

the party as substantially similar to the contemplated transaction.

Signed at Washington, DC this 28th day of June, 2002.

Ivan L. Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-10991, et al.]

Proposed Exemptions; Deutsche Bank AG and Its Affiliates

AGENCY: Pension and Welfare Benefits
Administration, Labor.

ACTION: Notice of proposed exemptions.

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

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration (PWBA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to PWBA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to:

"moffittb@pwba.dol.gov", or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

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

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

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

Deutsche Bank AG and Its Affiliates, Located in Frankfurt am Main, Germany

[Application No. D-10991]

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 as set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).¹

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

Section I—Transactions

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) 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 (D) of the Code, shall not apply, as of April 24, 2001, to

(a) the lending of securities, under certain "exclusive borrowing" arrangements, to

(1) Deutsche Bank AG (Deutsche Bank); or

(2) Its affiliates Deutsche Bank Securities Inc. (DBS), Deutsche Bank AG, New York Branch (DBNY), and the "Foreign Borrowers," as defined in Section III (collectively, with Deutsche Bank, referred to as the "Borrowers," as defined in Section III)

by employee benefit plans (Plans), including commingled investment funds holding assets of such Plans, with respect to which the Borrowers are a party in interest; and

(b) The receipt of compensation by Deutsche Bank or its affiliates in connection with the securities lending transactions, provided that the conditions, set forth in Section II, are satisfied.

Section II—Conditions

(a) For each Plan, neither the Borrower nor any affiliate has or exercises discretionary authority or control over the Plan's investment in the securities available for loan, nor do they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

(b) The party in interest dealing with the Plan is a party in interest with respect to the Plan (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H), or (I) of the Act.

(c) The Borrower directly negotiates an exclusive borrowing agreement (the Borrowing Agreement) with a Plan fiduciary that is independent of the Borrower and its affiliates.

(d) The terms of each loan of securities by a Plan to a Borrower are at least as favorable to such Plan as those of a comparable arm's length transaction between unrelated parties, taking into account the exclusive arrangement.

(e) In exchange for granting the Borrower the exclusive right to borrow certain securities, the Plan receives from the Borrower either (i) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement from time to time), (ii) a periodic payment that is

equal to a percentage of the value of the total balance of the outstanding borrowed securities, or (iii) any combination of (i) and (ii) (collectively, the Exclusive Fee). If the Borrower deposits cash collateral, all the earnings generated by such cash collateral shall be returned to the Borrower—provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the Plan that a percentage of the earnings on the collateral may be retained by the Plan, or the Plan may agree to pay the Borrower a rebate fee and retain the earnings on the collateral (the Shared Earnings Compensation). If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral shall be returned to the Borrower—provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a lending fee (the Lending Fee)(the Lending Fee and the Shared Earnings Compensation are collectively referred to as the “Transaction Lending Fee”). The Transaction Lending Fee, if any, shall be either in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

(f) The Borrower may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to the Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage, or other percentage determined pursuant to an objective formula.

(g) By the close of business on or before the day the loaned securities are delivered to the Borrower, the Plan receives from the Borrower (by physical delivery, book entry in a securities depository located in the United States,

wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank other than Deutsche Bank or any affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption (PTE) 81–6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) (and as further amended or superseded).² Such collateral will be deposited and maintained in an account which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held with a third party, an affiliate of the Borrower, or a branch of Deutsche Bank other than the Borrower that is a trustee or custodian of the Plan. If maintained by an affiliate of the Borrower or a branch of Deutsche Bank other than the Borrower, the collateral will be segregated from the assets of such affiliate or branch.

(h) The market value (or in the case of a letter of credit, the stated amount) of the collateral initially equals at least 102 percent of the market value of the loaned securities on the close of business on the day preceding the date of the loan and, if the market value of the collateral at any time falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of the Plan may agree upon) of the market value of the loaned securities, the Borrower delivers additional collateral on the following day to bring the level of the collateral back to at least 102 percent. The level of the collateral is monitored daily by the Plan or its designee, which may be Deutsche Bank or any of its affiliates, including Deutsche Bank Trust Company Americas (DBT), which provides custodial or directed trustee services in respect of the securities covered by the Borrowing Agreement for the Plan. The Borrowing Agreement will provide the Plan with a continuing security interest in, and a lien on, the collateral, or will provide for the transfer of title to the collateral to the Plan.

² PTE 81–6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to a U.S. broker-dealer registered under the Securities Exchange Act of 1934 (the 1934 Act) (or exempted from registration under the 1934 Act as a dealer in exempt Government securities, as defined therein) or to a U.S. bank, that is a party in interest with respect to such plan.

(i) Before entering into a Borrowing Agreement, the Borrower furnishes to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement—provided, however, that in the case of a Borrower that is a branch of Deutsche Bank, the Borrower will furnish to the Plan the most recent publicly available audited and unaudited statement of Deutsche Bank's financial condition.

(j) The Borrowing Agreement contains a representation by the Borrower that, as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

(k) The Plan receives the equivalent of all distributions made during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities, that the Plan would have received (net of tax withholdings)³ had it remained the record owner of the securities.

(l) The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty (except for, if the Plan has terminated its Borrowing Agreement, the return to the Borrower of a pro-rata portion of the Exclusive Fee paid by the Borrower to the Plan) whereupon the Borrower delivers securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities.

(m) In the event that the Borrower fails to return securities in accordance with the Borrowing Agreement, the Plan will have the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities,

³ The Department notes the Borrowers' representation that dividends and other distributions on foreign securities payable to a lending Plan are subject to foreign tax withholdings and that the Borrower will always put the Plan back in at least as good a position as it would have been had it not loaned securities.

the Borrower will indemnify the Plan in the United States with respect to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default, together with expenses incurred by the Plan plus applicable interest at a reasonable rate, including reasonable attorneys' fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly indemnify the Plan.

(n) Except as otherwise provided herein, all procedures regarding the securities lending activities, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as to applicable securities laws of the United States, Germany, the United Kingdom, Japan, Canada, and/or Australia, as appropriate.

(o) Only Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to the Borrowers—provided, however, that

(1) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations, or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are “plan assets” under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million—provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

(2) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations, or employee organization (the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are “plan assets” under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any

Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity

(i) Has full investment responsibility with respect to plan assets invested therein; and

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above is formed for the sole purpose of making loans of securities.)

(p) Prior to any Plan's approval of the lending of its securities to the Borrowers, a copy of this exemption, if granted, (and the notice of pendency) is provided to the Plan, and the Borrower informs the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.⁴

(q) The independent fiduciary of the Plan receives monthly reports with respect to the securities lending transactions, including, but not limited to, the information set forth in the following sentence, so that an independent Plan fiduciary may monitor such transactions with the Borrowers. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the security is loaned, and the number of days the security has been on loan. At the request of the Plan, such a report will be provided on a daily or weekly basis, rather than a monthly basis. Also, upon request of the Plan, the Borrower will provide the Plan with daily

⁴ The Department notes the Borrowers' representation that, under the proposed exclusive borrowing arrangements, neither the Borrower nor any of its affiliates will perform the essential functions of a securities lending agent, i.e., the Borrowers will not be the fiduciary who negotiates the terms of the Borrowing Agreement on behalf of the Plan, the fiduciary who identifies the appropriate borrowers of the securities, or the fiduciary who decides to lend securities pursuant to an exclusive arrangement. However, the Borrowers or their affiliates may monitor the level of collateral and the value of the loaned securities.

confirmations of securities lending transactions.

(r) In addition to the above conditions, all loans involving Foreign Borrowers must satisfy the following supplemental requirements:

(1) Such Foreign Borrower is subject to regulation by (i) the Bundesaufsichtsamt fuer das Kreditwesen (the BAK) and the Deutsche Bundesbank in Germany, (ii) the Financial Services Authority and the Securities and Futures Authority in the United Kingdom, (iii) the Ministry of Finance or the Financial Services Agency and the Tokyo Stock Exchange or the Osaka Stock Exchange in Japan, (iv) the Office of the Superintendent of Financial Institutions Canada, Ontario Securities Commission, and the Investment Dealers Association in Canada, or (v) the Australian Prudential Regulation Authority, Australian Securities and Investments Commission, and the Australian Stock Exchange Limited in Australia.

(2) Such Foreign Borrower is in compliance with all applicable provisions of Rule 15a-6 (17 C.F.R. 240.15a-6) under the Securities Exchange Act of 1934 (the 1934 Act) that provides foreign broker-dealers a limited exception from U.S. registration requirements;

(3) All collateral is maintained in U.S. dollars or in U.S. dollar-denominated securities or letters of credit, or other collateral permitted under PTE 81-6 (as amended or superseded);

(4) All collateral is held in the United States and the situs of the Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1; and

(5) Prior to entering into a transaction involving a Foreign Borrower, Deutsche Bank or the Foreign Borrower must:

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

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

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

(iv) Agree that enforcement by a Plan of the indemnity provided by Deutsche Bank or the Foreign Borrower will occur in the U.S. courts.

(s) Deutsche Bank or the Borrower maintains, or causes to be maintained, within the United States for a period of six years from the date of such transaction, in a manner that is convenient and accessible for audit and examination, such records as are

necessary to enable the persons described in paragraph (t)(1) to determine whether the conditions of the exemption have been met, except that

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Deutsche Bank and/or its affiliates, the records are lost or destroyed prior to the end of the six-year period; and

(2) No party in interest other than the Borrower 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 below by paragraph (t)(1).

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

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

(ii) Any fiduciary of a participating Plan or any duly authorized representative of such fiduciary;

(iii) Any contributing employer to any participating Plan or any duly authorized employee representative of such employer; and

(iv) Any participant or beneficiary of any participating Plan or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in subparagraphs (t)(1)(ii)–(t)(1)(iv) are authorized to examine the trade secrets of Deutsche Bank or its affiliates or commercial or financial information which is privileged or confidential.

Section III—Definitions

(a) An “affiliate” of a person means:

(i) any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with, the person. (For purposes of this paragraph, the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual);

(ii) any officer, director, employee, or relative (as defined in section 3(15) of the Act) of any such other person or any partner in any such person; and

(iii) any corporation or partnership of which such person is an officer,

director, or employee, or in which such person is a partner.

(b) The term “Foreign Borrower” or “Foreign Borrowers” means any broker-dealer or bank that, now or in the future, is an affiliate of Deutsche Bank that is subject to regulation by (i) the BAK and the Deutsche Bundesbank in Germany, (ii) the Financial Services Authority and the Securities and Futures Authority in the United Kingdom, (iii) the Ministry of Finance or the Financial Services Agency and the Tokyo Stock Exchange or the Osaka Stock Exchange in Japan, (iv) the Office of the Superintendent of Financial Institutions Canada, Ontario Securities Commission, and the Investment Dealers Association in Canada, or (v) the Australian Prudential Regulation Authority, Australian Securities and Investments Commission, and the Australian Stock Exchange Limited in Australia.

(c) The term “Borrower” or “Borrowers” means Deutsche Bank, DBS, DBNY, the Foreign Borrowers, and any other affiliate of Deutsche Bank that, now or in the future, is a U.S. registered broker-dealer or a government securities broker or dealer or a U.S. bank.

Effective Date: The proposed exemption, if granted, will be effective as of April 24, 2001.

Summary of Facts and Representations

1. Deutsche Bank AG, a full service universal bank, is organized under German law and is regulated by the Deutsche Bundesaufsichtsamt fuer das Kreditwesen (i.e., the BAK) and the Deutsche Bundesbank. Deutsche Bank, as of December 31, 2000, had approximately 697,306,000 in assets and 19,807,000 in stockholders' equity.

Deutsche Bank Trust Company Americas (i.e., DBT), a wholly owned subsidiary of Deutsche Bank, is a New York banking corporation and a leading commercial bank, providing a wide range of banking, fiduciary, custodial, brokerage, and investment services to corporations, institutions, governments, employee benefit plans, governmental retirement plans, and private investors. Deutsche Bank indirectly owns all of the equity interest of DBT, which is also a member bank of the Federal Reserve system. DBT is one of the largest trustees of ERISA plans and a large manager of passively managed funds. Other Deutsche Bank asset managers may also manage ERISA assets in passively managed styles in the future.

Deutsche Bank AG, New York Branch (i.e., DBNY) is subject to regulation by the New York State Banking Authority and the Board of Governors of the

Federal Reserve Bank. In addition, DBNY is subject to regulation by the BAK and the Deutsche Bundesbank. Deutsche Bank Securities Inc. (i.e., DBS), an affiliate of Deutsche Bank, is incorporated under the laws of the State of Delaware and is registered with and regulated by the SEC as a U.S. broker-dealer under Section 15 of the 1934 Act. As of December 31, 2000, DBS had approximately \$98,070,582,098 in assets and \$6,705,615,063 in stockholders' equity. Deutsche Bank has foreign branches and affiliates worldwide that are in the business of trading securities and engaging in broker-dealer activities (among other investment and trading activities) in their respective countries. The affiliated foreign broker-dealers or banks of Deutsche Bank to be covered by this proposed exemption (i.e., the Foreign Borrowers), and their respective regulating entities, are as follows:

(a) Deutsche Bank AG, located in Frankfurt am Main, is subject to regulation in Germany by the BAK and the Deutsche Bundesbank;

(b) Deutsche Bank AG, London Branch, located in London, is subject to regulation by the BAK and the Deutsche Bundesbank and, in the United Kingdom, is subject to regulation by the Securities and Futures Authority in respect of the conduct of investment business;

(c) Morgan Grenfell & Co., Ltd., located in London, is subject to regulation in the United Kingdom by the Financial Services Authority in respect of prudential supervision;

(d) Deutsche Bank Securities Limited, Tokyo Branch, located in Tokyo, is subject to regulation in Japan by the Ministry of Finance, the Financial Services Agency, the Tokyo Stock Exchange, and the Osaka Stock Exchange;

(e) Deutsche Bank AG, Canada Branch, Deutsche Bank Canada, and Deutsche Bank Securities Limited, located in Toronto, are subject to regulation in Canada by the Office of the Superintendent of Financial Institutions Canada and the Ontario Securities Commission, as well as the Investment Dealers Association, a self-regulatory organization. In addition, Deutsche Bank AG, Canada Branch is also subject to regulation by the BAK and the Deutsche Bundesbank; and

(f) Deutsche Bank AG, Sydney Branch and Deutsche Securities Australia Ltd., located in Sydney, are subject to regulation in Australia by the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, and the Australian Stock Exchange Limited. In addition, Deutsche Bank AG, Sydney Branch is

also subject to regulation by the BAK and the Deutsche Bundesbank.

Deutsche Bank requests an individual exemption to cover the Foreign Borrowers identified above, as well as any broker-dealer or bank that, now or in the future, is an affiliate of Deutsche Bank that is subject to regulation by (i) the BAK, and the Deutsche Bundesbank in Germany, (ii) the Financial Services Authority and the Securities and Futures Authority in the United Kingdom, (iii) the Ministry of Finance or the Financial Services Agency and the Tokyo Stock Exchange or the Osaka Stock Exchange in Japan, (iv) the Office of the Superintendent of Financial Institutions Canada, Ontario Securities Commission, and the Investment Dealers Association in Canada, or (v) the Australian Prudential Regulation Authority, Australian Securities and Investments Commission, and the Australian Stock Exchange Limited in Australia.

2. The Borrowers, acting as principals, actively engage in the borrowing and lending of securities. The Borrowers utilize borrowed securities either to satisfy their own trading requirements or to re-lend to other broker-dealers and entities which need a particular security for a certain period of time. The Borrowers represent that in the United States, as described in the Federal Reserve Board's Regulation T, borrowed securities are often used in short sales, for non-purpose loans to exempted borrowers, or in the event of a failure to receive securities that a broker-dealer is required to deliver.

3. Deutsche Bank represents that the Foreign Borrowers are subject to regulation by a governmental agency in the foreign country in which they are located. Deutsche Bank further represents that registration of a foreign broker-dealer or bank with the governmental agency in these cases addresses regulatory concerns similar to those concerns addressed by registration of a broker-dealer with the SEC under the 1934 Act. The rules and regulations set forth by the above-referenced agencies and the SEC share a common objective: The protection of the investor by the regulation of securities markets.

With respect to Germany, the BAK, a federal institution with ultimate responsibility to the Ministry of Finance, in cooperation with the Deutsche Bundesbank, the central bank of the German banking system, provides extensive regulation of the banking sector. The BAK ensures that Deutsche Bank has procedures for monitoring and controlling its worldwide activities through various statutory and regulatory standards, such as requirements

regarding adequate internal controls, oversight, administration, and financial resources. The BAK reviews compliance with these limitations on operations and internal control requirements through an annual audit performed by the year-end auditor and through special audits, e.g., on specific sections of the Banking Act, as ordered by the BAK and the respective State Central Bank auditors. The BAK obtains information on the condition of Deutsche Bank by requiring submission of periodic, consolidated financial reports and through a mandatory annual report prepared by the auditor. The BAK also receives information regarding capital adequacy, country risk exposure, and foreign exchange exposure from Deutsche Bank. German banking law mandates penalties to ensure correct reporting to the BAK. The auditors face penalties for gross violation of their duties in auditing, for reporting misleading information, omitting essential information from the audit report, failing to request pertinent information, or failing to report to the BAK.

Germany, the United Kingdom, Japan, Canada, and Australia all have comprehensive financial resource and reporting/disclosure rules concerning broker-dealers. Broker-dealers are required to demonstrate their capital adequacy. The reporting/disclosure rules impose requirements on broker-dealers with respect to risk management, internal controls, and records relating to counterparties. All such records must be produced at the request of the agency at any time. The agencies' registration requirements for broker-dealers are enforced by fines and penalties and thus constitute a comprehensive disciplinary system for the violation of such rules.

4. Deutsche Bank represents that, in addition to the protections afforded by the applicable foreign regulatory body, compliance by the Foreign Borrowers with any applicable requirements of Rule 15a-6 (17 CFR 240.15a-6) of the 1934 Act (and the amendments and interpretations thereof) will offer further protections to the Plans.⁵ SEC Rule 15a-

⁵ According to the Borrowers, section 3(a)(4) of the 1934 Act defines "broker" to mean "any person engaged in the business of effecting transactions in securities for the account of others, but it does not include a bank." Section 3(a)(5) of the 1934 Act provides a similar exclusion for "banks" in the definition of the term "dealer." However, section 3(a)(6) of the 1934 Act defines "bank" to mean a banking institution organized under the laws of the United States or a State of the United States. Further, Rule 15a-6(b)(3) provides that the term "foreign broker-dealer" means "any non-U.S. resident person * * * whose securities activities, if conducted in the United States, would be described by the definition of 'broker' or 'dealer' in sections 3(a)(4) or 3(a)(5) of the [1934] Act." Therefore, the

6 provides an exemption from U.S. registration requirements for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a "U.S. institutional investor" or a "major U.S. institutional investor," provided that the foreign broker-dealer, among other things, enters into these transactions through a U.S. registered broker-dealer intermediary. The term "U.S. institutional investor," as defined in Rule 15a-6(b)(7), includes an employee benefit plan within the meaning of the Act if (a) the investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company, or registered investment advisor, or (b) the employee benefit plan has total assets in excess of \$5 million, or (c) the employee benefit plan is a self-directed plan with investment decisions made solely by persons that are "accredited investors," as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended. The term "major U.S. institutional investor" is defined as a person that is a U.S. institutional investor that has, or has under management, total assets in excess of \$100 million, or an investment adviser registered under section 203 of the Investment Advisers Act of 1940 that has total assets under management in excess of \$100 million.⁶ The Borrowers represent that the intermediation of the U.S. registered broker-dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

The Borrowers represent that under SEC Rule 15a-6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major U.S. institutional investor in accordance

test of whether an entity is a "foreign broker" or "dealer" is based on the nature of such foreign entity's activities and, with certain exceptions, only banks that are regulated by either the United States or a State of the United States are excluded from the definition of the term "broker" or "dealer." Thus, for purposes of this exemption request, the Borrowers are willing to represent that they will comply with the applicable provisions and relevant SEC interpretations and amendments of Rule 15a-6.

⁶ Note that the categories of entities that qualify as "major U.S. institutional investors" has been expanded by a No-Action letter issued by the SEC. See SEC No-Action Letter issued to Cleary, Gottlieb, Steen & Hamilton on April 9, 1997 (April 9, 1997 No-Action Letter).

with Rule 15a-6⁷ must, among other things:

(a) Consent to service of process for any civil action brought by, or proceeding before, the SEC or any self-regulatory organization;

(b) Provide the SEC with any information or documents within its possession, custody or control, any testimony of any such foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to the transactions effected pursuant to the Rule;

(c) Rely on the U.S. registered broker-dealer through which the transactions with the U.S. institutional and major U.S. institutional investors are effected to (among other things):

(1) Effect the transactions, other than negotiating the terms;

(2) Issue all required confirmations and statements;

(3) As between the foreign broker-dealer and the U.S. registered broker-dealer, extend or arrange for the extension of credit in connection with the transactions;

(4) Maintain required books and records relating to the transactions, including those required by SEC Rules 17a-3 (Records to be Made by Certain Exchange Members) and 17a-4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act;

(5) Receive, deliver, and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or major U.S. institutional investor in compliance with Rule 15c3-3 of the 1934 Act (Customer Protection—Reserves and Custody of Securities);⁸ and

(6) Participate in certain oral communications (e.g., telephone calls) between the foreign associated person and the U.S. institutional investor (not the major U.S. institutional investor), and accompany the foreign associated person on certain visits with both U.S. institutional and major U.S. institutional investors. The Borrowers represent that, under certain circumstances, the foreign associated

person may have direct communications and contact with the U.S. Institutional Investor.⁹ (See April 9, 1997 No-Action Letter.)

5. An institutional investor, such as a pension fund, lends securities in its portfolio to a broker-dealer or bank in order to earn a fee while continuing to enjoy the benefits of owning the securities (e.g., from the receipt of any interest, dividends, or other distributions due on those securities and from any appreciation in the value of the securities). The lender generally requires that the securities loan be fully collateralized, and the collateral usually is in the form of cash or high quality liquid securities, such as U.S. Government or Federal Agency obligations or irrevocable bank letters of credit. If the borrower deposits cash collateral, the lender invests the collateral, and the borrowing agreement may provide that the lender pay the borrower a previously-agreed upon amount or rebate fee and keep the earnings on the collateral. If the borrower deposits government securities, the borrower is entitled to the earnings on its deposited securities and may pay the lender a lending fee. If the borrower deposits irrevocable bank letters of credit as collateral, the borrower pays the lender a fee as compensation for the loan of its securities. These fees, defined below as the Transaction Lending Fee, may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement.

6. The Borrowers request an individual exemption for the lending of securities, under certain exclusive borrowing arrangements, by Plans with respect to which Deutsche Bank or any of its affiliates is a party in interest (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H), or (I) of the Act. For each Plan, neither the Borrower nor any of its affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan, nor will they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets. It is represented that because the

Borrowers, by exercising their contractual rights under the proposed exclusive borrowing arrangements, will have discretion with respect to whether there is a loan of particular Plan securities to the Borrowers, the lending of securities to the Borrowers may be outside the scope of relief provided by PTE 81-6.¹⁰

7. For each Plan, the Borrowers will directly negotiate a Borrowing Agreement with a Plan fiduciary which is independent of the Borrowers. Under the Borrowing Agreement, the Borrowers will have exclusive access for a specified period of time to borrow certain securities of the Plan, pursuant to certain conditions. The Borrowing Agreement will specify all material terms of the agreement, including the basis for compensation to the Plan under each category of securities available for loan. The Borrowing Agreement will also contain a requirement that the Borrowers pay all transfer fees and transfer taxes relating to the securities loans. The terms of each loan of securities by a Plan to a Borrower will be at least as favorable to such Plan as those of a comparable arm's length transaction between unrelated parties, taking into account the exclusive arrangement.

8. The Borrowers may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to the Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage, or other percentage determined pursuant to an objective formula.

9. In exchange for granting the Borrower the exclusive right to borrow certain securities, the Borrower will pay the Plan either (i) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement), (ii) a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii) (i.e., the Exclusive Fee).

If the Borrower deposits cash collateral, all the earnings generated by such cash collateral shall be returned to the Borrower—provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the Plan that a percentage of the earnings on the collateral may be retained by the Plan, or the Plan may agree to pay the Borrower a rebate fee

⁷ If it is determined that applicable regulation under the 1934 Act does not require Deutsche Bank or the Borrower to comply with SEC Rule 15a-6, both entities will nevertheless comply with subparagraphs (a) and (b) of Item 4 above.

⁸ Under certain circumstances described in the April 9, 1997 No-Action Letter (e.g., clearance and settlement transactions), there may be direct transfers of funds and securities between a Plan and Deutsche Bank or between a Plan and the Foreign Borrower. The Borrowers note that in such situations, the U.S. registered broker-dealer will not be acting as principal with respect to any duties it is required to undertake pursuant to Rule 15a-6.

⁹ The term "foreign associated person" as defined in Rule 15a-6(b)(2) means any natural person domiciled outside the United States who is an associated person, as defined in section 3(a)(18) of the 1934 Act, of the foreign broker or dealer, and who participates in the solicitation of a U.S. institutional investor or a major U.S. institutional investor under Rule 15a-6(a)(3).

¹⁰ PTE 81-6 requires, in part, that neither the borrower nor an affiliate of the borrower may have discretionary authority or control over the investment of the plan assets involved in the transaction.

and retain the earnings on the collateral (i.e., the Shared Earnings Compensation). If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral shall be returned to the Borrower—provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a lending fee. The Lending Fee, together with the Shared Earnings Compensation, is referred to as the Transaction Lending Fee.

The Transaction Lending Fee, if any, may be in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. For example, in addition to the Borrower's paying different fees to different Plans, the Borrower may pay different fees for different portfolios of securities (i.e., the fee for a domestic securities portfolio may be different from the fee for a foreign securities portfolio). The Borrower may also pay different fees for securities of issuers in different foreign countries; for example, there may be a different fee for German securities than for French securities. In addition, with respect to, for example, the French securities, there may be different fees for liquid securities than for illiquid securities.

Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

The Plan will be entitled to the equivalent of all distributions made to holders of the borrowed securities during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities that the Plan would have received (net of tax withholdings in the case of foreign securities), had it remained the record owner of the securities.

10. By the close of business on or before the day the loaned securities are delivered to the Borrower, the Plan will receive from the Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by U.S. banks other than Deutsche Bank or its affiliates, or other collateral permitted under PTE 81-6 (as amended or superseded). Such collateral will be deposited and maintained in an account on behalf of a Plan which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of the Plan by an affiliate of the Borrower that is the trustee or custodian of the Plan. If maintained by an affiliate of the Borrower or a branch of Deutsche Bank other than the Borrower, the collateral will be segregated from the assets of such affiliate or branch.

The market value (or in the case of a letter of credit, a stated amount) of the collateral on the close of business on the day preceding the day of the loan will be at least 102 percent of the market value of the loaned securities. The Plan, its independent fiduciary or its designee, which may be Deutsche Bank or any of its affiliates which provides custodial or directed trustee services in respect of the securities covered by the Borrowing Agreement for the Plan, will monitor the level of the collateral daily and, if the market value of the collateral on the close of a business day falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of the Plan may agree upon) of the market value of the loaned securities at the close of business on such day, the Borrower will deliver additional collateral by the close of business on the following day to bring the level of the collateral back to at least 102 percent. The Borrowing Agreement will provide the Plan with a continuing security interest in, and lien on, the collateral, or will provide for the transfer of title to the collateral to the Plan.

If the Borrower deposits cash collateral, the Plan invests the collateral, and all earnings on such cash collateral shall be returned to the Borrower—except that the Borrowing Agreement may provide that the Plan receive Shared Earnings Compensation, which, as discussed above, may be a percentage of the earnings on the collateral which may be retained by the Plan, or the Plan

may agree to pay the Borrower a rebate fee and retain the earnings on the collateral. The terms of the rebate fee for each loan will be at least as favorable to the Plan as those of a comparable arm's length transaction between unrelated parties, taking into account the exclusive arrangement, and will be based upon an objective methodology which takes into account several factors, including potential demand for the loaned securities, the applicable benchmark cost of fund indices (typically, the U.S. Federal Funds rate established by the U.S. Federal Reserve System (the Federal Funds), the overnight REPO¹¹ rate, or the like), and anticipated investment return on overnight investments permitted by the independent fiduciary of the Plan. If the Borrower deposits non-cash collateral, such as government securities or irrevocable bank letters of credit, the Borrower shall be entitled to the earnings on its non-cash collateral—except that the Borrower may, but shall not be obligated to, agree to pay the Plan a Lending Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement.

The Borrower will provide a monthly report to the independent fiduciary of the Plan which includes the following information. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the security is loaned, and the number of days the security has been on loan. At the request of the Plan, such a report will be provided on a daily or weekly basis, rather than a monthly basis. Also, upon request of the Plan, the Borrower will provide the Plan with daily confirmations of securities lending transactions.

11. Before entering into a Borrowing Agreement, the Borrower will furnish to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as

¹¹ An overnight REPO is an overnight repurchase agreement that is an arrangement whereby securities dealers and banks finance their inventories of Treasury bills, notes, and bonds. The dealer or bank sells securities to an investor with a temporary surplus of cash, agreeing to buy them back the next day. Such transactions are settled in immediately available Federal Funds, usually at a rate below the Federal Funds rate (the rate charged by the banks lending funds to each other).

well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement—provided, however, that in the case of a Borrower that is a branch of Deutsche Bank, the Borrower will furnish to the Plan the most recent publicly available audited and unaudited statement of Deutsche Bank's financial condition. Further, the Borrowing Agreement will contain a representation by the Borrower that as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

12. Prior to any Plan's approval of the lending of its securities to the Borrowers, a copy of this exemption, if granted, (and the notice of pendency) will be provided to the Plan, and the Borrower will inform the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.

13. With regard to those Plans for which Deutsche Bank or any of its affiliates provides custodial, directed trustee, clearing and/or reporting functions relative to securities loans, Deutsche Bank and a Plan fiduciary independent of Deutsche Bank and its affiliates will agree in advance, and in writing, to any fee that Deutsche Bank or any of its affiliates is to receive for such custodial, directed trustee, clearing and/or reporting services. Such fees, if any, would be fixed fees (e.g., Deutsche Bank or any of its affiliates might negotiate to receive a fixed percentage of the value of the assets with respect to which it performs these services, or to receive a stated dollar amount), and any such fee would be in addition to any fee Deutsche Bank or any of its affiliates has negotiated to receive from any such Plan for standard custodial or other services unrelated to the securities lending activity. The arrangement for Deutsche Bank or any of its affiliates to provide such functions relative to securities loans to the Borrowers will be terminable by the Plan within five business days of the receipt of written notice without penalty to the Plan, except for the return to the Borrowers of a pro-rata portion of the Exclusive Fee paid by the Borrowers to the Plan, if the Plan has also terminated its exclusive borrowing arrangement with the Borrowers.

14. The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty. Upon termination of

any securities loan, the Borrower will deliver securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities.

15. In the event that the Borrower fails to return securities in accordance with the Borrowing Agreement, the Plan will have the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the United States with respect to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default, together with expenses incurred by the Plan plus applicable interest at a reasonable rate, including reasonable attorneys' fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly indemnify the Plan.

16. Except as provided herein, all the procedures under the Borrowing Agreement will, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as to applicable securities laws of the United States, Germany, the United Kingdom, Japan, Canada and/or Australia, as appropriate. In addition, in order to ensure that the independent fiduciary representing a Plan has the experience, sophistication, and resources necessary to adequately review the Borrowing Agreement and the fee arrangements thereunder, only Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to the Borrowers—provided, however, that

(a) In the case of two or more Related Plans whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million—provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate

of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

(b) In the case of two or more Unrelated Plans whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity.

(i) Has full investment responsibility with respect to plan assets invested therein; and

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above is formed for the sole purpose of making loans of securities.)

The Borrowers represent that the opportunity for the Plans to enter into exclusive borrowing arrangements with the Borrowers under the flexible fee structures described herein is in the interests of the Plans because the Plans will then be able to choose among an expanded number of competing exclusive borrowers, as well as maximizing the volume of securities lent and the return on such securities.

17. In addition to the above conditions, all loans involving Foreign Borrowers must satisfy the following supplemental requirements:

(i) Such Foreign Borrower is a bank which is subject to regulation by (a) the BAK and the Deutsche Bundesbank in Germany, (b) the Financial Services Authority and the Securities and Futures Authority in the United Kingdom, (c) the Ministry of Finance or the Financial Services Agency and the Tokyo Stock Exchange or the Osaka Stock Exchange in Japan, (d) the Office of the Superintendent of Financial Institutions Canada, Ontario Securities

Commission, and the Investment Dealers Association in Canada, or (e) the Australian Prudential Regulation Authority, Australian Securities and Investments Commission, and the Australian Stock Exchange Limited in Australia;

(ii) Such Foreign Borrower is in compliance with all applicable provisions of Rule 15a-6 (17 CFR 240.15a-6) under the 1934 Act that provides foreign broker-dealers a limited exception from U.S. registration requirements;

(iii) All collateral is maintained in U.S. dollars or in U.S. dollar-denominated securities or letters of credit, or other collateral permitted under PTE 81-6 (as amended or superseded);

(iv) All collateral is held in the United States and the situs of the Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1; and

(v) Prior to entering into a transaction involving a Foreign Borrower, Deutsche Bank or the Foreign Borrower must:

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

(2) Agree to appoint a Process Agent in the United States;

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

(4) Agree that enforcement by a Plan of the indemnity provided by Deutsche Bank or the Foreign Borrower will occur in the U.S. courts.

18. In summary, the Borrowers represent that the subject transactions satisfy the statutory criteria of section 408(a) of the Act because:

(a) Each Borrower will directly negotiate a Borrowing Agreement with an independent fiduciary of each Plan;

(b) The Plans will be permitted to lend to the Borrower, a major securities borrower who will be added to an expanded list of competing exclusive borrowers, enabling the Plans to earn additional income from the loaned securities on a secured basis, while continuing to enjoy the benefits of owning the securities;

(c) In exchange for granting the Borrower the exclusive right to borrow certain securities, the Borrower will pay the Plan the Exclusive Fee, which as discussed above may be either (i) a flat fee (which may be a percentage of the value of the total securities subject to the Borrowing Agreement), (ii) a percentage of the value of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii);

(d) Any change in the Exclusive Fee or Shared Earnings Compensation that the Borrower pays to the Plan with respect to any securities loan will require the prior written consent of the independent fiduciary, except that consent will be presumed where the Exclusive Fee or Shared Earnings Compensation changes pursuant to an objective formula specified in the Borrowing Agreement, and the independent fiduciary is notified at least 24 hours in advance of such change and does not object in writing thereto, prior to the effective time of such change;

(e) The Borrower will provide sufficient information concerning its financial condition to a Plan before a Plan lends any securities to the Borrower;

(f) The collateral posted with respect to each loan of securities to the Borrower initially will be at least 102 percent of the market value of the loaned securities and will be monitored daily by the independent fiduciary;

(g) The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty, except for the return to the Borrower of a pro-rata portion of the Exclusive Fee paid by the Borrower to the Plan, and whereupon the Borrower will return any borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities;

(h) Neither the Borrower nor any of its affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan;

(i) The minimum Plan size requirement (as specified in Section II(o) above) will ensure that the Plans will have the resources necessary to adequately review and negotiate all aspects of the exclusive borrowing arrangements; and

(j) All the procedures will, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as applicable securities laws of the United States, Germany, the United Kingdom, Japan, Canada and/or Australia, as appropriate.

For Further Information Contact: Ms. Karin Weng of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

Goldman Sachs & Co. (located in New York, NY) and its Affiliates

[Application No. D-11084]

Proposed Exemption

The Department of Labor 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 as set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).¹²

Section I—Transactions

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) 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 (D) of the Code, shall not apply as of March 22, 2002, to:

(a) The lending of securities, under certain exclusive borrowing arrangements, to:

(1) Goldman, Sachs & Co. (Goldman) and any affiliate of Goldman that, now or in the future, is a U.S. registered broker-dealer, a government securities broker or dealer or U.S. bank (together with Goldman, the "U.S. Broker-Dealers");

(2) Goldman Sachs Canada Inc., which is subject to regulation in Canada by the Ontario Securities Commission and the Investment Dealers Association;

(3) Goldman Sachs International and Goldman Sachs Equity Securities (U.K.), which are subject to regulation in the United Kingdom by the Financial Services Authority (the UK FSA) (formerly, the Securities and Futures Authority (the UK SFA));

(4) Goldman, Sachs & Co. oHG, which is subject to regulation in Germany by the Deutsche Bundesbank and the Federal Banking Supervisory Authority, e.g., der Bundesaufsichtsamt für das Kreditwesen (the BAK);

(5) Goldman Sachs (Japan) Ltd., which is subject to regulation in Japan by the Financial Services Agency and the Tokyo Stock Exchange;

(6) Goldman Sachs Australia Pty Limited, which is subject to regulation in Australia by the Australian Securities & Investments Commission (the ASIC);

(7) Goldman, Sachs & Co. Bank, which is subject to regulation in Switzerland by the Swiss Federal Banking Commission; and

(8) Any broker-dealer or bank that, now or in the future, is an affiliate of Goldman which is subject to regulation

¹² For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to the corresponding provisions of the Code.

by the Ontario Securities Commission and the Investment Dealers Association in Canada, the UK FSA in the United Kingdom, the Deutsche Bundesbank and/or the BAK in Germany, the Financial Services Agency and the Tokyo Stock Exchange in Japan, the ASIC in Australia or the Swiss Federal Banking Commission in Switzerland (each such affiliated foreign broker-dealer or bank referred to as a "Foreign Borrower," and, together with the U.S. Broker-Dealers, collectively referred to as the "Borrowers"), by employee benefit plans, including commingled investment funds holding assets of such plans (Plans) with respect to which Goldman or any of its affiliates is a party in interest; and

(b) The receipt of compensation by Goldman or any of its affiliates in connection with securities lending transactions, provided that the following conditions set forth in Section II, below, are satisfied.

Section II—Conditions

(a) For each Plan, neither the Borrower nor any affiliate has or exercises discretionary authority or control over the Plan's investment in the securities available for loan, nor do they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

(b) The party in interest dealing with the Plan is a party in interest with respect to the Plan (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H) or (I) of the Act.

(c) The Borrower directly negotiates an exclusive borrowing agreement (the Borrowing Agreement) with a Plan fiduciary which is independent of the Borrower and its affiliates.

(d) The terms of each loan of securities by a Plan to a Borrower are at least as favorable to such Plan as those of a comparable arm's-length transaction between unrelated parties, taking into account the exclusive arrangement.

(e) In exchange for granting the Borrower the exclusive right to borrow certain securities, the Plan receives from the Borrower either (i) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement from time to time), (ii) a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii) (collectively, the Exclusive Fee). If the Borrower pledges cash collateral, any earnings generated by such cash collateral shall be returned to the

Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the Plan that a percentage of the earnings on the collateral may be retained by the Plan and/or the Plan may agree to pay the Borrower a rebate fee and retain any earnings on the collateral (the Shared Earnings Compensation). If the Borrower pledges non-cash collateral, any earnings on the non-cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a lending fee (the "Lending Fee") (the Lending Fee and the Shared Earnings Compensation are referred to herein as the "Transaction Lending Fee"). The Transaction Lending Fee, if any, shall be either in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

(f) The Borrower may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to the Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage of portfolio value or other percentage determined pursuant to an objective formula.

(g) By the close of business on or before the day on which the loaned securities are delivered to the Borrower, the Plan receives from the Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank other than Goldman or an affiliate of Goldman, or any

combination thereof, or other collateral permitted under Prohibited Transaction Exemption 81-6 (46 FR 7527, Jan. 23 1981, as amended at 52 FR 18754, May 19, 1987) (PTE 81-6) (as amended or superseded)¹³ having, as of the close of business on the preceding business day, a market value or, in the case of letters of credit a stated amount, equal to not less than 102 percent of the then market value of the securities lent. Such collateral will be deposited and maintained in an account which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of the Plan by an affiliate of the Borrower that is the trustee or a custodian of the Plan. If maintained by an affiliate of the Borrower, the collateral will be segregated from the assets of such affiliate.

(h) If the market value of the collateral at any time falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of the Plan may agree upon) of the market value of the loaned securities, the Borrower delivers additional collateral on the following day to bring the level of the collateral back to at least 102 percent. The level of the collateral is monitored daily by the Plan or its designee, which may be Goldman or any of its affiliates which provides custodial or directed trustee services in respect of the securities covered by the Borrowing Agreement for the Plan. The applicable Borrowing Agreement shall give the Plan a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral and a lien on the collateral.

(i) Before entering into a Borrowing Agreement, the Borrower furnishes to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement.

(j) The Borrowing Agreement contains a representation by the Borrower that, as of each time it borrows securities, there has been no material adverse change in

¹³ PTE 81-6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to a U.S. broker-dealer registered under the Securities Exchange Act of 1934 (the 1934 Act) (or exempted from registration under the 1934 Act as a dealer in exempt Government securities, as defined therein) or to a U.S. bank, that is a party in interest with respect to such plan.

its financial condition since the date of the most recently furnished statements of financial condition.

(k) The Plan receives the equivalent of all distributions made during the loan period, including, but not limited to, any cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities, that the Plan would have received (net of tax withholdings)¹⁴ had it remained the record owner of the securities.

(l) The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty (except for, if the Plan has terminated its Borrowing Agreement, the return to the Borrower of a pro-rata portion of the Exclusive Fee paid by the Borrower to the Plan) whereupon the Borrower delivers securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities.

(m) In the event that the Borrower fails to return securities in accordance with the Borrowing Agreement and paragraph (l) above, the Plan's remedy will be the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the U.S. against any losses resulting from its use of the borrowed securities equal to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default together with expenses incurred by the Plan plus applicable interest at a reasonable rate including reasonable attorneys fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly indemnify the Plan.

(n) Except as otherwise provided herein, all procedures regarding the securities lending activities, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as to applicable

securities laws of the United States, Canada, the United Kingdom, Germany, Japan, Australia, or Switzerland, as appropriate.

(o) Only Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to the Borrower; provided, however, that—

(1) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with the Borrower, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

(2) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrower, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(i) Has full investment responsibility with respect to plan assets invested therein; and

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the

commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above are formed for the sole purpose of making loans of securities.)

(p) Prior to any Plan's approval of the lending of its securities to the Borrower, a copy of this exemption, if granted, (and the notice of pendency) is provided to the Plan, and the Borrower informs the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.¹⁵

(q) The independent fiduciary of the Plan receives monthly reports with respect to the securities lending transactions, including but not limited to the information set forth in the following sentence, so that an independent Plan fiduciary may monitor such transactions with the Borrower. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the security is loaned, and the number of days the security has been on loan. At the request of the Plan, such a report will be provided on a daily or weekly basis, rather than a monthly basis. Also, upon request of the Plan, the Borrower will provide the Plan with daily confirmations of securities lending transactions.

(r) In addition to the above conditions, all loans involving a Foreign Borrower must satisfy the following supplemental requirements:

(1) Such Foreign Borrower is a registered broker-dealer subject to regulation in Canada by the Ontario Securities Commission and the Investment Dealers Association, in the United Kingdom by the UK FSA, in Germany by the Deutsche Bundesbank and the BAK, in Japan by the Financial Services Agency and the Tokyo Stock Exchange, in Australia by the ASIC, or in Switzerland by the Swiss Federal Banking Commission;

¹⁵ The Department notes the Applicants' representation that, under the proposed exclusive borrowing arrangements, neither the Borrower nor any of its affiliates will perform the essential functions of a securities lending agent, e.g., the Applicants will not be the fiduciary who negotiates the terms of the Borrowing Agreement on behalf of the Plan, the fiduciary who identifies the appropriate borrowers of the securities or the fiduciary who decides to lend securities pursuant to an exclusive arrangement. However, the Applicants or their affiliates may monitor the level of collateral and the value of the loaned securities.

¹⁴ The Department notes that Applicants' representation that dividends and other distributions on foreign securities payable to a lending Plan are subject to foreign tax withholdings and that the Borrower will always put the Plan back in at least as good a position as it would have been had it not loaned securities.

(2) Such Foreign Borrower is in compliance with all applicable provisions of Rule 15a-6 (17 C.F.R. 240.15a-6) under the Securities Exchange Act of 1934 (the 1934 Act) which provides foreign broker-dealers a limited exception from United States registration requirements;

(3) All collateral is maintained in United States dollars or in U.S. dollar-denominated securities or letters of credit or such other collateral as may be permitted under PTE 81-6 (as amended or superseded);

(4) All collateral is held in the United States and the situs of the Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1; and

(5) Prior to entering into a transaction involving a Foreign Borrower, the Foreign Borrower must:

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

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

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

(iv) Agree that enforcement by a Plan of the indemnity provided by the Foreign Borrower will occur in the United States courts.

(s) Goldman or the Borrower maintains, or causes to be maintained, within the United States for a period of six years from the date of such transaction, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described in paragraph (t)(1) to determine whether the conditions of the exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Goldman and/or its affiliates, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest other than the Borrower 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 below by paragraph (t)(1).

(t)(1) Except as provided in subparagraph (t)(2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (s) are unconditionally

available at their customary location for examination during normal business hours by—

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

(ii) Any fiduciary of a participating Plan or any duly authorized representative of such fiduciary;

(iii) Any contributing employer to any participating Plan or any duly authorized employee representative of such employer; and

(iv) Any participant or beneficiary of any participating Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in subparagraphs (t)(1)(ii)–(t)(1)(iv) are authorized to examine the trade secrets of Goldman or its affiliates or commercial or financial information which is privileged or confidential.

Section III—Definitions

(a) An “affiliate” of a person means:

(i) any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person. (For purposes of this paragraph, the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual);

(ii) any officer, director, employee or relative (as defined in section 3(15) of the Act) of any such other person or any partner in any such person; and

(iii) any corporation or partnership of which such person is an officer, director or employee, or in which such person is a partner.

(b) The term “Foreign Borrower” or “Foreign Borrowers” means Goldman Sachs Canada Inc. or any broker-dealer or bank, now or in the future, that is an affiliate of Goldman subject to regulation in Canada by the Ontario Securities Commission and the Investment Dealers Association, Goldman Sachs International and Goldman Sachs Equity Securities (U.K.) or any broker-dealer or bank, now or in the future, that is an affiliate of Goldman subject to regulation in the United Kingdom by the UK FSA, Goldman, Sachs & Co. oHG or any broker-dealer or bank, now or in the future, that is an affiliate of Goldman subject to regulation in Germany by the Deutsche Bundesbank and the BAK, Goldman Sachs (Japan) Ltd. or any broker-dealer or bank, now or in the future, that is an affiliate of Goldman subject to regulation in Japan by the Financial Services Agency and the

Tokyo Stock Exchange, Goldman Sachs Australia Pty Limited or any broker-dealer or bank, now or in the future, that is an affiliate of Goldman subject to regulation in Australia by the ASIC, Goldman, Sachs & Co. Bank or any broker-dealer or bank, now or in the future, that is an affiliate of Goldman subject to regulation in Switzerland by the Swiss Federal Banking Commission.

(c) The term “Borrower” includes Goldman, the U.S. Broker-Dealers, and the Foreign Borrowers.

Effective Date: This proposed exemption, if granted, will be effective as of March 22, 2002.

Summary of Facts and Representations

1. Goldman, Sachs & Co. (Goldman), a New York limited partnership, is a wholly owned subsidiary and the principal operating subsidiary of The Goldman Sachs Group, Inc. (the GS Group), a Delaware corporation. Goldman, a full-line investment services firm, is registered with and regulated by the Securities and Exchange Commission (the SEC) as a broker-dealer and as an investment adviser, is registered with and regulated by the Commodity Futures Trading Commission (the CFTC) as a futures commission merchant, is a member of the New York Stock Exchange (the NYSE) and other principal securities exchanges in the United States, and is also a member of the National Association of Securities Dealers, Inc. (the NASD). As of August 31, 2001, the GS Group had approximately \$302 billion in assets and \$17.96 billion in shareholders' equity.

Goldman has several foreign affiliates which are broker-dealers or banks. The affiliated foreign broker-dealers or banks of Goldman that will be covered by this proposed exemption (the Foreign Borrowers), and their respective regulating entities, are as follows: (a) Goldman Sachs Canada Inc., located in Toronto, is subject to regulation by the Ontario Securities Commission and the Investment Dealers Association in Canada, (b) Goldman Sachs International and Goldman Sachs Equity Securities (U.K.), located in London, are subject to regulation by the Securities and Futures Authority (the UK FSA) (formerly, the Securities and Futures Authority (the UK SFA)) in the United Kingdom, (c) Goldman, Sachs & Co. oHG, located in Frankfurt, is subject to regulation by the Deutsche Bundesbank and the Federal Banking Supervisory Authority, i.e., der Bundesaufsichtsamt für das Kreditwesen (the BAK) in Germany, (d) Goldman Sachs (Japan) Ltd., located in Tokyo, is subject to regulation by the Financial Services

Agency and the Tokyo Stock Exchange in Japan, (e) Goldman Sachs Australia Pty Limited, located in Sydney, is subject to regulation by the Australian Securities & Investments Commission (the ASIC) in Australia, (f) Goldman, Sachs & Co. Bank, located in Zurich, is subject to regulation by the Swiss Federal Banking Commission in Switzerland, and (g) any broker-dealer or bank that, now or in the future, is an affiliate of Goldman which is subject to regulation by the Ontario Securities Commission and the Investment Dealers Association in Canada, the UK SFA in the United Kingdom, the Deutsche Bundesbank and the BAK in Germany, the Financial Services Agency and the Tokyo Stock Exchange in Japan, the ASIC in Australia, or the Swiss Federal Banking Commission in Switzerland.

2. The Borrowers, acting as principal, actively engage in the borrowing and lending of securities. The Borrowers utilize borrowed securities either to satisfy their own trading requirements or to re-lend to other broker-dealers and entities which need a particular security for a certain period of time. The Applicants represent that in the United States, as described in the Federal Reserve Board's Regulation T, borrowed securities are often used in short sales, for non-purpose loans to exempted borrowers, or in the event of a failure to receive securities that a broker-dealer is required to deliver.

The Applicants wish to enter into exclusive borrowing arrangements with employee benefit plans, including commingled investment funds holding the assets of such plans (Plans), for which Goldman or any affiliate of Goldman may be a party in interest. For example, Goldman or an affiliate may be an investment manager for assets of a Plan that are unrelated to the assets involved in the transaction. Goldman or any of its affiliates may provide securities custodial services, directed trustee services, clearing and/or reporting functions in connection with securities lending transactions, or other services to the Plan.

3. The Applicants represent that although the Foreign Borrowers will not be registered with the SEC, their activities are subject to regulation by a governmental agency in the foreign country in which they are located. The Applicants further represent that registration of a foreign broker-dealer or bank with the governmental agency in these cases addresses regulatory concerns similar to those concerns addressed by registration of a broker-dealer with the SEC under the 1934 Act. The rules and regulations set forth by the above-referenced agencies and the

SEC share a common objective: the protection of the investor by the regulation of securities markets.

4. The Applicants represent that although Goldman Sachs International and Goldman Sachs Equity Securities (U.K.) or any other foreign broker-dealer of Goldman in the United Kingdom will not be registered with the SEC, their activities are governed by the rules, regulations and membership requirements of the UK FSA. In this regard, the Applicants state that these broker-dealers are subject to the UK FSA rules relating to, among other things, minimum capitalization, reporting requirements, periodic examinations, client money and safe custody rules, and books and records requirements with respect to client accounts. The Applicants represent that the UK FSA rules require each firm which employs registered representatives or registered traders to have positive tangible net worth and to be able to meet its obligations as they may fall due, and that the UK FSA rules set forth comprehensive financial resource and reporting/disclosure rules regarding capital adequacy. In addition, to demonstrate capital adequacy, the Applicants state that the UK FSA rules impose reporting/disclosure requirements on broker-dealers with respect to risk management, internal controls, and transaction reporting and recordkeeping requirements. In this regard, required records must be produced at the request of the UK FSA at any time. The Applicants further state that the rules and regulations of the UK FSA for broker-dealers are backed up by potential fines and penalties as well as a comprehensive disciplinary system.

5. With respect to Canada, the United Kingdom, Japan, and Australia, all these countries have comprehensive financial resource and reporting/disclosure rules concerning broker-dealers. Broker-dealers are required to demonstrate their capital adequacy. The reporting/disclosure rules impose requirements on broker-dealers with respect to risk management, internal controls, and records relating to counterparties. All such records must be produced at the request of the agency at any time. The agencies' registration requirements for broker-dealers are enforced by fines and penalties and thus constitute a comprehensive disciplinary system for the violation of such rules.

6. With respect to Germany, the BAK, an independent federal institution with ultimate responsibility to the Ministry of Finance, in cooperation with the Deutsche Bundesbank, the central bank of the German banking system, provides extensive regulation of the banking

sector. The BAK insures that Goldman, Sachs & Co. oHG has procedures for monitoring and controlling its worldwide activities through various statutory and regulatory standards, such as requirements regarding adequate internal controls, oversight, administration and financial resources. The BAK reviews compliance with these limitations on operations and internal control requirements through an annual audit performed by the year-end auditor and through special audits, e.g., on specific sections of the Banking Act, as ordered by the BAK and the respective State Central Bank auditors. The BAK obtains information on the condition of Goldman, Sachs & Co. oHG by requiring submission of periodic, consolidated financial reports and through a mandatory annual report prepared by the auditor. The BAK also receives information regarding capital adequacy, country risk exposure, and foreign exchange exposure from Goldman, Sachs & Co. oHG. German banking law mandates penalties to insure correct reporting to the BAK. The auditors face penalties for gross violation of their duties in auditing, for reporting misleading information, omitting essential information from the audit report, failing to request pertinent information, or failing to report to the BAK.

7. With respect to Switzerland, the powers of the Swiss Federal Banking Commission include licensing banks, issuing directives to address violations by or irregularities involving banks, requiring information from a bank or its auditor regarding supervisory matters and revoking bank licenses. The Swiss Federal Banking Commission exercises oversight over Swiss banks, such as Goldman, Sachs & Co. Bank, through independent auditors known as "Recognized Auditors," which act on behalf of the Commission under detailed statutory provisions. Each Swiss bank, including Goldman, Sachs & Co. Bank, must appoint a recognized Auditor and notify the Swiss Federal Banking Commission of an intent to change its auditor. The Recognized Auditor may take action within a bank as deemed necessary or as instructed by the Swiss Federal Banking Commission and must inform the Commission of supervisory matters. The Swiss Federal Banking Commission insures that Goldman, Sachs & Co. Bank has procedures for monitoring and controlling its worldwide activities through various statutory and regulatory standards. Among these standards are requirements for adequate internal controls, oversight, administration, and

financial resources. The Swiss Federal Banking Commission reviews compliance with these limitations on operations and internal control requirements through an annual audit performed by the Recognized Auditor.

The Swiss Federal Banking Commission obtains information on the condition of Goldman, Sachs & Co. Bank and its foreign offices and subsidiaries by requiring submission of periodic, consolidated financial reports and through a mandatory annual report prepared by the Recognized Auditor. The Swiss Federal Banking Commission also receives information regarding capital adequacy, country risk exposure, and foreign exchange exposures from Goldman, Sachs & Co. Bank.

Swiss banking law mandates penalties to insure correct reporting to the Swiss Federal Banking Commission. Recognized Auditors face penalties for gross violations of their duties in auditing, or reporting misleading information, omitting essential information from the audit report, failing to request pertinent information or failing to report to the Swiss Federal Banking Commission.

8. With respect to Australia, Goldman Sachs Australia Pty Limited is subject to regulation by ASIC, and as a participating organization, by the Australian Stock Exchange Limited (ASX). The rules of ASX (which are more detailed than those of ASIC) require each firm to have a positive tangible net worth and be able to meet its obligations as they may fall due. In addition, the rules of ASX set forth comprehensive financial resource and reporting/disclosure rules regarding capital adequacy. Further, to demonstrate capital adequacy, the rules of the ASX impose reporting/disclosure requirements on broker-dealers with respect to risk management, internal controls, and transaction reporting, and recordkeeping requirements, to the effect that required records must be produced upon request. ASIC also has rules covering these matters. Finally, the rules and regulations of ASX and ASIC impose potential fines and penalties on broker-dealers, establishing a comprehensive disciplinary system.

9. Goldman represents that, in connection with the transactions covered by this proposed exemption, the Foreign Borrowers' compliance with any applicable requirements of Rule 15a-6 (17 C.F.R. 240.15a-6) of the 1934 Act (as discussed further in Paragraph 10, below), and SEC interpretations thereof, providing for foreign affiliates a limited exemption from U.S. registration

requirements, will offer additional protections to the Plans.¹⁶

10. Rule 15a-6 provides an exemption from U.S. registration requirements for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a "U.S. institutional investor" or a "major U.S. institutional investor," provided that the foreign broker-dealer, among other things, enters into these transactions through a U.S. registered broker-dealer intermediary. The term "U.S. institutional investor," as defined in Rule 15a-6(b)(7), includes an employee benefit plan within the meaning of the Act if (a) the investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company or registered investment advisor, or (b) the employee benefit plan has total assets in excess of \$5 million, or (c) the employee benefit plan is a self-directed plan with investment decisions made solely by persons that are "accredited investors" as defined in Rule 501(a)(1) of Regulation D of the Securities Act of 1933, as amended. The term "major U.S. institutional investor" is defined as a person that is a U.S. institutional investor that has, or has under management, total assets in excess of \$100 million or an investment adviser registered under section 203 of the Investment Advisers Act of 1940 that has total assets under management in excess of \$100 million.¹⁷ The Applicants represent that the

¹⁶ According to the Applicants, section 3(a)(4) of the 1934 Act defines "broker" to mean "any person engaged in the business of effecting transactions in securities for the account of others, but it does not include a bank." Section 3(a)(5) of the 1934 Act provides a similar exclusion for "banks" in the definition of the term "dealer." However, section 3(a)(6) of the 1934 Act defines "bank" to mean a banking institution organized under the laws of the United States or a State of the United States. Further, Rule 15a-6(b)(3) provides that the term "foreign broker-dealer" means "any non-U.S. resident person * * * whose securities activities, if conducted in the United States, would be described by the definition of 'broker' or 'dealer' in sections 3(a)(4) or 3(a)(5) of the [1934 Act]." Therefore, the test of whether an entity is a "foreign broker" or "dealer" is based on the nature of such foreign entity's activities and, with certain exceptions, only banks that are regulated by either the United States or a State of the United States are excluded from the definition of the term "broker" or "dealer." Thus, for purposes of this exemption request, the Applicants are willing to represent that they will comply with the applicable provisions and relevant SEC interpretations and amendments to Rule 15a-6.

¹⁷ Note that the categories of entities that qualify as "major U.S. institutional investors" has been expanded by a Securities and Exchange Commission No-Action letter. See SEC No-Action Letter issued to Cleary, Gottlieb, Steen & Hamilton on April 9, 1997 (April 9, 1997 No-Action Letter).

intermediation of the U.S. registered broker-dealer imposes upon the foreign broker-dealer the requirement that the securities transaction be effected in accordance with a number of U.S. securities laws and regulations applicable to U.S. registered broker-dealers.

The Applicants represent that under Rule 15a-6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major U.S. institutional investor in accordance with Rule 15a-6¹⁸ must, among other things:

(a) Consent to service of process for any civil action brought by, or proceeding before, the SEC or any self-regulatory organization;

(b) Provide the SEC with any information or documents within its possession, custody or control, any testimony of any such foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to the transactions effected pursuant to the Rule;

(c) Rely on the U.S. registered broker-dealer through which the transactions with the U.S. institutional and major U.S. institutional investors are effected to (among other things):

(1) Effect the transactions, other than negotiating the terms;

(2) Issue all required confirmations and statements;

(3) As between the foreign broker-dealer and the U.S. registered broker-dealer, extend or arrange for the extension of credit in connection with the transactions;

(4) Maintain required books and records relating to the transactions, including those required by Rules 17a-3 (Records to be Made by Certain Exchange Members) and 17a-4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act;

(5) Receive, deliver, and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or major U.S. institutional investor in compliance with Rule 15c3-3 of the 1934 Act (Customer Protection—Reserves and Custody of Securities);¹⁹ and

¹⁸ If it is determined that applicable regulation under the 1934 Act does not require Goldman or the Borrower to comply with Rule 15a-6, both entities will nevertheless comply with subparagraphs (a) and (b) of Representation 10.

¹⁹ Under certain circumstances described in the April 9, 1997 No-Action Letter (e.g., clearance and settlement transactions), there may be direct transfers of funds and securities between a Plan and Goldman or between a Plan and the Foreign

(6) Participate in certain oral communications (e.g., telephone calls) between the foreign associated person²⁰ and the U.S. institutional investor (other than a major U.S. institutional investor), and accompany the foreign associated person on certain visits with both U.S. institutional and major U.S. institutional investors. The Applicants represent that, under certain circumstances, the foreign associated person may have direct communications and contact with the U.S. institutional investor. (See April 9, 1997 No-Action Letter.)

11. An institutional investor, such as a pension fund, lends securities in its portfolio to a broker-dealer or bank in order to earn a fee while continuing to enjoy the benefits of owning the securities (e.g., from the receipt of any interest, dividends, or other distributions due on those securities and from any appreciation in the value of the securities). The lender generally requires that the securities loan be fully collateralized, and the collateral usually is in the form of cash or high quality liquid securities, such as U.S. Government or Federal Agency obligations or irrevocable bank letters of credit. If the borrower deposits cash collateral, the lender invests the collateral, and the borrowing agreement may provide that the lender pay the borrower a previously-agreed upon amount or rebate fee and keep any earnings on the collateral. If the borrower deposits government securities, the borrower is entitled to the earnings on its deposited securities and may pay the lender a lending fee. If the borrower deposits irrevocable bank letters of credit as collateral, the borrower pays the lender a fee as compensation for the loan of its securities. These fees, defined below as the Transaction Lending Fee, may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement.

12. The Applicants request an exemption for the lending of securities, under certain exclusive borrowing arrangements, by Plans with respect to which Goldman or any of its affiliates is

a party in interest (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H) or (I) of the Act. For each Plan, neither the Borrower nor any of its affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan, nor will they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets. The Applicants represent that because the Borrower, by exercising its contractual rights under the proposed exclusive borrowing arrangement, will have discretion with respect to whether there is a loan of particular Plan securities to the Borrower, the lending of securities to the Borrower may be outside the scope of relief provided by PTE 81-6.²¹

13. For each Plan, the Borrower will directly negotiate a Borrowing Agreement with a Plan fiduciary which is independent of the Borrower. Under the Borrowing Agreement, the Borrower will have exclusive access for a specified period of time to borrow certain securities of the Plan pursuant to certain conditions. The form of the Borrowing Agreement to be used in foreign jurisdictions will reflect appropriate local industry or market standards.²² The Borrowing Agreement will specify all material terms of the agreement, including the basis for compensation to the Plan under each category of securities available for loan. The Borrowing Agreement will also contain a requirement that the Borrower pay all transfer fees and transfer taxes relating to the securities loans. The terms of each loan of securities by a Plan to a Borrower will be at least as favorable to such Plan as those of a comparable arm's-length transaction between unrelated parties, taking into account the exclusive arrangement.

14. The Borrower may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to the Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage of portfolio value or other percentage determined pursuant to an objective formula.

15. In exchange for granting the Borrower the exclusive right to borrow certain securities, the Plan receives from the Borrower either (i) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement from time to time), (ii) a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii) (collectively, the Exclusive Fee). If the Borrower deposits cash collateral, any earnings generated by such cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the Plan that a percentage of the earnings on the collateral may be retained by the Plan and/or the Plan may agree to pay the Borrower a rebate fee and retain any earnings on the collateral (the Shared Earnings Compensation). If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a lending fee (the "Lending Fee") (the Lending Fee and the Shared Earnings Compensation are referred to herein as the "Transaction Lending Fee"). The Transaction Lending Fee, if any, may be in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. For example, in addition to the Borrower paying different fees for different portfolios of securities (i.e., the fee for a domestic securities portfolio may be different than the fee for a foreign securities portfolio), the Borrower may also pay different fees for securities of issuers in different foreign countries (i.e., there may be a different fee for German securities than for French securities). In addition, with respect to, for example, the French securities, there may be different fees for liquid securities than for illiquid securities. Any change in, or a change in the method of determining, the Exclusive Fee or the Transaction Lending Fee that the Applicants pay to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee

Borrower. The Applicants note that in such situations, the U.S. registered broker-dealer will not be acting as principal with respect to any duties it is required to undertake pursuant to Rule 15a-6.

²⁰ The term "foreign associated person" as defined in Rule 15a-6(b)(2) means any natural person domiciled outside the United States who is an associated person, as defined in section 3(a)(18) of the 1934 Act, of the foreign broker-dealer, and who participates in the solicitation of a U.S. institutional investor or a major U.S. institutional investor under Rule 15a-6(a)(3).

²¹ PTE 81-6 requires in part that neither the borrower nor an affiliate of the borrower may have discretionary authority or control over the investment of the plan assets involved in the transaction.

²² For example, the form of the Borrowing Agreement to be used in the United Kingdom differs from the standard U.S. Borrowing Agreement. Under the form Borrowing Agreement to be used in the United Kingdom, the Plan receives title to (rather than a pledge of or a security interest in) the collateral.

changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

The Plan will be entitled to the equivalent of all distributions made to holders of the borrowed securities during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities that the Plan would have received (net of tax withholdings in the case of foreign securities), had it remained the record owner of the securities.

16. An independent fiduciary of a Plan may provide written instructions directing that the investment of any cash collateral, or any portion thereof, be managed by Goldman or any of its affiliates or be invested in one or more mutual funds managed by Goldman or any of its affiliates. Goldman or such affiliate, as applicable, may receive a reasonable and customary investment management fee, provided that the independent fiduciary of the Plan approves of such compensation arrangement after receiving written disclosure of the compensation arrangement to be paid to Goldman or such affiliate, as applicable, in connection with such investment management. The independent fiduciary of the Plan may revoke such written instructions at any time.²³

17. By the close of business on or before the day on which the loaned securities are delivered to the Borrower, the Plan will receive from the Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by U.S. banks other than Goldman or an affiliate of Goldman, or other collateral permitted under PTE 81-6 (as amended or superseded) having, as of the close of business on the preceding business day, a market value or, in the case of letters of credit a stated amount, equal to not less than 102 percent of the then market value of the securities lent. Such

collateral will be deposited and maintained in an account on behalf of the Plan which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of the Plan by an affiliate of the Borrower that is the trustee or custodian of the Plan. The Plan, its independent fiduciary or its designee, which may be Goldman or any of its affiliates which provides custodial or directed trustee services in respect of the securities covered by the Borrowing Agreement for the Plan, will monitor the level of the collateral daily and, if the market value of the collateral on the close of a business day falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of the Plan may agree upon) of the market value of the loaned securities at the close of business on such day, the Borrower will deliver additional collateral by the close of business on the following day to bring the level of the collateral back to at least 102 percent. The applicable Borrowing Agreement will give the Plan a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral and a lien on the collateral.

If the Borrower pledges cash collateral, the Plan invests the collateral, and all earnings on such cash collateral shall be returned to the Borrower; provided that the Borrowing Agreement may provide that the Plan receive Shared Earnings Compensation, which, as discussed above, may be a percentage of the earnings on the collateral which may be retained by the Plan or the Plan may agree to pay the Borrower a rebate fee and retain any earnings on the collateral. The terms of the rebate fee for each loan will be at least as favorable to the Plan as those of comparable arm's length transactions between unrelated parties taking into account the exclusive arrangement, and will be based upon an objective methodology which may take into account one or more of several factors, including potential demand for the loaned securities, the applicable benchmark cost of fund indices (typically, the U.S. Federal Funds rate established by the U.S. Federal Reserve System (the Federal Funds), the overnight REPO²⁴ rate, or the like) and/

or the anticipated investment return on overnight investments permitted by the independent fiduciary of the Plan. If the Borrower pledges non-cash collateral, such as government securities or irrevocable bank letters of credit, the Borrower shall be entitled to any earnings on its non-cash collateral; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a Lending Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement.

The Borrower will provide a monthly report to the independent fiduciary of the Plan which includes the following information. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the security is loaned, and the number of days the security has been on loan. At the request of the Plan, such a report will be provided on a daily or weekly basis, rather than a monthly basis. Also, upon request of the Plan, the Borrower will provide the Plan with daily confirmations of securities lending transactions.

18. Before entering into a Borrowing Agreement, the Borrower will furnish to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement. Further, the Borrowing Agreement will contain a representation by the Borrower that as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

19. Prior to any Plan's approval of the lending of its securities to the Borrower, a copy of this exemption, if granted, (and the notice of pendency) is provided to the Plan, and the Borrower informs the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.

²³ This transaction is outside the scope of the proposed exemption. The Department notes that it is the responsibility of Goldman to determine whether the conditions of ERISA section 408(b)(2) will be met with respect to the transaction (i.e., the reasonable contract or arrangement requirement and the reasonable compensation requirement).

²⁴ An overnight REPO is an overnight repurchase agreement that is an arrangement whereby securities dealers and banks finance their inventories of Treasury bills, notes and bonds. The dealer or bank sells securities to an investor with a temporary surplus of cash, agreeing to buy them back the next day. Such transactions are settled in immediately available Federal Funds, usually at a

rate below the Federal Funds rate (the rate charged by the banks lending funds to each other).

20. With regard to those Plans for which Goldman or any of its affiliates provides custodial, directed trustee, clearing and/or reporting functions relative to securities loans, Goldman or its applicable affiliate and a Plan fiduciary independent of Goldman and its affiliates will agree in advance and in writing to any fee that Goldman or any of its affiliates is to receive for such services. Such fees, if any, would be fixed fees (e.g., Goldman or any of its affiliates might negotiate to receive a fixed percentage of the value of the assets with respect to which it performs these services, or to receive a stated dollar amount) and any such fee would be in addition to any fee Goldman or any of its affiliates has negotiated to receive from any such Plan for standard custodial or other services unrelated to the securities lending activity. The arrangement for Goldman or any of its affiliates to provide such functions relative to securities loans to the Borrower will be terminable by the Plan within five business days of the receipt of written notice without penalty to the Plan, except for the return to the Borrower of a pro-rata portion of the Exclusive Fee paid by the Borrower to the Plan, if the Plan has also terminated its exclusive borrowing arrangement with the Borrower.

21. The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty. Upon termination of any securities loan, the Borrower will deliver securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities.

22. In the event that the Borrower fails to return securities in accordance with the Borrowing Agreement and the immediately preceding paragraph, the Plan's remedy will be the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the U.S. against any losses resulting from its use of the borrowed securities equal to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default together with expenses incurred by the Plan plus applicable interest at a reasonable rate,

including reasonable attorneys fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly indemnify the Plan.

23. Except as provided herein, all the procedures under the Borrowing Agreement will, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as to applicable securities laws of the United States, Canada, the United Kingdom, Germany, Japan, Australia or Switzerland, as appropriate. In addition, in order to ensure that the independent fiduciary representing a Plan has the experience, sophistication, and resources necessary to adequately review the Borrowing Agreement and the fee arrangements thereunder, only Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to the Borrower; provided, however, that—

(a) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 C.F.R. 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with the Borrower, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

(b) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrower, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust

or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(i) Has full investment responsibility with respect to plan assets invested therein; and

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above are formed for the sole purpose of making loans of securities.)

The Applicants represent that the opportunity for the Plans to enter into exclusive borrowing arrangements with the Borrower under the flexible fee structures described herein is in the interests of the Plans because the Plans will then be able to choose among an expanded number of competing exclusive borrowers, as well as maximizing the return on the lending portfolio.

24. In addition to the above conditions, all loans involving Foreign Borrowers must satisfy the following supplemental requirements:

(i) Such Foreign Borrower is a registered broker-dealer subject to regulation in Canada by the Ontario Securities Commission and the Investment Dealers Association, in the United Kingdom by the UK FSA, in Germany by the Deutsche Bundesbank and the BAK, in Japan by the Financial Services Agency and the Tokyo Stock Exchange, in Australia by the ASIC, or in Switzerland by the Swiss Federal Banking Commission;

(ii) Such Foreign Borrower is in compliance with all applicable provisions of Rule 15a-6 (17 C.F.R. 240.15a-6) under the 1934 Act which provides foreign broker-dealers a limited exception from United States registration requirements;

(iii) All collateral is maintained in United States dollars or in U.S. dollar-denominated securities or letters of credit or such other collateral as may be permitted under PTE 81-6 (as amended or superseded);

(iv) All collateral is held in the United States and the situs of the Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under Section 404(b) of the Act and the regulations promulgated under 29 C.F.R. 2550.404(b)-1; and

(v) Prior to entering into a transaction involving a Foreign Borrower, the Foreign Borrower must:

(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 the service of process on the Process Agent; and

(4) Agree that enforcement by a Plan of the indemnity provided by the Foreign Borrower will occur in the United States courts.

25. In addition to the protections cited above, Goldman or the Borrower will maintain, or cause to be maintained, within the United States for a period of six years from the date of a transaction, such records as are necessary to enable the Department and other persons (as specified herein in Section II(t)(1)) to determine whether the conditions of the exemption have been met.

26. In summary, the Applicants represent that the described transactions satisfy the statutory criteria of section 408(a) of the Act because:

(a) The Borrower will directly negotiate a Borrowing Agreement with an independent fiduciary of each Plan;

(b) The Plans will be permitted to lend to the Borrower, a major securities borrower who will be added to an expanded list of competing exclusive borrowers, enabling the Plans to earn additional income from the loaned securities on a secured basis, while continuing to enjoy the benefits of owning the securities;

(c) In exchange for granting the Borrower the exclusive right to borrow certain securities, the Borrower will pay the Plan the Exclusive Fee, which as discussed above may be either (i) a flat fee (which may be a percentage of the value of the total securities subject to the Borrowing Agreement), (ii) a percentage of the value of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii);

(d) Any change in the Exclusive Fee or Shared Earnings Compensation that the Borrower pays to the Plan with respect to any securities loan will require the prior written consent of the independent fiduciary, except that consent will be presumed where the Exclusive Fee or Shared Earnings Compensation changes pursuant to an objective formula specified in the Borrowing Agreement and the independent fiduciary is notified at least 24 hours in advance of such change and does not object in writing thereto, prior to the effective time of such change;

(e) The Borrower will provide sufficient information concerning its financial condition to a Plan before a Plan lends any securities to the Borrower;

(f) The collateral posted with respect to each loan of securities to the Borrower initially will have, as of the close of business on the preceding business day, a market value or, in the case of letters of credit a stated amount, equal to not less than 102 percent of the then market value of the securities lent and will be monitored daily by the independent fiduciary or its designee, which may be Goldman or any of its affiliates which provides custodial or directed trustee services in respect of the securities covered by the Borrowing Agreement for the Plan;

(g) The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty, except for the return to the Borrower of a pro-rata portion of the Exclusive Fee paid by the Borrower to the Plan, and whereupon the Borrower will return any borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities;

(h) Neither the Borrower nor any of its affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan;

(i) The minimum Plan size requirement (as specified in Section II(o)) will ensure that the Plans will have the resources necessary to adequately review and negotiate all aspects of the exclusive borrowing arrangements; and

(j) All the procedures will, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as applicable securities laws of the United States, Canada, the United Kingdom, Germany, Japan, Australia or Switzerland, as appropriate.

Effective Date: This proposed exemption, if granted, will be effective as of March 22, 2002.

For Further Information Contact: Karen E. Lloyd, U.S. Department of Labor, telephone (202) 693-8540. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section

4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

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

Signed at Washington, DC, this 28th day of June, 2002.

Ivan Strasfeld,

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

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