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Department of Labor

**Employee Benefits Security
Administration**

**Proposed Exemptions Involving; D-11082
& D-11109—Deutsche Bank, AG; D-
11263—Banc One Investment Advisors
Corporation and J.P. Morgan Investment
Management Inc.; D-11449—Pileco, Inc.
Employees Profit Sharing Plan; and D-
11460—Mellon Bank N.A.; Notice**

DEPARTMENT OF LABOR**Employee Benefits Security Administration**

[Application Nos. D-11082 & D-11109; D-11263; D-11449; and D-11460]

Proposed Exemptions Involving; D-11082 & D-11109—Deutsche Bank, AG; D-11263—Banc One Investment Advisors Corporation and J.P. Morgan Investment Management Inc.; D-11449—Pileco, Inc. Employees Profit Sharing Plan; and D-11460—Mellon Bank N.A.

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

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-5700, 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 application 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 exemption 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 exemption was 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, this notice of proposed exemption are issued solely by the Department.

The application contains representations with regard to the proposed exemption which is summarized below. Interested persons are referred to the application on file with the Department for a complete statement of the facts and representations.

Deutsche Bank, AG (Deutsche Bank or the Applicant)

Located in Germany, with Affiliates in New York, NY and Other Locations. [Application Nos. D-11082 and D-11109]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).¹

¹For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the following foreign exchange transactions involving less developed currencies, that are executed by Deutsche Bank or a current or future affiliate (domestic or foreign) thereof that is a bank or broker-dealer, acting as a local subcustodian in connection with a determination by Deutsche Bank or its affiliates to invest the assets of a client plan, an in-house plan whose assets are invested in a separately managed account with Deutsche Bank, or a pooled fund, in foreign securities, if the conditions set forth in Sections II, III and IV below are met with respect to:

(1) A trade-related currency conversion, or

(2) An income item conversion.

Section II. General Conditions

(a) At the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the client plan, in-house plan or pooled fund than the terms generally available in a comparable arm's length foreign exchange transaction between unrelated parties.

(b) The exchange rate used for a particular foreign exchange transaction does not deviate by more than 3 percent (above or below) the interbank bid and asked rates for such currency at the time of the transaction as displayed on an independent, nationally-recognized service that reports rates of exchange in the foreign currency market for such currency.

(c) The covered transactions are limited to those less developed currencies in which a transaction is executed with Deutsche Bank or its affiliate acting as local subcustodian at the direction of the global custodian because the global custodian either does not make a market in such currency, or otherwise determines to execute with the local subcustodian because of market conditions, market restrictions, illiquidity of the currency or similar exigencies.

(d) Where a market is served by more than one subcustodian, Deutsche Bank, as asset manager, has no decision making authority or role, or otherwise makes no recommendations with respect to the global custodian's selection of the subcustodian.

(e) The foreign exchange transaction is executed by Deutsche Bank or its

affiliate thereof acting as subcustodian at the direction of the global custodian in the ordinary course of its business as global custodian.

(f) The decision to select Deutsche Bank or its affiliate as the subcustodian is made by a global custodian which is unrelated to Deutsche Bank or any affiliate thereof.

(g) The selection of Deutsche Bank or its affiliate as subcustodian and any foreign exchange transactions executed by Deutsche Bank or its affiliate at the direction of the global custodian are not part of any agreement, arrangement or understanding, written or otherwise, designed to benefit Deutsche Bank, its affiliate or any other party in interest.

(h) Deutsche Bank or its affiliate appoints an independent fiduciary to represent the interests of (1) an in-house plan, or (2) plans investing in a large pooled fund.

(i) The decision to invest in a market and to select Deutsche Bank or its affiliate as asset manager is part of an investment strategy that is adopted by an independent fiduciary of a client plan, the independent fiduciary of an in-house plan, the independent fiduciary of a large pooled fund, or the independent fiduciary of an unrelated pooled fund.

(j) On an annual basis, the percentage of assets of in-house plans and pooled funds for which Deutsche Bank and/or its affiliates select the global custodian represent less than 20 percent of the total assets under custody by any such global custodian.

(k) Foreign affiliates of Deutsche Bank who engage in the covered transactions—

(1) Agree to submit to the jurisdiction of the United States;

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

(3) Consent to service of process on the Process Agent;

(4) Agree that they may be sued in the United States Courts in connection with the covered transactions described in this proposed exemption;

(5) Agree that any judgment on behalf of a plan or pooled fund may be collected in the United States from Deutsche Bank; and

(6) Agree to comply with, and be subject to, all relevant provisions of the Act.

(l) With respect to the covered transactions—

(1) Deutsche Bank or its affiliate designates an individual responsible for periodically (but no less frequently than on an annual basis) reviewing a sample

of such foreign exchange transactions to determine whether the covered transactions have been executed in accordance with the terms of this exemption. Such sample must include a sufficient number of transactions to ensure that each affected currency is tested.

(2) Deutsche Bank or its affiliate provides such individual with the records (which may be provided electronically) described in Section IV(a)(1)-(7), on an annual basis.

(3) Such individual notifies Deutsche Bank or its affiliate, the independent fiduciary of a client plan, the independent fiduciary of an in-house plan, the independent fiduciary of a large pooled fund, the independent fiduciary of an unrelated pooled fund, or the receiving fiduciary of a small pooled fund, of its findings in a written report within 90 days after the period to which the periodic review relates. Such report describes the steps performed by such individual during the course of the review, the level of compliance by Deutsche Bank or its affiliate with the terms and conditions of the exemption, and any specific instances of non-compliance by Deutsche Bank or its affiliate with the terms and conditions of the exemption.

Section III. Notice Requirements

(a) At the time Deutsche Bank or its affiliate is retained as asset manager, or prior to the initial investment of the plan's assets or pooled fund's assets in any foreign investments that may require the execution of a foreign exchange transaction by Deutsche Bank or its affiliate as subcustodian, Deutsche Bank or its affiliate provides the independent fiduciary of a client plan, the independent fiduciary of an in-house plan, the independent fiduciary of a large pooled fund, the independent fiduciary of an unrelated pooled fund, or the receiving fiduciary of a small pooled fund, a written notice (which may be effected electronically) that includes the following:

(1) The reasons why Deutsche Bank or its affiliate may consider a particular market to be an appropriate investment for the plan or pooled fund.

(2) The factors considered by Deutsche Bank or its affiliate in its selection of global custodian (if applicable) including: (i) the identity of the global custodian; and (ii) a summary of the global custodian's policies and procedures regarding the handling of foreign exchange transactions for plans or pooled funds with respect to which Deutsche Bank or its affiliate is a fiduciary and the factors that the global

custodian considers in its selection of a subcustodian.

(3) Notice that such foreign exchange transaction may be executed by Deutsche Bank or its affiliate as subcustodian, at the direction of a global custodian.

(4) A list of the markets in which plans or pooled funds may invest where Deutsche Bank or its affiliate serves as a subcustodian.

(5) A list of the markets where currency transactions are executed by a subcustodian, to the extent known.

(6) Notice that Deutsche Bank or its affiliate maintains records (described in Section IV), and such records are reasonably available at their customary location for examination in the U.S., during normal business hours, by the responsible reviewing individual, the independent fiduciary of a client plan, the independent fiduciary of an in-house plan, the independent fiduciary of a large pooled fund, the independent fiduciary of an unrelated pooled fund, or the receiving fiduciary of a small pooled fund, any participant or beneficiary of such plan or pooled fund, or any duly authorized employee or representative of such participant or beneficiary.

(7) Copies of the notice of proposed exemption and the grant of final exemption with respect to the subject transactions.

(b) If the independent fiduciary fails to object in writing to Deutsche Bank or its affiliate within 30 days following receipt of the information described in section III(a) by such fiduciary, then such fiduciary's authorization of the arrangement contemplated under this exemption shall be presumed.

(c) Deutsche Bank or its affiliate shall provide notification of any changes to the information required by Section III, including, but not limited to, the situation where Deutsche Bank or its affiliate replaces the global custodian with another independent entity or where there are changes in the markets in which currency transactions are executed by the subcustodian. If the independent fiduciary fails to object in writing to Deutsche Bank or its affiliate within 30 days following disclosure of such changes, such fiduciary's approval of these changes shall be presumed.

Section IV. Recordkeeping Requirements

(a) Deutsche Bank or its affiliate maintains, or causes to be maintained, for a period of six years from the date of the covered transactions, the following records, as well as any records necessary to enable the persons described in paragraph (c) of this

Section IV, to determine whether the conditions of this exemption have been met:

- (1) The account name,
- (2) The foreign exchange transaction execution date,
- (3) The exchange rate,
- (4) The high and low on Reuters or similar independent service on the date of the transaction,
- (5) The identity of the foreign currency sold or purchased,
- (6) The amount of foreign currency sold or purchased,
- (7) The amount of U.S. dollars exchanged, where the exchange is between foreign currencies and U.S. dollars or the amount of foreign currency exchanged, where the exchange is between two foreign currencies, and
- (8) The annual report described in Section II(l).

(b) The following are exceptions to paragraph (a) of this Section IV:

(1) If the records necessary to enable the persons described in paragraph (c) to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of Deutsche Bank, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than Deutsche Bank, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (c) below.

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

- (i) Any duly authorized employee or representative of the Department or the Internal Revenue Service (the Service);
- (ii) The independent fiduciary of a client plan, the independent fiduciary of an in-house plan, the independent fiduciary of a large pooled fund, the independent fiduciary of an unrelated pooled fund, or the receiving fiduciary of a small pooled fund, or
- (iii) Any participant or beneficiary of such plans or pooled funds or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described above in paragraphs (ii) and (iii) of this paragraph (c)(1) of this Section IV shall be authorized to examine trade secrets of Deutsche Bank, or any commercial or financial information, which is privileged or confidential.

Section V. Definitions

For purposes of this proposed exemption,

(a) The term “Deutsche Bank” means Deutsche Bank AG.

(b) An “affiliate” of Deutsche Bank means any domestic or foreign bank or broker-dealer directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Deutsche Bank;

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

(d) The term “bank” means a bank as defined in section 202(a)(2) of the Investment Advisers Act of 1940 (the Investment Advisers Act), or an institution that has substantially similar powers to a bank defined in section 202(a) of the Investment Advisers Act, and is —

- (i) Supervised by the United States or a State;
- (ii) Supervised and examined by the German banking authorities, or monitored and controlled pursuant to the statutory and regulatory standards of German law; or
- (iii) Subject to regulation and oversight by governmental entities that are substantially similar to the regulatory oversight of banks present in the United States.

(e) The term “broker-dealer” means a broker-dealer registered under the Securities Exchange Act of 1934, or is engaged in the business of effecting transactions in securities for the account of others, and is —

- (i) Registered and regulated under the relevant securities laws of the United States;
- (ii) Registered and regulated under the relevant securities laws of Germany; or
- (iii) Registered and regulated under the relevant securities laws of a country with securities laws that are substantially similar to the securities laws governing broker-dealers in the United States.

(f) The term “global custodian” means a bank or broker-dealer that is unrelated to Deutsche Bank or its affiliate, which is selected by (1) The named fiduciary of a client plan; (2) the sponsor (other than Deutsche Bank or its affiliate) of an unrelated pooled fund; (3) Deutsche Bank or its affiliate in the case of an in-

house plan; or (4) Deutsche Bank or its affiliate in the case of a pooled fund established by Deutsche Bank or an affiliate, for the purpose of holding and safeguarding all assets of the client plan, in-house plan, or pooled fund, physically or through a depository, through its branches or through its subcustodian network.

(g) The term “subcustodian” means a bank or broker-dealer, selected by a global custodian, to hold and safekeep designated assets of the plan or pooled fund at securities depositories, foreign clearing agencies or other entities which act as securities depositories, and to execute foreign exchange transactions and income item conversions. A subcustodian has no contractual relationship with the global custodian’s clients, but only with the global custodian.

(h) The term “responsible reviewing individual” means a senior official appointed by Deutsche Bank who has at least 10 years experience with the fiduciary responsibility provisions of the Act, and appropriate compliance training. Such person is appointed by Deutsche Bank to review a sample of the covered transactions periodically, but no less frequently than on an annual basis, in order to ensure compliance with the terms of the exemption on behalf of a client plan an in-house plan, or a pooled fund.

(i) The term “in-house plan” means a plan sponsored by Deutsche Bank or any person that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, Deutsche Bank.

(j) The term “client plan” means an employee benefit plan, other than a plan sponsored by Deutsche Bank, as described in section 3(3) of the Act or section 4975(e)(1) of the Code with respect to which Deutsche Bank or its affiliate acts as a fiduciary having full investment discretion.

(k) The term “pooled fund” means a collective investment fund or a pooled arrangement established for investment on behalf of two or more unrelated employee benefit plans by Deutsche Bank or an affiliate or by a fund sponsor other than Deutsche Bank or an affiliate for which Deutsche Bank or its affiliate acts as fiduciary with full investment discretion. The assets of a pooled fund may include the assets of (i) Client plans, (ii) in-house plans of Deutsche Bank or an affiliate, (iii) other pooled funds in which Deutsche Bank or an affiliate is not the fund sponsor, and (iv) other pooled funds in which Deutsche Bank or an affiliate is the fund sponsor.

(l) The term “large pooled fund” refers to a pooled fund that is sponsored

and managed by Deutsche Bank or an affiliate. A large pooled fund may include the assets of (i) Client plans, (ii) in-house plans of Deutsche Bank or an affiliate, (iii) other pooled funds in which Deutsche Bank or an affiliate is not the fund sponsor, and (iv) other pooled funds in which Deutsche Bank or an affiliate is the fund sponsor. In a large pooled fund, the total invested assets of an in-house plan (or in-house plans), if aggregated (whether invested directly or indirectly through another pooled fund), represent more than 20% of the total invested assets of such fund. Also, in a large pooled fund, Deutsche Bank will appoint an independent fiduciary, as described in Section V(o) below, to represent the interests of all plans investing in such fund.

(m) The term “small pooled fund” refers to a pooled fund that is sponsored and managed by Deutsche Bank or an affiliate. A small pooled fund may include the assets of (i) Client plans, (ii) in-house plans of Deutsche Bank or an affiliate, (iii) other pooled funds in which Deutsche Bank or an affiliate is not the fund sponsor, and (iv) other pooled funds in which Deutsche Bank or an affiliate is the fund sponsor. In a small pooled fund, the total invested assets of an in-house plan (or in-house plans), if aggregated (whether invested directly or through another pooled fund), represent less than 20% of the total invested assets of such fund.

(n) The term “unrelated pooled fund” refers to a pooled fund that is not sponsored by Deutsche Bank or an affiliate, but is managed by either of these entities.

(o) The term “independent fiduciary” means —

(1) In the case of a client plan or an unrelated pooled fund, a plan fiduciary or the named fiduciary of a pooled fund that is unrelated to, and independent of, Deutsche Bank and its affiliates. For purposes of this exemption, a plan fiduciary will be deemed to be unrelated to, and independent of, Deutsche Bank if such fiduciary represents that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization 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 Deutsche Bank and represents that such fiduciary must advise Deutsche Bank or its affiliate if those facts change, or

(2) In the case of an in-house plan or a large pooled fund, an individual or company is unrelated and independent of Deutsche Bank and its affiliates if such individual or company has at least 10 years experience in the financial

services business and significant experience in foreign currency trading and pricing who certifies that the gross income received from Deutsche Bank and its affiliates for the current year does not exceed 5% of such fiduciary's gross income from all services for the prior fiscal year. The independent fiduciary represents that such fiduciary is aware of its ERISA duties and responsibilities in acting as a fiduciary with respect to an in-house plan and the covered transactions.

(3) Notwithstanding anything to the contrary in this Section V(o), a plan fiduciary is not independent if—

(i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with Deutsche Bank, other than described herein;

(ii) Such fiduciary directly or indirectly receives any compensation or other consideration from Deutsche Bank for his own personal account in connection with any transaction described in this exemption in excess of the 5 percent gross income limitation set forth in Section V(o)(2) above;

(iii) Any officer, director or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of Deutsche Bank or an affiliate 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, the sponsor of an unrelated pooled fund, 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, the sponsor of an unrelated pooled fund, or of the responsible fiduciary, and if he or she abstains from participation in (A) the choice of Deutsche Bank or an affiliate as the investment manager/adviser for the client plan or unrelated pooled fund and (B) the decision to authorize or terminate authorization for transactions described in Section I, then Section V(o)(3)(iii) shall not apply.

(p) 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.

(q) The term “receiving fiduciary” means a person or entity in a small pooled fund who is designated to receive the disclosures described in Sections III and IV above, for dissemination to the fiduciaries of plans or other pooled funds participating in such small pooled fund.

(r) The term “foreign exchange” transaction means the exchange of the currency of one nation for the currency of another nation.

(s) The term “less developed currencies” means those currencies in which the global custodian does not make a market at the time of the transaction and in which the global custodian determines to purchase from or sell to the plan's or pooled fund's local subcustodian on behalf of a plan or pooled fund because the currency is difficult to trade, undeveloped or the subject of local government restrictions, or because of the volatility or lack of liquidity in the market at the time of the transaction. The term “less developed currencies” does not include the following currencies: the Euro; the British pound; the Swiss franc, the Canadian dollar; or the Japanese yen.

(t) The term “trade-related currency conversion” means the conversion of trade-related items (i.e., amounts necessary for purchases or proceeds from sales) into foreign currency or into U.S. dollars in order to permit purchase transactions to settle, and to permit proceeds of sales to be deployed in other investments or to be used to make distributions.

(u) The term “income item conversions” means the conversion of income items (e.g., interest, dividends, tax reclaims or other distributions) denominated in a foreign currency into U.S. dollars or another foreign currency.

Effective Date: If granted, this proposed exemption will be effective as of the date the proposed exemption is published in the **Federal Register**.

Summary of Facts and Representations

Deutsche Bank

1. Deutsche Bank is a German banking corporation and commercial bank, which provides a wide range of services to various types of entities worldwide. Deutsche Bank is a financial institution that in 2006 managed approximately \$716 billion in assets either through collective trusts, separately managed accounts or mutual funds. Deutsche Bank's asset management clients include a number of employee benefit plans covered by the Act, either in:

(a) Separately managed accounts, where the plan sponsor, and not the Applicant selects the global custodian, (b) pooled funds, where the fund sponsor, and not the Applicant selects the global custodian, and (c) pooled funds where the Applicant selects the global custodian, or (d) for its own plans, where the Applicant selects the global custodian.

Regulatory Authority

2. The Applicant states that it is subject to a comprehensive system of regulatory oversight and a mandatory insurance program. With respect to the regulatory and supervisory requirements applicable to Deutsche Bank, the Applicant states that Deutsche Bank, its branches, and its subsidiary banks worldwide are subject to regulatory requirements and protections that are, qualitatively, at least equal to those imposed on U.S.-domiciled banks.² Within the United States, the New York branch of Deutsche Bank and Deutsche Bank Trust Company Americas are regulated and supervised by the New York State Banking Department. In addition, certain activities of Deutsche Bank's New York branch and Deutsche Bank Trust Company Americas (the trustee of ERISA-covered bank collective trusts) are regulated and supervised by the Federal Reserve Bank of New York. Deutsche Asset Management Inc. and Deutsche Investment Management Americas Inc. are investment advisers registered under the Investment Advisers Act of 1940 and supervised by the Securities and Exchange Commission. With respect to Deutsche Bank itself, globally, the bank is regulated and supervised by the Bundesanstalt für Finanzdienstleistungsaufsicht (the BAFin), in cooperation with the Bundesbank. The BAFin is a federal institution with ultimate responsibility to the German Ministry of Finance. The Bundesbank, in turn, is the central bank of the Federal Republic of Germany and a part of the European Central Banks.

3. The Applicant states that the BAFin requires that it have procedures for monitoring and controlling its worldwide activities through the implementation of various statutory and regulatory standards. Among those standards are requirements for adequate internal controls, oversight, administration, and financial resources. The BAFin reviews compliance with these operational and internal control standards through an annual audit performed by the year-end auditor and through special audits ordered by the BAFin. In addition to the regulatory and supervisory arrangements described above, the Applicant states that Deutsche Bank and its foreign branches are covered under a mandatory deposit

insurance program.³ According to the Applicant, this insurance program is maintained by an institution separate from Deutsche Bank and is supervised by the BAFin. The program insures deposits denominated in the currency of a European Economic Area member state up to the lesser of 90 percent of the deposit amount or 20,000 Euros.

Request for Exemptive Relief

4. The Applicant seeks an exemption to permit plans, either directly or through pooled arrangements, to engage in certain trade-related and income-related foreign exchange transactions through subcustodians selected by unaffiliated global custodians in connection with a determination by Deutsche Bank and its affiliates to invest assets of a client plan, an in-house plan or a pooled fund in foreign securities. As described below, in some cases, the subcustodians selected by such global custodian will be Deutsche Bank and its current and future affiliates. The Applicant notes that the requested exemption would not apply to foreign exchange transactions for reasons other than trade-related currency conversions, or income item conversions. If granted, the exemption would be effective as of the date the notice of proposed exemption is published in the **Federal Register**.

Global Strategy

5. As noted above, Deutsche Bank acts as an investment manager to numerous plans, many of which are managed in a global strategy. In such strategies, each time a transaction is entered into, or income on held securities is received, a foreign exchange transaction is required. For example, if the investment manager decides to invest plan assets in a Japanese security, a trade-related currency conversion is required to convert the plan's U.S. dollars into the amount of Japanese yen required to purchase the security and settle the transaction. Similarly, each time a Japanese fixed income instrument pays interest (generally, semiannually or quarterly), that payment, which is made in yen, will generally be converted back to U.S. dollars.

6. The Applicant states that in well-developed markets, such as the one described above, there are many banks and broker-dealers with which the investment manager can effect transactions involving foreign currency.

In addition, the Applicant states there is little difficulty, either from a price or a settlement perspective, in doing so, with respect to freely traded currencies, such as the British pound, the Euro, and the Japanese yen. The Applicant represents that in effecting foreign exchange transactions in well-developed markets for an account, the investment manager generally has two options: (a) to send the transaction to the account's global custodian, in which case the transactions are generally effected at the global custodian's own proprietary desk in the U.S. or at the global custodian's London branch; or (b) to find a counterparty to effect the transaction, other than the account's global custodian.

7. The Applicant states that the choices differ somewhat with respect to emerging markets, which include much of Central and South America, Africa, and Asia.⁴ According to the Applicant, in markets where currency is hard to trade, undeveloped, or subject to local restrictions, the investment manager still chooses between routing the trade to its global custodian, or locating another counterparty, if it can find a counterparty with adequate credit and performance. In many instances, an investment manager cannot locate a counterparty of its own, and these instances generally occur in the same less developed currencies where the global custodian is unable or unwilling to make a market in that currency and instead will usually rely on a subcustodian in the applicable market, which may be the Applicant's affiliate. With respect to the option of locating another counterparty, the Applicant states that the investment manager would need to locate a local bank or broker-dealer in the applicable market, open a trading account after investigating the bank or broker-dealer's credit, and would then trade directly with that bank or broker-dealer, while relying on the global custodian to settle both the securities transaction and the foreign exchange transaction.

8. According to the Applicant, in markets where the currency is illiquid, or the penalties for transaction failure are severe, an investment manager generally does not attempt to locate a counterparty in the local market. Rather, the Applicant believes that it is very often the practice of investment managers to send foreign exchange transactions to the global custodian for execution, to obtain more certainty that

² In support of this, the Applicant notes that the U.S. Department of Treasury has accorded national treatment to German bank branches, and the German Ministry of Finance has granted relief to branches of U.S. banks in Germany, in particular with respect to "dotation" or endowment capital requirements and capital adequacy standards.

³ The Applicant states that, in addition, Deutsche Bank and its foreign branches are covered by a voluntary deposit protection program called the Deposit Protection Fund that safeguards liabilities in excess of the thresholds guaranteed by the European Union Program discussed above.

⁴ The list of emerging market currencies may change from time to time, as conditions change in the world market. For example, during recent years, the Argentine peso has transitioned back and forth from being freely traded to restricted.

the underlying securities transaction, with its foreign exchange component, will settle in a timely fashion.⁵ The Applicant states that not doing so raises the risk that the entire transaction will fail because the currency transaction becomes separated from the securities transaction in a market that is either very manual or where the settlement period is very short. The Applicant represents that where the penalty for failure is thousands of dollars or a suspension of one's license to trade, it is particularly important that an asset manager take all steps possible to avoid settlement failure.

Global Custody/Subcustody Arrangements

9. The Applicant states that each plan generally appoints a "global custodian" other than Deutsche Bank or its affiliate to hold and safekeep plan assets. A global custodian is typically a bank or trust company, selected by an independent plan fiduciary for a client plan, a sponsor of an unrelated pooled, or Deutsche Bank as asset manager for an in-house plan or a pooled fund. The Applicant further explains that assets are held either by the global custodian itself, or through a nominee, physically, or through a depository, in the United States or outside of the United States, through its branches or through its subcustody network, which generally consists of foreign banks or branches of U.S. banks, including its own branches. Accordingly, the Applicant states that even though Deutsche Bank or its affiliates, as trustee, may choose the global custodian in the case of a collective investment fund or other pooled fund it sponsors (rather than an independent fiduciary of a client plan, in the case of a separately managed account), the reasons for preferring conversion through one's global custodian are precisely the same for both types of accounts.⁶

10. The Applicant explains that a subcustodian is generally a bank or trust company, foreign or domestic, which is selected by a global custodian, to hold and safekeep designated assets of the plan, including in its own name, at securities depositories, or at foreign clearing agencies or other entities which act as securities depositories. The Applicant states that a subcustodian has no contractual relationship with the global custodian's clients (i.e., plans or

other accounts), but only with the global custodian.

11. According to the Applicant, one of the most important functions of a global custodian is to provide a foreign exchange facility for its customers, either through a central global trading desk, for readily tradable currencies, or through its subcustody network, for less developed currencies. The Applicant represents that, in all cases where it acts as investment manager for plan assets, a global custodian is solely in charge of selecting its subcustody network. The Applicant further represents that it is the responsibility of the global custodian to monitor its subcustodians on all performance and credit issues. Generally, the asset manager for an account (or the trustee for a collective investment fund) has no direct contact at all with the subcustodian.

12. With respect to selection of subcustodians, the Applicant states that a global custodian may have more than one option to choose from, and may, in fact, use more than one subcustodian in a market, depending on its business needs, but a particular account is only subcustodied with one subcustodian (i.e., all the assets of the plan in that market are held with one subcustodian). The Applicant represents that generally, if the global custodian uses more than one subcustodian (i.e., puts some clients with one and some with another, because of size, diversification of risk, price competition or credit concerns), the choice of which clients are assigned to which subcustodian is made by the global custodian, not by the client. However, the Applicant notes that it is far more common for a global custodian to have one subcustodian. The Applicant states that an account is held at that subcustodian, and the investment manager knows its identity, because all transactions are settled by the subcustodian, and information regarding the subcustodian is required when giving counterparties settlement instructions.

The Applicant explains that a subcustodian is not hired on a transaction by transaction basis, but remains the subcustodian for an account until the global custodian replaces the subcustodian for that entire account.

The Applicant represents that a subcustodian's relationship with the global custodian is generally governed by a standard contract which the global custodian presents to all of its subcustodians. Client accounts are not parties to the contract.

13. The Applicant represents that it has no control or input with respect to the subcustodians selected by a global custodian or the procedures the global

custodian uses in making such selections. Therefore, the decision to select Deutsche Bank or its affiliate as subcustodian by the global custodian, and any foreign exchange transactions executed by Deutsche Bank or its affiliate at the direction of the global custodian, are not part of an understanding, arrangement, agreement, written or otherwise, designed to benefit Deutsche Bank, its affiliates or another party in interest.⁷ Furthermore, the decision to invest in a market and to select Deutsche Bank or its affiliates as asset manager is part of an investment strategy that is adopted by an independent fiduciary of a client plan, an independent fiduciary of an in-house plan, an independent fiduciary of a large pooled fund, or an independent fiduciary of an unrelated pooled fund.

For example, the Applicant states that even in a market where more than one subcustodian is available, assume that the global custodian has a choice between using the Applicant's affiliate, Large International Bank X, and several local banks. The Applicant explains that if the global custodian preferred to select the Applicant's affiliate due to past experience with the other banks, transaction costs, each bank's credit rating, or other factors, the global custodian may select the Applicant's affiliate. The Applicant states that the global custodians use their own internal procedures and safeguards to select subcustodians for their clients, including any plans for which Deutsche Bank or its affiliate may serve as a trustee, investment manager, fiduciary or other party in interest. The Applicant represents that, in selecting a global custodian, the trustee would generally look at such factors as price (including the cost of transactions inside and outside of the network, reputation, the size of the global custodian's subcustody network, the number of markets in which the global custodian has subcustodians, the number of markets where interest is credited overnight, the global custodian's error rate and responsiveness, the number and performance of cash sweep vehicles offered by the global custodian, the global custodian's securities lending program, and the technology used by the global custodian and its subcustodians, among many other considerations.

⁵ When trades are routed to the global custodian, it becomes responsible for ensuring that the subcustodian settles both the foreign exchange conversion, and the underlying transaction.

⁶ Deutsche Bank represents that since 2003, it has not acted as global custodian for plans.

⁷ The Applicant notes that Deutsche Bank asset management division is separate from the Deutsche Bank's custody division, and this condition does not preclude the custody division from marketing its services to the global custodian.

Trade-Related Currency Conversions

14. The Applicant seeks relief with respect to certain trade-related foreign exchange transactions in markets with less developed currencies or in restricted markets. Specifically, Deutsche Bank is requesting that the proposed exemption apply to situations where Deutsche Bank (or its current or future affiliates) act as an investment manager to a plan or pooled fund, and the plan or pooled fund engages in certain trade-related currency conversions with the Applicant (or its affiliate), acting as a subcustodian with respect to the assets involved in the transaction. The Applicant notes that the requested relief would only apply to those currencies where the global custodian does not itself make a principal market in the currency and where the global custodian has selected a Deutsche Bank affiliate as subcustodian and sends client trades to that subcustodian.

15. According to the Applicant, trade-related currency conversions may be necessary in several situations. For example, the Applicant states that where plan assets managed by the Applicant or its affiliate are subcustodied with its affiliate, exemptive relief is necessary for such transactions to take place, because Prohibited Transaction Exemption (PTE) 98-54 (63 FR 63503, November 13, 1998) does not provide relief for managed accounts, or for the Applicant's foreign affiliates. PTE 98-54 requires that, in a purchase or sale transaction between a bank and a plan, the bank (or any domestic affiliate thereof) must be "supervised by the United States or a State thereof." The Applicant further notes that, when operating outside the United States, Deutsche Bank is not supervised by a State or by the United States.

The Applicant represents that trade-related currency conversions are necessary with respect to both well-developed and less developed currencies. However, in the absence of the requested relief, asset management in emerging markets is nearly impossible to undertake where the global custodian has selected a Deutsche Bank affiliate as subcustodian. As the Applicant describes above, in order for a plan to purchase a foreign security or other investment, it is often necessary to make a trade-related currency conversion in order to facilitate the purchase transaction. In addition, the Applicant states that such currency conversions may be necessary for purposes of investing sales proceeds in other investments, or for making

distributions of such proceeds. According to the Applicant, in cases where the manager wants to avoid currency risk, or to convert funds to a different currency to experience higher returns (such as a conversion from foreign currency to U.S. dollars, in order to experience higher returns available on a U.S. investment), it is important that the investment manager be able to convert available funds quickly.

16. The Applicant states that there are generally no additional fees added to transactions executed within a global custodian's subcustody network, while additional charges are often incurred for transactions done outside that network. The Applicant represents that those additional fees may make the currency conversion transaction disadvantageous to the plan for still another reason—price. In addition, the Applicant represents that, because the subcustodian generally receives significant transaction flow from the global custodian, which is also monitoring rates and performance, it is more likely that the rates provided by the subcustodian will be at least as good as might be available from a local bank or broker-dealer outside the global custodian's network. While the Applicant is not a global custodian and cannot describe each global custodian's practices, the Applicant believes that it is customary for all custody client trades to be forwarded to a subcustodian at the same time, and for the trades to be executed at the same rate as other trades received by the subcustodian at approximately the same time. The Applicant notes that confirmations of the transactions do not always reflect where the foreign exchange trade was executed. The investment manager generally does not know the rate before a foreign exchange trade is executed, and the manager may know the range in which it will fall and will approve that range. The Applicant states that the investment manager is advised of the rate late in the day for western hemisphere trades, and the next morning for the eastern hemisphere. The Applicant further represents that these rates can be verified using Reuters or a similar service.

17. According to the Applicant, in effecting foreign exchange transactions, the investment manager would generally rely on PTE 84-14 (49 FR 9494, March 13, 1984), or PTE 91-38 (67 FR 9483, March 1, 2002). However, the Applicant states that neither exemption is available where the trade is routed to a subcustodian who is an affiliate of the Applicant. Thus, the Applicant seeks relief for foreign exchange transactions where its affiliate is selected by a global

custodian. The Applicant states that not only does the investment manager have no control over the global custodian's selection of subcustodians, but it also cannot control which currencies a global custodian chooses to deal in, which impacts whether the global custodian has to send the foreign exchange transactions to its subcustodian in a particular market. The Applicant further states that the investment manager is not necessarily advised when a currency is added to the global custodian's dealing desk, or deleted from it.

Income-Related Transactions

18. The Applicant also seeks relief, with respect to certain income-related foreign exchange transactions. The covered transactions for which the Applicant requests relief also involve the Applicant or its affiliate, as investment manager for a plan or pooled fund, causing such plan or pooled fund to engage in foreign exchange transactions with the Applicant's affiliates, who may be acting as subcustodian for the assets involved in the transaction. Specifically, the Applicant is requesting an exemption that would apply to income item conversions in all currencies, which would not be covered by PTE 98-54, for the same reasons that the exemption does not apply to trade-related foreign exchange transactions. The Applicant explains that as with trade-related transactions, an income-related transaction is not itself an investment, but is an integral component of a plan's or pooled fund's foreign investment activities.

19. The Applicant states that the purpose of income-related transactions is to convert income items, such as interest, dividends, tax reclaims, and other distributions, either from foreign currency into U.S. dollars, or into another foreign currency. For example, the Applicant states that the manager may wish to convert dividend income to U.S. dollars to permit reinvestment, to enhance the plan's liquidity, or because the earnings on U.S. dollar cash equivalents are higher than the potential earnings on foreign cash equivalents. As with trade-related foreign exchange transactions, conversion may also be desirable to avoid currency risk with respect to income items.

20. According to the Applicant, global banks typically repatriate income through a process called "auto-repatriation," which minimizes the time that income receipts are held in foreign currency. The Applicant states that an account owner (such as a plan sponsor) would choose to use this process at the

inception of its relationship with a global custodian, or its investment manager would select auto-repatriation instead, at the time that it commences its investment management responsibilities for the account. The Applicant notes that disclosure regarding the auto-repatriation process is generally found in the service level agreements provided to customers by a global custodian.

Deutsche Bank further describes the typical auto-repatriation process as follows:

A global custodian using the auto-repatriation process contracts with a third-party vendor that electronically alerts the global custodian to expected income payments in all global fixed income and equity securities. Generally, that notice is received in advance of the expected income payment date. The global custodian's recordkeeping system, which is linked to the information feed, creates an "income map," or list of all the accounts (whether plan accounts or not) that hold the security with respect to which an income payment is expected, and the amount of the expected payment in the foreign currency for each account. A "pending transaction" for the income receipt is created, and the income map aggregates all accounts expecting that income payment and the total income expected for the entire custody client base of the global custodian. The aggregate amount of expected foreign income is sent either to the global custodian's own foreign exchange desk (in the case of developed currencies) or to the subcustodian (in the case of emerging markets or less-developed currencies). In addition, unexpected income items, such as tax reclaims, are also aggregated by currency, bundled with income trades involving non-plan clients of Deutsche Bank, and promptly executed and each aggregated account receives the same foreign exchange prices as all other accounts.

21. Deutsche Bank believes that many cash management programs automatically sweep idle U.S. dollar balances to their designated sweep vehicle at the end of each day. Therefore, the Applicant represents that automatic repatriation allows the account to experience no delay or gap in earning income on the U.S. dollar equivalent of their income payments. The Applicant opines that this is particularly beneficial in countries where either no interest is credited on foreign balances or where the interest credited on the foreign currency balance is relatively low compared to the rate of interest credited on U.S. dollar balances.

The Applicant further represents that auto-repatriation also minimizes the delays inherent in executing income transactions on a piecemeal basis, so that plans are able to realize investment returns on income more quickly. The Applicant states that generally, foreign

income trades do not settle until 2 days after the trade date. Thus, if auto-repatriation is not used, the investment manager must wait for foreign income to be received into a plan account, where the manager will actually see the income appear on the next day. According to the Applicant, before acting, the investment manager must first determine whether the amount of the foreign income payment is large enough to trade. If so, the trade will be executed, but not settled until 2 days after the trade date. Therefore, the Applicant states that the account would receive lower interest (or no interest) on foreign income for up to 3 days after the foreign income payment is made. A longer delay may result where the income payment is not large enough to trade (e.g., because, due to the amount of income involved, the transaction costs would exceed the amount of the income receipt).

In contrast, the Applicant represents that when auto-repatriation is used, the expected amount of income is sent to the global custodian or subcustodian before settlement and is aggregated with other income payments. As a result, the Applicant explains that income-related trades are completed quickly and the account (including plan accounts) begins to earn interest on funds as soon as possible.

22. As with trade-related foreign exchange transactions, the Applicant states that participation in auto-repatriation may cause plan assets which are managed by Deutsche Bank or its affiliate to be routed to an affiliate of Deutsche Bank which acts as a subcustodian for the plan. Thus, the Applicant represents that if a plan holds an investment in an emerging market, and the investment produces an income item in that market's currency, auto-repatriation of the income item to U.S. dollars may result in the conversion trade being directed to an affiliate of Deutsche Bank, through the global custodian's auto-repatriation system.

23. The Applicant explains that the direction of trades to an affiliate through auto-repatriation is not something that Deutsche Bank can control, nor would Deutsche Bank necessarily know about it in advance of the trade. Therefore, the Applicant states that the only way to prevent these transactions is for the plan not to repatriate income items using this process. The Applicant represents that, as a result, income items would have to be converted separately, most likely at a significant added cost to plans.

24. According to the Applicant, the inability to be part of the automatic income processing system may also have an unintended effect on the global

cash management system. The Applicant represents that most plans rely on their global custodian's deposits or its subcustodian deposits for overnight interest in a particular currency. To the extent that the economics and the inefficiencies of doing small income trades are reasons to leave foreign currency amounts unconverted, the Applicant notes that the transactions which are the subject of the exemption would result in more managed money being held in deposits of the global custodian or the subcustodian.

Summary of Exemption Request

25. The Applicant states that the proposed exemption would apply solely in the context of a global custodian which selects the Applicant's local branch as a subcustodian, in a market where the global custodian does not make a market in the local currency and, thus, the currency can be deemed to be "less developed" based on the trading perspective of the global custodian.

The Applicant represents that the proposed exemption would apply only when: (a) A client plan's independent fiduciary or the independent trustee of a pooled fund (other than Deutsche Bank or its affiliate) has chosen a global custodian which, in turn, selects a Deutsche Bank affiliate to act as a subcustodian, or (b) Deutsche Bank or its affiliate, as trustee of a pooled fund or for its in-house plans, chooses a global custodian which selects a Deutsche Bank affiliate to act as a subcustodian. In either case, Deutsche Bank believes that exemptive relief under section 406(b) of the Act may be necessary for both trade-related and income-related foreign exchange transactions effected with its affiliate, if that affiliate is the subcustodian for a plan or a pooled fund in an emerging market, and the Applicant is aware that transactions for foreign exchange in connection with securities or other investment transactions that are sent to the global custodian will be effected through the subcustodian.

With respect to a client plan, the Applicant states that Deutsche Bank or its affiliate has no control over the selection of a global custodian by the independent fiduciary. Furthermore, the Applicant states that Deutsche Bank or its affiliate has no control over: The subcustodian chosen by such global custodian; the global custodian's arrangements with subcustodians; or the global custodian's processes and procedures. Where Deutsche Bank or its affiliate acts as a trustee of a pooled fund or where it acts as a fiduciary for

an in-house plan, the Applicant notes that Deutsche Bank or its affiliate selects the global custodian, but has no control over that global custodian's subcustody network or arrangements with the subcustodians.

26. The Applicant states that the proposed exemption is beneficial to plans because under current law, the only option which the Applicant is able to exercise is not to invest plan assets in certain emerging markets that have less developed currencies. As a result, the Applicant states that the investment opportunities and flexibility available to plans or pooled funds clients are severely limited. The Applicant represents that it needs to be able to trade in emerging markets for plan, or pooled funds, regardless of whom the subcustodian is, so long as it is chosen by someone other than the Applicant or its affiliates.

The Applicant states that the proposed exemption is also beneficial to plans or pooled funds because even in markets where another subcustodian is available, plans may be faced with higher transaction costs. Therefore, using the Applicant's subcustodian may not be an option, even if it offers the same rates as other subcustodians. The Applicant opines that it is not practical or commercially reasonable to require a client plan's global custodian to refrain from using the Applicant's affiliates as subcustodians. In addition, the Applicant again emphasizes that it does not have the ability to control a global custodian from including the Applicant's affiliates in its subcustody networks.

27. The Applicant represents that under the proposed exemption, at the time a foreign exchange transaction is entered into, the terms of the transaction must be no less favorable to the plan or pooled fund than the terms generally available in a comparable arm's length foreign exchange transaction between unrelated parties. In addition, the exchange rate used for a particular foreign exchange transaction must not deviate by more than 3 percent (above or below) the interbank bid and asked rates for such currency at the time of the transaction as displayed on an independent, nationally-recognized service that reports rates of exchange in the foreign currency market for such currency. Further, the Applicant states that the transactions must be executed with the Applicant or its affiliate through the global custodian, in the course of the global custodian's normal transaction processing as global custodian. The Applicant states that these conditions are intended to ensure that the benefits of and costs to the plan

are the same as the benefits and costs experienced by other accounts.

28. The Applicant represents that the proposed exemption would not apply to foreign exchange transactions in which the global custodian is the Applicant or its affiliate. As noted above, the Applicant states that it divested itself of its global custody business in 2003. In all cases, the proposed exemption would require that the choice of the Applicant or its affiliate as a subcustodian be made by the unrelated global custodian, and not by the Applicant or its affiliate.

29. The proposed exemption also includes a condition that requires that the assets of plans and pooled funds for which Deutsche Bank and/or its affiliates select the global custodian be less than 20 percent of the total assets under the global custodian's custody.

As for other substantive safeguards, the foreign affiliates of Deutsche Bank agree to submit to the jurisdiction of the United States; agree to appoint a Process Agent in the United States, which may be an affiliate; consent to service of process on the Process Agent; agree that it may be sued in the United States Courts in connection with the covered transactions described in this proposed exemption; agree that any judgment on behalf of a plan or pooled fund may be collected in the United States from Deutsche Bank by the independent fiduciary to the extent applicable; and agree to comply with, and be subject to, all relevant provisions of the Act.

In addition, Deutsche Bank or its affiliate will designate a senior official who has at least ten years experience with the fiduciary responsibility provisions of the Act and appropriate compliance training as the "responsible reviewing individual." Such individual will review the covered transactions periodically (but not less frequently than on an annual basis) to ensure compliance with the terms of the exemption on behalf of a client plan, an in-house plan, or a large pooled fund. Following such review, the responsible reviewing individual will issue a written report to Deutsche Bank, the independent fiduciary of the client plan, the independent fiduciary of the in-house plan, the independent fiduciary of the large pooled fund, the independent fiduciary of the unrelated pooled fund, or the receiving fiduciary of the small pooled fund, within 90 days after the period to which the periodic review relates. The report will describe the steps performed by the responsible reviewing individual during the course of the review, the level of compliance by Deutsche Bank or its affiliate with the terms and conditions of the exemption,

and any specific instances of non-compliance by Deutsche Bank or its affiliate with the terms and conditions of the exemption.

If the findings of the responsible reviewing individual disclose that Deutsche Bank or its affiliate has failed to comply with the terms and conditions of this exemption with respect to multiple transactions executed on an on-going basis, or there has been a material factual change to the representations contained in the Summary of Facts and Representations of the proposed exemption, the exemption will no longer be available as of the date of such noncompliance. In the event the exemption is no longer effective, Deutsche Bank may apply for a new exemption seeking retroactive relief from the date it comes back into compliance, provided that Deutsche Bank: (a) Notifies the Department of the period during which it was in noncompliance and the underlying facts of such noncompliance, (b) files a Form 5330 with the Service and pays all applicable excise taxes, (c) makes the affected plan or pooled fund whole if the plan or pooled fund has suffered a loss as a result of such noncompliance, and (d) develops and adopts appropriate policies and procedures to ensure all future transactions are executed in compliance with the terms and conditions of the exemption. In the alternative, if the findings of the responsible reviewing individual disclose that Deutsche Bank has failed to comply with the terms and conditions of this exemption with respect to an isolated transaction, the exemption will continue to provide exemptive relief for covered transactions apart from the non-recurring transaction as long as Deutsche Bank: (a) files a Form 5330 with the Service and pays any applicable excise taxes, and (b) makes the affected plan or pooled fund whole if the plan or pooled fund has suffered a loss as a result of such noncompliance.⁸

With respect to the covered transactions, Deutsche Bank will hire an independent fiduciary to represent the interests of an in-house plan or a large pooled fund. This independent fiduciary will be an individual or company that: (a) Is unrelated and independent of Deutsche Bank, with at least 10 years experience in the financial services business and

⁸ The sole failure of a global custodian to comply with a condition of the exemption despite Deutsche Bank's best efforts to ensure the global custodian's compliance, shall not result in the loss of the exemption with respect to Deutsche Bank provided all other conditions have been met.

significant experience in foreign currency trading and pricing; (b) certifies that the gross income such fiduciary receives from Deutsche Bank and its affiliates for the current year does not exceed 5% of such fiduciary's gross income from all services for the prior fiscal year; and (c) represents that it understands its ERISA duties and responsibilities in acting as a fiduciary with respect to the plan(s) (or pooled funds) and the covered transactions. The independent fiduciary will review the transactions executed under the exemption, ask Deutsche Bank questions that it may have regarding such transactions, and take appropriate action on behalf of the plans or pooled funds if it has concerns about the trades.

Further, Deutsche Bank or its affiliate will maintain or cause to be maintained for a period of six years from the date of the covered transactions written records of the transaction to enable persons such as: the responsible reviewing individual, independent fiduciaries of client plans, independent fiduciaries in-house plans, independent fiduciaries of large pooled funds, independent fiduciaries of unrelated pooled funds, receiving fiduciaries of small pooled funds, participants, or representatives of the Department or the Service to determine whether the conditions of the exemption have been met. Such written records include: (a) The account name; (b) the foreign exchange transaction execution date; (c) the exchange rate; (d) the high and low on Reuters or similar service on the date of the transaction; (e) the identity of the foreign currency sold or purchased; (f) the amount of foreign currency sold or purchased; (g) the amount of U.S. dollars exchanged, where the exchange is between foreign currencies and U.S. dollars or the amount of foreign currency exchanged, where the exchange is between two foreign currencies; and (h) the annual report issued by the responsible reviewing individual.

30. Additionally, the proposed exemption includes a requirement that prior to the investment of a plan's or pooled fund's assets in a foreign investment, that may result in the execution of a foreign exchange transaction with Deutsche Bank or its affiliate as subcustodian, Deutsche Bank will provide written notice to the independent fiduciary of a client plan, the independent fiduciary of an in-house plan, the independent fiduciary of a large pooled fund, the independent fiduciary of an unrelated pooled fund, or the receiving fiduciary of a small pooled fund that includes the following information: (a) The reasons why

Deutsche Bank or its affiliate may consider the investment appropriate for the plan; (b) the identity of the global custodian and the factors considered in such global custodian's selection; (c) notice that such foreign exchange transaction may be executed by Deutsche Bank or its affiliate at the direction of a global custodian, and full disclosure of all fees that Deutsche Bank or its affiliate may receive as a result of the foreign exchange transaction; (d) in those cases where Deutsche Bank or its affiliate selects the global custodian, a summary of the global custodian's policies and procedures regarding the handling of foreign exchange transactions for plans or pooled funds with respect to which Deutsche Bank or its affiliate is a fiduciary and the factors that the global custodian considers in its selection of a subcustodian; (e) a list of the markets in which Deutsche Bank or its affiliate serves as a subcustodian, and whether a particular market is served by more than one subcustodian; (f) a list of the markets where currency transactions are executed by a subcustodian, to the extent known; (g) notice that Deutsche Bank or its affiliate maintains the required records, and such records are reasonably available at their customary location for examination in the U.S., during normal business hours, by the responsible reviewing individual, the independent fiduciary of a client plan, the independent fiduciary of an in-house plan whose assets are invested in a separately managed account with Deutsche Bank, the independent fiduciary of a large pooled fund, the independent fiduciary of an unrelated pooled fund, the receiving fiduciary of a small pooled fund, any participant or beneficiary of such plan or pooled fund, or any duly authorized employee or representative of such participant or beneficiary; (h) the independent fiduciary shall have 30 days to object in writing to Deutsche Bank or its affiliate, following disclosure by Deutsche Bank or its affiliate of the arrangement contemplated under the exemption. If such fiduciary fails to object in writing within this period, then such fiduciary's authorization of the arrangement shall be presumed; (i) notification of any changes to the information described above, including, but not limited to, the situation where Deutsche Bank or its affiliate replaces the global custodian with another independent entity; and (j) copies of the notice of proposed exemption and grant of final exemption with respect to the subject transactions. Such report may be provided electronically.

In addition, upon the request of the independent fiduciary, and within 90 days of such request, Deutsche Bank or its affiliate will provide compliance reports (which may be transmitted electronically) that demonstrate that the terms of the exemption have been met. Such written reports will include the information described above.

31. In summary, the Applicant represents that the transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act since, among other things:

(a) At the time the foreign exchange transaction is entered into, the terms of the transaction will not be less favorable to the plan or pooled fund than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties.

(b) The exchange rate used for a particular foreign exchange transaction will not deviate by more than 3 percent (above or below) the interbank bid and asked rates for such currency at the time of the transaction as displayed on an independent, nationally-recognized service that reports rates of exchange in the foreign currency market for such currency.

(c) The covered transactions will be limited to those currencies in which a transaction is executed with a Deutsche Bank affiliate acting as local subcustodian at the direction of the global custodian either does not make a market in such currency, or otherwise determines to execute with the local subcustodian because of market conditions, market restrictions, illiquidity of the currency or similar exigencies.

(d) Where a market is served by more than one subcustodian, Deutsche Bank or its affiliate will have no decision making authority or role with respect to the global custodian's selection of the subcustodian.

(e) The global custodian will not be Deutsche Bank or any affiliate thereof.

(f) The foreign exchange transaction will be executed by Deutsche Bank or its affiliate thereof acting as subcustodian at the direction of the global custodian in its normal course of business as global custodian.

(g) The decision to select Deutsche Bank or its affiliate as the subcustodian will be made by an unrelated global custodian.

(h) The selection of Deutsche Bank or its affiliate as subcustodian and any foreign exchange transactions executed by Deutsche Bank or its affiliate at the direction of a global custodian will not be part of an understanding, arrangement or agreement, written or

otherwise, designed to benefit Deutsche Bank, its affiliate or another party in interest.

(j) The decision to invest in a market and to select Deutsche Bank or its affiliate as asset manager will be part of an investment strategy that is adopted by an independent fiduciary of a client plan, the independent fiduciary of an in-house plan, the independent fiduciary of a large pooled fund, or the independent fiduciary of an unrelated pooled fund.

(j) On an annual basis, the percentage of assets of plans and pooled funds for which Deutsche Bank or its affiliates select the global custodian will be less than 20 percent of the total assets under the global custodian's custody.

(k) Foreign affiliates of Deutsche Bank who engage in the covered transaction will agree to submit to the jurisdiction of the United States Courts and consent to service of process on the Process Agent for purposes of any lawsuits that may be brought in connection with the foreign exchange transactions, and comply with, and be subject to, all relevant provisions of the Act.

(l) Deutsche Bank or its affiliate will designate an individual responsible for reviewing periodically a representative sample of consummated foreign exchange transactions, no less frequently than on an annual basis, to determine whether the covered transactions have been executed in accordance with the terms of this exemption.

(m) Prior to the investment of the plan's assets in a foreign investment that may require the execution of a foreign exchange transaction, Deutsche Bank or its affiliate will provide to the independent fiduciary of a client plan, the independent fiduciary of an in-house plan, the independent fiduciary of a large pooled fund, or the independent fiduciary of an unrelated pooled fund, a written notice (which may be effected electronically) that will include all relevant information pertaining to Deutsche Bank's investment strategy with respect to foreign exchange transactions.

(n) On the basis of such information, the independent fiduciary will adopt Deutsche Bank's investment strategy with respect to foreign exchange transactions.

(o) Upon the request of the independent fiduciary, and within 90 days of such request, Deutsche Bank or an affiliate will provide written compliance reports (which may be transmitted electronically) that demonstrate that the terms of the exemption have been met.

(p) Deutsche Bank or its affiliate will maintain, or will cause to be maintained, for a period of six years from the date of the covered transactions, certain records to enable such persons as: The responsible reviewing individual, the independent fiduciary of a client plan, or any duly authorized representative of the Department or the Service, to determine whether the conditions of this exemption have been met.

Notice to Interested Persons

The Applicant represents that because those potentially interested client plans cannot all be identified at the time this proposed exemption is published in the **Federal Register**, the only practical means of notifying the independent fiduciaries of such plans of the proposed exemption is by publication of the notice of pendency in the **Federal Register**. However, with respect to the fiduciaries of in-house plans (including independent fiduciaries of large pooled funds, independent fiduciaries of unrelated pooled funds, or receiving fiduciaries of small pooled funds), the Applicant will provide copies of the proposed exemption to such interested persons either by first class mail, hand delivery or electronic mail within 15 days of the publication of the proposed exemption in the **Federal Register**. Therefore, written comments and/or requests for a public hearing must be received by the Department not later than 45 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

If granted, this exemption will be available to Deutsche Bank for as long as the terms and conditions of the exemption are satisfied with respect to the assets of client plans, in-house plans or pooled funds that are engaged in the covered foreign exchange transactions.

FOR FURTHER INFORMATION CONTACT:

Allison Padams-Lavigne, U.S. Department of Labor, telephone (202) 693-8564. (This is not a toll-free number.)

Banc One Investment Advisors Corporation (BOIA) and J.P. Morgan Investment Management Inc. (JPMIM) and their Affiliates (Collectively, JPMorgan)

Located in New York, New York.
[Application No. D-11263]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, in accordance with the procedures set

forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Retroactive Exemption for the Acquisition, Holding, and Disposition of JPMorgan Chase & Co. Stock

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(D), 406(b)(1) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(D) and (E) of the Code, shall not apply, as of January 14, 2004, until the date this proposed exemption is granted, to the acquisition, holding, and disposition of the common stock of JPMorgan Chase & Co. (the JPM Stock) by Index and Model-Driven Funds managed by JPMorgan, provided that the following conditions and the general conditions in Section III are satisfied:

(a) The acquisition or disposition of the JPM Stock is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based.

(b) The acquisition or disposition of the JPM Stock does not involve any agreement, arrangement, or understanding regarding the design or operation of the Fund acquiring the JPM Stock which is intended to benefit JPMorgan or any party in which JPMorgan may have an interest.

(c) All aggregate daily purchases of JPM Stock by the Funds do not exceed, on any particular day, the greater of:

(1) Fifteen (15) percent of the aggregate average daily trading volume for the JPM Stock occurring on the applicable exchange and automated trading system (as described in paragraph (d) below) for the previous five business days, or

(2) Fifteen (15) percent of the trading volume for the JPM Stock occurring on the applicable exchange and automated trading system on the date of the transaction, both as determined by the best available information for the trades occurring on that date or dates.

(d) All purchases and sales of JPM Stock are either (i) Entered into on a principal basis in a direct, arm's length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of JP Morgan and is either registered under the Securities Exchange Act of 1934 (the 1934 Act), and thereby subject to regulation by the Securities and Exchange Commission (SEC), (ii) effected on an automated trading system (as defined in Section IV(i) below) operated by a broker-dealer independent of JPMorgan that is subject to regulation

by the SEC, or an automated trading system operated by a recognized U.S. securities exchange (as defined in Section IV(j) below), which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected on a recognized securities exchange (as defined in Section IV(j) below), so long as the broker is acting on an agency basis.

(e) No transactions by a Fund involve purchases from, or sales to, JPMorgan (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the Fund with such party in interest would otherwise be subject to an exemption); however, this condition would not apply to purchases or sales on an exchange or through an automated trading system (described in paragraph (d) of this Section) on a blind basis where the identity of the counterparty is not known.

(f) No more than five (5) percent of the total amount of JPM Stock that is issued and outstanding at any time is held in the aggregate by Index and Model-Driven Funds managed by JPMorgan.

(g) JPM Stock constitutes no more than three (3) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

(h) A plan fiduciary which is independent of JPMorgan authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds JPM Stock, pursuant to the procedures described herein (see Paragraph 12 of the Summary of Facts and Representations, below, regarding portfolio management services provided for particular plans).

(i) A fiduciary independent of JPMorgan directs the voting of the JPM Stock held by an Index or Model-Driven Fund on any matter in which shareholders of JPM Stock are required or permitted to vote.

Section II—Prospective Exemption for the Acquisition, Holding, and Disposition of JPMorgan Chase & Co. Stock

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(D), 406(b)(1) and 406(b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(D) and (E) of the Code, shall not apply, as of the date this proposed exemption is granted, to the acquisition, holding, and disposition of JPM Stock by Index and

Model-Driven Funds managed by JPMorgan, provided that the following conditions and the general conditions in Section III are satisfied:

(a) The acquisition or disposition of JPM Stock is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based.

(b) The acquisition or disposition of JPM Stock does not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring the JPM Stock which is intended to benefit JPMorgan or any party in which JPMorgan may have an interest.

(c) All purchases of JPM Stock pursuant to a Buy-up (as defined in Section IV(d)) occur in the following manner:

(1) Purchases on a single trading day are from, or through, only one broker or dealer;

(2) Based on the best available information, purchases are not the opening transaction for the trading day;

(3) Purchases are not effected in the last half hour before the scheduled close of the trading day;

(4) Purchases are at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from brokers that are not affiliates of JPMorgan (as defined in section IV(g));

(5) Aggregate daily purchases of JPM Stock by the Funds do not exceed, on any particular day, the greater of: (i) Fifteen (15) percent of the aggregate average daily trading volume for the security occurring on the applicable exchange and automated trading system for the previous five business days, or (ii) fifteen (15) percent of the trading volume for the security occurring on the applicable exchange and automated trading system on the date of the transaction, as determined by the best available information for the trades occurring on that date;

(6) All purchases and sales of JPM Stock occur either (i) on a recognized securities exchange (as defined in Section IV(j) below), (ii) through an automated trading system (as defined in Section IV(i) below) operated by a broker-dealer independent of JPMorgan that is registered under the 1934 Act, and thereby subject to regulation by the SEC, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system (as defined in Section IV(i) below) that is operated by a recognized securities

exchange (as defined in Section IV(j) below), pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(7) If the necessary number of shares of JPM Stock cannot be acquired within 10 business days from the date of the event that causes the particular Fund to require JPM Stock, JPMorgan appoints a fiduciary that is independent of JPMorgan to design acquisition procedures and monitor JPMorgan's compliance with such procedures, in accordance with Representation 7 in the Summary of Facts and Representations.

(d) For transactions subsequent to a Buy-up, all aggregate daily purchases of JPM Stock by the Funds do not exceed, on any particular day, the greater of:

(1) Fifteen (15) percent of the aggregate average daily trading volume for the JPM Stock occurring on the applicable exchange and automated trading system for the previous five (5) business days, or

(2) Fifteen (15) percent of the trading volume for JPM Stock occurring on the applicable exchange and automated trading system on the date of the transaction, as determined by the best available information for the trades that occurred on such date.

(e) All transactions in JPM Stock not otherwise described in paragraph (c) above are either: (i) Entered into on a principal basis in a direct, arms-length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of JPMorgan and is registered under the 1934 Act, and thereby subject to regulation by the SEC, (ii) effected on an automated trading system (as defined in Section IV(i) below) operated by a broker-dealer independent of JPMorgan that is subject to regulation by the SEC, or an automated trading system operated by a recognized securities exchange (as defined in Section IV(j) below), which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized securities exchange (as defined in Section IV(j) below), so long as the broker is acting on an agency basis.

(f) No transactions by a Fund involve purchases from, or sales to, JPMorgan (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets in the Fund (unless the transaction by the Fund with such party in interest would

otherwise be subject to an exemption); however, this condition would not apply to purchases or sales on an exchange or through an automated trading system (described in paragraphs (c) and (e) of this Section) on a blind basis where the identity of the counterparty is not known.

(g) No more than five (5) percent of the total amount of JPM Stock that is issued and outstanding at any time is held in the aggregate by Index and Model-Driven Funds managed by JPMorgan.

(h) JPM Stock constitutes no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

(i) A plan fiduciary independent of JPMorgan authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds JPM Stock, pursuant to the procedures described herein (see Paragraph 12 of the Summary of Facts and Representations below regarding portfolio management services provided for particular plans).

(j) A fiduciary independent of JPMorgan directs the voting of the JPM Stock held by an Index or Model-Driven Fund on any matter in which shareholders of JPM Stock are required or permitted to vote.

Section III—General Conditions

(a) JPMorgan maintains or causes to be maintained, for a period of six years from the date of the transaction, the records necessary to enable the persons described in paragraph (b) of this Section to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, solely due to circumstances beyond the control of JPMorgan, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than JPMorgan shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b) below.

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

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

Internal Revenue Service or the Securities and Exchange Commission,

(B) Any fiduciary of a plan participating in an Index or Model-Driven Fund who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan participating in an Index or Model-Driven Fund or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an Index or Model-Driven Fund, or a representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this paragraph (b) shall be authorized to examine trade secrets of JPMorgan or commercial or financial information that is considered confidential.

Section IV—Definitions

(a) The term “Index Fund” means any investment fund, account, or portfolio sponsored, maintained, trustee, or managed by JPMorgan, in which one or more investors invest, and—

(1) That is designed to track the rate of return, risk profile, and other characteristics of an independently maintained securities Index, as described in Section IV(c) below, by either (i) replicating the same combination of securities that comprise such Index, or (ii) sampling the securities that comprise such Index based on objective criteria and data;

(2) For which JPMorgan does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That contains “plan assets” subject to the Act; and,

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

(b) The term “Model-Driven Fund” means any investment fund, account, or portfolio sponsored, maintained, trustee, or managed by JPMorgan, in which one or more investors invest, and—

(1) That is composed of securities, the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third party data, not within the control of JPMorgan, to transform an independently maintained Index, as described in Section IV(c) below;

(2) That contains “plan assets” subject to the Act; and

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

(c) The term “Index” means a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if —

(1) The organization creating and maintaining the index is—

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

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

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

(2) The index is created and maintained by an organization independent of JPMorgan; and,

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

(d) The term “Buy-up” means an initial acquisition of JPM Stock by an Index or Model-Driven Fund which is necessary to bring the Fund's holdings of such stock either to its capitalization-weighted or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or to its correct weighting as determined by the model which has been used to transform the index.

(e) The term “JPMorgan” refers to Bank One Investment Advisors Corporation (BOIA) and J.P. Morgan Investment Management Inc. (JPMIM), and their respective Affiliates, as defined in paragraph (f) below.

(f) The term “Affiliate” means, with respect to BOIA or JPMIM, an entity which, directly or indirectly, through one or more intermediaries, is controlling, controlled by, or under common control with BOIA or JPMIM;

(g) An “affiliate” of a person includes:

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

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

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

(h) The term “control” means the power to exercise a controlling influence over the management or

policies of a person other than an individual.

(i) The term "automated trading system" means an electronic trading system that functions in a manner intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers, such as an "alternative trading system" within the meaning of the SEC's Reg. ATS [17 CFR 242.300], as such definition may be amended from time to time, or an "automated quotation system" as described in Section 3(a)(51)(A)(ii) of the 1934 Act [15 U.S.C. 78c(a)(51)(A)(ii)].

(j) The term "recognized securities exchange" means a U.S. securities exchange that is registered as a "national securities exchange" under Section 6 of the 1934 Act (15 U.S.C. 78f), as such definition may be amended from time to time, which performs with respect to securities the functions commonly performed by a stock exchange within the meaning of definitions under the applicable securities laws (e.g., 17 CFR 240.3b-16).

(k) The term "Fund" means an Index Fund (as described in Section IV(a)) or a Model-Driven Fund (as described in IV(b)).

Summary of Facts and Representations

1. On January 14, 2004, Bank One Corporation (Bank One), a publicly traded bank holding company, and J.P. Morgan Chase & Co. (JPMC), a publicly traded bank holding company, entered into an agreement to effect a merger of the assets and business operations of the two financial institutions (the Merger). The Merger became effective on July 1, 2004, on which date each share of Bank One common stock was exchanged for 1.32 shares of the common stock of JPMC. The combined company is known as JPMorgan Chase & Co. (also referred to herein as JPMC) and continues its corporate existence under Delaware law. The common stock of JPMC trades on the New York Stock exchange under the trading symbol "JPM."

With assets of approximately \$1.1 trillion and operations in more than 50 countries, JPMC is a leader in investment banking, financial services for consumers and businesses, financial transaction processing, asset and wealth management, and private equity. The headquarters for JPMC is located in New York.

JPMC is internally organized for management reporting purposes into six major lines of business: (i) Asset & Wealth Management; (ii) Card Services; (iii) Commercial Banking; (iv)

Investment Banking; (v) Retail Financial Services; and (vi) Treasury & Securities Services. Only the first line of business is relevant to the Applicants' exemption request.

Banc One Investment Advisors Corporation (BOIA) is an investment adviser registered under the Investment Advisers Act of 1940 (the Advisers Act). BOIA acts as an investment manager to employee benefit plans subject to the fiduciary responsibility provisions of ERISA, as well as governmental plans and other trusts or funds that are exempt from taxation under section 501(a) of the Code.

J.P. Morgan Investment Management, Inc. (JPMIM) is an investment adviser registered under the Advisers Act that manages assets for a wide range of institutional and private clients around the globe. As of December 31, 2005, JPMIM managed approximately \$1.19 trillion in assets for defined benefit and defined contribution plans, endowments and foundations, and other institutional clients, mutual funds, and high net worth individuals.

Effective as of the date of the Merger, BOIA and JPMIM are both wholly owned subsidiaries of JPMC. BOIA, JPMIM and their Affiliates that are now or may, in the future, be engaged in providing asset management services to ERISA-covered plans are collectively referred to as "JPMorgan."

2. Prior to January 14, 2004, BOIA maintained and managed Index and Model-Driven Funds which held assets of ERISA-covered employee benefit plans. The Applicants represent that, as a result of the Merger, an individual exemption for the acquisition, holding, and disposition of common stock of JPMC (i.e., JPM Stock) is necessary to enable certain Index and Model-Driven Funds managed by JPMorgan (formerly managed by BOIA) to acquire, hold, and dispose of JPM Stock. In this regard, there have been Funds that, since January 14, 2004, have acquired, held, and/or disposed of JPM Stock. The Applicants request a retroactive exemption, effective as of January 14, 2004 to the date that this proposed exemption is granted, to permit such transactions by these Funds. The Applicants are not requesting any retroactive relief for any pre-Merger acquisition, holding or disposition of the common stock of Bank One.

3. The Applicants represent that they provide investment advisory and management services to ERISA-covered plans through separately managed accounts and through collective investment vehicles. The Applicants' investment management services include indexed, quantitative, and

structured investment strategies. In addition to ERISA-covered plans, the Applicants' clients include retirement plans with non-U.S. participants, governmental entities, governmental plans, church plans, endowments and foundations, mutual funds, and other institutional investors.

4. In its capacity as fiduciary of an employee benefit plan, each of the Applicants is appointed by an independent plan fiduciary. The Applicants represent that their discretionary authority over whether the plan invests in particular Funds is restricted by guidelines adopted by an independent plan fiduciary, unless the plan subscribes to the Applicants' portfolio management in Funds (PMF) services (as discussed below).

5. The Applicants request that Index and Model-Driven Funds be permitted to invest in JPM Stock if such Stock is included among the securities listed in the index utilized by the Fund. The Applicants represent that indices that include JPM Stock include the S&P 500 Index and the Russell 1000 Value Index, among others. These indices are compiled by financial information agencies, such as Standard & Poor's and Frank Russell. These agencies are engaged in the provision of financial information or securities brokerage services to institutional investors and/or are publishers of financial information. In each instance, the indices are compiled by organizations that are independent of JPMorgan and are generally accepted standardized indices of securities that are not tailored for the use of JPMorgan. While many of these indices are not currently utilized by JPMorgan for its Index and Model-Driven Funds, there is a possibility that Funds holding assets of ERISA-covered plans will be established in the future that are based on these indices.

The Applicants represent that there were at least seven (7) different Index Funds maintained by Bank One that included JPM Stock in their portfolios, as of January 14, 2004. These Funds were all separately managed accounts that invest in either an S&P 500 or Russell 1000 Value Index strategy.

6. The Applicants state that the proposed exemption is desirable to allow Funds holding "plan assets" to purchase and hold JPM Stock in order to replicate the capitalization-weighted or other specified composition of JPM Stock in an independently maintained third party index⁹ used by an Index

⁹ According to the Applicants, various methods other than capitalization-weighting that may be used to determine the composition of JPM Stock in

Fund or to achieve the desired transformation of an index used to create a portfolio for a Model-Driven Fund.¹⁰ In addition, the Applicants represent that there will be instances, once this proposed exemption is granted, when JPM Stock will be added to an index on which a Fund is based or will be added to the portfolio of a Fund which seeks to track an index that includes such Stock.¹¹ In such instances, acquisitions of JPM Stock will be necessary to bring the Fund's holdings of such Stock either to its capitalization-weighted or other specified composition in the index, as determined by the independent organization maintaining such index, or to the correct weighting for such Stock as determined by the computer model that has been used to transform the index. If the Index or Model-Driven Fund holds "plan assets," the Applicants represent that all acquisitions of JPM Stock by such Fund will comply with the "Buy-up" conditions contained in Section II(c) of this proposed exemption.¹²

an index are as follows: (i) An index may weigh each of the securities that comprise the index equally, regardless of the relative capitalization of the issuer; (ii) an index might use share weighting, where the weighting of each stock is determined based on the total number of shares of each issuer available on the market; and (iii) in price weighting, the weighting of each stock is based on the price of the stocks in the index, a stock with a higher price will have a greater weight in the index than a stock with a lower price. The Dow Jones Industrial Average is an example of a price weighted index.

¹⁰The Applicants are not requesting any relief from sections 406 or 407(a) of the Act in connection with the acquisition and holding of JPM Stock by any employee benefit plans established and maintained by JPMorgan for its own employees that invest in the Applicants' Index Funds. In this regard, the Applicants represent that such transactions may be covered by the statutory exemption under section 408(e) of the Act, if the conditions of that exemption are met. However, the Department expresses no opinion in this proposed exemption as to whether the conditions of section 408(e) of the act have been or will be met.

¹¹The Applicants represent that the inclusion or exclusion of JPM Stock from an index and the weighting or changes to the weighting of JPM Stock in an index are based on data, criteria, and methodology determined by the organization that creates and maintains the index, which cannot be varied by JPMorgan. Changes in the weighting of JPM Stock in a Fund would occur when there is a change in factors underlying the applicable weighting methodology. Changes in index weightings are, for the most part, triggered by corporate actions (buying back shares, issuing more shares or acquiring another company for stock).

¹²The Applicants anticipate that, generally, acquisitions of JPM Stock by an Index or Model-Driven Fund in a "Buy-up" will occur within 10 business days from the date of the event that causes the particular Fund to require the addition of JPM Stock. The Applicants do not anticipate that the amounts of JPM Stock acquired by any Fund in a "Buy-up" will be significant. In this regard, the Department notes that the conditions required herein are designed to minimize the market impact

7. In the case of a Buy-up, if the necessary number of shares of JPM Stock cannot be acquired within 10 days from the date of the event that causes the particular Fund to require JPM Stock, JPMorgan will appoint a fiduciary that is independent of JPMorgan to design acquisition procedures and monitor JPMorgan's compliance with such procedures.¹³ The independent fiduciary and its principals will be completely independent from the Applicants. The independent fiduciary will also be experienced in developing and operating investment strategies for individual and collective investment vehicles that track third party indices. Furthermore, the independent fiduciary will not act as the broker for any purchases or sales of JPM Stock and will not receive any commissions as a result of this initial acquisition program.

The independent fiduciary will have as its primary goal the development of trading procedures that minimize the market impact of purchases made pursuant to the initial acquisition program by the Funds. The Applicants would expect that, under the trading procedures established by the independent fiduciary, the trading activities will be conducted in a low-profile, mechanical, non-discretionary manner and would involve a number of small purchases over the course of each day, randomly timed. The Applicants further expect that such a program will allow the Applicants to acquire the necessary shares of JPM Stock for the Funds with minimum impact on the market and in a manner that will be in the best interests of any employee benefit plans that participate in such Funds.

The independent fiduciary will also be required to monitor the Applicants' compliance with the trading program and procedures developed for the initial acquisition of JPM Stock. During the course of any initial acquisition program, the independent fiduciary will be required to review the activities weekly to determine compliance with the trading procedures and notify the Applicants should any non-compliance

of purchases made by the Funds in any "Buy-up" of JPM Stock.

¹³In this regard, all Funds holding JPM Stock, as of January 14, 2004, that have continued to acquire, hold, and dispose of JPM Stock in order to track indices including JPM Stock will not need to have daily transactions involving such Stock directed by an independent fiduciary. The Applicants state that the amount of JPM Stock involved in such transactions has been and continues to be determined by the independent organization that created and maintains the relevant index, and all other conditions required under this proposed exemption have been met.

be detected. Should the trading procedures need modifications due to unforeseen events or consequences, the independent fiduciary will be required to consult with the Applicants and must approve in advance any alteration of the trading procedures.

8. Subsequent to initial acquisitions pursuant to a Buy-up, all aggregate daily purchases of JPM Stock by the Funds will not exceed, on any particular day, the greater of:

(i) Fifteen (15) percent of the average daily trading volume for the JPM Stock occurring on the applicable exchange and automated trading system (as described herein)¹⁴ for the previous five (5) business days, or

(ii) Fifteen (15) percent of the trading volume for JPM Stock occurring on the applicable exchange and automated trading system (as described herein) on the date of the transaction, as determined by the best available information for the trades that occurred on such date.

9. JPMorgan represents that, as of January 14, 2004, until the date this proposed exemption is granted, all purchases and sales of JPM Stock by the Funds have occurred and will continue to occur in one of the following ways:

(i) Through a direct, arms-length transaction entered into on a principal basis with a broker-dealer¹⁵ that is independent of JPMorgan and is registered under the 1934 Act, and thereby subject to regulation by the SEC; (ii) through an automated trading system (as defined in Section IV(i) above) operated by a broker-dealer independent of JPMorgan that is registered under the 1934 Act, and thereby subject to regulation by the SEC, or an automated trading system operated by a recognized securities

¹⁴The Department notes that the Act's fiduciary responsibility provisions would apply to the manager's selection of a trading venue, including an automated trading system, to effect purchases and sales of JPM Stock on behalf of its managed Index and Model-Driven Funds.

¹⁵The Department notes that no relief is provided herein for purchases and sales of securities between a Fund and a broker-dealer, acting as a principal, which may be considered prohibited transactions as a result of such broker-dealer being a party in interest, under section 3(14) of the Act, with respect to any plans that are investors in the Fund. However, such transactions may be covered by one or more of the Department's existing class exemptions. For example, PTE 84-14 (49 FR 9497, March 13, 1984, as amended 70 FR 49305 (Aug. 23 2005)) permits, under certain conditions, parties in interest to engage in various transactions with plans whose assets are invested in an investment fund managed by a "qualified professional asset manager" (QPAM) who is independent of the parties in interest (with certain limited exceptions) and meets specified financial standards. The Department expresses no opinion as to whether any of its class exemptions would provide relief in this circumstance.

exchange (as defined in Section IV(j) above), which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; or (iii) through a recognized securities exchange as defined in Section IV(j) above so long as the broker is acting on an agency basis.

In addition, JPMorgan states that as of the date this proposed exemption is granted, all future transactions by the Funds involving JPM Stock which do not occur in connection with a Buy-up of such Stock by a Fund, as described above, will be either: (i) Entered into on a principal basis with a broker-dealer that is registered under the 1934 Act, and thereby subject to regulation by the SEC; (ii) effected on an automated trading system (as defined in Section IV(i) above) operated by a broker-dealer independent of JPMorgan subject to regulation by the SEC, or on an automated trading system operated by a recognized securities exchange (as defined in Section IV(j) above) which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; or (iii) effected through a recognized securities exchange (as defined in Section IV(j) above), so long as the broker is acting on an agency basis.¹⁶

10. With respect to all acquisitions and dispositions of JPM Stock by the Funds since January 14, 2004, the Applicants state that no such transactions have involved purchases from or sales to JPMorgan (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets in the Fund (except for purchases or sales on an exchange or through an automated trading system on a blind basis where the identity of the counterparty is not known). The Applicants represent that all future acquisitions and dispositions of JPM Stock by any Index or Model-Driven Funds maintained by JPMorgan also will not involve any purchases from or sales to JPMorgan (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets in the Fund (unless the transaction by the Fund with such party in interest would

otherwise be subject to an exemption), other than certain blind trades.¹⁷

11. The Applicants state that no more than five (5) percent of the total amount of JPM Stock that is issued and outstanding at the time, will be held in the aggregate by Index and Model-Driven Funds managed by JPMorgan.

For purposes of the acquisition and holding of JPM Stock by Funds from January 14, 2004 until the date this proposed exemption is granted, such Stock will constitute no more than three (3) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based. For example, as of March 31, 2008, JPM Stock represents 1.27% of the S&P 500 Index and 2.31% of the Russell 1000 Value Index. Although some indices may include JPM Stock in percentages that exceed three (3) percent of the index, JPMorgan does not currently utilize such indices for its Index and Model-Driven Funds with "plan assets" subject to the Act.

For purposes of future acquisitions and holdings of JPM Stock by such Funds, if this proposed exemption is granted, JPM Stock will constitute no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

With respect to an index's specified composition of particular stocks in its portfolio, the Applicants state that future Funds may track an index where the appropriate weighting for stocks listed in the index is not capitalization-weighted. Thus, the Applicants state that Funds maintained by JPMorgan and affiliates of JPMC may track indices where the selection of a particular stock by the index, and the amount of stock to be included in the index, is not established based on the market capitalization of the corporation issuing such stock. Therefore, since an independent organization may choose to create an index where there are other index weightings for stocks comprising the index, the Applicants request that the proposed exemption allow for JPM Stock to be acquired by a Fund in the amounts that are specified by the particular index, subject to the other restrictions imposed by this proposed exemption. The Applicants represent that, in all instances, acquisitions or dispositions of JPM Stock by a Fund will be for the sole purpose of maintaining strict quantitative conformity with the relevant index

upon which the Fund is based or, in the case of a Model-Driven Fund, a modified version of such an index as created by a computer model based on prescribed objective criteria and third party data.¹⁸

12. The Applicants state that plan fiduciaries independent of JPMorgan have authorized and will continue to authorize the investment of any plan's assets in an Index or Model-Driven Fund that purchases and/or holds JPM Stock.

With respect to transactions involving JPM Stock, the Applicants state that they may provide portfolio management services (i.e., PMF services) to a particular plan (a PMF Plan). In this regard, the Applicants may exercise some discretion in allocating and reallocating the plan's assets among various funds, including Index or Model-Driven Funds that may hold JPM Stock. These allocations are based on a plan's investment objectives, risk profile, and market conditions. However, the Applicants make the following representations with respect to the purchase, directly or indirectly, of JPM Stock by such plans:

(a) The Applicants represent that any prohibited transactions that might occur as a result of the discretionary allocation and reallocation of plan assets among collective investment funds will be exempt from the prohibitions of section 406 of the Act by reason of section 408(b)(8).¹⁹

(b) Before JPM Stock is purchased by a Fund, the appropriate independent fiduciary for each PMF Plan that is currently invested, or could be invested, in such Fund will be furnished an explanation and a simple form to return to JPMorgan for the purpose of indicating either approval or disapproval of investments in the Fund

¹⁸ The Applicants represent that JPMorgan does not currently manage any Model-Driven Funds, but, consistent with prior similar exemption (e.g., see PTE 2000-30 (65 FR 37165, June 13, 2000) granted to Barclays Bank PLC), JPMorgan would like to retain the flexibility to do so in the future in reliance on this exemption, if granted. A Model-Driven Fund would be composed of securities the identity of which and the amount of which are selected by a computer model that is based upon prescribed objective criteria using independent third party data, not within the control of JPMorgan, to transform an independently maintained index. In managing a Model Driven Fund that includes JPM Stock, JPMorgan would maintain the weightings of JPM Stock in strict quantitative conformity with the weightings determined by the computer model.

¹⁹ The Department expresses no opinion in this proposed exemption as to whether the Applicants' discretionary allocation and reallocation services for any collective investment funds maintained by the Applicants satisfy the requirements of section 408(b)(8) of the Act and is not proposing any exemptive relief beyond that offered by section 408(b)(8) for such transactions.

¹⁶ PTE 86-128 (51 FR 41686, November 18, 1986) 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. The Department expresses no opinion as to whether the conditions of this exemption would be satisfied.

¹⁷ As set forth in Section II(e), the condition would not apply to purchases or sales on an exchange or through an automated trading system on a blind basis where the identity of the counterparty is not known.

including JPM Stock, together with a postage-paid return envelope. If the form is not returned to the Applicants, the Applicants may obtain a verbal response by telephone. If a verbal response is obtained by telephone, the Applicants will confirm the fiduciary's decision in writing within five (5) business days. In the event that no response is obtained from a plan fiduciary, the assets of the plan will not be invested in any Fund that invests in JPM Stock and any plan assets currently invested in such Fund at that time will be withdrawn.

(c) Each new management agreement with such a plan will contain language specifically approving or disapproving the investment in any Fund which holds or might hold JPM Stock. The fiduciary for each such plan will be informed that the existing management agreement could be modified in the same way. However, if the fiduciary does not specifically approve language in the agreement allowing the investment of plan assets in Funds which hold or might hold JPM Stock, then no such investment will be made by the Applicants.

(d) Each such plan will be informed on a quarterly basis of any investment in, or withdrawal from, any Fund holding JPM Stock. On an annual basis, the plan will be notified of its right to terminate the Applicants' discretionary authority to invest in or withdraw from such Funds. If the plan terminates the Applicants' authority to invest in or withdraw from the Funds, then the Applicants will effect the plan's withdrawal from the Funds as soon as reasonably practicable after being notified of such termination.

13. The Applicants will appoint an independent fiduciary that will direct the voting of JPM Stock held by the Funds. Currently, the independent fiduciary that directs the voting of JPM Stock held by the Funds is Institutional Shareholder Services, Inc.²⁰

JPMorgan states that in all instances the independent fiduciary chosen to vote JPM Stock for the Funds will be a consulting firm specializing in corporate governance issues and proxy voting on behalf of institutional investors with large equity portfolios. The fiduciary will develop and follow standard guidelines and procedures for the voting of proxies by institutional fiduciaries. The Applicants will provide the

independent fiduciary with all necessary information regarding the Funds that hold JPM Stock, the amount of JPM Stock held by the Funds on the record date for shareholder meetings of the Applicants, and all proxy and consent materials with respect to JPM Stock. The independent fiduciary will maintain records with respect to its activities as an independent fiduciary on behalf of the Funds, including the number of shares of JPM Stock voted, the manner in which they were voted, and the rationale for the vote. The independent fiduciary will supply the Applicants with such information after each shareholder meeting. The independent fiduciary will be required to acknowledge that it will be acting as a fiduciary with respect to the plans that invest in the Funds that own JPM Stock, when voting such Stock.

14. In summary, with respect to all past acquisitions, holdings, and dispositions of JPM Stock by the Funds since January 14, 2004, the Applicants represent that such transactions meet the criteria of section 408(a) of the Act for the following reasons:

(a) Each Index or Model-Driven Fund involved is based on an Index, as defined in Section IV(c) above;

(b) The acquisition, holding, and disposition of the JPM Stock by the Index or Model-Driven Fund is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Fund is based, and does not involve any agreement, arrangement, or understanding regarding the design or operation of the Fund acquiring the JPM Stock that is intended to benefit JPMorgan or any party in which JPMorgan may have an interest;

(c) All aggregate daily purchases of JPM Stock by the Funds do not exceed, on any particular day, the greater of: fifteen (15) percent of the aggregate average daily trading volume for such Stock occurring on the applicable exchange and automated trading system for the previous five (5) business days, or fifteen (15) percent of the trading volume for the Stock occurring on the applicable exchange and automated trading system on the date of the transaction, both as determined by the best available information for the trades occurring on that date or dates;

(d) All purchases and sales of JPM Stock occur either (i) on a principal basis in a direct, arms-length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of JPMorgan and is registered under the 1934 Act, and thereby subject to regulation by the SEC, (ii) effected on an

automated trading system operated by a broker-dealer independent of JPMorgan that is subject to regulation by the SEC, or an automated trading system operated by a recognized securities exchange, which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized securities exchange, so long as the broker is acting on an agency basis.

(e) No transactions by a Fund involve purchases from or sales to JPMorgan (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the Fund with such party in interest would otherwise be subject to an exemption); however, this condition would not apply to purchases or sales on an exchange or through an automated trading system on a blind basis where the identity of the counterparty is not known;

(f) No more than five (5) percent of the total amount of JPM Stock issued and outstanding at any time is held in the aggregate by Index and Model-Driven Funds managed by JPMorgan;

(g) JPM Stock constitutes no more than three (3) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based;

(h) A plan fiduciary independent of JPMorgan authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds JPM Stock; and

(i) A fiduciary independent of JPMorgan directs the voting of the JPM Stock held by an Index or Model-Driven Fund on any matter in which shareholders of JPM Stock are required or permitted to vote.

With respect to all prospective acquisitions, holdings, and dispositions of JPM Stock by the Funds after this proposed exemption is granted, the Applicants represent that such transactions will meet the criteria of section 408(a) of the Act for the following reasons:

(a) Each Index or Model-Driven Fund involved will be based on an Index, as defined in Section IV(c) above;

(b) The acquisition or disposition of JPM Stock will be for the sole purpose of maintaining strict quantitative conformity with the relevant Index upon which the Index or Model-Driven Fund is based, and will not involve any agreement, arrangement, or understanding regarding the design or operation of the Fund acquiring the JPM

²⁰ See 29 CFR 2509.94-2—Interpretive bulletin relating to written statements of investment policy, including proxy voting policy or guidelines. The Department further notes that the Act's general standards of fiduciary conduct also would apply to the selection of a service provider specializing in proxy voting.

Stock that is intended to benefit JPMorgan or any party in which JPMorgan may have an interest;

(c) Whenever JPM Stock is initially added to an index on which a Fund is based, or initially added to the portfolio of a Fund (*i.e.*, a Buy-up), all acquisitions of JPM Stock necessary to bring the Fund's holdings of such Stock either to its capitalization-weighted or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or to its correct weighting as determined by the computer model that has been used to transform the index, will be restricted by conditions that are designed to prevent possible market price manipulations;

(d) Subsequent to acquisitions necessary to bring a Fund's holdings of JPM Stock to its specified weighting in the index or model, pursuant to the restrictions noted in paragraph (c) above, all aggregate daily purchases of JPM Stock by the Funds will not exceed, on any particular day, the greater of: fifteen (15) percent of the aggregate average daily trading volume for such Stock occurring on the applicable exchange and automated trading system for the previous five (5) business days, or fifteen (15) percent of the trading volume for the Stock occurring on the applicable exchange and automated trading system on the date of the transaction, both as determined by the best available information for the trades that occurred on such date or dates;

(e) All transactions in JPM Stock, other than acquisitions of such Stock in a Buy-up described in paragraph (c) above, will be either: (i) Entered into on a principal basis with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of JPMorgan and is registered under the 1934 Act, and thereby subject to regulation by the SEC, (ii) effected on an automated trading system operated by a broker-dealer independent of JPMorgan subject to regulation by the SEC, or by a recognized securities exchange which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized securities exchange (as defined herein), so long as the broker is acting on an agency basis;

(f) No transactions by a Fund will involve purchases from or sales to JPMorgan (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the Fund with such party in interest would

otherwise be subject to an exemption); however, this condition would not apply to purchases or sales on an exchange or through an automated trading system on a blind basis where the identity of the counterparty is not known;

(g) No more than five (5) percent of the total amount of JPM Stock that is issued and outstanding at any time, will be held in the aggregate by Index and Model-Driven Funds managed by JPMorgan;

(h) JPM Stock will constitute no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based;

(i) A plan fiduciary independent of JPMorgan will authorize the investment of such plan's assets in an Index or Model-Driven Fund that purchases and/or holds JPM Stock pursuant to the procedures described herein, including those which relate to portfolio management services provided to certain plans (see Item 12 of the Summary of Facts and Representations above); and

(k) A fiduciary independent of JPMorgan will direct the voting of the JPM Stock held by an Index or Model-Driven Fund on any matter in which shareholders of JPM Stock are required or permitted to vote.

Notice to Interested Persons

Notice of the proposed exemption shall be mailed by first class mail to interested persons, including the appropriate independent fiduciaries for employee benefit plans currently invested in the Index and/or Model-Driven Funds that acquire and hold JPM Stock. The notice shall contain a copy of the proposed exemption as published in the **Federal Register** and an explanation of the rights of interested parties to comment, or request a hearing, regarding the proposed exemption. All notices should be sent to interested persons within 15 days of the publication of this proposed exemption in the **Federal Register**. Any written comments and/or requests for a hearing must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the **Federal Register**.

In addition, if this exemption is granted, JPMorgan shall provide a copy of the proposed exemption and a copy of the final exemption upon request to all ERISA-covered plans that invest in any Index or Model-Driven Fund that will include JPM Stock in its portfolio after the date the final exemption is published in the **Federal Register**.

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

Pileco, Inc. Employees Profit Sharing Plan (the Plan) Located in Houston, Texas

[Application No. D-11449]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale of certain unimproved real property (the Property) by the Plan to Pileco, Inc. (Pileco or the Applicant), the sponsor of the Plan, and a party in interest with respect to the Plan, provided that the following conditions are satisfied:

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

(b) At the time of the sale, the Plan receives the greater of either: (1) \$280,000; or (2) the fair market value of the Property as established by a qualified, independent appraiser in an updated appraisal of such Property;

(c) The Plan pays no fees, commissions or other expenses associated with the sale;

(d) The terms and conditions of the sale are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated third party; and

(e) The Plan trustee (1) Determines, among other things, whether it is in the best interest of the Plan to proceed with the sale of the Property; (2) reviews and approves the methodology used in the appraisal that is being relied upon; and (3) ensures that such methodology is applied by the qualified independent appraiser in determining the fair market value of the Property on the date of the sale.

Summary of Facts and Representations

1. The Plan is a defined contribution profit sharing plan without a 401(k) feature. The Plan was effective as of October 1, 1974, and was most recently restated effective May 8, 2004. As of September 30, 2006, the Plan had a total of 27 participants, and approximately \$2.99 million in total assets. The Plan's current trustee is Mr. Otto Kammerer,

who is also the Chairman of the Board of Directors of Pileco, as well as the Plan participant with the largest account balance. As of September 30, 2006, Mr. Kammerer's Plan account comprised approximately 28% (or \$837,200) of the Plan's total assets.

2. Pileco, which maintains its principal place of business in Houston, Texas, is primarily involved in the engineering, fabrication, sale, rental, and servicing of diesel pile hammers. Pileco is a wholly-owned subsidiary of Bauer Mashinen, GmbH (Bauer), a corporation organized under the laws of the Federal Republic of Germany. Bauer is a multinational firm, headquartered in Schrobenhausen, Germany, that specializes in engineering, construction, and heavy equipment manufacturing.

3. On March 26, 1980, the Plan purchased the Property from Richard and Christine Levinge, unrelated third parties, for \$77,912.15. The consideration was paid in cash. The Property is a vacant and unimproved 69,670 square foot parcel of land (consisting of 1.5994 acres) located east of Madie Drive, and north of Berry Road in Houston, Texas (Harris County). The Property is adjacent to other unimproved property that is owned by Pileco. Mr. Kammerer, as the Plan trustee, made the original decision to purchase the Property as a long-term growth investment for the Plan.²¹ Since the time of acquisition, the Property has not been an income-producing asset. Mr. Kammerer represents that all holding costs that have been incurred with respect to the Property since its acquisition in 1980, including, but not limited to: Property taxes, liability insurance premiums, and expenses associated with securing the premises, have been paid in full by Pileco.

4. The Property was originally appraised on September 22, 2006, by Stephen M. LaGrasta, MAI, who is an independent, state-certified real estate appraiser in the State of Texas. Mr. LaGrasta is a principal in the real estate appraisal firm of Yates-LaGrasta, Inc. of Houston, Texas. In an appraisal report dated October 2, 2006, Mr. LaGrasta valued the Property using the Sales Comparison Approach. Mr. LaGrasta compared the Property to five other properties sold within close proximity to the Property between January 2005 and September 2006. He adjusted the sale price of the comparable properties based upon sales date, location, size and

shape. Mr. LaGrasta determined that the fair market value of the Property was \$140,000 as of September 22, 2006.

In his original appraisal, Mr. LaGrasta did not attribute any special benefit to the value of the Property from Pileco's ownership of the adjacent property due to a number of factors, including: (a) A large amount of undeveloped land that is available in the area for purchase; (b) the comparatively larger size of Pileco's neighboring land in comparison to the size of the Property; (c) the less desirable location of the Property in relation to Pileco's neighboring land; and (d) the Property's lack of significant street frontage or other qualities that make it attractive for purposes of commercial development. Therefore, Mr. LaGrasta did not include any premium for assemblage value.²²

5. An updated appraisal of the Property was prepared by Mr. LaGrasta on January 21, 2008, and it reflects the current market conditions. The Property was again valued using the Sales Comparison Approach. Mr. LaGrasta compared the Property to three other similar properties sold within close proximity to the Property since March 2007. He adjusted the sales price of the comparable properties based upon the sales date, location, size and shape. Mr. LaGrasta determined that the fair market value of the Property was \$270,000 as of January 21, 2008. Based on its current appraised value, the Property currently represents approximately 9% of the Plan's assets.

In the updated appraisal report, Mr. LaGrasta again stated that the subject Property does not enhance the value of the property currently owned by Pileco. He determined that the payment by Pileco of an adjacency premium for the Property is not supported because: (a) The Pileco tract has extensive frontage in its current configuration; (b) there is other land available in the mixed use area and scarcity would not be an issue; (c) the Pileco property is not hampered by size, visibility and street frontage; and (d) the Pileco-owned property can be easily developed without the addition of the subject Property. Further, Mr. LaGrasta pointed out that the addition of the Property would tend to lower the per square foot value of the combined tract due to doubling in size. Also, Mr. LaGrasta noted that the combined tract would still be irregularly-shaped, which could hamper development and make the site less functional.

6. The Applicant requests an individual exemption from the Department in order to purchase the Property from the Plan. The Applicant represents that the Property is being sold as part of a change in control in which 100% of the capital stock of Pileco was acquired on October 7, 2005 by Bauer, which was then unaffiliated with the pre-October 7, 2005 shareholders of Pileco. The Board of Directors of Pileco has approved the complete freeze and termination of the Plan coincident with the closing of such an acquisition. In connection with the termination of the Plan, an application will be filed with the Internal Revenue Service for a favorable determination regarding the Plan's status as a qualified plan. Once such determination is received, the Plan will be liquidated and all account balances under the Plan will be distributed. Thus, the proposed transaction is motivated, in part, by a need to increase the Plan's liquidity in anticipation of the distribution of participants' account balances.

7. It is also represented that the Plan has made efforts to sell the Property to unrelated third parties. To this end, the Plan listed the Property on the open market for a number of years at a listing price of \$4.00 per square foot (\$278,680). However, this listing price was not based on a professional appraisal of the Property. During the listing period, the Plan did not receive any offers from third-party purchasers to purchase the Property.

8. The Plan will pay no real estate commissions or other expenses associated with the sale. Pileco will pay the Plan in cash, the greater of either: (a) \$280,000;²³ or (b) the fair market value of the Property, as established by a qualified, independent appraiser on the date of the transaction, as reflected in an updated appraisal of such Property.²⁴ Further, the parties will enter into a real estate contract to evidence the proposed sale transaction.

9. As the Plan trustee, Mr. Kammerer, will determine, among other things, whether it is in the best interest of the Plan to go forward with the sale of the Property. In addition, Mr. Kammerer will review and approve the

²¹ The Plan once owned another parcel of property that was adjacent to the subject Property. This property was sold to Pileco for \$152,678, pursuant to the Department's expedited exemption procedure (See E-00521; FAN 2006-12E, June 8, 2006).

²² "Assemblage" value reflects the willingness of a purchaser to pay above market value for a parcel of property in order to preserve such purchaser's interest in their present holdings of other parcels which are adjacent to such property.

²³ Pileco proposes to pay the appraised fair market value of the Property of \$270,000, plus \$10,000 which would be paid in full, in cash, at a closing to be held within thirty (30) days of the publication in the *Federal Register* of the notice granting the final exemption.

²⁴ The Applicant represents that, to the best of its knowledge, to the extent the amount paid by Pileco for the Property exceeds its fair market value, such excess amount (if treated as an employer contribution) will not cause the annual additions to the Plan to exceed the limitations prescribed by section 415 of the Code.

methodology used in the appraisal that is being relied upon, and he will ensure that such methodology is applied by a qualified independent appraiser in determining the fair market value of the Property on the date of the sale.

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

(a) The proposed sale will be a one-time transaction for cash;

(b) The Plan will receive the greater of either:

(i) \$280,000; or (ii) the fair market value for the Property, as established on the date of the sale by an independent, qualified appraiser in an updated appraisal of such Property;

(c) The Plan will pay no fees, commissions or other expenses associated with the sale;

(d) The terms and conditions of the sale will be at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated third party; and

(e) The Plan trustee: (i) Will determine, among other things, whether it is in the best interest of the Plan to proceed with the sale of the Property; (ii) will review and approve the methodology used in the appraisal that is being relied upon; and (iii) will ensure that such methodology is applied by the qualified independent appraiser in determining the fair market value of the Property on the date of the sale.

Tax Consequences of the Proposed Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the sponsoring employer to the plan and, therefore, must be examined under applicable provisions of the Internal Revenue Code, including sections 401(a)(4), 404 and 415.

FOR FURTHER INFORMATION CONTACT: Blessed Chuksorji-Keefe of the Department at (202) 693-8567. (This is not a toll-free number).

Mellon Bank N.A. (Mellon)

Located in Pittsburgh, Pennsylvania.
[Application No. D-11460]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, in accordance with the procedures set

forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

If the proposed exemption is granted, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply as of January 18, 2008, to the cash sale of certain medium term notes (the Notes) for \$28,584,601.46 by the EB Daily Liquidity Money Market Fund (the Fund) to The Bank of New York Mellon Corporation (BNYMC), a party in interest with respect to employee benefit plans invested in the Fund, provided that the following conditions are met.

(a) The sale was a one-time transaction for cash payment made on a delivery versus payment basis in the amount described in paragraph (b);

(b) The Fund received an amount as of the settlement date of the sale which was equal to the greatest of:

(i) The amortized cost of the Notes as of the date of the sale, if the Fund has been valued at amortized cost at any time within the preceding year;

(ii) The price at which the Fund purchased the Notes, if the Fund is valued at fair market value and the Fund has not been valued at amortized cost at any time within the preceding year; or

(iii) The fair market value of the Notes as of the date of the sale, as determined by an independent third party source or independent appraisal (in each case, including accrued but unpaid interest);

(c) The Fund did not bear any commissions or transaction costs with respect to the sale;

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

(e) Mellon took all appropriate actions necessary to safeguard the interests of the Fund, and the employee benefit plans invested in the Fund, in connection with the transactions;

(f) If the exercise of any of BNYMC's rights, claims or causes of action in connection with its ownership of the Notes results in BNYMC recovering from the issuer of the Notes, or any third party, an aggregate amount that is more than the sum of:

(i) The purchase price paid for the Notes by BNYMC (i.e., \$28.5 million); and

(ii) The interest due on the Notes from and after the date BNYMC purchased the Notes from the Fund, at the rate

specified in the Notes, BNYMC will refund such excess amounts promptly to the Fund (after deducting all reasonable expenses incurred in connection with the recovery).

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

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

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

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

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

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

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

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

(ii) None of the persons described, above, in paragraph (h)(i)(B)—

(D) Shall be authorized to examine trade secrets of Mellon, or commercial or financial information which is privileged or confidential; and

(iii) Should Mellon refuse to disclose information on the basis that such information is exempt from disclosure, Mellon shall, by the close of the thirtieth (30th) day following the

request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Summary of Facts and Representations

1. Mellon Bank, N.A. (Mellon) is a subsidiary of The Bank of New York Mellon Corporation (BNYMC), a Delaware financial services company that provides a wide range of banking and fiduciary services to a broad array of clients, including employee benefit plans subject to the Act. The Fund is a collective investment fund established and maintained by Mellon, as trustee, for the collective investment and reinvestment of assets contributed thereto by Mellon and its affiliates on behalf of their employee benefit plan clients. The Fund is a group trust that is exempt from federal income tax pursuant to Rev. Rul. 81-100. As of January 7, 2008, the value of the Fund's portfolio (including the Notes) was approximately \$1.39 billion. As of such date, there were 25 direct investors in the Fund, including 21 other collective investment funds maintained by Mellon, three employee benefit plans subject to the Act (including the Mellon 401(k) Retirement Savings Plan) and one government plan.

2. The Fund is a short-term investment fund ("STIF") that is utilized as (i) a short-term investment vehicle for the uninvested cash held by other Mellon collective investment funds and individual employee benefit plan clients of Mellon and its affiliates, and (ii) as an investment option for 401(k) plan clients. As of January 7, 2008, the Fund's dollar-weighted average duration/days to reset was 30.7 days. The Fund's stated investment objective provides that the Fund is to achieve a high level of current income consistent with stability of principal and liquidity. The assets of the Fund are invested in a diversified portfolio of investment grade money market instruments including, without limitation, commercial paper (including paper issued under Section 3(a)(3), Section 4(2) and Rule 144A of the Securities Act of 1933), the Mellon EB Temporary Investment Fund, notes, repurchase agreements and other evidences of indebtedness which are payable on demand or which have a maturity date not exceeding 13 months from date of purchase, except for floating rate securities, which may have a final maturity of up to two years from date of purchase. The Fund maintains a dollar-weighted average portfolio maturity of 90 days or less. Consistent with the foregoing, the Fund utilizes so-called amortized cost accounting

(similar to a money market mutual fund) with the result that units of the Fund are generally valued at a constant amount equal to \$1.00. The Fund's net income (including any accretion of discounts or amortization of premiums) is accrued daily and additional units are issued to reflect such net income.

3. The Fund purchased the Notes on January 27, 2007, for \$28.5 million. The Notes were two year bonds with a par value of \$28.5 million, issued by Stanfield Victoria Finance Ltd. (the Issuer) on March 24, 2006, with a maturity date of March 27, 2008. Interest on the Notes was taxable and payable quarterly at a variable rate which was reset each quarter based upon the three-month London Interbank Offered Rate (LIBOR). The principal amount and unpaid interest on the Notes were payable at maturity.

4. The Issuer is a so-called structured investment vehicle (SIV) that raised capital primarily by issuing various types and classes of notes, including the Notes. The capital raised was then utilized by the Issuer to purchase various financial assets, including other asset-backed securities and mortgage-backed securities. The assets acquired by the Issuer were pledged to secure payment of certain of the notes issued by the Issuer, including the Notes, pursuant to a security agreement with an independent bank serving as collateral agent. This security agreement provided that, as a general rule, upon the occurrence of an "Enforcement Event," as defined in the agreement, the collateral agent was required to sell all of the Issuer's assets and distribute the proceeds thereof.

5. The decision to invest Fund assets in the Notes was made by Mellon as trustee of the Fund. Prior to the investment, Mellon conducted an investigation of the potential investment, examining and considering the economic and other terms of the Notes. Mellon represents that the Fund's investment in the Notes was consistent with the Fund's investment policies and objectives. At the time the Fund acquired the Notes, the Notes were rated "AAA" by Standard & Poor's Corporation ("S&P") and "Aaa" by Moody's Investor Services, Inc. ("Moody's"). Based on its consideration of the relevant facts and circumstances, Mellon states that it was prudent and appropriate for the Fund to acquire the Notes.²⁵

²⁵ The Department is expressing no opinion in this proposed exemption regarding whether the acquisition and holding of the Notes by the Fund violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act.

6. On November 7, 2007, S&P placed a "negative watch" on the Notes. On December 21, 2007, Moody's downgraded the rating of the Notes to "Baa3." On January 7, 2008, S&P downgraded the rating of the Notes to "B-." Responding to these events, Mellon, on behalf of the Fund, executed an amendment to the security agreement governing the Notes on January 7, 2008. Pursuant to this amendment, by providing notice (Election Notice) on or before January 17, 2008, Mellon could elect to have the pro-rata share of the collateral assets allocable the Notes held by the Fund excluded from any asset sale by the collateral agent that would otherwise occur immediately upon the occurrence of an Enforcement Event. On January 8, 2008, as a result of the foregoing ratings down-grades, an Enforcement Event occurred. On January 10, 2008, the Issuer did not repay certain notes maturing on that date. On January 14, 2008, Mellon submitted an Election Notice to the collateral agent instructing the collateral agent to exclude the Fund's pro rata share of the Issuer's assets from the asset sale triggered by the occurrence of the Enforcement Event on January 8, 2008. On January 15, 2008, Moody's further downgraded its rating of the Notes to "B2." On January 17, 2008, S&P further downgraded its rating of the Notes to "D."

7. Mellon's election was based on Mellon's determination that the market for the collateral assets securing the Notes was severely distressed and that the inherent value of such assets was substantially greater than the price that could have been obtained if such assets were sold currently by the collateral agent. Accordingly, Mellon determined that it was in the best interest of the Fund to exclude such assets from a current sale.

8. While the units of the Fund are generally valued at \$1.00, Mellon, as Trustee of the Fund, obtains market prices for all of the Fund's assets to confirm that the fair market value of such assets is substantially consistent with the constant \$1.00 value being utilized in the operation of the Fund. Mellon utilizes an unrelated entity, Interactive Data Corporation (IDC), as a pricing service for this purpose. On January 11, 2008, IDC reported the price of the Notes as being 99.0501 percent of their par value. Mellon questioned the IDC price in light of the facts discussed in paragraph 6 above and the fact that Credit Suisse First Boston had indicated that the Notes were trading at distressed levels. IDC announced on January 11, 2008 that, effective January 15, 2008, it would no longer price the Notes in view

of the occurrence of an Enforcement Event and "the lack of current bid and other verifiable market and/or credit information pertaining" to the Notes. As a result of the events described in paragraph 6, an independent analysis of the Notes prepared by Gifford Fong Associates (GFA) was obtained on January 11, 2008. The analysis estimated the value of the Notes, as of January 10, 2008, at 91 percent of their par value. GFA's determination of the value of the Notes was based upon its analysis and evaluation of the underlying assets of the Issuer relating to the Notes.

9. In view of the foregoing, Mellon determined that it would be appropriate and in the best interest of the Fund for the Notes to be sold by the Fund for their par value plus accrued interest. Mellon also determined that the purchase of the Notes by BNYMC would be permissible under applicable banking law. Therefore, in order to protect the Fund and the participating investors having an interest in the Fund from potential investment losses, Mellon determined that a sale of the Notes by the Fund to BNYMC at a price equal to the par value of the Notes plus accrued interest would be in the best interest of the Fund and all of its participating investors. On January 17, 2008, notice of this determination was provided to a representative of each of the 25 investors having a direct interest in the Fund.

10. On January 18, 2008, BNYMC purchased the Notes from the Fund for a lump sum cash payment of \$28,584,601.46. This sum represented the par value of the Notes (i.e. \$28.5 million) plus the accrued interest owing on the Notes (i.e. \$84,601.46) as of January 17, 2008. Mellon represents that this amount equals the amortized cost of the Notes plus accrued but unpaid interest.

11. As noted in paragraph 8, prior to the consummation of the transaction, valuations of the Notes were obtained on January 11, 2008 (seven days prior to the sale) from an independent pricing service, GFA, in addition to the most recent price available from IDC. GFA's valuation of the Notes reflected its estimation of the value of the Notes as of January 10, 2008. Mellon states that GFA is a highly-regarded independent valuation firm with respect to the pricing of securities such as the Notes. As noted in paragraph 8 above, the valuation of the Notes obtained from GFA was 91 percent of their par value. Moreover, Mellon had obtained information from an independent broker-dealer that the market for the Notes was in extreme distress with

prices for any actual trades being substantially below the GFA value. On the basis of this information, Mellon determined that the purchase price paid by BNYMC to the Fund exceeded the aggregate fair market value of the Notes as of the date of the transaction.

12. Mellon, as trustee of the Fund, believed that the sale of the Notes to BNYMC was in the best interests of the Fund, and the employee benefit plans invested in the Fund, at the time of the transaction. Mellon states that any sale of the Notes on the open market would have produced significant losses for the Fund and for the participating investors in the Fund. Mellon represents that the sale of the Notes by the Fund to BNYMC benefited the participating investors in the Fund by placing such investors in the same economic position they would have occupied absent the deterioration in the value of the Notes due to their rating downgrades, the occurrence of an Enforcement Event and the general disruption in the relevant markets. The participating investors in the Fund benefited further because the purchase price paid by BNYMC for the Notes substantially exceeded the aggregate fair market value of the Notes, as determined by GFA.

In addition, Mellon states that the transaction was a one-time sale for cash in connection with which the Fund did not bear any brokerage commissions, fees, or other expenses. Mellon represents that it took all appropriate actions necessary to safeguard the interests of the Fund and its participating investors in connection with the sale of the Notes.

13. Mellon states that the sale of the Notes by the Fund to BNYMC resulted in an assignment of all of the Fund's rights, claims, and causes of action against the Issuer or any third party arising in connection with or out of the issuance of the Notes or the purchase of the Notes by the Fund. Mellon states further that if the exercise of any of the foregoing rights, claims or causes of action results in BNYMC recovering from the Issuer or any third party an aggregate amount that is more than the sum of (a) the purchase price paid for the Notes by BNYMC (i.e. \$28.5 million); and (b) the interest due on the Notes from and after the date BNYMC purchased the Notes from the Fund, at the rate specified in the Notes, BNYMC will refund such excess amounts promptly to the Fund (after deducting all reasonable expenses incurred in connection with the recovery).

14. In summary, the applicant represents that the transaction satisfied the statutory criteria of section 408(a) of the Act and section 4975 of the Code

because: (a) The sale of the Notes by the Fund was a one-time transaction for cash payment made on a delivery versus payment basis; (b) the Fund received an amount equal to the amortized cost of the Notes, plus accrued but unpaid interest, at the time of sale, which was greater than the aggregate fair market value of the Notes as determined by an independent pricing service and an independent valuation firm at the time of sale; (c) the Fund did not pay any commissions or other expenses with respect to the sale; (d) Mellon, as trustee of the Fund, determined that the sale of the Notes to BNYMC was in the best interests of the Fund, and the employee benefit plans invested, directly or indirectly, in the Fund, at the time of the transaction; (e) Mellon took all appropriate actions necessary to safeguard the interests of the Fund in connection with the transactions; and (f) BNYMC will promptly refund to the Fund any amounts recovered from the Issuer or any third party in connection with its exercise of any rights, claims or causes of action as a result of its ownership of the Notes, if such amounts are in excess of the sum of: (i) the purchase price paid for the Notes by BNYMC (i.e. \$28.5 million) and (ii) the interest due on the Notes from and after the date BNYMC purchased the Notes from the Fund, at the rate specified in the Notes.

Notice to Interested Persons

Written notice will be provided to a representative of each of the 25 investors having a direct interest in the Fund. The notice shall contain a copy of the proposed exemption as published in the **Federal Register** and an explanation of the rights of interested parties to comment, or request a hearing, regarding the proposed exemption. Such notice will be provided by personal or express delivery within 15 days of the issuance of a proposed exemption. Any written comments and/or requests for a hearing must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Lloyd of the Department, telephone (202) 693-8554. (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 exemption, 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 exemption, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 1st day of July, 2008.

Ivan Strasfeld

Director of Exemption Determinations,

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