should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

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

Overview of this information collection:

(1) *Type of information collection:* Revision of a currently approved collection.

(2) *The title of the form/collection:* Hate Crime Incident Report and the Quarterly Hate Crime Report.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Forms 1–699 and 1–700; Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: City, county, state, federal, and tribal law enforcement agencies. This collection is needed to collect information on hate crime incidents committed throughout the United States. Data are tabulated and published in the annual Crime in the United States and Hate Crime Statistics.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 13,242 law enforcement agency respondents with an estimated response time of 9 minutes.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 7,945 hours, annual burden, associated with this information collection.

If additional information is required contact: Ms. Lynn Bryant, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: June 7, 2010.

Lynn Bryant,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. 2010–13996 Filed 6–10–10; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Prohibited Transaction Exemptions 2010–16, 2010–17, and 2010–18; Grant of Individual Exemptions involving: D–11521, Morgan Stanley & Co., Inc., and Its Current and Future Affiliates and Subsidiaries (Morgan Stanley) and Union Bank, N.A., and Its Affiliates (Union Bank), PTE 2010–16; D–11584, The Bank of New York Mellon (BNY Mellon), PTE 2010–17; L–11558, Boston Carpenters Apprenticeship and Training Fund, PTE 2010–18

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.

Morgan Stanley & Co., Inc., and Its Current and Future Affiliates and Subsidiaries (Morgan Stanley) and Union Bank, N.A., and Its Affiliates (Union Bank), Located in New York, NY and San Francisco, CA

Exemption

Section I—Transactions

Effective October 1, 2008, the restrictions of section 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to:

(a) The lending of securities to:

(1) Morgan Stanley & Co. Incorporated, and its successors (MS&Co.) and Union Bank, N.A., and its successors (UB);

(2) Any current or future affiliate of MS&Co. or UB,[1] that is a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940, that is supervised by the U.S. or a state, any broker-dealer registered under the Securities Exchange Act of 1934 (the "1934 Act"), or any foreign affiliate that is a bank or broker-dealer that is supervised by (i) the Securities and Futures Authority ("SFA") in the United Kingdom; (ii) the Bundesanstalt fur Finanzdienstleistungsaufsicht (the "BAFin") in Germany; (iii) the Ministry of Finance ("MOF") and/or the Tokyo Stock Exchange in Japan; (iv) the Ontario Securities Commission, the Investment Dealers Association and/or the Office of Superintendent of Financial Institutions in Canada; (v) the Swiss Federal Banking Commission in

[1] Any reference to MS&Co. or UB shall be deemed to include any successors thereto.

Switzerland; (vi) the Reserve Bank of Australia or the Australian Securities and Investments Commission and/or Australian Stock Exchange Limited in Australia; (vii) the Commission Bancaire ("CB"), the Comite des Establissements de Credit et des Enterprises d'Investissement (CECEI) and the Autorite des Marches Financiers ("AMF") in France; and (viii) the Swedish Financial Supervisory Authority ("SFSA") in Sweden (the branches and/or affiliates in the enumerated foreign countries hereinafter referred to as the "Foreign Affiliates") and together with their U.S. branches or U.S. affiliates (individually, "Affiliated Borrower" and collectively, "Affiliated Borrowers"), by employee benefit plans, including commingled investment funds holding plan assets (the Client Plans or Plans),[2] for which MS&Co., UB or an affiliate of either acts as securities lending agent or subagent (the "Lending Agent"),[3] and also may serve as directed trustee or custodian of securities being lent, or for which a subagent is appointed by the Lending Agent, which subagent is either (I) a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 or a broker-dealer registered under the 1934 Act, (i) which has, as of the last day of its most recent fiscal year, equity capital in excess of $100 million and (ii) which annually exercises discretionary authority to lend securities on behalf of clients equal to at least $1 billion; or (II) an investment adviser registered under the Investment Advisers Act of 1940, (i) which has, as of the last day of its most recent fiscal year, equity capital in excess of $1 million and (ii) which annually exercises discretionary authority to lend securities on behalf of clients equal to at least $1 billion (each, a "Lending Subagent"); and

(b) The receipt of compensation by the Lending Agent and the Lending Subagent in connection with these transactions.

Section II—Conditions

Section I of this exemption applies only if the conditions of Section II are satisfied. For purposes of this exemption, any requirement that the approving fiduciary be independent of MS&Co., UB, and their affiliates shall not apply in the case of an employee benefit plan sponsored and maintained by the Lending Agent and/or an affiliate for its own employees (an Affiliated Plan) invested in a Commingled Fund, provided that at all times the holdings of all Affiliated Plans in the aggregate comprise less than 10% of the assets of the Commingled Fund.

(a) For each Client Plan, neither MS&Co., UB, nor any of their affiliates has or exercises discretionary authority or control with respect to the investment of the assets of Client Plans involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets, including decisions concerning a Client Plan's acquisition or disposition of securities available for loan.

(b) Any arrangement for the Lending Agent to lend securities is approved in advance by a Plan fiduciary who is independent of MS&Co., UB, and their affiliates (the Independent Fiduciary).

Notwithstanding the foregoing, section II(b) shall be deemed satisfied with respect to loans of securities by Client Plans to MS&Co. or a U.S. affiliate (Morgan Stanley Affiliated Borrower) by UB as Lending Agent or Lending Subagent that were outstanding as of October 1, 2008 (the Existing Loans), provided (i) no later than April 1, 2009, UB provided to Client Plans with Existing Loans a description of the general terms of the securities loan agreements between such Client Plans and the Morgan Stanley Affiliated Borrowers, and (ii) at the time of providing such information, UB notified each such Client Plan that if the Client Plan did not approve the continued lending of securities to Morgan Stanley by May 11, 2009, UB would terminate the loans and cease to make any new securities loans on behalf of that Client Plan to Morgan Stanley.

(c) The specific terms of the securities loan agreement (the Loan Agreement) are negotiated by the Lending Agent which acts as a liaison between the Lender and the Affiliated Borrower to facilitate the securities lending transaction. In the case of a Separate Account, the Independent Fiduciary of a Client Plan approves the general terms of the Loan Agreement between the Client Plan and the Affiliated Borrower as well as any material change in such Loan Agreement. In the case of a Commingled Fund, approval is pursuant to the procedure described in paragraph (i), below.

(d) The terms of each loan of securities by a Lender to an Affiliated Borrower are at least as favorable to such Separate Account or Commingled Fund as those of a comparable arm's-length transaction between unrelated parties.

(e) A Client Plan, in the case of a Separate Account, may terminate the lending agency or sub-agency arrangement at any time, without penalty, on five business days notice. A Client Plan in the case of a Commingled Fund may terminate its participation in the lending arrangement by terminating its investment in the Commingled Fund no later than 35 days after the notice of termination of participation is received, without penalty to the Plan, in accordance with the terms of the Commingled Fund. Upon termination, the Affiliated Borrowers will transfer securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Separate Account or, if the Plan's withdrawal necessitates a return of securities, to the Commingled Fund within:

(1) The customary delivery period for such securities;

(2) Five business days; or

(3) The time negotiated for such delivery by the Client Plan, in a Separate Account, or by the Lending Agent, as lending agent to a Commingled Fund, and the Affiliated Borrowers, whichever is least.

(f) The Separate Account, Commingled Fund or another custodian designated to act on behalf of the Client Plan, receives from each Affiliated Borrower (either by physical delivery, book entry in a securities depository located in the United States, wire transfer or similar means) by the close of business on or before the day the loaned securities are delivered to the Affiliated Borrower, collateral consisting of U.S. currency, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank, other than Morgan Stanley or Union Bank (or any subsequent parent corporation of the Lending Agent) or an

[2] The common and collective trust funds maintained by MS&Co., UB or an affiliate, and in which Client Plans invest, are referred to herein as "Commingled Funds." The Client Plan separate accounts for which MS&Co., UB or an affiliate act as directed trustee or custodian are referred to herein as "Separate Accounts." Commingled Funds and Separate Accounts are collectively referred to herein as "Lender" or "Lenders."

[3] MS&Co., UB or an affiliate may be retained by primary securities lending agents to provide securities lending services in a sub-agent capacity with respect to portfolio securities of clients of such primary securities lending agents. As a securities lending sub-agent, MS&Co.'s or UB's role parallels that under the lending transactions for which MS&Co., UB or an affiliate acts as a primary securities lending agent on behalf of its clients. References to MS&Co.'s or UB's performance of services as securities lending agent should be deemed to include its parallel performance as a securities lending sub-agent and references to the Client Plans should be deemed to include those plans for which the Lending Agent is acting as a sub-agent with respect to securities lending, unless otherwise specifically indicated or by the context of the reference.

affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption (PTE) 2006–16 (71 FR 63786, October 31, 2006) (as it may be amended or superseded) (collectively, the Collateral).[4] The Collateral will be held on behalf of a Client Plan in a depository account separate from the Affiliated Borrower.

(g) The market value (or in the case of a letter of credit, a stated amount) of the Collateral on the close of business on the day preceding the day of the loan is initially equal at least to the percentage required by PTE 2006–16 (as amended or superseded) but in no case less than 102 percent of the market value of the loaned securities. The applicable Loan Agreement gives the Separate Account or the Commingled Fund in which the Client Plan has invested a continuing security interest in, and a lien on or title to, the Collateral. The level of the Collateral is monitored daily by the Lending Agent. If the market value of the Collateral, on the close of trading on a business day, is less than 100 percent of the market value of the loaned securities at the close of business on that day, the Affiliated Borrower is required to deliver, by the close of business on the next day, sufficient additional Collateral such that the market value of the Collateral will again equal 102 percent or the percentage otherwise required by PTE 2006–16 (as amended or superseded).

(h)(1) For a Lender that is a Separate Account, prior to entering into a Loan Agreement, the applicable Affiliated Borrower furnishes its most recently available audited and unaudited financial statements to the Lending Agent which will, in turn, provide such statements to the Client Plan before the Client Plan approves the terms of the Loan Agreement. The Loan Agreement contains a requirement that the applicable Affiliated Borrower must give prompt notice at the time of a loan of any material adverse changes in its financial condition since the date of the most recently furnished financial statements. If any such changes have taken place, the Lending Agent will not make any further loans to the Affiliated Borrower unless an Independent Fiduciary of the Client Plan in a Separate Account is provided notice of any material change and approves the continuation of the lending arrangement in view of the changed financial condition.

Notwithstanding the foregoing, section II(h)(1) shall be deemed satisfied with respect to the Existing Loans provided (i) UB provided to such Client Plans no later than April 1, 2009, the most recently available audited and unaudited financial statements of the Morgan Stanley Affiliated Borrower and notice of any material adverse change in financial condition since the date of the most recent financial statement being furnished to the Client Plans, and (ii) at the time of providing such information, UB notified each Client Plan that if the Client Plan did not approve the continued lending of securities to Morgan Stanley by May 11, 2009, UB would terminate the loans and cease to make any new securities loans on behalf of that Client Plan to Morgan Stanley.

(h)(2) For a Lender that is a Commingled Fund, the Lending Agent will furnish upon reasonable request to an Independent Fiduciary of each Client Plan invested in the Commingled Fund the most recently available audited and unaudited financial statements of the applicable Affiliated Borrower prior to authorization of lending, and annually thereafter.

(i) In the case of Commingled Funds, the information described in paragraph (c) (including any information with respect to any material change in the arrangement) shall be furnished by the Lending Agent as lending fiduciary to the Independent Fiduciary of each Client Plan whose assets are invested in the Commingled Fund, not less than 30 days prior to implementation of the arrangement or material change to the lending arrangement as previously described to the Client Plan, and thereafter, upon the reasonable request of the Client Plan's Independent Fiduciary. In the event of a material adverse change in the financial condition of an Affiliated Borrower, the Lending Agent will make a decision, using the same standards of credit analysis the Lending Agent would use in evaluating unrelated borrowers, whether to terminate existing loans and whether to continue making additional loans to the Affiliated Borrower.

In the event any such Independent Fiduciary submits a notice in writing within the 30-day period provided in the preceding paragraph to the Lending Agent, as lending fiduciary, objecting to the implementation of, material change in, or continuation of the arrangement, the Plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the Commingled Fund, without penalty to the Plan, no later than 35 days after the notice of withdrawal is received. In the case of a Plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a Plan electing to withdraw. In the case of a Plan whose assets are proposed to be invested in the Commingled Fund subsequent to the implementation of the arrangement, the Plan's investment in the Commingled Fund shall be authorized in the manner described in paragraph (c).

(j) In return for lending securities, the Lender either—(1) Receives a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan; or

(2) Has the opportunity to derive compensation through the investment of cash Collateral. (Under such circumstances, the Lender may pay a loan rebate or similar fee to the Affiliated Borrowers, if such fee is not greater than the fee the Lender would pay in a comparable arm's-length transaction with an unrelated party.)

(k) Except as otherwise expressly provided herein, all procedures regarding the securities lending activities will, at a minimum, conform to the applicable provisions of PTE 2006–16, as amended or superseded, as well as to applicable securities laws of the United States, the United Kingdom, Canada, Australia, Switzerland, Japan, France, Sweden and Germany.

(l) If any event of default occurs, to the extent that (i) liquidation of the pledged Collateral or (ii) additional cash received from the Affiliated Borrower does not provide sufficient funds on a timely basis, the Client Plan will have the right to purchase securities identical to the borrowed securities (or their equivalent as discussed in paragraph (e) above) and apply the Collateral to the payment of the purchase price. If the Collateral is insufficient to accomplish such purchase, the Affiliated Borrower will indemnify the Client Plan invested in a Separate Account or Commingled Fund in the United States with respect to the difference between the replacement cost of the borrowed securities and the market value of the Collateral on the date the loan is declared in default, together with expenses incurred by the Client Plan plus applicable interest at a reasonable

[4] PTE 2006–16 permits the use of certain types of foreign collateral if the lending fiduciary is a U.S. Bank or U.S. Broker-Dealer (as defined in the exemption) and such fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs which a plan may incur or suffer directly arising out of a borrower default. See PTE 2006–16, Section V(f)(5). The Department notes that the requirements of Section V(f)(5) of PTE 2006–16 must be satisfied in order for those types of collateral to be used in connection with this exemption.

rate, including reasonable attorney's fees incurred by the Client Plan for legal action arising out of default on the loans, or failure by the Affiliated Borrower to properly indemnify the Client Plan. The Affiliated Borrower's indemnification will enable the Client Plan to collect on any indemnification from a U.S.-domiciled affiliate of the Affiliated Borrower.

(m) The Lender receives the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including but not limited to all interest and dividends on the loaned securities, shares of stock as a result of stock splits and rights to purchase additional securities, or other distributions.

(n) Prior to any Client Plan's approval of the lending of its securities to any Affiliated Borrower, a copy of this final exemption and the notice of proposed exemption is provided to the Client Plan.

Notwithstanding the foregoing, effective October 1, 2008, through June 11, 2010, section II(n) shall be deemed satisfied with respect to the Existing Loans, provided (i) UB provides to such Client Plans that have consented to securities lending prior to June 11, 2010, a copy of the requested exemption and (ii) UB advises each such Client Plan that unless the Client Plan notifies UB to the contrary within 30 days, its consent to make loans to Morgan Stanley will be presumed.

(o) The Independent Fiduciary of each Client Plan that is invested in a Separate Account is provided with (including by electronic means) quarterly reports with respect to the securities lending transactions, including, but not limited to, the information described in Representation 40 of the Summary of Facts and Representations of the Notice of Proposed Exemption (75 FR 3078, January 19, 2010) ("Notice"), so that the Independent Fiduciary may monitor such transactions with the Affiliated Borrower. The Independent Fiduciary invested in a Commingled Fund is provided with (including by electronic means) quarterly reports with respect to the securities lending transactions, including, but not limited to, the information described in Representation 40 of the Summary of Facts and Representations of the Notice, so that the Independent Fiduciary may monitor such transactions with the Affiliated Borrower. The Lending Agent may, in lieu of providing the quarterly reports described in this paragraph (o) to each Independent Fiduciary of a Client Plan invested in a Commingled Fund, provide such Independent Fiduciary with the certification of an auditor selected by the Lending Agent who is independent of MS&Co, UB and their affiliates (but who may or may not be independent of the Client Plan) that the loans appear no less favorable to the Lender than the pricing established in the schedule described in paragraph 29 of the Summary of Facts and Representations of the Notice. Where the Independent Fiduciary of a Client Plan invested in a Commingled Fund is provided the certification of an auditor, such Independent Fiduciary shall be entitled to receive the quarterly reports upon request.

Notwithstanding the foregoing, section II(o) shall be deemed satisfied with respect to the Existing Loans provided UB provides to such Client Plans no later than July 31, 2009, the material described in section II(o) with respect to the period from October 1, 2008, through June 30, 2009.

(p) Only Client Plans with total assets having an aggregate market value of at least $50 million are permitted to lend securities to the Affiliated Borrowers; provided, however, that—

(1) In the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3–101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangement with the Lending Agent, the foregoing $50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of $50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million.

(2) In the case of two or more Client Plans which are not maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Lending Agent, the foregoing $50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of $50 million (excluding the assets of any Client Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(A) Has full investment responsibility with respect to plan assets invested therein; and

(B) Has total assets under its management and control, exclusive of the $50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of $100 million.

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

(q) With respect to any calendar quarter, at least 50 percent or more of the outstanding dollar value of securities loans negotiated on behalf of Lenders will be to borrowers unrelated to MS&Co., UB and their affiliates.

(r) In addition to the above, all loans involving foreign Affiliated Borrowers have the following requirements:

(1) The foreign Affiliated Borrower is a bank, supervised either by a state or the United States, a broker-dealer registered under the Securities Exchange Act of 1934 or a bank or broker-dealer that is supervised by (i) the SFA in the United Kingdom; (ii) the BAFin in Germany; (iii) the MOF and/or the Tokyo Stock Exchange in Japan; (iv) the Ontario Securities Commission, the Investment Dealers Association and/or the Office of Superintendent of Financial Institutions in Canada; (v) the Swiss Federal Banking Commission in Switzerland; and (vi) the Reserve Bank of Australia or the Australian Securities and Investments Commission and/or Australian Stock Exchange Limited in Australia; (vii) the CB, the CECEI, and the AMF in France; and (viii) the SFSA in Sweden;

(2) The foreign Affiliated Borrower is in compliance with all applicable provisions of Rule 15a–6 under the Securities Exchange Act of 1934 (17 CFR 240.15a–6) (Rule 15a–6) which provides foreign broker-dealers a limited exemption from United States registration requirements;

(3) All Collateral is maintained in United States dollars or U.S. dollar-denominated securities or letters of credit (unless an applicable exemption provides otherwise);

(4) All Collateral is held in the United States and the situs of the securities

lending agreements is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)–1 related to the lending of securities; and

(5) Prior to a transaction involving a foreign Affiliated Borrower, the foreign Affiliated Borrower—

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

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

(C) Consents to service of process on the Process Agent; and

(D) Agrees that enforcement by a Client Plan of the indemnity provided by the Affiliated Borrower will, at the option of the Client Plan, occur exclusively in the United States courts.

(s) The Lending Agent maintains, or causes to be maintained, within the United States for a period of six years from the date of such transaction, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described in paragraph (t)(1) to determine whether the conditions of the exemption have been met, except that—(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Lending Agent and/or its affiliates, the records are lost or destroyed prior to the end of the six-year period; and (2) No party in interest other than the Lending Agent or 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 below by paragraph (t)(1).

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

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

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

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

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

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

(t)(3) Should the Lending Agent refuse to disclose information on the basis that such information is exempt from disclosure, the Lender 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.

The Department received two comments with respect to the Notice of Proposed Exemption (75 FR 3078, January 19, 2010) ("Notice"), one from Union Bank and one from Morgan Stanley. A discussion of the comments and the Department's views follows.

Union Bank commented on the first sentence of footnote 42 of the Notice, which states: "The common and collective trust funds for which MS&Co., UB or an affiliate act as directed trustee or custodian, and in which Client Plans invest, are referred to herein as 'Commingled Funds.' " According to Union Bank, "[c]onsistent with federal securities law exceptions and exemptions and banking regulations applicable to the Commingled Funds, Union Bank has and exercises 'exclusive management' of the Commingled Funds it maintains." Union Bank further stated that it understood the same was the case with respect to banking affiliates of MS&Co. and their Commingled Funds.[5] Therefore, Union Bank requested that the first sentence of footnote 42 be revised to read as follows: "The common and collective trust funds maintained by MS&Co., UB or an affiliate, and in which Client Plans invest, are referred to herein as 'Commingled Funds.' "

In order to accurately describe the relationship between these entities, the Department has revised the sentence as requested. In this regard, however, the Department notes that Section II(a) of the exemption provides that neither MS&Co., UB nor any of their affiliates may have or exercise discretionary authority or control with respect to the investment of the assets of Client Plans involved in transactions covered by the exemption, nor may these entities render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets, including decisions concerning a Client Plan's acquisition or disposition of securities available for loan.

Section II(a) applies equally to Commingled Funds, which are included in the definition in Section I of the term "Client Plans" or "Plans." The prohibition in Section II(a) remains a condition of the exemption regardless of the revised language in the footnote. The exemption does not provide relief for lending from Commingled Funds for which MS&Co., UB, or any affiliate, has or exercises discretionary authority or control with respect to the investment of the assets involved in the transaction, or for which MS&Co., UB, or any affiliate renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such assets, including decisions concerning a Client Plan's acquisition or disposition of securities available for loan. For purposes of clarity the Department states that the exemption does not provide relief for securities lending from index funds and model-driven funds.

Morgan Stanley, as noted above, provided the same comment as Union Bank with respect to footnote 42 of the Notice. Additionally, Morgan Stanley wished to clarify a statement in paragraph 27 of the Summary of Facts and Representations of the Notice. Paragraph 27 stated:

> In return for lending securities, the Lender either will receive a reasonable fee which is related to the value of the borrowed securities and the duration of the loan, or will have the opportunity to derive compensation through the investment of cash collateral or a combination of both. In the case of a Lender investing the cash collateral, the Lender may pay a loan rebate or similar fee to the Affiliated Borrowers, if such fee is not greater than the fee the Lender would pay in a comparable arm's-length transaction with an unrelated party.

Morgan Stanley wished to clarify that where collateral for a loan consists of both securities and cash, the Lender would receive a fee from the Affiliated Borrower in respect of the portion of the loan collateralized by securities and the Lender would have the opportunity to derive compensation from the investment of cash collateral (less the rebate paid to the Affiliated Borrower and any fees to the Lending Agent) in respect of the portion of the loan collateralized with cash.

Finally, Morgan Stanley informed the Department of a typographical error in footnote 48 of the Notice. The Department has reproduced the footnote in its entirety as it should have appeared in the Notice:

[5] In its comment, Morgan Stanley echoes Union Bank's comment on this point.

Separate maximum daily rebate rates will be established with respect to loans of securities within the designated classes identified above. Such rebate rates will be based upon an objective methodology which takes into account several factors, including potential demand for loaned securities, the applicable benchmark cost of fund indices, and anticipated investment return on overnight investments permitted by the Client Plan's independent fiduciary. The Lending Agent will submit the method for determining such maximum daily rebate rates to such fiduciary before initially lending any securities to an Affiliated Borrower on behalf of the Client Plan.

After giving full consideration to the entire record, including the written comments, the Department has determined to grant the exemption. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice, 75 FR 3078 (January 19, 2010).

FOR FURTHER INFORMATION CONTACT: Karen E. Lloyd of the Department, 202–693–8554. (This is not a toll free number.)

Exemption

The restrictions of sections 406(a), 406(b)(1) and 406(b)(2) [6] 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 (E) of the Code, shall not apply as of July 10, 2009, to the cash sale of certain medium term notes (the Notes) issued by Stanfield Victoria Finance Ltd. (Victoria Finance or the Issuer) for an aggregate purchase price of $26,997,049.52 by the BNY Mellon's Short Term Investment Fund (the Fund) to The Bank of New York Mellon Corporation (BNYMC), a party in interest with respect to employee benefit plans (the Plans) invested, directly or indirectly, in the Fund, provided that the following conditions are met:

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

(b) The Fund received an amount which was equal to the sum of (1) the total current amortized cost of the Notes as of the date of the sale plus (2) interest for the period beginning on January 1, 2008 to July 12, 2009, calculated at a rate equal to the earnings rate of the Fund during such period;

(c) The Fund did not bear any commissions, fees, transaction costs, or other expenses in connection with the sale;

(d) BNY Mellon, as trustee of the Fund, determined that the sale of the Notes was appropriate for and in the best interests of the Fund, and the Plans invested, directly or indirectly, in the Fund, at the time of the transaction;

(e) BNY Mellon took all appropriate actions necessary to safeguard the interests of the Fund, and the Plans invested, directly or indirectly, in the Fund, in connection with the transaction;

(f) If the exercise of any of BNYMC's rights, claims or causes of action in connection with its ownership of the Notes results in BNYMC recovering from Victoria Finance, the Issuer of the Notes, or from any third party, an aggregate amount that is more than the sum of: (1) The purchase price paid for the Notes by BNYMC and (2) interest on the purchase price paid for the Notes at the interest rate specified in the Notes, then BNYMC will refund such excess amount promptly to the Fund (after deducting all reasonable expenses incurred in connection with the recovery);

(g) BNY Mellon and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the person described below in paragraph (h)(1), to determine whether the conditions of this exemption have been met, except that:

(1) No party in interest with respect to a Plan which engages in the covered transaction, other than BNY Mellon and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by sections 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (h)(1); and

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

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

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

(B) Any fiduciary of any Plan that engages in the covered transaction, or any duly authorized employee or representative of such fiduciary;

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

(D) Any participant or beneficiary of a Plan that engages in the covered transaction, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described in paragraphs (h)(1)(B)–(D) shall be authorized to examine trade secrets of BNY Mellon or its affiliates, or commercial or financial information which is privileged or confidential; and

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

DATES: *Effective Date:* This exemption is effective as of July 10, 2009.

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 February 23, 2010 at 75 FR 8134.

FOR FURTHER INFORMATION CONTACT: Brian Shiker of the Department, telephone (202) 693–8552. (This is not a toll-free number.)

Exemption

I. The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act shall not apply to the purchase by the Fund from the NERCC, LLC (the Building Corporation), a party in interest with respect to the Fund, of a condominium unit (the Condo) in a building (the Building) owned by the New England Regional Council of Carpenters (the Union), also a party in interest with respect to the Fund, where the Union will own the only other condominium unit in the Building; provided that, at the time the transaction is entered into, the following conditions are satisfied:

(1) An independent, qualified fiduciary (the I/F), acting on behalf of the Fund, is responsible for analyzing the relevant terms of the transaction and deciding whether the Board of Trustees (the Trustees) should proceed with the transaction;

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

(2) The Fund may not purchase the Condo, unless and until the I/F approves such purchase;

(3) Acting as the independent fiduciary on behalf of the Fund, the I/F is responsible for: (a) Establishing the purchase price of the Condo, (b) reviewing the financing terms, (c) determining that such financing terms are the product of arm's length negotiations, and (d) ensuring that the Fund will not close on the Condo until the I/F has determined that proceeding with the transaction is feasible, in the interest of, and protective of the participants and beneficiaries of the Fund;

(4) The purchase price paid by the Fund for the Condo, as documented in writing and approved by the I/F, acting on behalf of the Fund, is the lesser of:

(a) The fair market value of the Condo, as of the date of the closing on the transaction, as determined by an independent, qualified appraiser selected by the I/F; or

(b) 58.3 percent (58.3%) of the amount actually expended by the Building Corporation in the construction of the Condo under the guaranteed maximum price contract (the GMP), plus the following amounts:

(i) 58.3 percent (58.3%) of the additional construction soft costs incurred outside the GMP contract (*i.e.,* the amount expended on furniture, fixtures, and equipment, and the amount expended for materials for minor work);

(ii) 54.4 percent (54.4%) of the amount expended on construction soft costs (*i.e.* architect, legal, zoning, permits, and other fees); and

(iii) 54.4 percent (54.4%) of the cost of the land underlying the Building;

(5) Acting as the independent fiduciary on behalf of the Fund, the I/F is responsible, prior to entering into the transaction, for: (a) Reviewing an appraisal of the fully completed Condo, which has been prepared by an independent, qualified appraiser, and updated, as of the date of the closing on the transaction, (b) evaluating the sufficiency of the methodology of such appraisal, and (c) determining the reasonableness of the conclusions reached in such appraisal;

(6) The terms of the transaction are no less favorable to the Fund than terms negotiated under similar circumstances at arm's length with unrelated third parties;

(7) The Fund does not purchase the Condo or take possession of the Condo until such Condo is completed;

(8) The Fund has not been, is not, and will not be a party to the construction financing loan or the permanent financing loan obtained by the Building Corporation and/or by the Union;

(9) The Fund does not pay any commissions, sales fees, or other similar payments to any party as a result of the transaction, and the costs incurred in connection with the purchase of the Condo by the Fund at closing do not include, directly or indirectly, any developer's profit, any premium received by the developer, nor any interest charges incurred on the construction financing loan or the permanent financing loan obtained by the Building Corporation and/or by the Union;

(10) Under the terms of the current collective bargaining agreement(s) and any future collective bargaining agreement(s), the Union must have the ability, unilaterally, to increase the contribution rate to the Fund at any time by diverting money to the Fund from wages and contributions within the total wage and benefit package, and under the terms of the financing that the Fund obtains to purchase the Condo, the Union must be obligated to increase the contribution rate to the Fund at any time in order to prevent a default by the Fund;

(11) In the event the Building Corporation and/or the Union defaults on the construction financing loan or the permanent financing loan obtained by the Building Corporation and/or the Union, the creditors under the terms of such construction financing loan or such permanent financing loan shall have no recourse against the Condo or any of the assets of the Fund;

(12) Acting as the independent fiduciary with respect to the Fund, the I/F is responsible for reviewing and approving the allocation between funding the purchase of the Condo from the Fund's existing assets or financing; and

(13) Acting as the independent fiduciary with respect to the Fund, the I/F is responsible for determining whether the transaction satisfies the criteria, as set forth in section 404 and section 408(a) of the Act.

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 45 days of the date of the publication of the Notice in the **Federal Register** on December 22, 2009. All comments and requests for hearing were due by February 5, 2010.

During the comment period, the Department received no requests for hearing. However, the Department did receive a comment via an e-mail, dated January 28, 2010, from the applicant. In the e-mail, the applicant requested certain changes in the facts and circumstances reflected in the Summary of Facts and Representations (SFR), as published in the Notice in the **Federal Register**, and also requested a modification to the language of one of the conditions of the exemption, as set forth in the Notice. The applicant's comments are discussed in paragraphs 1–8, below, in an order that corresponds to the appearance of the relevant language in the Notice.

1. The applicant has requested a modification to the language of condition 10 of the exemption, as set forth on page 68120, column 3, line 3 of the Notice. Condition 10 in the Notice reads, as follows:

> (10) Under the terms of the current collective bargaining agreement(s) and any future collective bargaining agreement(s), the Union has the ability, unilaterally, to increase the contribution rate to the Fund at any time by diverting money from wages and contributions to other benefit funds within the total wage and benefit package, and the Union is obligated to do so in order to prevent a default by the Fund under the terms of the financing (emphasis added) obtained by the Fund to purchase the Condo.

The applicant requests that the phrase, "under the terms of the financing," in bold in the quotation, above, be deleted from Condition 10 in the final exemption. In support of this request, the applicant argues that, as the terms of the financing for the Fund to purchase the Condo have not yet been negotiated and cannot be finalized until after the publication of the exemption, that it is not accurate to say that the Union is presently obligated by the financing terms to divert money from wages and contributions to other benefit funds within the total wage and benefit package in order to increase the contribution rate to the Fund and prevent default. Rather than say that the Union is obligated by the terms of the financing, the applicant suggests that the language of Condition 10 state that the Union is committed to divert money from wages and contributions to other benefit funds within the total wage and benefit package in order to increase the contribution rate to the Fund.

Further, the applicant argues that, as set forth in representation 19, in the SFR on page 68124, column 2, lines 20–22 in the Notice, the Union has represented its willingness to make such a commitment and, as set forth on page 68124, column 2, lines 9–20 in the Notice, it is represented that the Union anticipates having to make such a commitment as a pre-condition of the

Fund's obtaining tax exempt bond financing. In addition, the applicant points out that, as set forth in representation 33 in the SFR on page 68127, column 3, lines 38–45 in the Notice, Independent Fiduciary Services (IFS), as part of its review and possible approval of the proposed transaction, "will require that the Union pledge to increase contributions to the Fund by diversion from other aspects of the wage and benefit package to cover the Fund's cash flow needs." Accordingly, the applicant believes that the deletion of the phrase, "under the terms of the financing," from Condition 10 of the exemption does not lessen the Union's commitment.

While the Department acknowledges that the terms of the financing for the Fund to purchase the Condo have not yet been negotiated and cannot be finalized until after the publication of the final exemption in the **Federal Register**, the Department believes that the financing terms that the Fund obtains to purchase the Condo should obligate the Union to increase the contribution rate to the Fund at any time by diverting money from the wage and benefit package in order to prevent default by the Fund. Accordingly, the language of Condition 10 has been amended, as follows:

(10) Under the terms of the current collective bargaining agreement(s) and any future collective bargaining agreement(s), the Union must have the ability, unilaterally, to increase the contribution rate to the Fund at any time by diverting money to the Fund from wages and contributions within the total wage and benefit package, and under the terms of the financing that the Fund obtains to purchase the Condo, the Union must be obligated to increase the contribution rate to the Fund at any time in order to prevent a default by the Fund.

2. The applicant has requested a change to the language in representation 4, as set forth in the SFR on page 68121, column 1, line 6 and line 16 in the Notice. In this regard, in March 2009, Richard Scaramozza replaced Neal O'Brien, as one of the labor representatives serving as Trustees of the Fund, and in July 2009, Tom Gunning, III, replaced Steven Affanato, as one of the representatives of management serving as Trustees of the Fund. Further, on March 19, 2010, John Estano, one of the labor representative serving as Trustee of the Fund, retired and was replaced by Thomas Flynn.

The Department concurs with the applicant's requested change.

3. The applicant has requested a change to the language in representation 10, as set forth in the SFR on page 68122, column 1, line 18 in the Notice. In this regard, the applicant has informed the Department that the amount of the Union's construction loan is $8.48 million dollars and not the $10 million dollars estimated at the time the application was filed with the Department.

The Department concurs with the applicant's requested change.

4. The applicant has requested that one sentence in representation 10, as set forth in the SFR on page 68122, column 1, lines 47–50 in the Notice, should be stated differently. In this regard, the applicant suggests replacing this sentence, "These loans will bear a very low annual interest charge, estimated at one percent (1%) or below, to cover annual accounting expenses," with the following sentence, "The New Market Tax Credit (NMTC) benefits are provided through a low interest loan with an effective rate of two percent (2%) to cover the annual fee to Bank of America, the entity providing the NMTC benefits to the Union." The applicant represents that this replacement sentence describes the Union's actual NMTC transaction, as opposed to the estimated version reflected in the application as filed with the Department.

The Department concurs with the applicant's requested replacement.

5. The applicant has requested a change to one of the sentences in representation 12, as set forth in the SFR on page 68122, column 2, lines 22–29 in the Notice. In this regard, the applicant suggests adding the phrase, "and journeyman upgrade," after the word, "apprentice," such that the sentence reads, as follows:

The first floor of the Building intended for the Fund will have approximately 21,406 square feet of training space with fifteen (15) foot ceilings which are necessary for erecting and working off scaffolding, a major component of apprentice *and journeyman upgrade training* (emphasis added).

The Department concurs with the applicant's requested change.

6. The applicant has requested a change to the last sentence in representation 14, as set forth in the SFR on page 68122, column 3, line 46 in the Notice. In this regard, the last sentence in representation 14, as set forth in the Notice reads as follows: "It is represented that the intended retail lessees, include *an eye care center* (emphasis added), a banking area, and an ATM." The applicant requests that the phrase, "an eye care center," in bold, above, should be deleted from this sentence, because the eye care center office is not a separate retail tenant, as stated in the SFR. Further, in its comment letter, the applicant informed the Department that the eye care center is the employee benefit fund tenant, referred to in the SFR on page 68122, column 3, line 39 in the Notice, to which the Union may lease office space and to which the Union is a party in interest. As set forth in the SFR on page 68122, column 3, lines 40–42 in the Notice, if the Union leases offices space to such employee benefit fund, the Union intends to do so, pursuant to section 408(b)(2) of the Act.[7]

The Department concurs with the applicant's requested change.

7. The applicant has requested a change to footnote 24, as set forth in the SFR on page 68124, column 1, in the Notice. In this regard, footnote 24, as set forth in the Notice reads as follows:

It is represented that ownership interests in FTUB are as follows: New England Carpenters Pension Fund—36.5%, New England Carpenters Guaranteed Annuity Fund—18.2%, Empire State Carpenters Pension Fund—45%, and Bank Senior Management (through rabbi trust)—.3%.

In its comment, the applicant informed the Department that the ownership interests in First Trade Union Bank should read, as follows:

It is represented that ownership interests in FTUB are as follows: New England Carpenters Pension Fund—32.0%, New England Carpenters Guaranteed Annuity Fund—17.9%, Empire State Carpenters Pension Fund—49.9%, and Bank Senior Management (through rabbi trust)—.2%.

The Department concurs with the applicant's requested change.

8. The applicant has requested a change to representation 28(c), as set forth in the SFR on page 68125, column 3, lines 6–12 in the Notice. In this regard, subparagraph (c) in representation 28, as set forth in the Notice, reads as follows:

(c) a review of the Fund's independently prepared financial statements and projections of future cash flow in order to evaluate the Fund's ability to financially support the purchase of the Condo and the future operating costs associated with it.

The applicant represents that IFS will be reviewing the Fund's financial statements which are independently prepared, but that the projections of future cash flow are internally prepared by the Fund office and not by an outside accountant. Accordingly, the applicant

[7] The Department is offering no view, herein, as to whether the leasing of office space to any employee benefit fund to which the Union is a party in interest is covered by the statutory exemption provided in sections 408(b)(2) of the Act and the Department's regulations, pursuant to 29 CFR 2550.408b–2. Further, the Department is not providing, herein, any relief with respect to the leasing of office space to any such employee benefit fund by the Union.

suggests that the phrase, "the Fund office's internally prepared," be inserted before the word, "projections," such that sub-paragraph (c) in representation 28, should read as follows,

(c) a review of the Fund's independently prepared financial statements and the Fund office's internally prepared projections of future cash flow in order to evaluate the Fund's ability to financially support the purchase of the Condo and the future operating costs associated with it.

The Department concurs with the applicant's requested change.

9. In addition to the applicant's comments, discussed in paragraphs 1–8, above, the Department also received a comment via facsimile, dated February 4, 2010, from a commentator. In this comment, the commentator raised various issues regarding labor management relations under other statutory and regulatory programs beyond the scope of the Department's authority. It is the applicant's view that these issues are not relevant to the requested exemption. Accordingly, the applicant has chosen not to respond to those sections of the commentator's comment.

However, the applicant has responded to the following four (4) issues raised by the commentator which in the applicant's view are relevant to the requested exemption: (a) the sufficiency of the notification provided to interested persons of the publication of the Notice in the **Federal Register**; (b) the leasing of space in the Building by the Fund prior to the purchase of the Condo by the Fund; (c) the decline in work hours for carpenters in 2009; (d) the fact that the cost of the Building will likely exceed the fair market value of the Building upon completion. These issues raised by the commentator and the applicant's responses thereto are discussed in paragraphs 10–13, below.

10. The commentator maintains that the notification to interested persons of the publication of the Notice in the **Federal Register** was defective, because the mailing in booklet form could have been mistaken by interested persons as a progress report on the Building and/or a solicitation to register for classes. In this regard, it is the commentator's position that interested persons were denied the opportunity to comment and/or request a hearing on the proposed exemption.

In response, the applicant maintains that the booklet mailed to interested persons did not resemble the Union's quarterly magazine, recent course registration notices, or other notifications that promoted the Building or monitored its progress. It is the applicant's position that anyone who opened the booklet would have known that the booklet was not an ordinary mailing and that it contained a copy of the Notice. Further, the applicant sought and obtained approval from the Department for the inclusion of a one or two page insert of course offerings to be mailed to interested persons with the Notice. Accordingly, the applicant maintains that the notification to all interested persons was effectively served and was consistent with the Department's practices.

11. The commentator informed the Department that the Fund is already occupying space in the Building and is paying to the Building Corporation $60,000 to $80,000 a month in rent, on a square footage basis, pending the Department's approval of the sale of the Condo by the Building Corporation to the Fund. Further, the commentator states that the rent money paid by the Fund to occupy the Condo is not to be offset against the sale price of the Condo to be paid by the Fund. Accordingly, the commentator maintains that the Fund is expending money on renting space in the Building, when the existing training facility is suitable, and the Fund owns such facility outright.

In response, the applicant maintains that the leasing transaction between the Building Corporation and the Fund is covered by Prohibited Transaction Exemption 78–6 (PTE 78–6).[8] It is represented that in order to conduct classes in March 2010, the Building needed to be ready for occupancy in February 2010. By late fall 2009, the applicant represents that it was apparent that construction on the Building was likely to be completed by February 2010, but that the final exemption and the financing for the Fund to purchase the Condo were not likely to be in place before the beginning of the March 2010 semester.

Rather than remaining for another semester in the existing training facility which the applicant maintains is overcrowded and inadequate, the Trustees began considering the option of renting space in the Building on a short-term basis. To this end, the Union and the Fund each designated subcommittees to meet and negotiate the actual terms of the leasing arrangement. The Fund subcommittee consisted of two (2) members: (a) Richard Pedi, a Union Trustee, an employee of the Union, and a member of Local 218; and (b) George Allen, a principal of a subcontractor on the Building which is also a contributing employer to the Fund. The Union subcommittee consisted of four (4) members: (a) Jack Donahue, a member of the Union Executive Board in central Massachusetts; (b) Dave Palmisciano, a member of the Union Executive Board from Rhode Island; (c) Beth Conway, the Union's comptroller; and (d) Mark Erlich, the Executive Secretary/Treasurer and chief executive officer of the Union. It is represented that the Fund retained its management co-counsel, James Grosso (Mr. Grosso) of O'Reilly, Grosso & Gross to represent it in the leasing transaction. In this regard, it is represented that Mr. Grosso's responsibilities included: (a) Assistance in the negotiations to ensure that the terms of the lease were at least as favorable to the Fund as terms negotiated at arms length; (b) the review and approval of any written agreement that the Fund would sign; and (c) the responsibility of obtaining an appraisal

[8] Among other transactions, PTE 78–6 provides relief from section 406(a) of the Act for the leasing of real property (other than office space within the contemplation of section 408(b)(2) of the Act) by an apprenticeship plan from an employee organization any of whose members' work results in contributions being made to the apprenticeship plan, provided certain conditions are satisfied. Section 408(b)(2) of the Act provides relief from section 406(a) of the Act for a plan to contract or make reasonable arrangements with a party in interest for office space, provided certain conditions are satisfied.

The relief provided by PTE 78–6 and the relief provided by 408(b)(2) of the Act do not extend to transactions prohibited under section 406(b) of the Act. Section 406(b) of the Act prohibits a fiduciary from: (i) Dealing with the assets of a plan in his own interest or for his own account; (ii) acting, in his individual or any other capacity, in a transaction involving a plan on behalf of a party or representing a party whose interest are adverse to the interests of such plan or its participants or beneficiaries; or (iii) receiving any consideration for his own personal account from any party dealing with a plan in connection with a transaction involving the assets of such plan.

The Department has explained in regulations 29 CFR § 2550.408b–2(e) that the prohibitions of section 406(b) are imposed upon fiduciaries to deter them from exercising the authority, control, or responsibility that makes them fiduciaries when they have interests that may conflict with the interests of the plans for which they act. Thus, a fiduciary may not use the authority, control, or responsibility that makes him a fiduciary to cause a plan to pay an additional fee to such fiduciary, or to a person in which he has an interest that may affect the exercise of his best judgment as a fiduciary, to provide a service. However, regulation 29 CFR 2550.408b408b–2(e)(2) provides that a fiduciary does not engage in an act described in section 406(b)(1) of the Act if the fiduciary does not use any of the authority, control, or responsibility that makes him a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which the fiduciary has an interest that may affect the exercise of his judgment as a fiduciary. Accordingly, if any trustee had an interest in the leasing transaction that may have affected his best judgment as a fiduciary regarding the decision whether to engage in the transaction on behalf of the Fund, the trustee would have engaged in a violation of section 406(b)(1) and 406(b)(2) for which no relief was available under either PTE 78–6 or section 408(b)(2) of the Act.

of the fair market rental value of the Condo. On January 15, 2010, Mr. Grosso obtained an appraisal of the fair market rental value of the Condo from CBRE/CB Richard Ellis (CBRE), an independent, qualified appraiser. With regard to the Fund's proposed leasing, CBRE established the fair market rental value of 35,122 square feet of space in the Building at $30 per square foot, triple net.

It is represented that the terms of the lease were presented to the full Board of Trustees of the Fund (the Board). The Board consisted of the following management representatives: George Allen, Donald MacKinnon, Thomas Gunning, III, Christopher Pennie, William Fitzgerald, and Mark DeNapoli. The labor representatives on the Board are Joseph Power, Richard Pedi, John Estano, Steven Tewksbury, Charles MacFarlane, and Richard Scaramozza. All of the labor representatives on the Board are Union employees and members of various locals affiliated with the Union. In addition, Board members, Richard Pedi and George Allen, are also members of the Fund subcommittee that negotiated the terms of the lease.

With two (2) abstentions, the Board voted unanimously to accept the terms of the lease. The two (2) abstaining members of the Board were Joseph Power, a Union Trustee who is also a member of the Union Executive Board, and Mark DeNapoli, an Employer Trustee who is also the Executive Vice President of the construction manager of the Building retained by the Union.

Accordingly, on January 29, 2010, the Building Corporation and the Fund entered into an occupancy agreement for a month to month lease of 34,112 rentable square feet of space in the Building at a monthly rental rate of $73,150 (based on an annual rental of $25 per rentable square foot) for total rent of $877,800 per annum. Under the terms of the occupancy agreement, the Fund is responsible for a *pro rata* share of taxes, insurance, and operating expenses (including repairs) incurred by the Building Corporation with respect to the Building. The occupancy agreement can be terminated by either party giving not less than thirty (30) days prior written notice. Under the terms of the occupancy agreement, in the event that the Fund purchases the Condo, the lesser of: (a) $52,668, or (b) the product of (ii) 12 percent (12%), times (ii) the aggregate rental payments paid by the Fund though the purchase date will be credited to the Fund toward the purchase price of the Condo.

It is represented that the rent under the terms of the occupancy agreement is below market value, that the month to month term is favorable to the Fund, and that such month to month term is not commonly found in commercial leases. Furthermore, the applicant maintains that by moving into the Building prior to purchasing the Condo, the Fund was able to market the existing training facility for sale. In this regard, it is represented that a tentative agreement on the purchase of the existing training facility has been reached with an unrelated third party. It is expected that the sale of the existing training facility will net the Fund $1.4 million after commission and fees.

The Department, herein, is not providing any relief with respect to the leasing of space in the Building to the Fund by the Building Corporation. In this regard, the applicant has applied for a separate retroactive exemption (L–11624) with respect to the leasing of training space and office space in the Building to the Fund by the Building Corporation. By notice appearing elsewhere in this issue of the **Federal Register**, the Department is publishing a Notice of Proposed Exemption. If the proposed exemption is granted, the restrictions of sections 406(b)(1), and 406(b)(2) of the Act shall not apply, effective January 29, 2010 through June 30, 2010, to the leasing of training space and office space in the Building to the Fund by the Building Corporation. It is anticipated that the existing occupancy agreement between the Fund and the Building Corporation will be terminated, effective June 30, 2010. In reliance on the relief provided by Prohibited Transaction 78–6 (PTE 78–6)) and the statutory relief provided by 408(b)(2) of the Act, the terms of the leasing agreement between the Building Corporation and the Fund for training space and office space will be renegotiated, effective July 1, 2010.[9]

12. The commentator questions: (a) Why the Fund should take on an $11 million dollar mortgage for the purchase of the Condo when the existing training facility is suitable and owned outright; (b) why the Fund should move to the larger Condo when work hours for carpenters are down 40 percent and the curriculum and the staff of the Fund must be cut from the training program; and (c) why fiduciaries of the Fund pursued the option of building the Condo to suit the Fund, rather than modifying the existing facility at half the cost?

With regard to the amount of the Fund's mortgage, the applicant states that the Fund will seek financing in the amount of approximately $8 million, not $11 million dollars.

With regard to the amount of work hours for carpenters, the applicant does not dispute that there has been a decline in work hours for carpenters since the beginning of 2009 when the building project was started. In this regard, it is represented that carpenter work hours for calendar year 2009 declined 29 percent (29%) from 6.8 million to 4.8 million over calendar year 2008. The applicant points out that while 29 percent (29%) in carpenter work hours is a significant decline, it is far less than the 40 percent (40%) claimed by the commentator.

It is further represented by the applicant that IFS anticipated the possibility of a decline in carpenter work hours and performed a "stress test" based on different projected declines in such hours over the course of a number of years. In this regard, the applicant points out that IFS has represented that even under the scenario of a 16 percent (16%) decline in carpenter work hours in each year from 2013 through 2022, the Fund would still have adequate revenues to support the purchase and financing of the Condo.

The Department asked IFS to confirm that the work hours for carpenters for calendar year 2009 declined 29 percent (29%) from 6.8 million to 4.8 million over calendar year 2008, and to confirm that the 29 percent (29%) decline in work hours for carpenters within one year is within the parameters of the worst case "stress test" suggested by IFS that is based on an assumed 16 percent (16%) decline each year from 2013 until 2022. Further, the Department asked IFS to respond to the following question: Given that the work hours for carpenters for calendar year 2009 declined 29 percent (29%) in one year, is the worst case "stress test" with an assumed 16 percent (16%) in any one year still valid?

In response, IFS indicates that: (a) The Fund provided the statistics indicating that the hours worked by Union carpenters during the calendar year 2009 were 4.8 million, and that this represented a 29 percent (29%)

[9] The Department is offering no view, herein, as to whether PTE 78–6 covers the future leasing agreement between the Building Corporation and the Fund for training space. Further, the Department is not opining as to whether the conditions of PTE 78–6 in connection with such leasing of training space to the Fund by the Building Corporation are satisfied.

In addition, the Department is offering no view, herein, as to whether the future leasing agreement between the Building Corporation and the Fund for office space is covered by the statutory exemption provided in section 408(b)(2) of the Act and the Department's regulations, pursuant to 29 CFR 2550.408b–2. Further, the Department is not opining as to whether the conditions of 408(b)(2) in connection with such leasing of office space to the Fund by the Building Corporation are satisfied.

reduction from the 6.7 million hours worked in the prior calendar year; and (b) that IFS has no independent source for this data. IFS represents that the "worst case" scenario IFS developed was based on a decrease in hours from 6.7 million in 2008 to 1.1 million in 2022, which is a reduction of 84 percent (84%). IFS considers the 1.1 million level to be a sufficiently "worst case" economic scenario for this test. IFS represents that this scenario anticipated a significant decrease in hours for the 2009 period already, albeit somewhat less than the actual 1.9 million hours. A 29 percent (29%) decline in any one year is within the range of possibility for the aggregate worst case result modeled by IFS. In the model, IFS developed, maintaining the overall 5.6 million hour reduction after substituting the actual reduction in calendar year 2009 merely requires that the average declining rate over the final ten (10) years to average 14.5 percent (14.5%), rather than 16 percent (16%). IFS concludes that a 29 percent (29%) reduction in work hours in one year is within the reasonable limits of volatility for the overall 84 percent (84%) decline that IFS modeled between 2008 and 2022. Accordingly, IFS considers the worst case scenario to remain valid.

With regard to the feasibility of the subject transaction, the applicant points out that the structure of the exemption is more important than the actual number of carpenter work hours in any month. In this regard, the applicant states that IFS, acting as the independent fiduciary on behalf of the Fund, is responsible for reviewing the financing terms, the Fund's cash flow, and the amount of projected employer contributions to the Fund. Further, the applicant states that IFS will determine whether the transaction is feasible, in the interest of, and protective of the participants. If the transaction does not satisfy those requirements, the applicant states that IFS will not approve the transaction.

In conclusion, it is the applicant's view that the Fund's purchase of a new facility is in furtherance of its long-term commitment to its core mission of training apprentices and carpenters in the Boston area. The decision by the Trustees to purchase the Condo and the decision of how much to pay for the Condo are not based on the number of carpenter work hours in a peak period or during a recession, but on an analysis of the training needs of participants and the projected revenues and expenses of the Fund over the long term. Furthermore, the applicant points out that while the economic downturn has caused a decline in carpenter work hours and contributions to the Fund, it has also resulted in lower interest rate financing, and lower construction costs for the renovation of the Building. In addition, because of the decline in real estate value, the Fund is likely to experience a savings in the purchase price of the Condo, as the fair market value is expected to be less than the Fund's *pro rata* share of the construction costs for the renovation of the Building. The applicant maintains that IFS will analyze all of these factors before making its final decision on whether to proceed with the subject transaction.

13. The commentator states that the construction costs for the renovation of the Building were approximately $26 million dollars but that the fair market of such Building will be approximately $11 million upon completion.

In response, the applicant maintains that the comment concerning the decline in the value of the Building is erroneous and misleading. In this regard, it is represented that while the purchase price and construction costs of renovating the Building totaled over $26 million, the pro-rata allocation of those costs to the Union's condominium unit is in the $11 million range, so the Union did not suffer a $15 million loss, as implied by the commentator.

After full consideration and review of the entire record, including the written comments filed by the applicant and by the commentator, the Department has determined to grant the exemption, as amended, corrected, and clarified above. Comments and responses submitted to the Department by the applicant and comments submitted by the commentator have been included as part of the public record of the exemption application. Copies of these comments and the responses thereto are posted on the Department's Web site at *http://www.dol.gov/ebsa*. The complete application file (L–11558), including all supplemental submissions received by the Department, is 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 December 22, 2009, at 74 FR 68120.

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

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions 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 7th day of June 2010.

Ivan Strasfeld,

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

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

Application Nos. and Proposed Exemptions; D–11573, Citigroup Global Markets, Inc. and Its Affiliates (Together, CGMI or the Applicant); and L–11624, Boston Carpenters Apprenticeship and Training Fund (the Fund), et al.

AGENCY: Employee Benefits Security Administration, Labor

ACTION: Notice of proposed exemptions.