

Standard for Construction (§ 1926.550) is available for inspection and copying in the Docket Office, or by requesting a copy from Todd Owen at (202) 693-2444. For electronic copies of the ICR contact OSHA on the Internet at <http://www.osha.gov/comp-links.html> and select "Information Collection Requests."

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information-collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA-95) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and cost) is minimal, collection instruments are understandable, and OSHA's estimate of the information-collection burden is correct.

Paragraph (a)(11) of OSHA's Cranes and Derricks Standard for Construction (§ 1926.550) addresses conditions in which a crane or derrick powered by an internal-combustion engine is exhausting into an enclosed space that employees occupy or will occupy. Under these conditions, employers must record tests made of the breathing air in the space to ensure that adequate oxygen is available and that concentrations of toxic gases are at safe levels.

Establishing a test record allows employers to document oxygen levels and specific atmospheric contaminants, ascertain the effectiveness of controls, implement additional controls if necessary, and readily provide this information to other crews and shifts who may work in the enclosed space. Accordingly, employers will prevent serious injury and death to equipment operators and other employees who use or work near this equipment in an enclosed space. In addition, these records provide the most efficient means for an OSHA compliance officer to determine that an employer performed the required tests and implemented appropriate controls.

##### II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information-collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;

- The accuracy of OSHA's estimate of the burden (time and cost) of the information-collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information-collection and -transmission techniques.

##### III. Proposed Actions

OSHA is requesting a decrease in the existing burden-hour estimate for, as well as an extension of OMB approval of, the collection-of-information requirements specified by paragraph (a)(11) of § 1926.550. Accordingly, the Agency is requesting to decrease the current burden-hour estimate from 99 hours to 97 hours, a total reduction of 2 hours. This reduction occurred because OSHA decreased the burden hours previously required for employers to inform OSHA compliance officers, during an inspection, of the location of the test records; the Agency now accounts for these burden hours under § 1910.1020 (OMB Control No. 1218-0065).

The Agency will summarize the comments submitted in response to this notice. OSHA will then include this summary in its request to OMB to decrease the existing burden-hour estimates for, and to extend approval of, this information-collection requirement.

*Type of Review:* Extension of currently approved information-collection requirement.

*Title:* Cranes and Derricks Standard for Construction: Recording Tests for Toxic Gases and Oxygen-Deficient Atmospheres in Enclosed Spaces.

*Affected Public:* Business or other for-profit; not-for-profit institutions; Federal government; State, local, or tribal governments.

*Number of Respondents:* 50 (enclosed spaces).

*Frequency of Response:* On occasion.

*Average Time per Response:* 2 minutes (.03 hour) to perform atmospheric testing and record the results.

*Estimated Total Burden Hours:* 97 hours.

*Estimated Cost (Operation and Maintenance):* \$9,000.

##### IV. Authority and Signature

R. Davis Layne, Acting Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506)

and Secretary of Labor's Order No. 3-2000 (65 FR 50017).

Signed at Washington, DC on July 3, 2001.

**R. Davis Layne,**

*Acting Assistant Secretary of Labor.*

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#### DEPARTMENT OF LABOR

##### Pension and Welfare Benefits Administration

[Application No. D-10911, et al.]

##### Proposed Exemptions; Deferred Profit Sharing Plan of the Penske Corporation (the Plan) et al.

**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 request 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 request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, 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. 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-5638,

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.

#### Deferred Profit Sharing Plan of the Penske Corporation (the Plan) Located in Charlotte, North Carolina

[Application No. D-10911]

##### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, (1) effective June 15, 2000, to the acquisition and holding by the Plan of interests (the Interests) in the Penske Company, LLC (the LLC), a wholly owned subsidiary of the Plan sponsor, the Penske Corporation (Penske), which were distributed (the Distribution) as

dividends to the Plan as a shareholder of Penske common stock (Penske Stock); and (2) the proposed redemption, by the LLC, of the Interests held by the Plan for the greater of \$3.37 per-unit or their fair market value at the date of the redemption, provided that the following conditions were or will be met:

(a) The Interests were acquired by the Plan pursuant to Plan provisions for individually-directed investment of participant accounts;

(b) The Plan's receipt and holding of the Interests occurred in connection with the Distribution;

(c) The Plan's acquisition of the Interests resulted from an independent act of Penske as a corporate entity, such that all holders of the Penske Stock, including the Plan, were treated in the same manner;

(d) Within 15 business days after the date the notice granting the final exemption is published in the **Federal Register**, the LLC will redeem the Interests held by the Plan for not less than \$3.37 per unit;

(e) The price received by the Plan for the Interests is not less than the fair market value of the Interests on the date that the redemption occurs; and

(f) The Plan paid no fees or commissions in connection with the acquisition and holding of the Interests nor will it pay any fees or commissions in connection with the redemption of the Interests.

*Effective Date:* If granted, this proposed exemption will be effective as of June 15, 2000, with respect to the acquisition and holding by the Plan of the Interests. In addition, this exemption will be effective as of the date the final exemption is granted with respect to the LLC's redemption of the Interests held by the Plan.

##### Summary of Facts and Representations

1. Penske, the sponsor of the Plan, is a Delaware corporation engaged in the transportation services industry. Penske maintains its principal place of business in Detroit, Michigan and is more than 50% owned by RSP (RSP). The Plan is a qualified retirement plan described under section 401(a) of the Code and features a qualified cash or deferred compensation arrangement described in section 401(k) of the Code.

As of December 31, 2000, the Plan had a total of 1,174 participants and assets with an approximate aggregate fair market value of \$35,477,000. Also as of December 31, 2000, 47.9% (or \$16,997,073) of the fair market value of the total assets of the Plan was invested in Penske Stock. The shares of Penske Stock are held by 401 Plan Participants. Before June 15, 2000, the Plan held

5,601 shares of Penske Corporation Class B Voting Common Stock and 106,166 shares of Penske Corporation Class C Non-Voting Common Stock. In total, the Plan owns 111,767 shares (5,601 shares + 106,166 shares) of Penske. This represented 3.33 percent of the total 3,355,685 shares of Penske Stock outstanding at that time (treating the convertible preferred stock as fully converted) (111,767 shares ÷ 3,355,685 shares).

2. First Union National Bank (First Union), of Charlotte, North Carolina, serves as a directed trustee of the Plan. As such, First Union has no investment discretion over the Plan's assets.

3. A variety of funds have been established under the Plan for the investment of the Plan assets, including Fund E, the Penske Corporation Stock Fund. These funds are mutual funds, with the exception of Fund E and the two subfunds that have been established with Fund E—the Penske Subfund and the LLC Subfund. Fund E is invested principally in Penske Stock, and is available for investment only with respect to amounts attributable to profit-sharing contributions (the Contributions) that were made under the Plan by participants prior to January 1, 1996. Participants may periodically reallocate amounts attributable to the Contributions (including amounts invested in Fund E) among any of the other funds, but they may not reallocate any amounts to Fund E. Furthermore, under Section 6.1 of the Plan, as currently drafted, any income derived or net proceeds received from the sales of assets in Fund E is invested among the other funds established in accordance with the participant's investment direction.

4. The LLC is in the business of the management, operation, acquisition, and disposition of companies engaged in transportation-related services, such as manufacturers and suppliers to the heavy-duty truck and automotive industries and on-line electronic commerce enterprises. The LLC was formed by Penske on April 13, 2000 as a Delaware limited liability company. Penske contributed \$9,900 in cash and a trust maintained for the benefit of RSP contributed \$100 in cash to the LLC on, in exchange for all of the LLC Interests. On May 1, 2000, Penske purchased the trust's Interests in the LLC for \$100 in cash, so that Penske owned all of the Interests. This resulted in the LLC being a wholly owned subsidiary of Penske. On June 15, 2000, Penske made a *pro rata* distribution of the Interests, which are not publicly-traded, to all of Penske's shareholders of record as of June 14, 2000. The Plan, as a

shareholder of Penske Stock, also received a distribution of the Interests from Penske in proportion to its ownership interest in Penske Stock. As a result of the *pro rata* distribution of the Interests, the Plan received 5,601 Class B Voting Common Units in the LLC and 106,166 Class C Non-Voting Common Units in the LLC out of the total number of units issued—3,355,685 (treating the convertible preferred units as fully converted). Similarly, RSP received Interests in the LLC which corresponded with those received by the Plan. The Plan paid no fees or commissions to Penske in connection with the Distribution.

The Interests have been held on behalf of the Plan within Fund E in the LLC Subfund. Participants with accounts invested in Fund E have received information from Penske about the nature, risks and potential rewards of holding the Interests as an investment. This information was given in the form of an information statement (the Statement) provided by the employee benefits department of Penske. The Statement was sent only to participants in the Plan with accounts invested in Fund E.

5. Section 406(a)(1)(A) of the Act prohibits a fiduciary from causing a plan to engage in a transaction which the fiduciary knows (or should know) constitutes a sale or exchange of any property between the plan and a party in interest. Penske, as an employer any of whose employees are covered by the Plan, is a party in interest with respect to the Plan under section 3(14)(C) of the Act. The LLC is also a party in interest with respect to the Plan under section 3(14)(G) of the Act. Since 100% of this entity was owned directly by Penske and more than 50% of the LLC is currently owned indirectly by RSP, the LLC is a party in interest under section 3(14)(G) of the Code with respect to the Plan.

Because Penske believes that the LLC is an affiliate of Penske for purposes of section 407(d)(7) of the Act,<sup>1</sup> Penske represents that the Interests held by the Plan would constitute an “employer security” within the meaning of 407(d)(1) of the Act<sup>2</sup> but not a

<sup>1</sup> Section 407(d)(7) of the Act defines a corporation as an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of the Code, except that “applicable percentage” shall be substituted for “80 percent” wherever the latter percentage appears in such section) of which the employer maintains the plan is a member. For purposes of the preceding sentence, the term “applicable percentage” means 50 percent, or such lower percentage as the Secretary of Labor may prescribe by regulation.

<sup>2</sup> Section 407(d)(1) of the Act defines a “qualifying employer security” as a security issued

“qualifying employer security” under section 407(d)(5) of the Act<sup>3</sup> inasmuch as the Interests do not fall within any of the covered categories.

Therefore, Penske states that exemptive relief is needed with respect to the acquisition and continued holding of the Interests by the Plan to the extent there have been violations of sections 406(a), 406(b)(1) and (b)(2), and section 407(a) of the Act. In addition, Penske represents that the redemption of the Plan’s Interests by the LLC violates section 406(a)(1)(A) and section 406(b)(1) and (b)(2) of the Act. Accordingly, Penske requests an administrative exemption from the Department.

If granted, the exemption will be effective as of June 15, 2000 with respect to the acquisition and holding by the Plan of the Interests. In addition, this exemption will be effective as of the date the notice granting the exemption is published in the **Federal Register** with respect to the redemption of the Plan’s Interests by the LLC.

6. McDonald Investments Inc. (McDonald), a company which is customarily engaged in the valuation of businesses and their securities in connection with mergers and acquisitions, negotiated underwritings, competitive biddings, secondary distributions of listed and unlisted securities, private placements and valuations for estate, corporate and other purposes, valued all of the Interests as of June 15, 2000. McDonald represents that it is independent of Penske, the LLC and RSP.

In connection with rendering this valuation, McDonald reviewed and analyzed, among other things, the following: (i) The historical financial information concerning the LLC’s investments; (ii) certain other internal information, primarily financial in nature including projections concerning the business and operation of the LLC’s investments furnished to it by the LLC’s management for the purposes of the analysis; (iii) certain publicly-available information with respect to other companies that McDonald believed to be comparable to the LLC’s investments and the trading markets for other comparable companies’ securities; and (iv) certain publicly-available information concerning the nature and terms of other transactions that

by an employer of employees covered by the plan, or by an affiliate of such employer.

<sup>3</sup> Section 407(d)(5) of the Act defines a “qualifying employer security” as an employer security which is (a) stock; (b) a marketable obligation; or (c) an interest in a publicly-traded partnership, but only if such partnership is an existing partnership.

McDonald considered relevant to its inquiry. McDonald also met with certain officers and employees of Penske and the LLC to discuss the respective businesses and prospects of the LLC’s investments, as well as other matters McDonald believed relevant to the valuation. McDonald concluded that the fair market value of the LLC, on an equity basis, was in a range of \$7.3 million to \$15.3 million, with a mid-point of \$11.3 million. For purposes of determining the redemption price for the Interests, McDonald represented that the midpoint price of \$11.3 million was acceptable as the fair market value of the LLC as of June 15, 2000. As a result of the appraisal the per-unit of the Interest was valued at \$3.37 (\$11.3 million ÷ 3,355,685 units). Based upon this valuation, the Plan will receive a minimum of \$376,654.79 (111,767 units × \$3.37) as a result of the redemption.

7. The LLC was also valued by McDonald as of October 31, 2000. The second appraisal was based on the same criteria utilized in the first appraisal. McDonald concluded that the fair market value of the LLC, on an equity basis, was in a range of \$2.9 million to \$6.4 million, with a mid-point of \$4.7 million. Therefore, for purposes of determining the redemption price for the Interests, McDonald represented that the midpoint price of \$4.7 million was acceptable as the fair market value of the LLC as of October 31, 2000. As a result of the appraisal the per-unit of the Interest was valued at \$1.40 (\$4.7 million ÷ 3,355,685 units).

8. The LLC was valued for a third time by McDonald as of December 31, 2000. This appraisal was based on the same criteria utilized in the two prior appraisals. McDonald concluded that the fair market value of the LLC, on an equity basis, was in a range of \$5.8 million to \$10.1 million, with a mid-point of \$8 million. Therefore, for purposes of determining the redemption price for the Interests, McDonald represented that the midpoint price of \$8 million was acceptable as the fair market value of the LLC as of December 31, 2000. As a result of the appraisal the per-unit of the Interest was valued at \$2.38 (\$8 million ÷ 3,355,685 units).

10. On the basis of the foregoing, within 15 business days after the date the notice granting the final exemption is published in the **Federal Register**, the LLC will redeem the Interests held by the Plan for the greater of \$3.37 per-unit (which represents the highest of the independent appraisals of the LLC) or the fair market value of the Interests on the date that the redemption occurs. The proceeds of the redemption will be reallocated among the other funds

available for investment under the Plan pursuant to the participants' current investment elections for new Plan contributions. Penske states that the proposed redemption is in the interests of the Plan and its participants and beneficiaries because the redemption will be a one-time cash transaction allowing the Plan to divest itself of the Interests and reinvest the proceeds of the redemption in assets that will be diversified and generate higher rates of return.

11. In summary, the applicant represents that the transactions have satisfied or will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Interests were acquired by the Plan pursuant to Plan provisions for individually-directed investment of participant accounts;

(b) The Plan's receipt and holding of the Interests occurred in connection with the Distribution;

(c) The Plan's acquisition of the Interests resulted from an independent act of Penske as a corporate entity, such that all holders of the Penske Stock, including the Plan, were treated in the same manner;

(d) Within 15 business days after the date the notice granting the final exemption is published in the **Federal Register**, the LLC will redeem the Interests held by the Plan for not less than \$3.37 per-unit;

(e) The price received by the Plan for the Interests will not be less than the fair market value of the Interests on the date that the redemption occurs; and

(f) The Plan paid no fees or commission in connection with the acquisition and holding of the Interests nor will the Plan pay any fees or commissions in connection with the redemption of the Interests.

*For Further Information Contact:* Khalif Ford of the Department, telephone (202) 219-8883. (This is not a toll-free number).

#### **Development Company Funding Corporation Located in the District of Columbia**

[Application No. D-10926]

#### *Proposed Exemption*

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990).

#### Section I. Transactions

A. If the proposed exemption is granted, effective August 25, 2000, the restrictions of sections 406(a) and 407(a) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the following transactions involving Trusts and Certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of Certificates in the initial issuance of Certificates between the Underwriter of the Certificates and an employee benefit plan when the SBA, the Fiscal Agent, the Selling Agent, the Central Servicing Agent, the Trustee, the Underwriter, or an Obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of Certificates by a plan in the secondary market for such Certificates; and

(3) The continued holding of Certificates acquired by a plan pursuant to subsection I.A.(1) or (2).

Notwithstanding the foregoing, Section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 of the Act for the acquisition or holding of a Certificate on behalf of an Excluded Plan, by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.<sup>4</sup>

B. If the proposed exemption is granted, effective August 25, 2000, the restrictions of section 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code, shall not apply to:

(1) The direct or indirect sale, exchange or transfer of Certificates in the initial issuance of Certificates between the Underwriter and a plan, when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the Certificates is (a) an Obligor with respect to 5 percent or less of the fair market value of the 504 Program Loans underlying the Debentures related to that Series of Certificates, or (b) an affiliate of a person described in (a); if

(i) The plan is not an Excluded Plan;

(ii) Solely in the case of an acquisition of Certificates in connection with the initial issuance of the Certificates, at

<sup>4</sup> Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 of the Act for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) of the Act and regulation 29 CFR section 2510.3-21(c).

least 50 percent of each Series of Certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group, and at least 50 percent of the aggregate interest in the Series is acquired by persons independent of the Restricted Group.

(iii) A plan's investment in each Series of Certificates does not exceed 25 percent of all of the Certificates of that Series outstanding at the time of the acquisition; and

(iv) Immediately after the acquisition of the Certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in Certificates representing an interest in a Trust containing assets sold or serviced by the same entity.<sup>5</sup> For purposes of this subparagraph (iv) only, an entity will not be considered to service assets contained in a Trust if it is merely a subservicer of that Trust.

(2) The direct or indirect acquisition or disposition of Certificates by a plan described in paragraph B.(1) in the secondary market for such Certificates, provided that conditions set forth in paragraphs B.(1)(i), (iii) and (iv) are met; and

(3) The continued holding of Certificates acquired by a plan pursuant to subsection I.B.(1) or (2).

C. If the proposed exemption is granted, effective August 25, 2000, the restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a Trust, provided:

(1) Such transactions are carried out in accordance with the terms of a binding Trust Agreement; and

(2) The Trust Agreement is provided to, or described in all material respects in the offering circular or other disclosure document provided to the investing plans before they purchase Certificates issued by the Trust.<sup>6</sup>

<sup>5</sup> For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

<sup>6</sup> The offering circular or other disclosure document must contain substantially the same information that would be disclosed in a prospectus if the offering of the Certificates were made in a registered public offering under the Securities Act

D. If the proposed exemption is granted, effective August 25, 2000, the restrictions of sections 406(a) and 407(a) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any transaction to which those restrictions or sanctions would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H), or (I) of the Act or section 4975(e)(2)(F), (G), (H), (I) of the Code), solely because of the plan's ownership of Certificates.

### Section II. Conditions

The relief provided under Section I is available only if the following conditions are met:

A. The acquisition of Certificates by a plan is on terms (including the Certificate price) that are at least as favorable to the plan as such terms would be in an arm's-length transaction with an unrelated party;

B. The rights and interests evidenced by the Certificates are not subordinated to the rights and interests evidenced by other Certificates in the same Series;

C. The Certificates and Debentures are guaranteed as to the timely payment of principal and interest by the SBA, and are therefore backed by the full faith and credit of the United States;

D. The Trustee is not an affiliate of any other member of the Restricted Group.

### Section III. Definitions

For purposes of this exemption:

A. "Certificate" means a certificate:

(1) That represents a beneficial ownership interest in a discrete pool of Debentures and all payments thereon, held in Trust by the Trustee pursuant to the Trust Agreement;

(2) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the discrete pool of Debentures held as part of such Trust; and

(3) That is issued by the Trustee as agent for the SBA and guaranteed by the SBA as to timely payment of principal and interest pursuant to section 505 of the Small Business Investment Act of 1958, as amended (the Small Business Investment Act).

B. "Trust" means the trust created pursuant to the Trust Agreement, under which, with respect to each Series of Certificates, the Trustee holds in Trust for the benefit of the certificate holders of the Series the following property:

(1) The discrete pool of Debentures related to the Series;

(2) A debenture guarantee agreement executed by the SBA pursuant to section 503 of the Small Business Investment Act pursuant to which the SBA guarantees timely payment of principal and interest on the Debentures related to the Series; and

(3) The certificate account maintained by the Central Servicing Agent for such Series into which the Central Servicing Agent deposits payments due in respect of the Debentures on each semiannual debenture payment date.

C. "Debentures" means debentures issued by a certified development company and guaranteed as to timely payment of principal and interest by the SBA pursuant to section 503 of the Small Business Investment Act.

D. "504 Program Loans" means loans made by a certified development company to a small business concern and funded with the proceeds of a Debenture pursuant to section 503 of the Small Business Investment Act.

E. "SBA" refers to the U.S. Small Business Administration.

F. "Underwriter" means an entity which has received an individual prohibited transaction exemption from the Department that provides relief for the operation of asset pool investment trusts that issue "asset-backed" pass-through securities to plans, that is similar in format and structure to this exemption (the Underwriter Exemptions);<sup>7</sup> any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such entity; and any member of an underwriting syndicate or selling group of which such firm or person described above is a manager or co-manager with respect to the Certificates.

G. "Fiscal Agent" means the entity that has contracted with the SBA to assess the financial markets, arrange for the production of required documents, and monitor the performance of the Trustee and the Underwriter.

H. "Selling Agent" means the entity appointed by a certified development company to select Underwriters, negotiate the terms and conditions of Debenture offerings with the

Underwriters, and direct and coordinate Debenture sales.

I. "Central Servicing Agent" means the entity that has entered into a master servicing agreement with the SBA to support the orderly flow of funds among borrowers, certified development companies and the SBA.

J. "Trustee" means an entity that is the trustee of the Trust.

K. "Obligor" means any person that is obligated to make payments under a Section 504 Loan related to a Debenture contained in the Trust.

L. "Excluded Plan" means any employee benefit plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

M. "Restricted Group" with respect to a class of Certificates means:

- (1) Each Underwriter;
- (2) The Fiscal Agent;
- (3) The Selling Agent;
- (4) The Trustee;
- (5) The Central Servicing Agent;
- (6) Any Obligor with respect to loans

relating to Debentures included in the Trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the Trust, determined on the date of the initial issuance of Certificates by the Trust;

- (7) The SBA; or
- (8) Any affiliate of a person described in (1)-(7) above.

N. "Affiliate" of another person includes:

(1) Any person, directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), brother, sister, or spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

O. "Control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

P. A person will be "independent" of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary that has investment management authority or renders investment advice with respect to assets of such person.

Q. "Sale" includes the entrance into a Forward Delivery Commitment, provided:

(1) The terms of the Forward Delivery Commitment (including any fee paid to

of 1933. In the Department's view, the offering circular or other disclosure document must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

<sup>7</sup> For a listing of the Underwriter Exemptions, see the description provided in footnote 1 of Prohibited Transaction Exemption 2000-58 (65 FR 67765, November 13, 2000).

the investing plan) are no less favorable to the plan than they would be in an arm's-length transaction with an unrelated party;

(2) The offering circular or other disclosure document is provided to an investing plan prior to the time the plan enters into the Forward Delivery Commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to Sales are met.

R. "Forward Delivery Commitment" means a contract for the purchase or sale of one or more Certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the Certificates) and optional contracts (which give one party the right but not the obligation to deliver Certificates to, or demand delivery of Certificates from, the other party).

S. "Trust Agreement" means that trust agreement by and among the SBA, the Fiscal Agent and the Trustee, as amended, establishing the Trust and, with respect to each Series of Certificates, the supplement to the trust agreement pertaining to such Series.

T. "Series" means any particular series of Certificates issued pursuant to the Trust Agreement that, in the aggregate, represent the entire beneficial interest in a discrete pool of Debentures held by the Trustee pursuant to the Trust Agreement.

#### *Summary of Facts and Representations*

1. The Small Business Administration (the SBA) is an agency established on July 30, 1953, pursuant to the Small Business Act. It is under the general direction and supervision of the President of the United States, and is not within or affiliated with any other agency or department of the federal government. The SBA was created to further Congressional policy that the government should aid, counsel, assist and protect the interests of small businesses to preserve free competitive enterprise and strengthen the country's economy.

The SBA was authorized by the Small Business Investment Act to establish a program (the 504 program) to provide financing to small businesses for projects that further one or more economic development objectives and meet certain eligibility criteria specified in the 504 program regulations. The 504 program is intended to foster economic development, create or preserve job opportunities, and stimulate growth of small businesses.

2. Under the 504 program, financing is provided to small businesses by

certified development companies (CDCs). A CDC is generally a not-for-profit corporation or limited liability company that has been certified by the SBA, although a CDC certified by the SBA before January 1, 1987 may be a for-profit corporation. Each CDC must serve a designated area of operations identified by the CDC and approved by the SBA; there also may be one statewide CDC in a state, responsible for fostering economic development throughout the state and for providing loans under the 504 program in areas not adequately served by other CDCs. SBA regulations prescribe the number of members and the interests that must be represented by the members, the composition and activities of the board of directors and the staffing requirements of the CDC. They also impose an application process for certification as a CDC, including a public notice and comment period, and a probationary period.

In addition to marketing the 504 program, a CDC may furnish other financial and technical assistance to small businesses, or may assist them in obtaining such assistance. A CDC must generate at least two 504 program loan approvals every fiscal year, and its loan portfolio must meet certain standards of job creation or job preservation prescribed in regulations. CDCs submit annual and interim reports, as well as other information, to the SBA.

3. A small business applies for 504 program assistance to the CDC serving the area in which the project is located. If the SBA approves the project, permanent financing is arranged generally consisting of at least a 10% contribution from the small business; a loan from the CDC for up to 40% of the project costs and certain administrative costs, collateralized by a second lien on the project property; and a private sector loan for the balance, collateralized by a first lien on the project property. The minimum contribution from the small business is 15% if the borrower has operated for two years or less or if the project involves a limited or single purpose building or structure and is 20% if both conditions are met. Interim financing for everything except the borrower's contribution is often obtained from the private sector lender that will participate in the permanent financing.

The CDC's contribution to the project financing is raised by the CDC's issuance of a debenture. Under authority granted in 15 U.S.C. 697(a), the SBA guarantees the timely payment of all principal and interest as scheduled on this debenture; the full faith and credit of the United States is

pledged to the payment of these guaranteed amounts.<sup>8</sup>

4. The term of both the underlying loan and the debenture is either 10 or 20 years. The interest rate of the loan and of the debenture are set by the SBA and approved by the Secretary of the Treasury. The loan underlying the debenture is generally for a minimum of \$50,000, although it may, for good cause shown, be as small as \$25,000. The total 504 program assistance to a borrower and its affiliates may not exceed \$750,000 (or \$1,000,000 in the case of projects meeting certain public policy goals). The amount of the underlying note and of the debenture equals the amount of the underlying loan plus administrative costs, including the SBA guarantee fee, a funding fee to cover the cost of the public issuance of securities and the trustee, the CDC processing fee, closing costs, and the underwriter's fee.

The underlying loan is secured by a junior lien on project property, which is comprised of one or more long term fixed assets, such as land, buildings, machinery, and equipment, acquired or improved with 504 program financing for use in business operations. The debentures are not secured. In its discretion, the SBA may permit a debenture to be subordinated to other obligations of the CDC, but not to debt incurred by the CDC to obtain funds to loan to the borrower to be used as the borrower's contribution to the project financing.

An event of default under the 504 program note may require automatic acceleration or may permit forbearance of acceleration while a cure is attempted, depending upon the terms of the note. Automatic acceleration may be required upon the appointment of a receiver or liquidator for the borrower, the filing of a petition by or against the borrower under federal or state bankruptcy or insolvency law, the making of an assignment for the benefit of the borrower's creditors, or the failure by the borrower to comply with certain SBA regulations; however, the SBA may postpone acceleration if the SBA determines that timely payment is likely in the future. In the case of discretionary defaults, the SBA's policy is to seek to resolve the default, while making scheduled payments on the related debenture pursuant to its guarantee. If

<sup>8</sup> A small percentage of debentures are issued to fund the acquisition of property by a CDC that the CDC then leases to a small business concern. The lease payments are structured so as to be sufficient to service and retire the debenture. In the event of an automatic event of default on a lease, the lease may be terminated, but the SBA is not required to accelerate the related debenture so long as the CDC or the SBA continues to pay principal and interest when due on the debenture.

the note is accelerated, the debenture that funded it is automatically accelerated, and the SBA pays 100% of the principal balance, plus interest to the payment date, pursuant to its guarantee. The SBA generally recovers its guarantee payments from the CDC, although, except in the case of fraud, negligence, or misrepresentation by the CDC, its recovery is limited to the amount the CDC has received on the loan and to the collateral.

If the 504 program loan is prepaid, the corresponding debenture is prepaid with interest and any applicable premium. If the debenture is in a pool, as discussed below, the investors in the pool are paid pro rata, and the SBA's guarantee of the pool is proportionately reduced. If the entire pool is prepaid, the SBA may redeem the certificates backed by the pool. The payment of any prepayment premium to the trustee is not subject to the SBA guarantee, although the distribution of any prepayment premium is guaranteed. Recovery of any acquisition premium paid by an investor to acquire a participation certificate in the secondary market also is not guaranteed.

5. The debentures are issued under section 503 of the Small Business Investment Act, added in 1980 by P.L. 96-302. Until June 1989, the debentures were usually sold to the Federal Financing Bank, an instrumentality of the United States under the general supervision of the Secretary of the Treasury. However, in 1986, section 505, authorizing the creation of trusts that consist solely of guaranteed debentures and that issue certificates guaranteed by the SBA as to timely payment of principal and interest, was added to the Small Business Investment Act by Public Law 99-272.

Each debenture bears interest at a stated fixed rate per annum, and is a self-amortizing debt instrument calling for level payments of principal and interest at semiannual intervals over its term to maturity. A debenture may be prepaid in whole, but not in part, on any semiannual payment date for a specified prepayment price. The prepayment price may include a premium over the outstanding principal amount of the debenture. The premium declines with the passage of time and is eliminated after one-half of the stated term to maturity for the debenture has elapsed.

A selling agent for the CDCs agrees to sell a specified amount of SBA-guaranteed debentures (the debenture pool) to the underwriters under a Debenture Purchase, Pooling and Exchange Agreement. All debentures within a debenture pool have identical

stated interest rates, payment dates, and terms to maturity. The underwriters assign the debenture pool to the trustee in exchange for participation certificates.

The trustee issues the participation certificates as a series of the trust established by the 1986 trust agreement, as amended, pursuant to a supplement to the trust agreement. The supplement sets out the payment terms for the debentures and certificates. Each series of certificates relates to a discrete debenture pool and is issued pursuant to a discrete supplement to the trust agreement.

Each certificate represents an undivided beneficial ownership interest in each debenture in the related debenture pool and is entitled to a ratable share of all payments made on each debenture in that debenture pool. Thus, the interest rate, payment terms, and maturity date of a certificate will correspond to those of the debentures in the related pool.

With respect to each series of certificates, the certificates and the debentures in the related debenture pool are issued simultaneously. Each debenture pool is closed upon the simultaneous issuance of the series of certificates and the related debentures. The trust does not hold any assets that are not associated with a particular series.

Certificates issued under this program have a term of 10 or 20 years, must have a face value of at least \$25,000, and are issued in registered form and transferred only by entry on the central registry maintained by the trustee. The statute and regulations governing the 504 program do not provide for issuance of subordinated certificates.

The SBA agrees to issue its guarantee on the certificates. The Department of the Treasury approves the negotiated sale price and coupon on the certificates. The underwriters sell the certificates to investors and the proceeds, less an underwriting commission, are distributed to the CDC's selling agent, acting through a servicing agent, which transfers the funds to the CDC to fund the 504 program loans.

The certificates are not rated by a rating agency because of the SBA guarantee, which applies to both the certificates and the debentures that serve as collateral for the certificates, and which is backed by the full faith and credit of the United States. Because of this guarantee, the Applicant represents that the only risks to an investor in the participation certificates are the risk that prepayment of the certificate may affect its yield, and the

de minimis risk that the United States, acting through the SBA, may default on its obligation.

Participation certificates issued under the 504 program will prepay if any debenture included in the related pool (1) is accelerated or terminated in connection with an event of default under the related 504 program note or notes or (2) is prepaid at the option of the related CDC, usually in connection with the prepayment of the related 504 program note or notes. Each offering circular for the participation certificates contains tables which disclose prepayment experience for the debentures in connection with accelerations and prepayments since the second half of 1986.

The acquisition of certificates by employee benefit plans will be on terms (including the certificate price) that are at least as favorable to the plan as such terms would be in an arm's-length transaction with an unrelated party.

7. As of February 16, 2000, there had been 161 issues of 20-year certificates and 65 issues of 10-year certificates. Offerings of 20-year certificates have been made monthly since November 1986, and the aggregate amount of such certificates sold as of February 16, 2000 was \$10,453,821,000. Ten-year certificates were first offered in December 1986; they were offered quarterly from January 1987 until January 1995, and have been offered bi-monthly since January 1995; the aggregate amount of such certificates sold as of February 16, 2000 was \$558,669,000.

8. Regulations issued under the Small Business Investment Act require the SBA and CDC to appoint a selling agent to select underwriters, negotiate the terms of debenture offerings with the underwriters, and direct and coordinate debenture sales; regulations likewise require the appointment of a fiscal agent to assess the financial markets, arrange for the production of documents required for offering certificates, and monitor the performance of the trustee and the underwriters. Development Company Funding Corporation (DCFC) has been appointed as fiscal agent for the SBA under a Fiscal Agency Agreement with the SBA dated as of August 12, 1999 (superseding agreements dated as of December 1, 1986 and September 30, 1988) and as selling agent for CDCs that issue debentures which DCFC sells to underwriters pursuant to a Selling Agency Agreement with the SBA dated as of August 12, 1999 (superseding agreements dated as of December 1, 1986 and September 30, 1988). DCFC is a District of Columbia not-for-profit

corporation that was created to facilitate 504 program transactions. DCFC shares some of its facilities and staff with the National Association of Development Companies, a not-for-profit trade organization. It is paid by the SBA for its services as fiscal agent, and is paid its necessary expenses for staff and overhead, net of other income, by the SBA for its services as selling agent. Payments to DCFC of its fees as fiscal agent and selling agent are made from the master reserve account, described below.

9. The regulations provide for the designation by the SBA of a central servicing agent to support the orderly flow of funds among the borrowers, CDCs and SBA. SBA has engaged Colson Services Corp. (Colson) to act as central servicing agent, receiving and disbursing funds wired by the underwriters, and servicing payments on the debentures. Colson collects a monthly servicing fee from the borrower of each 504 program loan.

Colson was awarded the contract to act as central servicing agent through a competitive bidding process. Colson is required by regulation to provide a fidelity bond or insurance in an amount that fully protects the government, and the master servicing agreement between Colson and the SBA requires that Colson carry a fidelity bond or similar insurance in an amount commensurate with the level of funds in its possession, but not less than \$10 million. In addition, the master servicing agreement requires Colson to maintain a standard Banker's Blanket Bond insurance policy in an amount "customary and sufficient" to protect against loss caused by actions of Colson, its employees or agents.

10. The master servicing agreement requires Colson to maintain certain accounts to hold funds that are in Colson's custody in connection with the 504 program. The master servicing agreement specifies the accounts to be maintained and the payments to be made, and imposes timing and other performance requirements. Colson maintains accounts required under the master servicing agreement at J.P. Morgan Chase & Co., which recently purchased Colson. The master servicing agreement limits the investment of funds in these accounts to debt obligations issued or guaranteed by the U.S. government and money market funds that hold these types of investments. Investment earnings are sufficient to pay the trustee and investment management fees charged in connection with the account, and a fee to Colson for record-keeping services that Colson provides for the accounts.

Investment earnings in excess of these fees are disbursed semiannually to the CDCs.

Colson maintains a master reserve account through which all funds related to the 504 program loans and the debentures flow. The master reserve account is funded by the guarantee fee and a funding fee collected from the borrower of a 504 program loan, and by principal and interest payments on 504 program loans. Interest on loan payments that accrues in the account between the date of receipt of each monthly payment and its disbursement by the trustee to certificateholders must be paid by Colson to the CDC servicing the loan, at the direction of the SBA.

The master servicing agreement requires Colson to deliver periodic status reports to the SBA, and requires independent audits of Colson's financial statements and operations each year. It also provides for a contracting officer to administer the contract on behalf of SBA and for a contracting officer's technical representative to monitor all technical aspects of and to assist in administering the contract. SBA and its authorized representatives have the right of access and inspection of Colson's facilities and records relating to the operations of the 504 program. Colson may forfeit its right to its fees if, in the determination of the SBA, it has not submitted required reports or performed required services, unless the failure is beyond its control and without its fault. In addition, SBA may terminate the contract for default by Colson, including Colson's failure to perform its obligations in a timely manner, as well as Colson's insolvency or the filing of a petition in bankruptcy by or against Colson if the petition is not dismissed or withdrawn within 90 days.

11. The regulations also require appointment of a trustee to issue and transfer the certificates, maintain registries of the debentures and the certificates, hold the debentures for the benefit of the SBA and the certificateholders, receive payments on the debentures and disburse payments on the certificates. None of the administrative fees paid by the borrower (including the SBA guarantee fee, funding fee, the CDC processing fee, closing costs and the underwriter's fee) are paid out of the trust. The trustee, as holder of a debenture guarantee agreement with the SBA with respect to any pool of debentures, has the right to enforce the SBA's guarantee for the benefit of the holders of the certificates in the related series. Harris Trust Company of New York (Harris Trust) was appointed as trustee and entered into a trust agreement dated as of

December 1, 1986 with the SBA and with DCFC as fiscal agent. Effective May 8, 2000, The Bank of New York succeeded Harris Trust as trustee. Under the trust agreement, as amended, the trustee is compensated by the SBA from time to time as shall be agreed.

As a condition of the exemption, the trustee may not be an affiliate of the underwriter, fiscal agent, selling agent, central servicing agent, any obligor with respect to loans relating to debentures included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust (determined on the date of the initial issuance of certificates by the trust), the SBA, or any of their affiliates.

12. Each agent must provide a fidelity bond or insurance sufficient to fully protect the interest of the government, and must furnish the SBA with access to all books, records and other documents relating to SBA-guaranteed debentures.

13. In connection with the original issuance of participation certificates, an offering circular is furnished to all investors, including investing plans. The participation certificates are exempt from the requirements of the Securities Act of 1933 and the Securities Exchange Act of 1934. However, the SBA, like most other government agencies that issue certificates or debt securities, seeks to conform to market convention, and therefore complies, to the extent possible, with the disclosure requirements generally applicable to offerings of participation certificates. Therefore, the participation certificates are issued pursuant to offering circulars that, in general, contain:

(a) Information concerning the payment terms of the participation certificates, and any material risk factors with respect to the participation certificates;

(b) a description of the SBA guarantee;

(c) identification of the trustee;

(d) a description of the SBA 504 program and the debentures held by the trust;

(e) a description of the servicing arrangements set forth in the trust agreement, including a description of periodic statements that are provided to or made available to investors by the trustee;

(f) a description of the events that constitute events of default under the governing agreements and a description of the trustee's and the investors' remedies incident thereto;

(g) a general discussion of the principal Federal income tax consequences of the purchase,



ownership and disposition of the participation certificates by a typical investor;

(h) a description of the underwriters' or placement agents' plan for distributing the participation certificates to investors; and

(i) information about the scope and nature of the secondary market, if any, for the participation certificates. Reports indicating the amount of payments of principal and interest are provided to investors as frequently as distributions are made to investors.

No information about the characteristics of the borrowers of the underlying collateral is included; investors generally evaluate the credit quality of the collateral solely on the basis of the SBA's full faith and credit guarantee.

Under the authorizing legislation, the SBA must require disclosure by a seller, prior to any sale, of "information on the terms, conditions, and yield" of the participation certificates; regulations add the requirement to provide information on the premium and any other characteristics not guaranteed by the SBA. (15 U.S.C. 697b(f)(1)(C), 13 CFR 120.941.) Thus, each seller, whether in the initial offering or the secondary market, must inform its purchaser of the economic terms and risks of the investment, as modified by the price at which each sale is made.

14. The underwriters are permitted, but not required, to engage in certain transactions that may stabilize the price of the participation certificates. In general, it is the policy of many underwriters to attempt to make a market for securities for which they are the lead or co-managing underwriter.

15. The participation certificates are generally priced at a spread above the interest rate on Treasury notes of comparable maturity. The spread reflects the risk of prepayment. Historically, the spread has been similar to that of certain comparable guaranteed governmental mortgage-backed securities.

16. The Applicant represents that the participation certificates are an extremely high-quality investment, benefitting from an SBA guarantee, backed by the full faith and credit of the United States, on both the certificates and on the debentures that constitute the collateral for the certificates. The certificates are acceptable as security for the deposit of public moneys subject to the control of the United States, and as collateral for Treasury Tax and Loan Accounts. National banks, and, if permitted by state law, state banks that are members of the Federal Reserve System may deal in, underwrite and

purchase the certificates for their own account without limitation. The certificates are legal investments for federal savings and loan associations, federal savings banks, and federal credit unions. They are legal investments for surplus and reserve funds of Federal Home Loan Banks to the same extent as they are legal investments for fiduciary and trust funds under the laws of the state in which the Federal Home Loan Bank is located. In the discretion of each Federal Reserve Bank, they may be used as security for advances to depository institutions by Federal Reserve Banks. Under the laws of many states, they are legal for investment by savings banks, savings and loan associations, credit unions, insurance companies, trustees and other fiduciaries.

17. In summary, the Applicant represents that the proposed transactions will satisfy the statutory criteria of section 408(a) of the Act because:

(a) The decision to acquire certificates will be made by a plan fiduciary after receipt of full and detailed disclosure of all material features of the trust and the certificates, including all applicable fees and charges.

(b) The transactions may easily be audited by a plan fiduciary and all the records necessary to review the transactions will be kept for six years. No further review by the Department is required.

(c) The debentures and the certificates are guaranteed as to principal and interest by the United States of America.

(d) Each series of certificates relates to a discrete debenture pool, which pool is closed upon the simultaneous issuance of the series of certificates and the related debentures. The trust does not hold any assets that are not associated with a particular series.

(e) All actions by the SBA, the fiscal agent and the trustee with respect to the trust, the assets of the trust, the certificates and certificateholders will be governed by the trust agreement, which will be available to plan fiduciaries for their review prior the plan's investment in certificates.

#### *Notice to Interested Persons*

The Applicant represents that because those potentially interested participants and beneficiaries cannot all be identified, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than 45 days from the date of

publication of this notice of proposed exemption in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Karen Lloyd of the Department, telephone (202) 219-8194. (This is not a toll-free number.)

**J.P. Morgan Chase & Co. (Morgan Chase) and its Affiliates (Collectively, the Applicants) Located in New York, New York**

[Application Number D-10998]

#### *Proposed Exemption*

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).<sup>9</sup>

#### Section I. Covered 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 to: (1) The proposed purchase or sale by employee benefit plans (the Plans), other than Plans sponsored and maintained by the Applicants, of publicly-traded debt securities (the Debt Securities) issued by the Applicants; and (2) the extension of credit by the Plans to the Applicants in connection with the holding of the Debt Securities.

This proposed exemption is subject to the general conditions that are set forth below in Section II.

#### Section II. General Conditions

(a) The Debt Securities are made available by the Applicants in the ordinary course of their business to Plans as well as to customers which are not Plans.

(b) The decision to invest in the Debt Securities is made by a Plan fiduciary (the Independent Plan Fiduciary) or a participant in a Plan that provides for participant-directed investments (the Plan Participant), which is independent of the Applicants.

(c) The Applicants do not have any discretionary authority or control or provide any investment advice, within the meaning of 29 CFR 2510.3-21(c), with respect to the Plan assets involved in the transactions.

(d) The Plans pay no fees or commissions to the Applicants in

<sup>9</sup>For purposes of this exemption, references to Title I of the Act, unless otherwise noted herein, refer also to corresponding provisions of the Code.

connection with the transactions covered by the requested exemption, other than the mark-up for a principal transaction permissible under Part II of Prohibited Transaction Class Exemption (PTCE) 75-1 (40 FR 50845, October 31, 1975).<sup>10</sup>

(e) The Applicants agree to notify Plan investors in the prospectus (the Prospectus) for the Debt Securities that, at the time of acquisition, no more than 15 percent of a Plan's assets should be invested in any of the Debt Securities.

(f) The Debt Securities do not have a duration which exceeds 9 years from the date of issuance.

(g) Prior to a Plan's acquisition of any of the Debt Securities, the Applicants fully disclose, in the Prospectus, to the Independent Plan Fiduciary or Plan Participant, all of the terms and conditions of such Debt Securities, including, but not limited to, the following:

(1) A statement to the effect that the return calculated for the Debt Securities will be denominated in U.S. dollars;

(2) The specified index (the Index) or Indexes on which the rate of return on the Debt Securities is based;

(3) A numerical example, designed to be understood by the average investor, which explains the calculation of the return on the Debt Securities at maturity and reflects, among other things, (i) a hypothetical initial value and closing value of the applicable Index, and (ii) the effect of any adjustment factor on the percentage change in the applicable Index;

(4) The date on which the Debt Securities are issued;

(5) The date on which the Debt Securities will mature and the conditions of such maturity;

(6) The initial date on which the value of the Index is calculated;

(7) Any adjustment factor or other numerical methodology that would affect the rate of return, if applicable;

(8) The ending date on which interest is determined, calculated and paid;

(9) Information relating to the calculation of payments of principal and interest, including a representation to the effect that, at maturity, the beneficial owner of the Debt Securities is entitled to receive the entire principal amount, plus an amount derived directly from the growth in the Index (but in no event less than zero);

(10) All details regarding the methodology for measuring performance;

(11) The terms under which the Debt Securities may be redeemed;

(12) The exchange or market where the Debt Securities are traded or maintained; and

(13) Copies of the proposed and final exemptions relating to the exemptive relief provided herein, upon request.

(h) The terms of a Plan's investment in the Debt Securities are at least as favorable to the Plan as those available to an unrelated non-Plan investor in a comparable arm's length transaction at the time of such acquisition.

(i) In the event the Debt Securities are delisted from any nationally-recognized securities exchange, the Applicants will apply for trading through the National Association of Securities Dealers Automated Quotations System (NASDAQ), which requires that there be independent market-makers establishing a market for such securities in addition to the Applicants. If there are no independent market-makers, the exemption will no longer be considered effective.

(j) The Debt Securities are rated in one of the three highest generic rating categories by at least one nationally-recognized statistical rating service at the time of their acquisition.

(k) The rate of return for the Debt Securities is objectively determined and, following issuance, the Applicants retain no authority to affect the determination of the return for such security, other than in connection with a "market disruption event" (the Market Disruption Event) that is described in the Prospectus for the Debt Securities.

(l) The Debt Securities are based on an Index that is—

(1) Created and maintained<sup>11</sup> by an entity that is unrelated to the Applicants and is a standardized and generally-accepted Index of securities; or

(2) Created by the Applicants, but maintained by an entity that is unrelated to the Applicants,

(i) Consists either of standardized and generally-accepted Indexes or an Index comprised of publicly-traded securities that are not issued by the Applicants, are designated in advance and listed in the Prospectus for the Debt Securities (Under either circumstance, the Applicants may not unilaterally modify the composition of the Index, including the methodology comprising the rate of return.);

(ii) Meets the requirements for an Index in Rule 19b-4 (Rule 19b-4) under the Securities Exchange Act of 1934 (the 1934 Securities Act), and

(iii) The index value (the Index Value) for the Index is publicly-disseminated through an independent pricing service, such as Reuters Group, PLC (Reuters) or Bloomberg L.P. (Bloomberg), or through a national securities exchange.

(m) The Applicants do not trade in any way intended to affect the value of the Debt Securities through holding or trading in the securities which comprise an Index.

(n) The Applicants maintain, for a period of six years, the records necessary to enable the persons described in paragraph (o) of this section to determine whether the conditions of this proposed 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 the Applicants, the records are lost or destroyed prior to the end of the six year period; and

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

(o)(1) Except as provided in section (o)(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 (n) are unconditionally available at their customary location during normal business hours by:

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

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

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

(D) Any Plan Participant or beneficiary of any participating Plan, or any duly authorized representative of such Plan Participant or beneficiary.

(o)(2) None of the persons described above in subparagraphs (B)–(D) of paragraph (o)(1) are authorized to examine the trade secrets of the Applicants or commercial or financial information which is privileged or confidential.

<sup>10</sup> The Department is providing no opinion herein as to whether any principal transactions involving debt securities would be covered by PTCE 75-1, or whether any particular mark-up by a broker-dealer for such transaction would be permissible under Part II of PTCE 75-1.

<sup>11</sup> For purposes of this exemption, the term "maintain" means that all calculations relating to the securities in the Index, as well as the rate of return of the Index, are made by an entity that is unrelated to the Applicants.

### Summary of Facts and Representations

1. Morgan Chase is a financial holding company incorporated under Delaware law in 1968 and headquartered in New York City. As of December 31, 2000, after giving effect to the merger described below, Morgan Chase was the second largest banking institution in the United States, with approximately \$715 billion in assets and approximately \$42 billion in stockholders' equity. On December 31, 2000, J.P. Morgan & Co. Incorporated merged with and into The Chase Manhattan Corporation. Upon completion of the merger, its name was changed to "J.P. Morgan Chase & Co." (i.e., Morgan Chase). The merger was accounted for as a pooling of interests. Morgan Chase is a global financial services firm with operations in over 60 countries, and has as its principal bank subsidiaries: The Chase Manhattan Bank (Chase Bank) and Morgan Guaranty Trust Company of New York (Morgan Guaranty), each of which is a New York banking corporation headquartered in New York City; and Chase Manhattan Bank USA, National Association, headquartered in Delaware. The principal non-bank subsidiary of Morgan Chase is its investment bank subsidiary, J.P. Morgan Securities Inc. (J.P. Morgan Securities). Chase Bank is expected to merge with Morgan Guaranty in late 2001.

2. The activities of Morgan Chase will be internally organized, for management reporting purposes, into five major businesses:

- Investment Banking, which includes securities underwriting financial advisory, trading, mergers and acquisitions advisory, and corporate lending and syndication businesses;

- Investment Management and Private Banking, which includes an asset management business, including mutual funds; institutional money management and cash management businesses; and a private bank, which provides wealth management solutions for a global client base of high net worth individuals and families;

- Treasury and Securities Services, which provides information and transaction processing services, and moves trillions of dollars daily in securities and cash for its wholesale clients. Treasury and Securities Services includes custody, cash management, trust and other fiduciary service businesses;

- J.P. Morgan Partners, which is one of the world's largest and most diversified private equity investment firms, with total funds under management in excess of \$20 billion; and

- Retail and Middle Market Banking, which serves over 30 million consumers, small business and middle-market customers nationwide. Retail and Middle Market Banking offers a wide variety of financial products and services, including customer banking, credit cards, mortgage services and consumer finance services, through a diverse array of distribution channels, including the internet and branch and ATM networks.

3. The Plans will consist of employee benefit plans that are covered under the provisions of Title I of the Act, as amended, and/or subject to section 4975 of the Code. For purposes of this proposed exemption, the Plans will not consist of plans that are sponsored and maintained by the Applicants for their own employees. In the case of the Applicants' in-house plans, Morgan Chase represents that the acquisition and holding of the Debt Securities by such plans would be covered under the statutory exemption that is provided under section 408(e) of the Act.<sup>12</sup>

4. The Applicants represent that broker-dealers routinely need additional capital in order to maintain inventories of securities for their market-making and other business activities. As a result, the Applicants maintain a continuous need to borrow funds from various institutional and individual investors for use in their business operations. In response to this need, certain of the Applicants may from time to time issue (the Issuers) various high-quality, publicly-offered debt securities (i.e., the Debt Securities), rated in one of the three highest generic rating categories by nationally recognized rating firms, offering varying levels of risk and potential return. Among the debt securities offered by the Applicants are publicly-offered, unsecured, SEC-registered Debt Securities, with terms that are no longer in duration than nine (9) years. The Debt Securities will be U.S. dollar-denominated so that no foreign currency conversions will be required in the calculation of the rate of return. Further, the Debt Securities will offer varying levels of risk and rates of return. The Debt Securities would be listed on at least one major stock exchange, and they would be issued in denominations of \$10 per principal

<sup>12</sup> The Department expresses no opinion herein on whether the acquisition and holding of the Debt Securities by the Applicants' in-house plans are covered under the provisions of section 408(e) of the Act. In this regard, interested persons should refer to the conditions contained in section 408(e), as well as the definitions of the terms "qualifying employer security" (see section 407(d)(5) of the Act) and "marketable obligations" (see section 407(e) of the Act).

unit, with the minimum purchase being one unit.

The Debt Securities may be offered on a variety of terms and formulas under which rates of return are objectively determined in accordance with certain Indexes by the calculation agent. A registered broker-dealer Applicant would act as calculation agent. The Applicants represent that since small Plans will likely invest in the Debt Securities, the formulas used to calculate the rates of return will be designed to be understood by the average investor and clearly described in the "plain English" summary of the Debt Securities in the Applicants' prospectus.

5. The Applicants represent that their activities are subject to various levels of oversight and regulation by the Securities and Exchange Commission (SEC), the Commodities Futures Trading Commission, and other federal and state regulatory agencies. The Applicants also represent that their activities are subject to the oversight of self-regulatory organizations such as the NYSE and the AMEX. The Applicants further represent that J.P. Morgan Securities, as a registered broker-dealer and member of the NYSE, is subject to the Net Capital Rule 15c3-1 of the 1934 Act, which specifies the minimum net capital requirement of a broker-dealer.

6. Due to the affiliation between an Issuer and J.P. Morgan Securities or its Affiliates, as a service provider to the Plans, the Applicants represent that they are likely to be parties in interest, as defined in section 3(14)(B) or (H) of the Act, with respect to a high percentage of Plans that purchase, sell, or hold these Debt Securities regardless of whether the Debt Securities are purchased directly from the Applicants.<sup>13</sup> Thus, the Applicants represent that an Issuer may be a party in interest to a Plan solely because of its affiliation with a service provider to the Plan, and as the counterparty to the Plan in a transaction where the Plan holds a Debt Security issued by an Affiliate. Further, other Affiliates may be service providers to Plans on account of their roles as trustees, custodians, investment advisors, or broker-dealers for such Plans. These relationships would make an Issuer a party in interest to those Plans and would create potential prohibited transactions in the event

<sup>13</sup> In this regard, the Applicants represent that PTCE 75-1 does not directly address transactions where, as here, there is a continuing extension of credit as a result of a sale to a plan by a broker-dealer of debt securities issued by the broker-dealer's affiliates.

such Plans acquire and hold the Debt Securities.<sup>14</sup>

The Applicants are requesting an administrative exemption to enable Plans to invest in the Debt Securities, under the terms and conditions described herein, and to avoid liability for prohibited transactions resulting from investment by Plans in the Debt Securities.

7. The Applicants believe that while Part II of PTCE 75-1 provides relief for principal transactions between a broker-dealer and a Plan, and would cover a purchase of the broker-dealer affiliates' securities by such Plans (if the conditions required therein were met), it is questionable whether that class exemption would cover the continuing extension of credit related to the holding of any Debt Securities by a Plan.<sup>15</sup>

The Applicants note that some independent Plan fiduciaries have expressed concern regarding the application of PTCE 75-1 to broker-dealer sales of broker-affiliated debt to Plans either as a part of an original issue of the securities or in the secondary market. Moreover, the Applicants

<sup>14</sup> In ERISA Advisory Opinion 88-09A (April 15, 1988), a bank that sponsored self-directed master and prototype IRAs requested an opinion from the Department as to whether purchases of stock issued by the parent corporation of the bank directly from such parent by the self-directed IRAs would violate section 4975 of the Code.

Section 4975 of the Code prohibits, in part, the sale or exchange of property between a plan and a disqualified person (4975(c)(1)(A)) and the use by or for the benefit of a disqualified person of the income or assets of a plan (4975(c)(1)(D)). Section 4975(e)(2) of the Code defines the term "disqualified person" to include a plan fiduciary and a person providing services to a plan.

ERISA Advisory Opinion 88-09A concluded that, although the bank is a disqualified person with respect to the IRAs by reason of the provision of services, the corporate parent of the bank is not a disqualified person with respect to the IRAs solely by reason of its ownership of the bank. In this regard, interested persons should contrast section 3(14)(H) of the Act with section 4975(e)(2)(H) of the Code. The question of whether the corporate parent is a disqualified person under any other provision of section 4975(e)(2) of the Code would require an examination of the particular facts and circumstances. The Advisory Opinion further concluded that, to the extent that the corporate parent is not a disqualified person with respect to the IRAs, purchases of stock from the parent by the bank on behalf of the IRAs, at the direction of the IRA participant, would not involve transactions described in section 4975(c)(1)(A) of the Code. However, while the corporate parent of such bank may not be a disqualified person with respect to the IRAs, purchases of parent stock by the IRAs would raise issues under section 4975(c)(1)(D) of the Code if a transaction was part of a broader overall agreement, arrangement or understanding designed to benefit disqualified persons.

<sup>15</sup> The Department is providing no opinion herein as to whether any principal transaction involving Debt Securities would be covered by PTCE 75-1, or whether any particular mark-up by a broker-dealer for such transaction would be permissible under Part II of PTCE 75-1.

represent that PTCE 96-23 (61 FR 15975, April 10, 1996)<sup>16</sup> is unavailable to participant-directed, defined contribution Plans and other small Plans because these Plans, due to their size, are unlikely to have INHAMs responsible for making investment decisions relating to the acquisition, holding and disposition of securities in which the Plans invest.

Similarly, the Applicants note that while PTCE 84-14<sup>17</sup> minimizes the risk of inadvertent prohibited transactions for Plans whose assets are managed by a QPAM, they believe it is unlikely that participant-directed, defined contribution Plans or small Plans would incur the expense of a QPAM for the purchase and continued holding of the Debt Securities. The Applicants also believe that the additional cost of a QPAM for a small Plan with a small investment would not be cost-effective. The Applicants further explain that this cost would be uneconomical here because the QPAM would be required to continue its services for the entire period during which the Debt Securities are held by the Plan since the potential prohibited transaction is not just a sale or exchange under section 406(a)(1)(A) of the Act, but is also an extension of credit under section 406(a)(1)(B) of the Act. Accordingly, the Applicants state that the absence of a QPAM would preclude small Plans from being able to purchase the Debt Securities without creating the risk of a prohibited transaction.

8. The Applicants propose to continue offering the Debt Securities to non-Plan investors and maintain that these investors will continue to constitute a substantial market for such securities. However, for each Plan investor, the Applicants represent that the terms of the Plan's investment in the Debt Securities will be at least as favorable to the Plan as those available to an unrelated non-Plan investor in a

<sup>16</sup> PTCE 96-23 permits various transactions involving employee benefit plans whose assets are managed by an in-house asset manager (the INHAM). An INHAM is an entity which is generally a subsidiary of an employer sponsoring the plan. It is also a registered investment adviser with management and control of total assets attributable to plans maintained by the employer and its affiliates which are in excess of \$50 million.

<sup>17</sup> PTCE 84-14 provides a class exemption for transactions between a party in interest with respect to an employee benefit plan and an investment fund (including either a single customer or pooled separate account) in which the plan has an interest, and which is managed by a qualified professional asset manager (the QPAM), provided certain conditions are met. QPAMs (e.g., banks, insurance companies, registered investment advisers with total client assets under management in excess of \$50 million) are considered to be experienced investment managers for plan investors that are aware of their fiduciary duties under the Act.

comparable arm's-length transaction at the time the Debt Securities are acquired by the Plan. Additionally, the Applicants represent that no Plan will pay the Applicants any fees or commissions in connection with transactions involving the Debt Securities, except for the mark-up for a principal transaction permitted under PTCE 75-1.

In addition to the aforementioned requirements, the Applicants represent that a Plan's investment in the Debt Securities will be restricted to those Plans for which the Applicants have no discretionary authority and do not provide investment advice with respect to the investment in the Debt Securities. In this regard, the decision to invest in the Debt Securities will be made by an Independent Plan Fiduciary or a Plan Participant, which is independent of the Applicants. Moreover, the Applicants represent that the Prospectus for each of the Debt Securities that are offered to the Plans will contain a recommendation that no more than 15 percent of a Plan's assets should be invested in the Debt Securities at the time such security is acquired by a Plan.<sup>18</sup>

9. The Debt Securities will be rated in one of the three highest generic rating categories by a nationally-recognized rating firm at the time of acquisition by a Plan. There will be no triggering events or early amortization events if the Applicants' credit rating drops below a certain level established by a rating agency. Throughout the term of any of the Debt Securities, the Plans will be able to access the latest bid and asked price quotations for all of the Applicants' Debt Securities by calling a broker or any electronic service with a recognized price quotation delivery system. If a Plan wishes to terminate any Debt Securities investment prior to maturity, such investor may do so by selling the Debt Security on the open market at the prevailing market price. However, the Issuer may not unilaterally terminate the Debt Securities prior to maturity unless the

<sup>18</sup> In this regard, the Applicants propose to include substantially the following statement in the Prospectus for each of the Debt Securities, under a heading entitled "Employer-Sponsored Plan Considerations":

These [Debt Securities] Securities are being sold to Plans pursuant to an exemption issued by the Department of Labor. In accordance with the terms of that exemption, the Issuer is required to inform such Plans that no more than 15 percent of plan (or individual participant) assets, at the time of acquisition, should be invested in the Debt Securities. Please note, however, that it is the responsibility of the person making the investment decision to determine whether the purchase is a prudent investment for the plan (or participant-directed account).

Debt Securities are callable at a specific price which will be disclosed in the Prospectus. Assuming the Debt Securities are callable, the Applicants represent that there will be no loss of principal.

10. The rate of return for the Debt Securities may be fixed or variable. The prospectus or prospectus supplement covering the Debt Securities would set forth the annual interest rate for fixed rate Securities, and, for variable rate Securities, the formula to be applied to determine the interest payable at maturity. The formula will include identification of the specified Index for the Debt Securities. Such Index may be either (a) created and maintained by an entity that is unrelated to the Applicants or (b) created by the Applicants, but maintained by an unrelated entity.

(a) *Index Created and Maintained by an Entity Unrelated to the Applicants.* This Index, which will be created by an entity that is unrelated to the Applicants, will consist of a standardized and generally-accepted index of securities, such as the Nikkei 225 Index Tokyo Stock Exchange or the Standard & Poor's 500 Index. In addition, this Index will be maintained by such unrelated entity. In other words, all calculations relating to the securities in the Index, as well as the rate of return of the Index, will be made by an entity other than the Applicants.

(b) *Index Created by the Applicants, but Maintained by an Unrelated Entity.* This Index will be created by the Applicants. However, it must be maintained by an entity that is unrelated to the Applicants, such as the stock exchange on which the Debt Security is listed. In addition, the Index will consist either of standardized and generally-accepted Indexes or it will be an Index comprised of publicly-traded securities that are not issued by the Applicants, are designated in advance and listed in the Prospectus for the Debt Securities. Under either circumstance, the Applicants will not be permitted to make any modifications to the composition of the Index, including the methodology comprising the rate of return, unilaterally.

Further, the Index will meet the requirements for an Index in accordance with Rule 19b-4 of the 1934 Securities Act, which imposes regulatory standards on the entity maintaining the Index. Under Rule 19b-4, a self-regulatory organization, such as a securities exchange, is required to adopt trading rules, procedures and listing standards for the product classes relating to any security that the exchange proposes to list. In addition, the self-regulatory organization must

maintain a surveillance program for a class of securities. If the SEC has not approved the self-regulatory organization's rules, procedures and standards, the self-regulatory organization must make a filing with the SEC prior to listing the security. According to the Applicants, this procedure provides adequate safeguards so that any Debt Securities that are created by the Applicants will meet the listing and trading standards approved by the self-regulatory organization.

Finally, the Index Value of the Index will be publicly-disseminated through an independent pricing service, such as Reuters or Bloomberg, or through a national securities exchange.

11. Price quotations with respect to the Debt Securities will be available on a daily basis from market reporting services, such as Bloomberg or Reuters, and the daily financial press, such as The Wall Street Journal. In the event the Debt Securities are delisted, the Issuer(s) will apply for trading through the NASDAQ, which requires that there be independent market-makers establishing a market for the securities in addition to the Issuer(s). In the event there are no independent market-makers, the Applicants represent that the exemption will no longer be considered effective.

12. The terms of each of the Debt Securities will be set forth with specificity. Therefore, in addition to the description of the formula for computing the rate of return, the Prospectus will include, but will not be limited to, the following information:

- A statement to the effect that the return calculated for the Debt Securities will be denominated in U.S. dollars;
- The specified Index or Indexes on which the rate of return on the Debt Securities is based;
- A numerical example, designed to be understood by the average investor, which explains the calculation of the return on the Debt Securities at maturity and reflects, among other things, (i) a hypothetical initial value and closing value of the applicable Index, and (ii) the effect of any adjustment factor on the percentage change in the applicable Index;
- The date on which the Debt Securities will be issued;
- The date on which the Debt Securities will mature and the conditions of such maturity;
- The initial date on which the value of the Index is calculated;
- Any adjustment factor or other numerical methodology that would affect the rate of return, if applicable;
- The ending date on which interest will be determined, calculated and paid;

- Information relating to the calculation of payments of principal and interest, including a representation to the effect that, at maturity, the beneficial owner of the Debt Securities will be entitled to receive the entire principal amount, plus an amount derived directly from the growth in the Index (but in no event less than zero);

- All details regarding the methodology for measuring performance;
- The terms under which the Debt Securities may be redeemed;
- The exchange or market where the Debt Securities are traded or maintained; and
- Copies of the proposed and final exemptions relating to the exemptive relief provided herein, upon request.

Aside from the Prospectus, the Applicants do not contemplate making any ongoing communications to the investors in the Debt Securities except to the extent required under applicable securities laws.

13. With respect to variable rate Debt Securities, the Applicants represent that the interest rate will be objectively determined. Where any of the Applicants acts as "Calculation Agent" for determining applicable rates of return, such calculation will be made using a formula fully disclosed in the prospectus or prospectus supplement relating to the Debt Security. Following the issuance of such Debt Security, the Applicants will retain no authority to affect the determination of such interest rate absent a Market Disruption Event. The determination that a Market Disruption Event may have occurred can have the effect of eliminating the affected trading day from calculation of the value of the underlying Index. The Calculation Agent is responsible for determining whether such Event has, in fact, occurred. Where the variable rate of a Debt Security is tied to a basket of equity securities, for example, a "Market Disruption Event" is typically defined as any of the following events, with certain exceptions:<sup>19</sup>

(a) the suspension or material limitation of trading in 20% or more of the underlying stocks which then comprise the Index, in each case, for more than two hours of trading or during the one-half hour period preceding the close of trading on the NYSE or any other applicable organized U.S. exchange. For purposes of this definition, limitations on trading during

<sup>19</sup> For purposes of determining whether a Market Disruption Event has occurred, a limitation on the hours in a trading day and/or number of days of trading will not constitute a Market Disruption Event if it results from an announced change in the regular business hours of the relevant exchange.

significant market fluctuations imposed pursuant to NYSE Rule 80B (or any applicable successor or similar rule or regulation promulgated by any self-regulatory organization or the SEC) shall be considered "material."

(b) the suspension or material limitation, in each case, for more than two hours of trading or during the one-half hour period preceding the close of trading (whether by reason of movements in price otherwise exceeding levels permitted by the relevant exchange or otherwise) in (A) futures contracts related to the Index which are traded on the Chicago Mercantile Exchange or any other major U.S. exchange, or (B) options contracts related to the Index which are traded on any major U.S. exchange.

(c) the unavailability, through a recognized system of public dissemination of transaction information, for more than two hours of trading or during the one-half hour period preceding the close of trading, of accurate price, volume or related information in respect of 20% or more of the underlying stocks which then comprise the Index or in respect of futures contracts related to the Index, options on such futures contracts or options contracts related to the Index, in each case traded on any major U.S. exchange.

14. The Applicants represent that the principal amount of the Debt Securities that are the subject of this exemption, if granted, will be protected regardless of the performance of the applicable Index. Although the return on a Debt Security may go up or down in the same direction as the performance of the applicable Index, the interest rate floor is set at zero. Thus, even where the value of the applicable Index decreases, there will be no invasion of principal if the Debt Securities are held until maturity.<sup>20</sup> However, if a Plan must sell

<sup>20</sup> The Applicants have provided the following example to illustrate this principle by describing the return at maturity on each \$10 principal investment in the Debt Securities that are the subject of this proposed exemption:

- Where the value of the applicable Index increases by 50 percent, the Plan is entitled to receive \$15 at maturity (\$10 principal plus \$5 interest) because the rate of return moves in the same direction as the growth in the applicable Index;
- Where the value of the applicable Index remains unchanged during the applicable period, the Plan is entitled to receive \$10 at maturity (\$10 principal plus \$0 interest) because the rate of return moves in the same direction as the growth in the applicable Index; and
- Where the value of the applicable Index decrease by 50 percent, the Plan is entitled to receive \$10 at maturity (\$10 principal and \$0 interest) because the rate of return moves in the same direction as the growth in the applicable Index but in no event drops below zero.

the Debt Securities on the open market prior to their maturity, the market price will reflect the market's perception of the potential yield on such securities based on the current yield and interest rates for other debt securities of the same duration. This market price may result in a loss of principal value of the investment in the Debt Securities in the same fashion as would occur for other debt securities.

15. The Applicants represent that they will exercise no discretion with respect to the Indexes. Further, the Applicants represent that they will not trade in any way intended to affect the value of the Debt Securities through holding or trading in the securities which comprise these Indexes. The securities of the Applicants may comprise part of the Index (e.g., Morgan Chase's common stock is included in the S&P 500 Index, which is one of the Indexes that may be used in the Applicants' variable rate Debt Securities). In addition, the Applicants may reserve the right to purchase or sell positions in the Index, or in all or certain of the assets by reference to which the Index is calculated (Underlying Assets), or derivatives relating to the Index. The Applicants do not believe, however, that their hedging activity will have a material impact on the value of the Index, the Underlying Assets, or any derivative or synthetic instrument relating to the Index. The Applicants will maintain written records of all of the Debt Securities transactions for a period of six years.

16. The Applicants represent that the Debt Securities may be included among assets acquired by a Plan to comprise the underlying portfolio of a "synthetic" guaranteed investment contract (Synthetic GIC), whereby the Plan's beneficial interest in one or more debt instruments is combined with a guarantee of future value. In this regard, the Applicants represent that they will not be the issuer, guarantor, or "wrapper" provider in connection with a Synthetic GIC. The Applicants represent that they are not requesting any relief for extensions of credit to such Plans and the Plan Participants, other than extensions of credit resulting from such Plan's holding of the Debt Securities. Accordingly, the Applicants

While the foregoing examples are simplistic, it should be noted that for some of the Debt Securities, such as those tied to the Standard & Poor's 500 Index, the interest payments shown above may be reduced on a daily basis by an adjustment factor (the Adjustment Factor), equal to a stated percent per year. On the maturity date of the Debt Securities, the annual application of the Adjustment Factor will reduce the Plan investor's overall interest payments. This information will be disclosed prominently in the Prospectus.

are not requesting specific exemptive relief with respect to any additional prohibited transactions that may relate to any Synthetic GICs.

17. In summary, the Applicants represent that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) The Debt Securities will be made available by the Applicants in the ordinary course of their business to customers which are not Plans.

(b) The Applicants will not have any discretionary authority or control, or provide any "investment advice," within the meaning of 29 CFR 2510.3-21(c), with respect to the assets of Plans which are invested in the Debt Securities.

(c) The Plans will pay no fees or commissions to the Applicants in connection with the transactions covered by the requested exemption, other than the mark-up for a principal transaction permissible under PTCE 75-1.

(d) The decision to invest in the Debt Securities will be made by an Independent Plan Fiduciary or a Plan Participant, which is independent of the Applicants.

(e) In connection with a Plan's acquisition of any of the Debt Securities, the Applicants will disclose to the Independent Plan Fiduciary, or, if applicable, the Plan Participant, in the Prospectus, all of the material terms and conditions concerning the Debt Securities.

(f) A Plan will acquire the Debt Securities on terms that are at least as favorable to the Plan as those available to an unrelated non-Plan investor in a comparable arm's length transaction.

(g) The Debt Securities will be rated in one of the three highest generic rating categories by at least one nationally-recognized statistical rating service at the time of such security's acquisition by the Plan.

(h) The rate of return for the Debt Securities will be objectively determined and the Applicants will retain no authority to affect the determination of such return, other than in connection with a Market Disruption Event that is described in the Prospectus for the Debt Securities.

(i) The Index will be: (1) Created and maintained by an entity that is unrelated to the Applicants and consist of a standardized and generally-accepted Index; or (2) created by the Applicants, but maintained by an entity that is unrelated to the Applicants, and (i) will consist either of standardized and generally-accepted Indexes or will be an Index comprised of publicly-

traded securities that are not issued by the Applicants, are designated in advance, and listed in the Prospectus for the Debt Securities, (ii) will meet the requirements for an Index as set forth in SEC Rule 19b-4, and (iii) the Index Value for such Index will be publicly-disseminated through an independent pricing service or a national securities exchange.

#### Notice to Interested Persons

The Applicants represent that because those potentially interested Plans proposing to engage in the covered transactions cannot all be identified, the only practical means of notifying Independent Plan Fiduciaries or Plan Participants of such affected Plans is by publication of the proposed exemption in the **Federal Register**. Therefore, any comments from interested persons must be received by the Department no later than 30 days from the publication of this notice of proposed exemption in the **Federal Register**.

For Further Information Contact: Mr. Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

#### Wagner, Doxey and Company Money Purchase Plan (the Plan) Located in San Francisco, California

[Application No. D-11003]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale of certain improved real property (the Property) by the individual account of Warren L. Wagner (the Account) in the Plan, to Mr. Wagner, who is a disqualified person with respect to the Plan,<sup>21</sup> provided that the following conditions are satisfied: (a) The sale is a one-time transaction for cash; (b) the Account pays no commissions nor other expenses relating to the sale; (c) the Account receives an amount that is the greater of \$750,000, or the fair market value of the Property as of the date of the sale, as determined by a qualified, independent

appraiser; (d) within 30 days of publication in the **Federal Register** of the notice granting this proposed exemption, Mr. Wagner reimburses the Account for the fair market rental value of the Property with respect to his past and present use of such Property, including a reasonable rate of interest for the period from the date such amounts were due to the Account to the date of payment; and (e) within 30 days of publication in the **Federal Register** of the notice granting this proposed exemption, Mr. Wagner files Form 5330 with the Internal Revenue Service (the Service) and pays all applicable excise taxes due by reason of the above prohibited transactions.

#### Summary of Facts and Representations

1. The Plan, which is a defined contribution money purchase pension plan sponsored by Wagner, Doxey and Company (the Company), provides for mandatory employer contributions only. The Company is a partnership that originally was a registered broker-dealer in the business of trading government securities. However, in November 1999, the Company ceased its broker-dealer activities, and Mr. Wagner and his partner Robert J. Doxey, who are the only Plan participants, limited their activities to managing their own investments. Mr. Wagner is a trustee of the Plan. The Plan provides for individually directed accounts. As of December 31, 2000, the fair market value of all the assets of the Plan was \$1,966,977. As of that date, Mr. Wagner's Account had assets equal to \$1,062,939.03.

2. The Property consists of a three-bedroom condominium located at 30 West Lake Blvd., #112, Tahoe City, California. It is in a suburban condominium development known as Tahoe Tavern. The Property has 1,552 square feet. The applicant represents that the Property is not adjacent to, nor close to, any other real property owned by Mr. Wagner.

3. The Property was acquired by the Account on June 22, 1998 from McClain Johnston and Annabelle D. Johnston, who are unrelated parties, for investment purposes. The Account paid cash in the amount of \$377,230.72 (including fees and commissions) for the Property. The applicant represents that all expenses relating to the Property since its acquisition have been paid by the Account, including taxes, insurance, association, and property management fees, totalling \$74,056.40. The Property has also been rented out to unrelated parties for vacations through the property management services of Tahoe

Tavern and has produced income totalling \$28,980.00 for the Account.

4. The applicant states that Mr. Wagner made personal use of the Property in 1998, 1999, and 2000, and that he currently occupies the Property.<sup>22</sup> On June 15, 2001, Mr. Wagner made a lump sum payment in the amount of \$46,790.00 to the Account for the fair market rental value of the Property with respect to his past use of such Property, through June, 2001. This amount was determined based on the rental value of similar condominiums in Tahoe Tavern during the relevant time periods, provided by the property manager. Assuming that rent was to be paid to the Account in advance on a quarterly basis, Mr. Wagner will pay an additional \$3345.69 in interest, based on the average Federal Funds Rate, for the period from the date rent was due to the date of payment, i.e., June 15, 2001. Further, concurrently with filing an exemption application with the Department, Mr. Wagner also filed Form 5330 with the Service for Plan years 1998, 1999, and 2000 and paid all applicable excise taxes that were due, a total of \$5,404.50, by reason of the past prohibited transactions. Finally, within 30 days of publication in the **Federal Register** of the notice granting this proposed exemption, Mr. Wagner will reimburse the Account, with interest, using the same methodology described above, with respect to his present use of the Property until the date of the proposed sale, as well as filing Form 5330 with the Service and paying any additional excise taxes that are due for Plan year 2001.

5. The Property has been appraised by Ossi Korkeila of Korkeila & Associates, located in Truckee, California, a qualified, independent appraiser certified in the State of California. Relying on the market data approach, Mr. Korkeila concluded that the fair market value of the Property was approximately \$750,000, as of

<sup>22</sup> Mr. Wagner used the Property during the following periods and paid the following rental amounts.

1998: 9/27 to 9/29—three days @ \$160.00 per day = \$480.00; 10/2 to 10/4—three days @ \$160.00 per day = \$480.00; 11/5 to 11/7—three days @ \$160.00 per day = \$480.00; Total: \$1440.00 (as corrected upon recomputation).

1999: 5/14 to 5/16—three days @ \$185.00 per day = \$555.00; 5/21 to 5/23—three days @ \$185.00 per day = \$555.00; 5/27 to 5/28—two days @ \$185.00 per day = \$370; 6/12 to 6/26—two weeks @ \$2065.00 per week = \$4130.00; 8/29 to 12/31—four months and three days @ \$7380; Total: \$12,990.00.

2000: 1/1 to 12/31 @ \$1800.00 per month; Total: \$21,600.00.

2001: Mr. Wagner currently uses the Property and has paid rent for the period from 1/1 to 6/30 @ \$1800.00 per month = \$10,800.00.

<sup>21</sup> Because Warren L. Wagner and Robert J. Doxey, who are partners, are the only participants in the Plan, the Plan is not within the jurisdiction of Title I of the Act, pursuant to 29 CFR 2510.3-3(b). However, there is jurisdiction under Title II of the Act, pursuant to section 4975 of the Code.

September 26, 2000. Mr. Korkeila examined three recent sales of comparable properties in the local real estate area in making his determination.

6. Mr. Wagner proposes to purchase the Property for cash from his own Account for an amount that is the greater of \$750,000, or the fair market value of the Property as of the date of the sale, based on an updated independent appraisal. The Account will pay no commissions nor other expenses relating to the sale.

The applicant represents that the Property was originally purchased by the Account solely for investment purposes, in light of the Property's significant appreciation and income-generating potential. However, due to an abrupt change in both his career plans and personal life, namely, the cessation of his broker-dealer securities business and the need to move from San Francisco to Tahoe City for family reasons, Mr. Wagner now desires to purchase the Property himself for use as a personal residence in retirement.

In addition, the applicant represents that the exemption will be in the best interests of the Account because it will enable the Account to quickly sell the Property without paying any brokerage commissions or other transaction costs and to reinvest the sale proceeds in other investments that will achieve greater diversification.

7. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria for an exemption under section 4975(c)(2) of the Code for the following reasons: (a) The sale will be a one-time transaction for cash; (b) the Account will pay no commissions nor other expenses relating to the sale; (c) the Account will receive an amount that is the greater of \$750,000, or the fair market value of the Property as of the date of the sale, as determined by a qualified, independent appraiser; (d) within 30 days of publication in the **Federal Register** of the notice granting this proposed exemption, Mr. Wagner will reimburse the Account for the fair market rental value of the Property with respect to his past and present use of such Property, including a reasonable rate of interest for the period from the date such amounts were due to the Account to the date of payment; (e) within 30 days of publication in the **Federal Register** of the notice granting this proposed exemption, Mr. Wagner will file Form 5330 with the Service and pay all applicable excise taxes due by reason of the above prohibited transactions; and (f) the Account will be divested of an illiquid asset and achieve greater diversification of assets.

#### *Notice to Interested Persons*

Because the only Plan assets involved in the proposed transaction are those in Mr. Wagner's Account, and he is the only participant to be affected, it has been determined that there is no need to distribute the notice of proposed exemption to interested persons.

Comments and requests for a hearing with respect to the proposed exemption are due within 30 days of the date of publication of this notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karin Weng of the Department, telephone (202) 219-8881. (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 5th day of July, 2001.

**Ivan Strasfeld,**

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

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## **NUCLEAR REGULATORY COMMISSION**

**[Docket No. 50-312]**

### **Sacramento Municipal Utility District, Rancho Seco Nuclear Generating Station; Environmental Assessment and Finding of No Significant Impact**

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption from certain requirements of 10 CFR 50.54 and 10 CFR 73.55 and an associated amendment to Facility Operating License No. DPR-54, issued to the Sacramento Municipal Utility District (the licensee), for the Rancho Seco Nuclear Generating Station, a permanently shutdown nuclear reactor facility located in Sacramento County, California.

#### **Environmental Assessment**

##### *Identification of the Proposed Action*

The proposed action would eliminate the security plan requirements from the 10 CFR part 50 licensed site after the spent nuclear fuel has been transferred to the 10 CFR part 72 licensed Independent Spent Fuel Storage Installation (ISFSI).

The proposed action is in accordance with the licensee's application for a license amendment and exemption dated February 20, 2001.

##### *The Need for the Proposed Action*

Sections 50.54 and 73.55 of Title 10 of the Code of Federal Regulations require that licensees establish and maintain physical protection and security for activities involving nuclear fuel within the 10 CFR part 50 licensed area of a facility. The proposed action is needed because there will no longer be any nuclear fuel in the 10 CFR part 50 licensed facility to protect against radiological sabotage or diversion after the transfer of the spent nuclear fuel to the Rancho Seco ISFSI. Subpart H of 10 CFR part 72 establishes physical protection and relies on 10 CFR 73.51 to