

receive any selling concessions with respect to the securities purchased for Client Plans by its affiliate; (c) prior to any purchase of securities on behalf of a Client Plan, certain disclosures are provided to an Independent Fiduciary of each such Client Plan and written authorization is obtained; (d) periodic reporting regarding the covered transactions is provided to an Independent Fiduciary of each Client Plan; and (e) investing plans and their investment managers must meet certain minimum size requirements.

Types of Securities and Offerings

3. In Section I, paragraphs (a) and (b) of the proposed exemption are derived from PTE 75-1, Part III, and provide the following: (1) The securities¹⁸ are part of an issue registered under the 1933 Act, or if exempt from registration under such Act, fall within specified categories: (a) Issued or guaranteed by the United States; (b) issued by a bank; (c) exempt from registration under a federal statute other than the 1933 Act; (d) registered under the 1934 Act; or (e) are part of an "Eligible Rule 144A Offering";¹⁹ (2) the securities are

¹⁸ With respect to any purchase of asset-backed securities by a Client Plan, the Department notes that this proposed exemption provides relief only for the transactions described herein and does not cover any additional prohibited transactions that may occur as a result of a purchase of such securities. For example, additional prohibited transactions may occur by operation of the "look-through rule" contained in the Department's regulation defining "plan assets" for purposes of plan investments (see 29 CFR 2510.3-101). Such additional prohibited transactions may be covered by one of the Department's existing individual exemptions for asset-backed securities. A listing of such exemptions is provided in the text of the operative language of PTE 2002-41 (67 FR 54487, August 22, 2002), which granted an amendment to these exemptions.

Further, the Department has noted that, under the Department's plan asset regulation, if a plan invests in a publicly-offered security, the plan's assets will not include, solely by reason of such investment, any of the underlying assets of the entity issuing the security (*i.e.*, the "look-through rule" will not apply and the operations of the entity will not be subject to scrutiny under the prohibited transaction provisions of the Act). The regulation defines a "publicly-offered" security as one that is freely transferable, widely-held, and registered under the federal securities laws. For this purpose, a class of securities is considered "widely held" if it is owned by 100 or more investors who are independent of the issuer and of one another (see 29 CFR 2510.3-101(b)(3)).

¹⁹ In Section I, paragraph (a)(1)(ii) of the proposed exemption requires that if the securities are equity securities in an Eligible Rule 144A Offering, the offering syndicate shall obtain a legal opinion regarding the adequacy of the disclosure in the offering memorandum. This condition may be satisfied by the type of "10b-5" opinion customarily obtained in connection with such offerings. The Department believes that requiring such review by a law firm will help insure that the offering memorandum meets federal securities law standards. The Department notes that in Section I, paragraph (c) of the proposed exemption requires

purchased for not more than the offering price within a specific time period,²⁰ subject to certain specified exceptions for rights offerings and debt offerings;²¹ (3) the securities are sold pursuant to a firm-commitment offering, in which the syndicate members are committed to purchasing all the securities being offered, subject to certain exceptions for rights offerings and over-allotment options; and (4) the issuer of the securities has been in continuous operation for not less than three years (including the operation of any predecessors), with certain exceptions.

Percentage Limitations on the Amount of Purchased Securities

4. In Section I, paragraphs (c) and (d) of the proposed exemption contain percentage limitations applicable to the amount of purchased securities. The first percentage test in paragraph (c) provides that the amount of securities to be purchased by the Asset Manager on behalf of a particular Client Plan may not exceed three percent of the total amount of securities being offered. Paragraph (c) further provides percentage limitations on the aggregate amount of securities that the Asset Manager may purchase for all its Client Plans, including Pooled Funds, from the total amount of securities being offered: (1) 10 percent for equity securities; (2) 35 percent for debt securities rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization, *i.e.*, Standard & Poor's Rating Services, Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co., or Fitch IBCA, Inc., or their successors (collectively, the Rating Organizations); and (3) 25 percent for debt securities rated in the fifth or sixth highest rating categories by at least one of the Rating Organizations.²²

debt securities to be rated by at least one independent nationally recognized statistical rating organization, thus insuring that sufficient information about those securities and their issuer will be available to investors.

²⁰ The language regarding the timing of the purchase differs slightly from PTE 75-1, Part III. This language is based upon Rule 10f-3 (17 CFR 270.10f-3).

²¹ In Section I, paragraph (a)(2)(ii) of the proposed exemption permits certain purchases of debt after the first day of the offering. Should the debt be downgraded after the offering commences and prior to being purchased for a Client Plan, the Department expects that the Asset Manager would consider whether, prior to purchase, the price was adjusted to reflect the downgrade.

²² In Section I, paragraph (c)(4) of the proposed exemption requires that when calculating the percentages of securities purchased in an Eligible Rule 144A Offering, one must consider any concurrent public offering. The Department notes that any concurrent offering will necessarily be in a foreign securities market, since Rule 144A is

5. Paragraph (d) of Section I provides that the consideration to be paid by the Client Plan in purchasing the offered securities may not exceed three percent of the fair market value of such Client Plan's total net assets. However, paragraph (d) eliminates the requirement contained in PTE 75-1, Part III, that, if the consideration involved exceeds \$1 million, it may not exceed one percent of the fair market value of the plan's total assets. This modification by the Department parallels the amendment in 1997 of the SEC Rule 10f-3.

Underwriting Compensation

6. The proposed exemption requires in paragraph (e) of Section I that any purchase of securities by the Asset Manager pursuant to the exemption may not be part of an agreement, arrangement, or understanding designed to benefit the Asset Manager or an affiliate.²³ Paragraph (f) of Section I further provides that the Affiliated Broker-Dealer may not receive, either directly, indirectly, or through designation, any selling concession or other consideration that is based upon the amount of securities purchased by the Asset Manager's Client Plans pursuant to the proposed exemption. The Affiliated Broker-Dealer may also not receive, either directly or indirectly, that portion of the fixed designation that is attributable to securities purchased pursuant to the exemption. The Affiliated Broker-Dealer is not precluded from receiving management fees, underwriting fees, or other consideration that is not based upon the amount of securities actually sold to the Asset Manager's Client Plans.

7. Paragraph (g) of section I provides that the amount the Affiliated Broker-Dealer receives in management fees, underwriting fees, or other compensation may not be increased for the purpose of offsetting the reduction of the Affiliated Broker-Dealer's compensation from selling concessions. Further, the Affiliated Broker-Dealer must provide the Asset Manager with a written certification, signed by an officer of the Affiliated Broker-Dealer, that the Affiliated Broker-Dealer complied with the underwriting compensation requirements found in paragraphs (e), (f), and (g) of section I of

unavailable where there is a concurrent domestic offering.

²³ The Department notes that the intent of the condition in paragraph (e) of Section I of the proposed exemption is not to deny direct benefits to other parties to a transaction but, rather, to exclude relief for transactions that are part of a broader overall agreement, arrangement, or understanding designed to benefit parties in interest.