

close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 16, 2009 at 74 FR 58992.

*For Further Information Contact:* Mr. Anh-Viet Ly of the Department at (202) 693-8648. (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 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) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 16th day of February, 2010.

**Ivan Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application Nos. and Proposed Exemptions; D-11514]

#### **Citigroup Inc. and Its Affiliates (Citigroup or the Applicant); Subaru of America, Inc. (Subaru); and The Bank of New York Mellon (BNY Mellon); et al.; 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](mailto: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.

*Warning:* If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

#### **Notice to Interested Persons**

##### *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.

#### **Citigroup Inc. and Its Affiliates (Citigroup or the Applicant), Located in New York, New York**

[Application No. D-11514.]

##### *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).<sup>1</sup>

*Section I. Sales of Auction Rate Securities From Plans to Citigroup: Unrelated to a Settlement Agreement*

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan (as defined in Section V(e)) of an Auction Rate Security (as defined in Section V(c)) to Citigroup, where such sale (an Unrelated Sale) is unrelated to, and not made in connection with, a Settlement Agreement (as defined in Section V(f)), provided that the conditions set forth in Section II have been met.

*Section II. Conditions Applicable to Transactions Described in Section I*

(a) The Plan acquired the Auction Rate Security in connection with brokerage or advisory services provided by Citigroup to the Plan;

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

(c) Except in the case of a Plan sponsored by Citigroup for its own employees (a Citigroup Plan), the Unrelated Sale is made pursuant to a written offer by Citigroup (the Offer) containing all of the material terms of the Unrelated Sale. Either the Offer or other materials available to the Plan provide: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due and unpaid with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available). Notwithstanding the foregoing, in the case of a pooled fund maintained or advised by Citigroup, this condition shall be deemed met to the extent each Plan invested in the pooled fund (other than a Citigroup Plan) receives advance written notice regarding the Unrelated Sale, where such notice contains all of the material terms of the Unrelated Sale;

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any

accrued but unpaid interest or dividends;

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

(g) The decision to accept the Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or IRA owner who is independent (as defined in Section V(d)) of Citigroup. Notwithstanding the foregoing: (1) in the case of an IRA (as defined in Section V(e)) which is beneficially owned by an employee, officer, director or partner of Citigroup, the decision to accept the Offer or retain the Auction Rate Security may be made by such employee, officer, director or partner; or (2) in the case of a Citigroup Plan or a pooled fund maintained or advised by Citigroup, the decision to accept the Offer may be made by Citigroup after Citigroup has determined that such purchase is in the best interest of the Citigroup Plan or pooled fund;<sup>2</sup>

(h) Except in the case of a Citigroup Plan or a pooled fund maintained or advised by Citigroup, neither Citigroup nor any affiliate exercises investment discretion or renders investment advice within the meaning of 29 CFR 2510.3-21(c) with respect to the decision to accept the Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) Citigroup and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(1), to determine whether the conditions of this exemption, if granted, have been met, except that:

(1) No party in interest with respect to a Plan which engages in an Unrelated Sale, other than Citigroup and its affiliates, as applicable, shall be subject

<sup>2</sup> The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 of the Act 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 plan fiduciary must act prudently with respect to, among other things, the decision to sell the Auction Rate Security to Citigroup for the par value of the Auction Rate Security, plus unpaid interest and dividends. The Department further emphasizes that it expects plan fiduciaries, prior to entering into any of the proposed transactions, to fully understand the risks associated with this type of transaction following disclosure by Citigroup of all relevant information.

to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(1); and

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

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

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the U.S. Securities and Exchange Commission; or

(B) Any fiduciary of any Plan, including any IRA owner, that engages in an Unrelated Sale, or any duly authorized employee or representative of such fiduciary; and

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

(2) None of the persons described above in paragraphs (l)(1)(B)–(C) shall be authorized to examine trade secrets of Citigroup, or commercial or financial information which is privileged or confidential; and

(3) Should Citigroup refuse to disclose information on the basis that such information is exempt from disclosure, Citigroup shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

*Section III. Sales of Auction Rate Securities From Plans to Citigroup: Related to a Settlement Agreement*

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (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), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan of an Auction Rate Security to Citigroup, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement

<sup>1</sup> For purposes of this proposed exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

Agreement, provided that the conditions set forth in Section IV have been met.

*Section IV. Conditions Applicable to Transactions Described in Section III*

(a) The terms and delivery of the Offer are consistent with the requirements set forth in the Settlement Agreement and acceptance of the Offer does constitute a waiver of any claim of the tendering Plan;

(b) The Offer or other documents available to the Plan specifically describe, among other things:

(1) How a Plan may determine: the Auction Rate Securities held by the Plan with Citigroup; the number of shares or par value of the Auction Rate Securities; the interest or dividend amounts that are due and unpaid with respect to the Auction Rate Securities; and (if reliable information is available) the most recent rate information for the Auction Rate Securities;

(2) The background of the Offer;

(3) That neither the tender of Auction Rate Securities nor the purchase of any Auction Rate Securities pursuant to the Offer will constitute a waiver of any claim of the tendering Plan;

(4) The methods and timing by which Plans may accept the Offer;

(5) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Offer;

(6) The timing for acceptance by Citigroup of tendered Auction Rate Securities;

(7) The timing of payment for Auction Rate Securities accepted by Citigroup for payment;

(8) The methods and timing by which a Plan may elect to withdraw tendered Auction Rate Securities from the Offer;

(9) The expiration date of the Offer;

(10) The fact that Citigroup may make purchases of Auction Rate Securities outside of the Offer and may otherwise buy, sell, hold or seek to restructure, redeem or otherwise dispose of the Auction Rate Securities;

(11) A description of the risk factors relating to the Offer as Citigroup deems appropriate;

(12) How to obtain additional information concerning the Offer; and

(13) The manner in which information concerning material amendments or changes to the Offer will be communicated to the Plan;

(c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and

(d) All of the conditions in Section II have been met.

*Section V. Definitions*

For purposes of this proposed exemption:

(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 “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) 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;

(d) A person is “independent” of Citigroup if the person is: (1) not Citigroup or an affiliate; and (2) not a relative (as defined in section 3(15) of the Act) of the party engaging in the transaction;

(e) The term “Plan” means an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of the Act; or an entity holding plan assets within the meaning of 29 CFR 2510.3–101, as modified by section 3(42) of the Act; and

(f) The term “Settlement Agreement” means a legal settlement involving Citigroup and a U.S. state or federal authority that provides for the purchase of an ARS by Citigroup from a Plan.

*Effective Date:* If granted, this proposed exemption will be effective as of February 1, 2008.

**Summary of Facts and Representations**

1. Citigroup Inc. is a holding company whose businesses provide a broad range of financial services to consumer and corporate customers around the world. As of June 30, 2008, Citigroup and its subsidiaries had total consolidated assets of approximately \$2.1 trillion. Citigroup’s consumer and corporate banking business is a global franchise encompassing, among other things, branch and electronic banking, consumer lending services, investment services, and credit and debit card services. Citigroup also provides securities trading, research, and brokerage services to consumer and corporate customers, primarily through its registered broker-dealer, Citigroup Global Markets Inc. Formerly, “Smith Barney” was the brand name used by Citigroup for its retail brokerage business, and Smith Barney had more than 15,000 financial advisors, located in approximately 800 offices across the United States, who served

approximately 9.2 million domestic client accounts, representing approximately \$1.5 trillion in assets.<sup>3</sup> In the ordinary course of its business, Citigroup provides a range of financial services to IRAs and pension, profit sharing and 401(k) plans qualified under section 401(a) of the Code under which some or all of the participants are employees described in section 401(c) of the Code. In this last regard, Citigroup acts as a broker and a dealer with respect to the purchase and sale of securities, including Auction Rate Securities.

2. The Applicant describes Auction Rate Securities 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

<sup>3</sup> In May 2009, Morgan Stanley Smith Barney was formed as a joint venture (JV). Under the JV agreement, each of Citigroup and Morgan Stanley Inc. (Morgan Stanley) (including their respective subsidiaries) contributed specified businesses into the JV, together with all contracts, employees, property licenses and other assets (as well as liabilities) used primarily in the contributed businesses. Generally, in the case of Citigroup, the contributed businesses included Citigroup’s retail brokerage and futures business operated under the name “Smith Barney” in the United States and Australia and operated under the name “Quilter” in the United Kingdom, Ireland and Channel Islands. Certain investment advisory and other businesses of Citigroup also were included. In the case of Morgan Stanley, the contributed businesses consisted generally of Morgan Stanley’s global wealth management (retail brokerage) and private wealth management businesses. This exemption application covers transactions between Citigroup and Plan clients as of the period prior to the formation of the JV.

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, under a typical Dutch Auction process, Citigroup 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. Citigroup may place one or more bids in an auction for its own account to acquire ARS for its inventory, to prevent: (a) 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, resulting in no ARS being sold through the auction process); or (b) an auction from clearing at a rate that Citigroup believes does not reflect the market for the particular ARS being auctioned.

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

5. The Applicant states further that Citigroup may share a portion of the auction rate dealer fees it receives from the issuer with other broker-dealers that submit orders through Citigroup, for those orders that Citigroup successfully places in the auctions. Similarly, with respect to ARS for which broker-dealers other than Citigroup act as dealer, such other broker-dealers may share auction dealer fees with Citigroup for orders submitted by Citigroup.

6. According to the Applicant, since February 2008, only a minority of auctions have cleared, particularly involving municipalities. As a result, Plans holding ARS may not have sufficient liquidity to make benefit payments, mandatory payments and withdrawals and expense payments when due.<sup>4</sup>

<sup>4</sup> The Department notes that Prohibited Transaction Exemption 80-26 (45 FR 28545 (April 29, 1980), as amended at 71 FR 17917 (April 7, 2006)) permits interest-free loans or other extensions of credit from a party in interest to a plan if, among other things, the proceeds of the loan or extension of credit are used only: (1) for the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or (2) for

7. The Applicant represents that, in certain instances, Citigroup may have previously advised or otherwise caused a Plan to acquire and hold an Auction Rate Security.<sup>5</sup> In connection with Citigroup's role in the acquisition and holding of ARS by various Citigroup clients, including the Plans, Citigroup entered into Settlement Agreements with certain U.S. states and federal authorities. Pursuant to these Settlement Agreements, among other things, Citigroup was required to send a written offer to certain Plans that held ARS in connection with the advice and/or brokerage services provided by Citigroup. As described in further detail below, eligible Plans that accepted the Offer were permitted to sell the ARS to Citigroup for cash equal to the par value of such securities, plus any accrued interest and/or dividends. Specifically, pursuant to the relevant settlement, Applicant made an offer (the First Offer or an Offer) by letter dated October 3, 2008, to eligible customers who then maintained an account with Applicant to purchase all non-auctioning auction rate securities purchased by such eligible customers from Applicant on or before February 11, 2008 (Subject Securities). Eligible customers who wanted Applicant to purchase some or all of their auction rate securities by November 5, 2008 were required to notify Applicant of their desire to do so by October 21, 2008. Eligible customers that wanted Applicant to purchase some or all of their auction rate securities at any scheduled auction date between November 5, 2008 and June 12, 2009 were required to notify Applicant of their desire to do so at least three business days before the auction date.

Also pursuant to the relevant settlement, by letter dated October 20, 2008, Applicant made an Offer (the Second Offer, and together with the First Offer, the Offers) to eligible customers who had transferred their account from Applicant to another securities firm or bank to purchase all Subject Securities purchased by such eligible customers. Eligible customers who wanted Applicant to purchase some or all of their auction rate securities by December 23, 2008 were required to notify Applicant of their desire to do so by December 5, 2008. Eligible customers who wanted Applicant to purchase some or all of their auction rate securities at any scheduled auction date between

a purpose incidental to the ordinary operation of the plan.

<sup>5</sup> The relief contained in this proposed exemption does not extend to the fiduciary provisions of section 404 of the Act.

December 23, 2008 and June 12, 2009 were required to notify Applicant of their desire to do so at least three business days before the auction date. To take advantage of the Second Offer, eligible customers were also required to arrange for the transfer of the Subject Securities to Applicant through FINRA's Automated Customer Account Transfer Service. No additional custody charges were imposed in connection with transferred securities.

The Applicant is requesting retroactive and prospective relief for the Settlement Sales. With respect to Unrelated Sales, the Applicant states that to the best of its knowledge, no Unrelated Sale has occurred. However, the Applicant is requesting retroactive relief (and prospective relief) for Unrelated Sales in the event that a sale of Auction Rate Securities by a Plan to Citigroup has occurred outside the Settlement process. If granted, the proposed exemption will be effective February 1, 2008.

8. The Applicant is requesting relief for the sale of Auction Rate Securities under two different circumstances: (a) Where Citigroup initiates the sale by sending to a Plan a written Offer to acquire the ARS (*i.e.*, an Unrelated Sale), notwithstanding that such Offer is not required under a Settlement Agreement; and (b) where Citigroup is required under a Settlement Agreement to send to Plans a written Offer to acquire the ARS (*i.e.*, a Settlement Sale). The Applicant states that the Unrelated Sales and Settlement Sales (hereinafter, either, a Covered Sale) are in the interests of Plans. In this regard, the Applicant states that the Covered Sales would permit Plans to normalize Plan investments. The Applicant represents that each Covered Sale will be for no consideration other than cash payment against prompt delivery of the ARS, and such cash will equal the par value of the ARS, plus any accrued but unpaid interest or dividends. The Applicant represents further that Plans will not pay any commissions or transaction costs with respect to any Covered Sale.

9. The Applicant represents that the proposed exemption is protective of the Plans. The Applicant states that: Each Covered Sale will be made pursuant to a written Offer; and the decision to accept the Offer or retain the ARS will be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Citigroup. Additionally, each Offer will be delivered in a manner designed to alert a Plan fiduciary that Citigroup intends to purchase ARS from the Plan. Offers made in connection with an Unrelated Sale will include the material terms of the Unrelated Sale,

including: The identity and par value of the Auction Rate Security; the interest or dividend amounts that are due with respect to the Auction Rate Security; and the most recent rate information for the Auction Rate Security (if reliable information is available). Offers made in connection with a Settlement Agreement will specifically include, among other things: the background of the Offer; the method and timing by which a Plan may accept the Offer; the expiration date of the Offer; a description of certain risk factors relating to the Offer; how to obtain additional information concerning the Offer; and the manner in which information concerning material amendments or changes to the Offer will be communicated. The Applicant states that, with very narrowly tailored exceptions, neither Citigroup nor any affiliate will exercise investment discretion or render investment advice with respect to a Plan's decision to accept the Offer or retain the ARS.<sup>6</sup> In the case of a Citigroup Plan or a pooled fund maintained or advised by Citigroup, the decision to engage in a Covered Sale may be made by Citigroup after Citigroup has determined that such purchase is in the best interest of the Citigroup Plan or pooled fund. The Applicant represents further that Plans will not waive any rights or claims in connection with any Covered Sale.

10. The Applicant represents that the proposed exemption, if granted, would be administratively feasible. In this regard, the Applicant notes that each Covered Sale will occur at the par value of the affected ARS (plus accrued but unpaid interest and dividends, to the extent applicable), and such value is readily ascertainable. The Applicant represents further that Citigroup will maintain the records necessary to enable the Department and Plan fiduciaries, among others, to determine whether the conditions of this exemption, if granted, have been met.

11. In summary, the Applicant represents that the transactions described herein satisfy the statutory criteria of section 408(a) of the Act because, among other things:

(a) Each Covered Sale shall be made pursuant to a written Offer;

(b) Each Covered Sale shall be for no consideration other than cash payment against prompt delivery of the ARS;

(c) The amount of each Covered Sale shall equal the par value of the ARS,

plus any accrued but unpaid interest or dividends;

(d) Plans will not waive any rights or claims in connection with any Covered Sale;

(e)(1) the decision to accept an Offer or retain the ARS shall be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Citigroup; and (2) neither Citigroup nor any affiliate shall exercise investment discretion or render investment advice within the meaning of 29 CFR 2510.3-21(c) with respect to the decision to accept the Offer or retain the ARS;

(f) Plans shall not pay any commissions or transaction costs with respect to any Covered Sale;

(g) A Covered Sale shall not be part of an arrangement, agreement or understanding designed to benefit a party in interest to the affected Plan;

(h) With respect to any Settlement Sale, the terms and delivery of the Offer, and the terms of Settlement Sale, shall be consistent with the requirements set forth in the Settlement Agreement;

(i) Citigroup shall make available in connection with an Unrelated Sale the material terms of the Unrelated Sale, including: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due but unpaid with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available);

(j) Each Offer made in connection with a Settlement Agreement shall describe the material terms of the Settlement Sale, including the following (and shall not constitute a waiver of any claim of the tendering Plan): (1) The background of the Offer; (2) that neither the tender of ARS nor the purchase of ARS pursuant to the Offer will constitute a waiver of any claim of the tendering Plan; (3) the methods and timing by which the Plan may accept the Offer; and (4) the purchase dates, or the manner of determining the purchase dates, for ARS pursuant to the Offer and the timing for acceptance by Citigroup of tendered ARS for payment; and

(k) Citigroup shall make available to the Plan information regarding how the Plan can determine: The ARS held by the Plan with Citigroup; the number of shares and par value of the ARS; interest or dividend amounts; purchase dates for the ARS; and (if reliable information is available) the most recent rate information for the ARS.

#### 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**.

Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

#### FOR FURTHER INFORMATION CONTACT:

Brian Shiker of the Department, telephone (202) 693-8552. (This is not a toll-free number.)

**Subaru of America, Inc. (Subaru),  
Located in Cherry Hill, New Jersey**

[Application No. D-11531.]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act 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) and (b) of the Act shall not apply to the reinsurance of risks and the receipt of premiums therefrom by Pleiades Insurance Company, Ltd. (PIC) in connection with an insurance contract sold by Minnesota Life Insurance Company (MN Life) or any successor insurance company to MN Life which is unrelated to Subaru, to provide group-term life insurance to employees of Subaru under the Subaru of America, Inc. Welfare Benefit Plan (the Plan), provided the following conditions are met:

(a) PIC—

(1) Is a party in interest with respect to the Plan by reason of a stock or partnership affiliation with Subaru that is described in section 3(14)(E) or (G) of the Act,

(2) Is licensed to sell insurance or conduct reinsurance operations in at least one State as defined in section 3(10) of the Act, (3) Has a U.S. branch, the Pleiades Insurance Company Ltd. (US Branch), which has obtained a Certificate of Authority from the Insurance Commissioner of its domiciliary State which has neither been revoked nor suspended,

(4)(A) Has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year immediately prior to the taxable year of the reinsurance transaction; or

(B) Has undergone a financial examination (within the meaning of the law of its domiciliary State, the District of Columbia) by the Insurance Commissioner of the District of

<sup>6</sup> The Applicant states that while there may be communication between a Plan and Citigroup subsequent to an Offer, such communication will not involve advice regarding whether the Plan should accept the Offer.

Columbia within 5 years prior to the end of the year preceding the year in which the reinsurance transaction occurred, and

(5) Is licensed to conduct reinsurance transactions by a State whose law requires that an actuarial review of reserves be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority;

(b) The Plan pays no more than adequate consideration for the insurance contracts;

(c) In subsequent years, the formula used to calculate premiums by MN Life or any successor insurer will be similar to formulae used by other insurers providing comparable coverage under similar programs. Furthermore, the premium charge calculated in accordance with the formula will be reasonable and will be comparable to the premium charged by the insurer and its competitors with the same or a better rating providing the same coverage under comparable programs;

(d) The Plan only contracts with insurers with a rating of A or better from A.M. Best Company. The reinsurance arrangement between the insurer and PIC will be indemnity insurance only, *i.e.*, the insurer will not be relieved of liability to the Plan should PIC be unable or unwilling to cover any liability arising from the reinsurance arrangement;

(e) No commissions are paid with respect to the reinsurance of such contracts; and

(f) For each taxable year of PIC, the gross premiums and annuity considerations received in that taxable year by PIC for life and health insurance or annuity contracts for all employee benefit plans (and their employers) with respect to which PIC is a party in interest by reason of a relationship to such employer described in section 3(14)(E) or (G) of the Act does not exceed 50% of the gross premiums and annuity considerations received for all lines of insurance (whether direct insurance or reinsurance) in that taxable year by PIC. For purposes of this condition (f):

(1) the term "gross premiums and annuity considerations received" means as to the numerator the total of premiums and annuity considerations received, both for the subject reinsurance transactions as well as for any direct sale or other reinsurance of life insurance, health insurance or annuity contracts to such plans (and their employers) by PIC. This total is to be reduced (in both the numerator and the denominator of the fraction) by

experience refunds paid or credited in that taxable year by PIC.

(2) all premium and annuity considerations written by PIC for plans which it alone maintains are to be excluded from both the numerator and the denominator of the fraction.

#### Summary of Facts and Representations

1. Subaru of America, Inc. (Subaru), a wholly owned subsidiary of Fuji Heavy Industries, Ltd. of Japan (Fuji), is a marketer of Subaru products manufactured by Fuji. The Plan is a fully insured welfare plan within the meaning of section 3(1) of the Act. The Plan includes group-term life insurance (including basic, supplemental and dependent coverage).

2. PIC is a 100% owned subsidiary of Subaru. PIC's U.S. branch, the Pleiades Insurance Company, Ltd. (US Branch) (hereafter, "Branch"), is domiciled in the District of Columbia. As of March 31, 2009, PIC reported approximately \$39 million in gross annual premiums and \$214 million in total assets. The applicant represents that for each taxable year of PIC, the total amount of premiums, both for the subject reinsurance transactions as well as for any direct sale or other reinsurance of life insurance for all employee benefit plans for which PIC is a party in interest by reason of a relationship to the sponsoring employer described in section 3(14)(E) or (G) of the Act have not exceeded and will not exceed 50% of the gross premiums received by PIC from all lines of insurance in that taxable year.

3. Subaru provides to its employees certain welfare benefits through the Plan. The group-term life insurance component of the Plan currently has approximately 929 participants and beneficiaries.

4. The life insurance is currently underwritten by Minnesota Life Insurance Company (MN Life), an unaffiliated insurance carrier. Subaru has entered into a policy with MN Life for 100% of this coverage. Subaru proposes to use its subsidiary, PIC (through Branch), to reinsure 100% of the risk through a reinsurance contract between PIC and MN Life in which MN Life would pay 100% of the premiums to PIC. The premium paid to MN Life by Subaru includes fees for administrative costs, so there is no additional cost to the Plan as a result of the reinsurance arrangement. From the participants' perspective, the participants have a binding contract with MN Life, which is legally responsible for the group-term life insurance risk associated under the Plan. MN Life is liable to provide the

promised coverage regardless of the proposed reinsurance arrangement.

5. The applicant represents that the proposed transaction will not in any way affect the cost to the insureds of the group-term life insurance contracts, and the Plan will pay no more than adequate consideration for the insurance. Neither Subaru nor PIC will profit from the reinsurance arrangement at the expense of the Plan or its participants. Also, Plan participants are afforded insurance protection from MN Life at competitive rates arrived at through arm's-length negotiations. MN Life is rated "A+" by the A. M. Best Company, whose insurance ratings are widely used in financial and regulatory circles. MN Life has assets in excess of \$26 billion. MN Life will continue to have the ultimate responsibility in the event of loss to pay insurance benefits to the employee's beneficiary. The applicant represents that PIC is a sound, viable company which is dependent upon insurance customers that are unrelated to itself and its affiliates for premium revenue.

6. The applicant represents that the proposed reinsurance transaction will meet all of the conditions of PTE 79-41 covering direct insurance transactions:

(a) PIC is a party in interest with respect to the Plan (within the meaning of section 3(14)(G) of the Act) by reason of stock affiliation with Subaru, which maintains the Plan.

(b) Branch is licensed to do business in the District of Columbia.

(c) PIC has undergone an examination by an independent certified public accountant for its fiscal year ending March 31, 2009.

(d) PIC has received a Certificate of Authority from its domiciliary State (as defined in Act section 3(10)), the District of Columbia, which has neither been revoked nor suspended.

(e) The Plan will pay no more than adequate consideration for the insurance. The proposed transaction will not in any way affect the cost to the insureds of the group-term life insurance transaction.

(f) No commissions will be paid with respect to the acquisition of insurance by Subaru from MN Life or the acquisition of reinsurance by MN Life from PIC.

(g) For each taxable year of PIC, the "gross premiums and annuity considerations received" in that taxable year for group life and health insurance (both direct insurance and reinsurance) for all employee benefit plans (and their employers) with respect to which PIC is a party in interest by reason of a relationship to such employer described in section 3(14)(E) or (G) of the Act will not exceed 50% of the "gross premiums

and annuity considerations received" by PIC from all lines of insurance in that taxable year. All of the premium income of PIC comes from reinsurance. PIC has received no premiums for the group-term life insurance in the past.

7. In summary, the applicant represents that the proposed transaction will meet the criteria of section 408(a) of the Act because: (a) Plan participants and beneficiaries are afforded insurance protection by MN Life, an "A+" rated group insurer, at competitive market rates arrived at through arm's-length negotiations; (b) PIC is a sound, viable insurance company which does a substantial amount of public business outside its affiliated group of companies; and (c) each of the protections provided to the Plan and its participants and beneficiaries by PTE 79-41 will be met under the proposed reinsurance transaction.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department, telephone (202) 693-8546. (This is not a toll-free number.)

**The Bank of New York Mellon (BNY Mellon), Located in Pittsburgh, PA**

[Application No. D-11584.]

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).<sup>7</sup>

If the proposed exemption is granted, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(A) through (E) of the Code, shall not apply as of July 10, 2009, to the cash sale of certain medium term notes (the Notes) issued by Stanfield Victoria Finance Ltd. (Victoria Finance or the Issuer) for an aggregate purchase price of \$26,997,049.52 by the BNY Mellon's Short Term Investment Fund (the Fund) to The Bank of New York Mellon Corporation (BNYMC), a party in interest with respect to employee benefit plans (the Plans) invested, directly or indirectly, in the Fund, provided that the following conditions are met:

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

(b) The Fund received an amount which was equal to the sum of (1) the

total current amortized cost of the Notes as of the date of the sale plus (2) interest for the period beginning on January 1, 2008 to July 12, 2009, calculated at a rate equal to the earnings rate of the Fund during such period;

(c) The Fund did not bear any commissions, fees, transaction costs, or other expenses in connection with the sale;

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

(e) BNY Mellon took all appropriate actions necessary to safeguard the interests of the Fund, and the Plans invested, directly or indirectly, in the Fund, in connection with the transaction;

(f) If the exercise of any of BNYMC's rights, claims or causes of action in connection with its ownership of the Notes results in BNYMC recovering from Victoria Finance, the Issuer of the Notes, or from any third party, an aggregate amount that is more than the sum of: (1) the purchase price paid for the Notes by BNYMC and (2) interest on the purchase price paid for the Notes at the interest rate specified in the Notes, then BNYMC will refund such excess amount promptly to the Fund (after deducting all reasonable expenses incurred in connection with the recovery);

(g) BNY Mellon and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the person described below in paragraph (h)(1), to determine whether the conditions of this exemption have been met, except that:

(1) No party in interest with respect to a Plan which engages in the covered transaction, other than BNY Mellon and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by sections 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (h)(1); and

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

(h)(1) Except as provided in paragraph (h)(2), and notwithstanding any provisions of subsection (a)(2) and (b) of 504 of the Act, the records referred to,

above, in paragraph (g) are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission;

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

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

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

(2) None of the persons described in paragraphs (h)(1)(B)-(D) shall be authorized to examine trade secrets of BNY Mellon or its affiliates, or commercial or financial information which is privileged or confidential; and

(3) Should BNY Mellon refuse to disclose information on the basis that such information is exempt from disclosure, BNY Mellon shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

*Effective Date:* If granted, this proposed exemption will be effective as of July 10, 2009.

**Summary of Facts and Representations**

1. BNY Mellon is a state bank subject to regulation by the State of New York. As of December 31, 2008, BNY Mellon managed assets in excess of \$210 billion, a substantial part of which consisted of Plans subject to the Act. BNY Mellon is a subsidiary of BNYMC.

2. BNYMC is the parent of BNY Mellon by reason of its 100% ownership of BNY Mellon. BNYMC has a number of subsidiaries and affiliates. It is a Delaware financial services company that provides a wide range of banking and fiduciary services to a broad array of clients, including employee benefit plans subject to the Act and plans subject to Section 4975 of the Code. As of December 31, 2008, BNYMC had total assets of \$237.5 billion.

3. The Fund is a group trust that is exempt from federal income tax pursuant to Rev. Rul. 81-100. BNY Mellon serves as a discretionary trustee for the Fund. The Fund is a short-term

<sup>7</sup> For purposes of this proposed exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

investment fund that values its assets based on their amortized cost and seeks to maintain a constant unit value equal to \$1.00. The Fund invests primarily in commercial paper, including repurchase agreements, agency discount notes, corporate notes, medium term notes, floating rate notes, Treasuries, agency securities, time deposits, asset backed securities, and mortgage backed securities.

4. On July 10, 2009, the value of the Fund's portfolio was approximately \$4.9 billion. Also on July 10, 2009, there were in excess of 300 direct investors in the Fund, a substantial number of which were government-sponsored employee benefit plans, individual retirement accounts subject to section 408 of the Code, and employee benefit plans covered under section 401 of the Code.<sup>8</sup> No in-house Plan of BNY Mellon invested in the Fund. However, the BNYMC Pension Plan did invest in the Fund, and it had a 0.05% indirect interest in the Fund.

5. On May 16, 2007, the Fund purchased, with settlement on May 18, 2007, the Notes, having an aggregate par value of \$81,000,000, for \$81,000,000. Victoria Finance, an unrelated party to BNY Mellon, issued these notes on May 18, 2007. The Notes had a maturity date of February 8, 2009. On November 30, 2007, BNY Mellon sold back to the Issuer \$47,033,000 of the Notes pursuant to a tender offer by the Issuer. Although BNY Mellon had tendered all the Notes owned by the Fund, only a partial tender was accepted, leaving the Fund with a balance of \$33,967,000 in the Notes.

6. The Issuer is a structured investment vehicle (SIV) that raised capital primarily by issuing various types and classes of commercial paper, including the Notes. The assets acquired by the Issuer, which consisted of corporate and asset backed securities, were then pledged to secure the Notes pursuant to a security agreement with an independent bank serving as collateral agent. The security agreement provided that, as a general rule, upon the occurrence of an "Enforcement Event" (as defined in the security agreement), the collateral agent was required to sell all of the Issuer's assets and distribute the proceeds thereof. Interest on the Notes was taxable and

payable monthly at a variable rate that was reset on the 15th day of each month based upon the one-month London Interbank Offered Rate (LIBOR), minus four basis points. All interest accrued through December 31, 2007 was paid in full and on a timely basis.

7. The decision to invest in the Notes was made by BNY Mellon. Prior to the investment, BNY Mellon conducted an investigation of the potential investment, examining and considering the economic and other terms of the Notes. BNY Mellon represents that the investment in the Notes was consistent with the applicable investment policies and objectives of the Fund. At the time the Fund acquired the Notes, they were rated "A-1+" by Standard & Poor's Corporation (S&P) and "P-1" by Moody's Investor Services, Inc. (Moody's). Based on its consideration of the relevant facts and circumstances, BNY Mellon states that it was prudent and appropriate for the Fund to acquire the Notes.<sup>9</sup>

8. On November 7, 2007, S&P placed a "negative watch" on the Notes. On December 21, 2007, Moody's downgraded the rating of the Notes to "Baa3." On January 7, 2008, S&P downgraded the rating of the Notes to

<sup>9</sup>The Department is expressing no opinion in this proposed exemption regarding whether the acquisition and holding of the Notes by the Fund violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan. Section 404(a) of the Act also states that a plan fiduciary should diversify the investments of a plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

Moreover, the Department is not providing any opinion as to whether a particular category of investments or investment strategy would be considered prudent or in the best interests of a plan as required by section 404 of the Act. The determination of the prudence of a particular investment or investment course of action must be made by a plan fiduciary after appropriate consideration of those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including a plan's potential exposure to losses and the role the investment or investment course of action plays in that portion of the plan's portfolio with respect to which the fiduciary has investment duties (*see* 29 CFR 2550.404a-1). The Department also notes that in order to act prudently in making investment decisions, a plan fiduciary must consider, among other factors, the availability, risks and potential return of alternative investments for the plan. Thus, a particular investment by a plan, which is selected in preference to other alternative investments, would generally not be prudent if such investment involves a greater risk to the security of a plan's assets than other comparable investments offering a similar return or result.

"B-." Responding to these events, BNY Mellon, on behalf of the Fund, executed an amendment to the security agreement governing the Notes pursuant to which, by providing notice (Election Notice) on or before January 17, 2008, BNY Mellon could elect to have the pro-rata share of the collateral assets allocable to the Notes held by the Fund excluded from any asset sale by the collateral agent that would otherwise occur immediately upon the occurrence of an Enforcement Event. On January 8, 2008, as a result of the foregoing ratings down-grades, an Enforcement Event occurred. On January 15, 2008, Moody's further downgraded its rating of the Notes to "B2." On January 16, 2008, BNY Mellon submitted an Election Notice to the collateral agent instructing the collateral agent to exclude the Fund's pro rata share of the Issuer's assets from the asset sale triggered by the occurrence of the Enforcement Event on January 8, 2008. On January 17, 2008, S&P further downgraded its rating of the Notes to "D."

9. BNY Mellon's election was based on BNY Mellon's determination that the market for the collateral assets securing the Notes was severely distressed and that the inherent value of such assets was substantially greater than the price that could have been obtained if such assets were sold currently by the collateral agent. Accordingly, BNY Mellon determined that it was in the best interests of the Fund to exclude such assets from a current sale. Had BNY Mellon not executed this amendment and submitted the Election Notice, the assets of the Issuer underlying the Notes likely would have been sold at a substantial discount, resulting in large losses for the Fund's investors.

10. The Applicant represents that since the time of the Enforcement Event, a collateral agent and an enforcement manager have controlled the Issuer and, under the terms of the applicable security agreement, stopped paying interest or principal on the Notes. However, pro rata periodic distributions to holders of the Notes and other senior creditors of the Issuer have been made based on the cash flow received by the Issuer with respect to underlying assets. The Applicant represents that as of July 12, 2009, the Fund had received distributions from the collateral agent sufficient to pay down the unpaid interest accrued through January 15, 2008, plus approximately 23 percent of the amortized cost of the Notes (from \$33,967,000 to \$26,090,137.06).

11. BNY Mellon represents that following the date of the Enforcement Event, the market value of the Notes

<sup>8</sup>It is represented that section 408(b)(8) of the Act would apply to the investment by the ERISA-covered Plans in the Fund. Section 408(b)(8) of the Act provides a statutory exemption for any transactions between a plan and a common or collective trust fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency if certain requirements are met.



decreased substantially. BNY Mellon further represents that on or about July 10, 2009, it obtained information from two independent broker-dealers (Deutsche Bank and Credit Suisse) that the market for the Notes was in extreme distress, with prices for actual trades being substantially lower than their par value or amortized cost. In this regard, Deutsche Bank provided an execution price of \$29.50 and Credit Suisse provided a bid indication price of \$25.00.

12. In view of the foregoing, BNY Mellon and the BNY Mellon fiduciary committee with responsibility for overseeing the Fund ultimately determined that it would be appropriate and in the best interests of the Fund to sell the Notes to BNYMC at a price equal to the sum of (a) the total current amortized cost of the Notes, plus (b) interest for the period from January 1, 2008 to July 12, 2009, calculated at a rate equal to the earnings rate of the Fund during such period. Such a sale would protect the Fund from any investment loss with respect to the Notes. BNY Mellon also determined that the purchase of the Notes by BNYMC would be permissible under applicable banking law.

13. Shortly before the consummation of the transaction on July 10, 2009, BNY Mellon sent written notice to the designated representative of each of the investors having a direct interest in the Fund of BNY Mellon's intent to cause the Fund to sell the Notes to BNYMC. While such notice did not contemplate or require any response, it should be noted that this notice did not generate any negative reaction from any of the recipients thereof.

14. The Applicant represents that on July 10, 2009, BNYMC purchased the Notes from the Fund for an aggregate lump sum payment of \$26,997,049.52, which amount represented the sum of (a) the total current amortized cost of the Notes (\$26,090,137.06), plus (b) interest for the period from January 1, 2008 to July 12, 2009, calculated at a rate equal to the earnings rate of the Fund during such period (\$906,912.46).

15. BNY Mellon, as trustee of the Fund, believed that the sale of the Notes to BNYMC was in the best interests of the Fund, and the Plans invested, directly or indirectly, in the Fund, at the time of the transaction. BNY Mellon states that any sale of the Notes on the open market would have produced significant losses for the Fund and for the participating investors in the Fund.

16. BNY Mellon represents that the sale of the Notes by the Fund to BNYMC benefited the investors in the Fund because the purchase price paid by

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

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

18. In summary, the Applicant represents that the transactions satisfied the statutory criteria for an exemption under section 408(a) of the Act because: (a) the sale of the Notes by the Fund to BNYMC was a one-time transaction for cash; (b) the Fund received an amount equal to the sum of (i) the total current amortized cost of the Notes, plus (ii) interest for the period beginning on January 1, 2008 to July 12, 2009, calculated at a rate equal to the earnings rate of the Fund during such period, which amount was substantially greater than the aggregate market value of the Notes at the time of sale, as determined based on information regarding the then prevailing trading prices for the Notes obtained from two independent broker-dealers; (c) the Fund did not pay any commissions or other expenses with respect to the sale; (d) BNY Mellon, as trustee of the Fund, and the BNY Mellon fiduciary committee with responsibility for overseeing the Fund determined that the sale of the Notes to BNYMC was in the best interests of the Fund, and the Plans invested, directly or indirectly, in the Fund, at the time of the transaction; (e) BNY Mellon took all appropriate actions necessary to safeguard the interests of the Fund in connection with the transactions; and (f) BNYMC will promptly refund to the Fund any amount recovered from the

Issuers or any third party in connection with its exercise of any rights, claims or causes of action as a result of its ownership of the Notes, if such amounts are in excess of the sum of (i) the purchase price paid for the Notes by BNYMC, and (ii) interest on the purchase price paid for the Notes at the interest rate specified in the Notes (after deducting all reasonable expenses incurred in connection with the recovery).

**FOR FURTHER INFORMATION CONTACT:** Mr. Brian Shiker of the Department, telephone (202) 693-8552. (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 17th day of February, 2009.

**Ivan Strasfeld,**

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

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**BILLING CODE 4510-29-P**

## OFFICE OF MANAGEMENT AND BUDGET

### Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan

**AGENCY:** Office of Management and Budget, Executive Office of the President.

**ACTION:** Request for written submissions from the public.

**SUMMARY:** The Federal Government is currently undertaking a landmark effort to develop an intellectual property enforcement strategy building on the immense knowledge and expertise of the agencies charged with enforcing intellectual property rights. By committing to common goals, the Government will more effectively and efficiently combat intellectual property infringement. In this request for comments, the Government, through the office of the Intellectual Property Enforcement Coordinator ("IPEC"), invites public input and participation in shaping an effective intellectual property enforcement strategy.

This new effort is mandated by the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Public Law 110-403 (Oct. 13, 2008) ("the PRO IP Act" or "the Act") which created, within the Executive Office of the President, the position of the IPEC. The Act requires the IPEC to chair an interagency intellectual property enforcement advisory committee in order to develop an Administration strategy for enforcement against intellectual property infringement: The Joint Strategic Plan. The IPEC is currently working with the interagency advisory committee to develop this intellectual property enforcement strategy.

This request for comments and for recommendations for an improved enforcement strategy is divided into two parts. In the first, the IPEC seeks written

submissions from the public regarding the costs to the U.S. economy resulting from intellectual property violations, and the threats to public health and safety created by infringement. In the second part, the IPEC requests detailed recommendations from the public regarding the objectives and content of the Joint Strategic Plan and other specific recommendations for improving the Government's intellectual property enforcement efforts. Responses to this request for comments may be directed to either of these two parts, or both, and may include a response to one or more requests for information found in either part.

**DATES:** Submissions must be received on or before Wednesday, March 24, 2010, at 5 p.m.

**ADDRESSES:** All submissions should be sent electronically via [intellectualproperty@omb.eop.gov](mailto:intellectualproperty@omb.eop.gov).

### Publication and Confidential Information

Submissions filed in response to this request will be made available to the public by posting them on the Internet. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you have confidential business information that would support your recommendation or that you believe would help the Government formulate an effective enforcement strategy, please let us know, and we may request that additional information.

**FOR FURTHER INFORMATION CONTACT:** Thomas L. Stoll, Office of the Intellectual Property Enforcement Coordinator, at (202) 395-1808.

**SUPPLEMENTARY INFORMATION:** Through the PRO IP Act, Congress created the IPEC, to serve within the Executive Office of the President, and an interagency advisory committee specifically tasked with formulating and implementing a Joint Strategic Plan to improve the effectiveness of the U.S. Government's efforts to protect the rights of intellectual property owners and to reduce the costs of and threats posed by intellectual property infringement, in the U.S. and in other countries. The IPEC seeks public input, in the form of written comments, on the formulation of a Joint Strategic Plan and on the U.S. Government's intellectual property enforcement efforts.

### Part I

The Joint Strategic Plan must contain an analysis of the threat posed by violations of intellectual property rights, including the costs to the U.S. economy

resulting from such violations, and the threats to public health and safety created by infringement. Thus, the IPEC seeks written submissions from the public identifying the costs to the U.S. economy resulting from infringement of intellectual property rights, both direct and indirect, including any impact on the creation or maintenance of jobs.

In addition, the IPEC seeks written submissions identifying threats to public health and safety posed by intellectual property infringement, in the U.S. and in other countries.

Submissions directed to the economic costs of violations of intellectual property rights must clearly identify the methodology used in calculating the estimated costs and any critical assumptions relied upon, identify the source of the data on which the cost estimates are based, and provide a copy of or a citation to each such source.

Submissions directed to threats to public health or safety must include a detailed description of the threat, identify the source of the information substantiating the existence of that threat and provide a copy of or a citation to each such source.

The issues and challenges that pertain to adequate and appropriate enforcement of intellectual property are changing rapidly. Therefore, if desired, submissions may also identify and discuss emerging or future threats to the U.S. economy or to health and safety over the next five to ten years.

### Part II

The IPEC requests written submissions from the public that provide specific recommendations for accomplishing one or more of the objectives of the Joint Strategic Plan, or other specific recommendations for significantly improving the U.S. Government's enforcement efforts. Recommendations may include, but need not be limited to: Proposed legislative changes, regulations, executive orders, other executive action, guidelines, or changes in policies, practices or methods.

Recommendations should include a detailed description of a preferred method for accomplishing the recommendation. If a submission includes multiple recommendations, the IPEC requests that the submission rank the recommendations in order of priority, where possible.

The objectives of the Joint Strategic Plan include:

- Reducing the supply of infringing goods, domestically and internationally;
- Identifying weaknesses, duplication of efforts, waste, and other unjustified