

brief outline of the content of the presentation.

**Authority:** This notice is issued under the authority of sections 6(b)(1) and 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 656), the Federal Advisory Committee Act (5 U.S.C. App. 2), and 29 CFR part 1912.

Signed at Washington, DC, this 25th day of January, 2000.

**Charles N. Jeffress,**

*Assistant Secretary of Labor.*

[FR Doc. 00-2134 Filed 1-31-00 8:45 am]

**BILLING CODE 4510-26-M**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### Federal Advisory Council on Occupational Safety and Health; Notice of Meeting

Notice is hereby given of the date and location of the next meeting of the Federal Advisory Council on Occupational Safety and Health (FACOSH), established under Section 1-5 of Executive Order 12196 of February 26, 1980, published in the **Federal Register**, February 27, 1980 (45 FR 1279). FACOSH will meet on February 11, 2000 starting at 1:30 p.m., in Rooms 9 and 10 of the Bureau of Labor Statistics (BLS) Conference Center at the Postal Square Building at Two Massachusetts Avenue, NE, (First Street Entrance Only), Washington, DC 20212. The meeting will adjourn at approximately 3:30 p.m., and will be open to the public. All persons wishing to attend this meeting must exhibit a photo identification to security personnel.

Agenda items will include:

1. Call to Order
2. Federal Safety and Health Councils
3. Federal Safety and Health Conference Overview
4. OSHA Issues/Updates
5. Reports by Subcommittees
6. New Business
7. Adjournment

Written data, views or comments may be submitted, preferably with 20 copies, to the Office of Federal Agency Programs, at the address provided below. All such submissions, received by February 8, 2000, will be provided to the members of the Council and will be included in the record of the meeting. Anyone wishing to make an oral presentation should notify the Office of Federal Agency Programs by close of business February 8, 2000. The request

should state the amount of time desired, the capacity in which the person will appear and a brief outline of the content of the presentation. Persons who request the opportunity to address the Advisory Council may be allowed to speak, as time permits, at the discretion of the Chairperson of the Advisory Council. Individuals with disabilities who wish to attend the meeting should contact John E. Plummer at the address indicated below, if special accommodations are needed.

For additional information, please contact John E. Plummer, Director, Office of Federal Agency Programs, U.S. Department of Labor, Occupational Safety and Health Administration, Room N3112, 200 Constitution Avenue, NW, Washington, DC 20210, TEL: (202) 693-2122. An official record of the meeting will be available for public inspection at the Office of Federal Agency Programs.

Signed at Washington, DC, this 27th day of January 2000.

**Charles N. Jeffress,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 00-2120 Filed 1-31-00; 8:45 am]

**BILLING CODE 4510-26-M**

## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Application No. D-10384, et al.]

#### Proposed Exemptions; Deutsche Bank AG, et al. (Deutsche Bank)

**AGENCY:** Pension and Welfare Benefits 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 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

#### *Written Comments and Hearing Requests*

Unless otherwise stated in the Notice of Proposed Exemption, all interested persons are invited to submit written comments, and with respect to exemptions involving the fiduciary prohibitions of section 406(b) of the Act, requests for hearing within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the

person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, NW, Washington, DC 20210.

#### *Notice to Interested Persons*

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

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 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.

**Deutsche Bank AG, et al. (Deutsche Bank) Located in New York, NY**

[Application No. D-10384]

*Proposed Exemption*

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

**Section I. Covered Transactions**

If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to (1) the sale to employee benefit plans (the Plans) of a synthetic guaranteed investment contract (the Buy & Hold Synthetic GIC) offered by Deutsche Bank, which is or may become a party in interest with respect to the Plans; and (2) extensions of credit by Deutsche Bank to the Plans for the purpose of funding benefit withdrawals.

This proposed exemption is conditioned on the requirements set forth below in Section II.

**Section II. General Conditions**

(a) The decision to enter into a Buy & Hold Synthetic GIC is made on behalf of a participating Plan in writing by a fiduciary of such Plan which is independent of Deutsche Bank.

(b) Only Plans with total assets having an aggregate market value of at least \$50 million are permitted to purchase Buy & Hold Synthetic GICs; provided however that—

(1) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are “plan assets” under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity has purchased a Buy & Hold Synthetic GIC, the foregoing \$50 million requirement is deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that, if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the

commingled entity, which are in excess of \$100 million, or

(2) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are “plan assets” under the Plan Asset Regulation, which entity has purchased a Buy & Hold Synthetic GIC, the foregoing \$50 million requirement is deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

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

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

(c) Prior to the execution of a Buy & Hold Synthetic GIC, the independent Plan fiduciary receives a full and detailed written disclosure of all material features concerning the Buy & Hold Synthetic GIC, including—

(1) A copy of the contract (the Contract), underlying the Buy & Hold Synthetic GIC, which has been executed by Deutsche Bank and the Plan fiduciary, which stipulates the relevant provisions of such instrument, the interest rate that is credited (the Crediting Rate) to the book value account (the Book Value Account) of the Buy & Hold Synthetic GIC, the applicable fees and the rights and obligations of the parties;

(2) Information explaining in a manner calculated to be understood by a Plan fiduciary that if adverse market conditions occur, that the Crediting Rate to the Book Value Account of a Buy & Hold Synthetic GIC may be as low as 0 percent; and

(3) Copies of the proposed exemption and grant notice with respect to the exemptive relief provided herein.

(d) Following the receipt of such disclosure, the Plan fiduciary approves, in writing, the execution of the Buy &

Hold Synthetic GIC on behalf of the Plan.

(e) Upon entering into a Buy & Hold Synthetic GIC with a Plan fiduciary of a Plan that provides for participant investment selection (the Section 404(c) Plan), Deutsche Bank informs the Plan fiduciary that such fiduciary should provide each Plan participant with—

(1) A summary of the primary provisions of the Contract, including the applicable fees; and

(2) Information explaining that if adverse market conditions occur, the Book Value Account's Crediting Rate may be as low as 0 percent.

(f) Subsequent to a Plan's investment in a Buy & Hold Synthetic GIC, the Plan fiduciary and, if applicable, the Plan participant, upon such participant's request, receive a monthly report consisting of a statement of the Book Value Account, which specifies, among other things, the Book Value Account balance for the prior month, withdrawals from the Contract, any reduction in the balance of the Book Value Account on account of a security in the fixed portfolio (the Fixed Portfolio) becoming an impaired security, interest credited to the Book Value Account at the Crediting Rate, and the current month's ending balance for the Book Value Account. The report will also specify the Current Crediting Rate, the prior month's ending fair market value of the Fixed Portfolio, the proceeds of any securities liquidated, fees charged to the Plan, and the current month's ending fair market value of the Fixed Portfolio and rate of return.

(g) As to each Plan, the combined total of all fees and charges imposed under a Buy & Hold Synthetic GIC is not in excess of “reasonable compensation” within the meaning of section 408(b)(2) of the Act.

(h) Each Buy & Hold Synthetic GIC specifically provides an objective method for determining the fair market value of the securities owned by the Plan pursuant to such GIC.

(i) Each Buy & Hold Synthetic GIC has a predefined maturity date selected by the Plan fiduciary and agreed to by Deutsche Bank.

(j) Neither Deutsche Bank nor its affiliates maintain custody of the assets underlying the Buy & Hold Synthetic GIC or commingle those assets with other funds under their management.

(k) The formulas for computing the Crediting Rate for the Buy & Hold Synthetic GIC and a charge for terminating the Buy & Hold Synthetic GIC within three years of its effective date (the Early Termination Charge) are objectively determined. Further, the Early Termination Charge compensates

Deutsche Bank for its direct costs incurred in connection with the Buy & Hold Synthetic GIC.

(l) Deutsche Bank maintains books and records of each Buy & Hold Synthetic GIC transaction for a period of six years in a manner that is accessible for audit and examination. Such books and records are subject to annual audit by independent, certified public accountants.

#### *Summary of Facts and Representations*

1. The parties involved in the proposed transactions are described as follows:

(a) *Deutsche Bank AG* is a German banking institution founded in 1870 and based in Frankfurt, Germany. It is the largest triple-A rated bank in the world. In terms of assets and deposits, Deutsche Bank AG is the largest bank in the European union and among the ten largest banks in the world. Through its affiliates, Deutsche Bank AG is engaged, on a global basis, in investment banking, market making, distributing debt and equity securities of both governmental and private issuers. In addition, Deutsche Bank AG has capabilities worldwide in the areas of corporate finance, financial advisory services, foreign exchange transactions, over-the-counter derivative transactions and asset securitization.

(b) *Deutsche Bank North America Holding Corp. (DBNA)*, a direct subsidiary of Deutsche Bank AG, was created on September 4, 1991 to coordinate the North American activities of the DBNA and Deutsche Bank AG branches and subsidiaries that offer commercial banking, investment banking, asset management and capital markets products and services to individuals and corporations in the United States, Canada and Mexico.

(c) *Deutsche Bank New York (DBNY)*, the New York branch of Deutsche Bank, is operated pursuant to a license issued by the Superintendent of Banks of the State of New York on July 14, 1978. DBNY derives its powers from the New York Banking Law and is subject to the supervision of the New York State Banking Department, the Board of Governors of the Federal Reserve System and the United States courts. DBNY serves private individuals, enterprises, public corporations and institutional investors and banks in the United States, as well as Deutsche Bank AG's German clients.

(d) *Deutsche Morgan Grenfell Financial Products (DMGFP)*, an indirect subsidiary of DBNA and an unincorporated business division of various Deutsche Bank AG branches and subsidiaries, markets investment

banking products and services worldwide. Specifically, DMGFP's main activities include the marketing, arranging and hedging, in the name of various branches of Deutsche Bank AG, of certain of Deutsche Bank AG's fixed income activities which include Buy & Hold Synthetic GICs.

As of June 30, 1999, the aforementioned Deutsche Bank entities had total assets, on a consolidated basis, of \$877.317 billion.

(e) *The Plans* involved herein will consist primarily of defined contribution plans that are subject to the Act as well as Plans that are subject to sections 401(a) and 403(b) of the Code. As also noted herein, a Plan may invest in a Buy & Hold Synthetic GIC through commingled investment entities.

2. The transactions for which prospective exemptive relief is requested would be entered into by Deutsche Bank AG, typically through DBNY. The investment product would be marketed and arranged primarily through DMGFP, a subsidiary established pursuant to section 4(c)(8) of the Bank Holding Company Act of 1955, as amended, and supervised by the Board of Governors of the Federal Reserve System. The Buy & Hold Synthetic GIC will only be marketed to Plans by entities that are Deutsche Bank affiliates located in the United States.

Accordingly, Deutsche Bank is requesting an exemption from the Department in order to sell its Buy & Hold Synthetic GIC product to Plans and to extend credit to such Plans for the purpose of funding benefit withdrawals from the Contract. The Buy & Hold Synthetic GIC is a variation of traditional guaranteed investment contracts (the GICs). The Buy & Hold Synthetic GIC will be offered to an indeterminate number of Plan investors and to commingled entities. Deutsche Bank will negotiate the terms of the Buy & Hold Synthetic GIC with the appropriate Plan fiduciary which is expected to be the Plan's named fiduciary.<sup>1</sup>

3. Deutsche Bank represents that the Buy & Hold Synthetic GIC will provide purchasers with the advantages of a traditional GIC along with enhanced security that is not offered under a

traditional GIC. Under Deutsche Bank's Buy & Hold Synthetic GIC, each Plan will retain legal title to all of the assets underlying the arrangement and have the benefit of a contract pursuant to which all participant-initiated benefit payments and transfers will be paid based on the balance of the Book Value Account (see Representation 7.) For this purpose, participant-initiated benefit payments and transfers mean withdrawals necessary to accommodate any loans from the Plan to participants, in-service withdrawals requested by participants, distributions arising from termination of employment in the ordinary course and transfers, at the direction of participants, from the investment fund in which the Buy & Hold Synthetic GIC is held to another investment fund available under the Plan other than a "competing" investment fund (see Representation 11).

4. Like traditional GICs, Deutsche Bank's duties and obligations with respect to the Buy & Hold Synthetic GIC will be governed by the terms of a Contract which it will execute with the independent fiduciary of the affected Plan. The Contract, which will have no required minimum principal amount, will be issued pursuant to New York Banking Law and will be subject to the supervision of the New York State Banking Department and the Board of Governors of the Federal Reserve System. The terms and conditions of each Contract will be negotiated by the Plan fiduciary and Deutsche Bank. For example, the maturity date for the Buy & Hold Synthetic GIC will be agreed to by the Plan fiduciary and Deutsche Bank before the Contract is executed. Effectively, the Plan fiduciary will determine the maturity date of a Buy & Hold Synthetic GIC. However, in no event will the Buy & Hold Synthetic GIC have a stated maturity date exceeding seven years. Once the Contract is executed, Deutsche Bank will have no discretion over any of the terms of the Contract, which may be amended or modified only upon the mutual consent of the Plan fiduciary and Deutsche Bank.

5. Deutsche Bank represents that it will only market the Buy & Hold Synthetic GIC to Plans (or to collective investment funds established for the investment of assets of more than one Plan) that have at least \$50 million in assets. In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (i.e., the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity

<sup>1</sup> The Department notes that section 404(a)(1) of the Act requires, among other things, that a fiduciary of a plan must act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan. The Department notes that in order to act prudently in making investment decisions, plan fiduciaries must consider, among other factors, the availability, risks and potential return of alternative investments for the plan.

the assets of which are "plan assets" under the Plan Asset Regulation, which entity has purchased a Buy & Hold Synthetic GIC, the foregoing \$50 million requirement will be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million. However, if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary must have total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (i.e., the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity has purchased a Buy & Hold Synthetic GIC, the foregoing \$50 million requirement will be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity will be required to have (a) full investment responsibility with respect to Plan assets invested therein; and (b) total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Plan investment in the commingled entity, which are in excess of \$100 million.

6. Prior to the execution of a Buy & Hold Synthetic GIC, the independent Plan fiduciary will receive a full and detailed written disclosure of all material features concerning the Buy & Hold Synthetic GIC, including (a) the Contract underlying the Buy & Hold Synthetic GIC, which has been executed by Deutsche Bank and the Plan fiduciary, which stipulates the relevant provisions of such instrument, the applicable fees and the rights and obligations of the parties; (b) information, explaining in a manner calculated to be understood by the Plan fiduciary, that if adverse market

conditions occur, the interest rate that is credited (i.e., the Crediting Rate) to the Book Value Account of a Buy & Hold Synthetic GIC may be as low as 0 percent; and (c) copies of the proposed exemption and grant notice with respect to the exemptive relief provided herein. Following the receipt of such disclosure, the Plan fiduciary will approve, in writing, the execution of the Buy & Hold Synthetic GIC on behalf of the Plan.

Upon entering into a Buy & Hold Synthetic GIC with a Plan fiduciary of a Section 404(c) Plan, Deutsche Bank will inform the Plan fiduciary that such fiduciary should provide each Plan participant with (a) a summary of the primary provisions of the Contract; and (b) information explaining that, if adverse market conditions occur, the Book Value Account's Crediting Rate may be as low as 0 percent.

Subsequent to a Plan's investment in a Buy & Hold Synthetic GIC, the Plan fiduciary and, if applicable, the Plan participant, upon such participant's request, will receive a monthly report consisting of a statement of the Book Value Account, which specifies, among other things, the Book Value Account balance for the prior month, withdrawals from the Contract, any reduction in the balance of the Book Value Account on account of a security in the Fixed Portfolio becoming an impaired security, interest credited to the Book Value Account at the Crediting Rate, and the current month's ending balance for the Book Value Account. The report will also specify the Current Crediting Rate, the prior month's ending fair market value of the Fixed Portfolio, the proceeds of any securities liquidated, fees charged to the Plan, and the current month's ending fair market value of the Fixed Portfolio and rate of return.

7. Every Buy & Hold Synthetic GIC will consist of two components. One component will be the underlying securities or portfolio of assets (i.e., the Fixed Portfolio), title to which will remain with the Plan's trustee. The Fixed Portfolio will be comprised primarily of high grade, fixed income securities, which will be selected and managed by the Plan's trustee or another Plan fiduciary which is unaffiliated with Deutsche Bank. The Fixed Portfolio may consist of a single security or a fixed portfolio of securities that will be established at the inception of the Contract and is intended to be held until maturity. The value of the securities will be determined by objective standards (see Representation 16 below).

Although the Fixed Portfolio will not come under Deutsche Bank's administration or control, it affects the second component of each Contract, the Book Value Account, an accounting record established by Deutsche Bank to record the Plan's interest under the Buy & Hold Synthetic GIC. This is the amount that will be available to satisfy participant-initiated benefit payments and transfers.

At the inception of the Contract, the Book Value Account will be equal to the value of the Fixed Portfolio. Thereafter, the Book Value Account will be credited with a rate of interest (i.e., the Crediting Rate) that will be reset periodically (monthly, quarterly, semi-annually or annually) in accordance with the following formula which will be set forth in the Contract:

$$BV = \sum_{k=1}^n ((\text{net cashflow}_k) / (1 + \text{IRR}^{k-n}))$$

Where BV=The balance of the Book Value Account (as determined under the Contract provisions) on the determination date;  
net cash flow<sub>k</sub>=(1) In the case where the Fixed Portfolio consists of one security, the expected cashflows from that security, or (2) in the case where the Fixed Portfolio consists of more than one security, the aggregate expected cashflows from the securities (in either case, excluding all fees and charges applicable under the Buy & Hold Synthetic GIC) at time k; <sup>2</sup>  
IRR=The internal rate of return for the Fixed Portfolio;  
n=The determination date (as determined under the Contract provisions); and

<sup>2</sup> For purposes of the formula, the expected cashflows from a security in the Fixed Portfolio and the total number of expected cashflows from the security will be determined under a three-part method in the following order of preference: (a) from widely-available published sources independent of Deutsche Bank and its affiliates (such as Bloomberg); (b) if such information is not provided by widely-available, independent, published sources, the Plan fiduciary will cause the lead underwriter of the security (if the underwriter is not an affiliate of Deutsche Bank) to determine and provide such information to Deutsche Bank; or (c) if such information is not available from the lead underwriter or if the lead underwriter is an affiliate of Deutsche Bank, the Plan fiduciary will cause the issuer of the security to provide such information to Deutsche Bank. Deutsche Bank believes that the vast majority of the securities that will be included in the Fixed Portfolio will be publicly-traded securities for which cashflow information may be obtained from widely-available, independent, published sources. However, where the Plan fiduciary has specifically requested, Deutsche Bank will enter into a Buy & Hold Synthetic GIC with respect to one or more securities that are not publicly-traded. Then, methods (b) or (c) above will be applied to determine cashflow information.

N=The time of final cashflow from the Fixed Portfolio.

The foregoing formula, which will be objectively determined by a Plan fiduciary that is independent of Deutsche Bank (see Representation 9), is intended to produce a Crediting Rate that will equal the projected "internal rate of return" of each security comprising the Fixed Portfolio, with a floor of 0 percent. In addition, as described in Representations 4 and 12, the Contract will mature on a stated maturity date.

8. The Buy & Hold Synthetic GIC will be supported by one or more specific fixed income securities that are bought in the primary or secondary market and are intended to be held until maturity. High quality mortgage-backed securities will be the primary type of security utilized, although other high quality securities may be used to support a Buy & Hold Synthetic GIC. All securities in the Fixed Portfolio will have predictable yield and cash flow characteristics. As principal, interest and other payments are made on the Fixed Portfolio, such amounts will be made available for investment outside of the Buy & Hold Synthetic GIC at the direction of a Plan fiduciary independent of Deutsche Bank. Generally, the Fixed Portfolio will be sold only upon termination of the Contract in order to provide amounts for benefit payments or for participant-directed transfers to other investment funds available under the Plan.

9. Deutsche Bank believes that one of the attractive features of the Buy & Hold Synthetic GIC to a Plan is that Deutsche Bank will assume certain obligations with respect to the availability of funds for benefit withdrawals and participant-directed transfers between investment funds and the return realized from the Fixed Portfolio. Mechanically, this is accomplished through the establishment of the Book Value Account.

The Book Value Account will reflect the value of the Fixed Portfolio at the inception of the Contract, as increased by the Crediting Rate determined pursuant to the formula set forth in the Contract and described above. The formula is intended to produce a Crediting Rate that will be equal to the projected internal rate of return<sup>3</sup> of the Fixed Portfolio, but the Crediting Rate is guaranteed never to be below 0 percent. The Crediting Rate will be reset periodically so that it will at all times

<sup>3</sup> The term "internal rate of return" means the rate of return on the Fixed Portfolio determined without regard to any return from the reinvestment of interest, dividends and other proceeds on the Fixed Portfolio. Those amounts will be reinvested outside the Buy & Hold Synthetic GIC by a Plan fiduciary independent of Deutsche Bank.

reflect the projected internal rate of return of the Fixed Portfolio. Each component of this formula will be set forth in the Contract and explained to the Plan fiduciary who will decide whether to purchase the Buy & Hold Synthetic GIC on behalf of any Plan. At all times during the term of the Contract, the Crediting Rate will be determined pursuant to the formula.

10. Under the Contract, all participant-initiated benefit payments and transfers will be paid based on the balance of the Book Value Account. The Book Value Account will be reduced each month dollar-for-dollar for the amount of participant-initiated benefit payments and transfers made under the Plan and for the amount of principal payments, coupon interest and other payments received by the Plan from the Fixed Portfolio. Benefit payments or transfers resulting from an action of the Plan's sponsor may result in the Book Value Account being subject to an additional reduction due to the premature withdrawal of such assets depending on the relationship of the balance of the Book Value Account to the market value of the Fixed Portfolio at the time of the withdrawal.

11. Deutsche Bank's agreement to bear the economic effects of participant-initiated benefit payments and transfers through the use of the Book Value Account will be subject to certain conditions that are intended to assure that the factors under which Deutsche Bank has agreed to assume these effects do not change without its consent. If those conditions are not satisfied, Deutsche Bank will not be obligated to ensure the availability of the funds from the Fixed Portfolio to satisfy those benefit payments and transfers based on the balance of the Book Value Account, but rather withdrawals will be effected at the market value of the Fixed Portfolio. First, the Plan may not permit participant-directed transfers directly (or with less than a 90 day "equity wash") from the investment fund in which the Buy & Hold Synthetic GIC is held to another "competing" investment fund available under the Plan, i.e., to another investment fund that has an investment objective of providing a stable rate of return with limited risk of loss of principal. This condition is intended to assure that participants will not have an economic incentive to direct transfers from the Buy & Hold Synthetic GIC to obtain a temporary improvement in the return on their accounts without any material change in their risk profile.

Second, the Plan may not be amended without Deutsche Bank's consent in order to change the provisions of the

Plan pertaining to participant-initiated benefit payments and transfers or otherwise in a manner which may affect Deutsche Bank's obligations in this regard. For example, if a Plan provides that amounts necessary to fund loans from the Plan to participants were to be withdrawn *pro rata* from all investment funds (e.g., equity, balanced and fixed income), the Plan could not be amended to require that the funds for all such loans be withdrawn solely from the investment fund in which the Buy & Hold Synthetic GIC is held unless Deutsche Bank consents to the amendment.

Third, if any withdrawal arises from an action of the Plan's sponsor that affects a significant number of employees (e.g., layoffs, plant closings, divestitures, mergers or consolidations, the complete or partial termination of the Plan and the implementation of an early retirement incentive program), the effect of such withdrawal on the Book Value Account will generally be comparable to that of a similar withdrawal under a traditional GIC, i.e., such withdrawal from the Contract will be effected at the market value of the Fixed Portfolio. A Plan fiduciary may negotiate with Deutsche Bank that the Contract shall provide that any such withdrawal will be effected at the market value of the Fixed Portfolio only after similar employer-initiated withdrawals over a specified period (e.g., the preceding 12 months or the term of the Contract) have exceeded a specified percentage of the Book Value Account.

12. The Contract will mature on the stated maturity date of the security in the Fixed Portfolio or, if there is more than one security in the Fixed Portfolio, the latest stated maturity date of any of the securities. The stated maturity date of a security is the date of the expected maturity of the security at the time of the purchase. If the principal of the security (or the securities) in the Fixed Portfolio is actually repaid faster or slower than expected, the Contract will not mature on the stated maturity of the security (or the latest maturity date), but instead will mature on the date the last principal payment is actually received by the Plan. In no event will the Contract mature later than the actual maturity date of the security.

Notwithstanding the foregoing, the Contract may also mature on a fixed date mutually agreed upon by the Plan fiduciary and Deutsche Bank.<sup>4</sup>

<sup>4</sup> As noted in Representation 4, no Buy & Sell Synthetic GIC described herein will have a stated maturity date exceeding seven years.

If, on the maturity date, the balance of the Book Value Account exceeds the fair market value of the Fixed Portfolio, Deutsche Bank will pay the Plan the difference (see Representation 15). Because the Book Value Account's Crediting Rate will be equal to the underlying Fixed Portfolio's projected internal rate of return, any difference between the balance of the Book Value Account and the fair market value of the Fixed Portfolio on the maturity date of the Contract should be insignificant. Thus, any payment Deutsche Bank will have to make to support the Book Value Account should be negligible.

13. A Plan fiduciary may also elect to terminate the Buy & Hold Synthetic GIC at any time on 30 days (or such shorter period as mutually agreed upon by the Plan fiduciary and Deutsche Bank) prior notice to Deutsche Bank. Deutsche Bank may also terminate the Buy & Hold Synthetic GIC on 30 days prior notice to the Plan fiduciary only under limited circumstances, e.g., (a) on account of regulatory restrictions, or (b) if the Plan has breached one of its obligations under the Contract or has taken actions that would constitute an event of default under the Contract. Specifically, the Contract may be terminated by Deutsche Bank if (a) any fee or charge payable to Deutsche Bank under the Contract has not been timely paid, (b) a representation upon which Deutsche Bank has relied upon in entering into the Contract was or becomes untrue, (c) if withdrawals are effected from the Contract other than as permitted, or (d) if there are material changes in the arrangement that may have a material adverse effect on Deutsche Bank's obligations under the Contract (including changes in the Plan or its administration).<sup>5</sup>

Although the decision to terminate the Contract under these circumstances will be made by Deutsche Bank, such action can only be taken after the Plan has breached one of its obligations under the Contract or unilaterally has taken other actions that could materially modify, in an adverse manner, Deutsche Bank's obligations under the Contract. Thus, the Plan can preclude Deutsche Bank from terminating the arrangement merely by satisfying its contractual obligations and by not acting in a manner that materially alters the underwriting assumptions relied upon by Deutsche Bank in entering into the arrangement.

<sup>5</sup> According to the applicant, a change in custodial bank would not be considered a material change warranting a termination of the Contract by Deutsche Bank.

14. If the Plan fiduciary voluntarily terminates the Contract or if Deutsche Bank terminates the Contract for one of the reasons specified in the Contract (such as the Plan's breach of a contractual obligation), the Plan fiduciary will have complete control over the Fixed Portfolio (i.e., the Portfolio may be invested without any contractual constraints) and will realize the fair market value of the Fixed Portfolio. Deutsche Bank will have no obligation with respect to the Book Value Account (see Representation 21). If the Contract is terminated by the Plan fiduciary voluntarily within three years after its effective date, an Early Termination Charge payable by the Plan may apply that will be determined under an objective formula set forth in the Contract, which is intended to enable Deutsche Bank to recoup its costs incurred (e.g., research and underwriting resources, internal and external legal and other professional charges, and operational and systems expenses) in connection with the Contract. The formula is set forth as follows:

$[(F * BV)] * N,$

Where

F = The expense charge payable to Deutsche Bank as agreed upon by Deutsche Bank and the Plan's independent fiduciary at the inception of the Contract, expressed as an annual percentage rate;

BV = The balance of the Book Value Account on the termination date; and

N = The number of days in the period from the termination date through the third anniversary date of the effective date of the Contract, divided by 365.

Under no circumstances will the Early Termination Charge be payable by the Plan if Deutsche Bank has breached any of its obligations under the Contract or has defaulted under the Contract.

15. Under the Buy & Hold Synthetic GIC, Deutsche Bank will assume the obligation for the availability of funds to satisfy participant-initiated benefit payments and transfers up to the amount of the balance of the Book Value Account as of any date. Deutsche Bank, the Plan, the Plan fiduciaries or other agents will not have any discretion over when a withdrawal may be made from the Contract. The Contract will not be accessed for withdrawals until other specified sources of funds (e.g., contributions to the Plan's investment fund under which the Buy & Hold Synthetic GIC is held, current investment income, maturing proceeds, cash equivalents, available cash

attributable to the underlying Fixed Portfolio and other investment contracts which are to be accessed for withdrawals before the Contract under a "last-in-first-out" hierarchy) have been depleted. If a withdrawal is made from the Contract, such withdrawal will be made from cash realized on the sale of a portion of the Fixed Portfolio or, if an election is made by the Plan fiduciary and consented to by Deutsche Bank, such withdrawal amount will be paid to the Plan in cash by Deutsche Bank and the Plan will be obligated to repay such amount to Deutsche Bank as principal, interest and other amounts paid to the Plan on the Fixed Portfolio become available.<sup>6</sup>

16. If a withdrawal is to be satisfied by the sale of assets in the Fixed Portfolio, the Plan fiduciary will do so in a manner consistent with its fiduciary responsibilities under the Act. The Contract provides that the fair market value of the securities sold will be determined based upon the actual proceeds received by the Plan fiduciary in an arm's length transaction. Under the Contract, the fair market value of any security in the Fixed Portfolio will be determined by averaging three competitive bids for such security received from parties independent of, and mutually agreed upon by, Deutsche Bank and the Plan.

17. The portion of the Fixed Portfolio sold will also depend upon the type of Contract negotiated by the Plan fiduciary. In this regard, Deutsche Bank will offer Plans two types of Contracts (or a combination thereof). In the first type of Contract, as withdrawals occur during the term of such Contract, only the portion of the Fixed Portfolio necessary to satisfy the withdrawal having a fair market value equal to the amount of the withdrawal will be sold. Then, the Book Value Account will be correspondingly reduced by the amount of such payment. However, if the amount of the withdrawal is greater than the fair market value of the entire Fixed Portfolio (which could happen if the fair market value of the Fixed

<sup>6</sup> The election available to Deutsche Bank to pay the amount of the withdrawal instead of liquidating a portion of the Fixed Portfolio to satisfy the withdrawal is intended to create liquidity for the Plan in circumstances where the security that would otherwise be liquidated would be difficult to sell (e.g., where the principal amount of the security is small) rather than a situation where the value of the Fixed Portfolio falls below a minimum level. Deutsche Bank represents that the election would benefit the Plan by saving costs that would otherwise be incurred if the Plan was forced to sell the security on the open market. Deutsche Bank further represents that its election to pay the amount of a withdrawal will not affect its obligations to the Plan under the Buy & Hold Synthetic GIC.

Portfolio is less than the balance of the Book Value Account), Deutsche Bank will be required to sell the entire Fixed Portfolio to satisfy the withdrawal. In addition, Deutsche Bank will be required to pay the Plan the difference between the amount of the withdrawal and the fair market value of the Fixed Portfolio in cash. Conversely, if the value of the Fixed Portfolio exceeds the amount of the withdrawal, the Plan will not be required to pay the difference to Deutsche Bank.

When a withdrawal occurs under the second type of Contract, the portion of the Fixed Portfolio sold will be that portion having a fair market value equal to the amount of the withdrawal multiplied by a fraction, the numerator of which is the fair market value of the entire Fixed Portfolio and the denominator of which is the balance of the Book Value Account, and, if the sale proceeds are less than the amount of the withdrawal, Deutsche Bank will pay the Plan the amount of the deficiency in cash or, if the sale proceeds are greater than the amount of the withdrawal, the Plan will pay Deutsche Bank the amount of the excess in cash.<sup>7</sup>

18. To illustrate the method for making a withdrawal under the second type of Contract, assume that a withdrawal of \$10,000 is needed and to effect the withdrawal the Plan sells a portion of the Fixed Portfolio having a book value of \$10,000, but a then current market value of \$9,500. The Book Value Account will be reduced by \$10,000, the value of the Fixed Portfolio will be reduced by \$9,500 and Deutsche Bank will make a cash payment to the Plan of \$500 to make up the difference. If, however, the market value of the portion of the Fixed Portfolio sold were \$10,500, the Book Value Account would still be reduced by \$10,000, the Fixed Portfolio would be reduced by the full \$10,500 and the Plan would pay

Deutsche Bank an additional fee of \$500.

19. Under the second type of Contract, if the proceeds realized on the sale of a portion of the Fixed Portfolio are greater than the amount of the withdrawal, the Plan fiduciary may exercise its right to terminate the Contract and take full control over the Fixed Portfolio and, thereby, avoid paying an additional fee to Deutsche Bank equal to the excess. The purpose of this additional fee is to protect Deutsche Bank from the additional risks that were not intended to be assumed by Deutsche Bank in the context of the Buy & Hold Synthetic GIC. When a Plan fiduciary enters into a Buy & Hold Synthetic GIC, both the fiduciary and Deutsche Bank intend that the Fixed Portfolio will be held to maturity. Participant-initiated benefit payments and transfers that would require selling a portion of the Fixed Portfolio are possible, but are not contemplated. If such a sale were required and, at such time, the overall market value of the Fixed Portfolio exceeded the balance of the Book Value Account, Deutsche Bank would expect that a Plan fiduciary might decide to exercise its option to terminate the arrangement and "cash-in" the benefit of the appreciation in the market value of the Fixed Portfolio.<sup>8</sup> This is because, as the Buy & Hold Synthetic GIC is designed, the value of the Book Value Account and the Fixed Portfolio are expected to be equal at maturity. If, at any given point in time, the market value of the Fixed Portfolio exceeds the balance of the Book Value Account, it would generally reflect an unanticipated increase in the market value of the underlying Fixed Portfolio, the benefit of which could likely be lost if the Fixed Portfolio were held to maturity. If, however, the market value of the Fixed Portfolio does not exceed the balance of the Book Value Account, but an asset in the Fixed Portfolio with a market value above its book value were sold to effect a withdrawal following the selection of such security by the Plan fiduciary, Deutsche Bank would be placed in the situation of having an obligation with respect to the performance of assets that, as a whole, are underperforming while an asset that exceeded projected performance was disposed of at a profit. To allow the Plan to reap the benefit of the profit on this asset would fail to reflect the "book loss" on the entire Fixed Portfolio, a loss which Deutsche Bank is contractually obligated to bear.

<sup>8</sup> Under such circumstances, the Plan would not incur any costs unless the termination occurs prior to the third anniversary of the effective date of the contract (see Representation 14).

Thus, the profit is payable to Deutsche Bank as an additional fee and reflects the fact that this "profit," if realized at maturity, would otherwise have offset or reduced the amount Deutsche Bank would ultimately have been required to pay in respect of the Book Value Account of the remaining underperforming assets.

Alternatively, if the Plan fiduciary does not wish to pay Deutsche Bank this additional fee, the fiduciary may elect to enter into the first type of Contract described above. The two types of Contracts offer different risk levels from which the fiduciary may choose the one appropriate for the Plan.

20. Under either type of Contract, a fiduciary of the Plan independent of Deutsche Bank will, in its sole discretion, determine which of the securities in the Fixed Portfolio will be sold. If any portion of the Fixed Portfolio has to be sold to effect any withdrawal, the Plan fiduciary will do so in a manner consistent with its fiduciary responsibilities under the Act. The Contract provides that the fair market value of the securities sold will be determined based upon the actual proceeds received by the Plan fiduciary in an arm's length transaction.

21. If at the time the Contract matures, the balance of the Book Value Account exceeds the fair market value of the Fixed Portfolio, Deutsche Bank will make a payment to the Plan equal to such excess (the Book Value Payment). If the fair market value of the Fixed Portfolio equals or exceeds the balance of the Book Value Account, no Book Value Payment will be made and such excess belongs exclusively to the Plan.

During the term of the Contract, the Plan fiduciary will reinvest the proceeds of the Fixed Portfolio as the fiduciary sees fit in other investments. Any principal, interest and other proceeds paid to the Plan with respect to the Fixed Portfolio will not become subject to the Contract but instead will be reinvested by the Plan fiduciary. Accordingly, the value of the Fixed Portfolio will decline over time as principal and interest payments are made on the underlying security or securities. The Book Value Account will be correspondingly reduced as amounts are distributed from the arrangement. By reason of these distributions, it is expected that the Book Value Account will decrease significantly from its initial value by the time the Contract matures. Given this reduction in the Book Value Account and the fact that the Book Value Account's Crediting Rate is calculated based on the expected rate of return on the fixed Portfolio, any

<sup>7</sup> The underlying principle of the second type of contract is that a withdrawal resulting from a participant-initiated benefit payment or transfer does not affect the rate of interest credited to the Book Value Account. The credited rate of interest is maintained principally by keeping the ratio of the balance of the Book Value Account to the fair market value of the Fixed Portfolio the same before and after the withdrawal. This is illustrated in the following example where—

- Before the withdrawal, the balance of the Book Value Account is \$100 and the market value of the Fixed Portfolio is \$90. Assume a withdrawal of \$10 occurs.

- After the withdrawal, the balance of the Book Value Account is reduced by \$10 (amount of the withdrawal) to \$90. The market value of the Fixed Portfolio is reduced by the product of \$10 (amount of the withdrawal) and \$90 (the market value of the Fixed Portfolio before the withdrawal), over \$100 (balance of the Book Value Account before the withdrawal), an amount equal to \$81. (In other words,  $\$10 \times \$90/\$100 = \$9$ .  $\$90 - \$9 = \$81$ .)

Book Value Payment made should be *de minimus*.<sup>9</sup>

22. Deutsche Bank believes that the Buy & Hold Synthetic GIC is superior to traditional GICs in that each Buy & Hold Synthetic GIC serves the dual functions of (a) affording a Plan substantially greater protection against the risks of loss of its principal investment and (b) providing the Plan with an opportunity for a greater rate of return than a traditional GIC. Under the Buy & Hold Synthetic GIC, Deutsche Bank will make payments to the Plan such that all participant-initiated benefit payments and transfers will be paid based on the balance of the Book Value Account. This means that, despite fluctuations in the market value of the Fixed Portfolio, each participant, in making participant-initiated benefit payments and transfers, will be protected against any loss of principal by Deutsche Bank's contractual commitment. In the ordinary course, the effect of this commitment will be to enable the Plan to account for the value of the assets of the Plan held pursuant to the Contract without regard to any interim fluctuation in the market value of such assets. However, this commitment will have a real economic effect for Plan participants in the event that withdrawals are made from the Buy & Hold Synthetic GIC.

23. To recap, the Fixed Portfolio to be held under the Contract will be determined at the inception of the Contract. Generally, the Fixed Portfolio will be disposed of only upon termination of the Contract (if determined by the Plan fiduciary) or upon the occurrence of certain events specified in the Contract (see Representation 15 above). A security will be removed from the Fixed Portfolio if it becomes an impaired security (i.e., generally a defaulted or accelerated security or a security that no longer satisfies specified credit-related criteria) as objectively determined under the provisions of the Contract.<sup>10</sup>

<sup>9</sup>It is expected that, as of the maturity date of the Contract, there will be only a *de minimus* difference between the value of the Fixed Portfolio and the balance of the Book Value Account. However, during the term of the Contract, parity between Book Value and fair market value may not exist. For example, if a participant-initiated benefit payment or transfer occurs and such payment or transfer is made from cash realized on the sale of a portion of the Fixed Portfolio, the value of the Fixed Portfolio remaining after such sale and the Book Value Account after the reduction for the amount of such benefit payment may be quite different depending on the relationship of the Book Value of the portion of the Fixed Portfolio sold and the market value.

<sup>10</sup>In this regard, Deutsche Bank represents that it uses a standard, commercial definition of the term "impaired security" which is also used by many other issuers of synthetic GICs. Although this

In addition, the Plan will hold legal title to the Fixed Portfolio. Subject to the Plan's obligation to pay Deutsche Bank's fees, any appreciation in the market value of the Fixed Portfolio, as well as current interest and principal payments, will belong to the Plan.

Thus, the only risk to the Fixed Portfolio posed by the financial condition of Deutsche Bank will relate to the amount representing the excess, if any, of the balance of the Book Value Account over the fair market value of the Fixed Portfolio. Therefore, Deutsche Bank represents that the Buy & Hold Synthetic GIC will provide greater security than a traditional GIC wherein a Plan places a substantial amount of its assets at risk based on the creditworthiness of the issuer of the GIC.

24. Deutsche Bank will maintain, for a period of six years following the execution of each Buy & Hold Synthetic GIC transaction full and complete records and books reflecting the various accounts established in accordance with the Buy & Hold Synthetic GIC. Such records will be kept in a manner that is accessible for audit and examination. Upon written request by a Plan representative, Deutsche Bank will make its records pertaining to the Buy & Hold Synthetic GIC available during normal business hours for audit by independent, certified public accountants hired by the Plan fiduciary.

25. Deutsche Bank and the Plan fiduciary will agree to an expense charge (determined at the inception of the Contract) payable to Deutsche Bank with respect to the Buy & Hold Synthetic GIC that will be stated as an annual fee equal to a fixed percentage of

definition will appear in the template agreement provided by Deutsche Bank to a prospective customer for review, the specific definition of "impaired security," will be subject to negotiation by Deutsche Bank and the Plan fiduciary before the Contract is executed.

The standard definition of an "impaired security" is as follows: An "impaired security" means (a) a security with respect to which an event has occurred or exists which, under one or more agreements or instruments relating to such security, has resulted in the principal of, and/or interest on, such security becoming due and payable before any such amount would otherwise have been due or payable other than as a result of a call or other prepayment of a security made in accordance with its terms that does not constitute a default under such security; (b) a security with respect to which the issuer has failed to make one or more payments of principal or interest when due (giving effect to any applicable grace period); or (c) a security (1) with respect to which the specified rate of interest is not paid or distributed when due, (2) with respect to which interest is accruing on a principal balance that is less than the difference between the original par or face amount of such security and the amount of principal previously paid on such security, or (3) where the rate of interest thereon has been reset other than pursuant to the original terms thereof.

the balance of the Book Value Account and will accrue on a daily compound basis. This charge will cover four elements: (a) A benefit risk charge, (b) a maturity risk charge, (c) an expense charge, and (d) a profit charge. The benefit risk charge is a fee for assuming the risk of loss associated with participant-initiated benefit payments and transfers. It will be developed on a Plan-specific basis after a review of the Plan's benefit payment cashflow history and the structure of the Plan itself (i.e., the frequency at which withdrawals and investment transfers are permitted, and the structure of alternate investment opportunities). The maturity risk charge will be based on a review of the volatility of, and the guidelines for investment of, the Fixed Portfolio. The expense and profit charges will be assessed based on the expected expenses related to the arrangement and the payment to Deutsche Bank of a reasonable profit. Such negotiated charge would remain in effect throughout the term of the Contract.

Based on its review of competitive practices, Deutsche Bank represents that the aggregate charges with respect to the Buy & Hold Synthetic GICs offered by Deutsche Bank are, and are expected to continue to be, comparable to the charges made by other Buy & Hold Synthetic GIC providers.

26. In summary, it is represented that the subject transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The decision to enter into a Buy & Hold Synthetic GIC will be made on behalf of a Plan, in writing, by a fiduciary of the Plan which is independent of Deutsche Bank.

(b) Each Plan or commingled entity investing in a Buy & Hold Synthetic GIC will have at least \$50 million in assets.

(c) Prior to and subsequent to the execution of a Buy & Hold Synthetic GIC, the Plan fiduciary, and if applicable, Plan participants, will receive full and detailed written disclosures of all material features of the Contract, including a description of all applicable fees and charges as well as ongoing disclosures with respect to such investment.

(d) As to each Plan, the combined total of all fees and charges under the Buy & Hold Synthetic GIC will not be in excess of "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(e) Each Buy & Hold Synthetic GIC will specifically provide an objective method for determining the fair market value of the securities owned by the Plan pursuant to such GIC.

(f) Deutsche Bank will maintain, for a period of six years from the date of each Buy & Hold Synthetic GIC transaction, in a manner for audit and examination, books and records of all transactions which will be subject to annual audit by certified, public accountants selected by and responsible solely to the Plan.

#### *Notice to Interested Persons*

The applicant represents that because those potentially interested participants and beneficiaries cannot all be identified, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by publication in the **Federal Register**. Therefore, comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

#### **Cullen Incorporated Profit Sharing Plan and Trust (the Profit Sharing Plan), Cullen Incorporated Employees Defined Contribution Pension Plan and Trust (the Money Purchase Plan) (Collectively the Plans) Located in Fredericksburg, Virginia**

[*Exemption Application No. D-10823 and D-10824*]

#### *Proposed Exemption*

The Department of Labor (the Department) is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).<sup>11</sup> If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the past sale (the Sale) by the Plan of property located in Fredericksburg, Virginia (the Property) to Robert C. O'Neill (Mr. O'Neill), the trustee of the Plans, President and sole shareholder of the Plan Sponsor, and a party in interest

<sup>11</sup> Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978, 5 U.S.C. App. 1 [1995]) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

In the discussion of the exemption, references to section 406 and 408 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

with respect to the Plans, provided that the following conditions are satisfied: (a) the Sale was a one time transaction for a lump sum cash payment; (b) the purchase price was the fair market value of the Property as of the date of the Sale; (c) the Property has been appraised by a qualified, independent real estate appraiser; and (d) the Plans paid no commissions or other expenses relating to the Sale.

**EFFECTIVE DATE OF EXEMPTION:** The effective date of this exemption is November 6, 1998.

#### *Summary of Facts and Representations*

1. The applicant is Robert C. O'Neill (Mr. O'Neill). Mr. O'Neill is the trustee for the Plans. He is also the President and sole shareholder of Cullen Incorporated (Cullen Inc.), the Plans' sponsor. As of October 8, 1999, there were 14 participants in each Plan.

2. The Applicant understands that at the time of consummation of the Sale, the approximate fair market value of the total assets of the Profit Sharing Plan and Money Purchase Plan were \$348,139 and \$557,948, respectively and that approximately 11% and 12%, respectively, of the total assets for the 1997 Plan year were involved in the subject transaction.

The applicant represents that at the time of the Sale, Mr. O'Neill was the Plans' trustee. Cullen Inc., was the Plans' sponsor and a party in interest with respect to the Plans. Cullen Inc. is a property management company which manages various properties owned by the Cullen Land Corporation (Cullen Land).

3. The applicant states that the Property was owned by the Plans at the time of the Sale. The Property consisted of a building (the Kayo Building), a 850 square foot cinder block structure on 8,809 square feet located at 530 Princess Anne Street, Fredericksburg, Virginia 22401.

The applicant represents that on March 21, 1989 the Cullen Trust Limited Partnership, a Virginia Limited Partnership, was formed to purchase the Property from an unrelated third party. Cullen Land was the General Partner and the Plans were Limited Partners. The applicant further represents that the Property was purchased for \$103,384 by the Plans on September 1, 1991. The Profit Sharing Plan was a 39.5% limited partner with a capital contribution of \$38,933 and the Money Purchase Plan, a 59.5% limited partner with a capital contribution of \$63,391. Cullen Land owned a 1% interest with a capital contribution of \$1060.

The applicant represents that the Property was purchased to diversify the

portfolios of the Plans. The site of the Property is one block from the terminus of the Virginia Railway Express, the commuter rail service to the Washington, D.C. area. The applicant states that it was anticipated that the commuter rail would have a major impact on property values.

In addition, the applicant represents that the Property was leased to various unrelated third party commercial tenants from 1989 to 1998. Cullen Inc. leased and managed the Property and received no commissions or fees.

4. The Applicant represents that the motivation for the Plans' 1998 Sale of the Property to Mr. O'Neill was solely to benefit Plans' interests. The Plans owned the Property for about ten years. The applicant states that by 1997 and 1998 the annual rental income<sup>12</sup> from leasing the Kayo building to third parties did not produce the annual return commensurate with other alternative investments and the forecast for appreciation in the value of the Property was not adequate to justify its continued retention.<sup>13</sup>

In addition, the applicant represents that the Property would have required improvements at considerable cost to the Plans to increase returns. Accordingly, the applicant represents that it would not have been prudent to have the Plans take on debt, invest additional capital in the Property, and subsequently find a tenant.

5. The applicant represents that the services of Lawrence J. Gorman (Mr. Gorman) of Retirement Plan Services, Inc., located in Fredericksburg, Virginia, were retained to provide administrative services to the Plans. In addition, the applicant states that Mr. Gorman was a pension trust officer with the National Bank of Fredericksburg, in Fredericksburg, Virginia. Thereafter, the applicant represents, Mr. Gorman established his own pension administration business in the Fredericksburg area and the Plans transferred their business to Mr. Gorman's company.

The applicant represents that Mr. Gorman prepared the Plans' tax returns and Department of Labor reports since

<sup>12</sup> In this regard, the applicant represents that from 1989 to 1998 the gross rent was \$48,877 and the total expenses incurred to be \$30,281. Accordingly, the Plans' total return on this investment amounted to approximately \$18,596.

<sup>13</sup> The Department expresses no opinion as to whether the acquisition and holding of the Property by the Plans met the requirements of section 404 of the Act.

1989. The applicant further represents that he relied on the advice and counsel of Mr. Gorman prior to engaging in the Sale of the Property. The applicant states that Mr. Gorman was kept abreast of all developments relating to the transaction. The applicant further states that Mr. Gorman advised that the transaction as executed would be acceptable under applicable law as long as it would be documented by a qualified real estate appraiser that the price was at its fair market value.

6. The applicant retained the services of Mr. William R. Johnson (Mr. Johnson), MAI, an accredited appraiser with the Johnson Real Estate Services, Inc., located in Fredericksburg, Virginia. Mr. Johnson appraised the Property on April 25, 1998. Mr. Johnson represented that he is a certified general real estate appraiser, and represented that he and his firm were independent of the parties involved. After analyzing the Property, Mr. Johnson concluded that the fair market value of the Property, the "as is" market value of the fee simple interest in the Property, was \$125,000. In reaching this conclusion as to the value of the Property, Mr. Johnson used the sales comparison approach. Last, Mr. Johnson indicated in his report that the exposure time for this value is about 10 months and the estimated marketing time to be between 9 and 12 months.

7. The applicant represents that on November 6, 1998, he purchased the limited partnership interests from the Plans for \$125,000, the value of the Property as appraised by Mr. Johnson within the exposure time of 10 months.

Mr. O'Neill allocated \$49,874 to the Profit Sharing Plan for its interest and \$75,126 to the Money Purchase Plan for its interest. Mr. O'Neill determined to convert the Property into an office building for Cullen Inc. The cost of the conversion was \$245,000. The applicant represents that Cullen Inc. currently leases the Property.

8. The applicant represents that in late 1998, Cullen Inc. learned that Mr. Gorman had sold his business and his company and left the area. O'Neill secured the services of Phipps, Buckholder, located in Fredericksburg, Virginia, to provide administrative services and tax return preparation for the Plans. Phipps, Buckholder discovered the prohibited transaction during the review of the records of the Plans. Shortly thereafter, the applicant voluntarily sought advice from counsel and accordingly, filed this exemption application with the Department.

9. The applicants represent that the exemption would be administratively feasible in that unwinding the transaction would likely cause losses to

the Plans. It is in the interest of the Plans' participants and beneficiaries because the Plans' assets are now more liquid and investments can be more diversified. It is protective of their rights because the parties to the transaction obtained an independent appraisal prior to consummating the transaction and the purchase price of the Property was equal to its fair market value.

10. In summary, the Applicant represents that the requested retroactive individual exemption will satisfy the criteria of section 408(a) of the Act for the following reasons: (a) the Sale was a one time transaction for a lump sum cash payment; (b) the Plans received the fair market value of the Property at the time of the transaction; (c) the fair market value of the Property was determined by an independent, qualified real estate appraiser; and (d) the Plans paid no commissions or other expenses relating to the Sale.

**FOR FURTHER INFORMATION CONTACT:** J. Martin Jara of the Department, telephone (202) 219-8881. (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 of 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 accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 25th day of January, 2000.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Pension and Welfare Benefits Administration,  
Department of Labor.*

[FR Doc. 00-2122 Filed 1-31-00; 8:45 am]

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## **DEPARTMENT OF LABOR**

### **Pension and Welfare Benefits Administration**

**[Prohibited Transaction Exemption 2000-01; Exemption Application No. D-10755, et al.]**

#### **Grant of Individual Exemptions; South Central New York District Council of Carpenters Pension Fund (the Fund), et al.**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of Individual Exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and