

DEPARTMENT OF LABOR**Employee Benefits Security Administration****Prohibited Transaction Exemptions and Grant of Individual Exemptions Involving: 2010-01; Deutsche Bank, AG (Deutsche Bank or the Applicant), D-11082 and D-11109; 2010-02, State Street Bank and Trust Company, D-11522; and 2010-03, The Bank of New York Mellon (BNY Mellon), D-11571**

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of Individual Exemptions.

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

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, 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 proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon

the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and (c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Deutsche Bank, AG (Deutsche Bank or the Applicant) Located in Germany, with Affiliates in New York, NY and Other Locations

[Prohibited Transaction Exemption 2010-01; Exemption Application Nos. D-11082 and D-11109.]

*Exemption***Section I. Covered Transactions**

The restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (b)(2) of the Act (or ERISA), and the taxes imposed by section 4975(a) and (b) of Code, by reason of section 4975(c)(1)(A) through (E) of the Code,¹ shall not apply, effective July 8, 2008, to the following foreign exchange transactions involving less developed currencies, that are executed by Deutsche Bank or a current or future affiliate (domestic or foreign) thereof that is a bank or broker-dealer, acting as a local subcustodian where Deutsche Bank or its affiliates, as asset managers, have determined to invest the assets of a client plan held in a separately managed account, an in-house plan whose assets are held in a separately managed account with Deutsche Bank or its affiliate, or a pooled fund, in foreign securities, if the conditions set forth in Sections II, III and IV below are met with respect to:

(1) A trade-related currency conversion, or

(2) An income item conversion.

Section II. General Conditions

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

(b) The exchange rate used for a particular foreign exchange transaction does not deviate by more than 3 percent (above or below) the interbank bid and asked rates for such currency at the time of the transaction as displayed on an

independent, nationally-recognized service that reports rates of exchange in the foreign currency market for such currency.

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

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

(e) The foreign exchange transaction is executed by Deutsche Bank or its affiliate thereof acting as subcustodian at the direction of the global custodian in the ordinary course of its business as global custodian.

(f) The decision to select Deutsche Bank or its affiliate as the subcustodian is made by an unrelated global custodian for the relevant account.

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

(h) Deutsche Bank or its affiliate, as asset manager, appoints an independent fiduciary to receive, review and take appropriate action, if any, with respect to the report required by Section II(1)(3) and the notices in Section III(a) and (c) on behalf of (1) an in-house plan, or (2) plans investing in a restricted pooled fund.

(i) The decision to select Deutsche Bank or its affiliate as asset manager is part of an investment strategy that is adopted by an independent fiduciary of a client plan whose assets are held in a separately managed account or the independent fiduciary of an unrelated pooled fund.

(j) On an annual basis, determined as of December 31 of the relevant year, the percentage of assets of in-house plans and pooled funds in which client plans invest for which Deutsche Bank and/or its affiliates select the global custodian represent less than 20 percent of the total assets under custody by any such global custodian.

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

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

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

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

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

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

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

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

(l) With respect to the covered transactions—

(1) Deutsche Bank or its affiliate as asset manager, designates an individual (the responsible reviewing individual) who is responsible for periodically (but no less frequently than on an annual basis) reviewing a sample of such foreign exchange transactions to determine whether the covered transactions have been executed in accordance with the terms of this exemption. Such sample must include a sufficient number of transactions to ensure that each affected currency is tested.

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

(3) The responsible reviewing individual notifies Deutsche Bank or its affiliate as asset manager, the independent fiduciary of each client plan whose assets are held in a separately managed account, the independent fiduciary of an in-house plan and any restricted pooled fund required under Section II(h), the independent fiduciary of an unrelated pooled fund, and the independent fiduciary of each plan investing in an unrestricted pooled fund, of its findings in a written report within 90 days after the period to which the periodic review relates. Such report describes the steps performed by such individual during the course of the review, the level of compliance by Deutsche Bank or its affiliate with the terms and conditions of the exemption, and any specific instances of non-compliance by Deutsche Bank or its affiliate with the terms and conditions of the exemption.

Section III. Notice Requirements

(a) At the time Deutsche Bank or its affiliate is retained as asset manager, or prior to the initial investment of the plan's assets or pooled fund's assets in any foreign investments that may require the execution of a foreign exchange transaction by Deutsche Bank or its affiliate as subcustodian, Deutsche Bank or its affiliate provides the independent fiduciary of each client plan whose assets are held in a separately managed account, the independent fiduciary of each in-house plan and restricted pooled fund as required under Section II(h), the independent fiduciary of each unrelated pooled fund, and the independent fiduciary of each plan investing in an unrestricted pooled fund, a written notice (which may be effected electronically) that includes the following:

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

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

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

(4) A list of the markets in which plans or pooled funds may invest where Deutsche Bank or its affiliate serves as a subcustodian, where a foreign exchange transaction may be executed by Deutsche Bank or its affiliate as subcustodian at the direction of a global custodian.

(5) A list of the markets where currency transactions are executed by Deutsche Bank or an affiliate, as subcustodian, to the extent known.

(6) Notice that Deutsche Bank or its affiliate maintains records (described in Section IV), and that such records are reasonably available at their customary location for examination in the U.S., during normal business hours, by the responsible reviewing individual, the independent fiduciary of a client plan whose assets are held in a separate account, the independent fiduciary of

an in-house plan or a restricted pooled fund, as required under Section II(h), the independent fiduciary of an unrelated pooled fund, the independent fiduciary of each plan investing in an unrestricted pooled fund, any participant or beneficiary of such plan or pooled fund, or any duly authorized employee or representative of such participant or beneficiary.

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

(8) Notice of the definition of the term "independent" under this exemption as used in the term "independent fiduciary," and a request that the independent fiduciary of a client plan notify Deutsche Bank or its affiliate asset manager if, at any time, such fiduciary is not independent of Deutsche Bank.

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

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

(d) With respect to pooled funds, in the event the independent fiduciary of a client plan submits a notice in writing to the person engaging in or proposing to engage in the covered transaction objecting to the implementation of, a material change in or continuation of the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the pooled fund without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans. In the case of a plan that elects to so withdraw, the withdrawal shall be effected prior to the implementation of a material change in the arrangement, but an existing arrangement need not be discontinued

by reason of a plan electing to withdraw.

Section IV. Recordkeeping Requirements

(a) Deutsche Bank or its affiliate maintains, or causes to be maintained, for a period of six years from the date of the covered transactions, the following records, as well as any records necessary to enable the persons described in paragraph (c) of this Section IV, to determine whether the conditions of this exemption have been met:

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

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

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

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

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

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) The independent fiduciary of a client plan whose assets are held in a separately managed account, the independent fiduciary of an in-house plan or restricted pooled fund required under Section II(h), the independent fiduciary of each unrelated pooled fund, or the independent fiduciary of each plan investing in an unrestricted pooled fund, or

(iii) Any participant or beneficiary of such plans or pooled funds (described in paragraph (ii) above) or any duly authorized employee or representative of such participant or beneficiary.

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

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

Section V. Definitions

For purposes of this exemption,

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

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

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

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

(1) Supervised by the United States or a State;

(2) Supervised and examined by the German banking authorities, or monitored and controlled pursuant to the statutory and regulatory standards of German law; or

(3) Subject to regulation and oversight by governmental entities that are substantially similar to the regulatory oversight of banks present in the United States.

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

(1) Registered and regulated under the relevant securities laws of the United States;

(2) Registered and regulated under the relevant securities laws of Germany; or

(3) Registered and regulated under the relevant securities laws of a country with securities laws that are substantially similar to the securities laws governing broker-dealers in the United States.

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

(3) Deutsche Bank or its affiliate as asset manager, in the case of an in-house plan; or (4) Deutsche Bank or its affiliate as asset manager in the case of a pooled fund established by Deutsche Bank or an affiliate, for the purpose of holding and safeguarding the assets of the client plan, in-house plan, or pooled fund, physically or through securities depositories, foreign clearing agencies or other entities which act as securities depositories, through its branches or through its subcustodian network. For purposes of Section V(f) only, the global custodian will be unrelated to Deutsche Bank or its affiliate if the global custodian is not controlling, controlled by under common control with Deutsche Bank, directly or indirectly through one or more intermediaries.

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

(h) The term “responsible reviewing individual” means a senior official appointed by Deutsche Bank or its affiliate acting as asset manager, who has at least 10 years experience with the fiduciary responsibility provisions of

the Act, and appropriate compliance training. Such person is appointed by Deutsche Bank or its affiliate to review a sample of the covered transactions periodically, but no less frequently than on an annual basis, in order to ensure compliance with the terms of the exemption on behalf of a client plan whose assets are held in a separately managed account, an in-house plan, or a pooled fund.

(i) The term "in-house plan" means an employee benefit plan as described in section 3(3) of the Act, or a plan as described in section 4975(e)(1) of the Code, that is sponsored by Deutsche Bank or any person that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, Deutsche Bank.

(j) The term "client plan" means an employee benefit plan, as described in section 3(3) of the Act, or a plan, as described in section 4975(e)(1) of the Code, other than an in-house plan, with respect to which Deutsche Bank or its affiliate acts as a fiduciary with discretionary authority over the management of the assets involved in covered transactions (whether or not any such authority has been delegated to an unaffiliated sub-adviser).

(k) The term "pooled fund" means a collective investment fund or a pooled arrangement: (1) That is deemed to hold "plan assets" (within the meaning of section 3(42) of the Act and the regulations thereunder), (2) that holds assets of at least two or more unrelated employee benefit plans within the meaning of section 3(3) of the Act or plans within the meaning of section 4975(e)(1) of the Code, and (3) for which Deutsche Bank or its affiliate acts as fiduciary with discretionary authority over the management of its assets (whether or not any such authority has been delegated to an unaffiliated sub-adviser).

(l) The term "restricted pooled fund" refers to a pooled fund (1) that is sponsored and managed by Deutsche Bank or an affiliate, (2) in which the total invested assets of an in-house plan (or in-house plans), if aggregated (whether invested directly or indirectly through another pooled fund), represent 20% or more (determined as of the last day of each month) of the total invested assets of such pooled fund, and (3) for which Deutsche Bank or an affiliate will appoint an independent fiduciary, as described in Section V(o) below, to represent the interests of all plans investing in such fund.

(m) The term "unrestricted pooled fund" refers to a pooled fund that (1) is sponsored and managed by Deutsche

Bank or an affiliate and (2) in which the total invested assets of an in-house plan (or in-house plans), if aggregated (whether invested directly or indirectly through another pooled fund), represent less than 20% (determined as of the last day of each month) of the total invested assets of such pooled fund.

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

(o) The term "independent" as used in the term "independent fiduciary" means—

(1) In the case of a client plan whose assets are held in a separately managed account or an unrelated pooled fund, a plan fiduciary or the named fiduciary of a pooled fund, or a fiduciary appointed by the named fiduciary that is unrelated to, and independent of, Deutsche Bank and its affiliates. For purposes of this exemption, a plan fiduciary will be deemed to be unrelated to, and independent of, Deutsche Bank if neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for the transactions described in Section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of Deutsche Bank and such fiduciary represents that it will advise Deutsche Bank or its affiliate if those facts change, or

(2) In the case of the fiduciary required under Section II(h), in connection with an in-house plan or in connection with a restricted pooled fund, an individual or company is qualified and independent of Deutsche Bank and its affiliates if such individual or company: (i) Has at least 10 years experience in the financial services business and significant experience in foreign currency trading and pricing, and (ii) certifies that the gross income received from Deutsche Bank and its affiliates for the current year does not exceed 5% of such fiduciary's gross income from all services for the prior fiscal year. The independent fiduciary shall represent to Deutsche Bank that such fiduciary is aware of its ERISA duties and responsibilities in acting as a fiduciary with respect to an in-house plan or a restricted pooled fund and the covered transactions.

(3) In the case of an unrestricted pooled fund, the persons described in Section V(o)(1) or (2).

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

(i) Such fiduciary directly or indirectly controls, is controlled by, or

is under common control with Deutsche Bank, other than described herein;

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

(iii) Any officer, director or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of Deutsche Bank or an affiliate responsible for the transactions described in Section I is an officer, director or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the client plan sponsor, the sponsor of an unrelated pooled fund, or of the fiduciary responsible for the decision to authorize or terminate authorization for transactions described in Section I. However, if such individual is a director of the client plan sponsor, the sponsor of an unrelated pooled fund, or of the responsible fiduciary, and if he or she abstains from participation in (A) the choice of Deutsche Bank or an affiliate as the investment manager/adviser for the client plan or unrelated pooled fund and (B) the decision to authorize or terminate authorization for transactions described in Section I, then Section V(o)(4)(iii) shall not apply.

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

(q) The term "foreign exchange" transaction means the exchange of the currency of one nation for the currency of another nation.

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

(s) The term "trade-related currency conversion" means the conversion of trade-related items (i.e., amounts necessary for purchases or proceeds

from sales) into foreign currency or into U.S. dollars in order to permit purchase transactions to settle, and to permit proceeds of sales to be deployed in other investments or to be used to make distributions.

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

Effective Date: This exemption is effective as of July 8, 2008.

Written Comments

The proposed exemption gave interested persons an opportunity to comment and to request a hearing. In this regard, all interested persons were invited to submit written comments and/or requests for a hearing on the pending exemption on or before August 22, 2008. During the comment period, the Department received one written comment letter and no requests for a public hearing. The comment was submitted by the Applicant, and it is intended to clarify the operative language and the Summary of Facts and Representations of the proposed exemption in a number of areas or to confirm their validity. A discussion of the comments and the responses made by the Department is presented below.

A. Clarifications to the Operative Language²

1. Large Pooled Fund and Small Pooled Fund/Word Substitutions.

Section II(h) of the proposed exemption states that Deutsche Bank or its affiliate will appoint an independent fiduciary to represent the interests of (a) an in-house plan or (b) plans investing in a “large pooled fund.” The Applicant explains that the term “large pooled fund” may be misleading since what is relevant is not the size of the fund but the level of in-house plan investment in such fund. Therefore, the Applicant requests that the Department change the term to “restricted pooled fund.” Similarly, the Applicant requests that the Department revise the term “small pooled fund” to “unrestricted pooled fund.”

In response to this comment, the Department has substituted the terms “restricted pooled fund” and “unrestricted pooled fund” for the terms “large pooled fund” and “small pooled fund” in the final exemption.

2. Investment Decisions by Independent Fiduciary or Applicant.

Section II(i) of the proposed exemption requires that the decision by an independent fiduciary of a client plan, an in-house plan, a large pooled fund (redesignated herein as a “restricted pooled fund”) and unrelated pooled funds to invest in a given market and to select Deutsche Bank or an affiliate as asset manager is part of an investment strategy that is adopted by such fiduciary. The Applicant requests that the Department clarify that this condition requires nothing more than the authorization specified in Section III(b) of the proposal. The Applicant points out that in all instances, the decision to invest in a given market is made by Deutsche Bank or an affiliate, as asset manager, and not by the independent fiduciary. While a plan’s independent fiduciary decides on a general investment strategy (e.g., emerging markets debt), the Applicant points out that such fiduciary may or may not know the countries to which plan assets may be committed. The Applicant also explains that the decision to commit plan assets to a particular country and in what amounts are decisions made by the discretionary investment manager, which is Deutsche Bank or an affiliate. Further, in the context of an in-house plan or a restricted pooled fund, the Applicant states that the decision to appoint Deutsche Bank or an affiliate, as asset manager, is made by Deutsche Bank or an affiliate, and not by an independent fiduciary.

In response to this comment, the Department has revised Section II(i) of the final exemption to clarify that the decision to select Deutsche Bank or an affiliate as asset manager is made by the independent fiduciary of a client plan whose assets are held in a separately managed account or the independent fiduciary of an unrelated pooled fund.

3. Parties to Receive Notice from the Responsible Reviewing Individual/Word Substitutions. Section II(l)(3) of the proposal describes the parties that are to be notified by the responsible reviewing individual as to its determination whether the covered transactions have been executed in accordance with the terms and conditions of the exemption. Among the persons who are designated in the proposed exemption as recipients of periodic written reports from the responsible reviewing individual are “Deutsche Bank or its affiliate, the independent fiduciary of a client plan whose assets are held in a separately managed account, the independent fiduciary of an in-house plan, the independent fiduciary of a large pooled fund, the independent fiduciary of an unrelated pooled fund, or the receiving

fiduciary of a small pooled fund.” The Applicant requests that Section II(l)(3) of the proposed exemption be modified to reflect the substitution of the term “large” with “restricted” and the term “small” with “unrestricted,” as appropriate, in the context of the term “pooled fund.” The Applicant also asks that the term “receiving fiduciary” for an unrestricted pooled fund, as defined in Section V(q) of the proposal and as used in Section II(l)(3) be stricken because the responsible reviewing individual will notify the independent fiduciary of each plan investing in an unrestricted pooled fund directly.

In response to this comment, the Department has made the requested modifications to Section II(l)(3), and deleted Section V(q) of the proposal. The Department has also made corresponding revisions to Section III(a) and Section IV(c)(1)(ii) where these terms appear, as well.

4. Written Disclosures Provided to the Independent Fiduciary.

Section II(l)(3) of the proposal requires that the responsible reviewing individual notify Deutsche Bank, the independent fiduciary of each client plan whose assets are held in a separately managed account, the independent fiduciary of an in-house plan and any restricted pooled fund required under II(h), the independent fiduciary of unrelated pooled fund, and the independent fiduciary of each plan investing in an unrestricted pooled fund, of its findings in a written report within 90 days following the period to which the periodic review relates. Such report is to be completed annually. The Applicant states in the preamble to the proposed exemption (in the last paragraph of Representation 30) that within 90 days of a request by the independent fiduciary, Deutsche Bank must provide written compliance reports. The Applicant notes that the operative language does not contain this condition. The Applicant believes that such reports, would be duplicative of those required by Section II(l) and be overly burdensome. In response to this comment, the Department concurs with the Applicant, and notes that the exemption does not require additional reports other than those described in II(l)(3).

In addition, Section III(a)(4) of the proposed exemption states that Deutsche Bank or an affiliate is required to provide written disclosure to an independent fiduciary of the list of markets in which plans or pooled funds invest where Deutsche Bank or its affiliate serves as a subcustodian. Representation 30(e) of the Summary of Facts and Representations adds that

² The clarifications discussed in this section are also meant to include modifications to the Summary of Facts and Representations of the proposal.

disclosure must be provided as to whether a particular market is served by more than one subcustodian. The Applicant requests confirmation that this additional disclosure is not required because it will not have access to this information.

The Department concurs with the Applicant's comment and clarifies that disclosure of whether a particular market is served by more than one subcustodian is not required.

5. *Negative Consent by the Independent Fiduciary.* As stated briefly above, Section III(b) of the proposed exemption states that if the independent fiduciary fails to object in writing to Deutsche Bank or its affiliate within 30 days following the receipt of information concerning the investment of a plan or a pooled fund assets in foreign investments that may require the execution of foreign exchange transactions by Deutsche Bank or its affiliates as subcustodians, then such fiduciary's authorization of the contemplated arrangement will be presumed. The Applicant suggests that at the end of Section III(b), in order to clarify what happens if an independent fiduciary objects, the following language should be inserted:

The independent fiduciary required under Section II(h) shall not have any authority under this section. With respect to pooled funds, in the event the independent fiduciary submits a notice in writing to the person engaging in or proposing to engage in the covered transaction objecting to the implementation of, material change in or continuation of the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the pooled fund, without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans. In the case of a plan that elects to so withdraw, the withdrawal shall be affected prior to the implementation of a material change in the arrangement, but an existing arrangement need not be discontinued by reason of a plan electing to withdraw.

In response to this comment, the Department has determined to make some of the changes requested by the Applicant by adding a new condition designated as Section III(d). However, the Department has determined not to adopt the exclusionary language appearing in the first sentence of the above-referenced text, as suggested by the Applicant, which pertains to the independent fiduciary required under Section II(h) because of the independent fiduciary's critical role in protecting an in-house plan or a restricted pooled fund by taking all actions that are

necessary and proper on behalf of such plan or pooled fund. Section III(d) of the final exemption reads as follows:

With respect to pooled funds, in the event the independent fiduciary of a client plan submits a notice in writing to the person engaging in or proposing to engage in the covered transaction objecting to the implementation of, a material change in or continuation of the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the pooled fund without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans. In the case of a plan that elects to so withdraw, the withdrawal shall be effected prior to the implementation of a material change in the arrangement, but an existing arrangement need not be discontinued by reason of a plan electing to withdraw.

6. *Access to Records by Participants and Beneficiaries.* Section IV(c)(1)(iii) of the proposed exemption permits any participant or beneficiary of a plan or a pooled fund, the assets of which are involved in foreign exchange transactions pursuant to the exemption to have access to the records that the exemption, requires Deutsche Bank to maintain. The Applicant has requested that the Department delete Section IV(c)(1)(iii) and the reference to such subsection in Section IV(c)(2) because the requirement is burdensome. The Department continues to believe that the participants and beneficiaries in plans or pooled funds should have access to the required records, and accordingly, has decided not to make the requested changes.

7. *Affiliate Definition.* Section V(b) of the proposed exemption defines the term "affiliate" of Deutsche Bank as "any domestic or foreign bank or broker-dealer directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with Deutsche Bank." The Applicant has requested that this definition be expanded to include: "any domestic or foreign investment adviser that is, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with Deutsche Bank." According to the Applicant, this addition will ensure that the exemption is available where an affiliate of Deutsche Bank, which is a bank, broker-dealer or investment adviser, acts as asset manager, rather than Deutsche Bank, itself.

The Department has determined not to make the Applicant's requested change because it greatly expands the scope of the relief proposed without an

opportunity for notice and comment by interested persons.

8. *Global Custodian Definition.*

Section V(f) of the proposed exemption defines the term "global custodian" as follows:

The term "global custodian" means a bank or broker-dealer that is unrelated to Deutsche Bank or its affiliate, which is selected by (1) the named fiduciary of a client plan; (2) the sponsor (other than Deutsche Bank or its affiliate) of an unrelated pooled fund; (3) Deutsche Bank or its affiliate in the case of an in-house plan; or (4) Deutsche Bank or its affiliate in the case of a pooled fund established by Deutsche Bank or an affiliate, for the purpose of holding and safeguarding all assets of the client plan, in-house plan, or pooled fund, physically or through a depository, through its branches or through its subcustodian network.

For clarity, the Applicant requests that Section V(f)(1) of the definition be modified by substituting the term "named" with the term "independent" because Deutsche Bank will not know whether the plan fiduciary selecting the global custodian is actually a named fiduciary because such plan fiduciary may be the trustee or some other fiduciary to whom a named fiduciary has delegated appropriate authority. In response to this comment, the Department has made the requested change.

In addition, the Applicant requests that, in the last clause of Section V(f), the word "all" be deleted because some plans or funds may have more than one global custodian. Further, the Applicant suggests that the last clause of Section V(f) the phrase "a depository" be substituted with the phrase "securities depositories, foreign clearing agencies or other entities which act as securities depositories." According to the Applicant, this will ensure consistency with Section V(g) of the exemption which utilizes the latter language. The Department concurs with the Applicant's suggested revisions and has made the changes in the final exemption.

In addition, at the Applicant's recommendation, the Department has modified Section V(f) of the final exemption by clarifying that the term "unrelated," as used therein, means that "the global custodian will be unrelated to Deutsche Bank or its affiliates if the global custodian is not controlling, controlled by or under common control with Deutsche Bank, directly or indirectly through one or more intermediaries." Thus, the revised definition of the term "global custodian" is set forth as follows:

The term "global custodian" means a bank or broker-dealer that is unrelated to Deutsche

Bank or its affiliate, which is selected by (1) the independent fiduciary of a client plan in the case of a separately managed account; (2) the sponsor (other than Deutsche Bank or its affiliate) of an unrelated pooled fund; (3) Deutsche Bank or its affiliate as asset manager in the case of an in-house plan; or (4) Deutsche Bank or its affiliate as asset manager in the case of a pooled fund established by Deutsche Bank or an affiliate, for the purpose of holding and safeguarding the assets of the client plan, in-house plan, or pooled fund, physically or through securities depositories, foreign clearing agencies or other entities which act as securities depositories, through its branches or through its subcustodian network. For purposes of Section V(f) only, the global custodian will be unrelated to Deutsche Bank or its affiliates if the global custodian is not controlling, controlled by or under common control with Deutsche Bank, directly or indirectly through one or more intermediaries.

9. *In-House Plan Definition.* Section V(i) of the proposed exemption defines the term “in-house plan” as a “plan sponsored by Deutsche Bank or any person that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, Deutsche Bank.” The Applicant has requested that the Department adopt the following language as the new definition of “in-house plan” in order to maintain consistency with the Class Exemption for Plan Asset Transactions Determined by In-House Asset Managers (PTE 96–23) (61 FR 15975, 15982 (April 10, 1996)):

The term “in-house plan” means a plan sponsored by Deutsche Bank or any affiliate. For purposes of the foregoing only, “affiliate” means a member of either (1) a controlled group of corporations (as defined in section 414(b) of the Code) of which Deutsche Bank is a member, or (2) a group of trades or businesses under common control (as defined in section 414(c) of the Code) of which Deutsche Bank is a member; provided that “50 percent” shall be substituted for “80 percent” wherever “80 percent” appears in section 414(b) or 414(c) or the rules thereunder.”

The Department notes that the Applicant’s suggested definition of “in-house plan,” which is taken from PTE 96–23 would limit certain plans from being considered “in-house plans” as these plans would not come within the proposed definition. Therefore, the Department has not adopted the requested change. Instead, the Department has modified the definition of “in-house plan” as follows:

The term “in-house plan” means an employee benefit plan as described in section 3(3) of the Act, or a plan as described in section 4975(e)(1) of the Code, that is sponsored by Deutsche Bank or any person

that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with, Deutsche Bank.

10. *Client Plan Definition.* Section V(j) of the proposed exemption defines the term “client plan” as “an employee benefit plan, other than a plan sponsored by Deutsche Bank, as described in section 3(3) of the Act or section 4975(e)(1) of the Code with respect to which Deutsche Bank or its affiliate acts as a fiduciary having full investment discretion.” The Applicant has requested that the definition of “client plan” be modified as follows:

The term “client plan” means an employee benefit plan, as described in section 3(3) of the Act, or a plan, as described in section 4975(e)(1) of the Code, other than an in-house plan, with respect to which Deutsche Bank or its affiliate acts as a fiduciary with discretionary authority over the management of the assets involved in covered transactions (whether or not any such authority has been delegated to an unaffiliated sub-adviser).

The Applicant states that the revised definition clarifies Deutsche Bank’s role with respect to plan assets because the meaning of the phrase “full investment discretion,” as used in the client plan definition, is unclear. In addition, the Applicant states that the modification ensures that separately managed accounts that are sub-advised by a third party are included within the scope of exemptive relief.

In response to this comment, the Department has made the Applicant’s requested revision in the final exemption.

11. *Pooled Fund Definition.* Section V(k) of the proposed exemption defines the term “pooled fund” as follows:

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

The Applicant has suggested that this definition be deleted in its entirety and replaced with the following definition:

The term “pooled fund” means a collective investment fund or a pooled arrangement— (1) that is deemed to hold “plan assets” (within the meaning of section 3(42) of Act and the regulations thereunder), (2) that holds assets of at least two or more unrelated employee benefit plans within the meaning

of section 3(3) of Act or plans within the meaning of section 4975(e)(1) of the Code, and (3) for which Deutsche Bank or its affiliate acts as fiduciary with discretionary authority over the management of its assets (whether or not any such authority has been delegated to an unaffiliated sub-adviser).

The Applicant believes that the requested change provides clarification that the exemption applies to pooled funds only when they are deemed to hold plan assets. Moreover, the Applicant states that the revised definition acknowledges that non-plan investors may be invested in pooled funds that hold plan assets. In response to this comment, the Department has made the requested change.³

12. *Large Pooled Fund Redefined/ Word Substitution.* Section V(l) of the proposed exemption defines the term “large pooled fund” as follows:

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

The Applicant has requested that the term “large pooled fund” be changed to “restricted pooled fund” as it appears throughout the proposed exemption and as defined in Section V(l). In the Applicant’s view, the modified language more accurately describes this term.

In response to this comment, the Department has replaced the term “large pooled fund” with “restricted pooled fund” throughout the operative language of the final exemption. The Department also notes the corresponding changes to the Summary of Facts and Representations.

In addition, the Applicant has requested that the definition of the term “large pooled fund” be replaced with the following new definition:

The term “restricted pooled fund” refers to a pooled fund (i) that is sponsored by Deutsche Bank or an affiliate, (ii) in which the total invested assets of an in-house plan (or in-house plans), if aggregated (whether

³ For consistency in the formatting of the final exemption, the Department has also replaced the romanettes with numbers for the investment vehicles defined in Comments 11–13 above.

invested directly or indirectly through another pooled fund), represent 20% or more (determined as of the last day of each month) of the total invested assets of such pooled fund, and (iii) for which Deutsche Bank or an affiliate will appoint an independent fiduciary, as described in Section V(o) below, to represent the interests of all plans investing in such fund.

The Applicant states that the revised definition omits the reference to Deutsche Bank's management because the revised definition of "pooled fund" already references Deutsche Bank's management. In addition, the Applicant explains that the revised definition acknowledges that non-plan investors often invest in pooled funds that hold plan assets and requires monthly testing of the level of in-house plan investment.

The Department concurs, in part, with the Applicant's revised definition of the term "restricted pooled fund." However, the Department has decided to leave the reference to Deutsche Bank's or its affiliate's management authority intact in the final exemption in order to emphasize that Deutsche Bank or its affiliate sponsors the restricted pooled fund and has discretion over the assets of such pooled fund. Therefore, the revised definition of the term restricted pooled fund reads as follows:

The term "restricted pooled fund" refers to a pooled fund (1) that is sponsored and managed by Deutsche Bank or an affiliate, (2) in which the total invested assets of an in-house plan (or in-house plans), if aggregated (whether invested directly or indirectly through another pooled fund), represent 20% or more (determined as of the last day of each month) of the total invested assets of such pooled fund, and (3) for which Deutsche Bank or an affiliate will appoint an independent fiduciary, as described in Section V(o) below, to represent the interests of all plans investing in such fund.

13. Small Pooled Fund Redefined/ Word Substitution. Section V(m) of the proposed exemption defines the term "small pooled fund" as follows:

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

The Applicant has requested that the term "small pooled fund" be changed to "unrestricted pooled fund." Also, for the same reasons expressed above by the

Applicant for modifying the term "large pooled fund," the Applicant requests that Section V(m) be revised to the following:

The term "unrestricted pooled fund" refers to a pooled fund that (1) is sponsored by Deutsche Bank or an affiliate and (2) in which the total invested assets of an in-house plan (or in-house plans), if aggregated (whether invested directly or indirectly through another pooled fund), represent less than 20% (determined as of the last day of each month) of the total invested assets of such pooled fund.

The Department concurs with the Applicant's revised definition of the term "unrestricted pooled fund," with the exception of deleting the reference to Deutsche Bank or its affiliate managing the fund, and has made appropriate changes in the final exemption. The revised definition reads as follows:

The term "unrestricted pooled fund" refers to a pooled fund that (1) is sponsored and managed by Deutsche Bank or an affiliate and (2) in which the total invested assets of an in-house plan (or in-house plans), if aggregated (whether invested directly or indirectly through another pooled fund), represent less than 20% (determined as of the last day of each month) of the total invested assets of such pooled fund.

B. Confirmations

1. Fee Disclosures. The Applicant points out that in the proposed exemption, Representation 30(c) of the Summary of Facts and Representations provides for the disclosure of all fees Deutsche Bank or its affiliate may receive as a result of the covered transactions. However, the Applicant notes that there is no such requirement in the operative language of the proposal. The Applicant explains that the proposed exemption only requires that Deutsche Bank or its affiliate retain records that specify the price at which the transaction occurred, which is acceptable to the Applicant. Therefore, the Applicant requests that the final exemption reflect that the disclosure of "all fees" should not be required, but that the rate and other market information should be required.

The Department does not concur with the Applicant's reasoning. To the extent Deutsche Bank or its affiliate are able to make appropriate fee disclosures to independent fiduciaries without undue burden, the Department would require Deutsche Bank or its affiliate to provide this information.

2. Exemptive Relief for the Global Custodian. The Applicant has asked the Department to confirm that no exemptive relief is necessary if the global custodian makes a market in a particular currency and executes the

foreign exchange transaction as principal. The Applicant explains that although a global custodian would be engaged in a principal transaction, it might receive a ticket charge, as it would for any transaction. However, the Applicant believes that it is very unlikely that the global custodian would receive a ticket charge given that the plan would be engaging in a foreign exchange transaction through the global custodian's custody network. The Applicant also emphasizes that because it is unaware of the policies of each global custodian, it can only make generalized assertions about such policies.

In response to this comment, the Department believes that this comment is beyond the scope of the exemption. The Department notes that exemptive relief may be available for the global custodian under section 408(b)(18) of the Act to the extent the conditions therein are satisfied.⁴

3. Application of Foreign Laws. The Applicant has requested the Department to confirm that Section II(k) does not preclude the application of foreign laws. Section II(k) of the exemption requires that:

Foreign affiliates of Deutsche Bank which engage in the covered transactions—

- (1) Agree to submit to the jurisdiction of the United States;
- (2) Agree to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent);
- (3) Consent to service of process on the Process Agent;

⁴ Section 408(b)(18) of the Act is a statutory exemption that was enacted under the Pension Protection Act of 2006. This statutory exemption provides relief from section 406(a) of the Act and limited relief from section 406(b) of the Act for custodians or trustees with respect to foreign exchange transactions between a bank or broker-dealer (or an affiliate of either) and a plan with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary or other party in interest if,—(1) the transaction is in connection with the purchase, holding or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets); (2) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or an affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties; (3) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency; and (4) the bank or broker-dealer (or any affiliate of either) does not have investment discretion or provide investment advice with respect to the transaction.

(4) Agree that they may be sued in the United

States Courts in connection with the covered transactions described in this proposed exemption;

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

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

In response, the Department notes that this section does not preclude the application of foreign laws, but rather provides a means for a plan to seek a judgment in the courts of the United States if a claim arises in connection with the covered transactions. In addition, to the extent those foreign laws preclude a foreign affiliate of Deutsche Bank from meeting the conditions of the exemption, such affiliate may not rely on the relief provided by this exemption.

4. *Development of Policies and Procedures by Global Custodian.* The Applicant requests that the Department confirm that Section III(a) does not require the global custodian to develop any special policies and procedures regarding the handling of foreign exchange transactions for plans or pooled funds with respect to which Deutsche Bank or its affiliate is a fiduciary or disclose to Deutsche Bank the factors that the global custodian considers in its selection of a subcustodian.

In response to this comment, the Department notes that the requirements of Section III(a) relate exclusively to the information that Deutsche Bank must provide to certain designated persons.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption that was published in the **Federal Register** on July 8, 2008 at 73 FR 39158. For further information regarding the Applicant's comment letter or other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application files (Exemption Application Nos. D-11082 and D-11109) the Department is maintaining in this case. The application files, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. The Applicant's comment letter may also be viewed online at <http://www.regulations.gov>, at Docket ID Number: EBSA-2008-0006.

Accordingly, after giving full consideration to the entire record, including the Applicant's comment letters and supplements, the Department has decided to grant the exemption.

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

State Street Bank and Trust Company; Located in Massachusetts

[Prohibited Transaction Exemption No. 2010-02; Application No. D-11522.]

Exemption

The restrictions of sections 406(a)(1)(A) and (D) and 406(b) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), (E), and (F) of the Code, shall not apply as of October 24, 2008, to the cash sale of certain mortgage, mortgage-related, and other asset-backed securities for \$2,447,381,010 (the Sale) by stable value commingled funds and separate accounts both holding assets of employee benefit plans (the Accounts) to State Street Bank and Trust Company (State Street), the investment manager and/or trustee for the Accounts, provided that the conditions set forth below are met.

(a) The Sale was a one-time transaction for cash payment made on a delivery versus payment basis.

(b) The Accounts did not bear any commissions or transaction costs in connection with the Sale.

(c) The Accounts received as a purchase price for the securities an amount which, as of the effective date of the Sale, was equal to the fair market value of the securities, determined by reference to prices provided by independent third-party pricing sources consulted in accordance with pricing procedures used by the Accounts prior to the transaction.

(d) In connection with the Sale, State Street transferred to and allocated among the Accounts cash in the amount of \$450,000,000.

(e) At the time of the transaction, State Street, as trustee of the Accounts, determined (except with respect to the State Street Salary Savings Program, an employee benefit plan maintained for employees of State Street and certain affiliates (the State Street Plan)) that the Sale was appropriate for and in the best interests of the Accounts and the employee benefit plans invested in the Accounts. An independent fiduciary determined at the time of the transaction that the Sale was appropriate for and in the best interest

of the State Street Plan and its participants and beneficiaries.

(f) An independent consultant reviewed, after the Sale, the reasonableness of the prices used to purchase the securities, and concluded that the pricing methodology used by State Street provided a reasonable basis for determining the fair market value of the securities and that the methodology was reasonably applied with only immaterial deviations.

(g) In carrying out the Sale, State Street took all appropriate actions necessary to safeguard the interests of each Account and each employee benefit plan with a direct or indirect interest in an Account.

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

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

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

(i)(i) Except as provided below, in paragraph (ii), and notwithstanding any provisions of subsections (a)(2) and (b) of sections 504 of the Act, the records referred to in paragraph (h) above, 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, the Securities and Exchange Commission or the Federal Reserve Board;

(B) Any fiduciary of any plan that engaged 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 transactions, or any authorized employee or representative of these entities; or

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

(ii) None of the persons described above in subparagraphs (B)–(D) of paragraph (i)(i) are authorized to examine the trade secrets of State Street or commercial or financial information that is privileged or confidential.

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

The Department received one comment regarding the proposed exemption. At the Department's request, State Street submitted a response to the comment. A discussion of the commenter's assertions, State Street's responses, and the Department's views follows.

The commenter first stated that State Street failed to disclose certain information to the Department. Specifically, the commenter cited several news items reporting on litigation involving State Street that the commenter believed to be relevant to the pending exemption. The commenter also asserted that State Street concealed certain matters from the Department, most notably, the fact that the SEC had issued a "Wells Notice" to State Street, indicating that the staff of the SEC is recommending enforcement action against the company for violations of the antifraud provisions of the federal securities laws, relating to the disclosure and management of State Street's active fixed income strategies during 2007 and prior periods.⁵ Finally, the commenter stated that State Street had not provided all the information required by the Department's regulations at 29 CFR 2570.34 and 35. The commenter indicated that the application did not include required contact information about individual plans affected by the exemption.

In addition, the commenter took the position that the criteria established under section 408(a) of ERISA for the

⁵ The commenter identified two other matters that State Street had omitted from its application: First, that a partner in the law firm that represented State Street with respect to the exemption application, Ropes & Gray, was a member of State Street's Board of Directors and was chairman of its Executive Committee during the relevant time period; and second, that State Street sought a regulatory exemption from the SEC in 2002 with respect to the types of securities that could be used as collateral in securities lending transactions.

grant of an exemption would not be satisfied with respect to the pending exemption, in that the exemption would not serve the interests of the affected plans and their participants and beneficiaries.⁶ The commenter stated that the exemption would "paper[] over information that would enable the Named Plans and their respective participants and beneficiaries to pursue the fiduciary for additional underlying breaches." Further, the commenter asserted that participants in the State Street Salary Savings Program who were invested in the State Street Company Stock Fund saw the value of their accounts decline as a result of actions taken by State Street management at the time of the transaction that is the subject of the proposed exemption. The commenter requested that the Department hold a public hearing, or, alternatively, require State Street to disclose all pending lawsuits filed by employee benefit plans, as well as the contact information and employer identification number for all plans invested in any fund cited in the application, as well as certain other State Street funds.

In response, State Street stated that the news items identified by the commenter are not relevant to the transaction covered by the proposed exemption. In that regard, State Street pointed out that the news items did not involve funds affected by the proposed exemption, and pertain to events that occurred after the publication of the proposed exemption. State Street noted that the SEC Wells Notice was disclosed to the Department on July 8, 2009, and also was generally available as part of a public filing. State Street asserted that the other matters omitted from the application are not relevant to the Department's consideration of the proposed exemption. State Street stated that it believes it satisfied the requirements of the Department's regulations with respect to disclosures in its application.

The Department has carefully considered the issues raised by the commenter and the Applicant's responses. The Department does not believe that any of the news items or allegedly concealed or omitted matters would have materially affected the

⁶ Section 408(a) of ERISA provides that an exemption may not be granted unless the Secretary of Labor finds that the exemption is: "(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan."

Department's decision to propose, and ultimately, grant the exemption.⁷

With respect to plan contact information, the Department requested and the Applicant agreed to supplement its application with contact information for affected plans that were managed in separate accounts. As to plans invested in pooled funds, the Department's regulations at 29 CFR 2570.35 require disclosure of information with respect to the pooled funds as opposed to individual investing plans. See 29 CFR 2570.35(c)(2). State Street's original application provided the employer identification number for the pooled funds. Because the pooled funds are sponsored by State Street, the Department does not believe it is necessary to have additional contact information on file for the pooled funds.

Finally, the Department has determined that the exemption does satisfy the criteria established in section 408(a) of ERISA, including the requirement that the exemption be in the interests of the affected plans and their participants and beneficiaries. The Department does not believe that the grant of the exemption will undermine any rights that a plan participant or beneficiary might have against State Street as fiduciary. The Department's view is that by purchasing distressed securities (the Selected Assets) and making an additional cash infusion into the affected Accounts, State Street took actions designed to protect the interests of the plans invested in those Accounts. The Department believes that the Applicant was persuasive in arguing that it was necessary to remove the Selected Assets from the Accounts in order to reduce the likelihood that the wrap providers would terminate their contracts, thereby depriving the Accounts of "book value" treatment of plan investments. In this regard, the Department notes that the identification of the Selected Assets was confirmed by an independent consultant. In addition, the sale price of the Selected Assets was determined by independent third party pricing services and confirmed as reasonable by an independent consultant.⁸

⁷ The Department notes that the SEC Wells Notice was disclosed to the Department as stated by the Applicants.

⁸ The commenter suggested that the Department deny the exemption, thereby requiring State Street to pay an excise tax pursuant to section 4975 of the Internal Revenue Code, so that "State Street's incumbent management will face intra-corporate measures to remove bad managers and executives." The Department notes that if the exemption were denied, not only would State Street be required to pay an excise tax under section 4975 of the Code, it also would be required to "correct" the transaction, possibly by returning the Selected

The Department has determined not to hold a public hearing with respect to the proposed exemption. The Department's regulations provide that a hearing will be held where necessary to fully explore material factual issues identified by the person requesting the hearing. See 29 CFR 2570.46. In this case, the Department concludes that the commenter has not identified any material factual issues that would require a hearing.

With respect to the additional disclosure requested by the commenter, the Department's regulations require disclosure of much of the information requested by the commenter, including lawsuits against the applicant concerning the applicant's conduct as a fiduciary or party in interest with respect to any plan, as well as contact information/EIN for affected plans or pooled funds. The Department believes that the additional disclosure requested by the commenter regarding plans that are not affected by the exemption is beyond the scope of the Department's exemption procedure regulation and this proceeding.

Accordingly, after giving full consideration to the entire record, including the written comment, the Department has determined to grant the exemption. 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 September 25, 2009, at 74 FR 49031.

For Further Information Contact: Karen E. Lloyd of the Department, at (202) 693-8554. This is not a toll-free number.

The Bank of New York Mellon (BNY Mellon or the Applicant) Located in New York, NY

[Prohibited Transaction Exemption 2010-03; Exemption Application No. D-11571.]

Exemption

The restrictions of sections 406(a) and 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply as of February 20, 2009, to the cash sale of certain floating rate securities (the Securities) issued by Lehman Brothers Holdings, Inc. or its affiliates (together, Lehman) for an aggregate purchase price of \$235,737,419.05 by the EB Temporary

Investment Fund—Lehman (Liquidating Fund), the EB SMAM Short Term Investment Fund—Lehman (Liquidating Fund), the DF Temporary Investment Fund—Lehman (Liquidating Fund) and the Pooled Employee Daily Liquidity Fund—Lehman (Liquidating Fund) (collectively, the Liquidating Funds) 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 Liquidating Funds. This exemption is subject to the following conditions:

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

(b) The Liquidating Funds received an amount for the sale of the Securities, which was equal to the sum of (1) The par value of the Securities plus (2) accrued but unpaid interest through September 12, 2008, determined at the contract rate, plus (3) accrued and unpaid interest from September 15, 2008 through the earlier of (i) the date of sale or (ii) the maturity date of the Securities, determined at the investment earnings rate of the collective fund from which the Securities were transferred to the Liquidating Fund for the period from September 15, 2008 to the earlier of the maturity date of the Security or February 20, 2009;

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

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

(e) BNY Mellon took all appropriate actions necessary to safeguard the interests of the Liquidating Funds, and the Plans invested, directly or indirectly, in the Liquidating Funds, 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 Securities results in BNYMC recovering from Lehman, the issuer of the Securities, or from any third party, an aggregate amount that is more than the sum of:

(1) the purchase price paid for the Securities by BNYMC; and

(2) interest on the par value of the Securities from and after the date BNYMC purchased the Securities from the Liquidating Funds, determined at the last-published interest rate on the Securities preceding the Lehman's bankruptcy filing. BNYMC refunds such

excess amount promptly to the Liquidating Funds (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 section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (h)(1);

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

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

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

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the covered 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 above, in paragraph (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

Assets to the Accounts. The Department does not believe that this would be a favorable result for the Accounts and their investing plans.

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", 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