

**DEPARTMENT OF LABOR****Employee Benefits Security Administration**

[Application Nos. and Proposed Exemptions; D-11477, D-11478, and D-11479, Respectively, UBS AG (UBS) and Its Affiliates UBS Financial Services Inc. (UBS Financial), and UBS Financial Services Inc. of Puerto Rico (PR Financial) (Collectively, the Applicants); and D-11488, Robert W. Baird & Co. Incorporated, et al.]

**Notice of Proposed Exemptions**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of Proposed Exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (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 applications for exemption and the comments received will be available for

public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

**Notice to Interested Persons**

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

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

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

**UBS AG (UBS), and Its Affiliates UBS Financial Services Inc. (UBS Financial), and UBS Financial Services Inc. of Puerto Rico (PR Financial) (Collectively, the Applicants), Located in Zurich, Switzerland; New York, New York; and San Juan, Puerto Rico, Respectively**

[Exemption Application Numbers D-11477, D-11478, and D-11479, Respectively]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If

the proposed exemption is granted, the restrictions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) The acquisition by the UBS Savings and Investment Plan, the UBS Financial Services Inc. 401(k) Plus Plan, and the UBS Financial Services Inc. of Puerto Rico Savings Plus Plan (collectively, the Plans) of certain entitlements (each, an Entitlement) and certain subscription rights (each, a Right) issued by UBS, a party in interest with respect to the Plans; (2) the holding of the Entitlements by the Plans between April 28, 2008 and May 9, 2008, inclusive, pending the automatic conversion of the Entitlements into shares of UBS common stock; and (3) the holding of the Rights by the Plans between May 27, 2008 and June 9, 2008, inclusive, provided that the following conditions were satisfied:

(a) All decisions regarding the acquisition and holding of the Rights and Entitlements by the Plans were made by U.S. Trust, Bank of America Private Wealth Management (U.S. Trust), a qualified, independent fiduciary;

(b) The Plans' acquisition of the Rights and Entitlements resulted from an independent act of UBS as a corporate entity, and without any participation on the part of the Plans;

(c) The acquisition and holding of the Rights and Entitlements by the Plans occurred in connection with a capital improvement plan approved by the board of directors of UBS, in which all holders of UBS common stock, including the Plans, were treated exactly the same;

(d) All holders of UBS common stock, including the Plans, were issued the same proportionate number of Rights based on the number of shares of UBS common stock held by such Plans;

(e) All holders of UBS common stock, including the Plans, were issued the same proportionate number of Entitlements based on the number of shares of UBS common stock held by such Plans;

(f) The acquisition of the Rights and Entitlements by the Plans occurred on the same terms made available to other holders of UBS common stock;

(g) The acquisition of the Rights and Entitlements by the Plans was made pursuant to provisions of each such Plan for the individually-directed investment of participant accounts; and

(h) The Plans did not pay any fees or commissions in connection with the

acquisition or holding of the Rights or Entitlements.

#### Summary of Facts and Representations

1. UBS is one of the world's largest financial firms and is a global wealth manager, an investment banking and securities firm, and a global asset manager. UBS is headquartered in Zurich, Switzerland and currently operates in over fifty countries and throughout the United States, including Puerto Rico and the Virgin Islands. Among the wholly-owned subsidiaries of UBS are UBS Financial and PR Financial. UBS Financial is headquartered in New York, New York, and PR Financial is headquartered in San Juan, Puerto Rico.

2. UBS sponsors the UBS Savings and Investment Plan (the Savings Plan), a defined contribution, profit-sharing plan with a Code section 401(k) feature. The Savings Plan provides for participant-directed individual accounts that are intended to comply with the provisions of section 404(c) of the Act and the corresponding regulations located at 29 CFR 2550.404c-1. The Applicants represent that the trustee of the Savings Plan is State Street Bank and Trust Company of Boston, Massachusetts. The Applicants further represent that UBS is a party in interest with respect to the Savings Plan because, under section 3(14)(C) of the Act, it constitutes an employer whose employees are covered under the Savings Plan. As of December 31, 2007, the Applicants represent that the Savings Plan had approximately 14,719 participants and total assets of \$1,416,402,131. The Applicants state that the Savings Plan allows participants to direct investments into various investment funds, including the UBS Common Stock Fund (the Fund). The Applicants represent that the Fund is not diversified, and consists primarily of UBS common stock (each whole share of the Fund comprising one UBS Share) plus cash for liquidity purposes. According to the Applicants, the UBS Shares held by the Savings Plan were valued at \$87,773,382 as of December 31, 2007, and comprised approximately 6.2% of the total assets in the Savings Plan.

3. UBS Financial sponsors the UBS Financial Services Inc. 401(k) Plus Plan (the Plus Plan), a defined contribution, profit-sharing plan with a Code section 401(k) feature. The Plus Plan provides for participant-directed individual accounts that are intended to comply with the provisions of section 404(c) of the Act and the corresponding regulations located at 29 CFR 2550.404c-1. The Applicants represent that the trustee of the Plus Plan is the

Northern Trust Company of Chicago, Illinois. The Applicants further represent that UBS is a party in interest with respect to the Plus Plan under section 3(14)(H) of the Act because it owns, directly or indirectly, 100% of UBS Financial. The Applicants state that, as of December 31, 2007, the Plus Plan had approximately 23,471 participants and total assets of \$2,531,642,183. Like the Savings Plan, the Plus Plan allows participants to direct investments into the Fund, along with other investments. The Applicants represent that the UBS Shares held by the Plus Plan were valued at \$547,605,850 as of December 31, 2007, and comprised approximately 21.6% of the total assets in the Plus Plan.

4. PR Financial sponsors the UBS Financial Services Inc. of Puerto Rico Savings Plus Plan (the PR Plan), which provides for participant-directed individual accounts that are intended to comply with the provisions of section 404(c) of the Act and the corresponding regulations located at 29 CFR 2550.404c-1. The Applicants represent that the trustee of the PR Plan is the Northern Trust Company of Chicago, Illinois. The Applicants state that the PR Plan utilizes the same trust as the Plus Plan, and allows participants to direct investments into the Fund, along with other investments. The Applicants also represent that UBS is a party in interest with respect to the PR Plan under section 3(14)(H) of the Act because it owns, directly or indirectly, 100% of PR Financial. The Applicants state that, as of December 31, 2007, the PR Plan had approximately 368 participants and total assets of \$39,050,978. The Applicants also represent that the UBS Shares held by the PR Plan were valued at \$14,197,762 as of December 31, 2007, and comprised approximately 36.4% of the total assets in the PR Plan.

5. The Applicants represent that the trustees of each of the Plans have the authority to invest and reinvest all amounts in each participant's account, as elected by the participant. Generally, in the absence of any such election, the trustee shall invest the amounts as specified by the appropriate investment committee of each of the Plans. The Applicants further represent that the Savings Plan's trust agreement provides that its trustee has the authority to exercise the voting rights of any stocks; to exercise any conversion privileges, subscription rights, or other options; to consent to or otherwise participate in changes affecting corporate securities; and generally to exercise any of the powers of an owner with respect to stocks, bonds, or other property held in the commingled fund or in the trust.

The Applicants also represent that the Plus Plan's and the PR Plan's trust agreement provides that rights, options, or warrants offered to purchase UBS Shares shall be exercised by its trustee to the extent that there is cash available.

The Applicants state that the Savings Plan's trust agreement provides that cash dividends and earnings attributable to UBS Shares in the Fund shall be reinvested in the Fund and allocated in whole shares and fractions thereof to the account of each participant with respect to whom directed investments in the Fund are maintained on the date such allocation is made. The Applicants represent that cash dividends and earnings received by the Plus Plan and the PR Plan's trust are reinvested by purchasing additional UBS Shares.

#### The Entitlements

6. On February 27, 2008, as part of UBS's capital improvement program, the Applicants represent that the UBS board of directors proposed, and its shareholders approved, a change to the capital structure of the company that permitted the replacement of the UBS 2007 cash dividend with an award to existing shareholders (including participants in the Plans who were invested in UBS Shares) of the Entitlements. The Applicants represent that, with respect to the awarding of the Entitlements by UBS, the Plans were treated exactly the same as the other holders of UBS Shares.

On April 28, 2008, UBS awarded a total of 14,440,531 Entitlements to existing UBS shareholders on the date of record. According to the Applicants, the award stipulated that, at any time from April 28, 2008 to May 9, 2008, inclusive (the Entitlements Trading Period), shareholders in general were permitted to buy or sell the Entitlements on SWX Europe Limited (SWX), a securities exchange based in London, England.<sup>1</sup> The Applicants state that at the end of the Entitlements Trading Period, any Entitlements held by a shareholder were to be aggregated and automatically converted into an appropriate whole number of UBS Shares. In this regard, the Applicants represent that under the terms of the award, no fewer than twenty (20) Entitlements enabled a

<sup>1</sup> The Applicants represent that SWX Europe Limited is a wholly-owned subsidiary of SWX Swiss Exchange, the securities exchange of Switzerland, and provides cross-border trading of primarily Swiss blue-chip securities. The Applicants also state that SWX Europe Limited (formerly known as virt-x Exchange Limited) has been in operation since 2001 and is a recognized investment exchange that is supervised by the United Kingdom's Financial Services Authority. The Applicants represent that UBS holds no interest in any of the foregoing financial exchanges.

shareholder the right to receive one UBS Share. For example, if an individual held 23 Entitlements at the conclusion of the Entitlements Trading Period, he or she would have received a single UBS Share, and the remaining three Entitlements would have lapsed without any right of compensation from UBS.

### The Rights

7. The Applicants represent that, under the foregoing capital improvement program, UBS decided to effect an ordinary capital increase by allotting subscription rights (the Rights Offering) to existing holders of UBS common stock (including participants in the Plans who were invested in UBS Shares). At its annual general meeting on April 23, 2008, the UBS board of directors proposed, and UBS shareholders approved, a change to the UBS's capital structure to accommodate the Rights Offering. The Applicants represent that the Rights Offering provided for a public offering of approximately 760 million additional UBS Shares, which would result in approximately \$15.5 billion in additional capital for UBS. The Applicants further represent that the right to vote on whether to permit the Rights Offering was passed through under the plans to those participants who held UBS Shares. The Applicants also represent that, with respect to the awarding of the Rights by UBS, the Plans were treated exactly the same as the other holders of UBS Shares. On May 21, 2008, the UBS board of directors determined the final terms of the Rights Offering, setting the subscription price at 21.00 Swiss Francs (CHF) per UBS Share (or \$20.16 per UBS Share).

On May 27, 2008, UBS awarded one Right for each UBS Share on the date of record. According to the Applicants, the award stipulated that, upon receiving the Rights, shareholders in general were permitted to (i) Exercise their Rights, which entitled them to purchase additional UBS Shares; (ii) purchase more Rights on the SWX or the New York Stock Exchange (NYSE); or (iii) sell their Rights on the SWX or the NYSE. The exercise of twenty (20) Rights allowed the holder to purchase seven (7) UBS Shares at a price of \$20.16 per share. The Applicant states that the trading period for the Rights ran from May 27, 2008 through June 9, 2008, inclusive (the Rights Trading Period). According to the Applicant, any Rights that remained unexercised at the end of the Rights Trading Period lapsed without any right of compensation from UBS.

8. The Applicants represent that neither the Rights nor the Entitlements constitute qualifying employer securities as defined in section 407(d)(5) of the Act. Accordingly, in connection with the awarding of the Rights and Entitlements by UBS, the applicable investment provisions of each of the Plans and of the Plans' respective trust agreements were amended effective April 1, 2008 to expressly permit the acquisition of the Rights and Entitlements by the Plans pending the submission of an application for an administrative exemption with the Department. The Plans and the Plans' respective trust agreements were further amended as of April 1, 2008 to provide for the appointment of a designated independent fiduciary possessing discretionary authority with respect to the holding, exercise, conversion, sale, or other disposition of the Rights and Entitlements. In this connection, the provisions of the Plans and of the Plans' respective trust agreements concerning participant investment elections were also amended as of April 1, 2008 to permit the designated independent fiduciary, rather than participants in the Plans, to direct the disposition of the Rights and Entitlements.

9. On April 28, 2008, each of the Plans contracted with U.S. Trust to serve both as an investment manager (within the meaning of section 3(38) of the Act) for the Plans and as the designated independent fiduciary of the Plans with respect to transactions involving the Rights and Entitlements. The Applicants represent that U.S. Trust is an experienced and qualified fiduciary with extensive trust and management capabilities such as discretionary asset management, asset allocation and diversification, investment advice, securities trading, and the performance of independent fiduciary assignments for plans covered by the Act.

At the time of its engagement, U.S. Trust determined that it was in the interests of the Plans to accept the Rights and Entitlements. In addition, the Plans' April 28, 2008 engagement agreement with U.S. Trust specifically charged the independent fiduciary with responsibility for conducting a due diligence review of the Rights and Entitlements, as well as developing a prudent strategy for the disposition of the Rights and Entitlements on behalf of the Plans. In this connection, the Applicants further represent that they, and not the Plans, have borne the cost of any fees payable to U.S. Trust for its investment management and independent fiduciary services.

10. Under the terms of the relevant master trust agreements, the assets held by each of the trusts in the employer's stock fund must be invested in UBS Shares. For example, section 3(h) of the master trust for the Savings Plan states that "the UBS Stock Fund shall be invested primarily in UBS Shares," and that it "may be invested in short-term liquid investments pending investment in UBS Shares." In addition, article 7.5(d) of the UBS Financial Services Inc. Master Investment Trust Agreement for the Plus Plan and the PR Plan provides that, "except for short-term investment of cash, [UBS] has limited the investment power of the Trustee in the Company Stock Investment Fund to the purchase of [UBS] Stock." Accordingly, U.S. Trust decided that each of the Plans should hold the Entitlements until their automatic conversion into UBS Shares, rather than permitting the Plans to sell the Entitlements during the Entitlements Trading Period. U.S. Trust determined that, absent short-term cash needs, the trustees for the Plans must invest assets in the Fund in UBS common stock. U.S. Trust further determined that the Plans would receive substantially the same value (be it in UBS Shares or in cash) whether the Entitlements were sold or converted into UBS Shares. In addition, U.S. Trust represents that selling the Entitlements would have exposed the Plans to market risk (during the time required to sell the Entitlements and reinvest the proceeds in UBS common stock), foreign exchange risk (in that the cash proceeds generated from the sale of the Entitlements on the SWX would have necessitated a currency conversion to U.S. dollars prior to reinvestment into UBS common stock), and trading costs associated with the foregoing transactions.

11. Following the acquisition of the Rights by the Plans, U.S. Trust determined that the Plans lacked sufficient funds in allocated accounts to exercise the Rights, and U.S. Trust had no authority to utilize other assets of the Plans for this purpose. Accordingly, U.S. Trust decided on behalf of the Plans to sell the Rights on either the SWX or the NYSE, and also determined the appropriate time during the Rights Trading Period that each of the Plans should sell the Rights on one of the exchanges. The Applicants further represent that U.S. Trust has confirmed that, prior to June 9, 2008 (the expiration of the Rights Trading Period), all of the Rights held by each of the Plans were sold in arm's length transactions with third parties on the SWX or the NYSE.

The Applicants represent that U.S. Trust's in-house trade executing group executed the sales with brokers Cantor Fitzgerald, Knight Trading, Merrill Lynch, and JP Morgan, based on the group's independent evaluation of relevant factors such as price, trading volume, trade flow, and best execution. The Applicants represent that none of the foregoing brokers were affiliates of either U.S. Trust or of UBS at the time that the Rights were sold. The Applicants state that the trades involving the Rights took place at brokerage commission rates ranging from \$0.01 per Right to \$0.015 per Right; collectively, the commissions represented less than 1% of the total sales proceeds from the Plans' sales of the Rights. The Applicants represent that all trading commissions were paid to the respective brokers, and that neither U.S. Trust nor UBS (nor any affiliates of U.S. Trust or UBS) received any trading commissions in connection with the sale of the Rights.

12. The Applicants represent that an administrative exemption providing relief for the acquisition and holding of both the Rights and Entitlements by the Plans would be administratively feasible because an independent fiduciary was appointed by the Plans to approve the acquisition, holding, and disposition of the Rights and Entitlements. In this connection, U.S. Trust subsequently provided, in writing, a comprehensive, reasoned rationale concerning its determinations with respect to the Rights and Entitlements. Accordingly, the Applicants represent, there is no need for monitoring by the Department of the transactions that are the subject of this exemption request.

The Applicants represent that, with respect to the Entitlements, an exemption would be in the interests of the Plans and of their participants and beneficiaries because it would allow the Plans to acquire additional UBS Shares, which the independent fiduciary believed to be beneficial to the Plans. The Applicants represent that, with respect to the Entitlements, an exemption would be protective of the rights of participants and beneficiaries because it would ensure that such participants have the same opportunity as other holders of UBS Shares to receive additional UBS Shares.

With respect to the Rights, the Applicants represent that an exemption would be in the interests of the Plans, and protective of the Plans and of their participants and beneficiaries, because it would ensure that such individuals have the same opportunity as other holders of UBS Shares to sell the Rights

on an exchange and receive the proceeds from any such sale.

13. In summary, the Applicants represent that the past transactions for which exemptive relief is sought meet the statutory criteria of section 408(a) of the Act because: (a) All decisions regarding the acquisition and holding of the Rights and Entitlements by the Plans were made by U.S. Trust, Bank of America Private Wealth Management (U.S. Trust), a qualified, independent fiduciary; (b) the Plans' acquisition of the Rights and Entitlements resulted from an independent act of UBS as a corporate entity, and without any participation on the part of the Plans; (c) the acquisition and holding of the Rights and Entitlements by the Plans occurred in connection with a capital improvement plan approved by the board of directors of UBS, in which all holders of UBS common stock, including the Plans, were treated exactly the same; (d) all holders of UBS common stock, including the Plans, were issued the same proportionate number of Rights based on the number of shares of UBS common stock held by such Plans; (e) all holders of UBS common stock, including the Plans, were issued the same proportionate number of Entitlements based on the number of shares of UBS common stock held by such Plans; (f) the acquisition of the Rights and Entitlements by the Plans occurred on the same terms made available to other holders of UBS common stock; (g) the acquisition of the Rights and Entitlements by the Plans was made pursuant to provisions of each such Plan for individually-directed investment of participant accounts; and (h) the Plans did not pay any fees or commissions in connection with the acquisition or holding of the Rights or Entitlements.

*Notice to Interested Persons:* Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the Applicants and the 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:** Mr. Mark Judge of the Department, telephone (202) 693-8339. (This is not a toll-free number).

Robert W. Baird & Co. Incorporated, Located in Milwaukee, Wisconsin.

#### **Exemption Application Number D-11488**

#### *Proposed Exemption*

The Department is considering granting an exemption under the

authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).<sup>2</sup>

#### Section I. Loans Involving Auction Rate Securities

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and section 406(b)(1) and (2) of ERISA, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective February 1, 2008, to the lending of Auction Rate Securities (as defined in section III(b)) by a Plan (as defined in section III(e)) to Robert W. Baird & Co. Incorporated or any of its affiliates (Baird), provided that the conditions set forth in section II have been met.

#### Section II. Conditions

(a) The last auction for the loaned Auction Rate Security was unsuccessful;

(b) The Plan does not waive any rights or claims in connection with the Auction Rate Security as a condition of engaging in the loan (the Loan);

(c) The transaction is not part of an arrangement, agreement or understanding designed to benefit a party in interest;

(d) Baird is and remains a broker-dealer registered under the Securities Exchange Act of 1934 (the Exchange Act) or is exempt from registration under section 15(a)(1) of the Exchange Act as a dealer in exempted government securities (as defined in section 3(a)(12) of the Exchange Act);

(e) The decision to enter into a Loan is made by a Plan fiduciary who is Independent (as defined in section III(d)) of Baird. Notwithstanding the foregoing, an employee of Baird who is the Beneficial Owner (as defined in section III(c)) of a Title II Only Plan (as defined in section III(f)) may direct the Title II Only Plan to engage in a Loan if all of the other applicable conditions of this exemption, if granted, have been met;

(f) Prior to any Loan, Baird shall have furnished the Plan fiduciary described in paragraph (e) with:

(1) The most recently available audited statement of Baird's financial condition, as audited by a United States certified public accounting firm;

<sup>2</sup> For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

(2) The most recently available unaudited statement of Baird's financial condition (if the unaudited statement is more recent than the audited statement described above); and

(3) A representation that, at the time the Loan is negotiated, there has been no material adverse change in its financial condition since the date of the most recent financial statement furnished to the Plan. Such representations may be made by Baird's agreement that each Loan shall constitute a representation by Baird that there has been no such material adverse change. Notwithstanding the foregoing, an employee of Baird who is the Beneficial Owner of a Title II Only Plan may receive the information described in this paragraph (f) if all of the other applicable conditions of this exemption, if granted, have been met;

(g) The Loan is made pursuant to a written loan agreement (the Lending Agreement), the terms of which are at least as favorable to the Plan as an arm's-length transaction with an unrelated party would be. The Lending Agreement must contain all of the material terms of the Loan and cover only the lending of Auction Rate Securities by the Plan to Baird. Such Lending Agreement may be in the form of a master agreement covering a series of Loans;

(h) With respect to any Loan, Baird credits the lending Plan's account with Baird (the Account) with an amount of cash equal to 100 percent of the total par value of the loaned Auction Rate Securities. Baird must credit the Account by the close of business on the day on which Baird receives the Auction Rate Securities from the Plan;

(i) The Plan has the opportunity to derive compensation through the investment of the cash collateral described in paragraph (h);

(j) The Plan pays Baird a rebate fee negotiated in advance of the Loan that does not exceed the interest and/or dividends the Plan receives in connection with its ownership of the loaned Auction Rate Securities;

(k) The Plan may terminate the Loan at any time and for any reason;

(l) Baird may terminate the Loan if:  
(1) The Plan closes its Account or reduces the balance thereof to less than 100 percent of the total par value of the Auction Rate Securities that are the subject of the Loan;

(2) The Plan is an individual retirement account described in section 4975(e)(1)(B)-(F) of the Code (an IRA) and the Beneficial Owner of the IRA dies or divides the IRA pursuant to a divorce, annulment or marital settlement;

(3) The Auction Rate Security associated with the Loan is redeemed by its issuer or may be sold at auction for its par value, or;

(4) Baird identifies a secondary market for the Auction Rate Security which Baird has a reasonable basis to believe will permit the lending Plan to receive no less than 90% of the Security's par value if the Auction Rate Security is promptly offered for sale on such market;

(m) Following any Loan termination as set forth in (k) or (l), Baird shall deliver Auction Rate Securities to the Plan which are identical (or the equivalent thereof (in the event of a reorganization, recapitalization or merger of the issuer of the Auction Rate Securities)) to the Auction Rate Securities borrowed by Baird within the lesser of:

(1) The customary delivery period for such securities;

(2) Five business days; or

(3) The time negotiated for such delivery by the Plan and Baird;

(n) Following any Loan termination as set forth in (k) or (l), if Baird fails to return all the borrowed Auction Rate Securities (or the equivalent thereof (in the event of a reorganization, recapitalization or merger of the issuer of the Auction Rate Securities)) within the timeframe set forth in paragraph (m), the Plan may keep the full amount of cash collateral provided by Baird in connection with the Loan;

(o) Following any Loan termination as set forth in (k) or (l), if the Plan fails to return the full amount of cash collateral:

(1) Baird may liquidate the borrowed Auction Rate Securities, in which case the Plan's obligation to return the cash collateral shall terminate. If the amount received by Baird from the liquidation (after deducting brokerage commissions and other transaction costs) exceeds the amount of cash collateral provided by Baird in connection with the Loan, then Baird shall pay such excess to the Plan. If the amount received by Baird from the liquidation (after deducting brokerage commissions and other transaction costs) is less than the amount of cash collateral provided by Baird in connection with the Loan, then the Plan shall pay such deficiency to Baird; or

(2) If Baird is unable to liquidate the ARS, Baird will retain the ARS and reserve its right to sue the Plan;

(p)(1) Where the Plan, as lender, does not return the full amount of cash collateral in connection with a Loan termination, Baird, as borrower, can seek interest at the prime rate on the amount of cash collateral owed by the Plan;

(2) Where Baird, as borrower, does not return the excess described in (o)(1), if any, the Plan, as lender, can seek interest at the prime rate on the amount of excess owed by Baird; and

(q) If Baird fails to comply with any provision of a loan agreement which requires compliance with this exemption, if granted, the Plan fiduciary who caused the Plan to engage in such transaction shall not be deemed to have caused the Plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of ERISA solely by reason of Baird's failure to comply with the conditions of the exemption.

### Section III. Definitions

(a) The term "affiliate" means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term "Auction Rate Security" or "ARS" means a security:

(1) that is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and

(2) with an interest rate or dividend that is reset at specific intervals through a Dutch auction process;

(c) The term "Beneficial Owner" means: The individual for whose benefit a Title II Only Plan is established and includes a relative or family trust with respect to such individual;

(d) The term "Independent" means a person who is: (1) Not Baird or an affiliate; and (2) not a relative (as defined in ERISA section 3(15)) of the party engaging in the transaction;

(e) The term "Plan" means: Any plan described in section 3(3) of the Act and/or section 4975(e)(1)(B)-(F) of the Code; and

(f) The term "Title II Only Plan" means: Any plan described in section 4975(e)(1) of the Code which is not an employee benefit plan covered by Title I of ERISA.

### Summary of Facts and Representations

1. The applicant is Baird (hereinafter, either the Applicant or Baird), an employee-owned wealth management, capital markets, asset management and private equity firm headquartered in Milwaukee, Wisconsin. Baird is a registered broker-dealer and a member of the Financial Industry Regulatory Authority. Baird is also a registered investment advisor, providing investment advice and asset management services to clients that include the Plans, which are plans described in section 3(3) of the Act and/or section 4975(e)(1) of the Code.

2. The Applicant describes Auction Rate Securities (ARS), and the

arrangement by which ARS are bought and sold, as follows. Auction Rate Securities are securities (issued as debt or preferred stock) with an interest rate or dividend that is reset at periodic intervals pursuant to a process called a Dutch Auction. Investors submit orders to buy, hold, or sell a specific ARS to a broker-dealer selected by the entity that issued the ARS. The broker-dealers, in turn, submit all of these orders to an auction agent. The auction agent's functions include collecting orders from all participating broker-dealers by the auction deadline, determining the amount of securities available for sale, and organizing the bids to determine the winning bid. If there are any buy orders placed into the auction at a specific rate, the auction agent accepts bids with the lowest rate above any applicable minimum rate and then successively higher rates up to the maximum applicable rate, until all sell orders and orders that are treated as sell orders are filled. Bids below any applicable minimum rate or above the applicable maximum rate are rejected. After determining the clearing rate for all of the securities at auction, the auction agent allocates the ARS available for sale to the participating broker-dealers based on the orders they submitted. If there are multiple bids at the clearing rate, the auction agent will allocate securities among the bidders at such rate on a pro-rata basis.

3. The Applicant states that Baird is permitted, but not obligated, to submit orders in auctions for its own account either as a bidder or a seller and routinely does so in the auction rate securities market in its sole discretion. In this regard, Baird may routinely place one or more bids in an auction for its own account to acquire ARS for its inventory, to prevent: (1) A failed auction (i.e., an event where there are insufficient clearing bids which would result in the auction rate being set at a specified rate); or (2) an auction from clearing at a rate that Baird believes does not reflect the market for the particular ARS being auctioned.

4. The Applicant states that for many ARS, Baird has been appointed by the issuer of the securities to serve as a dealer in the auction and is paid by the issuer for its services. Baird is typically appointed to serve as a dealer in the auctions pursuant to an agreement between the issuer and Baird. That agreement provides that Baird will receive from the issuer auction dealer fees based on the principal amount of the securities placed through Baird.

5. The Applicant states further that Baird may share a portion of the auction rate dealer fees it receives from the

issuer with other broker-dealers that submit orders through Baird, for those orders that Baird successfully places in the auctions. Similarly, with respect to ARS for which broker-dealers other than Baird act as dealer, such other broker-dealers may share auction dealer fees with Baird for orders submitted by Baird.

6. According to the Applicant, since February 2008, a minority of auctions have cleared, particularly involving municipalities. The Applicant represents that, in certain instances, when an auction fails, the affected Auction Rate Security may pay little or no interest and/or dividends to the holder of the Security. The Applicant states that, when this happens, the owner of the Auction Rate Security may benefit from lending such low-paying Security as part of a securities lending transaction that: (1) Is collateralized with cash; and (2) limits the loan rebate fee (described below) to the interest and/or dividends attributable to the loaned Auction Rate Security. The Applicant describes the loan rebate fee as the fee paid by the lender of the Auction Rate Security (i.e., a Plan) to the borrower of the Auction Rate Security (i.e., Baird). Under the methodology described above, if, for example, a Plan lends an Auction Rate Security paying a one percent rate of interest to Baird, the Plan would pay Baird a loan rebate fee of one percent, leaving the Plan free to invest and receive interest on the cash collateral. The Applicant notes that a Plan receiving cash collateral for its loaned Auction Rate Securities benefits to the extent it is able to derive a greater rate of return (through the investment of such cash collateral) than the Plan would otherwise have received, as interest and/or dividends, from the issuer of the Auction Rate Security. However, the Applicant points out that lending Auction Rate Securities pursuant to this methodology may not always be advisable.<sup>3</sup> In this regard, the Applicant represents that, in certain

<sup>3</sup>The Department notes that the Act's general standards of fiduciary conduct applies to the transactions described herein. In this regard, section 404 requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a fiduciary with respect to a Plan must act prudently with respect to, among other things, the decision to lend Auction Rate Securities to Baird. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any transaction proposed herein, to fully understand the risks associated with this type of transaction following disclosure by Baird of all relevant information. Plan fiduciaries are cautioned to carefully consider their particular facts and circumstances before determining whether a Loan transaction with Baird would satisfy section 404 of ERISA.

instances, when an auction fails, the affected Auction Rate Security may default to a high rate of interest or dividends. To the extent a Plan lends an Auction Rate Security bearing a high rate of interest, and, under the terms of the loan agreement, the Plan is required to pay a loan rebate fee equal to the interest or dividends attributable to the loaned Security, the Plan may be foregoing a greater rate of return than the Plan is likely to receive from its investment of the cash collateral. The Applicant explains this detrimental result with the following example: (1) A Plan earning 10% on an Auction Rate Security would be paying that 10% to Baird in the form of a loan rebate fee; (2) the Plan is not likely to receive more than 10% on the investment of the cash collateral provided by Baird in connection with the loan.

7. The Applicant states that several Plans holding Auction Rate Securities with failed auctions previously expressed an interest in lending such Auction Rate Securities to Baird and, in response, Baird sent the Lending Agreement to such Plans. Each Lending Agreement required, among other things as described in further detail below: (1) That Baird, as borrower, pay cash collateral to the Plan lending the Auction Rate Securities; and (2) the Plan, as lender, to pay Baird a rebate fee equal to the interest or dividends the Plan would otherwise have received in connection with its ownership of the Auction Rate Security. The Applicant states that certain of these loans have already occurred. In this regard, the Applicant represents that, as of December 23, 2008, 6 Plans have lent a total (par value) of \$1,175,000 in Auction Rate Securities to Baird: The first Loan was entered into on August 22, 2008, and the most recent Loan was entered into on November 24, 2008.

8. In connection with the above Loans, and to permit additional future Loans, the Applicant is requesting this proposed exemption. According to the Applicant, all Loans covered by the exemption, if granted, have been (and will be) structured in a manner that is protective of lending Plans. In this regard, the Applicant represents that, prior to entering into a Loan, a Plan fiduciary who is independent of Baird (with very narrow exceptions) will receive a written Lending Agreement. Among other things, the Agreement will alert such fiduciary that lending Auction Rate Securities paying an above-market rate of interest may not be advisable. The Plan fiduciary will further receive timely audited information from Baird regarding the financial condition of Baird; and must

approve the Plan's participation in the Loan. Upon such approval, Baird will credit the lending Plan's Account with an amount of cash equal to 100 percent of the par value of loaned Auction Rate Securities. This crediting must be accomplished by the close of business on the day on which Baird receives the Auction Rate Securities from the Plan, and the lending Plan will thereafter have the opportunity to derive compensation through the investment of the cash collateral. The Applicant states any rebate fee paid by a lending Plan to Baird pursuant to a Loan has not (and will not) exceed the interest and/or dividends the Plan receives in connection with its ownership of the loaned Auction Rate Securities. The Applicant states also that each Loan will involve only Auction Rate Securities for which the last auction was unsuccessful, and that lending Plans will not waive any rights or claims in connection with the Auction Rate Security as a condition of engaging in the Loan. The Applicant represents further that the Loans will not be part of an arrangement, agreement or understanding designed to benefit a party in interest.

9. That Applicant represents also that a Plan may terminate a Loan at any time and for any reason. Baird, however, may terminate a Loan only in certain limited and specified instances. In this latter regard, pursuant to the terms of each Lending Agreement, Baird may only terminate a Loan if: (1) The Plan closes its Account or reduces the balance thereof to less than 100 percent of the par value of the loaned Auction Rate Securities; (2) the Plan is an IRA and the Beneficial Owner of the IRA dies or divides the IRA pursuant to a divorce, annulment or marital settlement; (3) the Auction Rate Security associated with the Loan is redeemed by its issuer or may be sold at auction for its par value; or (4) Baird identifies a secondary market for the Auction Rate Security which Baird has a reasonable basis to believe will permit the lending Plan to receive no less than 90% of the Security's par value if the Auction Rate Security is promptly offered for sale on such market.

10. The Applicant states that each Lending Agreement contains several provisions designed to ensure that any Loan termination, as described above, will be carried out in a manner that is fair and equitable to lending Plans. In this regard, the Applicant represents that if a Loan is properly terminated and Baird fails to return all the borrowed Auction Rate Securities within the timeframe specified in the Lending Agreement, the Plan may keep the full

amount of cash collateral provided by Baird in connection with the Loan. If the Plan fails to return the full amount of cash collateral, Baird may liquidate the borrowed Auction Rate Securities. In this last regard, if the net amount received by Baird from the liquidation: (1) exceeds the amount of cash collateral provided by Baird in connection with the Loan, then Baird shall pay such excess to the Plan; (2) is less than the amount of cash collateral provided by Baird in connection with the Loan, then the Plan shall pay such deficiency to Baird. The Applicant notes that, if Baird is unable to liquidate the Auction Rate Securities, Baird will retain the ARS and reserve its right to sue the Plan. The Applicant notes also that, under the Lending Agreement, if one party to the Loan does not return the full amount due its counterparty (e.g., if Baird does not return all the borrowed Auction Rate Securities to a Plan), the Loan counterparty will be entitled to interest equal to the prime rate.

10. In summary, the Applicant represents that the transactions described herein satisfy the statutory criteria set forth in section 408(a) of the Act and section 4975(c)(2) of the Code because, among other things:

(a) Lending Plans will not waive any rights or claims in connection with the Auction Rate Security as a condition of engaging in the Loan;

(b) Prior to any Loan, Baird shall have furnished a Plan fiduciary with, at a minimum, the most recently available audited statement of Baird's financial condition, as audited by a United States certified public accounting firm;

(c) Each Loan will be made pursuant to a written Lending Agreement, the terms of which will be at least as favorable to the Plan as an arm's-length transaction with an unrelated party would be;

(d) With respect to any Loan, Baird will credit the lending Plan's Account with an amount of cash equal to 100 percent of the par value of loaned Auction Rate Securities, and such crediting will occur by the close of business on the day on which Baird receives the Auction Rate Securities from the Plan;

(e) The Plan will have the opportunity to derive compensation through the investment of the cash collateral;

(f) The Plan will pay Baird a rebate fee negotiated in advance of the Loan that does not exceed the interest or dividends the Plan receives in connection with its ownership of the loaned Auction Rate Securities;

(g) The Plan may terminate the Loan at any time and for any reason;

(h) Baird may terminate the Loan in narrow circumstances described in the Lending Agreement; and

(i) Any termination of the Loan will be fair and equitable to the lending Plan.

#### *Notice to Interested Persons*

The Applicant represents that the potentially interested participants and beneficiaries cannot all be identified and therefore the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**. However, written notice will be provided to a representative of each Plan that has engaged in a Loan as of the date this notice is published in the **Federal Register**. 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 regarding the proposed exemption. Such notice will be provided by personal or express delivery within 15 days of the issuance of the proposed exemption. Comments and requests for a 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**.

**FOR FURTHER INFORMATION CONTACT:** Chris Motta of the Department, telephone (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 13th day of January 2009.

**Ivan Strasfeld,**

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

[FR Doc. E9-962 Filed 1-16-09; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Request for Extension of Previously Approved Information Collection: ATAA Activities Report, Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration is soliciting comments concerning the proposed extension of the Alternative Trade Adjustment

Assistance Activities Report (ATAAAR). A copy of the proposed collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice by accessing: <http://www.doleta.gov/OMBControlNumber.cfm>.

**DATES:** Written comments must be submitted to the office listed below on or before March 23, 2009.

**ADDRESSES:** Submit written comments to Susan Worden, U.S. Department of Labor, Employment and Training Administration, Room C-5325, 200 Constitution Avenue, *Phone:* 202-693-3708 (this is not a toll-free number), *Fax:* 202.693.3517, *E-mail:* [worden.susan@dol.gov](mailto:worden.susan@dol.gov).

#### SUPPLEMENTARY INFORMATION:

I. Section 246 of Title II, Chapter 2 of the Trade Act of 1974, as amended by the Trade Act of 2002, establishes ATAA as an alternative assistance program for older workers certified eligible to apply for Trade Adjustment Assistance. This program is effective for petitions filed on or after August 6, 2003. ATAA is designed to allow eligible older workers for whom retraining may not be appropriate to quickly find reemployment and receive a wage subsidy to help bridge the salary gap between their old and new employment. To receive the ATAA benefits, workers must be TAA and ATAA certified.

Key workload data on ATAA is needed to measure program activities and to allocate program and administrative funds to the State Agencies administering the Trade programs for the Secretary. States will provide this information on the ATAA Activities Report (ATAAAR).

Regulations published at 617.61 give the Secretary authority to require the States to report the data described in this directive; therefore the respondents' obligation to fulfill these requirements is mandatory.

#### II. Review Focus:

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and

- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

#### III. Current Actions:

*Type of Review:* Extension without change.

*Agency:* Employment and Training Administration.

*Title:* Alternative Trade Adjustment Assistance Activities Report (ATAAAR), ETA.

*OMB Number:* 1205-0459.

*Recordkeeping:* Respondent is expected to maintain records which support the requested data for three years.

*Affected Public:* State, Local or Tribal Government.

*Burden (annual):* 50 Responses × .43 Hours × 4 quarters = 86 hours.

*Total Respondents:* 50.

*Frequency:* Quarterly.

*Total Responses:* 200 annually.

*Average Time per Response:* .43 Hours.

*Estimated Total Burden Hours:* 86 Hours.

*Total Burden Cost (capital/startup):* \$0.

*Total Burden Cost (operating/maintaining):* \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: January 12, 2009.

**Erin FitzGerald,**

*Director, Division of Trade Adjustment Assistance, Office of National Response, Employment and Training Administration.*

[FR Doc. E9-1027 Filed 1-16-09; 8:45 am]

**BILLING CODE 4510-FN-P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts; Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that six meetings of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506 as follows (ending times are approximate):