

the Applicant may be a party in interest with respect to such Plans.

The Applicant believes that the principal transactions at issue may fall outside the scope of relief provided by PTE 75-1 (40 FR 50845, October 31, 1975), Part II,³² because that class exemption is unavailable where the broker-dealer's affiliate is the trustee of a Plan, even if only a directed trustee. In addition, because PTE 75-1 provides an exemption only for U.S. registered broker-dealers and U.S. banks, it is unavailable for the Applicant's Foreign Affiliates.³³ Thus, the Applicant seeks an individual exemption permitting it to execute principal transactions with Plans in the situations described above.

As a condition of the proposed exemption, the Applicant (including an affiliate) may not have discretionary authority or control with respect to the investment of the Plan assets involved in the transaction, nor render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets. However, the Applicant may be a directed trustee of the Plan (as discussed further in Item 5, below).

In addition, this condition will be deemed met if the Applicant is the "legacy manager" whose appointment as a manager of plan assets has been terminated prior to the commencement of the portfolio liquidation or restructuring, since the legacy manager would not have been involved in the selection of the "transition broker-dealer" and would no longer be acting as a fiduciary with respect to the assets involved in the liquidation or restructuring.

This condition will also be met if the Applicant is the "destination manager," who was not involved in the selection of the transition broker-dealer but provides such broker-dealer with a list of securities to be purchased for the

Plan with the proceeds of the securities being liquidated, so long as the list represents those securities in an Index or Model-Driven Fund.

Similarly, this condition will be met if the destination manager prepares for the Plan sponsor (*i.e.*, the Independent Fiduciary) a list of securities to be purchased for the Plan with the proceeds of the securities being liquidated, so long as that list is prepared without regard to the identity of the transition broker-dealer and without reference to the portfolio being liquidated or restructured, and is substantially the same list that would be provided to other similarly situated investors with substantially similar investment guidelines and objectives, or is substantially similar to the investments in existing portfolios managed in the same style.

Thus, the Applicant may be retained as an investment manager for the Plan with respect to some or all of the portfolio resulting from the liquidation or restructuring (as discussed further in Item 6, below), provided that an Independent Fiduciary has given prior approval for the principal transactions, as part of the liquidation or restructuring, and the other conditions set forth herein are met.³⁴

4. The Applicant represents that when sponsors of Plans terminate an investment manager, it is customary to hire a broker-dealer to liquidate the portfolio of the terminated manager and/or create the portfolio of the newly hired manager. An Independent Fiduciary, generally the Plan sponsor, hires a broker-dealer to perform these so-called "transition services." The Independent Fiduciary instructs the broker-dealer to purchase or sell a list of securities within a specified period. The list of securities to be sold is from the portfolio held by the Plan at the time the manager is terminated. The list of securities to be purchased is from a list prepared by the new manager (who may or may not be affiliated with the Applicant). Generally, the transition broker-dealer takes both the legacy portfolios and the destination portfolios, matches any securities that appear in

both, and allocates such securities to the appropriate destination managers ratably. Then the remaining legacy securities are sold, the cash proceeds placed in the appropriate custody account, and the destination securities are purchased.

The Applicant represents that, while the Independent Fiduciary may specify that the transactions are to be executed by the broker-dealer as agent in markets where such transactions are typical,³⁵ it is often the case that the markets involved require principal transactions, such as is the case for NASDAQ National Market securities or fixed income securities.

The Applicant represents that often the Independent Fiduciary and the transition broker-dealer will agree that certain principal transactions will be effected at a price determined by an objective reference outside the control of the transition broker-dealer, including, but not limited to, the opening or closing price of the security for the day on the principal exchange on which the security is traded, the volume-weighted average price³⁶ for the day, or the price as reported by an independent reporting service for that particular day. In such case, the Applicant represents that the price at which the principal transaction will occur will be determined by market forces and not by the broker-dealer.

Prior to any transaction that is not based on an objective reference for pricing, as in the case of a security that is not publicly traded, the Independent Fiduciary shall specify whether the transaction is to be agency or principal, either on a security-by-security basis, or based on the whole portfolio or an identifiable part of the portfolio (such as all debt securities, all equity securities, all domestic securities, or the like). According to the Applicant, the Independent Fiduciary can assess the fairness of pricing for a non-publicly-traded security by one of the following means: (i) Review the value at which the security is being carried by the Plan; (ii) review the price that other dealers are quoting and the prices at which the

³² PTE 75-1, Part II, provides a class exemption, subject to certain conditions, from section 406(a) of the Act and section 4975(c)(1)(A) through (D) of the Code, for principal transactions between employee benefit plans and U.S. registered broker-dealers or U.S. banks that are parties in interest with respect to such plans. PTE 75-1, Part II(d) states, among other things, that "such broker-dealer, reporting dealer or bank is not a fiduciary with respect to the plan, and such broker-dealer, reporting dealer or bank is a party in interest or disqualified person with respect to the plan solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code, or by reason of a relationship to a person described in such sections."

³³ Goldman, and certain foreign affiliates thereof, obtained an individual exemption PTE 2000-57 (65 FR 56341, September 18, 2000) from the Department to engage in principal transactions, among other things, with employee benefit plans, effective April 15, 1999. In this regard, the Department notes that the relief provided by PTE 2000-57 may not cover the principal transactions described in this proposed exemption.

³⁴ The Department notes that the proposed exemption is unavailable for any principal transaction occurring upon or after the Applicant's assumption of responsibility as an investment manager for the Plan assets that would be involved in such transaction (notwithstanding the transactions described herein). Once the transition has been completed and the purchases and sales have been consummated, the destination manager will then assume fiduciary responsibility for the portfolio, and the proposed exemption will not apply to any subsequent principal transactions with an affiliate, as described herein, unless the manager is terminated (*i.e.*, a "legacy" investment manager).

³⁵ The Applicant represents that where securities are to be purchased or sold on an agency basis, the Applicant will comply with the safe harbor provided by 29 CFR 2510.3-21(d) for the execution of a securities transaction.

Further, the Department notes that PTE 86-128 (51 FR 41686, November 18, 1986) provides a class exemption permitting, among other things, persons who serve as fiduciaries for employee benefit plans to effect or execute securities transactions as an agent for the plan, provided the conditions set forth therein are met.

³⁶ For purposes of the proposed exemption, the term volume-weighted average price means the weighted average of the price of each trade that was reported for the security on a given day.