

afforded under PTE 75-1 to, among other things, situations where the Affiliated Broker-Dealer is a manager of the underwriting or selling syndicate. However, neither PTE 75-1, PTE 2000-25, PTE 2000-27 nor FAN 2001-19E currently addresses the situation where the fiduciary or its affiliate serves as Trustee with respect to a trust that is the issuer of the securities. Such trusts are normally associated with so-called asset-backed securities (ABS). ABS are usually issued as certificates representing an undivided interest in a trust which holds a portfolio of assets (e.g., secured consumer receivables or credit instruments that bear interest).⁴

With respect to the types of Trustees that would be covered by the proposed exemption, the Applicants state that in asset-backed securities, which are structured as pass-through securities, there is generally a trustee of the pool of assets. In certain transactions, such as offerings of collateralized bond obligations (CBOs), there may also be an indenture trustee to hold the debt obligation of the obligor. In more traditional public debt offerings, there is generally only an indenture trustee, who holds the debt obligation of the obligor, holds any assets pledged as collateral to secure payment of the debt obligation, makes required payments and keeps records, and in the event of a default, acts for the note holders. The

⁴ For a discussion of prohibited transactions under the Act and exemptions relating to a plan's acquisition and holding of ABS, interested persons should review PTE 2002-41 (67 FR 54487, August 22, 2002) and the so-called "Underwriter Exemptions" listed therein, as well as PTE 2002-19 (67 FR 14979, March 28, 2002), which amended three of the Underwriter Exemptions granted to J.P. Morgan Chase and certain Affiliates prior to the general amendment to the other Underwriter Exemptions provided by PTE 2002-41.

Thus, the proposed exemption, if granted, would provide relief for prohibited transactions relating to a plan's acquisition and holding of ABS where a Plan's Asset Manager is affiliated with the Trustee of an issuing trust for a series of ABS (i.e., an ATT). However, other prohibited transactions that may be involved with the plan's investment in ABS would have to be covered by an existing Underwriter Exemption (absent any other applicable exemption), including amendments relating thereto as described in PTEs 2002-19 and 2002-41. Interested persons should also review the Department's regulations defining "plan assets" for purposes of plan investments (see 29 CFR 2510.3-101, Definition of "plan assets"—plan investments).

The Department notes that a fiduciary or other party in interest desiring relief afforded by one or the other of these exemptions would have to ensure that the applicable conditions of the appropriate exemption are met. Thus, for example, if the securities sold in an underwriting are asset-backed securities, both the proposed exemption and the existing exemptions involving asset-backed securities referred to above may be relevant for the contemplated transactions. However, it should be noted that the party seeking the relief offered by a particular exemption must ensure that the conditions of the exemption have been met.

Applicants represent that the functions and obligations of an indenture trustee are aligned with the interests of the note holders because such a trustee is generally appointed only to perform such ministerial functions (i.e., hold collateral, maintain records, and make payments when due). In this regard, the proposed exemption would also cover situations where an Asset Manager's Affiliate serves as a custodian, paying agent, registrar or other similar ministerial capacities (see Definition of "Affiliated Trustee" in section II(I) above).

8. The Applicants state that the Affiliated Broker-Dealer is frequently involved in offerings of ABS and other securities where the Asset Manager or its Affiliate serves as a Trustee for the trust which issues such securities. The inability of the Asset Manager to purchase ABS or other securities for its Client Plans in such cases can be detrimental to those accounts because the accounts can lose important fixed-income investment opportunities that are relatively less expensive or qualitatively better than other available opportunities in such securities.

9. The Applicants represent that the frequency of such offerings of ABS or other securities results from consolidation in the banking industry and the attendant reduction in the number of banks participating in the corporate trust business. Many factors that have made participation in the trust business less attractive to banks have contributed to this trend. On the income side, these factors include competitive pressure on pricing corporate trust services and loss of transactional fees and traditional "float" income due to the growth in book entry securities. On the expense side, the Applicants represent that the cost of entry into the corporate trust business and the cost of remaining competitive in the business have increased dramatically. This increase includes both technological and personnel costs which are necessary to remain competitive. The cost increase is particularly acute in the structured finance sector of the corporate trust business, where both systems and staff need to have the capability of supporting increasingly complex transactions.

10. The Applicants represent that equally significant are the changes in the securities underwriting business, including increased participation by banks and bank affiliates, and consolidation within the industry. In 1990, Morgan Guaranty was the only bank in the corporate trust business that also had a significant underwriting affiliate. By 2000, four of the top ten

underwriters for structured finance transactions, such as ABS, had affiliated corporate trust businesses. Eight of the top ten trustees of trusts issuing ABS, a group with a combined market share of over 76 percent in 2000, were affiliates of underwriters active in the structured finance sector.⁵

11. The Applicants represent that currently most providers of corporate trust and related services in the structured finance marketplace are large banks that have the requisite staff and systems resources to efficiently serve the various types of ABS that are common to this marketplace. Most of these same banks, particularly those that are profitable and well capitalized, have expanded into the securities underwriting business, including underwriting of structured finance transactions. The Applicants represent that not only will plan investors be disadvantaged if banks and their affiliates that underwrite securities continue to be precluded from providing trustee services, but, further, it is clearly not in the best interest of plan investors to eliminate those banks—often the most competent in the servicing of structured finance transactions—from the pool of available corporate trust service providers.

12. The Applicants state that the Trustee in a structured finance transaction for ABS, while involved in complex calculations and reporting, typically does not perform any discretionary functions. Such a Trustee operates as a stakeholder and strictly in accordance with the explicit terms of the governing agreements, so that the intent of the crafters of the transaction may be carried out. These functions are essentially ministerial and include establishing accounts, receiving funds, making payments, and issuing reports, all in a predetermined manner. Unlike trustees for corporate or municipal debt, Trustees in structured finance transactions for ABS need not assume discretionary functions to protect the interests of debt holders in the event of default or bankruptcy because structured finance entities are designed to be bankruptcy remote vehicles. The Applicants represent that there is no

⁵ Under the Gramm-Leach-Bliley Act, signed into law by the President on November 12, 1999, certain provisions of the Glass-Steagall Act and the Bank Holding Company Act of 1956, as amended, are repealed. The Department notes that the effect of such law will likely be further consolidation of the financial services industry. The new law will facilitate cross-ownership and control among bank holding companies and securities firms through the creation of "financial holding companies" that will be permitted to engage in a broad range of financial and related activities, including underwriting and dealing activities.