DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11004, et al.]

Proposed Exemptions; Deutsche Bank AG (DB)

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 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the notice of proposed exemption, within 45 days from the date of publication of this **Federal Register** notice. Comments and requests for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. _____, stated in each notice of proposed exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *''moffitt.betty@dol.gov'',* or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

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

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

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

Deutsche Bank AG (DB), located in Germany, with affiliates in New York, New York and other locations; and JPMorgan Chase Bank, located in New York, New York; (collectively, with their Affiliates, the Applicants). (Application Nos. D–11004 and D–11106).

Proposed Exemption

Under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990), the Department is considering amending the following individual prohibited transaction exemptions (PTEs) and authorization made pursuant to PTE 96–62 (61 FR 39988, July 31, 1996—referred to herein as ''EXPRO''): PTE 2000–25 (65 FR 35129, June 1, 2000), issued to Morgan Guaranty Trust Company of New York and J.P. Morgan Investment Management, Inc., and PTE 2000–27, issued to the Chase Manhattan Bank (65 FR 35129, June 1, 2000), and Final Authorization Number (FAN) 2001–19E, issued to DB and its Affiliates (June 23, 2001).[1]

Section I—Transactions

If the proposed exemption is granted, the restrictions of section 406 of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) of the Code, shall not apply to the purchase of any securities by the Asset Manager on behalf of employee benefit plans (Client Plans), including Client Plans investing in a pooled fund (Pooled Fund), for which the Asset Manager acts as a fiduciary, from any person other than the Asset Manager or an affiliate thereof, during the existence of an underwriting or selling syndicate with respect to such securities, where the Affiliated Broker-Dealer is a manager or member of such syndicate (an ''affiliated underwriter transaction'' (AUT)), and/or where an Affiliated Trustee serves as trustee of a trust that issued the securities (whether or not debt securities) or serves as indenture trustee of securities that are debt securities (an ''affiliated trustee transaction'' (ATT)), provided that the following conditions are satisfied:

(a) The securities to be purchased are—

(1) Either:

(i) Part of an issue registered under the Securities Act of 1933 (the 1933 Act) (15 U.S.C. 77a *et. seq.*) or, if exempt from such registration requirement, are (A) 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, (B) issued by a bank, (C) exempt from such registration requirement pursuant to a Federal statute other than the 1933 Act, or (D) are 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 (the 1934 Act) (15 U.S.C. 781), and the issuer of which has been subject to the reporting requirements of section 13 of that Act (15 U.S.C. 78m) for a period of at least 90 days immediately preceding the sale of securities and has filed all

[1] *See also* PTE 2000–26 (65 FR 35129, June 1, 2000), issued to Goldman, Sachs & Co., and its Affiliates; PTE 2000–29 (65 FR 35129, June 1, 2000), issued to Morgan Stanley Dean Witter & Co. and its Affiliates; FAN 2001–24E (October 6, 2001), issued to Barclays Global Investors N.A., Barclays Capital, Inc. and their Affiliates; and FAN 2002–09E (September 14, 2002), issued to The TCW Group, Inc., and its Affiliates. The Department will separately consider similar amendments to those exemptions and authorizations upon the receipt of applications or submissions relating thereto from such entities.

reports required to be filed thereunder with the Securities and Exchange Commission (SEC) during the preceding 12 months; or

(ii) Part of an issue that is an ''Eligible Rule 144A Offering,'' as defined in SEC rule 10f–3 (17 CFR 270.10f–3(a)(4)). Where the Eligible Rule 144A Offering is of equity securities, the offering syndicate shall obtain a legal opinion regarding the adequacy of the disclosure in the offering memorandum;

(2) Purchased prior to the end of the first day on which any sales are made, at a price that is not more than the price paid by each other purchaser of securities in that offering or in any concurrent offering of the securities, except that —

(i) If such securities are offered for subscription upon exercise of rights, they may be 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 price that is not more than the price paid by each other purchaser of securities in that offering or in any concurrent offering of the securities and may be purchased on a day subsequent to the end of the first day on which any sales are made, provided that the interest rates on comparable debt securities offered to the public subsequent to the first day and prior to the purchase are less than the interest rate of the debt securities being purchased; and

(3) Offered pursuant to an underwriting or selling 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.

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

(1) Such securities are non-convertible debt securities rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization, *i.e.*, Standard & Poor's Rating Services, Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co., or Fitch IBCA, Inc., or their successors (collectively, the Rating Organizations); or

(2) Such securities are issued or fully guaranteed by a person described in paragraph (a)(1)(i)(A) of this exemption; or

(3) Such securities are fully guaranteed by a person who has issued securities described in (a)(1)(i)(B), (C), or (D), and who has been in continuous operation for not less than three years, including the operation of any predecessors.

(c) The amount of such securities to be purchased by the Asset Manager on behalf of a Client Plan does not exceed three percent of the total amount of the securities being offered. Notwithstanding the foregoing, the aggregate amount of any securities purchased with assets of all Client Plans (including Pooled Funds) managed by the Asset Manager (or with respect to which the Asset Manager renders investment advice within the meaning of 29 CFR 2510.3–21(c)) does not exceed:

(1) 10 percent of the total amount of any equity securities being offered;

(2) 35 percent of the total amount of any debt securities being offered that are rated in one of the four highest rating categories by at least one of the Rating Organizations; or

(3) 25 percent of the total amount of any debt securities being offered that are rated in the fifth or sixth highest rating categories by at least one of the Rating Organizations; and

(4) If purchased in an Eligible Rule 144A Offering, the total amount of the securities being offered for purposes of determining the percentages for (1)-(3) above is the total of:

(i) The principal amount of the offering of such class sold by underwriters or members of the selling syndicate to ''qualified institutional buyers'' (QIBs), as defined in SEC rule 144A (17 CFR 230.144A(a)(1)); plus

(ii) The principal amount of the offering of such class in any concurrent public offering.

(d) The consideration to be paid by the Client Plan in purchasing such securities does not exceed three percent of the fair market value of the total net assets of the Client Plan, as of the last day of the most recent fiscal quarter of the Client Plan prior to such transaction.

(e) The transaction is not part of an agreement, arrangement, or understanding designed to benefit the Asset Manager or an affiliate.

(f) If the transaction is an AUT, the Affiliated Broker-Dealer does not receive, either directly, indirectly, or through designation, any selling concession or other consideration that is based upon the amount of securities purchased by Client Plans pursuant to this exemption. In this regard, the Affiliated Broker-Dealer may not receive, either directly or indirectly, any compensation that is attributable to the fixed designations generated by purchases of securities by the Asset Manager on behalf of its Client Plans.

(g) If the transaction is an AUT,

(1) The amount the Affiliated Broker-Dealer receives in management, underwriting or other compensation is not increased through an agreement, arrangement, or understanding for the purpose of compensating the Affiliated Broker-Dealer for foregoing any selling concessions for those securities sold pursuant to this exemption. Except as described above, nothing in this paragraph shall be construed as precluding the Affiliated Broker-Dealer from receiving management fees for serving as manager of the underwriting or selling syndicate, underwriting fees for assuming the responsibilities of an underwriter in the underwriting or selling syndicate, or other consideration that is not based upon the amount of securities purchased by the Asset Manager on behalf of Client Plans pursuant to this exemption; and

(2) The Affiliated Broker-Dealer shall provide to the Asset Manager a written certification, signed by an officer of the Affiliated Broker-Dealer, stating the amount that the Affiliated Broker-Dealer received in compensation during the past quarter, in connection with any offerings covered by this exemption, was not adjusted in a manner inconsistent with section I, paragraphs (e), (f), or (g), of this exemption.

(h) In the case of a single Client Plan, the covered transaction is performed under a written authorization executed in advance by an independent fiduciary (Independent Fiduciary) of the Client Plan.

(i) Prior to the execution of the written authorization described in paragraph (h) above, the following information and materials (which may be provided electronically) must be provided by the Asset Manager to the Independent Fiduciary of each single Client Plan:

(1) A copy of the notice of proposed exemption and of the final exemption, if granted, as published in the **Federal Register**; and

(2) Any other reasonably available information regarding the covered transactions that the Independent Fiduciary requests.

(j) Subsequent to an Independent Fiduciary's initial authorization permitting the Asset Manager to engage in the covered transactions on behalf of a single Client Plan, the Asset Manager will continue to be subject to the requirement to provide any reasonably available information regarding the covered transactions that the Independent Fiduciary requests.

(k) In the case of existing plan investors in a Pooled Fund, such Pooled Fund may not engage in any covered

transactions pursuant to this exemption, unless the Asset Manager has provided the written information described below to the Independent Fiduciary of each plan participating in the Pooled Fund. The following information and materials (which may be provided electronically) shall be provided not less than 45 days prior to the Asset Manager's engaging in the covered transactions on behalf of the Pooled Fund pursuant to the exemption:

(1) A notice of the Pooled Fund's intent to purchase securities pursuant to this exemption and a copy of the notice of proposed exemption and of the final exemption, if granted, as published in the **Federal Register**;

(2) Any other reasonably available information regarding the covered transactions that the Independent Fiduciary requests; and

(3) A termination form expressly providing an election for the Independent Fiduciary to terminate the plan's investment in the Pooled Fund without penalty to the plan. Such form shall include instructions specifying how to use the form. Specifically, the instructions will explain that the plan has an opportunity to withdraw its assets from the Pooled Fund for a period at least 30 days after the plan's receipt of the initial notice described in subparagraph (1) above and that the failure of the Independent Fiduciary to return the termination form by the specified date shall be deemed to be an approval by the plan of its participation in covered transactions as a Pooled Fund investor. Further, the instructions will identify the Asset Manager and its Affiliated Broker-Dealer and/or Affiliated Trustee and state that this exemption may be unavailable unless the Independent Fiduciary is, in fact, independent of those persons. Such fiduciary must advise the Asset Manager, in writing, if it is not an ''independent Fiduciary,'' as that term is defined in section II(g) of this exemption.

For purposes of this paragraph, the requirement that the authorizing fiduciary be independent of the Asset Manager shall not apply in the case of an in-house plan sponsored by the Applicants or an affiliate thereof. However, in-house plans must notify the Asset Manager, as provided above.

(l) In the case of a plan whose assets are proposed to be invested in a Pooled Fund subsequent to implementation of the procedures to engage in the covered transactions, the plan's investment in the Pooled Fund is subject to the prior written authorization of an Independent Fiduciary, following the receipt by the Independent Fiduciary of the materials described in subparagraphs (1) and (2) of paragraph (k). For purposes of this paragraph, the requirement that the authorizing fiduciary be independent of the Asset Manager shall not apply in the case of an in-house plan sponsored by the Applicants or an affiliate thereof.

(m) Subsequent to an Independent Fiduciary's initial authorization of a plan's investment in a Pooled Fund that engages in the covered transactions, the Asset Manager will continue to be subject to the requirement to provide any reasonably available information regarding the covered transactions that the Independent Fiduciary requests.

(n) At least once every three months, and not later than 45 days following the period to which such information relates, the Asset Manager shall:

(1) Furnish the Independent Fiduciary of each single Client Plan, and of each plan investing in a Pooled Fund, with a report (which may be provided electronically) disclosing all securities purchased on behalf of that Client Plan or Pooled Fund pursuant to the exemption during the period to which such report relates, and the terms of the transactions, including:

(i) The type of security (including the rating of any debt security);

(ii) The price at which the securities were purchased;

(iii) The first day on which any sale was made during this offering;

(iv) The size of the issue;

(v) The number of securities purchased by the Asset Manager for the specific Client Plan or Pooled Fund;

(vi) The identity of the underwriter from whom the securities were purchased;

(vii) In the case of an AUT, the spread on the underwriting;

(viii) In the case of an ATT, the basis upon which the Affiliated Trustee is compensated;

(ix) The price at which any such securities purchased during the period were sold; and

(x) The market value at the end of such period of each security purchased during the period and not sold;

(2) Provide to the Independent Fiduciary in the quarterly report (i) in the case of AUTs, a representation that the Asset Manager has received a written certification signed by an officer of the Affiliated Broker-Dealer, as described in paragraph (g)(2), affirming that, as to each AUT covered by this exemption during the past quarter, the Affiliated Broker-Dealer acted in compliance with section I, paragraphs (e), (f), and (g) of this exemption, and that copies of such certifications will be provided to the Independent Fiduciary upon request, and (ii) in the case of ATTs, a representation of the Asset Manager affirming that, as to each ATT, the transaction was not part of an agreement, arrangement or understanding designed to benefit the Affiliated Trustee;

(3) Disclose to the Independent Fiduciary that, upon request, any other reasonably available information regarding the covered transactions that the Independent Fiduciary requests will be provided, including, but not limited to:

(i) The date on which the securities were purchased on behalf of the plan;

(ii) The percentage of the offering purchased on behalf of all Client Plans and Pooled Funds; and

(iii) The identity of all members of the underwriting syndicate;

(4) Disclose to the Independent Fiduciary in the quarterly report, any instance during the past quarter where the Asset Manager was precluded for any period of time from selling a security purchased under this exemption in that quarter because of its status as an affiliate of the Affiliated Broker-Dealer or of an Affiliated Trustee and the reason for this restriction;

(5) Provide explicit notification, prominently displayed in each quarterly report, to the Independent Fiduciary of a single Client Plan, that the authorization to engage in the covered transactions may be terminated, without penalty, by the Independent Fiduciary on no more than five days' notice by contacting an identified person; and

(6) Provide explicit notification, prominently displayed in each quarterly report, to the Independent Fiduciary of a Client Plan investing in a Pooled Fund, that the Independent Fiduciary may terminate investment in the Pooled Fund, without penalty, by contacting an identified person.

(o) Each single Client Plan shall have total net assets with a value of at least $50 million. In addition, in the case of a transaction involving an Eligible Rule 144A Offering on behalf of a single Client Plan, each such Client Plan shall have at least $100 million in securities, as determined pursuant to SEC rule 144A (17 CFR 230.144A).[2] In the case of

[2] SEC rule 10f-3(a)(4), 17 CFR 270.10f-3(a)(4), states that the term ''Eligible Rule 144A Offering'' means an offering of securities that meets the following conditions:

(i) The securities are offered or sold in transactions exempt from registration under section 4(2) of the Securities Act of 1933 (15 U.S.C. 77d(d)), rule 144A thereunder (§ 230.144A of this chapter), or rules 501–508 thereunder (§§ 230.501–230–508 of this chapter);

(ii) The securities are sold to persons that the seller and any person acting on behalf of the seller reasonably believe to include qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter; and

a Pooled Fund, the $50 million requirement will be met if 50 percent or more of the units of beneficial interest in such Pooled Fund are held by plans having total net assets with a value of at least $50 million. For purchases involving an Eligible Rule 144A Offering on behalf of a Pooled Fund, the $100 million requirement will be met if 50 percent or more of the units of beneficial interest in such Pooled Fund are held by plans having at least $100 million in assets and the Pooled Fund itself qualifies as a QIB, as determined pursuant to SEC rule 144A (17 CFR 230.144A(a)(F)).

For purposes of the net asset tests described above, where a group of Client 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 or the $100 million net asset requirement may be met by aggregating the assets of such Client Plans, if the assets are pooled for investment purposes in a single master trust.

(p) The Asset Manager qualifies as a ''qualified professional asset manager'' (QPAM), as that term is defined under part V(a) of Prohibited Transaction Exemption 84–14 (49 FR 9494, 9506, March 13, 1984) and, in addition, has, as of the last day of its most recent fiscal year, total client assets under its management and control in excess of $5 billion and shareholders' or partners' equity in excess of $1 million.

(q) No more than 20 percent of the assets of a Pooled Fund, at the time of a covered transaction, are comprised of assets of employee benefit plans maintained by the Asset Manager, the Affiliated Broker-Dealer, the Affiliated Trustee or an affiliate thereof for their own employees, for which the Asset Manager, the Affiliated Broker-Dealer, or an affiliate exercises investment discretion.

(r) The Asset Manager, and the Affiliated Broker-Dealer, as applicable, maintain, or cause to be maintained, for a period of six years from the date of any covered transaction such records as are necessary to enable the persons described in paragraph (s) of this proposed exemption to determine whether the conditions of this exemption have been met, except that—

(1) No party in interest with respect to a Client Plan, other than the Asset Manager and the Affiliated Broker-Dealer or Affiliated Trustee, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required by paragraph (s); and

(2) This record-keeping condition shall not be deemed to have been violated if, due to circumstances beyond the control of the Asset Manager or the Affiliated Broker-Dealer, or Affiliated Trustee, as applicable, such records are lost or destroyed prior to the end of the six-year period.

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

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

(ii) Any fiduciary of a Client Plan, 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 a Client Plan, or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of a Client Plan, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described in paragraphs (s)(1)(ii)—(iv) shall be authorized to examine trade secrets of the Asset Manager or the Affiliated Broker-Dealer, or the Affiliated Trustee or commercial or financial information which is privileged or confidential; and

(3) Should the Asset Manager or the Affiliated Broker-Dealer or the Affiliated Trustee refuse to disclose information on the basis that such information is exempt from disclosure pursuant to paragraph (s)(2) above, the Asset Manager shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

(t) An indenture trustee whose affiliate has, within the prior 12 months, underwritten any securities for an obligor of the indenture securities will resign as indenture trustee if a default occurs upon the indenture securities.

Section II—Definitions

(a) The term ''Asset Manager'' means any asset management affiliate of the Applicants (as ''affiliate'' is defined in paragraph (c)) that meets the requirements of this proposed exemption.

(b) The term ''Affiliated Broker-Dealer'' means any broker-dealer affiliate of the Applicants (as ''affiliate'' is defined in paragraph (c)) that meets the requirements of this exemption. Such Affiliated Broker-Dealer may participate in an underwriting or selling syndicate as a manager or member. 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.

(c) The term ''affiliate'' of a person includes:

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

(2) Any officer, director, partner, employee, or relative (as defined in section 3(15) of the Act) of such person; and

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

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

(e) The term ''Client Plan'' means an employee benefit plan that is subject to the fiduciary responsibility provisions of the Act and whose assets are under the management of the Asset Manager, including a plan investing in a Pooled Fund (as ''Pooled Fund'' is defined in paragraph (f) below).

(f) The term ''Pooled Fund'' means a common or collective trust fund or pooled investment fund maintained by the Asset Manager.

(g)(1) The term ''Independent Fiduciary'' means a fiduciary of a Client Plan who is unrelated to, and independent of, the Asset Manager, the Affiliated Broker-Dealer and the Affiliated Trustee. For purposes of this exemption, a Client Plan fiduciary will be deemed to be unrelated to, and independent of, the Asset Manager, the Affiliated Broker-Dealer and the Affiliated Trustee if such fiduciary represents that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for transactions described in section I, is an officer, director, or

(iii) The seller and any person acting on behalf of the seller reasonably believe that the securities are eligible for resale to other qualified institutional buyers pursuant to § 230.144A of this chapter.

highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Asset Manager, the Affiliated Broker-Dealer or the Affiliated Trustee and represents that such fiduciary shall advise the Asset Manager if those facts change.

(2) Notwithstanding anything to the contrary in this section II(g), a fiduciary is not independent if:

(i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Asset Manager, the Affiliated Broker-Dealer or the Affiliated Trustee;

(ii) Such fiduciary directly or indirectly receives any compensation or other consideration from the Asset Manager, the Affiliated Broker-Dealer or the Affiliated Trustee for his or her own personal account in connection with any transaction described in this exemption;

(iii) Any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Asset Manager, responsible for the transactions described in section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Client Plan sponsor or of the fiduciary responsible for the decision to authorize or terminate authorization for transactions described in section I. However, if such individual is a director of the Client Plan sponsor or of the responsible fiduciary, and if he or she abstains from participation in (A) the choice of the Plan's investment manager/adviser and (B) the decision to authorize or terminate authorization for transactions described in section I, then section II (g)(2)(iii) shall not apply.

(3) The term ''officer'' means a president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), or any other officer who performs a policy-making function for the entity.

(4) In the case of existing Client Plans in a Pooled Fund, at the time the Asset Manager provides such Client Plans with initial notice pursuant to this exemption, the Asset Manager will notify the fiduciaries of such Client Plans that they must advise the Asset Manager, in writing, if they are not independent, within the meaning of this section II (g).

(h) The term ''security'' shall have the same meaning as defined in section 2(36) of the Investment Company Act of 1940 (the 1940 Act), as amended (15 U.S.C. 80a–2(36)(1996)). For purposes of this exemption, mortgage-backed or other asset-backed securities rated by a Rating Organization will be treated as debt securities.

(i) The term ''Eligible Rule 144A Offering'' shall have the same meaning as defined in SEC rule 10f–3(a)(4) (17 CFR 270.10f–3(a)(4)) under the 1940 Act.

(j) The term ''qualified institutional buyer'' or ''QIB'' shall have the same meaning as defined in SEC rule 144A (17 CFR 230.144A(a)(1)) under the 1933 Act.

(k) The term ''Rating Organizations'' means Standard & Poor's Rating Services, Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co., or Fitch IBCA, Inc., or their successors.

(l) The term ''Affiliated Trustee'' means the Applicants and any bank or trust company affiliate of the Applicants (as ''affiliate'' is defined in paragraph (c)(1)) that serves as trustee of a trust that issues securities which are asset-backed securities or as indenture trustee of securities which are either asset-backed securities or other debt securities that meet the requirements of this proposed exemption. For purposes of this proposed exemption, other than section I(t), performing services as custodian, paying agent, registrar or in similar ministerial capacities is also considered serving as trustee or indenture trustee.

Preamble

This document contains a notice of pendency before the Department of a proposed individual exemption which, if granted, would amend: PTE 2000–25, issued to Morgan Guaranty Trust Company of New York and J.P. Morgan Investment Management, Inc. (65 FR 35129, June 1, 2000), PTE 2000–27, issued to the Chase Manhattan Bank (65 FR 35129, June 1, 2000), and FAN 2001–19E, issued to DB and its Affiliates (June 23, 2001), pursuant to EXPRO. The exemptions, and EXPRO authorization, respectively, permit purchases of securities by the Applicants' asset management affiliate on behalf of employee benefit plans for which such asset management affiliate is a fiduciary, from underwriting or selling syndicates where the Applicants' broker-dealer affiliate participates as a manager or syndicate member. If granted, this proposed amendment would permit a plan's asset manager to acquire securities, on behalf of the plan, in an initial public offering (IPO) when it or its affiliate is the trustee, indenture trustee or a similar functionary for the trust which issued the securities. Thus, the relief requested is designed to cover acquisitions of asset-backed securities by plans where the plans' asset manager is affiliated with such a trustee for an issuing trust, as described herein. If adopted, this proposed amendment would affect the participants and beneficiaries of the plans involved in such transactions and the fiduciaries with respect to such plans.

Summary of Facts and Representations

The facts and representations contained in the applications are summarized below. Interested persons are referred to the applications on file with the Department (*see* D–11004 and D–11106) for the complete representations of the Applicants.

1. DB is a German banking corporation and a leading commercial bank, with total assets of 928,994 million euros and shareholders equity of 43,683 million euros, as of 2001. DB and its Affiliates (including the New York Branch of Deutsche Bank (DBNY)) provide a wide range of banking, fiduciary, record keeping, custodial, brokerage and investment services to corporations, institutions, governments, employee benefit plans, governmental retirement plans and private investors worldwide. DB is regulated by the Bundesanstalt fuer Finanzdienstleistungsaufsicht (the ''BAFin'') in Germany.

2. Deutsche Bank Trust Company Americas (''DBTCA'') is a New York banking corporation and member bank of the U.S. Federal Reserve System. Deutsche Asset Management, Inc. (''DeAM Inc.'') is an investment adviser registered under the Investment Advisors Act of 1940. Both DBTCA and DeAM Inc. are indirect wholly-owned subsidiaries of DB. DBTCA and DeAM Inc., among other DB Affiliates, provide investment management and investment advisory services to plans covered by the Act. Hereinafter, DB, DBTCA, and DeAM Inc., and their other current and future asset management affiliates, shall be collectively referred to as the ''Asset Manager'' when discussing DB's activities relating to investment management or investment advisory services. Collectively, assets under management by DB and its Affiliates through collective trusts, separately managed accounts, and mutual funds currently exceed $585 billion.

3. Deutsche Banc Securities, Inc., a wholly-owned subsidiary of DB, is a registered broker-dealer (hereinafter, collectively with any other current and future broker-dealer affiliates, the ''Affiliated Broker-Dealer'') and regulated by the United States Securities & Exchange Commission (''SEC'') under Section 15 of the Securities Exchange Act of 1934. The Affiliated Broker-Dealer serves, and engages in

transactions with, plans covered by the Act.

4. J.P. Morgan Chase & Co. (''J.P. Morgan Chase'') is a financial holding company incorporated under Delaware law in 1968 and headquartered in New York, New York. As of December 31, 2001, after giving effect to the merger referred to below, J.P. Morgan Chase was the second largest banking institution in the United States, with approximately $694 billion in assets and approximately $41 billion in stockholders' equity. On December 31, 2000, J.P. Morgan & Co. Incorporated merged with and into The Chase Manhattan Corporation. Upon completion of the merger, The Chase Manhattan Corporation changed its name to ''J.P. Morgan Chase & Co.''

J.P. Morgan Chase is a global financial services firm with operations in over 60 countries, and has as its principal bank subsidiaries: JPMorgan Chase Bank, a New York banking corporation headquartered in New York City, which was formed in November 2001 by the merger of The Chase Manhattan Bank and Morgan Guaranty Trust Company of New York; and Chase Manhattan Bank USA, National Association, headquartered in Delaware.

The principal non-bank subsidiary of J.P. Morgan Chase is its investment bank subsidiary, J.P. Morgan Securities Inc. (''J.P. Morgan Securities''). J.P. Morgan Investment Management Inc. (''JPMIM'') is a wholly-owned subsidiary of J.P. Morgan Chase. J.P. Morgan Fleming Asset Management (USA) Inc. (JPMFAM), which was formerly known as Chase Asset Management, Inc., is a wholly-owned subsidiary of JPMorgan Chase Bank.

The activities of J.P. Morgan Chase are internally organized, for management reporting purposes, into five major businesses:

- Investment Banking, which includes securities underwriting and financial advisory, trading, mergers and acquisitions advisory, and corporate lending and syndication businesses;
- Investment Management and Private Banking, which includes an asset management business, including mutual funds; institutional money management and cash management businesses; and a private bank, which provides wealth management solutions for a global client base of individuals and families;
- Treasury & Securities Services, which provides information and transaction processing services, and moves securities and cash daily for its wholesale clients. Treasury & Securities Services includes custody, cash management, investor and institutional trust service businesses;
- J.P. Morgan Partners, a large and diversified private equity investment firm, with total funds under management in excess of $30 billion; and
- Retail and Middle Market Financial Services, which serves over 30 million consumers, small business and middle-market customers nationwide. Retail and Middle Market Financial Services offers a wide variety of financial products and services, including consumer banking, credit cards, mortgage services and consumer finance services, through a diverse array of distribution channels, including the internet and branch and ATM networks.

Requested Exemption

5. The Applicants seek to amend existing individual exemptions (*i.e.*, PTE 2000–25 (JP Morgan); PTE 2000–27 (Chase)) and an authorization made pursuant to PTE 96–62 a/k/a/ EXPRO (*i.e.*, FAN 2001–19E (DB)) that deal with the situation where an Asset Manager seeks to purchase securities for an employee benefit plan, in an initial offering, where the Asset Manager's Affiliate is a manager or member of the underwriting syndicate for such securities. Such a transaction is described herein as an Affiliated Underwriter Transaction or ''AUT''. The amendment proposed by the Applicants would add relief for two other transactions: (i) Where the Asset Manager is related to the trustee of the trust that issued the securities being underwritten or the indenture trustee of securities that are debt securities but its Affiliated Broker-Dealer is not part of the underwriting syndicate (*i.e.*, an Affiliated Trustee Transaction or ''ATT''); and (ii) where the Asset Manager is related both to the trustee and to a member or manager of the underwriting syndicate (*i.e.*, both an ''AUT'' and an ''ATT'' at the same time).

Therefore, the Applicants represent that the exemption, if granted, could be used in any of the following circumstances:

(i) Where an Asset Manager seeks to purchase securities (equities, debt, or asset-backed securities, regardless of whether the latter are treated for tax purposes as equity or debt) in an initial offering where an Affiliate of the Asset Manager is a manager or member of the underwriting syndicate but where, in the case of a debt security or an asset-backed security, the trustee or indenture trustee is an unaffiliated entity;

(ii) Where an Asset Manager seeks to purchase securities (debt or asset-backed securities, regardless of whether the latter are treated for tax purposes as equity or debt) in an initial offering where an Affiliate of the Asset Manager is the trustee or indenture trustee but where no member or manager of the underwriting syndicate is an Affiliate of the Asset Manager; or

(iii) Where an Asset Manager seeks to purchase securities (debt or asset-backed securities, regardless of whether the latter are treated for tax purposes as equity or debt) in an initial offering where an Affiliate of the Asset Manager is both the trustee or indenture trustee and a manager or member of the underwriting syndicate.

In such instances involving an ''AUT'', the exemption (if granted) would permit an Asset Manager to purchase for its Client Plans, or Pooled Funds, securities in an initial public offering (*i.e.*, an IPO) from underwriting or selling syndicates in which the Affiliated Broker-Dealer participates as a manager or member. In such instances involving an ''ATT'', DB or JPMorgan Chase Bank or an Affiliate of either, will act as a trustee, indenture trustee, or similar functionary (collectively, a ''Trustee'') with respect to the issuer of the securities (*i.e.*, a trust). The Applicants state that all such purchases of securities, whether in an ''AUT'' or ''ATT'' or both, would be made from an underwriter or broker-dealer other than the Affiliated Broker-Dealer and that the Affiliated Broker-Dealer would not receive any selling concessions with respect to the securities sold to Client Plans. Thus, the proposed exemption would not cover any purchases of securities for a plan by an Asset Manager directly from the Asset Manager's Affiliate.[3]

6. The Applicants represent that where the Affiliated Broker-Dealer is a member of an underwriting or selling syndicate, the Asset Manager generally makes purchases of securities for its Client Plans in compliance with part III of PTE 75–1, 40 FR 50845 (October 31, 1975). PTE 75–1, part III, provides a class exemption, under certain conditions, for a plan fiduciary to purchase securities from an underwriting or selling syndicate of which the fiduciary or an affiliate is a member. However, relief under PTE 75–1 is unavailable if the fiduciary or its affiliate is a manager of the underwriting or selling syndicate.

7. PTE 2000–25, PTE 2000–27 and FAN 2001–19E expanded the relief

[3] With respect to possible acquisitions of asset-backed securities that could be made by plans in the secondary market, where the plans' asset manager has an affiliate that acts as a sub-servicer for the issuing trust, *see* DOL Adv. Op. 99–03A (January 25, 1999).

afforded under PTE 75–1 to, among other things, situations where the Affiliated Broker-Dealer is a manager of the underwriting or selling syndicate. However, neither PTE 75–1, PTE 2000–25, PTE 2000–27 nor FAN 2001–19E currently addresses the situation where the fiduciary or its affiliate serves as Trustee with respect to a trust that is the issuer of the securities. Such trusts are normally associated with so-called asset-backed securities (ABS). ABS are usually issued as certificates representing an undivided interest in a trust which holds a portfolio of assets (*e.g.*, secured consumer receivables or credit instruments that bear interest).[4]

With respect to the types of Trustees that would be covered by the proposed exemption, the Applicants state that in asset-backed securities, which are structured as pass-through securities, there is generally a trustee of the pool of assets. In certain transactions, such as offerings of collateralized bond obligations (CBOs), there may also be an indenture trustee to hold the debt obligation of the obligor. In more traditional public debt offerings, there is generally only an indenture trustee, who holds the debt obligation of the obligor, holds any assets pledged as collateral to secure payment of the debt obligation, makes required payments and keeps records, and in the event of a default, acts for the note holders. The Applicants represent that the functions and obligations of an indenture trustee are aligned with the interests of the note holders because such a trustee is generally appointed only to perform such ministerial functions (*i.e.*, hold collateral, maintain records, and make payments when due). In this regard, the proposed exemption would also cover situations where an Asset Manager's Affiliate serves as a custodian, paying agent, registrar or other similar ministerial capacities (see Definition of ''Affiliated Trustee'' in section II(l) above).

8. The Applicants state that the Affiliated Broker-Dealer is frequently involved in offerings of ABS and other securities where the Asset Manager or its Affiliate serves as a Trustee for the trust which issues such securities. The inability of the Asset Manager to purchase ABS or other securities for its Client Plans in such cases can be detrimental to those accounts because the accounts can lose important fixed-income investment opportunities that are relatively less expensive or qualitatively better than other available opportunities in such securities.

9. The Applicants represent that the frequency of such offerings of ABS or other securities results from consolidation in the banking industry and the attendant reduction in the number of banks participating in the corporate trust business. Many factors that have made participation in the trust business less attractive to banks have contributed to this trend. On the income side, these factors include competitive pressure on pricing corporate trust services and loss of transactional fees and traditional ''float'' income due to the growth in book entry securities. On the expense side, the Applicants represent that the cost of entry into the corporate trust business and the cost of remaining competitive in the business have increased dramatically. This increase includes both technological and personnel costs which are necessary to remain competitive. The cost increase is particularly acute in the structured finance sector of the corporate trust business, where both systems and staff need to have the capability of supporting increasingly complex transactions.

10. The Applicants represent that equally significant are the changes in the securities underwriting business, including increased participation by banks and bank affiliates, and consolidation within the industry. In 1990, Morgan Guaranty was the only bank in the corporate trust business that also had a significant underwriting affiliate. By 2000, four of the top ten underwriters for structured finance transactions, such as ABS, had affiliated corporate trust businesses. Eight of the top ten trustees of trusts issuing ABS, a group with a combined market share of over 76 percent in 2000, were affiliates of underwriters active in the structured finance sector.[5]

11. The Applicants represent that currently most providers of corporate trust and related services in the structured finance marketplace are large banks that have the requisite staff and systems resources to efficiently serve the various types of ABS that are common to this marketplace. Most of these same banks, particularly those that are profitable and well capitalized, have expanded into the securities underwriting business, including underwriting of structured finance transactions. The Applicants represent that not only will plan investors be disadvantaged if banks and their affiliates that underwrite securities continue to be precluded from providing trustee services, but, further, it is clearly not in the best interest of plan investors to eliminate those banks—often the most competent in the servicing of structured finance transactions—from the pool of available corporate trust service providers.

12. The Applicants state that the Trustee in a structured finance transaction for ABS, while involved in complex calculations and reporting, typically does not perform any discretionary functions. Such a Trustee operates as a stakeholder and strictly in accordance with the explicit terms of the governing agreements, so that the intent of the crafters of the transaction may be carried out. These functions are essentially ministerial and include establishing accounts, receiving funds, making payments, and issuing reports, all in a predetermined manner. Unlike trustees for corporate or municipal debt, Trustees in structured finance transactions for ABS need not assume discretionary functions to protect the interests of debt holders in the event of default or bankruptcy because structured finance entities are designed to be bankruptcy remote vehicles. The Applicants represent that there is no

[4] For a discussion of prohibited transactions under the Act and exemptions relating to a plan's acquisition and holding of ABS, interested persons should review PTE 2002–41 (67 FR 54487, August 22, 2002) and the so-called ''Underwriter Exemptions'' listed therein, as well as PTE 2002–19 (67 FR 14979, March 28, 2002), which amended three of the Underwriter Exemptions granted to J.P. Morgan Chase and certain Affiliates prior to the general amendment to the other Underwriter Exemptions provided by PTE 2002–41.

Thus, the proposed exemption, if granted, would provide relief for prohibited transactions relating to a plan's acquisition and holding of ABS where a Plan's Asset Manager is affiliated with the Trustee of an issuing trust for a series of ABS (*i.e.*, an ATT). However, other prohibited transactions that may be involved with the plan's investment in ABS would have to be covered by an existing Underwriter Exemption (absent any other applicable exemption), including amendments relating thereto as described in PTEs 2002–19 and 2002–41. Interested persons should also review the Department's regulations defining ''plan assets'' for purposes of plan investments (*see* 29 CFR 2510.3–101, Definition of ''plan assets''—plan investments).

The Department notes that a fiduciary or other party in interest desiring relief afforded by one or the other of these exemptions would have to ensure that the applicable conditions of the appropriate exemption are met. Thus, for example, if the securities sold in an underwriting are asset-backed securities, both the proposed exemption and the existing exemptions involving asset-backed securities referred to above may be relevant for the contemplated transactions. However, it should be noted that the party seeking the relief offered by a particular exemption must ensure that the conditions of the exemption have been met.

[5] Under the Gramm-Leach-Bliley Act, signed into law by the President on November 12, 1999, certain provisions of the Glass-Steagall Act and the Bank Holding Company Act of 1956, as amended, are repealed. The Department notes that the effect of such law will likely be further consolidation of the financial services industry. The new law will facilitate cross-ownership and control among bank holding companies and securities firms through the creation of ''financial holding companies'' that will be permitted to engage in a broad range of financial and related activities, including underwriting and dealing activities.

''issuer'' outside the structured transaction to pursue for repayment of the debt. The Trustee's role is defined by a contract-explicit structure that spells out the actions to be taken upon the happening of specified events. The Applicants state that there is no opportunity (or incentive) for the Trustee in a structured finance transaction, by reason of its affiliation with an underwriter, asset manager, or otherwise, to take or not to take actions that might benefit the underwriter or asset manager to the detriment of plan investors.

With respect to offerings of more traditional public debt securities that are not part of a structured finance transaction, the Applicants state that an indenture trustee may have more discretion when the issuer of the securities is not bankruptcy remote.[6] In such instances, indenture trustees generally exercise meaningful discretion only in the context of a default, at which time the indenture trustee has the duty to act for the bondholders, in a manner consistent with the interests of investing plans (and other investors) and not with the interests of the issuer. In such situations, an indenture trustee may be an affiliate of an underwriter for the securities. In the event of a default, the duty of an indenture trustee in pursuing the bondholders' rights against the issuer might conflict with the indenture trustee's other business interests. However, the Applicants represent that under the Trust Indenture Act of 1939 (the Trust Indenture Act), an indenture trustee whose affiliate has, within the prior 12 months, underwritten any securities for an obligor of the indenture securities generally must resign as indenture trustee if a default occurs upon the indenture securities. Thus, the Applicants maintain that this requirement and other provisions of the Trust Indenture Act are designed to protect bondholders from conflicts of interest to which an indenture trustee may be subject.[7]

13. According to the Applicants, the role of the underwriter in a structured financing for a series of ABS involves, among other things, assisting the sponsor or originator of the applicable receivables or other assets in structuring the contemplated transaction. The Trustee becomes involved later in the process, after the principal parties have agreed on the essential components, to review the proposed transaction from the limited standpoints of technical workability and potential Trustee liability. After the issuance of securities to plan investors in a structured financing, while the Trustee performs its role as Trustee over the life of the transaction, the underwriter of the securities has no further role in the transaction. In addition, the Trustee has no opportunity to take or not take action, or to use information in ways that might advantage the underwriter to the detriment of plan investors. The Applicants state that an underwriter, in order to protect its reputation, clearly wants the transaction to succeed as it was structured, which includes the Trustee performing in a manner independent of the underwriter.

14. The Applicants represent that, in many offerings of ABS or other securities, the Trustee's fee is a fixed dollar amount that does not depend on the size of the offering. In such cases, the Asset Manager has no conflict of interest in an ATT because it cannot increase the Trustee's fee by causing Client Plans to participate in the offering. Where the Trustee's fee in an ATT is a portion of the principal amount of outstanding securities to be offered, the Asset Manager could conceivably cause Client Plans to participate to affect the size of the offering and thus the Trustee's fee.[8] The Applicants further represent that the protective conditions of the requested exemption (*e.g.*, the requirement of advance approval by an independent fiduciary and reporting of the basis for the Trustee's fee) render this possibility remote.

In this regard, the Applicants state that the present conditions of the proposed exemption, which are based on the prior individual exemptions granted by the Department for an ''AUT'', impose adequate safeguards as well for an ''ATT'' in order to prevent possible abuse. First, there are significant limitations on the quantity of securities that the Asset Manager may acquire for a Client Plan, meaning not only that there will be significant limitations on the ability of the Asset Manager to affect the fees of its Affiliate, but also insuring that significant numbers of independent investors also decided that the securities were an appropriate purchase. Second, the Asset Manager must obtain the consent of an independent fiduciary to engage in these transactions. Third, regular reporting of the subject transactions to an independent fiduciary will take place. Fourth, an independent fiduciary must be provided information on how securities purchased under the proposed exemption actually performed. Finally, the consent of the independent fiduciary may be revoked if it suspects that purchases by the Asset Manager have been motivated by a desire to generate fees for its Affiliated Trustee.

Investments in Offered Securities

15. The Applicants represent that the Asset Manager makes investment decisions on behalf of, or renders investment advice to, its Client Plans in accordance with the governing document of the particular Client Plan or Pooled Fund and the guidelines and objectives established in the investment management or advisory agreement. Since the Client Plans are covered by Title I of the Act, such investment decisions are also subject to the fiduciary responsibility provisions of the Act.[9]

[6] The amount of discretion possessed by an indenture trustee will depend on the terms of the particular indenture, and factual issues, such as whether a default has occurred.

[7] The Applicants submit that the Trust Indenture Act addresses analogous circumstances and is thus instructive regarding potential conflicts of interest. DB represents that the Trust Indenture Act was amended in 1990 to correct unnecessarily restrictive provisions that deemed a conflict of interest to exist where an indenture trustee or its affiliate simultaneously acts in other capacities (*e.g.*, underwriter) for the issuer of the debt securities. The Applicants state that the U.S. Congress, at the SEC's instigation, determined that an indenture trustee and its affiliates could act in multiple capacities (including as trustee and underwriter for the issuer) absent a default under the governing trust indenture. According to the Applicants, the premise for this change was that until such a default occurs, there is no risk that the trustee could or would act in any way that might conflict with the interests of security holders (*i.e.*, certificate holders of ABS). One of the reasons for the amendments to the Trust Indenture Act was the recognition of the alternative: withdrawal from the corporate trust business of the largest and best service providers, whose management would undoubtedly be attracted to the greater profitability of underwriting as opposed to the steady, but smaller profits from acting as an indenture trustee. According to the Applicants, the amendment to the Trust Indenture Act has in fact proved to be a benefit to the public in encouraging the best providers of trustee services to continue to provide such services.

[8] The Applicants note that this theoretical conflict is directly addressed by the protective conditions in the Underwriter Exemptions and in this proposed exemption. In this regard, the Applicants state that the exemption (if granted) will apply only to firm commitment underwritings, where, by definition, the entire issue of securities will be purchased, either by the public or the underwriters (*see* section I(a)(3) above). Thus, where the trustee's fee would be a fixed percentage of the total dollar amount of the securities issued in the offering, the amount of the trustee's fee would be, in fact, a fixed dollar amount that would be known to plan investors as part of disclosures made relating to the offering (*e.g.*, the prospectus or private placement memorandum). The Department notes that plan fiduciaries would have a duty to adequately review, and effectively monitor, all fees paid to service-providers, including those paid to parties affiliated with an Asset Manager.

[9] By proposing this exemption, the Department is not expressing an opinion regarding whether any investment decisions or other actions taken by an

Continued

16. The Applicants state that a decision by an Asset Manager for a Client Plan to invest in particular securities is made on the basis of price, value, and the particular Client Plan's investment criteria, not on whether the Trustee with respect to the securities is, or is affiliated with, the Asset Manager. The Applicants further assert that the Asset Manager has little incentive to make purchases for Client Plans in IPOs involving an ATT that are not in the interests of the Client Plans because the Asset Manager's compensation for its services is generally based upon total assets under its management. If the assets under its management do not perform well, the Asset Manager will receive less compensation and could lose the Client Plan's future business.

According to the Applicants, the proposed exemption would be in the interest of a Client Plan's participants and beneficiaries because it will increase investment opportunities for such plans in ABS or other securities. Failure to grant the exemption will unnecessarily restrict the investment opportunities available to Client Plans in fixed-income securities.

17. In summary, the Applicants represent that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Client Plans will gain access to desirable investment opportunities;

(b) In each offering, the Asset Manager will purchase the securities for its Client Plans from an underwriter or broker-dealer other than the Affiliated Broker-Dealer;

(c) Conditions similar to those of PTE 75–1, part III, will restrict the types of securities that may be purchased, the types of underwriting or selling syndicates and issuers involved, and the price and timing of the purchases;

(d) The amount of securities that the Asset Manager may purchase on behalf of Client Plans will be subject to percentage limitations;

(e) The Affiliated Broker-Dealer will not be permitted to receive, either directly, indirectly, or through designation, any selling concessions with respect to the securities sold to the Asset Manager;

(f) Prior to any purchase of securities, the Asset Manager will make the required disclosures to an Independent Fiduciary of each Client Plan and obtain written authorization for such transaction (*i.e.*, an ATT);

(g) The Asset Manager will provide regular reporting to an Independent Fiduciary of each Client Plan with respect to all securities purchased pursuant to the exemption, if granted, including all ATTs;

(h) Each Client Plan participating in these transactions will be subject to a minimum size requirement of at least $50 million ($100 million for ''Eligible Rule 144A Offerings''), with certain exceptions for Pooled Funds;

(i) The Asset Manager must have total assets under management in excess of $5 billion and shareholders' or partners' equity in excess of $1 million; and

(j) The Trustee will be unable to subordinate the interests of the investing Client Plans to those of the Asset Manager.

For a complete discussion of the facts and representations supporting the Department's decision to grant the original exemptions for JPMorgan Chase Bank and its Affiliates (*i.e.*, PTEs 2000–25 and 2000–27) for AUTs, interested persons should review the notice of proposed exemption for Morgan Guaranty Trust of New York, *et al.*, published in the **Federal Register** on February 8, 2000 (65 FR 6229).

Copies of all documents relating thereto are available for public inspection and may be obtained by interested persons from the Public Documents Room, Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Interested persons should request File Numbers D–10119 and D–10120, and D–10779 with respect to the application for JPMorgan Chase Bank (formerly, Morgan Guaranty Trust of New York and The Chase Manhattan Bank). With regard to FAN 2001–19E for DB and its Affiliates, interested persons should request File Number E–00226.

Notice to Interested Persons: The Applicants represent that because those potentially interested Client Plans that may invest in securities, involving either an AUT or an ATT (or both), cannot all be identified, the only practical means of notifying such Client Plans of this proposed exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

Asset Manager regarding the acquisition and holding of ABS or other securities in an ATT would be consistent with its fiduciary obligations under part 4 of title I of the Act. In this regard, section 404 of the Act requires, among other things, that a plan fiduciary 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 decisions on behalf of a plan.

FOR FURTHER INFORMATION CONTACT: Gary Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number). IBEW Local No. 1 Health and Welfare Fund, (the Welfare Fund) and IBEW Local No. 1, Apprenticeship and Training Fund, (the Training Fund; collectively, the Funds or the Applicants), located in St. Louis, MO. (Application Nos. L–11155 and L–11156, respectively.)

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act shall not apply to the lease of certain classroom space and supplemental facilities (the Lease) by the Welfare Fund to the Training Fund, a party in interest with respect to the Welfare Fund.

The proposed exemption is subject to the following conditions:

(1) The terms of the Lease are at least favorable to the Welfare Fund and the Training Fund as those obtainable in an arm's length transaction with an unrelated party.

(2) Qualified, independent appraisers have determined the initial amount of the Lease payments.

(3) A qualified, independent fiduciary, The Philip Company (TPC), has approved the Lease and has agreed to monitor the terms of the exemption, at all times, on behalf of the Welfare Fund.

(4) The independent fiduciary agrees to take whatever actions are necessary and proper to enforce the Welfare Fund's rights under the Lease and to protect the participants and beneficiaries of the Welfare Fund.

(5) The rental payments under the Lease are adjusted once every five years by the independent fiduciary to ensure that such Lease payments are not greater than or less than the fair market rental value of the leased space.

(6) The fair market rental amount for the leased space, at no time, will exceed 25 percent of the assets of either Fund, including any improvements that are constructed thereon.

(7) The independent fiduciary and the Board of Trustees of the Welfare Fund (the Welfare Fund Trustees) have determined that the Lease is an appropriate investment for the Welfare Fund and is in the best interest of the Welfare Fund's participants and beneficiaries.

(8) The Board of Trustees of the Training Fund (the Training Fund Trustees) has determined that the Lease transaction is an appropriate investment for the Training Fund and is in the best interest of the Training Fund's participants and beneficiaries.

Summary of Facts and Representations

1. The Welfare Fund, which operates under a formal Trust Agreement, is a collectively-bargained, multiemployer joint welfare plan. The Welfare Fund provides medical and related benefits to union electricians and their families. The Welfare Fund was established by Local 1, of the International Brotherhood of Electrical Workers, AFL–CIO (Local 1), a labor organization, and the St. Louis Chapter, of the National Electrical Contractors Association (St. Louis Chapter, NECA), an employer association.

The benefits provided by the Welfare Fund are funded by contributions made by the employers pursuant to collective bargaining agreements between Local 1 and the St. Louis Chapter, NECA. As of December 31, 2001, the Welfare Fund had net assets available for benefits of $87,890,891 based upon audited financial statements.[10] As of April 30, 2003, the Welfare Fund had 4,782 participants. The Welfare Fund's operations are located at 3260 Hampton Avenue, St. Louis, Missouri.

2. The Training Fund, which is administered under a formal Trust Agreement, is a collectively-bargained, multiemployer joint apprenticeship training plan. The Training Fund was established by Local 1 and the St. Louis Chapter, NECA. The Training Fund provides training and educational benefits to electrical apprentices and journeymen. The benefits are funded by contributions made by the employers to the Training Fund pursuant to collective bargaining agreements between Local 1 and the St. Louis Chapter, NECA. The Training Fund is a party in interest with respect to the Welfare Fund because employees of the Training Fund are participants in the Welfare Fund. As of December 31, 2002, the Training Fund had net assets available for benefits of $4,998,407 based upon audited financial statements.[11] As of April 30, 2003, the Training Fund had 3,267 participants. The Training Fund's present facility is located at 2300 Hampton Avenue, St. Louis, Missouri (the 2300 Hampton Avenue Building).

3. The Welfare Fund is administered by six trustees. Three of the Welfare Fund Trustees are appointed by Local 1 while the remaining three Welfare Fund Trustees have been appointed by the St. Louis Chapter, NECA. The Local 1 appointed Welfare Fund Trustees are Messrs. Stephen P. Schoemehl, James Reinheimer and Mathew Lampe. The St. Louis Chapter, NECA appointed trustees of the Welfare Fund are Messrs. Douglas R. Martin, Robert Kaemmerlen and Eric Aschinger.

The Training Fund is also administered by six trustees, three of whom are appointed by Local 1, and three of whom are appointed by the St. Louis Chapter, NECA. The Local 1 appointed Training Fund Trustees are Messrs. Stephen P. Schoemehl, Thomas E. George, and Dan King. The St. Louis Chapter, NECA appointed Training Fund Trustees are Messrs. Douglas R. Martin, T. Michael Fogarty, and Stephen J. Kohnen. As noted herein, Messrs. Stephen P. Schoemehl and Douglas Martin are common Trustees to both Funds.

4. The IBEW–NECA Service Center (the Service Center), which is a ''not for profit'' Missouri corporation, is a party in interest with respect to the Welfare Fund because it is an employer whose employees participate in such Fund. The Board of Directors of the Service Center are appointed by the Business Manager of Local 1 and the St. Louis Chapter, NECA. The Service Center provides employee benefit plan administration to approximately 17 welfare and pension funds, including the Funds. The largest group of employee benefits funds administered by the Service Center were established by Local 1 and the St. Louis Chapter, NECA pursuant to collective bargaining. The Service Center also administers employee benefit funds established by Local 257, IBEW, and the St. Louis Chapter, NECA, and a pension fund established by the Illinois Chapter, NECA and several locals of the IBEW. The Service Center's costs of administration are allocated among the various employee benefit funds that the Service Center administers.

The Service Center's sole administrative facility is located at 3260 Hampton Avenue, St. Louis, Missouri. There, the Service Center leases portions of three separate two-story buildings (the 3260 Hampton Avenue Buildings) from the Local 1, IBEW Pension Benefit Trust Fund (the Pension Fund), which is the owner of the 3260 Hampton Avenue Buildings. The Pension Fund is one of the employee benefit plans administered by the Service Center. The three 3260 Hampton Avenue Buildings comprise a total of 12,000 square feet of space. Of this total, the Service Center leases 9,300 square feet of space in these premises.[12] Two unrelated tenants occupy the remaining space in the 3260 Hampton Avenue Buildings.

The Welfare Fund is administered by the Service Center in the 3260 Hampton Avenue Buildings. Of the 9,300 square feet of space leased by the Service Center, employees of the Service Center perform work for the Welfare Fund within approximately 3,965 square feet of space.

The parking facilities at the 3260 Hampton Avenue Buildings are limited with a total of 45 spaces, of which 13 spaces are leased to the two outside tenants. There is no convenient overflow parking at the 3260 Hampton Avenue Buildings.

5. Under section 4.05 of the Welfare Fund Trust Agreement, the Welfare Fund Trustees are authorized to invest in real estate. Therefore, on September 26, 2002, the Welfare Fund Trustees signed a contingent sales contract for the purchase of a two-story, concrete block building, with office and training center facilities, located at 5735 Elizabeth Avenue, St. Louis, Missouri (the 5735 Elizabeth Avenue Building) with the owner, the Plumbers' and Pipefitters' Welfare Educational Fund, an unrelated party. Following the initial planning meetings, Messrs. Schoemehl and Martin, who are the common Trustees of the Welfare Fund and the Training Fund, did not participate in the decisions to purchase the 5735 Elizabeth Avenue Building or to lease it, in accordance with the Lease described herein.

Under the terms of the contingent sales contract, the Welfare Fund must satisfy the purchaser's contingencies prior to the last day of the applicable contingency period. The contingencies to be satisfied contemplate the Welfare Fund (a) obtaining any and all inspections and assessment reports pertaining to the 5735 Elizabeth Avenue Building; (b) obtaining a commitment for title insurance; (c) obtaining a survey of the 5735 Elizabeth Avenue Building

[10] According to the Applicants, the Welfare Fund's 2002 audit report has not been completed. However, draft balance sheets for this Fund show net assets available for benefits of $91,586,030 as of December 31, 2002, and $89,305,694, as of March 31, 2003.

[11] Based on an unaudited financial statement, the Training Fund had net assets available for benefits of $4,832,184.44 as of March 31, 2003.

[12] As noted above, the Pension Fund currently leases portions of its 3260 Hampton Avenue Buildings to the Service Center, a party in interest with respect to the Pension Fund. The Applicants represent that the current lease satisfies the terms and conditions of Prohibited Transaction Exemptions (PTEs) 76–1 and 77–10 (41 FR 12740, March 26, 1976 and 42 FR 33918, July 1, 1977, respectively). However, the Department expresses no opinion herein on whether such lease satisfies the terms and conditions of these class exemptions.

by a licensed Missouri land surveyor; (d) obtaining verification that the present zoning and deed restrictions of the 5735 Elizabeth Avenue Building will permit the Welfare Fund's intended commercial use and development; (e) reviewing and approving all documents and contracts pertaining to the 5735 Elizabeth Avenue Building; (f) receiving evidence satisfactory to the Welfare Fund in all respects as to the economic feasibility of acquiring, developing, and improving the 5735 Elizabeth Building; and (g) obtaining, from the Department, an individual exemption from the Act's prohibited transactions rules in order to engage in the subject Lease of a portion of the 5735 Elizabeth Avenue Building by the Welfare Fund to the Training Fund.

The relevant terms of the proposed sale contemplate that the 5735 Elizabeth Avenue Building will be sold to the Welfare Fund for $1,070,000 on an ''as is'' basis. The sale will take place approximately 30 days from the date the Department publishes the notice granting the requested exemption in the **Federal Register**.

6. Under section 3.03(a)(3) of the Training Fund Trust Agreement, the Training Fund Trustees are authorized to enter into a lease of buildings related to the training program. In this regard, the Applicants represent that the Training Fund requires overflow classroom and lab space at a location which is conveniently located to the Training Fund's 2300 Hampton Avenue Building. The Applicants state that the lease of the second floor of the 5735 Elizabeth Avenue Building would present an attractive opportunity for the Training Fund to acquire overflow classroom and lab space at a location that is one block away from the Training Fund's existing facility in the 2300 Hampton Avenue Building, and close to the Local 1 office.

The Training Fund Trustees represent that the Training Fund cannot meet current and anticipated demand for training programs at the 2300 Hampton Avenue Building. This is because the 2300 Hampton Avenue Building is located on a landlocked parcel. The Training Fund Trustees also state that constructing on the existing land parcel would be disruptive and costly for the Training Fund. Furthermore, the Training Fund Trustees maintain that leaving the existing facility at 2300 Hampton Avenue would not be an option for the Training Fund because it owns the property and, as of 1999, renovations costing $1,600,000 were made to the building.

7. The Applicants state that the Welfare Fund and its administrator, the Service Center, also require additional space for claims administration offices. The Applicants assert that the first floor of the 5735 Elizabeth Avenue Building will present an opportunity to expand and consolidate the Service Center's administrative offices on a single floor at a location that is convenient to many participants because of its proximity to the Training Fund and Local 1, one block apart in distance. The Applicants represent that the proposed lease of office space between the Welfare Fund and the Service Center, a participating employer, will be subject to the exemptive relief provided under PTEs 76–1 and 77–10. The Applicants further explain that it is the parties' intention that the Service Center Lease will comply with the terms and conditions of these class exemptions.[13] Therefore, the Applicants do not request additional administrative exemptive relief from the Department regarding such Lease.

8. Accordingly, with respect to the second floor of the 5735 Elizabeth Avenue Building, the Applicants request an administrative exemption from the Department that will permit, if granted, the Welfare Fund to lease classroom space and supplemental facilities to the Training Fund. The exemption transaction and related transactions will be structured as follows:

(a) The Welfare Fund will purchase the 5735 Elizabeth Avenue Building for a purchase price of $1,070,000, contingent upon, among other things, the Department granting this exemption;

(b) The Welfare Fund and the Training Fund will enter into the subject Lease for classroom space and supplemental facilities on the second floor of the 5735 Elizabeth Avenue Building; and

(c) The Welfare Fund and the Service Center will enter into the Service Center Lease on the first floor of the 5735 Elizabeth Avenue Building in a manner that is designed to comply with PTEs 76–1 and 77–10.

9. The construction costs in renovating the 5735 Elizabeth Avenue Building are estimated at $1,503,934, with an estimated additional $115,000 in professional costs related to architectural, legal, and appraisal services.[14] The Training Fund will contribute $426,207 to fund its allocated share of the second floor construction costs. This will result in a total net cost to the Welfare Fund of $2,262,727 for the purchase price and renovation costs of the 5735 Elizabeth Avenue Building. However, such costs will not exceed 5 percent of the assets of the Welfare Fund.

10. The second floor Lease of the 5735 Elizabeth Avenue Building to the Training Fund is for 8,309 square feet in ''white box'' condition, with renovations completed to bring the second floor into compliance with applicable building codes.[15] Initially, the Training Fund's base rent was set at $10.50 per square foot [16] based upon an independent appraisal (the Appraisal) of the property that was performed on November 20, 2002 by Messrs. Edward W. Dinan, MAI, CRE and Mark B. Baffa, Appraiser/Analyst, who are qualified, independent appraisers (the Appraisers), employed by Dinan Real Estate Advisors of St. Louis, Missouri. (*See* Representation 14 for further details about the Appraisal.) The Appraisers concluded that the market rent for the first floor Service Center Lease was $14.50 per square foot, and for the second floor Training Fund Lease, $10.50 per square foot. The $10.50 per square foot rental amount was based on the assumption that the Welfare Fund would fund the full $426,207 of construction costs for the renovation and any rehabilitation of the second floor of the 5735 Elizabeth Avenue Building. However, the Training Fund Trustees decided to

[13] The Welfare Fund Trustees represent that the Service Center Lease will satisfy the terms and conditions of PTEs 76–1 and 77–10. However, the Department expresses no opinion herein on whether such lease will satisfy the terms and conditions of these class exemptions.

[14] It is contemplated that Kadean Construction Company (Kadean), a general contractor, will perform the renovation work to be performed for the Training Fund. Kadean is not a party in interest to the Welfare Fund or the Training Fund because it is not a contributing employer. However, Kadean will subcontract the electrical work on the project to signatory employers who are parties in interest to the Training and Welfare Funds as contributing employers.

The Department is providing no opinion in this proposed exemption on whether the contemplated expenditures to be made by the Training Fund for the construction of the second floor of the 5735 Elizabeth Avenue Building are (or will be) consistent with the fiduciary responsibilities contained in part 4 of title I of the Act. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that plan fiduciaries act prudently and solely in the interest of the plan and its participants and beneficiaries when providing benefits to such participants and beneficiaries and defraying reasonable expenses of administering the plan.

[15] The Applicants represent that the Welfare Fund and the independent fiduciary are required to approve any alterations, additions, modifications, or improvements of a permanent nature to the second floor. During the term of the Lease, the alterations are the property of the Training Fund, and the Training Fund is required to reimburse the Welfare Fund for any additional taxes, inspections, and fees that are attributable in any way to such alterations. At the expiration of the Lease, or sooner termination, the alterations automatically become the property of the Welfare Fund.

[16] Or $7,270 monthly and $87,245 annually.

finance the second floor improvements by agreeing to pay the Welfare Fund $426,207, thereby buying down the Training Fund's rent to $6 per square foot.[17]

11. The Training Fund Lease is a written, triple net lease, having an initial term of five years and two five year renewal options. The Training Fund will pay 41.25 percent of the operating costs of the Building. Among others, these operating expenses include real estate taxes and insurance. At the time the Lease options are to be exercised, rent is to be set by the Welfare Fund's independent fiduciary, who has experience in real estate valuations.

Section 2.2 of the Training Fund Lease provides that the rent may be increased by the independent fiduciary, at the time of renewal, but in no event can the rent drop below the preceding term's rent. In this respect, the Welfare Fund is assured that the base rent amount remains at $6 per square foot. However, the Training Fund will have the right to terminate its exercise of a renewal option if the Training Fund does not accept the independent fiduciary's determination of rent payable during the renewal term.

12. The first floor lease of the 5735 Elizabeth Avenue Building to the Service Center, which the Applicants believe will be covered under PTEs 76–01 and 77–10, is for 11,836 square feet of finished office space. The Service Center's rent is set at $14.50 per square foot. The Service Center Lease is a written, triple net lease having a 10 year term, with one five year renewal option. The Service Center Lease provides for yearly termination during the initial term as of the last day of each lease year, provided that the Service Center gives at least 6 months prior written notice of such termination and pays a termination fee equal to the amount of unamortized improvement costs and a penalty of three months' rent. At the time the lease option is to be exercised, rent is to be set by the Welfare Fund's independent fiduciary.

Section 2.2 of the Service Center Lease provides that the rent may be increased by the independent fiduciary, at the time of renewal, but in no event can the rent drop below the preceding term's rent. In this respect, the Welfare Fund is assured that the base rent will remain at $14.50 per square foot. The Service Center will also pay 58.75 percent of the operating costs associated with the 5735 Elizabeth Avenue Building.

13. The Welfare Fund anticipates a rate of return on the 5735 Elizabeth Building of between 8.5 percent to 9.5 percent. With the assistance of the independent fiduciary, TPC, the Welfare Fund has established a contingency reserve of 10 percent of the projected construction costs ($150,000). If the entire contingency reserve is used, the Welfare Fund's projected return is 8.55 percent.

14. As noted briefly in Representation 10, on November 25, 2002, the Welfare Fund Trustees obtained an independent appraisal report (the Appraisal Report) of the 5735 Elizabeth Avenue Building. In the Appraisal Report, the Appraisers also valued the proposed improvements and the contemplated Leases.

Initially, the Appraisers determined that the fair market value of a fee simple interest in the 5735 Elizabeth Avenue Building was $1,070,000 as of November 20, 2002, in an ''as is'' condition. The Appraisers then valued the 5735 Elizabeth Avenue Building as of September 1, 2003, on an ''as proposed basis'' using both a ''direct capitalization'' valuation ($2,690,000) and a sales comparison approach ($2,620,000).

The Appraisal Report also included a survey of area rents. Under the survey, the Appraisers concluded that the market rent for the first floor Service Center Lease was $14.50 per square foot, and $10.50 per square foot for the second floor Training Fund Lease.

15. As noted above, the proposed rental under the Training Fund Lease was adjusted to $6 per square foot based upon the Training Fund agreeing to fund its allocated share of the construction costs. These costs include, among others, new mechanical, electrical and plumbing systems for the 5735 Elizabeth Avenue Building. The Appraisers, in a letter dated December 16, 2002, considered $6 per square foot ''market rent,'' given the assumption that the Training Fund was financing its own improvements. The Appraisers also adjusted the direct capitalization valuation of the 5735 Elizabeth Avenue Building downward to $2,290,000 in order to take into account the reduction in the Training Fund's rent to $6 per square foot. However, the Appraisers' sales comparison valuation remained unchanged at $2,690,000.

16. In addition to its short term obligations, the Welfare Fund is funding retiree medical benefits which is a long term funding goal similar to a pension benefit. The Welfare Fund's projected investment in the 5735 Elizabeth Avenue Building of approximately $2,290,000, with a projected return ranging from 8.5 percent to 9.5 percent, represents approximately 2.6 percent of the Welfare Fund's assets. The Welfare Fund's investment consultant, Mr. Randall Kirkland, has reviewed the contemplated purchase and has concluded that it does not represent an over-concentration in real estate and will fit the long term investment goals of the Welfare Fund which is funding for retiree medical. Furthermore, the Welfare Fund Trustees, and for that matter, the Training Fund Trustees, have determined that the Lease is an appropriate transaction for the Funds and is in the best interests of the participants and beneficiaries of such Funds.

17. The Welfare Fund Trustees have retained TPC to serve as independent fiduciary with respect to the Training Fund Lease and the Service Center Lease. Mr. Philip Hulse, the President of TPC, will undertake the specific duties of the independent fiduciary. Mr. Hulse is a real estate broker and a member of several real estate organizations, including the Society of Industrial and Office Realtors, National Association of Realtors, St. Louis Association of Realtors, Missouri Association of Realtors, and the Missouri State Bank Board of Directors. In addition, Mr. Hulse has partial ownership interests in several real estate partnerships of over two million square feet of office, industrial, and commercial space throughout the St. Louis metropolitan market. Since 1985, Mr. Hulse's firm, TPC, has been involved in the St. Louis, Missouri commercial and industrial real estate community where it has assisted clients in a variety of capacities, including tenant and buyer representation, site selection, asset disposition, investment, and development.

On December 17, 2002, the Welfare Fund Trustees and Mr. Hulse on behalf of TPC, entered into and executed an independent fiduciary engagement agreement. Pursuant to this agreement, TPC has agreed to (a) evaluate and make recommendations relating to the provisions on the fair market rental value of the 5735 Elizabeth Avenue Building (and any proposed amendments thereto); (b) evaluate and make recommendations on the provisions of the sales contact for the 5735 Elizabeth Avenue Building (and any proposed amendments thereto); (c) evaluate and make recommendations on the provisions of the Training Fund and Service Center Leases (and any proposed amendments thereto), and make a determination and

[17] Or $4,155 monthly and $49,854 annually. With the payment of renovation costs and first year rent, the Training Fund's total investment in the 5735 Elizabeth Avenue Building ($476,061) would represent approximately 10 percent of the Training Fund's assets.

recommendation to the Welfare Fund Trustees whether such Leases would be in the best interest and protective of the Funds; (d) monitor the transactions related to the Training Fund Lease, including verification that monthly rent has been timely paid; (e) monitor the exemption to ensure that the terms are complied with and take all appropriate actions to ensure that the Training Fund Lease is protective and in the best interest of the Welfare Fund; and (f) recommend to the Welfare Fund Trustees whether the Leases should be terminated or the amount of the Lease payment adjustments when the five year options under the Training Fund Lease becomes due.

On behalf of TPC, Mr. Hulse represents that both he and the firm are independent of, and unrelated to either Applicants. In addition, Mr. Hulse states that he has been advised by legal counsel to the Welfare Fund regarding his fiduciary obligations under ERISA and he acknowledges and accepts such duties, responsibilities and liabilities as an ERISA fiduciary for the Welfare Fund.

In his fiduciary capacity, Mr. Hulse has reviewed and made recommendations to the Welfare Fund Trustees on the purchase of the 5735 Elizabeth Avenue Building and contemplated leases involving the Training Fund and the Service Center. Prior to making its determination, Mr. Hulse represents that he has examined the Welfare Fund's overall investment portfolio, considered the liquidity requirements of the Welfare Fund, considered the diversification of the portfolio in light of the proposed transactions, and considered whether the proposed transactions herein comply with the Welfare Fund's investment objectives and policies. Lastly, Mr. Hulse explains that he has reviewed the Training Fund's creditworthiness to enter into the contemplated Lease.

Based on his review, Mr. Hulse has determined that both the purchase and Lease transactions are suitable for the Welfare Fund and its participants and beneficiaries. Mr. Hulse also believes that the Training Fund's ''rent buy down'' represents a common practice within the real estate industry and is, therefore, appropriate in this transaction. Further, Mr. Hulse represents that due to his commercial leasing experience, he has the ability to procure a fair market valuation of the rental space once the option to renew comes due five years from the inception of the Lease.

18. In summary, the Applicants represent that the transaction will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The terms of the Lease will be at least favorable to the Welfare Fund and the Training Fund as those obtainable in an arm's length transaction with an unrelated party.

(b) Qualified, independent appraisers have determined the initial amount of the Lease payments.

(c) A qualified, independent fiduciary has approved the Lease and will monitor the terms of the exemption, at all times, on behalf of the Welfare Fund.

(d) The independent fiduciary will take whatever actions are necessary and proper to enforce the Welfare Fund's rights under the Lease and to protect the participants and beneficiaries of the Welfare Fund.

(e) The rental payments under the Lease will be adjusted once every five years by the independent fiduciary to ensure that such rental payments are not greater than or less than the fair market rental value of the leased space.

(f) The fair market rental amount for the leased space, at no time, will exceed 25 percent of the assets of either Fund, including any improvements that are constructed thereon.

(g) The independent fiduciary, the Welfare Fund Trustees and the Training Fund Trustees have determined that the Lease is an appropriate investment for the Welfare Fund and is in the best interest of the participants and beneficiaries of the respective Funds.

Notice to Interested Persons

Notice of proposed exemption will be provided to all interested persons by first class mail within 10 days of publication of the notice of pendency in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption, as published in the **Federal Register**, and a supplemental statement, as described at 29 CFR 2570.43(b)(2). Such notice will inform interested persons of their right to comment on the proposed exemption. Comments are due within 40 days of the date of publication of the proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Silvia M. Quezada of the Department, telephone (202) 693–8553. (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 in Washington, DC, this 19th day of May, 2003.

Ivan Strasfeld,

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

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