DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). If granted, these proposed exemptions allow designated parties to engage in transactions that would otherwise be prohibited provided the conditions stated there in are met. This notice includes the following proposed exemptions: L–12002, Retirement System of the American National Red Cross; D–11955, Morgan Stanley & Co. LLC, and Current and Future Affiliates and Subsidiaries.

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, by January 3, 2022.

ADDRESSES: All written comments and requests for a hearing should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, U.S. Department of Labor, Attention: Application No.____, stated in each Notice of Proposed Exemption via email to *e-OED@dol.gov* or online through *http://www.regulations.gov* by the end of the scheduled comment period. Any such comments or requests should be sent by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1515, 200 Constitution Avenue NW, Washington, DC 20210. See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

SUPPLEMENTARY INFORMATION:

Comments

In light of the current circumstances surrounding the COVID–19 pandemic caused by the novel coronavirus which may result in disruption to the receipt of comments by U.S. Mail or hand delivery/courier, persons are encouraged to submit all comments electronically and not to follow with paper copies. Comments should state the nature of the person's interest in the proposed exemption and the manner in which the person would be adversely affected by the exemption, if granted. A request for a hearing can be requested by any interested person who may be adversely affected by an exemption. A request for a hearing must state: (1) The name, address, telephone number, and email address of the person making the request; (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption; and (3) a statement of the issues to be addressed and a general description of the evidence to be presented at the hearing. The Department will grant a request for a hearing made in accordance with the requirements above where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing. A notice of such hearing shall be published by the Department in the **Federal Register**. The Department may decline to hold a hearing where: (1) The request for the hearing does not meet the requirements above; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

Warning: All comments received will be included in the public record without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the *http://www.regulations.gov* website is an ''anonymous access'' system, which means EBSA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EBSA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Notice to Interested Persons

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

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[1] Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. app. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

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

Retirement System of the American National Red Cross

Located in Washington, DC

[Exemption Application No. D–12002]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637,

[1] The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

66644, October 27, 2011).[2] As described in more detail below, the applicant for the exemption is the American National Red Cross (the Red Cross or the Applicant) who seeks to contribute nine condominiums to the Retirement System of the American National Red Cross (Plan).[3] The proposed contribution (the Contribution) and the proposed assignment of certain rights and obligations from the Red Cross to the Plan in connection with the Contribution, would violate certain prohibited transaction provisions of ERISA and the Code, and therefore would require an exemption from those provisions.

Summary of Facts and Representations[4]

1. The Red Cross is a Congressionally-chartered organization with its principal offices at 430 17th Street NW, Washington, DC 20006. The Red Cross control group consists of its National Headquarters and its individual chapters and Biomedical units.

2. The Red Cross sponsors and maintains the Plan, a tax-qualified defined benefit pension plan covering its eligible National Headquarters employees and the eligible employees of its chapters and Biomedical units that have elected to participate in the Plan. Benefit accruals under the Plan generally were frozen effective January 1, 2013, for Plan participants other than certain groups represented by labor unions. The Plan had approximately 22,588 participants and net assets valued at $2,412,180,496 on June 30, 2020.

3. The Plan administrator is the Benefit Plan Committee of The American National Red Cross (the BPC), which serves as the Plan's named fiduciary with respect to its operation and administration as well as the oversight of its investments.[5]

4. The Red Cross owns nine condominium units (the Red Cross Condos, as defined in Section II(e) below) in a building (the Building) located at 2025 E Street NW, Washington, DC (the Property). The Building, part of the Red Cross's former headquarters, has 808,478 square feet of gross building area and was constructed between 1999 and 2002. The Building's net rentable area consists of 540,000 square feet of Class A Office space, of which the Red Cross Condos comprise 390,670 square feet of net rentable area.[6] The overall building is designed as 10-stories (above grade) North and five-stories (above grade) South tower, connected by an atrium with four below grade levels. As described in further detail below, the Red Cross Condos are currently subject to a pre-existing ground lease (with the Red Cross as lessee), a space lease (with the Red Cross as lessor), a property management agreement, a purchase and sale agreement, and reciprocal rights agreement. These agreements which are described below, were reviewed by an independent fiduciary acting on behalf of the Plan and negotiated at arm's-length between the Red Cross and the U.S. General Services Administration (GSA). The Plan would be directly or indirectly subject to the agreements if the condominiums are contributed to the Plan.

5. *The Ground Lease.* The Building was constructed on United States (U.S.) government property. Congress authorized the Red Cross to redevelop and improve the original building and directed GSA, on behalf of the U.S., to enter into a ground lease (the Ground Lease) with the Red Cross as lessee, on July 29, 1999. The Ground Lease has a 99-year term that runs from July 29, 1999, through July 28, 2098, and covers 1.97 acres. The Ground Lease contains a right of first offer in favor of GSA. The Red Cross can sell the Red Cross Condos to a third party, provided the purchaser agrees to abide by the terms of the Ground Lease.

6. The Red Cross pays a ground rent of $1.00 over the term of the lease, and all taxes, insurance and operating costs associated with the Red Cross Condos. During the Ground Lease's 99-year term, the Red Cross owns the leasehold improvements, including the Red Cross Condos, which are part of the Building. After that, the improvements revert to the U.S. government.

7. *The Space Lease.* On July 1, 2009, Red Cross entered into a space lease (the Space Lease) with GSA on behalf of the U.S. Department of State (the State Department) for portions of the building through June 30, 2020. The State Department currently occupies and leases all of the nine Red Cross condominiums. The Space Lease gives GSA an option to renew the lease for two ten-year periods. On June 26, 2019, GSA exercised the first ten-year renewal option extending the Space Lease through June 30, 2030.[7]

8. *Property Management Agreement.* The Applicant represents that the 2025 E Street Office Leasehold Condominium Unit Owners Association, Inc. (the Condo Association), a District of Columbia nonprofit corporation, entered into a property management agreement with the Red Cross as managing agent with respect to the Building, effective on January 18, 2017. Pursuant to the Agreement, the Red Cross may receive a property management fee of approximately $1 million annually. However, if this exemption is granted and the proposed Contribution is made, the Applicant represents that any provision of services by the Red Cross in connection with the Plan's ownership of a condominium would comply with the requirements of ERISA Section 408(b)(2). Further, the Red Cross would not receive any consideration for such services other than the reimbursement of ''direct expenses,'' as described in 29 CFR 2550.408b–2(e)(3). In this regard, this proposed exemption provides relief solely for the contribution of the Red Cross Condos to the Plan and does not provide relief for the Red Cross to receive any compensation in connection with its management of the Red Cross Condos, or for any other reason, in excess of Red Cross's ''direct expenses.''

9. *Purchase and Sale Agreement.* The Applicant represents that the Red Cross and GSA entered into a purchase and sale agreement, dated December 20, 2016, (the Purchase and Sale Agreement) under which GSA may

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

[3] The Red Cross made its request pursuant to ERISA Section 408, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011). Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. app 1 (1996) transferred the authority of the Secretary of the Treasury to issue administrative exemptions under Code section 4975(c)(2) to the Secretary of Labor. Accordingly, this notice of proposed exemption is being issued solely by the Department.

[4] The Department notes that availability of this exemption, is subject to the express condition that the material facts and representations contained in application D–12002 are true and complete and accurately describe all material terms of the transactions covered by the exemption. If there is any material change in a transaction covered by the exemption, or in a material fact or representation described in the application, the exemption will cease to apply as of the date of such change.

[5] The BPC was established effective March 7, 2019, as the successor to two separate committees, the Benefit Plan Administrative Committee of the American National Red Cross (BPAC) and the Benefit Plan Investment Committee of the American National Red Cross (BPIC). Certain statements herein describe actions or authorities of the former BPIC and BPAC, because these were the named fiduciaries at the time.

[6] The Red Cross Condos are subject to a condominium regime and consist of the following units and 273 parking spaces: LL2, LL1, 400, 500, 600, 700, 800, 900, and 1,000.

[7] As per the terms of the Space Lease, the second ten-year period would extend the Space Lease until June 30, 2040, provided that such option to renew is exercised no later than 12 months before the close of the first 10-year renewal term (by June 30, 2029). For this second renewal term to be effective, GSA and Red Cross (or the Plan as assignee of the Red Cross) must execute a separate lease agreement.

purchase the nine Red Cross Condos for approximately $230 million. Pursuant to the Purchase and Sale Agreement, GSA purchased five of the 14 condominium units in January 2017 for a total purchase price of $85,607,500 (the GSA Condos).

10. *The Proposed Contribution.* Red Cross proposes to contribute the Red Cross Condos to the Plan (*i.e.,* the Contribution), and assign to the Plan its rights and obligations under (1) the condominium declaration together with condominium by-laws, Condominium plat and plans, and such other documents as describe the rights and obligations of Red Cross as a condominium unit owner, (2) the Ground Lease, (3) the Space Lease, (4) the Purchase and Sale Agreement between the Red Cross and GSA dated December 20, 2016, and (5) the reciprocal rights agreement between the Red Cross and GSA dated December 20, 2016 (the Reciprocal Rights Agreement, described below). The Applicant states that the Red Cross Condos otherwise would be contributed free of debt and encumbrance.

11. The proposed contribution constitutes a ''sale or exchange'' of property between the Plan and the Red Cross, which is prohibited by ERISA Section 406(a)(l)(A). Further, the assignment of the rights and obligations the Red Cross Condos are subject to constitutes a ''transfer to, or use by or for the benefit of'' the Red Cross, which is prohibited by ERISA section 406(a)(1)(D). Since the Red Cross is a fiduciary with respect to the Plan, and the proposed contribution could reduce future funding obligations of the Red Cross to the Plan, the proposed transaction is also prohibited by the fiduciary anti-conflict of interest and self-dealing provisions of ERISA Sections 406(b)(l) and 406(b)(2).[8]

12. *Applicant's Reasons for Entering the Transaction.* The Applicant states that it is entering into the transaction to increase the funded status of the Plan and provide a reliable stream of inflation-adjusted rental income for the Plan that is expected to exceed its long-term expected rate of return on a consistent basis. The Applicant represents that the proposed transaction would benefit Plan participants and beneficiaries by permitting the Plan to accept and hold valuable real estate assets (the Red Cross Condos), which have been and are currently fully occupied. The Applicant represents that the Red Cross Condos provide a stream of annual cash flow while GSA obtains the necessary appropriations to purchase the remaining Red Cross Condos, and can be readily liquidated.

13. *Applicant States that the Proposed Contribution Would Be in the Interest of the Plan.* The Applicant represents that the Red Cross Condos' rental income would provide the Plan with an immediate, substantial and predictable source of income for the payment of Plan benefits and expenses. Moreover, the Applicant states that the proposed contribution of the Red Cross Condos to the Plan would diversify the Plan's investments, because the Plan's assets currently do not include real property.[9]

14. The Applicant represents that the proposed Contribution would be a voluntary contribution in addition to the Red Cross's minimum required contribution (MRC) under Code sections 412 and 430. The Applicant represents that the Plan had a credit balance of approximately $431,490,000 on January 23, 2020 (the Existing Credit Balance). As described below, the Applicant represents the value of the Contribution would not be added to the Plan's Existing Credit Balance, and the Red Cross would permanently waive the additional credit balance generated by the Contribution of the Red Cross Condos. The Applicant represents that the Contribution would not effectively substitute for the Red Cross cash MRCs in future years, and, therefore, the Contribution could (1) substantially increase the Plan's funding level, (2) reduce the Plan's variable-rate Pension Benefit Guaranty Corporation (PBGC) premiums, and (3) significantly reduce the Plan's unfunded vested benefits.[10]

15. The Applicant maintains that the Red Cross Condos would provide the Plan with a steady source of rental income (approximately $15 million of annual net), because the Red Cross Condos currently are fully occupied through at least June 30, 2030, by a reliable tenant (the State Department through GSA). The Applicant states that a near-term market for the Red Cross Condos exists, because GSA has agreed to pay a price consistent with the Red Cross Condos' percentage interest of the Building's fair market value as independently appraised in connection with the arm's-length negotiations between Red Cross and GSA pursuant to the Purchase and Sale agreement.

16. *Downside Risk Protections.* The Red Cross proposes to provide the following additional downside risk protections to the Plan:

17. *First Plan Protection.* The Applicant represents that the Contribution of the Red Cross Condos would not be used to satisfy the Red Cross's MRC to the Plan. The Contribution would be an additional voluntary contribution that the Red Cross intends to: (i) Improve the Plan's funding status; (ii) diversify the Plan's investments while providing the Plan with a steady source of rental income; and (iii) decrease the Plan's PBGC premium expenses, which are payable from Plan assets. In this regard, although the Contribution of the Red Cross Condos would generate a credit balance that typically could be used as a dollar-for-dollar credit against the Red Cross' future MRCs, the Red Cross will permanently waive that credit balance, so that the Contribution would not be used by the Red Cross to reduce future cash MRCs that it otherwise would be required to make to the Plan.

18. *Second Plan Protection.* The Red Cross proposes to make a minimum $5 million cash contribution to the Plan in any year in which: (i) Any or all of the Red Cross Condos are retained as assets of the Plan; and (ii) the Red Cross uses the Existing Credit Balance to reduce its cash MRC.

According to the Applicant, the minimum $5 million cash contribution represents the Red Cross' commitment to enhance the Plan's funding status in years when the Red Cross reduces its cash MRC with a portion of the Existing Credit Balance.

19. *Third Plan Protection.* As an additional protection to the Plan from downside risk, the Red Cross will extend a Parallel Reversion Commitment (the Commitment) to the Plan, as defined in Section II(a) below, if GSA does not extend the Space Lease through June 30, 2040. The Applicant states that if such event occurs, the Red Cross will purchase back from the Plan any remaining Red Cross Condos the Plan still owns on June 30, 2030, for a price equal to the value of the condos for pension funding purposes at the time the Red Cross contributed them to the Plan upon the demand of the Qualified Independent Fiduciary (as defined in Section II(c) below). The Applicant states that the Commitment will provide the Plan with sufficient

[8] See Interpretive Bulletin 94–3, 29 CFR 2509.94–3(b) (the Interpretive Bulletin) (an in-kind contribution of unencumbered property ''constitute(s) a prohibited transaction even if the value of the contribution is in excess of the sponsor's or employer's funding obligation for the plan year in which the contribution is made . . . because the contribution would result in a credit against funding obligations which might arise in the future.'').

[9] The Plan's Investment Policy Statement has been revised to accommodate the Red Cross Condos as assets of the Plan. See Section 4.6.8 of the Plan's Investment Policy Statement.

[10] The impact of the Contribution on the Plan's variable-rate PBGC premium depends on whether the Contribution would bring the Plan under the PBGC variable rate premium cap.

resources to liquidate its investment in the Red Cross Condos if the Qualified Independent Fiduciary determines that it would be advantageous for the Plan to do so, because the Plan would not have to invest its resources to re-market the Red Cross Condos.

20. *Department's Note:* The Department acknowledges that the Commitment could provide meaningful downside protection to the Plan in appropriate circumstances. However, a sale of a Red Cross Condo from the Plan to the Red Cross under the Commitment would violate several ERISA prohibited transaction provisions. At the present time, the Department does not have sufficient information to affirmatively determine the appropriate circumstances under which a sale of the Red Cross Condos from the Plan to the Red Cross under the terms of the Commitment would be in the interest and protective of the Plan and its participants and beneficiaries, and administratively feasible as required by ERISA Section 408(a). However, the Qualified Independent Fiduciary would have the option to invoke the Commitment if he or she finds it to be in the Plan's interest, subject to receiving a prohibited transaction exemption from the Department.

21. The Applicant represents that GSA must exercise its right to extend the Space Lease for an additional ten-year term (through June 30, 2040) by June 30, 2029. Therefore the Qualified Independent Fiduciary would know whether GSA will extend the lease agreement a year before the Space Lease expires. The one-year period will provide the Qualified Independent Fiduciary with sufficient time before the expiration of the Space Lease to determine whether the Plan would benefit from exercising the Commitment. Accordingly, the Qualified Independent Fiduciary must determine by June 30, 2029, whether implementation of the Parallel Reversion Commitment would be advantageous to the Plan if GSA does not extend the Space Lease through June 30, 2040. This determination must be submitted to the Department within sixty days after the date it is made by the Qualified Independent Fiduciary. If the Qualified Independent Fiduciary determines that the exercise of the Commitment would be advantageous to the Plan, the Applicant must submit an associated individual prohibited transaction exemption application to the Department within six months after the date the Qualified Independent Fiduciary's determination is filed with the Department.

22. *Fourth Plan Protection.* The Red Cross previously entered into a Reciprocal Rights Agreement with GSA dated December 20, 2016, which was amended on September 30, 2020.[11] The agreement, as amended, grants the Red Cross a reversion right that would provide the Plan (as the Red Cross's assignee) with the right (but not the obligation) to buy back the Red Cross Condos purchased by GSA at the same price that GSA paid for them, if GSA fails to: (1) Purchase all of the Red Cross Condos on or before June 30, 2030; and (2) extend the Space Lease for an additional ten-year term (through June 30, 2040).[12]

23. *Fifth Plan Protection.* As a final protection from downside risk, the Applicant states that for each Plan year during which the Red Cross Condos remain assets of the Plan, the Red Cross will contribute sufficient amounts to the Plan to ensure that its adjusted funding target attainment percentage (AFTAP), within the meaning of Code Section 436, is at least equal to 80 percent. This will ensure that the Plan would not become subject to the limitation on benefits and benefit accruals imposed by Code Section 436 that are applied based on the Plan's AFTAP.

24. *Qualified Independent Fiduciary.* Pursuant to a written agreement among Fiduciary Counselors Inc. (FCI), the Red Cross, the BPC and the Plan, dated January 11, 2019 (hereinafter, the Qualified Independent Fiduciary Agreement), FCI was retained to serve as the Plan's Qualified Independent Fiduciary with respect to the Contribution. FCI is an investment adviser registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940. The firm primarily acts as an independent fiduciary for employee benefit plans and has served in this capacity since 2001.

25. FCI represents and warrants that it is independent of and unrelated to the Red Cross, and that: (i) It does not directly or indirectly control, is not controlled by, and is not under common control with the Red Cross; (ii) neither it, nor any of its officers, directors, or employees is an officer, director, partner or employee of the Red Cross (or is a relative of such persons); (iii) it does not directly or indirectly receive any compensation or other consideration for its own account in connection with the Qualified Independent Fiduciary report (the Qualified Independent Fiduciary Report), except that FCI may receive compensation from the Red Cross for performing the services described in the Qualified Independent Fiduciary Agreement as long as the amount of such payment is not contingent upon or in any way affected by FCI's ultimate decision; and (iv) the percentage of FCI's revenue that is derived from any party in interest or its affiliates involved in the Transaction is less than five percent (5%) of its previous year's annual revenue from all sources.[13] In addition, FCI represents that it understands its duties and responsibilities under ERISA in acting as an independent fiduciary on behalf of the Plan.

26. No party associated with this exemption application has or will indemnify the Qualified Independent Fiduciary, in whole or in part, for negligence or any violations of state or federal law that may be attributable to the Qualified Independent Fiduciary in performing its duties with respect to the proposed Contribution. In addition, no contract or instrument purports to waive any liability under state or federal law for any such violations.

27. Pursuant to the Qualified Independent Fiduciary Agreement, FCI is responsible for completing the following duties:

(i) Determining whether and on what terms the Plan should engage in the proposed transaction, including the transaction price (the value to be attributed to the Contribution for ERISA funding purposes) and whether the proposed transaction is in the interests of the Plan's participants and beneficiaries;

[11] Originally, GSA's purchase option under the Reciprocal Rights Agreement extended to June 30, 2030, only if it purchased five Red Cross Condos (increasing its ownership percentage to 75 percent) by June 30, 2020. That date passed, and GSA did not purchase additional Red Cross Condos. The Red Cross and GSA amended the Reciprocal Rights Agreement, dated September 30, 2020, to extend the deadline for GSA to exercise its option to purchase the remaining Red Cross Condos until June 30, 2030, consistent with the current extension of the Space Lease through that date. This proposed exemption requires the Qualified Independent Fiduciary to determine that the Reciprocal Rights Agreement, and the other Red Cross Condo Documents, as amended, are in the interest of, and protective of, the Plan.

[12] Specifically, the Reciprocal Rights Agreement provides that, if (1) or (2) occurs, the Red Cross will have the right (but not the obligation) to cause the reversion to Red Cross of title to all GSA units that were purchased by GSA from the Red Cross, and continue to be owned by GSA, by refunding to GSA all purchase funds paid by GSA to the Red Cross for all such units.

[13] FCI represents that revenue for this assignment has been recognized over multiple years, as follows. In 2019, FCI recognized revenue that was 2.11% of its total 2018 income. In 2020, FCI recognized revenue that was 0.69% of its total 2019 income. FCI has not recognized any revenue in 2021. If additional services are needed from FCI as a result of the exemption being granted, FCI will recognize revenue as appropriate. Such revenue in any year will not exceed 5% of FCI's total income for the previous year.

(ii) Performing all other work in connection with the Red Cross's submission of its exemption application to the Department, including: (a) Preparing a preliminary report for the Department; (b) responding to the Department's questions; (c) assisting in the preparation of material for, and attending, a pre-submission conference, if scheduled; (d) conducting a due diligence analysis; (e) engaging a qualified appraiser (*i.e.,* the Qualified Independent Appraiser, as defined in Section II(b), below) to value the Red Cross Condos, as well as the 50 parking spaces retained by the Red Cross and the impact on the fair value of the Ground Lease; (f) reviewing the Qualified Independent Appraiser's opinion of value for consistency with sound principles of valuation; (g) reviewing the terms of the Contribution to ensure that they are in the interest of the Plan and the Plan's participants; (h) reviewing the Property management services provided by the Red Cross to the Condo Association and the arrangement for the use of 50 parking spaces by the Red Cross; (i) ensuring that all terms and conditions of the proposed transaction are met and, if necessary, taking action to ensure compliance with each term and condition; (j) preparing and issuing a final report to the Department; (k) reviewing and commenting on the draft exemption application and responding to any relevant comments received by the Department if it determines to publish a notice of proposed exemption in the **Federal Register**.

28. The First Independent Appraiser. FCI hired an appraiser in connection with the Contribution (the First Appraiser). The First Appraiser's engagement was subject to provisions stating that the First Appraiser was not liable for an act of negligence by the First Appraiser for any amount in excess of the total professional fees paid to the appraiser under the agreement or an addendum thereto.

29. The First Appraiser's insistence on limiting responsibility for negligent work, and FCI's acceptance of such a limitation, raised concerns for the Department regarding whether adequate protections were in place to warrant proposing an exemption.

30. ERISA's prohibited transaction provisions are designed to protect plans and their participants and beneficiaries from the dangers posed by transactions involving significant conflicts of interest. In determining whether to grant a prohibited transaction exemption, the Department expects independent fiduciaries to exercise special care when hiring a qualified independent appraiser to value hard-to-value assets that are an essential component of the exemption transaction, and to insist that those appraisers perform their work in accordance with expert standards and without protection from loss or the imposition of financial burden resulting from work that fails to adhere to those standards. The role of the Qualified Independent Appraiser in this transaction is critical to the Department's determination of whether to grant a proposed exemption, and the appraiser's work product must be held to the highest standard of care, diligence and accuracy. Releases from and limitations on liability for work that fail to adhere to those standards are not protective of the Plan and its participants and beneficiaries and do not support the Department's grant of a proposed exemption in this matter. An independent fiduciary's decision to hire an expert with these liability limitations calls into question the prudence of the independent fiduciary's decision, reduces the reliability of the appraisal report, and negates the purpose of requiring an independent appraisal of the Red Cross Condos.

31. *The Qualified Independent Appraiser.* The Department conveyed its concerns to the Red Cross and FCI. Thereafter, FCI engaged Chaney & Associates (Chaney) to serve as the Qualified Independent Appraiser in connection with the proposed Contribution, pursuant to an engagement agreement (the Engagement Agreement) dated June 9, 2020, which does not include indemnification provisions. In this regard, no party related to this exemption request has or will indemnify the Qualified Independent Appraiser, in whole or in part, for negligence or any violations of state or federal law that may be attributable to the Qualified Independent Appraiser in performing its duties with respect to the proposed Contribution. In addition, no contract or instrument purports to waive any liability under state or federal law for any such violations. Mark A. Chaney of Chaney performed the subject appraisal. Mr. Chaney is licensed in the District of Columbia as an Appraiser Certified General and has experience with commercial real estate and business valuations. Chaney has appraised 14 office properties within the 12 months before the Engagement Agreement, four of which were condominium regimes.

32. Pursuant to the Engagement Agreement, Chaney was retained to perform two appraisals of the Red Cross Condos. The first appraisal report is discussed below, and the second appraisal report will be performed to ensure the Red Cross Condos are accurately valued as of the date of the Contribution.

33. Chaney represents that it adhered to professional appraisal standards and concluded that the Red Cross Condos should be valued for purposes of this transaction at approximately $528/SF for the above grade units, and about $286/SF for the below grade units. Chaney notes that the appraisal will be updated as of the date of the Contribution.[14]

34. With respect to the overall building sales comparables, Chaney states that the continued operation of the subject as a rental, predicated on the extraordinary assumption that GSA does not exercise any of its purchase options, results in an investment value of $200,138,360 by way of the sales comparison approach or $200,140,000 rounded, on June 30, 2020.

35. The values determined pursuant to the different methodologies employed are depicted below.

[14] The Department expects and assumes that Chaney has properly discharged its obligations as an appraiser, and that expectation and assumption is material to the Department's determination to propose the exemption.

Value	Investment Extraordinary assumption GSA does not exercise any of its purchase options	Market As Is Extraordinary assumption GSA exercises all its purchase options by 6/30/30
Income Capitalization Approach (yield)	$205,730,000	$220,710,000
Income Capitalization Approach (direct)	$209,686,200	N/A
Sales Comparison Approach	$200,140,000	N/A
CONCLUSIONS	$205,180,800	$220,710,000

36. All values are estimated as of June 30, 2020, and reflect the leasehold interest; subject to the sublease of the Red Cross Condos to the State Department/GSA. Chaney states that the estimated marketing period is about 12 months, which is predicated on a survey of sales of similar properties occurring during the past few years locally.

37. Based on Chaney's highest and best use analysis, the current investment value of the Red Cross Condos, predicated on the extraordinary assumption that GSA does not exercise any of its purchase options, equates to $205,180,000 as of June 30, 2020, as shown in the table above. The market value as is of the Red Cross Condos, predicated on the extraordinary assumptions GSA exercises all its purchase options by June 30, 2030, is $220,710,000, also as of June 30, 2020.

38. *The Qualified Independent Fiduciary Report.* The Qualified Independent Fiduciary submitted to the Department its report, dated December 23, 2020 (*i.e.,* the Qualified Independent Fiduciary Report) where it represented that it considered the following, among other things: (i) Whether the Contribution is a permitted Plan investment; (ii) the valuation of the Contribution; (iii) whether the proposed Contribution would negatively impact the diversification of the Plan's investments; (iv) whether the Plan would have sufficient liquidity to meet its benefit payments on a going-forward basis; (v) whether the Contribution would sufficiently improve the funded status of the Plan; and (vi) whether the Contribution may be readily liquidated. The Qualified Independent Fiduciary represents that as of October 31, 2020, the Plan was well diversified with total assets of $2.3 billion, and that while the Contribution will increase the Plan's illiquid assets, assuming the Contribution was contributed on October 31, 2020 with a value of $212,945,000, illiquid assets would go from 7.1% pre-Contribution level to a level of 14.9% post-Contribution, which would be within the 0–25% targeted range. The Qualified Independent Fiduciary expects that the allocation will return to pre-Contribution levels as GSA exercises its purchase option. Consequently, the Qualified Independent Fiduciary stated that the Contribution will not cause any significant disruptions to the Plan's asset allocation. Based on the valuation provided by Chaney, which the Qualified Independent Fiduciary has determined to be reliable and current, and based on the Qualified Independent Fiduciary's adherence to the requirements of ERISA Section 404, the Qualified Independent Fiduciary determined that the market value of the Red Cross as of June 30, 2020 was $212,945,000.[15] The Qualified Independent Fiduciary stated this value reflects the fact that State Department desires to have GSA exercise the purchase options on its behalf, but that because funding for the purchases is uncertain and dependent on Congressional appropriations, neither Chaney nor the Qualified Independent Fiduciary has sufficient information to determine which assumption is more likely to be realized.

39. The Qualified Independent Fiduciary represents that Willis Towers Watson, the Plan's actuary, computed the AFTAP for the plan year beginning July 1, 2020, to be 122.46%. The Qualified Independent Fiduciary concluded that adding the Contribution of $212,945,000 would significantly improve the Plan's funded status. Finally, the Qualified Independent Fiduciary stated that the Contribution could be readily liquidated based on the fact that GSA and the Red Cross have already negotiated and extended a purchase option for GSA to purchase the Red Cross Condos. The Qualified Independent Fiduciary represents that, in the unlikely event that GSA does not purchase any or all of the remaining Red Cross Condos, the Red Cross Condos may be readily liquidated, since they are located in a Class A office condo building in a desirable part of the District of Columbia. During the course of the Qualified Independent Fiduciary's review of the proposed transaction, it held discussions with Red Cross' senior management and staff, as well as the Plan's outside ERISA counsel. In addition, the Qualified

[15] The Department expects and assumes that the Qualified Independent Fiduciary has properly discharged its obligations as a fiduciary, and that expectation and assumption is material to the Department's determination to propose the exemption.

Independent Fiduciary conducted several due diligence conversations with the Qualified Independent Appraiser. Further, the Qualified Independent Fiduciary reviewed the Plan's Actuarial Valuation Reports, the appraisal report, the Plan's Investment Performance Report, the Ground Lease, the Space Lease, the Purchase and Sale Agreement and other relevant documents discussed herein, and applied its reasonable judgement when making determinations with respect to the proposed transaction in accordance with ERISA Section 404. In that regard, the Qualified Independent Fiduciary represents that it prudently selected the Qualified Independent Appraiser to value the Red Cross Condos for purposes of the proposed Contribution, ensured the Qualified Independent Appraiser's independence, made sure that the information given to the Qualified Independent Appraiser was complete, current, and accurate, and concluded that, in accordance with its fiduciary responsibilities under ERISA, it was reasonable to rely upon the appraisal under the circumstances following the review of the appraisal and conversations with the Qualified Independent Appraiser.

40. The Qualified Independent Fiduciary considered certain terms and conditions to which the Red Cross has agreed, including, among other things, that: the Red Cross will assume all costs and expenses associated with accepting and disposing of the Contribution; no portion of the Contribution will be counted as a contribution to the Plan for minimum funding purposes; and the Red Cross will make additional cash contributions to the Plan if necessary to maintain an 80% AFTAP until the Contribution is liquidated.

41. Based on the above analysis of the proposed transaction, the Qualified Independent Fiduciary stated its view that the Contribution is in the interests of the Plan and its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the Plan. The Qualified Independent Fiduciary concluded that the Plan should accept the Contribution at a value it determines with the assistance of the Qualified Independent Appraiser.

42. Based on the foregoing, the Department has tentatively determined that the proposed exemption is:

(a) Administratively feasible because, among other things, the Qualified Independent Fiduciary has reviewed and approved the terms of the proposed Contribution, and will monitor compliance with the terms of the Contribution and the conditions of this proposed exemption, if granted;

(b) In the interests of the Plan and its participants and beneficiaries because, among other things, the Contribution would significantly increase the Plan's funding level and provide a significant stream of income for the Plan; and

(c) Protective of the rights of the Plan and of its participants and beneficiaries because, among other things, the exemption contains several provisions designed to limit or eliminate any downside risk to the Plan's acquisition and holding of a Red Cross Condo. For example, the proposed Contribution would be completely voluntary and would not be added to the Plan's Existing Credit Balance. Therefore, the Red Cross effectively would be contributing to the Plan an asset most recently valued between $205,180,800 and $220,710,000 that would provide funding to the Plan it otherwise would not have. The voluntary contribution would provide significant additional retirement income security to the Plan's participants and beneficiaries by helping to ensure that benefits promised to them by the Red Cross will be paid.

Proposed Exemption

Section I—Covered Transactions

If the proposed exemption is granted, the restrictions of ERISA Sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), and 406(b)(2) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (D) and (E), shall not apply to the: In-kind contribution (the Contribution) by the American National Red Cross (the Red Cross or the Applicant) of certain condominium units (the Red Cross Condos) located at 2025 E Street NW, Washington, DC (the Building) to the Retirement System of The American National Red Cross (the Plan); and the transfer by the Red Cross to the Plan of Red Cross's rights and obligations under the Red Cross Condo Documents, as defined in Section II(d) below, provided that the definitions in Section II and the conditions in Section III have been met.

Section II—Definitions

(a) The term ''Parallel Reversion Commitment'' means the agreement entered into between Red Cross and the Plan on or before the date of the Contribution whereby if GSA does not extend the Space Lease through June 30, 2040, upon the demand of the Qualified Independent Fiduciary, the Red Cross will purchase back from the Plan any remaining condos the Plan still owns on June 30, 2030, for a price equal to the value of such Red Cross Condos for funding purposes at the time of their contribution to the Plan. The Parallel Reversion Commitment can only be implemented after the conditions in Section III(g)(4) of this exemption have been met and the Department grants separate exemptive relief.

(b) A ''Qualified Independent Appraiser'' means Chaney & Associates (Chaney) or any individual or entity subsequently retained by the Qualified Independent Fiduciary to value the Red Cross Condos for purposes of the exemption, who meets the qualifications in the Department's regulation at 29 CFR 2570.31(i). Notwithstanding the above, the term ''Qualified Independent Appraiser'' does not include any entity whose terms of engagement include a provision that indemnifies the entity, in whole or in part, for negligence or for any violations of state or federal law that may be attributable to the Qualified Independent Fiduciary in performing its duties with respect to the proposed Contribution. In addition, no contract or instrument purports to waive any liability under state or federal law for any such violations.

(c) A ''Qualified Independent Fiduciary'' means Fiduciary Counselors Inc. (FCI), or an individual or entity that is subsequently retained by the Red Cross to represent the Plan for purposes of this exemption, and who meets the qualifications set forth in the Department's regulation at 29 CFR 2570.31(j). The term ''Qualified Independent Fiduciary'' does not include any entity whose terms of engagement include a provision that indemnifies the entity, in whole or in part, for negligence or for any violations of state or federal law that may be attributable to the Independent Fiduciary in performing its duties with respect to the proposed Contribution. In addition, no contract or instrument purports to waive any liability under state or federal law for any such violations.

(d) The term ''Red Cross Condo Documents'' means the following documents: (1) Condominium declaration together with condominium by-laws, Condominium plat and plans, and such other documents as describe the rights and obligations of Red Cross as a condominium unit owner, (2) the ground lease between the United States and the Red Cross dated July 29, 1999, (3) the space lease (the Space Lease) between the Red Cross and the U.S. General Services Administration (GSA) dated July 1, 2009, (4) the purchase and sale Agreement between the Red Cross and GSA dated December 20, 2016, and (5) the reciprocal rights agreement between the Red Cross and GSA, dated December 20, 2016, as amended.

(e) The term ''Red Cross Condos'' means the nine condominium units in a building located at 2025 E Street NW, Washington, DC.

Section III—Conditions

(a) For purposes of the Contribution, the Red Cross Condos are valued at their current fair market value, as determined by the Qualified Independent Fiduciary following its consideration and review of an appraisal, updated as of the date of the Contribution, performed by a Qualified Independent Appraiser;

(b) All rights and obligations attributable to the Red Cross Condo Documents are transferred to the Plan along with the Contribution of the Red Cross Condos;

(c) As of the date of the Contribution, there are no adverse claims, liens, debts, or encumbrances levied, or to be levied, against the Red Cross Condos;

(d) A Qualified Independent Fiduciary, exercising reasonable judgement in accordance with ERISA Section 404 when acting on behalf of the Plan, represents the interests of the Plan and its participants and beneficiaries with respect to the Contribution, and in doing so:

(1) Reviews, negotiates, and approves the terms of the Contribution;

(2) Determines that the Contribution is in the interests of the Plan and of its participants and beneficiaries and is protective of the rights of participants and beneficiaries of the Plan;

(3) Determines that the Red Cross Condos are valued for purposes of the Contribution at the Red Cross Condos' fair market value as of the date of the Contribution based on an updated appraisal that will be completed by a date that is within 30 days before the date of the Contribution, and exercises reasonable judgement in accordance with ERISA Section 404 when making this determination;

(4) Reviews the Appraisal to approve of the methodology used by the Qualified Independent Appraiser and to verify that the Qualified Independent Appraiser's methodology was properly applied;

(5) Ensures compliance with the terms of the Contribution and the conditions of this exemption are maintained at all times;

(6) Reviews the terms of the Red Cross Condo Documents, as amended, and determines that the terms are in the interest of and protective of the Plan;

(7) Will negotiate the terms of any future transaction with respect to the Red Cross Condos as an asset of the Plan, including without limitation to determine whether to continue to engage the Red Cross as property manager with respect to the Building and the terms of such engagement;

(e) The Plan does not pay any commissions, costs, or other expenses in connection with the Contribution, including any fees that are currently charged or accrued in the future by the Qualified Independent Fiduciary or the Qualified Independent Appraiser;

(f) The terms and conditions of the Contribution are no less favorable to the Plan than the terms and conditions that would be negotiated at arm's-length between unrelated third parties under similar circumstances;

(g) Downside Risk Protections:

(1) The Contribution of the Red Cross Condos will be in addition to the Red Cross's annual minimum required contributions (MRCs) determined in accordance with Code section 430 of the Code for the year in which the Contribution is made, and the Red Cross will permanently waive the credit balance generated by the Contribution of the Red Cross Condos, so that the Contribution will not substitute for cash contributions that the Red Cross otherwise would be required to make in the future;

(2) The Red Cross will make a minimum $5 million cash contribution to the Plan in any year in which:

(i) Any or all of the Red Cross Condos are retained as assets of the Plan; and

(ii) the Red Cross uses an existing credit balance to reduce its cash MRC;

(3) The Red Cross will contribute sufficient amounts to the Plan to ensure that its adjusted funding target attainment percentage, within the meaning of section 436 of the Code, is at least equal to 80 percent, for each Plan year during which the Red Cross Condos remain assets of the Plan;

(4) If GSA fails to purchase all the Red Cross Condos by June 30, 2030 and if the Space Lease fails to be extended through June 30, 2040, the Qualified Independent Fiduciary will determine whether implementation of a Parallel Reversion Commitment, as defined in Section II(a), is advantageous to the Plan as of June 30, 2030. This determination must be filed with the Department within sixty days thereafter. If the Qualified Independent Fiduciary determines that implementation of the Parallel Reversion Commitment would be advantageous to the Plan, the Applicant must submit an exemption request in connection therewith within six months after the Qualified Independent Fiduciary's determination is filed with the Department;

(h) Any provision of services by the Red Cross in connection with the Plan's ownership of a Red Cross Condo must comply with the requirements of ERISA Section 408(b)(2). Further, the Red Cross may not receive any consideration for such services other than the reimbursement of ''direct expenses,'' as described in 29 CFR 2550.408b–2(e)(3);

(i) All the facts and representations set forth in the Summary of Facts and Representation must be true and accurate.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons within 15 days of the publication of the notice of proposed exemption in the **Federal Register**. The notice will be provided to all interested persons in the manner agreed upon by the Applicant and the Department and will contain a copy of the notice of proposed exemption as published in the **Federal Register** and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. All written comments and/or requests for a hearing must be received by the Department within forty-five days of the date of publication of this proposed exemption in the **Federal Register**.

All comments will be made available to the public. *Warning:* If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

Morgan Stanley & Co. LLC, and Current and Future Affiliates and Subsidiaries (Morgan Stanley or the Applicant)

Located in New York, New York

[Application No. D–11955]

Proposed Exemption

The Department is considering granting an exemption under the authority of 408(a) of the Act and section 4975(c)(2) of the Code, in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 46637, 66644, October 27, 2011). If the exemption is granted, certain restrictions of sections 406(a) and 406(b) of the Act, and certain sanctions resulting from the application of section 4975 of the Code,[16] shall not apply to transactions involving Morgan Stanley and Mitsubishi (described below) that are modeled after the following class exemptions: Prohibited Transaction Exemption (PTE) 75–1, Part III and Part IV, PTE 77–3, PTE 77–4, PTE 79–13, PTE 86–128, and PTE 2002–12, provided the conditions of this exemption are met.[17]

Summary of Facts and Representations [18]

1. *Morgan Stanley.*

Morgan Stanley is a global financial services firm headquartered in New York, New York. In the ordinary course of its business, Morgan Stanley provides a range of financial services to clients which include IRAs and pension, profit sharing and 401(k) plans qualified under section 401(a) of the Code. Morgan Stanley maintains significant market positions in each of its business segments, which include: Institutional Securities, Wealth Management and Investment Management. As of December 31, 2019, Morgan Stanley had over 60,000 employees.

Through its Wealth Management segment, Morgan Stanley provides financial services and solutions to individual investors and small to medium-sized businesses and institutions. These services include brokerage and investment advisory services, financial and wealth planning services, annuity and insurance products, credit and other lending products, and banking and retirement plan services. Through its Investment Management segment, Morgan Stanley provides investment strategies and products that span geographies, asset classes, and public and private markets. Institutional clients include defined benefit and defined contribution plans, foundations, endowments, government entities, sovereign wealth funds, insurance companies, third-party fund sponsors and corporations. Through its Institutional Securities segment, Morgan Stanley provides investment banking, sales and trading, lending and other services to corporations, governments, financial institutions and high net worth clients.

Morgan Stanley Investment Management Inc. is a registered investment adviser subject to the Investment Advisers Act of 1940. Morgan Stanley & Co. LLC is a SEC-registered broker dealer.

2. *Mitsubishi.*

Mitsubishi UFJ Financial Group, Inc. is a bank holding company incorporated as a joint stock company (kabushiki kaisha) under the Companies Act of Japan. Mitsubishi UFJ Financial Group, Inc. owns entities that provide brokerage, custody and investment management services to clients that include plans. Mitsubishi UFJ Financial Group, Inc., together with its affiliates (hereinafter, any of these entities is referred to as Mitsubishi), is one of the world's largest and most diversified financial groups with total assets of ¥297.19 trillion, as of March 31, 2017.

3. *Mitsubishi's Investment in Morgan Stanley.*

On October 13, 2008, Mitsubishi made an equity investment to acquire a 21 percent ownership interest in Morgan Stanley on a fully diluted basis. Under the terms of the transaction, Mitsubishi acquired: (a) 7,839,209 shares of Series B Non-Cumulative Non-Voting Perpetual Convertible Preferred Stock (''Series B Preferred Stock'') with a 10 percent dividend and a conversion price of $25.25 per share; and (b) 1,160,791 shares of Series C Non-Cumulative Non-Voting Perpetual Preferred Stock (''Series C Preferred Stock'') with a 10 percent dividend. The transaction also permits Mitsubishi to nominate one member to Morgan Stanley's twelve-member board of directors and to designate an additional ''observer'' to be present at meetings of Morgan Stanley's board.

On June 30, 2011, Mitsubishi and Morgan Stanley agreed to convert all Mitsubishi-owned Morgan Stanley Series B Preferred Stock (face value of $7.8 billion; carrying value of $8.1 billion) into Morgan Stanley common stock. Immediately after the conversion, Mitsubishi-owned shares of Morgan Stanley Common Stock represented approximately 22.56% of the outstanding shares of Morgan Stanley Common Stock. Subsequently, the Mitsubishi's ownership percentage of Morgan Stanley common stock gradually increased because of Morgan Stanley's ongoing repurchases of stock from other investors. On April 18, 2018, Mitsubishi entered into an agreement with Morgan Stanley to sell shares of Morgan Stanley common stock as part of Morgan Stanley's share repurchase program. This agreement, as intended, allowed Mitsubishi to keep its ownership percentage of Morgan Stanley common stock below 24.9%, in order to comply with Mitsubishi's passivity commitments to the Board of Governors of the Federal Reserve System.

Mitsubishi is currently the largest investor in Morgan Stanley, holding 24.5 percent of Morgan Stanley's outstanding common stock. Mitsubishi also currently nominates two directors to Morgan Stanley's board of directors. Morgan Stanley states that, despite its ownership interest, Mitsubishi does not have sufficient control over Morgan Stanley to warrant treatment of Mitsubishi and Morgan Stanley as ''affiliates'' within the meaning of the Applicable Class Exemptions, which are described below.[19]

4. *Relevant ERISA Provisions and Prohibited Transaction Issues.*

Section 406(a) of ERISA proscribes certain ''prohibited transactions'' between plans and ''parties in interest'' with respect to those plans. ERISA Section 406(a) prohibits, among other things, sales, extensions of credit, and the provision of services between a plan (or an entity whose assets are deemed to constitute the assets of the plan) and a ''party in interest'' with respect to the plan, as well as the use of plan assets by or for the benefit of, or a transfer of plan assets to, a ''party in interest.'' Section 3(14) of ERISA defines the term ''party in interest'' to include, among others, a plan fiduciary, the sponsoring employer of a plan, service providers with respect to a plan, and certain related entities. ERISA section 3(14)(H) specifically provides that a 10% or more shareholder of certain entities, including a service provider to a plan, is a ''party in interest'' to that plan.

Pursuant to ERISA section 3(14)(H), Mitsubishi, as an entity that owns 10% or more of Morgan Stanley, is a ''party

[16] For purposes of this proposed exemption reference to specific provisions of Title I of the Act, unless otherwise specified, should be read to refer as well to the corresponding provisions of the Code.

[17] Part III and Part IV of Prohibited Transaction Exemption 75–1 (PTE 75–1 Parts III and IV)(40 FR 50845, October 31, 1975); Prohibited Transaction Exemption 77–3 (PTE 77–3) (42 FR 18734, April 8, 1977); Prohibited Transaction Exemption 77–4 (PTE 77–4) (42 FR 18732, April 8, 1977); Prohibited Transaction Exemption 79–13 (PTE 79–13) (44 FR 25533, May 1, 1979); Prohibited Transaction Exemption 86–128 (PTE 86–128) (51 FR 41686, November 18, 1986), as amended by (67 FR 64137, October 17, 2002); Prohibited Transaction Exemption 2002–12 (PTE 2002–12)(67 FR 9483, March 1, 2002).

[18] The Department notes that availability of this exemption, if granted, is subject to the express condition that the material facts and representations contained in application D–11955 are true and complete, and accurately describe all material terms of the transactions covered by the exemption. If there is any material change in a transaction covered by the exemption, or in a material fact or representation described in the application, the exemption will cease to apply as of the date of such change.

[19] For example, Section I(b) of PTE 86–128 defines an ''affiliate'' as, in relevant part, ''any person directly controlling, controlled by, or under common control with the person . . .'' where ''[t]he term 'control' means the power to exercise a controlling influence over the management or policies of a person other than an individual.''

in interest'' with respect to plans that receive services from Morgan Stanley. As noted above, Section 406(a) of ERISA prohibits a wide range of transactions between plans and ''parties in interest.'' Morgan Stanley is therefore prohibited by Section 406(a) of ERISA from causing plans to engage in a wide range of transactions involving Mitsubishi.

Section 406(b) of ERISA also prohibits fiduciary transactions involving fiduciary self-dealing, fiduciary conflicts of interest, and kickbacks to fiduciaries. Irrespective of whether Mitsubishi's ownership interest in Morgan Stanley gives it the level of control necessary to classify the two entities as affiliates for the purposes of the Applicable Class Exemptions, its degree of interest and influence is substantial, and could affect either party's best judgment as a plan fiduciary, raising issues under Section 406(b) of ERISA.

5. *Relevant Administrative Exemptions.*

The Department has authority under Section 408(a) of ERISA to grant administrative exemptions, on both a class and individual basis, which permit transactions that would otherwise violate the prohibitions of Section 406 of ERISA. Prior to granting an exemption, the Secretary of Labor must first find that such exemption is administratively feasible and in the interest of, and protective of, affected plans.[20]

The Department has granted a wide variety of class exemptions that permit affiliated parties to engage in specified plan-related transactions, provided that certain protective conditions are met. The following seven class exemptions (the Applicable Class Exemptions) are relevant to this proposed exemption:

PTE 75–1, Part III permits a fiduciary to cause a plan to purchase securities from a member of an underwriting syndicate, when the fiduciary is also a member of such syndicate, and the member selling the securities to the plan is not affiliated with the fiduciary. The class exemption defines the term ''fiduciary'' to include ''affiliates'' of the fiduciary.

PTE 75–1, Part IV permits a plan to purchase or sell securities in a principal transaction from a fiduciary that is also a ''market-maker'' with respect to such securities. For purposes of the exemption, the term ''fiduciary'' includes ''affiliates'' of the fiduciary.

PTE 77–3 permits the acquisition or sale of shares of a registered open-end investment company (a mutual fund) by a plan that covers only employees of the mutual fund, the mutual fund's investment adviser, the mutual fund's underwriter, or an affiliate thereof.

PTE 77–4 permits the purchase or sale by a plan of shares of a mutual fund, where the mutual fund's investment adviser is a plan fiduciary, or is affiliated with a plan fiduciary, but is not an employer of employees covered by the plan.

PTE 79–13 permits the purchase, ownership and sale of shares of a closed-end mutual fund by a plan, where such plan covers only employees of the closed-end mutual fund, employees of an investment adviser to the closed-end mutual fund, or employees of an affiliate of the closed-end mutual fund or investment adviser.

PTE 86–128 provides an exemption for certain fiduciaries and their affiliates to receive a fee from a plan or IRA for effecting or executing securities transactions as an agent on behalf of the plan or IRA. It also allows a fiduciary (or an affiliate of a fiduciary) to act as an agent in an ''agency cross transaction'' for both a plan (and IRA) and for another party to the transaction, and to receive reasonable compensation from another party to the transaction.

PTE 2002–12 permits the cross-trading of securities by and between certain index and model-driven funds managed by investment ''managers,'' and among index and model-driven funds, and certain large accounts, which engage such ''managers.'' For purposes of the exemption, the term ''manager'' includes affiliates of the ''manager.''

6. *Exemption Request.*

As described above, the Applicable Class Exemptions permit certain plan-related transactions involving affiliated parties (the Affiliated Transactions). Assuming Morgan Stanley and Mitsubishi are not affiliates for the purposes of the Applicable Class Exemptions, as they indicate, they could not engage in the Affiliated Transactions without violating Section 406 of ERISA. Morgan Stanley therefore requests an exemption that, in general terms, would allow Morgan Stanley and Mitsubishi to treat the other as an ''affiliate'' for purposes of the Applicable Class Exemptions when engaging in transactions that would otherwise mirror the Affiliated Transactions.

Morgan Stanley states that the requested exemption would be beneficial to both its client plans and its own sponsored plans. Morgan Stanley indicates that it would allow Morgan Stanley to invest in open and closed-end mutual funds maintained by Mitsubishi. Morgan Stanley further states that the requested exemption would allow the asset management affiliates of Morgan Stanley and Mitsubishi to engage the other's brokers to execute agency transactions in the same manner, and using the same conditions, as PTE 86–128; allow the cross trading of index and model driven accounts managed by asset manager affiliates of Morgan Stanley or Mitsubishi; allow both entities' asset managers to purchase securities in an underwriting when their affiliates were members of the underwriting syndicate; and allow market making transactions under PTE 75–1, Part IV with affiliates of either Morgan Stanley or Mitsubishi.

Morgan Stanley represents that the proposed exemption would enhance affected plans' investment and service provider options. According to Morgan Stanley, plan participants would have access to more counterparties and investment products in the market. In addition, the plans, as clients of Morgan Stanley and of Mitsubishi and its affiliates, would have access to more efficient and less expensive brokerage services. Morgan Stanley states that this proposed exemption should be granted for the same reasons the Department granted the Applicable Class Exemptions.

7. *Structure of this Proposed Exemption.*

The operative language in this document consists of nine Parts. Parts I through VII detail proposed individual exemptions. Each of the exemptions are modeled after one of the seven Applicable Class Exemptions. While the seven Applicable Class Exemptions permit specific transactions involving entities that are ''affiliated'', the seven proposed exemptions permit those same transactions but as undertaken by a Morgan Stanley entity and a related Mitsubishi entity. In general terms, the proposed individual exemptions permit two broad classes of transactions: (1) Those in which a Morgan Stanley entity acting as a plan fiduciary causes the plan to engage in a covered transaction involving a Mitsubishi entity acting as a non-fiduciary; and/or (2) those in which a Mitsubishi entity acting as a plan fiduciary causes the plan to engage in a covered transaction involving a Morgan Stanley entity acting as a non-fiduciary.[21] The proposed exemptions use the term ''Morgan Stanley/Mitsubishi Entity'' when referring to a Morgan Stanley or Mitsubishi entity that is acting as the plan fiduciary, and the term ''Related Entity'' when referring to the Morgan Stanley or a Mitsubishi

[20] 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).

[21] The exception is PTE 2002–12 and the transactions in this exemption that are modeled after PTE 2002–12, which are described below.

entity that is acting in a non-plan fiduciary role. Accordingly, the terms ''Morgan Stanley/Mitsubishi Entity'' and ''Related Entity'' are used in much the same way as the terms ''fiduciary'' and ''affiliate'' are used in the Applicable Class Exemptions. Examples are provided below.

Part VIII of this proposed exemption contains a set of new conditions that are not found in the Applicable Class Exemptions (the New Conditions). The New Conditions apply to each of the seven exemptions described in this proposal. Otherwise, the conditions in the proposed exemptions are similar to the conditions in the Applicable Class Exemptions. Distinctions between the proposed exemptions and the Applicable Class Exemptions are discussed below.

Part IX of this proposed exemption provides definitions not found in the Applicable Class Exemptions. For example, Part IX defines the term ''Morgan Stanley'' to mean, ''Morgan Stanley & Co. LLC and any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with Morgan Stanley & Co;'' and the term ''Mitsubishi'' to mean, ''Mitsubishi UFJ Financial Group, Inc., and any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with Mitsubishi UFJ Financial Group, Inc.''

8. *The Seven Proposed Individual Exemptions.*

Part I of this document is a proposed exemption that is based on PTE 75–1, Part III. This proposed exemption permits the purchase or other acquisition of certain securities by a plan during the existence of an underwriting or selling syndicate with respect to such securities, from any person other than a Morgan Stanley/Mitsubishi Entity or Related Entity, when a Morgan Stanley/Mitsubishi Entity is a fiduciary with respect to the plan, and a Related Entity is a member of the syndicate. For example, if the conditions in Parts I and VIII are met, (a) a Morgan Stanley entity, acting as the plan fiduciary, may cause the plan to purchase securities from a member of an underwriting syndicate (but not from Morgan Stanley or Mitsubishi), if Mitsubishi is a member of such syndicate; and/or (b) a Mitsubishi entity, acting as a plan fiduciary, may cause the plan to purchase securities from a member of an underwriting syndicate (but not from Morgan Stanley or Mitsubishi), if a Morgan Stanley entity is a member of the syndicate.

Part II of this document is a proposed exemption that is based on PTE 75–1, Part IV. The proposed exemption permits the purchase or sale of securities by a plan from or to a Related Entity which is a market-maker with respect to such securities, when a Morgan Stanley/Mitsubishi Entity is a plan fiduciary. For example, if the conditions in Parts II and VIII are met, a Morgan Stanley entity, acting as a plan fiduciary, may cause the plan to purchase or sell securities in a principal transaction involving a Mitsubishi entity that is acting as a ''market-maker'' with respect to the securities; and/or a Mitsubishi entity, acting as a plan fiduciary, may cause the plan to purchase or sell securities in a principal transaction involving a Morgan Stanley entity that is acting as a ''market-maker'' with respect to the securities.

Part III of this document is a proposed exemption that is based on PTE 77–3. This proposed exemption permits the purchase or sale by a plan of mutual fund shares, where the mutual fund's investment adviser or principal underwriter is a Related Entity, and the plan that is purchasing or selling the mutual fund shares covers only employees of a Morgan Stanley/Mitsubishi Entity. If the conditions in Parts III and VIII are met, this proposed exemption permits the acquisition or sale of shares of a mutual fund by a plan that covers only employees of (a) a Morgan Stanley entity, where a Mitsubishi entity is the mutual fund's investment adviser or principal underwriter; or (b) a Mitsubishi entity, where a Morgan Stanley entity is the mutual fund's investment adviser or principal underwriter.

Part IV of this document is a proposed exemption that is based on PTE 77–4. This proposed exemption permits the purchase or sale by a plan of mutual fund shares, where the mutual fund's investment adviser is a Related Entity and a Morgan Stanley/Mitsubishi Entity is a fiduciary with respect to the plan, but not an employer of employees covered by the plan. If the conditions of Parts IV and VIII are met, this proposed exemption permits the purchase or sale by a plan of shares of a mutual fund, where (a) a Morgan Stanley entity is the mutual fund's investment adviser and a Mitsubishi entity is a plan fiduciary, but not an employer of employees covered by the plan, and/or (b) a Mitsubishi entity is the mutual fund's investment adviser and a Morgan Stanley entity is a plan fiduciary, but not an employer of employees covered by the plan.

Part V of this document is a proposed exemption that is based on PTE 79–13. The proposed exemption permits the acquisition, ownership, or sale of shares of a closed-end mutual fund (where a Related Entity serves as investment adviser to such closed-end mutual fund) by a plan covering only employees of a Morgan Stanley/Mitsubishi Entity. Thus, if the conditions of Parts V and VIII are met, this proposed exemption would permit (a) the acquisition, ownership or sale of shares of a closed-end mutual fund with a Morgan Stanley entity as its investment adviser, by a plan covering only employees of a Mitsubishi entity, or (b) the acquisition, ownership or sale of shares of a closed-end mutual fund with a Mitsubishi entity as its investment adviser, by a plan covering only employees of a Morgan Stanley entity.

Part VI of this document is a proposed exemption that is based on PTE 86–128. This proposed exemption permits (a) a Morgan Stanley/Mitsubishi Entity, as a plan fiduciary, to use its authority to cause the plan to pay a fee to a Related Entity, for effecting or executing securities transactions on behalf of the plan; (b) a Morgan Stanley/Mitsubishi Entity using its fiduciary authority to cause a plan to enter into an agency cross transaction where (1) a Related Entity acts as the agent to the plan in such agency cross transaction, or (2) a Related Entity acts as the agent to one or more other parties to the agency cross transaction; and (c) the receipt of reasonable compensation by a Related Entity for effecting or executing an agency cross transaction on behalf of a plan with a Morgan Stanley/Mitsubishi Entity as the plan fiduciary that used its authority to cause the transaction, where such reasonable compensation is received from one or more other parties to the agency cross transaction (*i.e.,* not from the plan). If the conditions of Parts VI and Part VIII are met, this proposed exemption permits, among other things: A Morgan Stanley entity that is a plan fiduciary using its authority to cause the plan to pay a fee to a Mitsubishi entity, for effecting or executing securities transactions on behalf of the plan; and/or a Mitsubishi entity that is a plan fiduciary using its authority to cause the plan to pay a fee to a Morgan Stanley entity, for effecting or executing securities transactions on behalf of the plan.

Part VII of this document is a proposed exemption that is based on PTE 2002–12. This proposed exemption permits (a) the purchase and sale of securities among Index and Model Driven Funds (either, a Fund), where one such Fund is managed by a Morgan Stanley entity and the other fund is managed by a Mitsubishi entity; and (b) the purchase and sale of securities between a Fund and a Large Account, as defined in Part VII, Section IV(e) (or in certain instances, as between two Large Accounts), where one such Fund or Large Account is managed by a Morgan Stanley entity and the other such fund or Large Account is managed by a Mitsubishi entity. If the conditions in Parts VII and VIII are met, this exemption permits the cross-trading of securities by and between: A Fund managed by a Morgan Stanley investment manager and a Fund managed by a Mitsubishi investment manager; and/or a Fund and a Large Account (or in certain instances, by and between two Large Accounts), where one Fund/Large Account is managed by a Morgan Stanley investment manager and the other Fund/Large Account is managed by a Mitsubishi investment manager.

9. *Part VIII. New Conditions and Modifications.*

The proposed individual exemptions contain conditions not otherwise found in the Applicable Class Exemptions (the New Conditions).[22] The first New Condition provides that, if an Applicable Class Exemption is amended, revised or revoked pursuant to the Department's authority under Section 408(a) of ERISA, or if an Applicable Class Exemption is the subject of an interpretation issued by the Department, the relevant Part of this exemption will be subject to the same amendment, revision, revocation or interpretation.

Another New Condition of this exemption requires any Morgan Stanley or Mitsubishi entity engaging in a transaction that is covered by this exemption (with the exception of transactions described in Parts III and V), to provide a written notice to a plan fiduciary who is independent of both Mitsubishi and Morgan Stanley. The required notice must clearly detail in plain English: (a) The ownership relationship between Morgan Stanley and Mitsubishi; (b) the transaction(s) that Morgan Stanley and Mitsubishi will engage in on behalf of the plan under this exemption; and (c) that, as a result of the ownership relationship between Morgan Stanley and Mitsubishi, the previously identified transactions will provide a benefit to Morgan Stanley and/or Mitsubishi, and/or involve a conflict of interest.

Another New Condition requires the Morgan Stanley/Mitsubishi Entity engaging in a transaction covered by this exemption to comply with the following ''Impartial Conduct Standards'': (1) The Morgan Stanley/Mitsubishi Entity, at the time of the transaction, must act in the Best Interest of the plan. In this regard, acting in the Best Interest means acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of affected plan, and not place the financial or other interests of the Morgan Stanley/Mitsubishi Entity, Related Entity, or other party ahead of the interests of the affected plan, or subordinate the plan's interests to their own; (2)(A) The compensation received, directly or indirectly, by the Morgan Stanley/Mitsubishi Entity and Related Entities for their services may not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (B) As required by the federal securities laws, the Morgan Stanley/Mitsubishi Entity must obtain the best execution of the investment transaction reasonably available under the circumstances; and (3) The Morgan Stanley/Mitsubishi Entity's statements to the plan about the covered transaction and other relevant matters must not be materially misleading at the time statements are made.

This proposed exemption imposes certain global record retention requirements. In this regard, any applicable Morgan Stanley/Mitsubishi Entity must maintain, or cause to be maintained, for a period of six years, records necessary to determine whether the conditions of this exemption are met.

This proposed exemption requires that each Morgan Stanley/Mitsubishi Entity must develop and implement policies and procedures that are prudently designed to ensure that the conditions in this proposed exemption are met. This proposed exemption specifies that such required policies and procedures must be in place prior to any Morgan Stanley/Mitsubishi Entity engaging in a transaction that relies upon the relief provided hereunder.

10. *Modifications to Specific Exemptions.*

As noted above, PTE 77–4 provides relief for the purchase or sale by a plan of shares of a mutual fund, where the mutual fund's investment adviser is a plan fiduciary, or is affiliated with a plan fiduciary. This class exemption extends relief to ''section 406 of the Act and the taxes imposed by section 4975(a) and (b) of the Code . . . .''[23] Part IV of this proposed exemption permits transactions that are modeled after PTE 77–4, but limits relief to cover only sections 406(a)(1)(B) and 406(b) of ERISA and the corresponding provisions of the Code. Consistent with this, Part IV expressly provides that each Morgan Stanley/Mitsubishi Entity must satisfy section 408(b)(2) of ERISA or section 4975(d)(2) of the Code, as applicable.

As noted above, PTE 86–128 permits a plan fiduciary to effect or execute securities transactions (itself or through its affiliates) for a fee on behalf of a plan. Section I of PTE 86–128 defines certain terms used in the class exemption; Section II lists the specific transactions covered by the class exemption; Section III lists the conditions applicable to those transactions; and Section IV lists certain exceptions to those conditions.[24] One of these exceptions, set forth in Section IV(a) of the class exemption, provides that the conditions set forth in Section III do not apply to the Section II transactions to the extent such transactions are engaged in by individual retirement accounts that meet the conditions of 29 CFR 2510.3–2(d), or plans, other than training programs, that cover no employees within the meaning of 29 CFR 2510.3–3.

Unlike PTE 86–128, this proposed exemption does not carve out an exception for IRAs with respect to compliance with the conditions set forth in Section IV(a). Therefore, with respect to transactions in Part VI of this exemption, individual retirement accounts that meet the conditions of 29 CFR 2510.3–2(d) and plans that cover no employees, within the meaning of 29 CFR 2510.3–3, are subject to the conditions of this exemption on the same basis as plans (as plans are defined in Section 3(3) of ERISA).

Several of the Applicable Class Exemptions contain limitations or caps that are intended to protect affected plans. The parallel conditions in this proposed exemption clarify that these limitations or caps would apply across both the relevant individual exemption and the relevant Applicable Class Exemption. For example, condition (d) of PTE 75–1, Part III provides that the amount of such securities to be purchased or otherwise acquired by a plan does not exceed 3 percent (3%) of

[22] All of the transactions covered by this proposed exemption, if granted, and all of the conditions applicable to those transactions, are listed together at the end of this document.

[23] See 42 FR 18732 at 33.

[24] Section V of PTE 86–128 contains two illustrative examples, and Section VI sets forth effective dates and a transitional rule.

the total amount of such securities being offered. The parallel provision in this document (Part I, condition (d)) clarifies that the amount of such securities to be purchased or otherwise acquired by a plan *pursuant to this exemption and PTE 75–1, Part III,* does not exceed 3 percent (3%) of the total amount of such securities being offered (emphasis added). A similar clarification appears in Part I (e), Part II (b) and Part VI, Section IV, paragraph (c) of this exemption.

The Department's Findings

11. The Department granted each Applicable Class Exemption after determining on the record that the exemption was in the interest of and protective of, affected plans, and administratively feasible. Given that the transactions in this exemption are substantially similar to those permitted by the Applicable Class Exemptions, subject to not only essentially the same suite of conditions, but also to the New Conditions and the modifications described above, the Department has tentatively determined that this proposed exemption is in the interest of and protective of affected plans and their participants and beneficiaries, and administratively feasible.

Proposed Exemption

Based on the facts and representations, the Department of Labor (the Department) is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1978, as amended, (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1982 (the Code) and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).

Part I. Proposed Exemption From the Prohibitions Respecting Certain Classes of Transactions Involving Plans and Certain Underwriters (Modeled After PTE 75–1, Part III)

The restrictions of section 406 of the Act, and the taxes imposed by reason of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply to the purchase or other acquisition of certain securities by a plan during the existence of an underwriting or selling syndicate with respect to such securities, from any person other than Morgan Stanley or Mitsubishi, when a Morgan Stanley/Mitsubishi Entity is a fiduciary with respect to such plan, and a Related Entity is a member of such syndicate, provided that the following conditions are met:

(a) No Morgan Stanley/Mitsubishi Entity or Related Entity which is involved in any way in causing a plan to make the purchase is a manager of such underwriting or selling syndicate. The term ''manager'' means any member of an underwriting or selling syndicate who, either alone or together with other members of the syndicate, is authorized to act on behalf of the members of the syndicate in connection with the sale and distribution of the securities being offered or who receives compensation from the members of the syndicate for its services as a manager of the syndicate.

(b) The securities to be purchased or otherwise acquired are:

(1) Part of an issue registered under the Securities Act of 1933 (the 1933 Act) or, if exempt from such registration requirement, are:

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

(ii) Issued by a bank,

(iii) Issued by a common or contract carrier, if such issuance is subject to the provisions of section 20a of the Interstate Commerce Act, as amended,

(iv) Exempt from such registration requirement, pursuant to a Federal statute other than the 1933 Act, or are

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

(2) Purchased at not more than the public offering price prior to the end of the first full business day after the final terms of the securities have been fixed and announced to the public, except that:

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

(ii) If such securities are debt securities, they may be purchased at a public offering price on a day subsequent to the end of such first full business day, provided that the interest rates on comparable debt securities offered to the public subsequent to such first full business day and prior to the purchase are less than the interest rate of the debt securities being purchased.

(3) Offered pursuant to an underwriting agreement under which the members of the syndicate are committed to purchase all of the securities being offered, except if:

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

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

(c) The issuer of such securities has been in continuous operation for not less than three (3) years, including the operations of any predecessors, unless:

(1) Such securities are non-convertible debt securities rated in one of the four (4) highest rating categories by at least one (1) of the Rating Agencies, as defined below in Part IX (e);

(2) Such securities are issued or fully guaranteed by a person described above in subparagraph (b)(1)(i) of this Part I; or

(3) Such securities are fully guaranteed by a person who has issued securities described above in subparagraph (b)(1)(ii), (iii), (iv), or (v) of Part I, and in this subparagraph (c) of Part I.

(d) The amount of such securities to be purchased or otherwise acquired by a plan, pursuant to this exemption and PTE 75–1, Part III, does not exceed 3 percent (3%) of the total amount of such securities being offered.

(e) The consideration to be paid by a plan in purchasing or otherwise acquiring such securities pursuant to this exemption and PTE 75–1, Part III, does not exceed 3 percent (3%) of the fair market value of the total assets of such plan as of the last day of the most recent fiscal quarter of such plan prior to such transaction, provided that if such consideration exceeds $1 million, it does not exceed 1 percent (1%) of such fair market value of the total assets of such plan.

If such securities are purchased by a plan from a party in interest or disqualified person with respect to such plan, such party in interest or disqualified person shall not be subject to the civil penalty which 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 conditions of this exemption are not met. However, if such securities are purchased from a party in interest or disqualified person with respect to a plan, the restrictions of section 406(a) of the Act shall apply to any Morgan Stanley/Mitsubishi Entity acting as fiduciary with respect to such plan, 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, shall apply to such party in interest or disqualified person, unless the conditions for exemption of PTE 75–1 (40 FR 50845, October 31, 1975), Part II (relating to certain principal transactions) are met.

Part II. Proposed Exemption From Prohibitions Respecting Certain Classes of Transactions Involving Plans and Market-Makers (Modeled After PTE 75–1, Part IV)

The restrictions of section 406 of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply to any purchase or sale of any securities by a plan from or to a Related Entity which is a market-maker with respect to such securities, when a Morgan Stanley/Mitsubishi Entity is a fiduciary with respect to such plan, provided that the following conditions are met:

(a) The issuer of such securities has been in continuous operation for not less than three (3) years, including the operations of any predecessors, unless:

(1) Such securities are non-convertible debt securities rated in one of the four (4) highest rating categories by at least one (1) of the Rating Agencies;

(2) Such securities are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States; or

(3) Such securities are fully guaranteed by a person described in this subparagraph (a).

(b) As a result of purchasing such securities:

(1) The fair market value of the aggregate amount of such securities owned, directly or indirectly, by a plan and with respect to which a Morgan Stanley/Mitsubishi Entity is a fiduciary, pursuant to this exemption and PTE 75–1, Part IV, does not exceed 3 percent (3%) of the fair market value of the assets of such plan with respect to which such Morgan Stanley/Mitsubishi Entity is a fiduciary, as of the last day of the most recent fiscal quarter of such plan prior to such transaction, provided that if the fair market value of such securities exceeds $1 million, it does not exceed 1 percent (1%) of the fair market value of such assets of such plan, except that this subparagraph shall not apply to securities described in subparagraph (a)(2) of this Part II; and

(2) The fair market value of the aggregate amount of all securities for which any Related Entity is a market-maker, which are owned, directly or indirectly, by a plan and with respect to which a Morgan Stanley/Mitsubishi Entity is a fiduciary, pursuant to this exemption and PTE 75–1, Part IV, does not exceed 10 percent (10%) of the fair market value of the assets of such plan with respect to which the Morgan Stanley/Mitsubishi Entity is a fiduciary, as of the last day of the most recent fiscal quarter of such plan prior to such transaction, except that this subparagraph shall not apply to securities described in subparagraph (a)(2) of this Part II.

(c) At least one (1) person other than a Related Entity is a market-maker with respect to such securities.

(d) The transaction is executed at a net price to a plan for the number of shares or other units to be purchased or sold in the transaction which is more favorable to such plan than that which the Morgan Stanley/Mitsubishi Entity, acting as fiduciary and acting in good faith, reasonably believes to be available at the time of such transaction from all other market-makers with respect to such securities.

For purposes of this Part II, the term ''market-maker'' shall mean any specialist permitted to act as a dealer, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.

Part III. Proposed Exemption Involving Mutual Fund In-House Plans (Modeled After PTE 77–3)

The restrictions of sections 406 and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply to the acquisition or sale of shares of an open-end investment company registered under the Investment Company Act of 1940 (the 1940 Act), where a Related Entity is an investment adviser or principal underwriter with respect to the open-end investment company, by an benefit plan covering only employees of a Morgan Stanley/Mitsubishi Entity, provided that the following conditions are met (whether or not such investment company, investment adviser, principal underwriter or any affiliated person thereof is a fiduciary with respect to the plan):

(a) The plan does not pay any investment management, investment advisory or similar fee to any Morgan Stanley/Mitsubishi Entity or Related Entity. This condition does not preclude the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the 1940 Act.

(b) The plan does not pay a redemption fee in connection with the sale by the plan to the investment company of such shares, unless (1) such redemption fee is paid only to the investment company, and (2) the existence of such redemption fee is disclosed in the investment company prospectus in effect both at the time of the acquisition of such shares and at the time of such sale.

(c) The plan does not pay a sales commission in connection with such acquisition or sale.

(d) All other dealings between the plan and the investment company, the Related Entity, any other investment adviser or principal underwriter for the investment company, or any affiliated person (as defined in section 2(a)(3) of the 1940 Act) of the Related Entity, other investment adviser, or principal underwriter, are on a basis no less favorable to the plan than such dealings are with other shareholders of the investment company.

Part IV. Proposed Exemption for Certain Transactions Between Investment Companies and Plans (Modeled After PTE 77–4)

The restrictions of section 406(a)(1)(B) and (D) and 406(b) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(B), (D), (E) and (F) of the Code, shall not apply to the purchase or sale by a plan of shares of an open-end investment company registered under the 1940 Act, where a Related Entity is the investment adviser of the investment company and a Morgan Stanley/Mitsubishi Entity is a fiduciary with respect to the plan, but not an employer of employees covered by the plan, provided that the following conditions are met:

(a) The plan does not pay a sales commission in connection with such purchase or sale.

(b) The plan does not pay a redemption fee in connection with the sale by the plan to the investment company of such shares unless:

(1) The redemption fee is paid only to the investment company, and

(2) The existence of the redemption fee is disclosed in the investment company prospectus in effect both at the time of the purchase of the shares and at the time of the sale.

(c) The plan does not pay an investment management, investment advisory or similar fee with respect to the plan assets invested in the shares for the entire period of the investment. This condition does not preclude the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the 1940 Act. This condition also does not preclude payment of an investment advisory fee by the plan based on total plan assets from which a credit has been subtracted representing the plan's pro rata share of the investment advisory fees paid by the investment company. If, during any fee period for which the plan has prepaid its investment management, investment advisory or similar fee, the plan purchases shares of the investment company, the requirement of this subparagraph (c) 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 plan assets invested in the investment company shares: (1) Is anticipated and subtracted from the prepaid fee at the time of payment of the fee; (2) is returned to the plan no later than during the immediately following fee period; or (3) is offset against the prepaid fee for the immediately following fee period or for the fee period immediately following thereafter. For purposes of this subparagraph (c), a fee shall be deemed to be prepaid for any fee period if the amount of the fee is calculated as of a date not later than the first day of such period.

(d) A second fiduciary with respect to the plan, who is independent of and unrelated to Morgan Stanley and Mitsubishi, receives a current prospectus issued by the investment company, and full and detailed written disclosure of the investment advisory and other fees charged to or paid by such plan and the investment company, including the nature and extent of any differential between the rates of such fees, the reasons why the Morgan Stanley/Mitsubishi Entity may consider such purchases to be appropriate for the plan, and whether there are any limitations on the Morgan Stanley/Mitsubishi Entity with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations. For purposes of this subparagraph (d), the second fiduciary will not be deemed to be independent of and unrelated to Morgan Stanley and Mitsubishi if:

(1) The second fiduciary directly or indirectly controls, is controlled by, or is under common control with Morgan Stanley or Mitsubishi;

(2) The second fiduciary, or any officer, director, partner, employee or relative of such second fiduciary is an officer, director, partner, employee or relative of Morgan Stanley or Mitsubishi; or

(3) The second fiduciary directly or indirectly receives any compensation or other consideration for his or her own personal account in connection with any transaction described in this Part IV.

If an officer, director, partner, employee or relative of any Morgan Stanley or Mitsubishi entity is a director of such second fiduciary, and if he or she abstains from participation in:

(i) The choice of the plan's investment adviser,

(ii) The approval of any purchase or sale between the plan and the investment company, and

(iii) The approval of any change of fees charged to or paid by such plan, then subparagraph (d)(2) of this Part IV shall not apply.

For purposes of subparagraph (d)(1) above, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual, and 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.

(e) On the basis of the prospectus and disclosure referred to in subparagraph (d), the second fiduciary referred to in subparagraph (d) approves such purchases and sales consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act. Such approval may be limited solely to the investment advisory and other fees paid by the mutual fund in relation to the fees paid by such plan and need not relate to any other aspects of such investments. In addition, such approval must be either:

(1) Set forth in such plan's plan documents or in the investment management agreement between such plan and the Morgan Stanley/Mitsubishi Entity,

(2) Indicated in writing prior to each purchase or sale, or

(3) Indicated in writing prior to the commencement of a specified purchase or sale program in the shares of such investment company.

(f) The second fiduciary referred to in subparagraph (d) above, or any successor thereto, is notified of any change in any of the rates and fees referred to in subparagraph (d) and approves in writing the continuation of such purchases or sales and the continued holding of any investment company shares acquired by such plan prior to such change and still held by such plan. Such approval may be limited solely to the investment advisory and other fees paid by the mutual fund in relation to the fees paid by such plan and need not relate to any other aspects of such investment.

(g) Each Morgan Stanley/Mitsubishi Entity and Related Entity must satisfy section 408(b)(2) of ERISA or section 4975(d)(2) of the Code, as applicable.

Part V. Proposed Exemption Involving Closed-End Investment Company and In-House Plans (Modeled After PTE 79–13)

The restrictions of sections 406 and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code, shall not apply to the acquisition, ownership, or sale of shares of a closed-end investment company which is registered under the Investment Company Act of 1940 Act (1940 Act) and is not a ''small business investment company,'' as defined in section 103 of the Small Business Investment Company Act of 1958, with respect to which a Related Entity is an investment adviser, by an employee benefit plan covering only employees of a Morgan Stanley/Mitsubishi Entity, provided that the following conditions are met (whether or not such investment company, investment adviser or any affiliated person thereof is a fiduciary with respect to the plan):

(a) The plan does not pay any investment management, investment advisory, or similar fee to any Morgan Stanley/Mitsubishi Entity or Related Entity. This condition does not preclude the payment of investment advisory fees by the investment company under the terms of its investment advisory agreement adopted in accordance with section 15 of the 1940 Act.

(b) The plan does not pay a sales commission in connection with such acquisition or sale to any such investment company, or investment adviser, or any Morgan Stanley/Mitsubishi Entity or Related Entity; and

(c) All other dealings between the plan and such investment company, the investment adviser, or any Morgan Stanley/Mitsubishi Entity or Related Entity, are on a basis no less favorable to the plan than such dealings are with other shareholders of the investment company.

Part VI. Proposed Exemption for Securities Transactions Involving Plans and Broker-Dealers (Modeled After PTE 86–128)

Section I: Definition and Special Rules

The following definitions and special rules apply to this Part VI:

(a) The term ''Morgan Stanley/Mitsubishi Entity'' means Morgan Stanley & Co. LLC (MS) or one of its ''affiliates,'' or Mitsubishi UFJ Financial Group, Inc. (Mitsubishi UFJ) or one of its ''affiliates,'' acting as the plan fiduciary authorizing a transaction covered by this Part.

(b) An ''affiliate'' of a Morgan Stanley/Mitsubishi Entity or a Related Entity, which is defined below, includes the following:

(1) Any person directly or indirectly controlling, controlled by, or under common control with, MS or with Mitsubishi UFJ;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), brother, sister, or spouse of a brother or sister, of a Morgan Stanley/Mitsubishi Entity or a Related Entity; and

(3) Any corporation or partnership of which a Morgan Stanley/Mitsubishi Entity or a Related Entity is an officer(s), director(s), or partner(s).

A person is not an affiliate of another person solely because such person has investment discretion over the other's assets. The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) An ''agency cross transaction'' is a securities transaction in which the same Related Entity acts as agent for both any seller and any buyer for the purchase or sale of a security.

(d) The term ''covered transaction'' means an action described in Section II (a), (b), or (c) of this Part VI.

(e) The term ''effecting or executing a securities transaction'' means the execution of a securities transaction as agent for another person and/or the performance of clearance, settlement, custodial, or other functions ancillary thereto.

(f) A plan fiduciary is independent of a Morgan Stanley/Mitsubishi Entity and a Related Entity only if the fiduciary has no relationship to and no interest in MS and no interest in Mitsubishi UFJ that might affect the exercise of such fiduciary's best judgment as a fiduciary.

(g) The term ''profit'' includes all charges relating to effecting or executing securities transactions, less reasonable and necessary expenses including reasonable indirect expenses (such as overhead costs) properly allocated to the performance of these transactions under generally accepted accounting principles.

(h) The term ''securities transaction'' means the purchase or sale of securities.

(i) The term ''nondiscretionary trustee'' of a plan means a trustee or custodian whose powers and duties with respect to any assets of the plan are limited to

(1) The provision of nondiscretionary trust services to the plan, and

(2) Duties imposed on the trustee by any provision or provisions of the Act or the Code. The term ''nondiscretionary trust services'' means custodial services and services ancillary to custodial services, none of which services are discretionary. For purposes of this Part VI, a person does not fail to be a nondiscretionary trustee solely by reason of having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

(j) The term ''Related Entity'' means MS or one of its ''affiliates,'' or Mitsubishi UFJ or one of its ''affiliates,'' where the entity is not the plan fiduciary authorizing a transaction covered by this Part.

Section II: Covered Transactions

If each condition in Section III below is either satisfied or not applicable under Section IV, the restrictions of section 406(b) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) and (F) of the Code shall not apply to:

(a) A Morgan Stanley/Mitsubishi Entity, as a plan fiduciary, using its authority to cause the plan to pay a fee to a Related Entity, for effecting or executing securities transactions on behalf of the plan, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency;

(b) a Related Entity, as the agent in an agency cross transaction, acting on behalf of: (1) A plan with a Morgan Stanley/Mitsubishi Entity as the plan fiduciary that used its authority to cause the transaction; and (2) one or more other parties to the agency cross transaction; and

(c) the receipt of reasonable compensation by a Related Entity for effecting or executing an agency cross transaction on behalf of a plan with a Morgan Stanley/Mitsubishi Entity as the plan fiduciary that used its authority to cause the transaction, where the reasonable compensation is received from one or more other parties to the agency cross transaction.

Section III: Conditions

Except to the extent otherwise provided in Section IV below, Section II applies only if the following conditions are satisfied:

(a) The Morgan Stanley/Mitsubishi Entity or Related Entity engaging in the covered transaction is not an administrator of the plan, or an employer any of whose employees are covered by the plan.

(b) The covered transaction is performed under a written authorization executed in advance by a fiduciary of each plan whose assets are involved in the transaction, which plan fiduciary is independent of MS and Mitsubishi UFJ.

(c) The authorization referred to above in subparagraph (b) of this Section III is terminable at will by the plan, without penalty to the plan, upon receipt by the authorized Morgan Stanley/Mitsubishi Entity of written notice of termination. A form expressly providing an election to terminate the authorization described in subparagraph (b) of this Section III with instructions on the use of the form must be supplied to the authorizing plan fiduciary no less than annually. The instructions for such form must include the following information:

(1) The authorization is terminable at will by the plan, without penalty to the plan, upon receipt by the authorized Morgan Stanley/Mitsubishi Entity of written notice from the authorizing plan fiduciary or other plan official having authority to terminate the authorization; and

(2) Failure to return the form will result in the continued authorization of the authorized Morgan Stanley/Mitsubishi Entity to engage in the covered transactions on behalf of the plan.

(d) Within three (3) months before an authorization is made, the authorizing plan fiduciary is furnished with any reasonably available information that the Morgan Stanley/Mitsubishi Entity seeking authorization reasonably believes to be necessary for the authorizing plan fiduciary to determine whether the authorization should be made, including (but not limited to) a copy of this proposed exemption and the associated granted exemption, the form for termination of authorization described in Section III(c) of this Part VI, a description of the Morgan Stanley/Mitsubishi Entity's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing plan fiduciary requests.

(e) The authorizing plan fiduciary is furnished with either:

(1) A confirmation slip for each securities transaction underlying a

covered transaction within ten (10) business days of the securities transaction containing the information described in Rule 10b–10(a)(1–7) under the Securities and Exchange Act of 1934 (1934 Act), 17 CFR 240.10b–10; or

(2) At least once every three (3) months and not later than forty-five (45) days following the period to which it relates, a report disclosing:

(i) A compilation of the information that would be provided to a plan pursuant to subparagraph (e)(1) of this Section III during the three-month period covered by the report;

(ii) The total of all securities transaction related charges incurred by the plan during such period in connection with such covered transactions; and

(iii) The amount of the securities transaction-related charges retained by the Related Entity and the amount of such charges paid to other persons for execution or other services.

For purposes of this subparagraph (e), the words ''incurred by the plan'' shall be construed to mean ''incurred by the pooled fund'' with respect to covered transactions engaged in on behalf of a pooled fund in which the plan participates.

(f) The authorizing plan fiduciary is furnished with a summary of the information required under subparagraph (e)(1) of this Section III at least once per year. The summary must be furnished within forty-five (45) days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the plan during the period in connection with covered securities transactions.

(2) The amount of the securities transaction-related charges retained by the authorized Related Entity and the amount of these charges paid to other persons and their affiliates for execution or other services.

(3) A description of the Morgan Stanley/Mitsubishi Entity's brokerage placement practices, if such practices have materially changed during the period covered by the summary.

(4)(i) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing plan fiduciary with the information needed to assist in discharging its duty of prudence. The requirements of this subparagraph (f)(4)(i) will be met if the ''annualized portfolio turnover ratio'', calculated in the manner described in subparagraph (f)(4)(ii), is contained in the summary.

(ii) The ''annualized portfolio turnover ratio'' must be calculated as a percentage of the plan assets consisting of securities or cash over which the authorized Morgan Stanley/Mitsubishi Entity had discretionary investment authority, or with respect to which such Morgan Stanley/Mitsubishi Entity rendered, or had any responsibility to render, investment advice (the portfolio) at any time or times (management period(s)) during the period covered by the report. First, the ''portfolio turnover ratio'' (not annualized) is obtained by dividing:

(A) The lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by

(B) The monthly average of the market value of the portfolio securities during all management period(s). Such monthly average is calculated by totaling the market values of the portfolio securities as of the beginning and ending of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one (1) year or less are excluded from both the numerator and the denominator. The ''annualized portfolio turnover ratio'' is then derived by multiplying the ''portfolio turnover ratio'' by an annualizing factor. The annualizing factor is obtained by dividing (C) the number twelve (12) by (D) the aggregate duration of the management period(s) expressed in months (and fractions thereof).

(iii) The information described in this subparagraph (f)(4) is not required to be furnished in any case where the authorized Morgan Stanley/Mitsubishi Entity acting as plan fiduciary has not exercised discretionary authority over trading in the plan's account during the period covered by the report.

For purposes of this subparagraph (f), the words, ''incurred by the plan,'' shall be construed to mean ''incurred by the pooled fund'' with respect to covered transactions engaged in on behalf of a pooled fund in which the plan participates.

(g) For an agency cross transaction with respect to which Section IV(a) of this Part VI does not apply, the following conditions must also be satisfied:

(1) The information required under Section III(d) or Section IV(c)(1)(ii) of this Part VI includes a statement to the effect that with respect to agency cross transactions, the entity effecting or executing the transactions will have a potentially conflicting division of loyalties and responsibilities regarding the parties to the transactions;

(2) The summary required under Section III(f) of this Part VI includes a statement identifying the total number of agency cross transactions during the period covered by the summary and the total amount of all commissions or other remuneration received or to be received from all sources by the Related Entity engaging in the transactions in connection with those transactions during the period;

(3) The Morgan Stanley/Mitsubishi entity has the discretionary authority to act on behalf of, and/or provide investment advice to, either:

(i) One or more sellers, or

(ii) One or more buyers with respect to the transaction, but not both.

(4) The agency cross transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available; and

(5) The agency cross transaction is executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

(h) A Morgan Stanley/Mitsubishi Entity serving as trustee (other than a nondiscretionary trustee) may only engage in a covered transaction with a plan that has total net assets with a value of at least $50 million. In the case of a pooled fund, the $50 million net asset requirement will be met, if 50 percent or more of the units of beneficial interest in such pooled fund are held by plans each of which has total net assets with a value of at least $50 million.

For purposes of the net asset tests described above, where a group of plans is maintained by a single employer or controlled group of employers, as defined in section 407(d)(7) of the Act, the $50 million net asset requirement may be met by aggregating the assets of such plans, if the assets are pooled for investment purposes in a single master trust.

(i) The Morgan Stanley/Mitsubishi Entity serving as trustee (other than a nondiscretionary trustee) engaging in a covered transaction furnishes, at least annually, to the authorizing plan fiduciary of each plan the following:

(1) The aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms affiliated with such trustee;

(2) The aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms not affiliated with such trustee;

(3) The average brokerage commissions, expressed as cents per

share, paid by the plan to brokerage firms affiliated with such trustee; and

(4) The average brokerage commissions, expressed as cents per share, paid by the plan to brokerage firms not affiliated with such trustee.

For purposes of this subparagraph (i), the words, ''paid by the plan,'' should be construed to mean ''paid by the pooled fund'' when the trustee engages in covered transactions on behalf of a pooled fund in which the plan participates.

Section IV: Exceptions From Conditions

(a) Certain agency cross transactions. Section III of this Part VI does not apply in the case of an agency cross transaction, provided that the Morgan Stanley/Mitsubishi Entity and/or Related Entity:

(1) Does not render investment advice to any plan for a fee within the meaning of section 3(21)(A)(ii) of the Act with respect to the transaction;

(2) Is not otherwise a fiduciary who has investment discretion with respect to any plan assets involved in the transaction, *see* 29 CFR 2510.3–21(d); and

(3) Does not have the authority to engage, retain or discharge any person who is or is proposed to be a fiduciary regarding any such plan assets.

(b) Recapture of profits. Section III(a) of this Part VI does not apply in any case where the entity engaging in a covered transaction returns or credits to the plan all profits earned by the entity in connection with the securities transactions associated with the covered transaction.

(c) Special rules for pooled funds. In the case of a covered transaction involving an account or fund for the collective investment of the assets of more than one plan (pooled fund):

(1) Section III(b), (c), and (d) of this Part VI do not apply if:

(i) The arrangement under which the covered transaction is performed is subject to the prior and continuing authorization, in the manner described in this subparagraph (c)(1), of an authorizing plan fiduciary with respect to each plan whose assets are invested in the pooled fund who is independent of the Morgan Stanley/Mitsubishi Entity and the Related Entity. The requirement that the authorizing plan fiduciary be independent shall not apply in the case of a plan covering only employees of a Morgan Stanley/Mitsubishi Entity, if the requirements of Section IV(c)(2)(i) and (ii) of this Part VI are met.

(ii) The authorizing plan fiduciary is furnished with any reasonably available information that the Morgan Stanley/Mitsubishi Entity engaging or proposing to engage in the covered transactions reasonably believes to be necessary for the authorizing plan fiduciary to determine whether the authorization should be given or continued, not less than thirty (30) days prior to implementation of the arrangement or material change thereto, including (but not limited to) a description of the Morgan Stanley/Mitsubishi Entity's brokerage placement practices, and, where requested, any reasonably available information regarding the matter upon the reasonable request of the authorizing plan fiduciary at any time.

(iii) In the event an authorizing plan fiduciary submits a notice in writing to the Morgan Stanley/Mitsubishi Entity engaging in or proposing to engage in the covered transaction 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 pooled fund, without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans. In the case of a plan that elects to withdraw under this subparagraph (c)(1)(iii), the 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.

(iv) In the case of a plan whose assets are proposed to be invested in the pooled fund subsequent to the implementation of the arrangement and that has not authorized the arrangement in the manner described in subparagraphs (c)(1)(ii) and (c)(1)(iii) of this Section IV, such plan's investment in the pooled fund is subject to the prior written authorization of an authorizing fiduciary who satisfies the requirements of subparagraph (c)(1)(i).

(2) To the extent that Section III(a) of this Part VI prohibits any Morgan Stanley/Mitsubishi Entity or Related Entity from being the employer of employees covered by a plan investing in a pool managed by the Morgan Stanley/Mitsubishi Entity, Section III(a) of this Part VI does not apply if:

(i) The Morgan Stanley/Mitsubishi Entity is an ''investment manager'' as defined in section 3(38) of the Act, and

(ii) Either

(A) The Morgan Stanley/Mitsubishi Entity returns or credits to the pooled fund all profits earned by the Related Entity in connection with all covered transactions engaged in by the Related Entity on behalf of the fund, or

(B) The pooled fund satisfies the requirements of Section IV(c)(3) of this Part VI.

(3) A pooled fund satisfies the requirements of this subparagraph for a fiscal year of the fund if:

(i) On the first day of such fiscal year, and immediately following each acquisition of an interest in the pooled fund during the fiscal year by any plan covering employees of any Morgan Stanley/Mitsubishi Entity or Related Entity, the aggregate fair market value of the interests in such fund of all plans covering employees of any Morgan Stanley/Mitsubishi Entity and Related Entity, acquired under this exemption and PTE 86–128, does not exceed 20 percent (20%) of the fair market value of the total assets of the fund; and

(ii) The aggregate brokerage commissions received by any Related Entity, in connection with covered transactions engaged under this exemption and PTE 86–128, on behalf of all pooled funds in which a plan covering employees of any Morgan Stanley/Mitsubishi Entity or Related Entity participates, do not exceed 5 percent (5%) of the total brokerage commissions received by any Related Entity from all sources in such fiscal year.

Part VII. Proposed Exemption for Cross-Trades of Securities by Index and Model-Driven Funds (Modeled After PTE 2002–12)

Section I. Proposed Exemption for Cross-Trading of Securities by Index and/or Model-Driven Funds

The restrictions of sections 406(a)(1)(A) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) of the Code, shall not apply to the transactions described below, if the applicable conditions set forth in Sections II and III of this exemption, below, are satisfied.

(a) The purchase and sale of securities between an Index Fund or a Model-Driven Fund, as defined in Section IV(a) and (b), below, and another Index Fund or Model-Driven Fund (hereinafter, either, a Fund), at least one of which holds ''plan assets'' subject to the Act; or

(b) The purchase and sale of securities between a Fund and a Large Account, as defined in Section IV(e) of this Part VII, at least one of which holds ''plan assets'' subject to the Act, pursuant to a portfolio restructuring program, as defined in Section IV(f) of this Part VII, of the Large Account, where a Morgan

Stanley entity is the Manager on one side of the cross-trade and a Mitsubishi entity is the Manager on the other side of the cross-trade. Each Manager must comply with each condition below and is deemed a Morgan Stanley/Mitsubishi Entity for purposes of Parts VIII and IX below.

Notwithstanding the foregoing, this Part VII shall apply to cross-trades between two (2) or more Large Accounts pursuant to a portfolio restructuring program, if such cross-trades occur as part of a single cross-trading program involving both Funds and Large Accounts for which securities are cross-traded solely as a result of the objective operation of the program.

Section II. Specific Conditions

(a) The cross-trade is executed at the closing price, as defined below in Section IV(h) of this Part VII.

(b) Any cross-trade of securities by a Fund occurs as a direct result of a ''triggering event,'' as defined in Section IV(d), and is executed no later than the close of the third business day following such ''triggering event.''

(c) If the cross-trade involves a Model-Driven Fund, the cross-trade does not take place within three (3) business days following any change made by the Manager to the model underlying the Fund.

(d) The Manager has allocated the opportunity for all Funds or Large Accounts to engage in the cross-trade on an objective basis which has been previously disclosed to the authorizing fiduciaries of plan investors, and which does not permit the exercise of discretion by the Manager (*e.g.,* a pro rata allocation system).

(e) No more than 20 percent (20%) of the assets of the Fund or Large Account at the time of the cross-trade is comprised of assets of plans maintained by the Manager for its own employees (the Manager Plan(s)) for which the Manager exercises investment discretion.

(f)(1) Cross-trades of equity securities involve only securities that are widely-held, actively-traded, and for which market quotations are readily available from independent sources that are engaged in the ordinary course of business of providing financial news and pricing information to institutional investors and/or to the general public, and are widely recognized as accurate and reliable sources for such information. For purposes of this requirement, the terms, ''widely-held'' and ''actively-traded,'' shall be deemed to include any security listed in an Index, as defined in Section IV(c); and

(2) Cross-trades of fixed-income securities involve only securities for which market quotations are readily available from independent sources that are engaged in the ordinary course of business of providing financial news and pricing information to institutional investors and/or to the general public, and are widely recognized as accurate and reliable sources for such information.

(g) The Manager receives no brokerage fees or commissions as a result of the cross-trade.

(h) A plan's participation in the cross-trading program of a Manager, as a result of investments made in any Index or Model-Driven Fund that holds plan assets is subject to a written authorization executed in advance of such investment by a fiduciary of such plan which is independent of Morgan Stanley and Mitsubishi (the independent plan fiduciary).

For purposes of this Part VII, the requirement that the authorizing fiduciary be independent of the Manager shall not apply in the case of a Manager Plan.

(i) With respect to existing plan investors in any Index or Model-Driven Fund that holds plan assets as of the date this proposed exemption is granted, the independent fiduciary is furnished with a written notice, not less than forty-five (45) days prior to the implementation of the cross-trading program, that describes the Fund's participation in the cross-trading program of the Manager, provided that:

(1) Such notice allows each plan an opportunity to object to such plan's participation in the cross-trading program as a Fund investor by providing such plan with a special termination form;

(2) The notice instructs the independent plan fiduciary that failure to return the termination form to the Manager, by a specified date (which shall be at least thirty (30) days following such plan's receipt of the form) shall be deemed to be an approval by such plan of its participation in the Manager's cross-trading program as a Fund investor; and

(3) If the independent plan fiduciary objects to a plan's participation in the cross-trading program as a Fund investor by returning the termination form to the Manager by the specified date, such plan is given the opportunity to withdraw from each Index or Model-Driven Fund without penalty prior to the implementation of the cross-trading program, within such time as may be reasonably necessary to effectuate the withdrawal in an orderly manner.

(j) Prior to obtaining the authorization described in Section II(h) of this Part VII, and in the notice described in Section II(i) of this Part VII, the following statement must be provided by the Manager to the independent plan fiduciary:

Investment decisions for the Fund (including decisions regarding which securities to buy or sell, how much of a security to buy or sell, and when to execute a sale or purchase of securities for the Fund) will not be based in whole or in part by the Manager on the availability of cross-trade opportunities and will be made prior to the identification and determination of any cross-trade opportunities. In addition, all cross-trades by a Fund will be based solely upon a ''triggering event'' set forth in this Part VII. Records documenting each cross-trade transaction will be retained by the Manager.

(k) Prior to any authorization set forth in Section II(h) of this Part VII, and at the time of any notice described in Section II(i) of this Part VII, the independent plan fiduciary must be furnished with any reasonably available information necessary for the fiduciary to determine whether the authorization should be given, including (but not limited to) a copy of this proposed exemption and the final exemption, if granted, an explanation of how the authorization may be terminated, detailed disclosure of the procedures to be implemented under the Manager's cross-trading practices (including the ''triggering events'' that will create the cross-trading opportunities, the independent pricing services that will be used by the Manager to price the cross-traded securities, and the methods that will be used for determining closing price), and any other reasonably available information regarding the matter that the authorizing plan fiduciary requests. The independent plan fiduciary must also be provided with a statement that the Manager will have a potentially conflicting division of loyalties and responsibilities to the parties to any cross-trade transaction and must explain how the Manager's cross-trading practices and procedures will mitigate such conflicts.

With respect to Funds that are added to the Manager's cross-trading program or changes to, or additions of, triggering events regarding Funds, following the authorizations described in Section II(h) or Section II(i) of this Part VII, the Manager shall provide a notice to each relevant independent plan fiduciary of each plan invested in the affected Funds prior to, or within ten (10) days following, such addition of Funds or change to, or addition of, triggering events, which contains a description of such Fund(s) or triggering event(s). Such notice will also include a statement that such plan has the right to terminate its participation in the cross-trading program and its investment in any Index Fund or Model-Driven Fund without penalty at any time, as soon as is necessary to effectuate the withdrawal in an orderly manner.

(l) At least annually, the Manager notifies the independent fiduciary for each plan that has previously authorized participation in the Manager's cross-trading program as a Fund investor, that such plan has the right to terminate its participation in the cross-trading program and its investment in any Index Fund or Model-Driven Fund that holds plan assets without penalty at any time, as soon as is necessary to effectuate the withdrawal in an orderly manner. This notice shall also provide each independent plan fiduciary with a special termination form and instruct the fiduciary that failure to return the form to the Manager by a specified date (which shall be at least thirty (30) days following such plan's receipt of the form) shall be deemed an approval of the subject plan's continued participation in the cross-trading program as a Fund investor. In lieu of providing a special termination form, the notice may permit the independent plan fiduciary to utilize another written instrument by the specified date to terminate a plan's participation in the cross-trading program; provided that in such case the notification explicitly discloses that a termination form may be obtained from the Manager upon request. Such annual re-authorization must provide information to the relevant independent plan fiduciary regarding each Fund in which a plan is invested, as well as explicit notification that such plan fiduciary may request and obtain disclosures regarding any new Funds in which such plan is not invested that are added to the cross-trading program, or any new triggering events (as defined in Section IV(d) of this Part VII) that may have been added to any existing Funds in which such plan is not invested, since the time of the initial authorization described in Section II(h) of this Part VII, or the time of the notification described in Section II(i) of this Part VII.

(m) With respect to a cross-trade involving a Large Account:

(1) The cross-trade is executed in connection with a portfolio restructuring program, as defined in Section IV(f) of this Part VII, with respect to all or a portion of the Large Account's investments which an independent fiduciary of the Large Account (other than in the case of any assets of a Manager Plan) has authorized the Manager to carry out or to act as a ''trading adviser,'' as defined in Section IV(g) of this Part VII, in carrying out a Large Account-initiated liquidation or restructuring of its portfolio;

(2) Prior to the cross-trade, a fiduciary of the Large Account who is independent of Morgan Stanley and Mitsubishi (other than in the case of any assets of a Manager Plan) [25] has been fully informed of the Manager's cross-trading program, has been provided with the information required in Section II(k) of this Part VII, and has provided the Manager with advance written authorization to engage in cross-trading in connection with the restructuring, provided that:

(i) Such authorization may be terminated at will by the Large Account upon receipt by the Manager of written notice of termination.

(ii) A form expressly providing an election to terminate the authorization, with instructions on the use of the form, is supplied to the authorizing Large Account fiduciary concurrent with the receipt of the written information describing the cross-trading program. The instructions for such form must specify that the authorization may be terminated at will by the Large Account, without penalty to the Large Account, upon receipt by the Manager of written notice from the authorizing Large Account fiduciary;

(3) All cross-trades made in connection with the portfolio restructuring program must be completed by the Manager within sixty (60) days of the initial authorization (or initial receipt of assets associated with the restructuring, if later) to engage in such restructuring by the Large Account's independent fiduciary, unless such fiduciary agrees in writing to extend this period for another thirty (30) days; and,

(4) No later than thirty (30) days following the completion of the Large Account's portfolio restructuring program, the Large Account's independent fiduciary must be fully apprised in writing of all cross-trades executed in connection with the restructuring. Such writing shall include a notice that the Large Account's independent fiduciary may obtain, upon request, the information described in Section III(a) of this Part VII, subject to the limitations described in Section III(b) of this Part VII. However, if the program takes longer than sixty (60) days to complete, interim reports containing the transaction results must be provided to the Large Account fiduciary no later than fifteen (15) days following the end of the initial sixty (60) day period and the succeeding thirty (30) day period.

Section III. General Conditions

(a) The Manager maintains or causes to be maintained for a period of six (6) years from the date of each cross-trade the records necessary to enable the persons described below in subparagraph (b) of this Section III to determine whether the conditions of this Part VII have been met, including records which identify:

(1) On a Fund by Fund basis, the specific triggering events which result in the creation of the model prescribed output or trade list of specific securities to be cross-traded;

(2) On a Fund by Fund basis, the model prescribed output or trade list which describes:

(i) Which securities to buy or sell; and

(ii) How much of each security to buy or sell; in detail sufficient to allow an independent plan fiduciary to verify that each of the above decisions for the Fund was made in response to specific triggering events; and

(3) On a Fund by Fund basis, the actual trades executed by the Fund on a particular day 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, or other persons identified below in subparagraph (b) of this Section III, 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 the Manager, the records are lost or destroyed prior to the end of the six-year period, and no party in interest other than the Manager 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 subparagraph (b) below of this Section III.

(b)(1) Except as provided below in subparagraph (b)(2) of this Section III and notwithstanding any provisions of sections 504(a)(2) and (b) of the Act, the records referred to in subparagraph (a) of this Section III are unconditionally

[25] However, proper disclosures must be made to, and written authorization must be made by, an appropriate plan fiduciary for the Manager Plan in order for the Manager Plan to participate in a specific portfolio restructuring program as part of a Large Account.

available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department or the IRS,

(ii) Any fiduciary of a plan participating in a cross-trading program who has the authority to acquire or dispose of the assets of such plan, or any duly authorized employee or representative of such fiduciary,

(iii) Any contributing employer with respect to any plan participating in a cross-trading program or any duly authorized employee or representative of such employer, and

(iv) Any participant or beneficiary of any Manager Plan participating in a cross-trading program, or any duly authorized employee or representative of such participant or beneficiary.

(2) If, in the course of seeking to inspect records maintained by a Manager pursuant to this Section III, any person described below in subparagraph (b)(1)(ii) through (iv) of this Section III seeks to examine trade secrets, or commercial or financial information of the Manager that is privileged or confidential, and the Manager is otherwise permitted by law to withhold such information from such person, the Manager may refuse to disclose such information provided that, by the close of the thirtieth (30th) day following the request, the Manager gives a written notice to such person advising the person of the reasons for the refusal and that the Department of Labor may request such information.

(3) The information required to be disclosed to persons described above in subparagraph (b)(1)(ii) through (iv) of this Section III shall be limited to information that pertains to cross-trades involving a Fund or Large Account in which they have an interest.

Section IV. Definitions

The following definitions apply for purposes of this Part VII:

(a) ''Index Fund''—Any investment fund, account or portfolio sponsored, maintained, trusteed, or managed by a Manager or an Affiliate, 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, as defined in Section IV(c) of this Part VII, 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 the Manager does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That either contains ''plan assets'' subject to the Act, is an investment company registered under the 1940 Act, or contains assets of one or more institutional investors, which may include, but not be limited to, such entities as an insurance company separate account or general account, a governmental plan, a university endowment fund, a charitable foundation fund, a trust, or other fund which is exempt from taxation under section 501(a) of the Code; and,

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Index Fund which is intended to benefit a Manager or an Affiliate, or any party in which a Manager or an Affiliate may have an interest.

(b) ''Model-Driven Fund''—Any investment fund, account or portfolio sponsored, maintained, trusteed, or managed by the Manager or an Affiliate 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 using independent third party data, not within the control of the Manager, to transform an Index, as defined in Section IV(c) of this Part VII;

(2) Which either contains ''plan assets'' subject to the Act, is an investment company registered under the 1940 Act, or contains assets of one or more institutional investors, which may include, but not be limited to, such entities as an insurance company separate account or general account, a governmental plan, a university endowment fund, a charitable foundation fund, a trust, or other fund which is exempt from taxation under section 501(a) of the Code; and

(3) That involves no agreement, arrangement, or understanding regarding the design or operation of the Model-Driven Fund or the utilization of any specific objective criteria which is intended to benefit a Manager or an Affiliate, or any party in which a Manager or an Affiliate may have an interest.

(c) ''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:

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

(ii) A publisher of financial news or information, or

(iii) A public securities exchange or association of securities dealers; and,

(2) The index is created and maintained by an organization independent of the Manager, as defined in Section IV(i) of this Part VII; and,

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

(d) ''Triggering Event'':

(1) A change in the composition or weighting of the Index underlying a Fund by the independent organization creating and maintaining the Index;

(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:

(i) 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 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 the Manager has otherwise disclosed in the description of its cross-trading practices, pursuant to Section II(k) of this Part VII, the parameters for determining a material amount of net change, including any amount of discretion retained by the Manager that may affect such net change, in sufficient detail to allow the independent fiduciary to determine whether the authorization to engage in cross-trading should be given; and

(ii) Investments or withdrawals as a result of the Manager's discretion to invest or withdraw assets of a Manager Plan, other than a Manager Plan which is a defined contribution plan under which participants direct the investment of their accounts among various investment options, including such 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:

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

(ii) Stock attributable to dividends on portfolio securities; provided that such material amount has either 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 plan having assets held in the

Fund prior to, or within ten (10) days after, its inclusion as a ''triggering event'' for such Fund, or the Manager has otherwise disclosed in the description of its cross-trading practices, pursuant to Section II(k) of this Part VII the parameters for determining a material amount of accumulated cash or securities, including any amount of discretion retained by the Manager that may affect such accumulated amount, in sufficient detail to allow the independent fiduciary to determine whether the authorization to engage in cross-trading should be given;

(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 Model-Driven 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 plan having assets held in the Model-Driven Fund, prior to, or within ten (10) days after, its inclusion as a ''triggering event'' for such Model-Driven Fund; or

(5) A change in the composition or weighting of a portfolio for an Index Fund or a 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.

(e) ''Large Account''—Any investment fund, account or portfolio that is not an Index Fund or a Model-Driven Fund sponsored, maintained, trusteed (other than a Fund for which the Manager is a nondiscretionary trustee), or managed by the Manager, which holds assets of either:

(1) An employee benefit plan within the meaning of section 3(3) of the Act that has $50 million or more in total assets (for purposes of this requirement, the assets of one or more employee benefit plans maintained by the same employer, or controlled group of employers, may be aggregated provided that such assets are pooled for investment purposes in a single master trust);

(2) An institutional investor that has total assets in excess of $50 million, such as an insurance company separate account or general account, a governmental plan, a university endowment fund, a charitable foundation fund, a trust, or other fund which is exempt from taxation under section 501(a) of the Code; or

(3) An investment company registered under the 1940 Act (*e.g.,* a mutual fund) other than an investment company advised or sponsored by the Manager; provided that the Manager has been authorized to restructure all or a portion of the portfolio for such Large Account or to act as a ''trading adviser'' (as defined in Section IV(g) of this Part VII in connection with a portfolio restructuring program (as defined in Section IV(f) of this Part VII for the Large Account.

(f) ''Portfolio restructuring program''—Buying and selling the securities on behalf of a Large Account in order to produce a portfolio of securities which will be an Index Fund or a Model-Driven Fund managed by the Manager or by another investment manager, or in order to produce a portfolio of securities the composition of which is designated by a party independent of the Manager, without regard to the requirements of Section IV(a)(3) or (b)(2) of this Part VII, or to carry out a liquidation of a specified portfolio of securities for the Large Account.

(g) ''Trading adviser''—A Morgan Stanley or Mitsubishi entity whose role is limited with respect to a Large Account to the disposition of a securities portfolio in connection with a portfolio restructuring program that is a Large Account-initiated liquidation or restructuring within a stated period of time in order to minimize transaction costs. The Morgan Stanley or Mitsubishi Entity does not have discretionary authority or control with respect to any underlying asset allocation, restructuring or liquidation decisions for the account in connection with such transactions and does not render investment advice [within the meaning of 29 CFR 2510.3–21(c)] with respect to such transactions.

(h) ''Closing price''—The price for a security on the date of the transaction, as determined by objective procedures disclosed to investors in advance and consistently applied with respect to securities traded in the same market, which procedures shall indicate the independent pricing source (and alternates, if the designated pricing source is unavailable) used to establish the closing price and the time frame after the close of the market in which the closing price will be determined.

(i) ''Manager''—A Morgan Stanley entity acting as manager of a Fund or Large Account involved in one side of a cross-trade transaction involving a Mitsubishi entity acting as manager of a Fund or Large Account involved in the other side of the same cross-trade transaction; or a Mitsubishi entity acting as manager of a Fund or Large Account involved in one side of a cross-trade transaction involving a Morgan Stanley entity acting as manager of a Fund or Large Account involved in the other side of the same cross-trade transaction, where the Morgan Stanley entity and the Mitsubishi entity is:

(1) A bank or trust company, or any Affiliate thereof, which is supervised by a state or federal agency; or

(2) An investment adviser or any Affiliate thereof which is registered under the Investment Advisers Act of 1940.

(j) ''Affiliate''—An affiliate of a Manager is:

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

(2) Any officer, director, employee, or relative of such Manager, or partner of any such Manager; or

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

(k) ''Control''—The power to exercise a controlling influence over the management or policies of a person other than an individual.

(l) ''Relative''—A relative is a person that 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 sister.

(m) ''Nondiscretionary trustee''—A plan trustee whose powers and duties with respect to any assets of a plan are limited to

(1) The provision of nondiscretionary trust services to such plan, and

(2) Duties imposed on the trustee by any provision or provisions of the Act or the Code. The term ''nondiscretionary trust services'' means custodial services and services ancillary to custodial services, none of which services are discretionary. For purposes of this Part VII, a person who is otherwise a nondiscretionary trustee will not fail to be a nondiscretionary trustee solely by reason of having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

Part VIII. New Global Conditions Applicable to All Transactions Covered by This Exemption

(a) Notwithstanding the requirements above, the applicable Morgan Stanley/Mitsubishi Entity maintain(s) or cause(s) to be maintained for a period of six (6) years from the date of any transaction described herein, such records as are necessary to enable the persons described below in subparagraph (b) to determine whether the conditions of this proposed exemption were met, except that:

(1) If the records necessary to enable the persons described below in

subparagraph (b)(1)(i)–(iv) to determine whether the conditions of the proposed exemption have been met are lost or destroyed, due to circumstances beyond the control of the Morgan Stanley/Mitsubishi Entity, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest with respect to a plan which engages in the covered transactions, other than Morgan Stanley and Mitsubishi, 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 available for examination as required by subparagraph (b) below.

(b)(1) Except as provided below in subparagraph (b)(2), and notwithstanding the provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in subparagraph (a) are unconditionally available for examination during normal business hours at their customary location to the following persons or an authorized representative thereof:

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

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

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

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

(2) None of the persons described above in subparagraph (b)(1)(ii)–(iv) shall be authorized to examine the trade secrets of a Morgan Stanley/Mitsubishi Entity, or commercial or financial information, which is privileged or confidential; and

(3) Should a Morgan Stanley/Mitsubishi entity refuse to disclose information on the basis that such information is exempt from disclosure, pursuant to subparagraph (b)(2) above such Morgan Stanley/Mitsubishi Entity shall, by 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.

(c) If an Applicable Class Exemption is amended, revised or revoked, or is subject to a new interpretation by the Department following the grant of this exemption, such change or interpretation will apply to the relevant transactions, conditions and/or terms in the relevant exemption herein.

(d) *Disclosure of Conflicts:* The Morgan Stanley/Mitsubishi Entity engaging in a transaction covered by any Part of this exemption (with the exception of transactions described in Parts III and V) must provide a written notice to a fiduciary of that plan that is independent of both Mitsubishi and Morgan Stanley. The notice must clearly, and in plain English: Describe the ownership relationship between Morgan Stanley and Mitsubishi; describe the transactions that Morgan Stanley and Mitsubishi will engage in under this exemption on behalf of the plan or IRA; and alert the independent plan fiduciary that, as a result of the ownership relationship between Morgan Stanley and Mitsubishi, the previously identified transactions will provide a benefit to Morgan Stanley or Mitsubishi (*i.e.,* the party that is not exercising discretion over the assets involved in the transaction) and/or involve a conflict of interest;

(e) When relying on the relief in any Part of this exemption, the Morgan Stanley/Mitsubishi Entity must comply with the following ''Impartial Conduct Standards'': (1) The Morgan Stanley/Mitsubishi Entity, at the time of the transaction, must act in the Best Interest of the plan. In this regard, acting in the Best Interest means acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of affected plan, and not place the financial or other interests of the Morgan Stanley/Mitsubishi Entity, Related Entity, or other party ahead of the interests of the affected plan, or subordinate the plan's interests to their own; (2)(A) The compensation received, directly or indirectly, by the Morgan Stanley/Mitsubishi Entity and Related Entities for their services may not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (B) As required by the federal securities laws, the Morgan Stanley/Mitsubishi Entity must obtain the best execution of the investment transaction reasonably available under the circumstances; and (3) The Morgan Stanley/Mitsubishi Entity's statements to the plan about the covered transaction and other relevant matters must not be materially misleading at the time statements are made.

(f) All Morgan Stanley/Mitsubishi Entities utilizing the exemption will have policies and procedures in place that are prudently designed to ensure that the conditions of the exemption are met. The policies and procedures must be in place prior to the occurrence of the transaction that is the subject of the relevant relief.

Part IX. General Definitions

(a) The term ''Morgan Stanley/Mitsubishi Entity'' means an entity acting as a plan fiduciary in a transaction described in Parts I through VII:

(1) That meets the definition of Morgan Stanley, as defined below; or

(2) That meets the definition of Mitsubishi, as defined below; or

(b) The term ''Related Entity'' means an entity that meets the definition of ''Morgan Stanley/Mitsubishi Entity,'' except that the entity is not acting as a fiduciary with respect to the transaction that is the subject of the exemptive relief described in Parts I through VII of the exemption, if granted.

(c) The term ''Morgan Stanley'' means Morgan Stanley & Co. LLC and any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with Morgan Stanley & Co.

(d) The term ''Mitsubishi'' means Mitsubishi UFJ Financial Group, Inc., and any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with Mitsubishi UFJ Financial Group, Inc.

(e) For purposes of Part IX(c) and (d) above, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(f) The term ''Rating Agency'' or collectively, ''Rating Agencies'' means a credit rating agency that:

(1) Is currently recognized by the Securities and Exchange Commission (SEC) as a nationally recognized statistical ratings organization (NRSRO);

(2) Has indicated on its most recently filed SEC Form NRSRO that it rates ''issuers of asset-backed securities;'' and

(3) Has had, within a period not exceeding twelve (12) months prior to the initial issuance of the securities, at least three (3) ''qualified ratings engagements.'' A ''qualified ratings engagement'' is one:

(i) Requested by an issuer or underwriter of securities in connection with the initial offering of the securities;

(ii) For which the credit rating agency is compensated for providing ratings;

(iii) Which is made public to investors generally; and

(iv) Which involves the offering of securities of the type that would be granted relief by the certain underwriter exemptions (the Underwriter Exemptions).[26]

(g) The term ''Applicable Class Exemption'' means PTE 75–1, Part III; PTE 75–1, Part IV; PTE 77–3; PTE 77–4; PTE 79–13; PTE 86–128; or PTE 2002–12.

Effective Date: The exemption, if granted, will be effective as of the date the final exemption is published in the **Federal Register**.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons within 30 days of the publication of the notice of proposed exemption in the **Federal Register**. The notice will be provided to all interested persons in the manner agreed upon by the Applicant and the Department and will contain a copy of the notice of proposed exemption as published in the **Federal Register** and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the pending exemption. All written comments and/or requests for a hearing must be received by the Department within sixty days of the date of publication of this proposed exemption in the **Federal Register**.

All comments will be made available to the public. *Warning:* If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department, telephone (202) 693–8456. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

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

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

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

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

Signed at Washington, DC.

George Christopher Cosby,

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

[FR Doc. 2021–25139 Filed 11–17–21; 8:45 am]

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[26] The Underwriter Exemptions are a group of individual exemptions granted by the Department to provide relief for the origination and operation of certain asset pool investment trusts and the acquisition, holding, and disposition by plans of certain asset-backed pass-through certificates representing undivided interests in those investment trusts. The most recent amendment to the Underwriter Exemptions is the Amendment to Prohibited Transaction Exemption 2007–05, 72 FR 13130 (March 20, 2007), Involving Prudential Securities Incorporated, et al., To Amend the Definition of ''Rating Agency,'' [Prohibited Transaction Exemption 2012–08, 78 FR 41090 (July 9, 2013); Exemption Application No. D–11718].