decision by an employer or a sponsor of a plan described in Section IV(e)(1)–(3) of the exemption to withdraw some or all of the assets of such plan from a Commingled Fund, the 25% Test is no longer satisfied with respect to any Add-On Plan in such Commingled Fund, then the exemption will immediately cease to apply to all of the Add-On Plans invested in such Commingled Fund; and

(v) Where the assets of a Commingled Fund include assets of plans other than Former U.S. Steel Related Plans, as defined in Section IV(e), above, of this exemption, the 25% Test will be determined without regard to the assets of such other plans in such Commingled Fund.

(f) For purposes of Sections I and II of this exemption, ''Exemption Audit'' of any of the Former U.S. Steel Related Plans must consist of the following:

(1) A review by an independent auditor of the written policies and procedures adopted by UCF, pursuant to Section I(i) of this exemption, for consistency with each of the objective requirements of this exemption, as described, below, in Section IV(f)(5) of this exemption; and

(2)(i) A test by an independent auditor of a representative sample of the Plan's transactions in order to make findings regarding whether UCF is in compliance with:

(I) The written policies and procedures adopted by UCF pursuant to Section I(i) of this exemption, and

(II) The objective requirements described in Section I of this exemption;

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

(3) A determination as to whether UCF has satisfied the requirements of Section I(a), above, of this exemption;

(4) The issuance by an independent auditor of a written report describing the steps performed by such independent auditor during the course of its review and such independent auditor's findings.

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

(A) The requirements of Section I(a), above, of this exemption regarding registration under the Investment Advisers Act of 1940, total assets under management, and equity;

(B) The requirements of Section I of this exemption, regarding the discretionary authority or control of UCF with respect to the assets of the Former U.S. Steel Related Plans involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the Former U.S. Steel Related Plans to enter into the transaction;

(C) The transaction is not entered into with any person who is excluded from relief under Section I(h)(1), above, of this exemption, or Section I(h)(2) to the extent that such person has discretionary authority or control over the plan assets involved in the transaction, or Section I(h)(3); and

(D) The transaction is not described in any of the class exemptions listed in Section I(c), above, of this exemption.

(g) For purposes of Section III of this exemption, ''Exemption Audit'' of any of the Former U.S. Steel Related Plans must consist of the following:

(1) A review by an independent auditor of the written policies and procedures adopted by UCF pursuant to section I(i) for consistency with each of the objective requirements of this exemption (as described in section IV(g)(5)(A)–(D)).

(2) A test of a sample of UCF'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 UCF is in compliance with (i) the written policies and procedures adopted by UCF pursuant to section I(i) of the exemption and (ii) the objective requirements of the exemption; and (B) to render an overall opinion regarding the level of compliance of UCF's program with this section IV(g)(2)(A)(i)and (ii) of the exemption;

(3) A determination as to whether UCF has satisfied the requirements of Section III(a), above, of this exemption;

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

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

(A) The requirements of Section III(a), above, of this exemption regarding registration under the Investment Advisers Act of 1940, total assets under management, and equity;

(B) The requirements of Section I(d) of this exemption, regarding the discretionary authority or control of UCF with respect to the assets of the Former U.S. Steel Related Plans involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the Former U.S. Steel Related Plans to enter into the transaction;

(C) The transaction is not entered into with any person who is excluded from relief under Section I(h)(1), above, of this exemption, or Section I(h)(2) to the extent that such person has discretionary authority or control over the plan assets involved in the transaction, or Section I(h)(3); and

(D) The transaction is not described in any of the class exemptions listed in Section I(c), above, of this exemption.

(h) ''In-house Plan Assets'' means the assets of any plan maintained by an affiliate of UCF, as defined in Section IV(c), above, of this exemption and with respect to which UCF has discretionary authority or control.

(i) 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.

(j) UCF is ''related'' to a party in interest for purposes of Section I(h)(3) of this exemption, if the party in interest (or a person controlling, or controlled by, the party in interest) owns a 5 percent (5%) or more interest in U.S. Steel, or if UCF (or a person controlling, or controlled by UCF) owns a 5 percent (5%) or more interest in the party in interest. For purposes of this definition:

(1) The term, ''interest,'' means with respect to ownership of an entity—

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

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

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

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

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

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

(k) For purposes of Section I(a) of this exemption, the term, ''equity'' means the equity shown on the most recent balance sheet prepared within the two (2) years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

(l) ''Investment Fund'' includes single customer and pooled separate accounts maintained by an insurance company, individual trust and common collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of UCF) is subject to the discretionary authority of UCF.

(m) The term, ''relative,'' means a relative as that term is defined in section 3(15) of the Act, or a brother, sister, or a spouse of a brother or sister.

(n) The ''time'' as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after the date when this exemption is published in the **Federal Register** or a renewal that requires the consent of UCF occurs on or after such publication date and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this subsection shall be construed as exempting a transaction entered into by an Investment Fund which becomes a transaction described in section 406(a) of the Act or section 4975(c)(1)(A) through (D) of the Code while the transaction is continuing, unless the conditions of this exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption. In determining compliance with the conditions of the exemption at the time that the transaction was entered into for

purposes of the preceding sentence, Section I(h) of this exemption will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

(o) ''Commingled Fund'' means a trust fund managed by UCF containing assets of some or all of the plans described in Section IV(e)(1)–(3) of this exemption, plans other than Former U.S. Steel Related Plans, and if applicable, any Add-On Plan, as to which the 25% Test provided in Section IV(e)(4) of this exemption have been satisfied; provided that:

(1) Where UCF manages a single sub-fund or investment portfolio within such trust, the sub-fund or portfolio will be treated as a single Commingled Fund; and

(2) Where UCF manages more than one sub-fund or investment portfolio within such trust, the aggregate value of the assets of such sub-funds or portfolios managed by UCF within such trust will be treated as though such aggregate assets were invested in a single Commingled Fund.

(p) For purposes of Section III(d) of this exemption, an ''affiliate'' of a person means—

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

(2) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, ten percent (10%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets.

A named fiduciary (within the meaning of section 402(a)(2) of the Act) of a plan, and an employer any of whose employees are covered by the plan will also be considered affiliates with respect to each other for purposes of Section III(d), above, if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement. *Reliance.* The exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified herein.

Temporary Nature of Exemption

The Department has determined that the relief provided by this exemption is temporary in nature. The exemption, is effective February 15, 2003, and will expire on the day which is five (5) years from the date of the publication of this final exemption in the **Federal Register.** Accordingly, the relief provided by this exemption will not be available upon the expiration of such five-year period for any new or additional transactions, as described herein, after such date, but would continue to apply beyond the expiration of such five-year period for continuing transactions entered into before the expiration of the five-year period. Should the Applicant wish to extend, beyond the expiration of such five-year period, the relief provided by this exemption to new or additional transactions, the Applicant may submit another application for exemption.

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 December 24, 2008 at 73 FR 79186.

Written Comments

The Department received one comment with respect to the Notice, which was filed by the Applicant. The Applicant addressed several points in the Notice in its comment letter. The Applicant's commentary, a discussion of the Department's views in response thereto and the modifications to the proposed exemption are discussed below.

The Applicant's first comment focused on condition III(c) of the Notice regarding the written report to be issued by an independent auditor. As a condition for prospective relief, such report must contain the auditor's overall opinion regarding whether UCF's program, as a whole, complied with the policies and procedures adopted by UCF and with the objective requirements of the exemption. The Applicant asked the Department to clarify or further explain this condition. In addition, the Applicant requested further guidance on the selection and testing of the representative sample of transactions.

With regard to these comments, the Department wishes to note that because the auditor necessarily has to use its experience and judgment in designing and conducting a particular audit, the auditor must take into account the totality of the facts and circumstances in determining the appropriate size and types of transactions to audit. Based upon the specific sample of transactions tested during the audit period, we expect the auditor to render an overall opinion regarding the level of compliance of UCF's program with the objective requirements of the exemption. The Department notes, however, that in certain instances, an auditor may need to construct and test more than one sample of transactions. For example, an auditor may initially believe that the most appropriate way to make the required findings is to construct a sample that represents a subset of the total universe of relevant transactions engaged in by UCF under the exemption. In testing the sample, however, the auditor should look for, and may find, patterns of compliance failures that indicate that certain types of transactions are more prone to compliance failures than others. If such patterns appear, the auditor may need to test additional transactions to more accurately assess the extent and causes of non-compliant transactions. Ultimately, an auditor must construct and test a sampling of transactions that is sufficient in size (*i.e.,* number of transactions) and nature (*i.e.,* type of transactions) to afford the auditor a reasonable basis to make its required determinations under the exemption. Since the sole purpose of the audit is to assure compliance with the exemption, the sample should be sufficient in size and nature for the auditor to render an overall opinion regarding whether UCF's program complied with the objective requirements of the exemption and of its own policies and procedures. If the sample of transactions selected for testing by the independent auditor is properly designed so that it contains the appropriate weighting of representative transactions and if no instances of non-compliance are discovered, the auditor could then proceed to issue an overall opinion, without performing any further audit work, that, based upon its sampling of transactions, UCF's program as a whole complied with the policies and procedures adopted by UCF and with the objective requirements of the exemption. If, on the other hand, the auditor determined that a single transaction from the representative sample did not conform to the conditions for exemptive relief, the auditor must then determine whether the overall opinion could be issued without expanding the scope of the audit and conducting further testing. If the auditor were to decide that further auditing would not be necessary based upon valid documented reasoning (*e.g.,* the auditor's report explains why the auditor was able to determine why non-

compliance with respect to the single transaction was an isolated violation), the auditor could then issue the required overall opinion. It is noted that in such a case, the exemptive relief would not be available for a single transaction that did not satisfy the conditions of the exemption, but that exemptive relief would continue to be available for the remaining transactions provided that they met the conditions of the exemption.

The Applicant also raised some related questions that concerned item number 14 in the Summary of Facts and Representations of the Notice, which enumerated several items to be included in the auditor's written report required for prospective relief. The Applicant asked the Department to explain the difference between the content of subparagraph (ii) of item 14 of the facts and representations and subparagraph (v), because both items relate to the sample selected for review by the auditor. The Department responds that subparagraph (ii) focuses on the general process and methodology used to select the representative sample, whereas subparagraph (v) requires an explanation regarding the appropriateness of the specific sample size selected for review and taking into account instances of non-compliance.

In addition, the Applicant commented with respect to subparagraph (vi) of item number 14 in the Summary of Facts and Representations of the Notice. The Applicant commented that the subparagraph as written would require the auditor to determine the adequacy of the Plan's written policies and procedures, described in Section I(i), and their administration by UCF. The Applicant requested that this provision be made consistent with PTE 96–23, which requires that the auditor review the written policies and procedures of the INHAM not for ''adequacy,'' but rather for ''consistency'' with the objective requirements of the exemption. The Department agrees with this comment and notes that the requirement that an auditor determine the adequacy of UCF's written policies and procedures, described in Section I(i), is deleted. However, the Department notes that where there is a pattern of failure to comply rather than an isolated instance of non-compliance, the Department expects that the auditor would review UCF's policies and procedures to determine whether the weakness of the written policies and procedures contributed to this general pattern of non-compliance.

The Applicant next commented with respect to the requirement for prospective relief that the written audit reports be issued within six months following the end of the year to which the audit relates. The comment referred to other tasks which UCF must perform following the end of a year, and requested that the period be lengthened to one year following the end of the year to which the audit relates, rather than six months. The Department is not persuaded by this comment, and also believes that an additional six month delay is inconsistent with the underlying purposes of the annual audit requirement. Accordingly, the Department has not made the requested modification.

The Applicant also commented with respect to the effective dates of Section II of the exemption, which provides ''Interim Relief,'' and Section III, which provides ''Prospective Relief.'' The Applicant pointed out that as written in the Notice, there was a gap between the end of the effective period for interim relief and the beginning of the effective period for prospective relief. In addition, the Applicant noted that the effective dates will not necessarily come out at the beginning or end of a year or of an audit period. This would raise questions under two of the conditions of the prospective relief. First, the $1 million equity requirement of Section III(a) must be met as of the date of UCF's most recent balance sheet. Second, if an exemption audit covers an annual period that straddles the effective dates, the audit could be subject to two differing sets of standards. The Applicant recommended that to avoid these problems, the effective date for prospective relief should begin at the start of the first fiscal year of UCF after the date of publication of this final exemption in the **Federal Register**, and the end date of the interim relief should be concomitantly extended. The Department agrees with this comment and has modified the final exemption accordingly.

The Applicant also pointed out a cross-reference in the Notice that should be changed. In Section IV(g)(1), the parenthetical should reference subparagraphs IV(g)(5)(A)–(D) instead of subparagraphs IV(f)(5)(A)–(D). The Department agrees and had made the change in the exemption.

The Applicant also commented that in section II(a), the reference should be to subparagraphs (a) through (k) of Section I instead of subparagraphs (a) through (l), since subparagraph (l) refers to Section II. The Department agrees with this comment and has modified Section II(a) accordingly. Although it is the Department's intention that the retroactive relief in this case be conditioned upon the Applicant's good faith satisfaction of prospective conditions for future transactions, the Department believes that it is appropriate to make the retroactive relief contingent upon meeting the conditions for prospective relief for a finite period. Accordingly, in order for the Applicant to qualify for retroactive relief, it must comply with Sections II and III, as appropriate, through the date which is five (5) years from the date of the publication of the final exemption in the **Federal Register**. The Department has modified Section I(l) accordingly to reflect this requirement.

The Applicant also requested that the Department clarify that in the second-to-last sentence in item 3(b) of the Summary of Facts and Representations in the Notice, ''majority ownership on the UCF Board'' should read ''majority membership on the UCF Board.'' The Department notes this correction.

The Applicant also commented that item 11 of the Summary of Facts and Representations in the Notice could be read to imply that UCF represented it did not comply with the exemption audit requirement of FAN 2003–03E (the FAN). UCF, in its comment, maintained its position that it did indeed comply with the exemption audit requirement of the FAN, but it acknowledges the Department's view that it did not comply and has requested retroactive relief to February 15, 2003 for that reason.

Finally, the Applicant requested three changes to the Notice with respect to the prospective relief provided in Section III so that the conditions and definitions would be made consistent with the 2005 amendment to PTE 84–14.[11] First, the Applicant requested that the Department delete the ''one-year look-back rule'' that makes the exemption unavailable to a party in interest if it had exercised the power of appointment over UCF within the one-year period preceding the transaction, and clarifying that the power of appointment refers only to the power to appoint UCF as manager of the assets used in the transaction. The Department concurs with this suggestion and has added Section III(d) for prospective transactions while deleting the requirement that such prospective transactions satisfy the condition contained in Section I(b). Second, the Applicant requested that Section IV(a) exclude from the definition of an ''affiliate'' those partnerships in which the person has less than a 10% interest (rather than 5%). The Department concurs with this suggestion and made the requested change to the Notice by

[11] 70 FR 49305, August 23, 2005.

adding Section IV(p). Third, the Applicant requested that Section IV(j) be revised for prospective transactions with respect to the definition of ''related'' by changing the percentage of ownership in certain entities. The Department has determined not to make this requested modification to the final exemption. In this regard, the Department notes that the modification requested would conflict with other limitations contained in section I(h) in a number of instances.[12]

For Further Information, Contact: Gary H. Lefkowitz of the Department, telephone (202) 693–8546 (this is not a toll-free number).

Barclays Global Investors, N.A. and its affiliates and successors (BGI) and Barclays Capital Inc. and its affiliates and successors (BarCap) (collectively Applicants); Located in San Francisco, CA, and New York, NY.

[Prohibited Transaction Exemption 09–25; Application No. D–11508.]

Exemption

Section I—Temporary Exemption for Securities Lending Transactions Involving Index and Model-Driven Funds That Are Based on BarCap-Lehman Indices

For the period from September 22, 2008, through the earlier of (i) the effective date of an individual exemption granting permanent relief for the following transactions or (ii) one year from September 1, 2009 (the Relief Period), the restrictions of section 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act, section 8477(c)(2)(A) and (B) of FERSA, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the lending of securities carried out on behalf of Client Plans in reliance on Prohibited Transaction Exemption (PTE) 2002–46,[13] where the applicable Index or Model-Driven Fund managed by BGI meets the definition of an ''Index Fund'' or a ''Model-Driven Fund'' as set forth in Section III of PTE 2002–46 but for the fact that the underlying index is a BarCap-Lehman Index, provided that all of the other conditions of PTE 2002–46 and the conditions set forth in Section IV of this exemption are met.

Section II—Temporary Exemption for Transactions Involving Exchange-Traded Funds That Are Index and Model-Driven Funds Based on BarCap-Lehman Indices

Effective for the Relief Period, the restrictions of section 406(a) and (b) of the Act, section 8477(c)(2) of FERSA, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to transactions carried out on behalf of Client Plans in reliance upon Prohibited Transaction Exemption (PTE) 2008–01,[14] where the applicable Index or Model-Driven Fund would meet the definition of an ''Index Fund'' or a ''Model-Driven Fund'' as set forth in Section V of PTE 2008–01 but for the fact that the underlying index is a BarCap-Lehman Index, provided that all of the other conditions of PTE 2008–01 and the conditions set forth in Section IV of this exemption are met.

Section III—Temporary Exemption for Principal Transactions With the BarCap-Lehman Broker-Dealer

Effective for the Relief Period, the restrictions of section 406(a) and 406(b)(1) and (2) of the Act, section 8477(c)(2)(A) and (B) of FERSA, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the purchase or sale of fixed income securities between BGI on behalf of Client Plans and the BarCap-Lehman Broker-Dealer (Covered Principal Transactions) provided that the conditions set forth in Section V are met.

Section IV—Conditions Applicable to Sections I and II

(a) Each BarCap-Lehman Index is a published Index widely used in the market by independent institutional investors other than pursuant to an investment management or advisory relationship with BGI and is prepared or applied in the same manner for non-affiliated customers as for BGI.

(b) Prior to the use of a BarCap-Lehman Index in connection with the exemption and on an annual basis thereafter (but in no event prior to the date that is 90 days following May 6, 2009), BGI will provide BarCap with a list of BarCap Lehman Indices proposed to be used by BGI in connection with the exemption. BarCap will certify to BGI whether, in its reasonable judgment, each such index is widely used in the market. In making this determination, BarCap shall take into consideration factors such as (i) publication by Bloomberg, or a similar institution involved in the dissemination of financial information, (ii) hits on relevant Web sites including LehmanLive (or any successor Web site maintained by BarCap or its affiliate(s)) and Bloomberg.com (or similar Web site), and (iii) delivery of index information to clients by means other than through Web site access.

(c) Any fees charged for the use of the BarCap-Lehman Index are paid by BGI and not Client Plans.

(d) Information barriers are in place throughout the Relief Period between BGI and BarCap such that BGI is not provided access to information regarding the rules, decisions and data underlying the BarCap-Lehman Indices before such information is provided to users of such Indices who are independent of BarCap and such rules, decisions and data are determined objectively without regard to BGI's use of such BarCap-Lehman Indices.

(e) At the end of the Relief Period, a Qualified Independent Reviewer, as defined in Section VII(n), shall issue a written report (the Compliance Report), following its review of relevant BarCap-Lehman Indices and the underlying rules, certifying to each of the following:

(i) Each BarCap-Lehman Index was operated in accordance with objective rules, in the ordinary course of business as would be conducted between unaffiliated parties;

(ii) No manipulation of any BarCap-Lehman Index for the purpose of benefiting BGI, BarCap, or their affiliates occurred;

(iii) In the event that any rule change occurred in connection with the rules underlying any BarCap-Lehman Index, such rule change was not made for the purpose of benefiting BGI, BarCap, or their affiliates;

(iv) Based on a review of the factors cited in condition (b) above, each BarCap-Lehman Index was widely used in the market during the Relief Period;

(v) Based on the result of the Qualified Independent Reviewer's factual inquiries to the Applicants, condition (d) above was met; and

(vi) Based on the Qualified Independent Reviewer's review of paid bills or invoices, condition (c) above was met with respect to the fee or fees paid in connection with each transaction.

The Compliance Report shall be issued no later than 90 days following the end of the Relief Period describing the steps performed during the course of the Qualified Independent Reviewer's review, the level of compliance with conditions (e)(i) through (vi), and any specific instances of non-compliance.

[12] The Department notes that it is currently considering an amendment to PTE 96–23. The Department has under consideration an amendment to the ''related to'' definition in section IV(d) of PTE 96–23. To the extent the Department adopts such changes, the Department would consider making similar changes to this exemption at such time.

[13] 67 FR 59569, September 23, 2002.

[14] 73 FR 3274, January 17, 2008.

The Compliance Report shall be included in the records maintained by BGI pursuant to Section VI of this exemption, and BGI shall notify the independent fiduciary(ies) of each Client Plan, as part of its regular disclosure with respect to the applicable Fund(s), that the Compliance Report is available for their review.

(f) The Index or Model-Driven Funds described in Sections I and II meet the definition of Index Fund or Model-Driven Fund in Sections VII(k) or (l) of this exemption.

Section V—Conditions Applicable to Section III

(a) BGI exercises discretionary authority or control or renders investment advice with respect to the Client Plan assets involved in the Covered Principal Transaction solely in connection with an Index Fund or Model-Driven Fund in which Client Plans invest.[15]

(b) Each Covered Principal Transaction occurs as a direct result of a Triggering Event, as defined in Section VII(o), and is executed no later than the close of the third business day following such Triggering Event.

(c) Each Covered Principal Transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security.

(d) Each Covered Principal Transaction is on terms that BGI reasonably determines to be as favorable or more favorable to the Client Plan than the terms of an arm's length transaction with an unaffiliated counterparty would have been.

(e) Each Covered Principal Transaction is executed either:

(i) Through an automated routing system reasonably designed to ensure execution at the best available net price to the Client Plan for the number of securities to be purchased or sold in the Covered Principal Transaction; or

(ii) At a net price to the Client Plan for the number of securities to be purchased or sold in the Covered Principal Transaction which is as favorable or more favorable to the Client Plan as the prices at which at least two independent Approved Counterparties, who are ready and willing to trade the relevant security, offer to purchase or sell such security.

(f) The Covered Principal Transaction does not involve any security issued by Barclays PLC.

(g) At the end of the Relief Period, a Qualified Independent Reviewer shall issue a Compliance Report certifying to each of the following:

(i) Based on a review of execution policies and procedures during the Relief Period and a sample of Covered Principal Transactions, that the policies and execution procedures used in connection with Covered Principal Transactions were reasonably designed to obtain best execution for the securities to be purchased or sold in the Covered Principal Transaction; and

(ii) Each sampled Covered Principal Transaction occurred in accordance with conditions (a), (b), (c) and (e) above.

The Compliance Report shall be issued no later than 90 days following the end of the Relief Period describing the steps performed during the course of the Qualified Independent Reviewer's review, the level of compliance with conditions (g)(i) and (ii), and any specific instances of non-compliance. The Compliance Report shall be included in the records maintained by BGI pursuant to Section VI of this exemption, and BGI shall notify the independent fiduciary(ies) of each Client Plan, as part of its regular disclosure with respect to the applicable Fund(s), that the Compliance Report is available for their review.

(h) In the case of any Covered Principal Transaction in connection with an Index Fund or a Model-Driven Fund with respect to which the underlying Index is a BarCap-Lehman Index, each of conditions (a) through (f) set forth in Section IV above is met.

Section VI—Recordkeeping Conditions Applicable to Sections I, II and III

(a) BGI maintains, or causes to be maintained, for a period of six (6) years following the end of the Relief Period the records necessary to enable the persons described in paragraph (b) Below to determine whether the conditions of the exemption have been met, including the Compliance Reports described in Sections IV(e) and V(g), and records which identify with respect to the Covered Principal Transactions:

(i) On a Fund by Fund basis, the specific Triggering Events which result in the creation of the index or model prescribed output describing the characteristics of the securities to be traded; [16]

(ii) On a Fund by Fund basis, the index or model prescribed output which described the characteristics of the securities to be traded in detail sufficient to allow an independent plan fiduciary or the Qualified Independent Reviewer to verify that each of the above decisions for the Fund was made in response to specific Triggering Events; and

(iii) On a Fund by Fund basis, the actual trades executed by the Fund on a particular day, the identity of the counterparty, the prices offered by the Approved Counterparties, if relevant, and which of those trades resulted from Triggering Events.

Such records must be readily available to assure accessibility and maintained so that an independent fiduciary, the Qualified Independent Reviewer, or other persons identified below in paragraph (b) of this Section, may obtain them within a reasonable period of time. However, a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of BGI, the records are lost or destroyed prior to the end of the six-year period; and no party in interest other than BGI and its affiliates shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (b) below.

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

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

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

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

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

(E) The Qualified Independent Reviewer.

(2) None of the persons described above in subparagraphs (B)–(E) of paragraph (b)(1) are authorized to examine the trade secrets of BGI or its affiliates or commercial or financial information that is privileged or confidential.

[15] This does not preclude, in the case of a BGI Plan that is a defined contribution plan under which participants direct the investment of their accounts among various investment options, the discretionary authority to select and offer investment options under the plan.

[16] Characteristics of the securities used in rebalancing a fixed income index would include changes in (a) amount of securities, (b) duration, (c) yield curve, and (d) convexity.

(3) Should BGI refuse to disclose information on the basis that such information is exempt from disclosure, BGI shall, by the close of the thirtieth (30th) day following the request, provide written notice advising that person of the reason for the refusal and that the Department may request such information.

Section VII—Definitions

(a) *Approved Counterparty:* A dealer that (x) is either (i) registered in accordance with section 15(b) of the Exchange Act or (ii) exempt from the requirement to register as a dealer under the Exchange Act because it is a bank that buys and sells government securities (as such terms are defined in the Exchange Act) and (y) meets the credit and execution standards of BGI as described in paragraph 20 of the summary of facts and representations of the notice of proposed exemption (74 FR 20981, May 6, 2009).

(b) *Barclays:* Barclays PLC and its direct and indirect subsidiaries.

(c) *BarCap:* Barclays Capital Inc. and its successors.

(d) *BarCap-Lehman Broker-Dealer:* BarCap's U.S. broker-dealer business, including the broker-dealer business acquired by BarCap from Lehman on September 22, 2008.

(e) *BarCap-Lehman Index:* A generally accepted standardized securities Index created by Lehman prior to the closing of the Asset Purchase Agreement on September 22, 2008, and maintained by its successor, BarCap.

(f) *BGI:* Barclays Global Investors, N.A., its investment advisory affiliates and their respective successors.

(g) *BGI Plan:* A Plan maintained by BGI or an affiliate for the benefit of its own employees.

(h) *Client Plan:* An employee benefit plan subject to the Act, FERSA and/or the Code, whose assets are managed by or which is advised by BGI, or a BGI-managed fund or separate account in which assets of such plans are invested.

(i) *Exchange Act:* The Securities Exchange Act of 1934, as amended.

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

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

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

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

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

(2) The index is either (i) created and maintained by an organization independent of Barclays or (ii) a BarCap-Lehman Index; and

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

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

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

(2) For which either (i) BGI or its affiliate does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold or (ii) the underlying Index is a BarCap-Lehman Index;

(3) That contains ''plan assets'' subject to the Act; and

(4) That involves no agreement, arrangement or understanding regarding the design or operation of the Fund which is intended to benefit BGI its affiliate or any party in which BGI or its affiliate may have an interest.[17]

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

(1) Which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria to transform an Index using either (i) independent third-party data not within the control of BGI or an affiliate or (ii) data provided by the BarCap-Lehman Broker-Dealer that is commercially available on a widespread basis to unaffiliated end users such as mutual funds and collective investment funds on the same terms and conditions;

(2) Which contains ''plan assets'' subject to the Act; and

(3) That involves no agreement, arrangement or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria which is intended to benefit BGI or its affiliate or any party in which BGI or its affiliate may have an interest.[18]

(m) *Lehman:* Lehman Brothers Holdings Inc. and, as the context requires, its subsidiaries and affiliates prior to September 15, 2008.

(n) *Qualified Independent Reviewer:* A third party appointed by BGI that is independent of Barclays and its affiliates and has extensive experience in reviewing and/or auditing transactions and procedures involving assets of plans subject to the Act, FERSA and/or the Code for the purpose of confirming that the applicable transactions or procedures serve the best interests of such plans.

(o) *Triggering Event:* Any of the following events in connection with an Index Fund or a Model-Driven Fund (together, ''Funds''):

(1) A change in the composition or weighting of the Index underlying a Fund by either (i) the independent organization creating and maintaining the Index or (ii) in the case of a BarCap-Lehman Index, by the BarCap-Lehman Broker-Dealer. In the case of a change described in clause (ii) of the preceding sentence, the change is uniformly applied to all customers using the Index, including non-affiliated customers, and is not adopted for the purpose of benefiting BGI.

(2) A material amount of net change in the overall level of assets in a Fund, as a result of investments in and withdrawals from the Fund, provided that:

(A) Such material amount has either been identified in advance as a specified amount of net change relating to such Fund and disclosed in writing as a ''triggering event'' to an independent fiduciary of each Client Plan having assets held in the Fund prior to, or within ten (10) days following, its inclusion as a ''triggering event'' for such Fund or BGI has otherwise disclosed to the independent fiduciary the parameters for determining a material amount of net change, including any amount of discretion retained by the BGI that may affect such net change; and

(B) Investments or withdrawals as a result of BGI's discretion to invest or withdraw assets of a BGI Plan, other than a BGI Plan which is a defined contribution plan under which participants direct the investment of their accounts among various investment options, including the applicable Fund, will not be taken into account in determining the specified amount of net change;

(3) An accumulation in the Fund of a material amount of either:

(A) Cash which is attributable to interest or dividends on, and/or tender offers for, portfolio securities; or

[17] This requirement does not preclude BGI's payment of fees to BarCap for use of the Indices.

[18] This requirement does not preclude BGI's payment of fees to BarCap for use of the Indices or data.

(B) Stock attributable to dividends on portfolio securities; provided that such material amount has been identified in advance as a specified amount relating to such Fund and disclosed in writing as a ''triggering event'' to an independent fiduciary of each Client Plan having assets held in the Fund prior to, or within ten (10) days following, its inclusion as a ''triggering event'' for such Fund, or BGI has otherwise disclosed to the independent fiduciary the parameters for determining a material amount of accumulated cash or securities, including any amount of discretion retained by the BGI that may affect such net change.

(4) A change in the composition of the portfolio of a Model-Driven Fund mandated solely by operation of the formulae contained in the computer model underlying the Fund where the basic factors for making such changes (and any fixed frequency for operating the computer model) have been disclosed in writing to an independent fiduciary of each Client Plan having assets held in the Fund prior to, or within ten (10) days following, its inclusion as a ''triggering event'' for such Fund; or

(5) A change in the composition or weighting of a portfolio for an Index or Model-Driven Fund which results from an independent fiduciary's direction to exclude certain securities or types of securities from the Fund, notwithstanding that such securities are part of the Index used by the Fund.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on May 6, 2009 at 74 FR 20981 (the Notice).

Effective Date: The exemption is effective September 22, 2008.

Written Comments

The Department received one comment with respect to the Notice, which was filed by the Applicants. The Applicants' comment concerns Section V(d) of the Notice, which provided that:

[E]ach Covered Principal Transaction is on terms that BGI reasonably determines to be more favorable to the Client Plan than the terms of an arm's length transaction with an unaffiliated counterparty would have been.

The Applicants note that the Notice provided another standard for Covered Principal Transactions, relating to price. That condition, Section V(e), provides that:

[E]ach Covered Principal Transaction is executed either:

(i) Through an automated routing system reasonably designed to ensure execution at the best available net price to the Client Plan for the number of securities to be purchased or sold in the Covered Principal Transaction; or

(ii) at a net price to the Client Plan for the number of securities to be purchased or sold in the Covered Principal Transaction which is as favorable or more favorable to the Client Plan as the prices at which at least two independent Approved Counterparties, who are ready and willing to trade the relevant security, offer to purchase or sell such security.

In this regard, BGI represents that it is not currently executing transactions through an automated routing system. With respect to Covered Principal Transactions involving prices quoted by at least two independent Approved Counterparties (subsection (ii) above), BGI represents as follows: BGI's fixed income policies and procedures include consideration of various factors (of which one—price—is quantifiable) that may go into the selection of a counterparty for execution. In the context of Covered Principal Transactions, each counterparty with whom BGI would trade through a trading platform (for example, Tradeweb) is already a BGI approved counterparty that has been subject to internal approvals, including approval by BGI's credit group. For the execution of all Covered Principal Transactions made using the platform, the predominant (though not exclusive) factor used when comparing the terms offered by one of those Approved Counterparties is price.

Accordingly, because in BGI's view price is the only quantifiable factor and all the Approved Counterparties have been subject to prior internal approval, BGI is concerned that it may be difficult to prove that a Covered Principal Transaction is on terms ''more favorable to the Client Plan than the terms of an arm's length transaction with an unaffiliated counterparty'' under circumstances in which the price is ''as favorable or more favorable'' than the prices offered by two independent Approved Counterparties. BGI's concern also relates to the language governing transactions executed through an automated routing system (subsection (i) above), in the event that future trades are executed in that manner. The requirement that the trade be executed at ''best available net price'' would leave room for the possibility that two or more trading opportunities would exist at the same price, each of which could represent the ''best available net price.'' In such a case, BGI believes it may be difficult to demonstrate compliance with the requirement in Section V(d) that the terms of the transaction be ''more favorable to the Client Plan than the terms of an arm's length transaction with an unaffiliated counterparty.''

To address its concerns, BGI requests that the required standard for the overall terms of the Covered Principal Transaction (*i.e.,* Section V(d)) be conformed to the same required standard for the specific term of price of the Covered Principal Transaction. Therefore, BGI requests that Section V(d) be revised as follows:

Each Covered Principal Transaction is on terms that BGI reasonably determines to be as favorable or more favorable to the Client Plan than the terms of an arm's length transaction with an unaffiliated counterparty would have been.

Upon consideration of BGI's comment, the Department has determined to make the change requested by BGI.

For Further Information Contact: Karen E. Lloyd of the Department, 202–693–8554. (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 24th day of August, 2009.

Ivan Strasfeld,

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

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