

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration**

[Application No. D-11055, et al.]

Proposed Exemptions; Deutsche Bank AG (Duetsche Bank)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

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

Written Comments and Hearing Requests

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 Pension and Welfare Benefits Administration (PWBA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. ____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to PWBA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffittb@pwba.dol.gov", or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

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

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

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

Deutsche Bank AG (Deutsche Bank)

Located in Germany, with Affiliates in New York, New York and Other Locations

[Application Number D-11055]

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).

Section I. Covered Transactions

If the proposed exemption is granted, effective December 11, 2001, the restrictions of section 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 between Deutsche Bank AG or a foreign affiliate thereof that is a bank or broker-dealer (collectively, DBAG), and an employee benefit plan with respect to

which DBAG is a trustee, custodian, fiduciary or other party in interest, pursuant to a standing instruction, if the conditions set forth in section II below are met:

- (1) An income item conversion; or
- (2) A *de minimis* purchase or sale transaction.

Section II. Conditions

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

(b) At the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms afforded by DBAG in comparable arm's-length foreign exchange transactions involving unrelated parties.

(c) DBAG does not have any discretionary authority or control with respect to the investment of the plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to the investment of those assets.

(d) DBAG maintains at all times written policies and procedures regarding the handling of foreign exchange transactions for plans with respect to which DBAG is a trustee, custodian, fiduciary or other party in interest or disqualified person which assure that the person acting for DBAG knows that he or she is dealing with a plan.

(e) The covered transaction is performed under a written authorization executed in advance by a fiduciary of the plan whose assets are involved in the transaction, which plan fiduciary is independent of DBAG. The written authorization must specify:

- (1) The identities of the currencies in which covered transactions may be executed; and
- (2) That the authorization may be terminated by either party without penalty on no more than ten days notice.

(f)(1) Income item conversions are executed within no more than one business day from the date of receipt of notice by DBAG that such items are good funds, and a foreign custodian which is an affiliate of DBAG, provides such notice to DBAG within "one business day" of its receipt of good funds;

(2) *De minimis* purchase and sale transactions are executed within no more than one business day from the date that either DBAG receives notice

from a foreign custodian that the proceeds of a sale of foreign securities dominated in foreign currency are good funds, or the direction to acquire foreign currency was received by DBAG and a foreign custodian which is an affiliate of DBAG provides such notice to DBAG within one business day of its receipt of good funds from a sale.

(g)(1) At least once each day, at the time(s) specified in its written policies and procedures, DBAG establishes either a rate of exchange or a range of rates to be used for income item conversions and *de minimis* purchase and sale transactions covered by this exemption.

(2) Income item conversions are executed at the next scheduled time for conversions following receipt of notice by DBAG from the foreign custodian that such funds are good funds. If it is the policy of DBAG to aggregate small amounts of foreign currency until a specified minimum threshold amount is received, then the conversion may take place at a later time but in no event more than 24 hours after receipt of notice.

(3) *De minimis* purchase and sale transactions are executed at the next scheduled time for such transactions following receipt of either notice that the sales proceeds denominated in foreign currency are good funds, or a direction to acquire foreign currency. If it is the policy of DBAG to aggregate small transactions until a specified threshold amount is received, then the execution may take place at a later time but in no event more than 24 hours after receipt of either notice that the sales proceeds have been received by the foreign custodian as good funds, or a direction to acquire foreign currency.

For purposes of this paragraph (g), the range of exchange rates established by DBAG for a particular foreign currency cannot deviate by more than three percent [above or below] the interbank bid and asked rates as displayed on Reuters or another nationally recognized independent service in the foreign exchange market (provided that the independent service chosen will be consistently used in determining whether the deviation limitation has been met) for such currency at the time such range or rates is established by DBAG;

(h) Prior to the execution of the authorization referred to in paragraph (e), DBAG provides the independent fiduciary with a copy of DBAG's written policies and procedures regarding the handling of foreign exchange transactions involving income item conversions and *de minimis* purchase and sale transactions. The policies and

procedures must, at a minimum, contain the following information:

(1) Disclosure of the time(s) each day that DBAG will establish the specific rate of exchange or the range of exchange rates for the covered transactions to be executed and the time(s) that such covered transactions will take place. DBAG shall include a description of the methodology that DBAG uses to determine the specific exchange rate or range of exchange rates;

(2) Disclosure that income item conversions and *de minimis* purchase and sale transactions will be executed at the first scheduled transaction time after notice that good funds from an income item conversion or a sale have been received, or a direction to purchase foreign currency has been received. To the extent that DBAG aggregates small amounts of foreign currency until a specified minimum threshold amount is met, a description of this practice and disclosure of the threshold amount; and

(3) A description of the process by which DBAG's foreign exchange policies and procedures for income item conversions and *de minimis* purchase and sale transactions may be amended and disclosed to plans.

(i) DBAG furnishes to the independent fiduciary a written confirmation statement with respect to each covered transaction not more than five business days after execution of the transaction.

(1) With respect to income item conversions, the confirmation shall disclose the following information:

- (A) Account name;
- (B) Date of notice that good funds were received;
- (C) Transaction date;
- (D) Exchange rate;
- (E) Settlement date;
- (F) Identity of foreign currency;
- (G) Amount of foreign currency sold;
- (H) Amount of U.S. dollars or other currency credited to the plan; and

(2) With respect to *de minimis* purchase and sale transactions, the confirmation shall disclose the following information:

- (A) Account name;
- (B) Date of notice that sales proceeds denominated in foreign currency are received as good funds or direction to acquire foreign currency was received;
- (C) Transaction date;
- (D) Exchange rate;
- (E) Settlement date;
- (F) Currencies exchanged:
 - i. Identity of the currency sold;
 - ii. Amount sold;
 - iii. Identity of the currency purchased; and
 - iv. Amount purchased.

(j) DBAG—

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

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

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

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

(5) Agrees that any judgment may be collectable by an employee benefit plan in the United States from Deutsche Bank; and

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

(k) DBAG maintains, within territories under the jurisdiction of the United States Government, for a period of six years from the date of the transaction, the records necessary to enable the persons described in paragraph (l) of this section to determine whether the applicable conditions of this exemption have been met, including a record of the specific exchange rate or range of exchange rates DBAG established each day for foreign exchange transactions effected under standing instructions for income item conversions and *de minimis* purchase and sale transactions. However, a prohibited transaction will not be considered to have occurred if, due to circumstances beyond DBAG's control, the records are lost or destroyed prior to the end of the six-year period, and no party in interest other than DBAG shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or the taxes imposed by section 4975(a) and (b) of the Code, if the records, are not maintained by DBAG, or are not made available for examination by DBAG, or its affiliate as required by paragraph (l) of this section.

(l)(1) Except as provided in subparagraph (2) of this paragraph and notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (k) of this section are available at their customary location for examination, upon reasonable notice, during normal business hours by:

(A) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service.

(B) Any fiduciary of a plan who has authority to acquire or dispose of the assets of the plan involved in the foreign exchange transaction or any duly authorized employee or representative of such fiduciary.

(C) Any contributing employer to the plan involved in the foreign exchange transaction or any duly authorized employee or representative of such employer.

(2) None of the persons described in subparagraphs (B) and (C) shall be authorized to examine DBAG's trade secrets or commercial or financial information of DBAG, which is privileged or confidential.

Section III. Definitions and General Rules

For purposes of this exemption,

(a) A "foreign exchange" transaction means the exchange of the currency of one nation for the currency of another nation.

(b) The term "standing instruction" means a written authorization from a plan fiduciary, who is independent of DBAG, to DBAG to effect the transactions specified therein pursuant to the instructions provided in such authorization.

(c)(1) The term "independent of DBAG" means a plan fiduciary who is unrelated to, and independent of, DBAG. For purposes of this exemption, a plan fiduciary will be deemed to be unrelated to, and independent of, DBAG if such fiduciary represents that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for transactions described in section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of DBAG and represents that such fiduciary shall advise DBAG if those facts change.

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

(i) such fiduciary directly or indirectly controls, is controlled by, or is under common control with DBAG;

(ii) such fiduciary directly or indirectly receives any compensation or other consideration from DBAG for his own personal account in connection with any transaction described in this exemption;

(iii) any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of DBAG, 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 plan sponsor or of the fiduciary responsible for the decision to authorize or terminate authorization for transactions described in section I.

However, if such individual is a director of the plan sponsor or of the responsible

fiduciary, and if he or she abstains from participation in (A) the choice of DBAG as a directed trustee or custodian and (B) the decision to authorize or terminate authorization for transactions described in section I, then section III(c)(2)(iii) shall not apply.

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

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

(e) An "income item conversion" means: (1) The conversion into U.S. dollars of an amount which is the equivalent of no more than 300,000 U.S. dollars of interest, dividends or other distributions or payments with respect to a security, tax reclaims, proceeds from dispositions of rights, fractional shares or other similar items denominated in the currency of another nation that are received by DBAG on behalf of the plan from the plan's foreign investment portfolio; or (2) the conversion into any currency as required and specified by the standing instruction of an amount which is the equivalent of no more than 300,000 U.S. dollars of interest, dividends, or other distributions or payments with respect to a security, tax reclaims, proceeds from dispositions of rights, fractional shares or other similar items denominated in the currency of another nation that are received by DBAG on behalf of the plan from the plan's foreign investment portfolio, provided that the converted funds are either transferred to an interest bearing account which provides a reasonable rate of interest within 24 hours of the conversion and held therein pending reinvestment by the plan or the bank reinvests such proceeds within 24 hours of the conversion at the direction of the plan.

(f) A "*de minimis* purchase or sale transaction" means the purchase or sale of foreign currencies in an amount of no more than 300,000 U.S. dollars or the equivalent thereof in connection with the purchase or sale of foreign securities by a plan.

(g) For purposes of this exemption the term "employee benefit plan" refers to a pension plan described in 29 CFR Sec. 2510.3-2 and/or a welfare benefit plan described in 29 CFR Sec. 2510.3-1.

(h) For purposes of this exemption, the term "good funds" means funds immediately available in cash with no

sovereign or other governmental impediments or restrictions to the exchange or transfer of such funds.

(i) For purposes of this exemption, the term "business day" means a banking day as defined by federal or state banking regulations.

(j) For purposes of this exemption, a "foreign affiliate" of Deutsche Bank means any non-U.S. entity that is directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with Deutsche Bank.

(k) For purposes of this exemption, the term "bank" means a foreign affiliate of Deutsche Bank: (1) That is a banking institution supervised and examined by the German banking authorities (currently, the Bundesanstalt für Finanzdienstleistungsaufsicht (the BAFin), in cooperation with the Deutsche Bundesbank (the Bundesbank)), or is subject to regulation by similar governmental banking authorities located in the same country as such affiliate; and (2) whose activities are monitored and controlled pursuant to the statutory and regulatory standards of German law applicable to the foreign affiliates of Deutsche Bank engaged in banking activities.

(l) For purposes of this exemption, the term "broker-dealer" means a foreign affiliate of Deutsche Bank: (1) Engaged in the business of effecting transactions in securities for the account of others, or regularly engaged in the business of buying and selling securities for its own account through a broker or otherwise; and (2) supervised by the German authorities responsible for regulating the activities described in (1) of this paragraph, or subject to regulation by similar governmental authorities located in the country in which such affiliate is located.

Effective Date: December 11, 2001.

Summary of Facts and Representations

1. Deutsche Bank is a German banking corporation and commercial bank that provides a wide range of services to various types of entities worldwide. Deutsche Bank is one of the largest financial institutions in the world in terms of assets held, managing over \$585 billion in assets either through collective trusts, separately managed accounts, or mutual funds.

Bankers Trust Company (Bankers Trust) is a commercial bank that provides a wide range of services to various types of entities worldwide.¹

¹ Within the United States, the New York branch of Deutsche Bank is regulated and supervised by the New York State Banking Department. In addition,

Trust is a wholly-owned subsidiary of Bankers Trust Corporation, which, in turn, is a wholly-owned indirect subsidiary of Deutsche Bank.

2. The applicant seeks an exemption to permit employee benefit plans to engage in certain foreign exchange transactions with Deutsche Bank and its non-U.S. banking affiliates. Specifically, the applicant is requesting an exemption for plans to engage, pursuant to an independent fiduciary's written authorization and the instructions contained therein (*i.e.*, a standing instruction), in foreign exchange transactions involving income item conversions and *de minimis* purchase or sale transactions (hereinafter, either, a foreign exchange transaction) with Deutsche Bank or its foreign affiliates (DBAG).² The applicant notes that no relief is being sought with respect to transactions where DBAG has discretionary authority or control over the investment of the assets involved, or provides investment advice with respect to such assets.

The applicant describes an income item conversion as the conversion into any currency (including U.S. dollars) of interest, dividends or other distributions or payments with respect to a security, tax reclaims, proceeds from dispositions of rights, fractional shares or other similar items denominated in the currency of another nation. The applicant states that for purposes of this proposed exemption, the amount of such conversion will not exceed the equivalent of 300,000 U.S. dollars. The applicant describes a *de minimis* purchase or sale transaction as the purchase or sale of foreign currencies in an amount of no more than the equivalent of 300,000 U.S. dollars in

certain activities of Deutsche Bank's New York branch are regulated and supervised by the Federal Reserve Bank of New York.

² The Department notes that the Acts general standards of fiduciary conduct would apply to the standing instruction arrangements permitted by this proposed exemption, if granted. In this regard, section 404 of the Act requires, among other things, a fiduciary to discharge his duties respecting a plan solely in the interest of the plans participants and beneficiaries and in a prudent manner.

Accordingly, an independent plan fiduciary must act prudently with respect to: (1) The decision to enter into an arrangement described herein; and (2) the negotiation of the terms of such an arrangement, including, among other things, the specific terms by which DBAG will engage in foreign exchange transactions on behalf of the plan. The Department further emphasizes that it expects plan fiduciaries, prior to entering into foreign exchange transactions pursuant to standing instructions, to fully understand the benefits and risks associated with such transactions and instructions, following disclosure by DBAG of all relevant information. In addition, the Department notes that such plan fiduciaries must periodically monitor, and have the ability to so monitor, the services provided by DBAG.

connection with the purchase or sale of foreign securities by a plan.

3. According to the applicant, income item conversions and purchase or sale transactions of less than \$300,000 are integral components to any plan's foreign investment activities. In this regard, the applicant states that upon a plan's receipt of a distribution in a foreign currency, an income item conversion may be necessary to convert such distribution to U.S. dollars or another foreign currency. Conversions to U.S. dollars may be necessary, the applicant states, for assets to be repatriated in a form usable for distribution, domestic reinvestment, or other purposes. Conversions to another foreign currency, meanwhile, may be necessary to enable plans to engage in additional foreign investments. Similarly, conversions may be necessary in connection with the proceeds from the purchase and sale of foreign securities by plans.

4. The applicant states that the proposed exemption is necessary given the amounts of assets involved, the continuously fluctuating nature of foreign exchange rates, and the currency restrictions in place in certain markets. According to the applicant, when DBAG acts as a custodian with respect to a plan, a foreign exchange transaction involving a relatively small amount of assets is often more efficiently transacted between the plan and DBAG than on the open market. Additionally, the applicant states, the proposed exemption, in allowing plans to engage in the covered transactions pursuant to a prior written authorization executed by an independent plan fiduciary, avoids certain delays that may be costly to such plans. Finally, the applicant states, trading with a DBAG custodian or affiliated sub-custodian may be necessary in certain markets that restrict the sale or purchase of the local currency.

5. The applicant states that Prohibited Transaction Class Exemption (PTE) 98-54 (63 FR 63503 (November 13, 1998)) grants relief for foreign exchange transactions that are similar in nature to those contained in this proposed exemption. The applicant notes, however, that in providing relief for an income item conversion and a *de minimis* purchase and sale transaction between a "bank" and an employee benefit plan, the class exemption requires that such "bank" (or any domestic affiliate thereof), be "supervised by the United States or a State thereof."³ The applicant states that, when operating outside the United

States, Deutsche Bank is not supervised by a State or by the United States.⁴

6. The applicant represents that plans will be protected to the extent that DBAG is allowed to participate in the types of foreign exchange transactions described herein. In this regard, the applicant states that Deutsche Bank 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.⁵ With respect to Deutsche Bank itself, globally, the bank is regulated and supervised by 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.

The applicant states that the BAFin requires that Deutsche Bank 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.⁶ 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

⁴ Although Bankers Trust qualifies as a "bank" under PTE 98-54, the principal foreign exchange desk for Bankers Trust is the London Branch of Deutsche Bank.

⁵ 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.

⁶ 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.

³ Part IV(c), 63 FR at 63510.

deposits denominated in the currency of a European Economic Area member state up to the lesser of 90% of the deposit amount or 20,000 euros.

7. The applicant represents that the conditions contained in this proposed exemption are protective of plans engaging in a conversion or transaction with DBAG. In this regard, the applicant states that any time a plan enters into an income item conversion and/or a *de minimis* purchase and sale transaction, the terms of the conversion and/or transaction will be no less favorable to the plan than: (a) The terms generally available in a comparable arm's-length transaction between unrelated parties; and (b) the terms afforded by DBAG in a comparable arm's-length transaction involving unrelated parties. In addition, the applicant states that DBAG will not have any discretionary authority or control, or render investment advice, with respect to the investment of the plan assets involved in the transaction. Further, DBAG will maintain certain written policies and procedures to assure that the person acting for DBAG knows that he or she is dealing with a plan.

With respect to the execution of an income item conversion, the applicant represents that each such conversion will be executed within "one business day" from the date of receipt of notice by DBAG that such items are good funds.⁷ Such notice, in turn, will be provided by a foreign custodian that is an affiliate of DBAG within "one business day" of the actual receipt of good funds. With respect to *de minimis* purchase and sale transactions, the applicant represents that each such transaction will be executed within "one business day" from the date that either Deutsche Bank receives notice from a foreign custodian that the proceeds of a sale of foreign securities dominated in foreign currency are good funds, or the direction to acquire foreign currency was received by Deutsche Bank and a foreign custodian that is an affiliate of Deutsche Bank provides such notice within one business day of its receipt of good funds from a sale. Moreover, the applicant states, at least once each day, DBAG will establish either a rate of exchange or a range of rates to be used for the transactions covered by this exemption.⁸

⁷ According to the applicant, if it is the policy of DBAG to aggregate small amounts of foreign currency until a specified minimum threshold amount is received, then a conversion may in no event take place more than 24 hours after receipt of notice.

⁸ The applicant states that such range of exchange rates established by DBAG for a particular foreign currency will not deviate by more than three

The applicant represents that plans will be further protected in that prior to the execution discussed above, DBAG will provide the independent fiduciary with a copy of DBAG's written policies and procedures regarding the handling of foreign exchange transactions involving income item conversions and *de minimis* purchase and sale transactions. Among other things, the policies and procedures must: disclose the methodology that DBAG uses to determine the specific exchange rate or range of exchange rates; and describe the process by which DBAG's foreign exchange policies and procedures for income item conversions and *de minimis* purchase and sale transactions may be amended and disclosed to plans. In addition, not more than five business days after execution of the transaction, DBAG must furnish an independent written confirmation statement with respect to each covered transaction. According to the applicant, with respect to income item conversions, such confirmation will contain, among other things, the exchange rate; the settlement date; and the identity and amount of foreign currency sold. With respect to *de minimis* purchase and sale transactions, such confirmation will contain, among other things, the transaction date; the exchange rates; the settlement date; the currencies exchanged; and the amount of foreign currency sold.

Finally, DBAG: (a) agrees to submit to the jurisdiction of the courts of the United States; (b) agrees to appoint a Process Agent for service of process in the United States, which may be an affiliate; (c) consents to service of process on the Process Agent; (d) agrees that it may be sued in the courts of the United States in connection with transactions described in this proposed exemption; (e) agrees that any judgment may be collectable by an employee benefit plan in the United States from Deutsche Bank; and (f) agrees to comply with, and be subject to, all relevant provisions of the Act.

8. In summary, the applicant represents that the proposed transactions 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 be no less favorable to the plan than the terms generally available in comparable arm's-length

percent [above or below] the interbank bid and asked rates as displayed on Reuters or another nationally recognized independent service in the foreign exchange market, for such currency at the time such range or rates is established by DBAG.

foreign exchange transactions between unrelated parties;

(b) At the time the foreign exchange transaction is entered into, the terms of the transaction will be no less favorable to the plan than the terms afforded by DBAG in comparable arm's-length foreign exchange transactions involving unrelated parties;

(c) DBAG will not have any discretionary authority or control with respect to the investment of the plan assets involved in the transaction and will not render investment advice with respect to the investment of those assets;

(d) DBAG will maintain at all times written policies and procedures regarding the handling of foreign exchange transactions for plans with respect to which the bank or broker-dealer is a trustee, custodian, fiduciary or other party in interest or disqualified person which assure that the person acting for DBAG knows that he or she is dealing with a plan;

(e) A covered transaction will be performed under a written authorization executed in advance by a fiduciary of the plan whose assets are involved in the transaction, which plan fiduciary is independent of DBAG;

(f) Income item conversions will be executed within no more than one business day from the date of receipt of notice by DBAG that such items are good funds, and a foreign custodian which is an affiliate of DBAG, will provide such notice to DBAG within "one business day" of its receipt of good funds;

(g) *De minimis* purchase and sale transactions will be executed within no more than one business day from the date that either DBAG receives notice from a foreign custodian that the proceeds of a sale of foreign securities dominated in foreign currency are good funds, or the direction to acquire foreign currency was received by DBAG and a foreign custodian which is an affiliate of DBAG provides such notice to DBAG within one business day of its receipt of good funds from a sale;

(h) At least once each day, at the time(s) specified in its written policies and procedures, DBAG will establish either a rate of exchange or a range of rates to be used for income item conversions and *de minimis* purchase and sale transactions covered by this exemption;

(i) With limited exceptions, income item conversions will be executed at the next scheduled time for conversions following receipt of notice by DBAG from the foreign custodian that such funds are good funds, and *de minimis* purchase and sale transactions will be executed at the next scheduled time for

such transactions following receipt of either notice that the sales proceeds denominated in foreign currency are good funds, or a direction to acquire foreign currency;

(j) The range of exchange rates established by DBAG for a particular foreign currency cannot deviate by more than three percent [above or below] the interbank bid and asked rates as displayed on Reuters or another nationally recognized independent service in the foreign exchange market (provided that the independent service chosen will be consistently used in determining whether the deviation limitation has been met) for such currency at the time such range or rates is established by DBAG;

(k) Prior to the execution of the authorization referred to above, DBAG will provide the independent fiduciary with a copy of DBAG's written policies and procedures regarding the handling of foreign exchange transactions involving income item conversions and *de minimis* purchase and sale transactions;

(l) DBAG will furnish to the independent fiduciary a written confirmation statement with respect to each covered transaction not more than five business days after execution of the transaction; and

(m) DBAG—

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

(2) Agrees to appoint a Process Agent, which may be an affiliate;

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

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

(5) Agrees that any judgment may be collectable by an employee benefit plan in the United States from Deutsche Bank; and

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

For Further Information Contact: Christopher Motta, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, telephone (202) 693-8544. (This is not a toll-free number.)

Reagent Chemical & Research, Inc. Employees' Profit Sharing Plan and Trust (the Plan), Located in Middlesex, New Jersey

[Application No. D-11095]

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 a 73.4815% tenancy-in-common interest (the Property Interest) by the Plan to Brian Skeuse, a vice president and shareholder of Reagent Chemical & Research, Inc. (RCR), and his spouse, Jan Skeuse (hereinafter sometimes referred to collectively as the "Skeuses"), parties in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) the sale is a one-time cash transaction;

(b) the Plan receives the greater of either: (i) \$180,029.68; or (ii) the current fair market value for the Property Interest established at the time of the sale by an independent qualified appraiser; and

(c) the Plan pays no commissions or other expenses associated with the sale.

Summary of Facts and Representations

(1) The Plan was adopted on December 12, 1962. RCR is the sponsor of the Plan. RCR is a subchapter "S" corporation organized under the laws of State of Delaware. RCR is in the business of the manufacture, distribution and sale of specialty chemicals. The Plan's current trustees are John T. Skeuse, brother of Brian Skeuse, and Stephen T. Finney, brother-in-law of Brian Skeuse.

The Plan is a defined contribution plan with approximately 320 participants. As of April 15, 2002, the Plan had approximately \$31,000,000.00 in total assets. The value of the Property Interest to be sold in the proposed transaction is 0.5806% of the total fair market value of the Plan's assets. At the time of the acquisition of the Property Interest by the Plan, such interest constituted 3.188% of the Plan's overall portfolio of assets.

2. On November 3, 1980, the Plan purchased approximately 34.58 acres of land (the Land) from Joe and Wenona Russo, unrelated third parties, for \$225,000, which was \$6,506.65 per acre. The sale consisted of a 34.58 acre parcel of which the Property Interest is a part. The purchase price for the Land was paid in full in cash. The Plan sold portions of the Land to the Skeuses on January 23, 1987 and April 3, 2001, pursuant to the terms and conditions of Prohibited Transaction Exemption (PTE) 87-17, 52 FR 2630 and PTE 01-12, 66

FR 17740⁹. The Property Interest consists of approximately 19.52 acres and is described as Block 41, Lot 38, Raritan Township, Hunterdon County, New Jersey.

The Property Interest is adjacent to the Skeuses' personal family residence. It is represented that the decision to purchase the Land as an investment for the Plan was made by Robert Dallas and Thomas Skeuse, Sr., who were the Plan's trustees at the time of the transaction¹⁰.

3. The Skeuses propose to pay a purchase price for the Property Interest in the amount of \$180,029.68, which would be paid in full in cash at a closing to be held subsequent to the granting of the proposed exemption. This amount represents 73.4815% of the appraised fair market value of the Land, which has been determined to be \$245,000.

The remaining 26.5185% tenancy-in-common interest in the Property Interest is owned by The Dallas Group of America, Inc. Employees' Profit Sharing Plan and Trust (the "Dallas Plan"). The Dallas Plan acquired its interest in the Property Interest from the Plan in connection with a Plan of Reorganization of the Employer, which resulted in the creation and spin-off of The Dallas Group of America, Inc., a New Jersey corporation. Pursuant to the said Plan of Reorganization and related Spin-off of Assets of The Reagent Chemical & Research, Inc. Employees' Profit Sharing Plan & Trust to the Dallas Plan, the Plan transferred 26.5185% of its assets to the Dallas Plan, including the Property Interest.¹¹ If this proposed exemption is granted, the Dallas Plan will also sell its interest in the Property Interest to the Skeuses based upon the same appraised fair market value and upon the same terms. The applicant represents that the Skeuses are not parties in interest with respect to the Dallas Plan and, therefore, is not requesting relief for that transaction.

4. The applicant states that the Property Interest has not been an income-producing asset and has been held for possible appreciation. The Plan has paid for taxes, insurance and maintenance on the Property Interest

⁹ The Department is providing no opinion herein as to whether the conditions of PTE 87-17 or PTE 01-12 were met.

¹⁰ The Department is not providing any opinion in this proposed exemption as to whether the acquisition and holding of the Land, and the acquisition of the Property Interest, by the Plan violates any of the provisions of Part 4 of Title I of the Act.

¹¹ The applicant represents that said plan spin-off was effectuated by the transfer of a pro-rata portion of each of the assets and each of the liabilities of the Plan to the Dallas Plan.

since the acquisition (the Holding Costs). Specifically, the Plan has paid the following Holding Costs since its acquisition of the Property Interest in November, 1980: (i) Real estate taxes, \$2,480.00; (ii) Insurance, \$4,300.00; (iii) Appraisal and other professional fees, \$3,150.00. The Plan's budgeted holding costs for holding the Property Interest for the current Plan year, consisting of, primarily, taxes, insurance and appraisal fees, is \$1,240.00. The applicant states that the Holding Costs for the Property Interest have been approximately \$11,170. Therefore, the total cost for the Property Interest (*i.e.*, the acquisition price of \$127,009, plus the Holding Costs of approximately \$11,170) is approximately \$138,179 as of April 2002.

5. The Property Interest was appraised on May 19, 2002, as having a fair market value of \$180,029.68 (the Appraisal). The Appraisal was prepared by George A. Copeland, Jr., MAI (Mr. Copeland), who is an independent, qualified real estate appraiser in the State of New Jersey. Mr. Copeland is employed by Copeland Appraisal Associates, Inc.

Mr. Copeland states that consideration was given in the Appraisal to three approaches to value, *i.e.*, the cost approach, sales comparison approach, and income approach.

However, Mr. Copeland relied on the sales comparison approach to determine the fair market value of the Property Interest. Mr. Copeland rendered an opinion as to whether and the extent to which the Property Interest has a greater value to the Skeuses (as compared to its value in the hands of an unrelated third party buyer) by reason of its proximity to the Skeuses' residential property. Mr. Copeland represented that he did not believe this to be the case because he believes that the Property Interest would not merit a premium above its fair market value in any sale to an adjacent property owner. In addition, Mr. Copeland represents that an undivided interest within the fee simple title of the Land is neither diminished nor enhanced in proportionate value under an assumed unified sale of the full fee simple title. Hence, in this circumstance, Mr. Copeland represents that the value of an undivided interest of the Land is directly consistent with the appropriate designated percentage of ownership.

6. The applicant now proposes that the Skeuses purchase the Property Interest from the Plan in a one-time cash transaction. The applicant represents that the proposed transaction would be in the best interest and protective of the Plan. The Plan will pay no commissions or other expenses associated with the

sale. The Skeuses will pay the Plan the greater of either: (a) \$180,029.68; or (b) the current fair market value of the Property Interest, as established by a qualified, independent appraiser at the time of the transaction.

The sale of the Property Interest will enable the Plan to sell an illiquid non-income producing asset and reinvest the sale proceeds in assets that may yield higher returns. The Plan has been attempting to liquidate its real estate investments and believes that the proposed transaction will occur during what appears to be a market peak, and the Plan should, accordingly, be able to maximize its gain from this real estate investment.

7. In summary, the applicant represents that the transaction will satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) The proposed sale will be a one-time cash transaction; (b) the Plan will receive the greater of either: (i) \$180,029.68; or (ii) the current fair market value for the Property Interest, as established at the time of the sale by an independent qualified appraiser; (c) the Plan will pay no fees, commissions or other expenses associated with the sale; and (d) the sale will enable the Plan to divest itself of a non-income producing asset and acquire investments which may yield higher returns.

Notice To Interested Persons: Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

For Further Information Contact: Khalif I. Ford of the Department at (202) 693-8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and

beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

Signed at Washington, DC, this 24th day of December, 2002.

Ivan Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2002-55; Exemption Application No. D-10958, et al.]

Grant of Individual Exemptions; Fidelity Management Trust Company and Its Affiliates (Collectively Fidelity)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

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