

(17 CFR 240.10b-5 and section 17(a) of the 1933 Act (15 USA 77a). Through these and other provisions, the SEC may use its full range of enforcement powers to exercise its regulatory authority over the market for Rule 144A Securities, in the event that it detects improper practices.

39. The Applicants represent that this potential liability for fraud provides a considerable incentive to the issuer of the securities and the members of the selling syndicate to insure that the information contained in a Rule 144A offering memorandum is complete and accurate in all material respects. Among other things, the lead manager typically obtains an opinion from a law firm, commonly referred to as a "10b-5" opinion, stating that the law firm has no reason to believe that the offering memorandum contains any untrue statement of material fact or omits to state a material fact necessary in order to make sure the statements made, in light of the circumstances under which they were made, are not misleading.

40. The Applicants represent that Rule 144A offerings generally are structured in the same manner as underwritten registered offerings. The major difference is that a Rule 144A offering uses an offering memorandum rather than a prospectus that is filed with the SEC. The marketing process is the same in most respects, except that the selling efforts are limited to contacting QIBs and there are no general solicitations for buyers (e.g. no general advertising). In addition, the Affiliated Broker-Dealer's role in these offerings is typically that of a lead or co-manager. Generally, there are no non-manager members in a Rule 144A selling syndicate. However, the Applicants request that the proposed exemption extend to authorization for situations where the Affiliated Broker-Dealer acts only as a syndicate member, not as a manager.

41. According to the Applicant, one of the policy objectives of Rule 144A was to attract more foreign issuers to the United States, and Rule 144A has been achieving this objective—from April 1990 through December 1993, the first three years of Rule 144A, over \$25.6 billion in foreign securities was sold under Rule 144A placements. See SEC Staff Report on Rule 144A (August 18, 1994), [1994-95 Transfer Binder] Fed. Sec. L. Rep. ¶85,428 (Question 1). This figure continued to hold in 1998, at 30.4 percent, so that foreign issuer Rule 144A offerings have kept pace with the rapid growth of Rule 144A offerings overall. (Securities Data Company, Inc.)

Summary

41. In summary, the Applicants represent that the subject transactions have satisfied or will satisfy the statutory criteria for an exemption set forth under section 408(a) of the Act because:

(a) The Client Plans have gained or will gain access to desirable investment opportunities;

(b) In each offering, the Asset Manager has purchased or will purchase the securities for its Client Plans from an underwriter or broker-dealer other than the Affiliated Broker-Dealer;

(c) Conditions similar to those of PTE 75-1, part III, have restricted or will restrict the types of securities that may be purchased, the types of underwriting or selling syndicates and issuers involved, and the price and timing of the purchases;

(d) The amount of securities that the Asset Manager may purchase on behalf of Client Plans has been subject to or will be subject to percentage limitations;

(e) The Affiliated Broker-Dealer has not permitted and will not be permitted to receive, either directly, indirectly or through designation, any selling concession with respect to the securities sold to the Asset Manager for the account of a Client Plan;

(f) Prior to any purchase of securities, the Asset Manager has made or will make the required disclosures to an Independent Fiduciary of each Client Plan and obtain written authorization;

(g) The Asset Manager has provided or will provide regular reporting to an Independent Fiduciary of each Client Plan with respect to all securities purchased pursuant to the exemption, if granted;

(h) Each Client Plan has been subject or will be subject to a minimum size requirement of at least \$50 million (\$100 million for Eligible Rule 144A offerings),¹⁵ with certain exceptions for Pooled Funds; and

(i) The Asset Manager is required or will be required to have total assets under management in excess of \$5

¹⁵ SEC Rule 10f-3(a)(4) (17 CFR 270.10f-3(a)(4)) states that the term "Eligible Rule 144A Offering" means an offering of securities that meets the following conditions:

(i) The securities are offered or sold in transactions exempt from registration under section 4(2) of the Securities Act of 1933 (15 U.S.C. 77d(2)), Rule 144A thereunder, or Rules 501-508 thereunder;

(ii) The securities are sold to persons that the seller and any person acting on behalf of the seller reasonably believe to include QIBs, as defined in Rule 144A; and

(iii) The seller and any person acting on behalf of the seller reasonably believe that the securities are eligible for resale to other QIBs pursuant to Rule 144A.

billion and shareholders' or partners' equity in excess of \$1 million.

Discussion of Proposed Exemption

1. The exemptive relief for underwritings proposed herein is similar to that provided in PTE 75-1, Part III. Under PTE 75-1, exemptive relief is subject to a number of conditions and limitations, including the following: (1) The plan fiduciary or its affiliate may not be a manager of the underwriting or selling syndicate; (2) the purchase must be from a person other than the plan fiduciary or its affiliate; (3) the types of securities that may be purchased and the price and timing of the purchases are circumscribed; (4) the amount of securities purchased on behalf of each plan may not exceed three percent of the offering; and (5) the consideration paid may not exceed three percent of the plan's total net assets (one percent, if the consideration involved exceeds \$1 million).

2. The exemptive relief proposed herein differs from that provided by PTE 75-1 in the following respects: (1) The proposed exemption covers transactions where the plan fiduciary is affiliated with a manager, as well as a member, of the underwriting or selling syndicate;¹⁶ (2) the proposed exemption covers purchases of Rule 144A Securities;¹⁷ (3) percentage limitations on the amount of securities that may be purchased have been modified to provide an aggregate limitation on a fiduciary's purchases for all Client Plans from a particular offering; and (4) the proposed exemption provides additional conditions, including the following: (a) The transaction is not part of an agreement, arrangement, or understanding designed to benefit the plan fiduciary or its affiliate; (b) neither a manager nor a member of the underwriting or selling syndicate may

¹⁶ In restricting the scope of PTE 75-1, Part III, to exclude transactions where the plan fiduciary is affiliated with the syndicate manager, the Department was concerned that the syndicate manager, as distinguished from a mere member of a syndicate, has a greater interest in the success of the sale of the new securities. If an affiliate of the managing underwriter is an investment manager for plans, those plans could provide a potential market for the less attractive offerings of underwritten securities. This proposed exemption contains certain safeguards and conditions that are designed to address these potential conflict of interest situations.

¹⁷ The Department notes that the provisions of the Act do not preclude plans from investing in any securities sold by an underwriting or offering syndicate, including those securities sold pursuant to Rule 144A. The exemptive relief provided by PTE 75-1, Part III, and the additional relief sought here are required because of the affiliation between the plan fiduciary and a member of the underwriting or selling syndicate.