

## II. Proposed Actions

OSHA proposes to decrease its earlier estimate of 40,086 burden hours to 11,178 burden hours for the collections of information found in 29 CFR 1910.269 (Electrical Power Generation, Transmission, and Distribution), and 29 CFR 1910.137 (Electrical Protective Equipment). OSHA will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the above standards.

*Type of Review:* Extension of currently approved information collection requirement.

*Agency:* Occupational Safety and Health Administration.

*Title:* Electrical Power Generation, Transmission, and Distribution (29 CFR 1910.269) and Electrical Protective Equipment (29 CFR 1910.137).

*OMB Number:* 1218-0190.

*Affected Public:* Business or other for-profit; not-for-profit institutions; Federal government; state, local or tribal government.

*Number of Respondents:* 362,000.

*Frequency:* On occasion; annually; semi-annually.

*Average Time per Response:* 2 minutes (0.03 hour) to 15 minutes (0.25 hour).

*Estimated Total Burden Hours:* 11,178.

## III. Authority and Signature

Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), Secretary of Labor's Order No. 6-96 (62 FR 111).

Signed at Washington, DC, this 26 day of May 2000.

**Charles N. Jeffress,**

*Assistant Secretary of Labor.*

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Exemption Application No. D-10654]

#### Withdrawal of Notice of Proposed Exemption Involving Fish Lake Beach, Inc. Profit Sharing Plan (the Plan); Located in Round Lake, Illinois

In the **Federal Register** dated February 29, 2000 (65 FR 10826), the Department of Labor (the Department)

published a notice of proposed exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 and from certain taxes imposed by the Internal Revenue Code of 1986. The notice of proposed exemption concerned the prospective cash sale of a certain parcel of real property by the Plan to the trust of Emilie Keil, a party in interest with respect to the Plan.

On April 7, 2000, the applicant informed the Department that it wished to withdraw the notice of proposed exemption.

Accordingly, the notice of proposed exemption is hereby withdrawn.

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

**Ivan L. Strasfeld,**

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

[FR Doc. 00-13642 Filed 5-31-00; 8:45 am]

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemptions 2000-25, et al.; Application Nos. D-10119 and D-10120, et al.]

#### Morgan Guaranty Trust Company of New York, et al.

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

**ACTION:** Grant of Individual Exemptions.<sup>1</sup>

**SUMMARY:** This document contains individual exemptions issued by the Department of Labor (the Department) from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from the taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemptions 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. The exemptions affect participants and beneficiaries of the plans investing in such securities.

**EFFECTIVE DATE:** The exemptions are effective as of February 8, 2000.

**FOR FURTHER INFORMATION CONTACT:** Ms. Andrea W. Selvaggio or Ms. Karin Weng of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On February 8, 2000, the Department published a notice of pendency in the **Federal Register** (65 FR 6229) of the proposed exemptions from 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. The exemptions were requested in separate applications filed pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990), by the following entities: Morgan Guaranty Trust Company of New York and J.P. Morgan Investment Management Inc. (together, J.P. Morgan) Goldman, Sachs & Co. (Goldman), The Chase Manhattan Bank (Chase), Citigroup Inc. (Citigroup), and Morgan Stanley Dean Witter & Co. (Morgan Stanley).

Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), generally transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, these exemptions are being issued solely by the Department.<sup>2</sup> For convenience, each applicant and its affiliates shall be referred to in the exemption in generic terms that denote certain roles, namely, "the Applicant," "the Asset Manager,"<sup>3</sup> or "the Affiliated Broker-Dealer."<sup>4</sup>

The notice of pendency invited all interested persons to submit written comments or request a public hearing concerning the proposed exemptions by March 24, 2000. The Department received six written comments and no requests for a hearing in response to the notice. Each of the five Applicants

<sup>2</sup> All references to specific provisions of Title I of the Act herein shall refer also to the corresponding provisions of the Code (if any).

<sup>3</sup> To the extent that the Applicant has more than one asset management affiliate, all references to the Asset Manager herein shall refer also to the other asset management entity or entities.

<sup>4</sup> To the extent that the Applicant has more than one registered broker-dealer affiliate that participates in underwriting or selling syndicates, all references to the Affiliated Broker-Dealer herein shall refer also to the other broker-dealer entity or entities.

<sup>1</sup> The term "Individual Exemptions" refers to the following Prohibited Transaction Exemptions (PTEs): PTE 2000-25 (Application Nos. D-10119 and D-10120, Morgan Guaranty Trust Company of New York and J.P. Morgan Investment Management Inc.); PTE 2000-26 (Application No. D-10587, Goldman, Sachs & Co.); PTE 2000-27 (Application No. D-10779, The Chase Manhattan Bank); PTE 2000-28 (Application No. D-10820, Citigroup Inc.); and PTE 2000-29 (Application No. D-10832, Morgan Stanley Dean Witter & Co.).

submitted a comment. In addition, a law firm, located in Hartford, Connecticut, representing an unidentified financial institution, submitted a comment. Based upon the information contained in the entire record, the Department has determined to grant the proposed exemptions, subject to certain modifications. The comments and modifications are discussed below.

### Discussion of the Comments

1. Three of the Applicants, Goldman, Chase, and Citigroup, wished to correct or clarify certain representations made in the Summary of Facts and Representations (the Summary) contained in the notice of proposed exemption (the Notice) (see 65 FR 6229).

a. Goldman stated that the fourth sentence in Item 2 of the Summary (65 FR at 6230) should be revised to read,

The Investment Management Division of the Applicant (hereinafter, the Asset Manager) includes Goldman Sachs Asset Management and is a separate operating division of the Applicant \* \* \*

b. Chase stated that, as a technical matter, the precise name of its registered investment adviser subsidiary is "Chase Asset Management, Inc.," not "Chase Asset Management," as appears in the second sentence of Item 3 of the Summary (65 FR at 6230).

c. Citigroup stated that the last two sentences in Item 4 of the Summary (65 FR at 6230) should be revised to read,

It is represented that, as of December 31, 1999, the last day of its most recent fiscal year, all of Citigroup's asset management affiliates had, in the aggregate, client assets under management of approximately \$364.4 billion. As of that date, approximately 3.9% of client assets under management were attributable to Client Plans, including those investing in a Pooled Fund.

d. In addition, Citigroup requested that, in clause (e) of the last "Summary" paragraph (65 FR at 6234) of the Summary, the phrase "\* \* \* for the account of a Client Plan" be added at the end of the clause after "Asset Manager."

The Department acknowledges the Applicants' corrections to the Summary and concurs in the clarifying revision to clause (e) on page 6234 of the Summary.

The remainder of the comments requested certain modifications to the proposed operative language in this final exemption.

### 2. Section I(b)—Issuer Requirements and Exceptions

Three of the Applicants, J.P. Morgan, Goldman, and Morgan Stanley, requested clarification of Section I(b) of the Notice (65 FR at 6237), which requires the issuer of the securities to

have been in continuous operation for not less than three years, with certain exceptions. Specifically, Section I(b)(3) provides an exception where the securities are fully guaranteed by a person who has issued securities described in certain other provisions of the exemption "\* \* \* and this paragraph (b)." The Applicants stated that this language is circular because it is not clear which part of Section I(b) is being referred to.

The Department concurs in the Applicants' request for clarification, and the language of Section I(b) has been revised in the final exemption so that Section I(b)(3) refers explicitly to a guarantee by a person who "has been in continuous operation for not less than three years, including the operation of any predecessors," as described in the lead-in language of paragraph (b).

### 3. Section I(c) & (d)—Three Percent Limitations and Pooled Funds

The five Applicants requested the deletion of references to "Pooled Funds" in connection with the three percent limitations in Section I(c) and (d) of the Notice. Section I(c) requires that the amount of securities purchased by the Asset Manager on behalf of a particular Client Plan or Pooled Fund may not exceed three percent of the total amount of securities being offered, subject to certain aggregate percentage limitations. Section I(d) requires that the consideration paid by the Client Plan or Pooled Fund for such securities may not exceed three percent of the fair market value of such Client Plan's or Pooled Fund's total net assets.

The Applicants noted that imposing the three percent limitations contained in both Section I(c) and (d) of the Notice on a Pooled Fund as a whole would result in a Client Plan's being treated differently, depending on whether it invests in a Pooled Fund or whether its assets are managed by the Asset Manager directly. They argued that there was no basis for the different treatment, given that Pooled Funds are "look-through" vehicles under the Department's "plan assets" regulation (29 CFR 2510.3-101). Therefore, the Applicants believe that the three percent limitations should be applied on a plan-by-plan basis.

For example, J.P. Morgan noted that a Pooled Fund is a commingled investment pool with multiple Client Plan investors, which, by its nature, spreads risks among those investors. A single Client Plan's risk would be limited to its proportionate share of any assets of the Pooled Fund. Thus, for a Client Plan with a five percent interest in a Pooled Fund, even if the Pooled

Fund were to purchase 10 percent of an offering, such Client Plan's exposure to the offering would be only one-half of one percent. As another example, Chase stated that, if six Client Plans are in a Pooled Fund, the Pooled Fund should be permitted to purchase 18 percent of an offering, subject to the aggregate percentage limitations in Section I(c).

The Applicants stated that the same rationale supports the elimination of the three percent limitation on the consideration paid by a Pooled Fund for such securities in Section I(d) of the Notice. Therefore, in their view, the three percent limitation should apply only to the net assets of each Client Plan in the Pooled Fund.

The Department concurs in the Applicants' request to modify Section I(c) and (d) of the Notice so that both provisions impose a three percent limitation on each Client Plan investing in a Pooled Fund, rather than on the Pooled Fund as a whole. Accordingly, the Department has deleted the references to "Pooled Funds" in connection with the three percent limitations in Section I(c) and (d) of the final exemption. However, the Department notes that a Pooled Fund would remain subject to the percentage limitations described in Section I(c) of the exemption on the aggregate amount of securities that may be purchased in an offering by the Asset Manager for all its Client Plans.

4. Section I(a)(1)(ii) & (a)(2), (b), and (c)—

### Characterization of Asset-Backed Securities

Among the securities that may be purchased under the exemption are pass-through certificates representing interests in asset pools. Such certificates are often referred to as "mortgage-backed" securities or "asset-backed" securities and may have characteristics of both equity and debt. The five Applicants requested clarification that asset-backed securities will be treated as "debt" for purposes of the exemption.

For example, Section I(c) of the Notice imposes certain aggregate percentage limitations on the amount of securities that may be purchased in an offering by the Asset Manager for all its managed Client Plans. These percentage limitations differ, depending on whether the securities involved are equity securities, debt securities rated in one of the four highest rating categories, or debt securities rated in the fifth or sixth highest rating categories.

The Applicants noted that asset-backed securities, which entitle the holder to pass-through payments of principal and interest relating to assets

held in the underlying pool, are normally rated by nationally recognized statistical rating organizations and are regarded in the market as debt securities. The Applicants argued, therefore, that asset-backed securities should be categorized as debt for purposes of the exemption.

Other relevant provisions, in addition to Section I(c), are as follows: Section I(a)(1)(ii), which requires that, in the case of equity securities in an Eligible Rule 144A Offering, the offering syndicate must obtain a legal opinion regarding the adequacy of the disclosure in the offering memorandum; Section I(a)(2), which provides an exception for debt securities from the general requirement that the securities are 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; and Section I(b), which provides an exception for certain debt securities from the general requirement that the issuer of the securities must have been in continuous operation for not less than three years.

The Department concurs in the Applicants' suggestion that, solely for purposes of the exemption, appropriately rated mortgage-backed or other asset-backed securities should be treated as debt securities. Accordingly, this clarification has been added to the definition of "security" in Section II of the final exemption.

The Department is persuaded to take this position within the limited context of this exemption in recognition of the fact that most purchasers view asset-backed securities as debt securities. However, the Department is providing no opinion herein as to whether asset-backed securities should be considered either equity or debt securities for any other purposes outside the scope of this exemption.<sup>5</sup>

#### 5. Section I(i)(1) and (k)(1)—Notice of Proposed Exemption

Two of the Applicants, Goldman and Morgan Stanley, requested the deletion of the requirement in Section I(i)(1) and (k)(1) of the Notice (65 FR at 6238) that

a copy of such Notice, as published in the **Federal Register** on February 8, 2000, in addition to a copy of the final exemption, be provided to the Independent Fiduciaries of the Client Plans. They argued that providing both documents is unnecessary and that most of the Client Plans will already have received a copy of the Notice in connection with the Department's procedural requirements regarding notice to interested persons.

In response to the comments, the Department notes that new Client Plans will not have received a copy of the Notice. The Department believes that the proposed exemption provides useful information about the underwriting business that may be helpful to the Independent Fiduciaries monitoring covered transactions. Accordingly, the Department has retained the disclosure requirements pertaining to the Notice in the final exemption.

#### 6. Section I(n)(1)—Quarterly Report Information

The five Applicants requested the deletion in Section I(n)(1) of the Notice (65 FR 6239) of various items of information about the purchased securities required to be provided on a quarterly basis to the Independent Fiduciaries. According to the Applicants, this information is unnecessary and should be disclosed to the Independent Fiduciaries only upon request, as required in Section I(n)(3) of the Notice (65 FR at 6239).

The items in Section I(n)(1) of the Notice that the Applicants do not wish to specifically disclose in the quarterly reports to the Client Plans are as follows.

- a. The first day on which any sale was made during the offering (iii).
- b. The size of the issue (iv).
- c. The identity of the underwriter from whom the securities were purchased (vi)—this deletion was requested only by J.P. Morgan and Citigroup.

- d. The spread on the underwriting (vii)—this deletion was requested only by J.P. Morgan and Citigroup.

- e. In addition, Citigroup requested that item (ix) be revised to read, " \* \* \* the price at which any *such* securities purchased during the period were sold" [added word underlined], in order to clarify that the securities referred to are those purchased for a Client Plan under the exemption.

In this regard, the Department concurs in the revision to item (ix) of Section I(n)(1) of the Notice, as requested by Citigroup. However, the Department believes that the information required to be reported in items (iii), (iv), (vi), and

(vii) of Section I(n)(1) of the Notice are relevant for purposes of monitoring covered transactions by the Independent Fiduciaries. As explained in the proposed exemption, the items listed in Section I(n)(1) are virtually identical to the information already required by Securities and Exchange Commission (SEC) Rule 10f-3 under the Investment Company Act of 1940 (the 1940 Act), which the Applicants encouraged the Department to use as a model for this exemption. Under Rule 10f-3, the independent directors of mutual funds are charged with reviewing transactions where a mutual fund buys securities from a syndicate in which the fund's affiliate is a "principal underwriter," as defined in Section 2(a)(29) of the 1940 Act.<sup>6</sup>

The Department continues to believe that the quarterly report, which summarizes all the key elements of the subject transactions, will provide the Independent Fiduciaries with a convenient way to regularly monitor compliance with the exemption. Accordingly, the Department has retained the requirement in the final exemption to report the information listed in items (iii), (iv), (vi), and (vii) on a quarterly basis to the Independent Fiduciaries.

#### 7. Section I(n)(2)—Quarterly Affiliated Broker-Dealer Certification

Four of the Applicants, J.P. Morgan, Goldman, Chase, and Morgan Stanley, commented on Section I(n)(2) of the Notice (65 FR at 6239), which requires that the written certification from the Affiliated Broker-Dealer mandated by Section I(g)(2) of the Notice be made part of the quarterly reports to the Independent Fiduciaries.

<sup>6</sup> The Department understands that the Applicants, or their affiliates, are covered by Rule 10f-3 and, hence, are familiar with quarterly reporting of certain underwriting transactions. As a point of clarification, the Department notes that under the SEC's definition of "principal underwriter," underwriters, whether managers or members, have the same reporting requirements pursuant to Rule 10f-3. PTE 75-1, Part III, on the other hand, distinguishes between managers and members, defining a manager as an underwriter " \* \* \* authorized to act on behalf of all members \* \* \* or who receives compensation from the members of the syndicate for its services as a manager \* \* \*." In situations where an Applicant is a member, not a manager, the Applicant may continue to rely on PTE 75-1, Part III, to purchase securities covered by that exemption. These individual exemptions also permit the purchase of Eligible Rule 144A Securities. Where an Applicant wishes to obtain the additional relief granted in these exemptions, the same conditions apply to both managers and members. To further clarify, the Department has added the definition of "manager," as defined in PTE 75-1, Part III, to the definition of "Affiliated Broker-Dealer" in Section II of the final exemption.

<sup>5</sup> The Department notes that under Title I of the Act, and the "plan assets" regulation, "a beneficial interest in a trust [is] an equity interest," 29 CFR 2510.3-101(b)(1). As noted in the proposed exemption, footnote 13 (FR 65 at 6234), certain purchases of asset-backed securities may result in other prohibited transactions requiring additional exemptive relief because these securities are not publicly offered and the "significant participation" exception to the "look-through rule" of the "plan assets" regulation (29 CFR 2510.3-101(b)(3)) would not apply. A list of individual exemptions then existing for asset-backed securities may be found in PTE 97-34 (62 FR 39021, July 21, 1997), which granted an amendment to these exemptions.

a. Chase requested that Section I(n)(2) of the Notice be modified so that the time frame for providing the certification would be no later than the report covering the second calendar quarter after the quarter in which an underwriting occurred. In addition, Chase requested clarification regarding any difference in meaning behind the different terminology used to denote time periods in Section I(n)(4) and (n)(2) of the Notice—"next quarterly report" and "preceding quarter" versus "past quarter."

b. J.P. Morgan, Goldman, and Morgan Stanley argued that it is unnecessary to provide the actual certification, which will likely look the same from quarter to quarter and which will be maintained pursuant to the exemption's recordkeeping conditions. Therefore, the Applicants requested that the Asset Manager be required instead to merely state in its quarterly reports that it has received such certification from the Affiliated Broker-Dealer, and that a copy of such certification will be provided to the Independent Fiduciaries upon request.

With respect to the modification to Section I(n)(2) of the Notice requested by Chase regarding an extension of time for providing the certification to the Independent Fiduciaries, the Department believes that 45 days following the period in which an underwriting occurred is a sufficient time to provide the certification. In addition, the Department wishes to clarify that no difference in meaning was intended by the different terminology used to denote time periods in Section I(n)(4) and (n)(2) of the Notice. Therefore, the language of Section I(n)(4) has been revised in the final exemption to eliminate any appearance of inconsistency. Specifically, the phrase "next quarterly report" has been changed to "quarterly report," and the phrase "preceding quarter" to "past quarter."

With respect to the modification to Section I(n)(2) of the Notice requested by J.P. Morgan, Goldman, and Morgan Stanley, the Department concurs in the Applicants' suggestion that a representation regarding the certification in the quarterly reports may be made in lieu of providing the actual certification to the Independent Fiduciaries. The representation in the quarterly reports must state that the certification relates to each covered transaction during the past quarter. Accordingly, the Department has modified Section I(n)(2) in the final exemption.

#### *8. Section I(n)(4)—Quarterly Reporting on Trading Restrictions*

The five Applicants raised concerns that the language in Section I(n)(4) of the Notice (65 FR at 6239), which requires the disclosure in the quarterly reports of restrictions on trading in the covered securities, may be broader than necessary.

The Department notes that, according to the Applicants, their business separation policies are designed, among other things, to limit the flow of information that could restrict the Asset Manager's flexibility in managing client assets (65 FR at 6232). In deciding to propose the exemptions, the Department was reassured by those representations. Should this flexibility be limited, for example, by a restriction that precluded the Asset Manager's sale of the securities purchased in the underwriting, the Department believes that any such restriction should be disclosed to the Independent Fiduciaries. After consideration of the issue, the Department has determined to narrow the language in Section I(n)(4) in the final exemption by substituting the term "selling" in place of the term "trading in." In addition, the Department has revised the condition so that it refers explicitly to covered securities purchased during the past quarter.

#### *9. Section I(i)(3), (j) & (k)(3), (l) and (m)—Termination Form*

Four of the Applicants, J.P. Morgan, Goldman, Morgan Stanley, and Citigroup, requested deletion of the requirement that a "termination form" be provided annually that enables the Independent Fiduciaries to terminate authorization, without penalty, for the Asset Manager to engage in transactions pursuant to the exemption. In addition, Chase commented that the reference in Section I(j) of the Notice to Section I(i)(3) is duplicative and should be deleted.

Section I(i)(3) of the Notice (65 FR at 6238) requires that the termination form be provided as part of the initial disclosure to the Independent Fiduciaries of single Client Plans, while Section I(j) of the Notice (65 FR at 6238) requires that such a termination form also be provided at least annually. Section I(k)(3), (l), and (m) of the Notice (65 FR at 6238, 6239) contain parallel requirements for the Independent Fiduciaries of Client Plans investing in a Pooled Fund. The Applicants argued that termination forms are unnecessary, given the type of sophisticated plans that would be covered by the exemption and the quarterly disclosures that would

also be required. They stated that a more practical and efficient alternative would be the addition to the quarterly reports of a reminder that a Client Plan's prior consent to the covered transactions may be withdrawn at any time.

For a single Client Plan, it was suggested that such notification explicitly state that the authorization to engage in the covered transactions, as described in the quarterly report, may be terminated without penalty by the Independent Fiduciary on no more than five days' notice and would identify a contact person. For Client Plans investing a Pooled Fund that engages in the covered transactions, the notification would explicitly state that the Independent Fiduciary may terminate investment in the Pooled Fund without penalty and would identify a contact person.

The Department concurs in the Applicants' request to eliminate initial termination forms for single Client Plans and annual termination forms for both single Client Plans and Client Plans investing in a Pooled Fund. However, the Department believes that it is important for Client Plans in a Pooled Fund to receive a termination form as part of the initial disclosure materials, since withdrawing from the Pooled Fund is the only option available to a Client Plan not wishing to authorize use of the exemption. In lieu of annual termination forms, notification to the Independent Fiduciaries regarding their right to terminate authorization may be made in the quarterly reports, provided that such notification is prominently displayed. These modifications are reflected in Section I(i)(3), (j) & (k)(3), (l) and (m) of the final exemption. In this regard, the Department notes that the cross-reference in the original Section I(m) of the Notice to Section I(k)(3) was a typographical error that should have been a cross-reference to Section I(k)(2). To clarify, the Department has deleted such cross-references in parallel conditions Section I(j) and (m) of the final exemption and written out the relevant language concerning the requirement for making ongoing disclosures to the Independent Fiduciaries. The Department believes that these revisions are also responsive to Chase's comment regarding Section I(j) of the Notice.

#### *10. Section I(o)—\$50 Million Plan Size Requirement*

A comment concerning Section I(o) of the Notice was submitted by an unidentified financial institution which supports the grant of this final exemption by the Department. Although not one of the original Applicants, the

unidentified financial institution raised a concern that may be shared by other similarly situated financial institutions interested in the subject transactions.

The commentator noted that Section I(o) of the Notice limited exemptive relief to Client Plans with total net assets of \$50 million or more, or to Pooled Funds where at least 50 percent of the units of beneficial interest in such Pooled Fund are held by Client Plans having total net assets of at least \$50 million. The Department stated, in paragraph 13 of the Discussion of the Proposed Exemption in the Notice (65 FR at 6236), that the minimum plan size requirements will help insure that Client Plans have the resources and investment sophistication needed to monitor the Asset Manager's investment performance with respect to the covered transactions. However, the commentator argued that some smaller companies with qualified plans having total assets in the range of \$10 million to \$50 million are very sophisticated. The commentator stated that lowering the minimum plan size requirement would afford smaller companies and newer plans access to desirable investment opportunities.

After consideration of the issue, the Department has determined that the present minimum plan size requirements are necessary to insure an appropriate level of plan investor sophistication for the covered transactions. Of course, upon proper application, the Department would be prepared to consider additional relief for transactions that do not meet all the conditions of this exemption, provided that the findings under section 408(a) of the Act may be made.

#### *11. Section I(o)—Single Master Trust Requirement*

Three of the Applicants, J.P. Morgan, Goldman, and Morgan Stanley, requested a modification to Section I(o) of the Notice. The second paragraph of Section I(o) provides that the assets of a group of Client Plans maintained by a single employer, or controlled group of employers, may be aggregated for purposes of meeting the minimum size requirements therein, but only if the assets are pooled for investment purposes in a single master trust. Under the modification requested by the Applicants, aggregation of plan assets would be permitted even when such assets are not in a single master trust, if managed by a single Independent Fiduciary.

As noted in Item 10, above, the minimum size requirements for Client Plans and Pooled Funds in Section I(o) are designed to insure a certain level of

investment sophistication on the part of the Independent Fiduciaries who will be responsible for approving and monitoring the covered transactions. However, the Applicants argued that, if the assets of related plans are not pooled in a single master trust, that fact is not necessarily indicative of a lack of sophistication on the part of a single fiduciary who may be managing such assets.

After consideration of the issue, the Department is not persuaded by the arguments submitted in favor of modifying the exception to the minimum plan size requirements. Accordingly, the Department has retained the condition that aggregation of certain plan assets for purposes of meeting the minimum size requirements in Section I(o) of the final exemption is permitted only if the assets are held in a single master trust.

#### *12. Section I(q)—10 Percent Limitation on In-house Plan Investment in Pooled Funds*

Four of the Applicants, J.P. Morgan, Goldman, Chase, and Morgan Stanley, requested deletion of the requirement in Section I(q) of the Notice that no more than 10 percent of the assets of a Pooled Fund may be comprised of assets of employee benefit plans maintained by the Asset Manager, Affiliated Broker-Dealer, or an affiliate thereof, for their own employees (an In-house Plan), for which the Asset Manager, Affiliated Broker-Dealer, or an affiliate exercises investment discretion. This condition would be measured at the time of a covered transaction.

The Applicants stated that this 10 percent limitation has no direct bearing on the covered transactions themselves, insofar as permissible fees or the disclosure and approval process for Client Plans. Further, In-house Plans are limited in their ability to invest in Pooled Funds, even in situations where an additional investment may be in the interests of the In-house Plans. As an alternative to eliminating any percentage limitation altogether, J.P. Morgan suggested that a 25 percent limitation be substituted for the 10 percent limitation in Section I(q) of the Notice.

With respect to the Applicants' request to eliminate the 10 percent limitation in Section I(q) of the Notice, the Department is not persuaded by the arguments submitted in favor of deletion of this percentage requirement. The Department believes that elimination of this condition could result in a failure to insure a sufficient level of independent client oversight

over transactions involving a Pooled Fund.

However, the Department believes that a 20 percent limitation would still insure a sufficient level of independent investor oversight of the Asset Manager and would not unduly restrict the investment opportunities available for In-house Plans. Accordingly, the Department has substituted a 20 percent limitation on In-house Plan investment in Pooled Funds in Section I(q) of the final exemption.

#### *13. Section II(g)—Definition of Independent Fiduciary*

The five Applicants commented that Section II(g) of the Notice defining the term "Independent Fiduciary" for purposes of the subject transactions is too narrow. Specifically, Section II(g)(2) deems a fiduciary not to be "independent" of the Asset Manager if such fiduciary, or any officer, director, partner, employee, or relative of the fiduciary, is an officer, director, partner, or employee of the Asset Manager (or is a relative of such persons). The Applicants noted that it is too administratively burdensome to be required to track all such relationships to specific individuals who may be employed by such large organizations, especially when most of these persons would have no power to influence any decisions of the fiduciary on matters relating to the exemption.

As a solution to this problem, Chase favored the deletion of a separate definition of "Independent Fiduciary" and noted that users of certain class exemptions, such as PTE 94-20 (59 FR 8022, February 17, 1994)<sup>7</sup> and PTE 98-54 (63 FR 63503, November 13, 1998),<sup>8</sup> determine themselves whether a fiduciary is independent. Chase, along with Goldman and Morgan Stanley, suggested the adoption of the functional test for an Independent Fiduciary, as used in PTE 86-128 (51 FR 41686, November 18, 1986).<sup>9</sup> In Section I(f) of PTE 86-128, a plan fiduciary is deemed to be independent of a person in the absence of a relationship or interest in such person that might affect the

<sup>7</sup> PTE 94-20 provides a class exemption, under certain conditions, for the purchase and sale of foreign currencies between an employee benefit plan and a bank or a broker-dealer or an affiliate thereof, which is a party in interest with respect to such plan.

<sup>8</sup> PTE 98-54 provides a class exemption, under certain conditions, for foreign exchange transactions executed pursuant to standing instructions.

<sup>9</sup> PTE 86-128 provides a class exemption, under certain conditions, permitting persons who serve as fiduciaries for employee benefit plans to effect or execute securities transactions on behalf of such plans.

exercise of such fiduciary's best judgment in connection with the subject transactions.

As a third possibility, J.P. Morgan, Goldman, Morgan Stanley, and Citigroup requested an expansion of the "carve-out" provision, in Section II(g) of the Notice, for the Asset Manager's personnel who serve as directors of other organizations. Under the expanded "carve-out" provision, another organization may still be deemed "independent" of the Asset Manager, if such organization's officer, partner, or employee, as well as director, (or a relative of such persons), who is affiliated with the Asset Manager, abstains from participation in certain decisions relating to the retention of the Asset Manager and the required authorizations under the exemption. In this regard, J.P. Morgan suggested specific language to be added to the end of Section II(g) of the Notice.

The Department concurs in the Applicants' request for a revision to the definition of "Independent Fiduciary" in Section II(g) of the Notice. After discussion with all of the Applicants, the Department is persuaded that such definition can be revised in a manner calculated to minimize administrative burdens in connection with the exemption, while restricting those persons whose independent judgment might be compromised from acting as a fiduciary for a Client Plan because of certain relationships to the Asset Manager. Accordingly, the Department has modified the definition of "Independent Fiduciary" in Section II(g) of the final exemption to read as follows:

(g)(1) The term "Independent Fiduciary" means a fiduciary of a Client Plan who is unrelated to, and independent of, the Asset Manager and the Affiliated Broker-Dealer. For purposes of this exemption, a Client Plan fiduciary will be deemed to be unrelated to, and independent of, the Asset Manager and the Affiliated Broker-Dealer 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 highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Asset Manager or the Affiliated Broker-Dealer 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 or the Affiliated Broker-Dealer;

(ii) such fiduciary directly or indirectly receives any compensation or other consideration from the Asset Manager or the

Affiliated Broker-Dealer 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).

#### 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 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 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 require, among other things, that a fiduciary discharge his or her duties respecting a plan solely in the interest of the participants and beneficiaries of such plan and in a prudent manner in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, the Department finds that the exemptions are administratively feasible, in the interests of the affected plans and their participants and beneficiaries, and protective of the

rights of those participants and beneficiaries; and

(3) The exemptions are supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions. 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.

(4) The exemptions are subject to the express condition that the material facts and representations contained in the applications accurately describe all material terms of the transactions that are the subject of the exemptions.

#### Exemption

Under the authority of section 408(a) of the Employee Retirement Income Security Act (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, August 10, 1990), the Department grants the following individual Prohibited Transaction Exemptions (PTEs): PTE 2000–, Morgan Guaranty Trust Company of New York and J.P. Morgan Investment Management Inc.; PTE 2000–, Goldman, Sachs & Co.; PTE 2000–, The Chase Manhattan Bank; PTE 2000–, Citigroup Inc; and PTE 2000–, Morgan Stanley Dean Witter & Co.

#### Section I—Transactions

Effective February 8, 2000, 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, 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 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) 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)(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 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, 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 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, 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 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 Applicant 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 Applicant 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) the spread on the underwriting;

(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 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 offering 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 a copy of such certification will be provided to the Independent Fiduciary upon request;

(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 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 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). In the case of 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, or an affiliate 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 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 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, 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) a prohibited transaction shall not be considered to have occurred if, due to circumstances beyond the control of the Asset Manager or the Affiliated Broker-Dealer, 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 commercial or financial information which is privileged or confidential; and

(3) should the Asset Manager or the Affiliated Broker-Dealer 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.

## Section II—Definitions

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

(b) The term "Affiliated Broker-Dealer" means any broker-dealer affiliate of the Applicant (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 and the Affiliated Broker-Dealer. For purposes of this exemption, a Client Plan fiduciary will be deemed to be unrelated to, and independent of, the Asset Manager and the Affiliated Broker-Dealer 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 highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Asset Manager or the Affiliated Broker-Dealer 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 or the Affiliated Broker-Dealer;

(ii) such fiduciary directly or indirectly receives any compensation or other consideration from the Asset Manager or the Affiliated Broker-Dealer 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.

Signed at Washington, D.C., this 25th day of May, 2000.

**Ivan L. Strasfeld,**

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

[FR Doc. 00-13641 Filed 5-31-00; 8:45 am]

**BILLING CODE 4510-29-P**

## PENSION AND WELFARE BENEFITS ADMINISTRATION

**[Application Nos. D-10809 and D-10865]**

### **Notice of Proposed Individual Exemption to Amend and Replace Prohibited Transaction Exemption (PTE) 99-15, Involving Salomon Smith Barney Inc., Located in New York, NY**

**AGENCY:** Pension and Welfare Benefits Administration, U.S. Department of Labor.

**ACTION:** Notice of proposed individual exemption to modify and replace PTEs 99-15.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed and replacement individual exemption which, if granted, would amend PTE 99-15 (64 FR 1648, April 5, 1999), an exemption granted to Salomon Smith Barney. PTE 99-15 relates to the operation of the TRAK Personalized Investment Advisory Service product (the TRAK Program) and the Trust for Consulting Group Capital Markets Funds (the Trust). If granted, the proposed exemption would affect participants and beneficiaries of and fiduciaries with respect to employee benefit plans (the Plans) participating in the TRAK Program.

**EFFECTIVE DATE:** If granted, the proposed amendment will be effective as of April 1, 2000.

**DATES:** Written comments and requests for a public hearing should be received by the Department on or before July 17, 2000.

**ADDRESSES:** All written comments and requests for a public hearing (preferably, three copies) should be sent to the Office of Exemption Determinations, Pension and Welfare Benefits Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, Attention: Application Nos. D-10809 and D-10865. The applications pertaining to the proposed exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, NW, Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, telephone (202) 219-8881. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of a proposed exemption that would amend and replace PTE 99-15. PTE 99-15, provides an exemption from certain prohibited transaction restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), as amended, by reason of section 4975(c)(1) of the Code. Specifically, PTE 99-15 provides exemptive relief from the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, for the purchase or redemption of shares in the Trust by an employee benefit plan, an individual retirement account (the IRA), a retirement plan for a self-employed individual (the Keogh Plan), or an individual account pension plan that is subject to the provisions of Title I of the Act and established under section 403(b) of the Code (the Section 403(b) Plan).

PTE 99-15 also provides exemptive relief from the restrictions of section 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(E) and (F) of the Code, with respect to the provision, by the Consulting Group of Salomon Smith Barney (the Consulting Group), of (1) investment advisory services or (2) an automatic reallocation option to an independent fiduciary of a participating Plan (the Independent Plan Fiduciary) which may result in such fiduciary's selection of a portfolio (the Portfolio) in the TRAK Program for the investment of Plan assets.<sup>1</sup>

<sup>1</sup> PTE 99-15 also (a) described a series of corporate mergers which changed the names of the parties identified in two prior TRAK exemptions which it superseded [i.e., PTE 94-50 (59 FR 32024, June 21, 1994) and PTE 92-77 (55 FR 45833, October 5, 1992)] and which would permit broader distribution of TRAK-related products; (b) implemented a recordkeeping reimbursement offset procedure under the TRAK Program; (c) adopted an automated reallocation option under the TRAK Program that would reduce the asset allocation (or "outside") fee paid to Salomon Smith Barney by a Plan investor; and (d) expanded the scope of the exemption to include Section 403(b) Plans.

PTE 94-50 permitted Smith, Barney Inc. (Smith Barney), Salomon Smith Barney's predecessor, to add a daily-traded collective investment fund (the GIC Fund) to the existing Fund portfolios and to describe the various entities operating the GIC Fund. PTE 94-50 also replaced references to Shearson Lehman Brothers, Inc. (Shearson Lehman) with Smith Barney and amended and replaced PTE 92-77.

Finally, PTE 92-77 permitted Shearson Lehman to make the TRAK Program available to Plans that