

## I. Background

Section 104(b) of the Employee Retirement Income Security Act of 1974 (ERISA) requires the administrator of an employee benefit plan to furnish plan participants and certain beneficiaries with a Summary Plan Description (SPD) that describes, in language understandable to an average plan participant, the benefits, rights, and obligations of participants in the plan. The information required to be contained in the SPD is set forth in section 102(b) of ERISA. To the extent that there is a material modification in the terms of the plan or a change in the required content of the SPD, section 104(b)(1) of ERISA requires the administrator to furnish participants and specified beneficiaries a summary of material modifications (SMM) or summary of material reductions (SMR). The Department of Labor (Department) has issued regulations providing guidance on compliance with the requirements to furnish SPDs, SMMs, and SMRs. These regulations, which are codified at 29 CFR 2520.102-2, 102-3, and 29 CFR 104b-2 and 104b-3, contain information collections for which the Department has obtained OMB approval under the OMB Control No. 1210-0039. The current approval is scheduled to expire on January 31, 2007, and the Department intends, following receipt of comments pursuant to this notice, to submit an ICR to OMB requesting an extension of its approval of these information collections. The public is not required to respond to an information collection unless it displays a valid control number. No change to the existing ICR is being proposed or made at this time.

## II. Desired Focus of Comments

The Department is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
  - Enhance the quality, utility, and clarity of the information to be collected; and
  - Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, e.g., by permitting electronic submissions of responses.

## III. Current Actions

This notice requests comments on an extension of OMB's approval of the information collections included in 29 CFR 2520.102-2, 102-3, and 29 CFR 104b-2 and 104b-3. The Department is not proposing or implementing changes to the existing ICR at this time. A summary of the ICR and the current burden estimates follows:

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Summary Plan Description Requirements under ERISA.

*Type of Review:* Extension of a currently approved collection of information.

*OMB Number:* 1210-0039.

*Affected Public:* Business or other for-profit; Not-for-profit institutions.

*Respondents:* 900,000.

*Responses:* 50,000,000.

*Estimated Total Burden Hours:* 1,100,000.

*Estimated Total Burden Cost (Operating and Maintenance):* \$400,000,000.

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

**Joseph S. Piacentini,**

*Director, Office of Policy and Research, Employee Benefits Security Administration.*

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application Nos. D-08295 and D-10365]

RIN 1210-ZA10

### Prohibited Transaction Exemption (PTE) 2006-16; Class Exemption To Permit Certain Loans of Securities by Employee Benefit Plans

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

**ACTION:** Adoption of Amendment and Revocation of PTEs 81-6 and 82-63.

**SUMMARY:** This document amends and replaces Prohibited Transaction Exemption (PTE) 81-6 (46 FR 7527, January 23, 1981) and PTE 82-63 (47 FR 14804, April 6, 1982). PTE 81-6 exempts the lending of securities by employee benefit plans to certain banks and broker-dealers, and PTE 82-63

exempts certain compensation arrangements for the provision of securities lending services by a plan fiduciary to an employee benefit plan. The final amendment incorporates the exemptions into one renumbered exemption, and expands the relief that was provided in PTEs 81-6 and 82-63 to include additional parties and additional forms of collateral subject to the specified conditions. The exemption affects participants and beneficiaries of employee benefit plans, persons who lend securities on behalf of such plans, and parties in interest who engage in securities lending transactions with such plans.

**DATES:** The effective date of this amendment is January 2, 2007. The revocation of PTEs 81-6 and 82-63 is effective on January 2, 2007.

**FOR FURTHER INFORMATION CONTACT:** Allison Padams Lavigne, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8540 (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On October 23, 2003, the Department proposed a notice in the **Federal Register** of a proposed class exemption to amend PTEs 81-6 and 82-63 by incorporating PTEs 81-6 and 82-63 into a new class exemption and expanding the existing relief from the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (E) of the Code to additional parties under modified conditions.<sup>1</sup> The notice also proposed the revocation of PTEs 81-6 and 82-63. The proposal was published in response to two exemption applications. One application was submitted by the American Bankers Association (ABA) (D-08295), and the second application was submitted by the Robert Morris Associates, now known as the Risk Management Association (RMA) (D-10365). The applications were filed pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR 2570, subpart B (55 FR 32836, August 10, 1990).

The notice of pendency gave interested persons an opportunity to comment or request a public hearing on the proposal. The Department received six public comments. No request for a hearing was received. Upon

<sup>1</sup> Section 102 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (1996)) generally transferred the authority of the Secretary of the Treasury to issue exemptions under Code section 4975(c)(2) to the Secretary of Labor.

consideration of the comments received, the Department has determined to grant the proposed class exemption, subject to certain modifications. These modifications and the comments are discussed below.

#### Executive Order 12866

Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This class exemption has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this exemption is not a "significant regulatory action" under section 3(f) of the Executive Order. Accordingly, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order.

#### Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data will be provided in the desired format, that the reporting burden (time and financial resources) imposed on respondents is minimized, that the public can clearly understand the Department's collection instruments, and that the Department

can properly assess the impact of its collection requirements on respondents.

The Department previously solicited comments concerning the information collection request (ICR) included in the Proposed Amendment to PTE 81-6 and Proposed Restatement and Redesignation of PTE 82-63 (the Proposal) when that document was published in the **Federal Register** on October 23, 2003 (68 FR 60715). The ICR re-stated and combined then-existing ICRs previously approved under OMB Control Numbers 1210-0065 (PTE 81-6) and 1210-0062 (PTE-82-63) and requested approval for the program changes set forth in the Proposal, as well as an adjustment in the burden estimates based on updated information. The ICR was reviewed by OMB and approved on April 11, 2004, under the control number 1210-0065, and that approval is currently scheduled to expire on December 31, 2006.

The class exemption published in this notice has been revised from the Proposal in two basic ways. First, the categories of eligible foreign banks and broker dealers have been broadened to include foreign banks and broker dealers located in additional specified foreign countries, provided that such entities meet the additional specified conditions. Second, the permitted types of collateral for loans of securities by plans to eligible banks and broker dealers have been enlarged to include additional types of collateral. Currently, the Department is soliciting comments concerning revisions in the burden estimates for the ICR resulting from these modifications and from further changes in the Department's assumptions and estimation methodology, which are due to better understanding of the existing market for foreign and domestic securities lending. After consideration of any public comments received in response to this solicitation, the Department intends to submit an ICR to OMB for review of the paperwork burden modifications and changes described in this section. Under 5 CFR 1320.5(b), an Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number. The Department will publish notice in the **Federal Register** of OMB's decision upon review of the Department's ICR.

A copy of the ICR may be obtained by contacting Susan G. Lahne, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N-5647, Washington, DC 20210. Telephone: (202) 693-8410; Fax: (202) 219-5333.

These are not toll-free numbers. The ICR also may be viewed via the internet at <http://www.reginfo.gov/public/do/PRAMain>. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through January 2, 2007, OMB requests that comments be received within 30 days of publication of this class exemption to ensure their consideration.

The Department has consulted with industry experts and has received additional information on the nature and operation of the foreign and domestic securities lending markets. Based on this new information, the Department is revising its prior paperwork burden analysis to reflect its better understanding of the likely impact of the exemption.

In its prior paperwork burden analysis, the Department based its estimates conservatively on the assumption that all domestic broker dealers and banks with trust powers would take advantage of the exemption. This led to an estimate of 13,900 domestic entities that would be respondents to the information collections of the Proposal. Given the highly sophisticated nature of the securities lending market in general and the specific limitations of the exemption in particular, including the required indemnification agreements, equity capital minimums, and levels of collateralization, the Department believes that its original estimate

overstated the likely incidence of reliance. The Department now assumes that the exemption will be relied upon only by the limited group of large, sophisticated domestic broker dealers and banks currently active in the securities lending market, which the Department estimates at approximately 140 separate entities. In addition, the Department estimates that in total 60 foreign broker dealers and banks will begin to rely upon the exemption in its final form, including the 13 entities located in the United Kingdom that were previously included in the Department's paperwork burden analysis for the Proposal. This produces a total estimate of 200 respondents.

Given the nature of securities lending practices, which require expert knowledge, efficient and sophisticated communications systems, and careful monitoring and control of the timing of securities loan transactions, the Department further believes that each of the borrowing entities will establish securities lending relationships with only a limited number of plans. For purposes of this estimate, the Department has assumed that each borrower will sign a contract with no more than 10 employee benefit plans.

The specific information collections of this exemption have not changed from the Proposal. As described in the prior ICR, the exemption provides that, before a plan can lend securities, the borrower must provide the plan with a financial statement. In addition, the agreements regarding the loan transaction or series of transactions and the compensation arrangement for the Lending Fiduciary must be described in a written document. The Department continues to assume that these documents are routinely prepared by the respondent entities in-house as part of usual and customary business practice. The Department has therefore treated the preparation and review of these documents as an hour burden for purposes of this analysis; the cost burden derives solely from material and postage costs for distribution. These costs were estimated at \$4.00 per priority or overnight domestic mailing of the documents. Discussions with industry experts indicated that nearly all of the foreign-based institutions likely to rely on the exemption have established domestic branches. The Department assumes, therefore, that all mailings will be handled by the domestic-based operations and that there will be few, if any, respondents using foreign mail services.

The Department has also assumed that the respondents, all of which are large, sophisticated financial entities,

will generally communicate by electronic means. Because electronic communications will be undertaken through existing electronic systems and databases, the Department has not added any additional burden for documents that are assumed to be distributed by electronic means.

*Financial statements.* The Department assumes that each of the 200 respondents will provide each plan with which it has a master lending agreement (10 plans each) with a new financial statement on a quarterly basis, resulting in an estimate of 8,000 financial statements distributed annually (200 respondents  $\times$  10 plans  $\times$  4 quarterly financial statements). No preparation burden for these statements is assumed, however, since the financial statements will have been prepared for other purposes. The Department has assumed that only 10 percent of the respondents will distribute the financial statements in paper by mail. For the 800 financial statements that are therefore assumed to be distributed annually by mail (10 percent of 8,000 = 800), the Department assumes an hour burden of 5 minutes per statement, consisting of the preparation of an overnight or priority delivery package, resulting in an annual hour burden of 67 hours of clerical time (800 mailings  $\times$  5 min./60 min.). For these purposes, each statement is assumed, based on financial statements filed with the Securities and Exchange Commission, to consist of 10 pages. For the 800 financial statements delivered via mail, the Department further assumes a total annual cost of \$3,200 (800 mailings  $\times$  \$4.00 per mailing).

For the remaining 90 percent of the financial statements distributed annually, or 7,200 statements (8,000 – 800 = 7,200), the Department has assumed electronic distribution and has not estimated any additional distribution burden.

*Lending and compensation agreements.* The Department assumes that each respondent will use master agreements for both the lending agreement and the lending fiduciary compensation agreement and will review and distribute them on an annual basis. For purposes of burden analysis, the Department has assumed that each respondent will annually require 30 minutes to review each of these two agreements for compliance (1 hour total per respondent), resulting in an annual hour burden of 200 hours (200 respondents  $\times$  1 hour per respondent).

The respondents are further assumed to require 5 minutes to package and mail the agreements. Because of the nature of these agreements, the

Department assumes that the respondents will provide each of their plan partners with a single mailing annually containing both the lending agreement and the compensation agreement for that partner and that all agreements will be distributed in paper form by priority or overnight mail. The total time for preparation is 167 hours (200 respondents  $\times$  10 lending partners  $\times$  5 minutes per agreement/60). The cost for the distribution of these 2,000 documents (2,000 = 200 respondents  $\times$  10 lending partners each) by overnight or priority mail is estimated at \$8,000.

The total annual hour burden for this information collection, based on these assumptions, is therefore 434 hours (67 hours + 200 hours + 167 hours). The equivalent cost of the annual hour burden is estimated at \$21,514, based on \$16,600 for legal staff review of the agreements (200 hours  $\times$  \$83 per hour = \$16,600) and \$4,914 for clerical time to prepare and distribute the documents (234 hours  $\times$  \$21 per hour = \$4,914).

The total annual cost burden for this information collection is estimated at \$11,200 (\$8,000 for the agreements + \$3,200 for the financial statements = \$11,200).

The following summarizes the Department's paperwork burden estimates for this information collection:

*Type of Review:* Revision of a currently approved collection.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Securities Lending Prohibited Transaction Exemption.

*OMB Number:* 1210-0065.

*Affected Public:* Business or other for-profit, Not-for-profit institutions.

*Total Respondents:* 200.

*Frequency:* On occasion.

*Total Responses:* 2,000.

*Estimated Total Burden Hours:* 434.

*Estimated Burden Cost:* \$11,200.

#### Discussion of Comments Received

The Department received six comments regarding the proposed class exemption. The commenters requested specific modifications to the proposal in the following areas:

##### 1. Definition of "Foreign Broker-Dealer" and "Foreign Bank"

One commenter asked the Department to expand the definition of Foreign Broker-Dealers and Foreign Banks to include those foreign broker-dealers or foreign banks that are located in a foreign country in which a foreign broker-dealer or a foreign bank has received an individual exemption involving the lending of securities by plans. The commenter notes that, in each of these exemptions, the foreign

banks and foreign broker-dealers were under their country's governmental regulation and oversight, which provided a sufficient level of protection for plans. Another commenter asked the Department to expand relief to include broker-dealers and banks of Germany and the Netherlands within the definitions of Foreign Bank and Foreign Broker-Dealer. In the alternative, the commenter requested that relief be extended to broker-dealers and banks of Germany and the Netherlands, provided that the Lending Fiduciary is a U.S. Broker-Dealer or U.S. Bank and such fiduciary indemnifies the plan against losses that arise from a borrower's default. This commenter states that this type of indemnification agreement is present in most securities lending transactions.

The Department notes that the terms and conditions of the individual exemptions generally require that the foreign borrower be affiliated with a U.S. Bank or a U.S. Broker-Dealer that indemnifies the plan in the United States against potential loss resulting from a borrower's default. In addition, those exemptions require that the collateral be maintained in the United States in U.S. dollars or U.S. denominated securities. The Department notes that while these conditions were appropriate and protective of the plan in the context of an individual exemption, they may not be feasible in the context of a class exemption.<sup>2</sup> Thus, for purposes of the class exemption, it may be difficult for a plan to readily assess the risk of lending securities to broker-dealers and banks located in the various foreign jurisdictions. The Department believes that the presence of governmental regulation and oversight by the foreign countries that were involved in the individual exemptions, and an indemnification by a U.S. regulated entity, provide a significant degree of protection for plans. Accordingly, the Department has determined to expand the definition of Foreign Broker-Dealer (as defined in section V(c)) and Foreign Bank (as defined in section V(d)) under limited circumstances.

<sup>2</sup> The terms and conditions of the individual exemptions generally involve the lending of securities by a plan to a foreign affiliate of a U.S. broker-dealer or U.S. bank and require the U.S. affiliate to indemnify the plan in the United States against any potential losses arising from a default. In addition, these exemptions require that the collateral be maintained in U.S. dollars or U.S. denominated securities and be held in the U.S. The proposed class exemption did not contain an affiliate requirement and permitted non-U.S. forms of collateral that may be maintained outside the U.S.

Under the final exemption, the definition of Foreign Broker-Dealer has been expanded to include those broker-dealers registered and regulated under the relevant securities laws of a governmental entity of a country other than the United States where such securities laws were applicable to a broker-dealer that received: (i) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a broker-dealer or (ii) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96-62, as amended, (61 FR 39988 (July 31, 1996); 67 FR 44622 (July 3, 2002)) involving the loan of securities by a plan to a broker-dealer. The term "Foreign Bank" has been expanded to include those banks subject to regulation by the relevant governmental banking agency(ies) of a country other than the United States, where the regulation and oversight of these banking agencies were applicable to a bank that received: (i) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a bank or (ii) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96-62, as amended, (61 FR 39988 (July 31, 1996); 67 FR 44622 (July 3, 2002)) involving the loan of securities by a plan to a bank.<sup>3</sup>

However, to further protect the plans from any unnecessary costs and risks associated with the lending of securities in the different foreign jurisdictions, a new condition has been added to section III(c) of the exemption. This condition requires, in the case of a securities lending transaction involving a Foreign Broker-Dealer or a Foreign Bank that is described above (as defined in section V(c)(2) and V(d)(2) of the exemption), the Lending Fiduciary to be a U.S. Bank or U.S. Broker-Dealer that

<sup>3</sup> To date, individual exemptions have been granted and transactions have received final authorization under PTE 96-62, as amended, that involve securities loans by plans to broker-dealers and banks regulated under the applicable laws of Japan, Germany, the Netherlands, Sweden, Switzerland, France, Australia, Canada and the United Kingdom. Thus, any broker-dealer or bank that is subject to government regulation in any one of these countries would be able to utilize the relief provided in this exemption, if all applicable conditions are met. In this regard, if in the future, the Department grants individual exemptions or final authorizations under PTE 96-62 for transactions involving securities loans by plans to broker-dealers or banks regulated under the applicable laws of additional foreign countries, broker-dealers and banks subject to such government regulation would be able to utilize the final exemption provided all applicable conditions are met.

indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs incurred (including attorney's fees of such plan arising out of the default on the loans or the failure to indemnify properly under this provision) which the plan may incur or suffer directly arising out of a borrower default. In this regard, it is the Department's understanding that in a default situation, the plan will be able to recover the money it is owed under this indemnification agreement from the lending fiduciary in the United States.

Another commenter asked the Department to expand the definition of borrower to include Canadian broker-dealers and Canadian banks. The commenter described a strong similarity in the type of government oversight between broker-dealers and banks in Canada and the United States. In particular, the commenter described the regulation of Canadian broker-dealers. In Canada, securities regulation is within the jurisdiction of the Provinces. In Ontario, the Ontario Securities Commission (OSC) is responsible for regulating the securities markets with the purpose of protecting investors, ensuring optimal allocation of financial resources and maintaining public confidence in the markets. The OSC regulates market participants by notices and orders. It has an enforcement role in the market. It has the power to ensure that trading activities are carried out in accordance with applicable regulations. It can investigate, prosecute and impose penalties on individuals who do not comply with such regulations. Other provincial securities commissions operate similarly. All powers of all the commissions are subject to the oversight of the Ministers of Finance in each Province.

In addition, the commenter notes that the Canadian Securities Administration (CSA) reviews the activities of the provincial securities commissions to ensure consistency in the regulatory framework among the Provinces. The commenter adds that Canadian broker-dealers are subject to oversight by self-regulatory organizations (SRO's), which are subject to the supervision of the provincial commissions. According to the commenter, the Market Regulation Services is the independent regulation services provider for Canadian equity markets and is a recognized SRO by the CSA. Its mandate is to foster and protect investor confidence and market integrity through the administration, interpretation and enforcement of a

common set of market integrity principles.

The commenter also described the regulation of Canadian banks. The commenter noted that the Office of Superintendent of Financial Institutions (OSFI) regulates Canadian banks. OSFI is an independent agency of the Government of Canada and reports to the Minister of Finance. Its principal role is to safeguard depositors and other banking clients. OSFI imposes capital requirements to ensure that Canadian banks are able to meet their financial obligations as well as strict reporting, managing, accounting and auditing requirements.

Lastly, the commenter represented that under Canadian law, counterparties may agree to submit to the jurisdiction of the courts of the United States and the judgments of the courts in the United States are readily enforceable in Canada. Based on the representations of the commenter regarding the regulatory supervision of Canadian broker-dealers and banks, the Department has expanded the definition of "Foreign Broker-Dealer" to include any broker-dealer that: (i) Is regulated by a securities commission of a Province of Canada that is a "member" of the Canadian Securities Administration, and (ii) is subject to the oversight of a Canadian SRO; and has expanded the definition of "Foreign Bank" to include any bank that is regulated by the Office of the Superintendent of Financial Institutions in Canada.

Finally, one commenter requested that plans be permitted to loan securities to entities other than those permitted under the proposed exemption, provided that all obligations of the borrower are fully guaranteed by an entity that could have borrowed the securities itself. To the extent the commenter is referring to entities other than broker-dealers and banks for which the Department has previously granted relief, this comment raises issues that are beyond the scope of our original consideration, and the commenter has not provided sufficient information for the Department to consider this request. Accordingly, the Department has determined not to adopt this comment.

## 2. Level of Foreign Collateral That Must Be Pledged

One commenter expressed support for the collateral requirements found in the proposed exemption. Three commenters (including the Applicant) requested that the collateralization requirements (described in section II(b) of the proposed exemption) be made consistent with those in SEC Rule 15c3-

3 (17 CFR 240.15c3-3).<sup>4</sup> The Applicant states that regulatory and market developments have occurred since the Applicant first filed its exemption application. The Applicant expressed concern that, if the exemption requires different collateralization levels for plans than what is required for other investors by Rule 15c3-3, plans would be placed at a competitive disadvantage. Another commenter suggested that the level of collateralization required in SEC Rule 15c3-3 be required for those transactions in which the lending fiduciary is a U.S. Bank and such lending fiduciary indemnifies the plan against losses resulting from the borrower's default. According to the commenter, most securities lending transactions include these types of indemnification arrangements. Lastly, a commenter suggested that the collateralization requirements stated in the proposed exemption only be modified for those transactions involving plans with total assets in excess of \$500 million.

Rule 15c3-3 requires 100% collateralization if the collateral and securities are denominated in the same currency; 101% if the collateral and securities are denominated in a different currency (*i.e.*, Euros, British pounds, Swiss francs, Canadian dollars, and Japanese yen); and 105% if the collateral and securities are denominated in a different currency and such currency is other than those specified above.

On the basis of the comments, the Department has determined to adopt the collateralization requirements in Rule 15c3-3 for certain transactions where the lending fiduciary is a U.S. Broker-Dealer or U.S. Bank, and such fiduciary indemnifies the plan against loss in the event of borrower default.

Specifically, the Department has expanded section II(b) of the exemption to provide that: In the case of a securities lending transaction in which the Lending Fiduciary is a U.S. Bank or U.S. Broker-Dealer, and such Lending Fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default, the plan receives from the borrower by the close of the Lending

<sup>4</sup> On April 16, 2003, the SEC issued the Order Regarding the Collateral Broker-Dealers Must Pledge When Borrowing Customer Securities (Release No. 47683). Rule 15c3-3 specifies the types and amount of collateral that may be offered by broker-dealers who borrow fully paid and excess margin securities from customers. For purposes of this exemption, the term "Rule 15c3-3" shall also refer to the SEC Order contained in Release No. 47683.

Fiduciary's business on the day in which the securities lent are delivered to the borrower: "Foreign Collateral" having, as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than: (i) 100 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) on which the securities are primarily traded if the collateral posted is denominated in the same currency as the securities lent; or (ii) 101 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) on which the securities are primarily traded if the collateral posted is in a different currency than the securities lent and such currency is denominated in Euros, British pounds, Japanese yen, Swiss francs or Canadian dollars; or (iii) 105 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) if the collateral posted is in a different currency than the securities lent and is denominated in a currency other than those specified above.

Lastly, the Department believes that the Lending Fiduciary indemnification requirement discussed above provides a sufficient safeguard to protect a plan's interest under the revised collateralization levels making the \$500 million plan asset test unnecessary. Accordingly, the Department has not modified the exemption in this respect.

## 3. Expand The Types of Collateral Permitted Under The Exemption

Several commenters requested that the class exemption permit plans to accept the types of collateral permitted under SEC Rule 15c3-3. Another commenter requested that the definition of foreign collateral be broadened to include equity securities and fixed income securities.

*Rule 15c3-3 permits the following forms of collateral:*

1. Government securities as defined in section 3(42)(A) and (B) of the Securities Exchange Act of 1934 (the Exchange Act) (15 U.S.C. 78c(42)(A) and (B)) may be pledged when borrowing any securities.

2. Government securities as defined in section 3(42)(C) of the Exchange Act (15 U.S.C. 78c(42)(C)) and issued or guaranteed as to principal or interest by the following corporations may be pledged when borrowing any securities: (i) Federal Home Loan Mortgage Corporation, (ii) the Federal

National Mortgage Corporation, (iii) the Student Loan Marketing Association and (iv) the Financing Corporation.

3. Securities issued by, or guaranteed as to principal and interest by, the following Multinational Banks—the obligations of which are backed by participating countries, including the United States—may be pledged when borrowing any securities: (i) International Bank for Reconstruction and Development, (ii) the Inter-American Development Bank, (iii) the Asian Development Bank, (iv) the African Development Bank, (v) the European Bank for Reconstruction and Development, and (vi) the International Finance Corporation.

4. Mortgage-backed securities that meet the definition of a “mortgage related security” as defined by section 3(a)(41) of the Exchange Act (15 U.S.C. 78c(a)(41)) may be pledged when borrowing any securities.

5. Negotiable certificates of deposit and bankers acceptances issued by a “bank” as that term is defined in section 3(a)(6) of the Exchange Act (15 U.S.C. 78c(a)(6)), and which are payable in the United States and deemed to have a “ready market” as that term is defined in 17 CFR 240.15c3-1, may be pledged when borrowing any securities.

6. Foreign sovereign debt securities may be pledged when borrowing any securities, provided that: (i) At least one nationally recognized statistical rating agency (NRSRO) has rated in one of its two highest rating categories either the issue, the issuer or guarantor, or other outstanding unsecured long-term debt securities issued or guaranteed by the issuer or guarantor; and (ii) if the securities pledged are denominated in a different currency than those borrowed, the broker-dealer shall provide collateral in an amount that exceeds the minimum collateralization requirements in paragraph (b)(3) of Rule 15c3-3 (100%) by 1% when the collateral is denominated in the Euro, British pound, Swiss franc, Canadian dollar or Japanese yen, or by 5% when it is denominated in another currency.

7. Foreign sovereign debt securities that do not meet the NRSRO rating condition set forth in Item 6 above may be pledged only when borrowing non-equity securities issued by a person organized or incorporated in the same jurisdiction (including other debt securities issued by the foreign sovereign); provided that, if such foreign sovereign debt securities have been assigned a rating lower than the securities borrowed, such foreign sovereign debt securities must be rated in one of the four highest rating categories by at least one NRSRO. If the securities pledged are denominated in a different currency than those borrowed, the broker-dealer shall provide collateral in an amount that exceeds the minimum collateralization requirement in paragraph (b)(3) of Rule 15c3-3 by 1% when the collateral is denominated in the Euro, British pound, Swiss franc, Canadian dollar or Japanese yen, or by 5% when it is denominated in another currency.

8. The Euro, British pound, Swiss franc, Canadian dollar or Japanese yen may be pledged when borrowing any securities, provided that, when the securities borrowed are denominated in a different currency than that pledged, the broker-dealer shall provide

collateral in an amount that exceeds the minimum collateralization requirement in paragraph (b)(3) of Rule 15c3-3 by 1%. Any other foreign currency may be pledged when borrowing any non-equity securities denominated in the same currency.

9. Non-governmental debt securities may be pledged when borrowing any securities, provided that, in the relevant cash market they are not traded flat or in default as to principal or interest, and are rated in one of the two highest rating categories by at least one NRSRO. If such securities are not denominated in U.S. dollars or in the currency of the securities being borrowed, the broker-dealer shall provide collateral in an amount that exceeds the minimum collateralization requirement in paragraph (b)(3) of Rule 15c3-3 by 1% when the securities pledged are denominated in the Euro, British pound, Swiss franc, Canadian dollar or Japanese yen, or by 5% when they are denominated in any other currency.

The Department agrees with the commenters that the types of the collateral allowed under the class exemption should be expanded. Although the SEC concluded that the designation of additional categories of permissible collateral will add liquidity to the securities lending market and lower borrowing costs for broker-dealers, the Department does not believe that the commenters have made a sufficient showing that adopting all the categories of collateral described in Rule 15c3-3 would be protective of the interests of participants and beneficiaries if a borrower were to default.

In this regard, the Department notes that the collateral described in categories 1 and 2 of Rule 15c3-3 satisfies the definition of “U.S. Collateral” under the proposed exemption. For the sake of clarity, the Department has revised the definition of “U.S. Collateral” to specifically include: Government securities as defined in section 3(42)(A) and (B) of the Securities Exchange Act of 1934 (the Exchange Act); and Government securities as defined in section 3(42)(C) of the Exchange Act and issued or guaranteed as to principal or interest by the following corporations: (i) Federal Home Loan Mortgage Corporation, (ii) the Federal National Mortgage Corporation, (iii) the Student Loan Marketing Association and (iv) the Financing Corporation.

Additionally, the Department believes that it would be appropriate to expand the definition of “U.S. Collateral” to include: “Mortgage-backed securities” as described in category 4 of Rule 15c3-3, and “negotiable certificates of deposit and banker acceptances” as described in category 5 of Rule 15c3-3.

Further, the Department has determined that it would be appropriate

to expand the definition of “Foreign Collateral” to include all other types of collateral that are specified under Rule 15c3-3, as amended by the SEC from time to time, provided the Lending Fiduciary is a U.S. Broker-Dealer or U.S. Bank, and such entity provides the plan with an indemnification with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs which a plan may incur or suffer directly arising out of a borrower default. In the absence of an indemnification by a U.S. Broker-Dealer or U.S. Bank, the definition of “Foreign Collateral” in the final exemption has been revised to include the types of collateral described in categories 3 of Rule 15c3-3, rated foreign sovereign debt described in category 6, and the British pound, the Canadian dollar, the Swiss franc, the Japanese yen or the Euro.

In response to a comment, the Department has determined not to revise the exemption to include equity securities and fixed-income securities as these items appear to be outside the scope of Rule 15c3-3, and the Department has insufficient information about how these items would function as collateral.

#### *4. Issues Relating to the Lending Fiduciary's Indemnification of the Plan From Loss Upon a Borrower's Default*

Two commenters requested that the Department revise the indemnification provision of section III(b) to limit the lending fiduciary's indemnification obligation to losses resulting from a borrower's default, and not from any shortfall in the earnings on the collateral. The Department notes that the indemnification by the Lending Fiduciary is only applicable when the borrower defaults and there is a difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs incurred (including attorney's fees of such plan arising out of the default on the loans or the failure to indemnify properly under this provision) which the plan may incur or suffer directly arising out of a borrower default. The indemnification requirement, under the proposal, was never intended to encompass losses arising out of the investment of the collateral by a Lending Fiduciary or other party. Accordingly, the Department has clarified section III(b)(2) of the exemption to reflect this intent.

Another commenter asked the Department to expand section III(b)(2) of the proposed exemption to permit a parent corporation (which may or may not be domiciled in the United States) of a U.S. subsidiary acting as a Lending Fiduciary to provide the indemnity in lieu of the Lending Fiduciary itself. The Department believes that this request raises issues that are beyond the scope of the proposed exemption and has determined not to modify the exemption as requested by the commenter.

One commenter requested clarification regarding the scope of the indemnification provisions under the exemption. Specifically, the commenter questioned whether, in accordance with the provisions in an indemnification agreement, a Lending Fiduciary can stand in the shoes of the plan, and seek recovery from the borrower. Nothing in the final exemption would preclude a Lending Fiduciary from entering into an indemnification agreement that permits the Lending Fiduciary to seek recovery against a defaulting borrower after the Lending Fiduciary has made the plan whole pursuant to the indemnification agreement.

#### 5. Miscellaneous Comments

Another commenter questioned whether the exemption would apply to repurchase agreements (repos). The commenter states that in the context of securities loans that are structured and documented as repos, a Master Repurchase Agreement is utilized instead of a Master Securities Lending Agreement. Except for the difference in the form of the arrangement, such an agreement contains all of the same information and substantive requirements that would be found in a typical Master Securities Lending Agreement. The commenter indicates that the Master Repurchase Agreement contains terms and conditions that satisfy all of the substantive requirements of the exemption, including the requirement that the securities be returned at termination of the loan (*i.e.*, repurchase transaction) in consideration for the return of the cash, the requirement that any interest or dividends on the securities lent (*i.e.*, sold) be paid by the securities borrower (*i.e.*, the purchaser) to the securities lender (*i.e.*, the seller) as and when paid, and the requirement that the securities lender (*i.e.*, the seller) receive reasonable compensation for the loan of the securities (which may consist of the ability to retain investment earnings on the cash collateral in excess of a pre-specified rebate amount).

The Department notes that the exemption permits securities loans that

are structured as repos, provided that all of the other terms and conditions of the exemption are otherwise met. For the sake of clarity, the Department has added a definition of the terms "lending of securities" or "loan of securities" to include securities loans that are structured as repurchase agreements, provided that all terms of the exemption are otherwise met (section V(l) of the exemption).

Another commenter expressed concern that the exemption prevents plans from lending certain fixed income securities when a plan accepts foreign collateral by requiring the collateralization level for foreign collateral to be determined by reference to the market value of the securities lent on a "recognized securities exchange," or an "automated trading system." (See section II(b)(1)(B) and II(b)(2)(B)) The commenter requests that market value be determined in the same manner as set out under the 2000 version of the Master Securities Loan Agreement which was jointly published by the commenter and the Securities Industry Association. The Department believes that the objective standard contained in the proposal is an important safeguard, and is not persuaded by the comment.

One commenter requested that the Department clarify section IV(c) of the proposal. Section IV(c) of the proposal requires that the compensation be reasonable and be paid to the Lending Fiduciary in accordance with the terms of a written instrument, which may be in the form of a master agreement covering a series of securities lending transactions. The commenter was concerned that this provision could require that the aggregate compensation for all loans be reasonable. Thus, if one loan's compensation failed, then all loans would fail this condition. The Department intended that this condition apply on a loan-by-loan basis. Thus, the failure of one loan to meet this requirement would not cause all loans entered into pursuant to a master agreement to fail such requirement.

A commenter requested clarification on whether the exemption covers "fee-for-hold" arrangements. The commenter describes "fee-for-holds" as the following. The borrower pays a fee in exchange for the guaranteed availability of a particular security for a specified period of time or until the arrangement is terminated by either party. If a fee-for-hold arrangement is in place and the holding borrower chooses to borrow any such held securities, the fee-for-hold arrangement with respect to such securities terminates and the borrower will enter into a securities loan arrangement. These arrangements may

take two forms: (1) The plan may grant the borrower the right of first refusal essentially giving the borrower an option to borrow the securities if the lending plan is approached by another party seeking to borrow the same held securities; or (2) the plan may grant the borrower the exclusive right to borrow the securities. The commenter stated that title to the securities does not transfer until securities are actually delivered. The borrower pays a fee related to the type, quantity and duration of the fee-for-hold arrangement. Once loaned, the lending fee paid is based on market conditions at the time of the loan. The plan may terminate the arrangement at any time so that it may dispose of the securities at any time. The Department is of the view that these arrangements are within the scope of the exemption, provided that all terms and conditions are otherwise met.

One commenter requested that relief be extended to transactions covered by the Federal Employee's Retirement System Act of 1986 (FERSA). The Department notes that relief from the prohibited transaction provisions of FERSA is provided for transactions described in section I(c) of the final amendment by reason of PTE T88-1, as amended (53 FR 52838 (December 29, 1988), 57 FR 8689 (March 11, 1992).) No additional exemptive relief is necessary under the final amendment for those prohibited transactions described in FERSA which parallel those described in section 406(a) of ERISA, if the plan receives no less than adequate consideration.

In this regard, PTE T88-1, as amended, adopted six prohibited transaction class exemptions (including PTE 82-63) for purposes of section 8477(c)(2) of FERSA. The amendment to PTE T88-1 extended such relief to any amendments of these class exemptions which are granted by the Department pursuant to section 408(a) of ERISA unless the Department determines that PTE T88-1, as amended does not apply to such amendment. Accordingly, the Department determines that PTE T88-1, as amended shall apply to this final amendment for purposes of FERSA.

One commenter noted that the requirements in section II(d) that the loan agreement identify the currency in which payment of any fees will be made to the plan would be burdensome. The commenter noted that, in the context of securities loans secured by cash collateral, it is industry practice that the lender pays a rebate to the borrower rather than receiving a fee. Secondly, it is industry practice that the borrower's rebate will be in the same currency as

the currency of the cash collateral. In addition, many loans are covered by a master agreement and, in the context of a securities loan secured by non-cash collateral, parties may need to offer different forms of collateral on a loan-by-loan basis. Thus, the commenter requests that the parties be permitted to specify the currency of the fees in the loan confirmation. The Department concurs with the comment, and has modified the final exemption accordingly.

A commenter asked the Department to clarify how the final exemption would apply to securities loans that were entered into pursuant to PTEs 81-6 and 82-63 prior to the effective date of the final exemption. The Department notes that loan transactions entered into prior to the effective date of this exemption would be covered by PTE 81-6 and PTE 82-63, provided all conditions of the exemption are met. Transactions entered into on or after the effective date of the final exemption would be covered by this exemption, provided that the conditions therein are met. The Department notes that the conditions of PTE 81-6 and PTE 82-63 have been incorporated into this class exemption.

#### Description of the Exemption

Section I of the exemption describes the transactions that are covered by the exemption. Section I(a) tracks the language of PTE 81-6 by permitting the lending of securities that are assets of an employee benefit plan to a U.S. Broker-Dealer or U.S. Bank, if the general conditions set forth in section II are met. However, the conditions contained in PTE 81-6 have been amended to permit additional types of collateral to be used for the securities loan. Section I(b) of the exemption expands PTE 81-6 by permitting the lending of securities that are assets of an employee benefit plan to a Foreign Broker-Dealer or a Foreign Bank. A Foreign Broker-Dealer or a Foreign Bank must meet both the general conditions set forth in section II of the proposed exemption, as well as the specific conditions described in section III.

Under the final exemption, a Foreign Broker-Dealer is defined in section V(c) as a broker-dealer that has, as of the last day of its most recent fiscal year, equity capital that is the equivalent of no less than \$200 million and is: (1)(i) Registered and regulated under the laws of the Financial Services Authority in the United Kingdom, or (ii)(a) registered and regulated under the laws of a securities commission of a Province of Canada that is a member of the Canadian Securities Administration, and (b) is subject to the oversight of a

Canadian self-regulatory authority; or (2) registered and regulated, under the relevant securities laws of a governmental entity of a country other than the United States, and such securities laws and regulation were applicable to a broker-dealer that received: (i) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a broker-dealer or (ii) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96-62, as amended involving the loan of securities by a plan to a broker-dealer.

Section V(d) of the final exemption defines the term "Foreign Bank" to mean: An institution that has, substantially similar powers to a bank as defined in section 202(a)(2) of the Investment Advisers Act, has as of the last day of its most recent fiscal year, equity capital which is the equivalent of no less than \$200 million, and is subject to: (1) Regulation by the Financial Services Authority in the United Kingdom or the Office of the Superintendent of Financial Institutions in Canada, or (2) regulation by the relevant governmental banking agency(ies) of a country other than the United States, and the regulation and oversight of these banking agencies were applicable to a bank that received: (i) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a bank or (ii) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96-62, as amended involving the loan of securities by a plan to a bank.

Section I(c) permits the payment to a lending fiduciary of compensation for services rendered in connection with loans of plan assets that are securities, provided that the conditions set forth in section IV are met. The conditions found in section IV mirror the conditions that were found in PTE 82-63. Although the relief provided by section I(c) would apply to a broader range of lending activities, no changes have been made with respect to any of the conditions that are contained in PTE 82-63.

Section II(a) of the final exemption remains as proposed and requires that neither the borrower nor any affiliate of the borrower have or exercise discretionary authority or control with respect to the investment of the plan assets involved in the transaction, or render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

Under the final exemption, section II(b) requires that the plan receive from the borrower by the close of the Lending Fiduciary's business on the day in which the securities lent are delivered to the borrower, (1) "U.S. Collateral" having, as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than 100 percent of the then market value of the securities lent; or (2) "Foreign Collateral" having as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than: (i) 102 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) on which the securities are primarily traded if the collateral posted is denominated in the same currency as the securities lent, or (ii) 105 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in V(k)) on which the securities are primarily traded if the collateral posted is denominated in a different currency than the securities.

In addition, section II(b) has been expanded to include new collateralization requirements in the case of a securities lending transaction in which the Lending Fiduciary is a U.S. Bank or U.S. Broker-Dealer, and such Lending Fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default. For those securities transactions involving such an indemnification, the plan may receive from the borrower by the close of the Lending Fiduciary's business on the day in which the securities lent are delivered to the borrower: Foreign Collateral having, as of the close of business on the preceding day, a market value or in the case of bank letters of credit, a stated amount, equal to not less than:

(i) 100 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) on which the securities are primarily traded if the collateral posted is denominated in the same currency as the securities lent; or (ii) 101 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined



in section V(k) on which the securities are primarily traded if the collateral posted is in a different currency than the securities lent and such currency is denominated in Euros, British pounds, Japanese yen, Swiss francs or Canadian dollars; or (iii) 105 percent of the then market value of the securities lent as valued on a recognized securities exchange or an automated trading system (as defined in section V(k)) if the collateral posted is in a different currency than the securities lent and is denominated in a currency other than those specified above.<sup>5</sup>

The final exemption contains a revised definition of "U.S. Collateral" that incorporates additional forms of collateral described in Rule 15c3-3. The term "U.S. Collateral" is defined in section V(e) as:

- (1) U.S. currency,
- (2) "government securities" as defined in section 3(a)(42)(A) and (B) of the Securities Exchange Act of 1934 (the Exchange Act),
- (3) "government securities" as defined in section 3(a)(42)(C) of the Exchange Act issued or guaranteed as to principal or interest by the following corporations: The Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Student Loan Marketing Association and the Financing Corporation,
- (4) mortgage-backed securities meeting the definition of a "mortgage related security" set forth in section 3(a)(41) of the Exchange Act,
- (5) negotiable certificates of deposit and bankers' acceptances issued by a "bank" as that term is defined in section 3(a)(6) of the Exchange Act, and which are payable in the United States and deemed to have a "ready market" as that term is defined in 17 CFR 240.15c3-1, or
- (6) irrevocable letters of credit issued by a U.S. Bank other than the borrower or an affiliate thereof, or any combination thereof.

The final exemption contains a revised definition of "Foreign Collateral" that permits U.S. Banks, U.S. Broker-Dealers, Foreign Banks and Foreign Broker-Dealers to accept a broader range of collateral. The term "Foreign Collateral" is defined in section V(f) as:

- (1) Securities issued by or guaranteed as to principal and interest by the following Multilateral Development Banks—the obligations of which are backed by the participating countries, including the United

States: The International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development and the International Finance Corporation.

(2) Foreign sovereign debt securities provided that at least one nationally recognized statistical rating organization has rated in one of its two highest categories either the issue, the issuer or guarantor;

(3) the British pound, Canadian dollar, Swiss franc, Japanese yen or the Euro;

(4) irrevocable letters of credit issued by a Foreign Bank, other than the borrower or an affiliate thereof, which has a counterparty rating of investment grade or better as determined by a nationally recognized statistical rating organization; or

(5) any type of collateral described in Rule 15c3-3 of the Exchange Act, as amended from time to time, provided that the lending fiduciary is a U.S. Bank or U.S. Broker-Dealer and such fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs which a plan may incur or suffer directly arising out of a borrower default.

The Department notes that section II(c) of the exemption remains unchanged from the proposal and requires that plans receive collateral from borrowers by physical delivery, by wire transfer or by book entry in a securities depository located in the United States. For borrowers that are Foreign Banks and Foreign Broker-Dealers, the exemption requires that the plan receive either collateral by physical delivery, by wire entry or by book entry in a securities depository located in the United States or held on behalf of the plan at an Eligible Securities Depository as defined in section V(i) of the exemption.

Section II(d) of the exemption has been modified in light of the expanded definition of "Foreign Broker-Dealer" and "Foreign Bank." That section requires that the borrower furnish the Lending Fiduciary with its most recent available audited statement of the borrower's financial condition, as audited by a United States certified public accounting firm or in the case of a borrower that is a Foreign Broker-Dealer or Foreign Bank, a firm which is eligible or authorized to issue audited financial statements in conformity with accounting principles generally accepted in the primary jurisdiction that governs the borrowing Foreign Broker-Dealer or Foreign Bank.

Under section II(e) of the exemption, the loan must be made pursuant to a written loan agreement. Section II(e) further requires that the securities

lending agreement must give the plan a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral received by the plan. In section (f) of the exemption, the plan may receive a reasonable fee in connection with the securities loan or have the opportunity to derive compensation through the investment of the currency collateral. The plan may pay a loan rebate or similar fee to the borrower where the plan invests the currency collateral.

Section II(g) of the exemption requires that the fees and other consideration received by the plan in connection with the loan of securities must be reasonable. The identity of the currency in which payment of fees and rebates will be made must be disclosed to the plan either in the written loan agreement or the loan confirmation as agreed to by the borrower and the plan (or Lending Fiduciary) prior to the making of the loan.

Under the exemption, section II(h) requires that the plan receive the equivalent of all distributions made to holders of the borrower securities during the term of the loan including, but not limited to, dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities. Section II(i) requires that, if the market value of the collateral at the close of trading on a business day is less than the applicable percentage of the market value of the borrowed securities at the close of trading on that day, then the borrower shall deliver, by the close of business on the following business day, an additional amount of U.S. Collateral or Foreign Collateral, the market value of which, together with the market value of all previously delivered collateral, equals at least the applicable percentage of the market value of all borrowed securities as of such preceding day. Notwithstanding the foregoing, part of the U.S. Collateral or Foreign Collateral may be returned to the borrower if the market value of the collateral exceeds the applicable percentage described in this exemption as long as the market value of the remaining collateral equals the applicable percentage described in the exemption of the market value of the borrowed securities.

Under section II(j) of the exemption, a plan may terminate a loan at any time. Section II(k) of the exemption permits a plan to purchase securities identical to the loaned securities if the borrower does not return the loaned securities, and obligates the borrower to pay to the plan any amount of remaining obligation and expenses not covered by the collateral. Section II(l) of the

<sup>5</sup> The Department notes that this requirement would not preclude the Lending Fiduciary from requiring additional collateral should the circumstances so warrant.

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

Section III of the exemption contains conditions that are applicable to securities lending transactions with Foreign Broker-Dealers and Foreign Banks. Section III(a) requires that the lending fiduciary maintain the situs of the loan agreement in accordance with the indicia of ownership requirements under section 404(b) of ERISA and the regulations promulgated under 29 CFR 2550.404(b)-1. Further, section III(b) requires that a foreign borrower agree to submit to the jurisdiction of the district courts of the United States, and agree that the plan may in its sole discretion enforce the agreement in a U.S. court. It is the Department's understanding that in the event the borrower were to default, the plan would be able to secure a judgment in the United States which would be enforceable in a UK or a Canadian court. As an alternative to the requirement that the Foreign Broker-Dealer or Foreign Bank must agree to submit to the jurisdiction of the United States courts, the lending fiduciary may, if a U.S. Bank or U.S. Broker-Dealer, indemnify the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction cost incurred (including attorney's fees of such plan arising out of the default on the loans or the failure to indemnify properly under the exemption) which the plan may incur or suffer directly arising out of a borrower's default.

The final exemption contains a new condition in section III(c) which requires that in the case of a securities lending transaction involving a Foreign Broker-Dealer or a Foreign Bank that is described in section V(c)(2) or V(d)(2), the Lending Fiduciary must be a U.S. Bank or U.S. Broker-Dealer and prior to entering into the loan transaction, such fiduciary must agree to indemnify the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs incurred (including attorney's fees of such plan arising out of the default on the loans or the failure

to indemnify properly under this provision) which the plan may incur or suffer directly arising out of a borrower default. It is the Department's understanding that, in the event of a borrower default, the plan would be able to recover from the lending fiduciary, in the United States, the amount it is entitled to under the indemnification agreement.

As in the proposal, section IV of the exemption incorporates the conditions of PTE 82-63. Section V of the exemption contains the definitions. Unless noted above, the definitions of the exemption remain as they were in the proposed exemption.

The Department has added section VI that specifies the effective dates of the final exemption and the revocation of PTEs 81-6 and 82-63.

Lastly, the Department notes that section 611(d)(1) of the Pension Protection Act of 2006 (Pub. L. 109-280) (the PPA) amended the Employee Retirement Income Security Act of 1974 (ERISA) in part, by adding a new section 408(b)(17) which provides relief from ERISA section 406(a)(1)(A), (B) and (D) for any transaction between a plan and a person that is a party in interest other than fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of section 3(21)(A)(ii)) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in ERISA section 3(14)(F), (G), (H) or (I), or both, but only if in connection with such transaction the plan receives no less, nor pays more, than adequate consideration.<sup>6</sup> The Department notes that to the extent that a transaction involving a loan of securities by a plan to a party in interest meets the requirements of ERISA section 408(b)(17), such transaction does not need to comply with the terms of this class exemption. The Department further notes that the new section 408(b)(17) will not be available for the payment of compensation to a plan's securities lending agent. In this regard, see 408(b)(2) of ERISA and section I(c) of this final exemption for relief permitting the payment of compensation related to foreign securities lending services.

<sup>6</sup> Section 611(d)(2) of the PPA provided similar exemptive relief in amending section 4975 of the Code to add the new section 4975(c)(20).

## 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 ERISA and 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 ERISA and the Code. These provisions include any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA 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 ERISA; 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) In accordance with section 408(a) of ERISA and section 4975(c)(2) of the Code, and based on the entire record, the Department finds that the exemption is administratively feasible, in the interests of the plan(s) and of its participants and beneficiaries, and protective of the rights of the participants and beneficiaries of the plan;

(3) This exemption is supplemental to, and not in derogation of, any other provisions of ERISA and 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 class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

## Exemption

Accordingly, the following exemption is granted under the authority of section 408(a) of ERISA 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).

### I. Transactions

(a) Effective January 2, 2007, the restrictions of section 406(a)(1)(A) through (D) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the lending of securities that are assets of an employee benefit plan to a "U.S. Broker-Dealer" or to a "U.S. Bank," provided that the conditions set forth in section II below are met.

(b) Effective January 2, 2007, the restrictions of section 406(a)(1)(A) through (D) of ERISA and the taxes imposed by section 4975(a) and (b) of

the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the lending of securities that are assets of an employee benefit plan to a "Foreign Broker-Dealer" or "Foreign Bank", provided that the conditions set forth in sections II and III below are met.

(c) Effective January 2, 2007, the restrictions of section 406(b)(1) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to the payment to a fiduciary (the Lending Fiduciary) of compensation for services rendered in connection with loans of plan assets that are securities, provided that the conditions set forth in section IV below are met.

## II. General Conditions For Transactions Described in Sections I(a) and I(b)

(a) Neither the borrower nor any affiliate of the borrower has or exercises discretionary authority or control with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(b) The plan receives from the borrower by the close of the Lending Fiduciary's business on the day in which the securities lent are delivered to the borrower, (1) "U.S. Collateral" having, as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than 100 percent of the then market value of the securities lent; or

(2) "Foreign Collateral" having as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than:

(i) 102 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) on which the securities are primarily traded if the collateral posted is denominated in the same currency as the securities lent, or

(ii) 105 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in V(k)) on which the securities are primarily traded if the collateral posted is denominated in a different currency than the securities lent.

Notwithstanding the foregoing, if the Lending Fiduciary is a U.S. Bank or U.S. Broker-Dealer, and such Lending Fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the

collateral on the date of a borrower default, the plan receives from the borrower by the close of the Lending Fiduciary's business on the day in which the securities lent are delivered to the borrower, "Foreign Collateral" having as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than:

(i) 100 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) on which the securities are primarily traded if the collateral posted is denominated in the same currency as the securities lent; or

(ii) 101 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in V(k)) on which the securities are primarily traded if the collateral posted is denominated in a different currency than the securities lent and such currency is denominated in Euros, British pounds, Japanese yen, Swiss francs or Canadian dollars; or

(iii) 105 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in V(k)) if the collateral posted is denominated in a different currency than the securities lent and such currency is other than those specified above.

(c)(1) If the borrower is a U.S. Bank or U.S. Broker-Dealer, the Plan receives such U.S. Collateral or Foreign Collateral from the borrower by the close of the Lending Fiduciary's business on the day in which the securities are delivered to the borrower. Such collateral is received by the plan either by physical delivery, wire transfer or by book entry in a securities depository located in the United States. or,

(2) If the borrower is a Foreign Bank or Foreign Broker-Dealer, the plan receives U.S. Collateral or Foreign Collateral from the borrower by the close of the Lending Fiduciary's business on the day in which the securities are delivered to the borrower. Such collateral is received by the plan either by physical delivery, wire transfer or by book entry in a securities depository located in the United States or held on behalf of the plan at an Eligible Securities Depository. The indicia of ownership of such collateral shall be maintained in accordance with section 404(b) of ERISA and 29 CFR 2550.404b-1.

(d) Prior to making of any such loan, the borrower shall have furnished the Lending Fiduciary with:

(1) The most recent available audited statement of the borrower's financial

condition, as audited by a United States certified public accounting firm or in the case of a borrower that is a Foreign Broker-Dealer or Foreign Bank, a firm which is eligible or authorized to issue audited financial statements in conformity with accounting principles generally accepted in the primary jurisdiction that governs the borrowing Foreign Broker-Dealer or Foreign Bank;

(2) The most recent available unaudited statement of its financial condition (if the unaudited statement is more recent than such audited financial statement); and

(3) A representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition since the date of the most recent financial statement furnished to the plan that has not been disclosed to the Lending Fiduciary. Such representations may be made by the borrower's agreement that each loan shall constitute a representation by the borrower that there has been no such material adverse change.

(e) The loan is made pursuant to a written loan agreement, the terms of which are at least as favorable to the plan as an arm's-length transaction with an unrelated party would be. Such loan agreement states that the plan has a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral. Such agreement may be in the form of a master agreement covering a series of securities lending transactions.

(f) In return for lending securities, the plan:

(1) Receives a reasonable fee (in connection with the securities lending transaction), and/or

(2) Has the opportunity to derive compensation through the investment of the currency collateral. Where the plan has that opportunity, the plan may pay a loan rebate or similar fee to the borrower, if such fee is not greater than the plan would pay in a comparable transaction with an unrelated party.

(g) All fees and other consideration received by the plan in connection with the loan of securities are reasonable. The identity of the currency in which the payment of fees and rebates will be made shall be disclosed to the plan either in the written loan agreement or the loan confirmation as agreed to by the borrower and the plan (or Lending Fiduciary) prior to the making of the loan.

(h) The plan receives the equivalent of all distributions made to holders of the borrowed securities during the term of the loan including, but not limited to, dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities;

(i) If the market value of the collateral at the close of trading on a business day is less than the applicable percentage of the market value of the borrowed

securities at the close of trading on that day (as described in section II(b) of this exemption), then the borrower shall deliver, by the close of business on the following business day, an additional amount of U.S. Collateral or Foreign Collateral the market value of which, together with the market value of all previously delivered collateral, equals at least the applicable percentage of the market value of all the borrowed securities as of such preceding day.

Notwithstanding the foregoing, part of the U.S. Collateral or Foreign Collateral may be returned to the borrower if the market value of the collateral exceeds the applicable percentage (described in section II(b)) of the exemption) of the market value of the borrowed securities, as long as the market value of the remaining U.S. Collateral or Foreign Collateral equals at least the applicable percentage of the market value of the borrowed securities;

(j) The loan may be terminated by the plan at any time, whereupon the borrower shall deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the plan within the lesser of:

(1) The customary delivery period for such securities,

(2) Five business days, or

(3) The time negotiated for such delivery by the plan and the borrower.

(k) In the event that the loan is terminated, and the borrower fails to return the borrowed securities or the equivalent thereof within the applicable time described in section II(j) above, the plan may, under the terms of the loan agreement:

(1) Purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the borrower under the agreement, and any expenses associated with the sale and/or purchase, and

(2) The borrower is obligated, under the terms of the loan agreement, to pay, and does pay to the plan the amount of any remaining obligations and expenses not covered by the collateral, including reasonable attorney's fees incurred by the plan for legal action arising out of default on the loans, plus interest at a reasonable rate.

Notwithstanding the foregoing, the borrower may, in the event the borrower fails to return borrowed securities as described above, replace collateral, other than U.S. currency, with an amount of U.S. currency that is not less than the then current market value of the collateral, provided such replacement is approved by the Lending Fiduciary.

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

### III. Specific Conditions For Transactions Described in Section I(b)

(a) The Lending Fiduciary maintains the written documentation for the loan agreement at a site within the jurisdiction of the courts of the United States.

(b) Prior to entering into a transaction involving a Foreign Broker-Dealer that is described in section V(c)(1) or a Foreign Bank that is described in section V(d)(1) either:

(1) The Foreign Broker-Dealer or Foreign Bank agrees to submit to the jurisdiction of the United States; agrees to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent); consents to service of process on the Process Agent; and agrees that any enforcement by a plan of its rights under the securities lending agreement will, at the option of the plan, occur exclusively in the United States courts; or

(2) The Lending Fiduciary, if a U.S. Bank or U.S. Broker-Dealer, agrees to indemnify the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs incurred (including attorney's fees of such plan arising out of the default on the loans or the failure to indemnify properly under this provision) which the plan may incur or suffer directly arising out of a borrower default by the Foreign Broker-Dealer or Foreign Bank.

(c) In the case of a securities lending transaction involving a Foreign Broker-Dealer that is described in section V(c)(2) or a Foreign Bank that is described in section V(d)(2), the Lending Fiduciary must be a U.S. Bank or U.S. Broker-Dealer, and prior to entering into the loan transaction, such fiduciary must agree to indemnify the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs incurred (including attorney's fees of such plan arising out of the default on the loans or the failure to indemnify properly under this provision) which the plan may incur or suffer directly arising out of a borrower

default by the Foreign Broker-Dealer or Foreign Bank.

### IV. Specific Conditions for Transactions Described in Section I(c)

(a) The loan of securities is not prohibited by section 406(a) of ERISA or otherwise satisfies the conditions of this exemption.

(b) The Lending Fiduciary is authorized to engage in securities lending transactions on behalf of the plan.

(c) The compensation is reasonable and is paid in accordance with the terms of a written instrument, which may be in the form of a master agreement covering a series of securities lending transactions.

(d) Except as otherwise provided in section IV(f), the arrangement under which the compensation is paid:

(1) Is subject to the prior written authorization of a plan fiduciary (the "authorizing fiduciary"), who is (other than in the case of a plan covering only employees of the Lending Fiduciary or any affiliates of such fiduciary) independent of the Lending Fiduciary and of any affiliate thereof, and

(2) May be terminated by the authorizing fiduciary within:

(A) The time negotiated for such notice of termination by the plan and the Lending Fiduciary, or

(B) five business days, whichever is less, in either case without penalty to the plan.

(e) No such authorization is made or renewed unless the Lending Fiduciary shall have furnished the authorizing fiduciary with any reasonably available information which the Lending Fiduciary reasonably believes to be necessary to determine whether such authorization should be made or renewed, and any other reasonably available information regarding the matter that the authorizing fiduciary may reasonably request.

(f) (Special Rule for Commingled Investment Funds) In the case of a pooled separate account maintained by an insurance company qualified to do business in a State or a common or collective trust fund maintained by a bank or trust company supervised by a State or Federal agency, the requirements of section IV(d) of this exemption shall not apply, provided that:

(1) The information described in section IV(e) (including information with respect to any material change in the arrangement) shall be furnished by the Lending Fiduciary to the authorizing fiduciary described in section IV(d) with respect to each plan whose assets are invested in the account or fund, not less than 30 days prior to implementation of the arrangement or material change thereto, and, where requested, upon the reasonable request of the authorizing fiduciary;

(2) In the event any such authorizing fiduciary submits a notice in writing to the Lending Fiduciary objecting to the implementation of, material change in, or continuation of the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the account or fund, without penalty to the plan, within such time as may be necessary to effect such withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans. In the case of a plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a plan electing to withdraw; and

(3) In the case of a plan whose assets are proposed to be invested in the account or fund subsequent to the implementation of the compensation arrangement and which has not authorized the arrangement in the manner described in sections IV(f)(1) and IV(f)(2), the plan's investment in the account or fund shall be authorized in the manner described in section IV(d)(1).

#### V. Definitions

For purposes of this exemption:

(a) The term "U.S. Broker-Dealer" means a broker-dealer registered under the Securities Exchange Act of 1934 (the 1934 Act or the Exchange Act) or exempted from registration under section 15(a)(1) of the 1934 Act as a dealer in exempted government securities (as defined in section 3(a)(12) of the 1934 Act).

(b) The term "U.S. Bank" means a bank as defined in section 202(a)(2) of the Investment Advisers Act.

(c) The term "Foreign Broker-Dealer" means a broker-dealer that has, as of the last day of its most recent fiscal year, equity capital that is equivalent of no less than \$200 million and is:

(1) (i) Registered and regulated under the laws of the Financial Services Authority in the United Kingdom, or

(ii) (a) registered and regulated by a securities commission of a Province of Canada that is a member of the Canadian Securities Administration, and (b) is subject to the oversight of a Canadian self-regulatory authority; or

(2) registered and regulated under the relevant securities laws of a governmental entity of a country other than the United States, and such securities laws and regulation were applicable to a broker-dealer that received: (i) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a broker-dealer or (ii) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96-62, as amended, involving the loan of securities by a plan to a broker-dealer.

(d) The term "Foreign Bank" means an institution that has substantially similar powers to a bank as defined in section 202(a)(2) of the Investment Advisers Act, has as of the last day of its most recent fiscal

year, equity capital which is equivalent of no less than \$200 million, and is subject to:

(1) Regulation by the Financial Services Authority in the United Kingdom or the Office of the Superintendent of Financial Institutions in Canada, or

(2) regulation by the relevant governmental banking agency(ies) of a country other than the United States, and the regulation and oversight of these banking agencies were applicable to a bank that received: (a) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a bank or (b) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96-62, as amended, involving the loan of securities by a plan to a bank.

(e) The term "U.S. Collateral" means:

(1) U.S. currency;

(2) "government securities" as defined in section 3(a)(42)(A) and (B) of the Exchange Act;

(3) "government securities" as defined in section 3(a)(42)(C) of the Exchange Act issued or guaranteed as to principal or interest by the following corporations: The Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Student Loan Marketing Association and the Financing Corporation

(4) mortgage-backed securities meeting the definition of a "mortgage related security" set forth in section 3(a)(41) of the Exchange Act;

(5) negotiable certificates of deposit and bankers acceptances issued by a "bank" as that term is defined in section 3(a)(6) of the Exchange Act, and which are payable in the United States and deemed to have a "ready market" as that term is defined in 17 CFR 240.15c3-1; or

(6) irrevocable letters of credit issued by a U.S. Bank other than the borrower or an affiliate thereof, or any combination, thereof.

(f) The term "Foreign Collateral" means:

(1) Securities issued by or guaranteed as to principal and interest by the following Multilateral Development Banks—the obligations of which are backed by the participating countries, including the United States: The International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development and the International Finance Corporation;

(2) foreign sovereign debt securities provided that at least one nationally recognized statistical rating organization has rated in one of its two highest categories either the issue, the issuer or guarantor;

(3) the British pound, the Canadian dollar, the Swiss franc, the Japanese yen or the Euro;

(4) irrevocable letters of credit issued by a Foreign Bank, other than the borrower or an affiliate thereof, which has a counterparty rating of investment grade or better as determined by a nationally recognized statistical rating organization; or

(5) any type of collateral described in Rule 15c3-3 of the Exchange Act as amended from time to time provided that the lending fiduciary is a U.S. Bank or U.S. Broker-Dealer

and such fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs which a plan may incur or suffer directly arising out of a borrower default. Notwithstanding the foregoing, collateral described in any of the categories enumerated in section V(e) will be considered U.S. Collateral for purposes of the exemption.

(g) The term "affiliate" of another person means:

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

(2) Any officer, director, partner, employee, or relative (as defined in section 3(15) of ERISA) of such other person; and

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

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

(i) The term "Eligible Securities Depository" means an eligible securities depository as that term is defined under Rule 17f-7 of the Investment Company Act of 1940 [15 U.S.C. 80a], as such definition may be amended from time to time.

(j) The term "recognized securities exchange" means a U.S. securities exchange that is registered as a "national securities exchange" under section 6 of the Exchange Act of 1934 (15 U.S.C. 78f) or a designated offshore securities market as defined in Regulation S of the Securities Act of 1933 [17 CFR part 230.902(B)], as such definition may be amended from time to time, which performs with respect to securities, the functions commonly performed by a stock exchange within the meaning of the definitions under the applicable securities laws (e.g., 17 CFR part 240.3b-16).

(k) The term "automated trading system" means an electronic trading system that functions in a manner intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers such as an "alternative trading system" within the meaning of SEC's Reg. ATS [17 CFR part 242.300] as such definition may be amended from time to time, or an "automated quotation system" as described in section 3(a)(51)(A)(ii) of the Securities and Exchange Act of 1934 [15 U.S.C. 78c(a)(51)(A)(ii)].

(l) The term "lending of securities" or "loan of securities" shall include securities loans that are structured as repurchase agreements provided, that all terms of the exemption are otherwise met.

#### VI. Effective Dates

(a) This exemption is effective on January 2, 2007.

(b) PTEs 81-6 and 82-63 are revoked effective January 2, 2007.

Signed at Washington, DC, this 25th day of October, 2006.

Ivan L. Strasfeld,

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

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## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA-W) number and alternative trade adjustment assistance (ATAA) by (TA-W) number issued during the period of October 2 through October 6, 2006.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with

articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (*i.e.*, conditions within the industry are adverse).

#### Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

*None.*

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

*None.*

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

*None.*

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

*None.*

#### Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA-W-60,003; *Central Products Co.,*

*Brighton, CO: September 1, 2005.*

TA-W-60,084; *Hekman Furniture Co.,*

*Grand Rapids, MI: September 13,*

*2005.*

TA-W-60,177; *Hooker Furniture Corp.,*

*Martinsville, VA: September 29,*

*2005.*

TA-W-59,980; *Mechanical Products*

*Manufacturing, Co., Lucasville, OH:*

*August 18, 2005.*

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.