

“issuer” outside the structured transaction to pursue for repayment of the debt. The Trustee’s role is defined by a contract-explicit structure that spells out the actions to be taken upon the happening of specified events. The Applicants state that there is no opportunity (or incentive) for the Trustee in a structured finance transaction, by reason of its affiliation with an underwriter, asset manager, or otherwise, to take or not to take actions that might benefit the underwriter or asset manager to the detriment of plan investors.

With respect to offerings of more traditional public debt securities that are not part of a structured finance transaction, the Applicants state that an indenture trustee may have more discretion when the issuer of the securities is not bankruptcy remote.⁶ In such instances, indenture trustees generally exercise meaningful discretion only in the context of a default, at which time the indenture trustee has the duty to act for the bondholders, in a manner consistent with the interests of investing plans (and other investors) and not with the interests of the issuer. In such situations, an indenture trustee may be an affiliate of an underwriter for the securities. In the event of a default, the duty of an indenture trustee in pursuing the bondholders’ rights against the issuer might conflict with the indenture trustee’s other business interests. However, the Applicants represent that under the Trust Indenture Act of 1939 (the Trust Indenture Act), an indenture trustee whose affiliate has, within the prior 12 months, underwritten any securities for an obligor of the indenture securities generally must resign as indenture trustee if a default occurs upon the indenture securities. Thus, the Applicants maintain that this requirement and other provisions of the Trust Indenture Act are designed to protect bondholders from conflicts of interest to which an indenture trustee may be subject.⁷

⁶ The amount of discretion possessed by an indenture trustee will depend on the terms of the particular indenture, and factual issues, such as whether a default has occurred.

⁷ The Applicants submit that the Trust Indenture Act addresses analogous circumstances and is thus instructive regarding potential conflicts of interest. DB represents that the Trust Indenture Act was amended in 1990 to correct unnecessarily restrictive provisions that deemed a conflict of interest to exist where an indenture trustee or its affiliate simultaneously acts in other capacities (e.g., underwriter) for the issuer of the debt securities. The Applicants state that the U.S. Congress, at the SEC’s instigation, determined that an indenture trustee and its affiliates could act in multiple capacities (including as trustee and underwriter for the issuer) absent a default under the governing trust indenture. According to the

13. According to the Applicants, the role of the underwriter in a structured financing for a series of ABS involves, among other things, assisting the sponsor or originator of the applicable receivables or other assets in structuring the contemplated transaction. The Trustee becomes involved later in the process, after the principal parties have agreed on the essential components, to review the proposed transaction from the limited standpoints of technical workability and potential Trustee liability. After the issuance of securities to plan investors in a structured financing, while the Trustee performs its role as Trustee over the life of the transaction, the underwriter of the securities has no further role in the transaction. In addition, the Trustee has no opportunity to take or not take action, or to use information in ways that might advantage the underwriter to the detriment of plan investors. The Applicants state that an underwriter, in order to protect its reputation, clearly wants the transaction to succeed as it was structured, which includes the Trustee performing in a manner independent of the underwriter.

14. The Applicants represent that, in many offerings of ABS or other securities, the Trustee’s fee is a fixed dollar amount that does not depend on the size of the offering. In such cases, the Asset Manager has no conflict of interest in an ATT because it cannot increase the Trustee’s fee by causing Client Plans to participate in the offering. Where the Trustee’s fee in an ATT is a portion of the principal amount of outstanding securities to be offered, the Asset Manager could conceivably cause Client Plans to participate to affect the size of the offering and thus the Trustee’s fee.⁸ The

Applicants, the premise for this change was that until such a default occurs, there is no risk that the trustee could or would act in any way that might conflict with the interests of security holders (i.e., certificate holders of ABS). One of the reasons for the amendments to the Trust Indenture Act was the recognition of the alternative: withdrawal from the corporate trust business of the largest and best service providers, whose management would undoubtedly be attracted to the greater profitability of underwriting as opposed to the steady, but smaller profits from acting as an indenture trustee. According to the Applicants, the amendment to the Trust Indenture Act has in fact proved to be a benefit to the public in encouraging the best providers of trustee services to continue to provide such services.

⁸ The Applicants note that this theoretical conflict is directly addressed by the protective conditions in the Underwriter Exemptions and in this proposed exemption. In this regard, the Applicants state that the exemption (if granted) will apply only to firm commitment underwritings, where, by definition, the entire issue of securities will be purchased, either by the public or the underwriters (see section I(a)(3) above). Thus, where the trustee’s fee would be a fixed percentage of the total dollar amount of

Applicants further represent that the protective conditions of the requested exemption (e.g., the requirement of advance approval by an independent fiduciary and reporting of the basis for the Trustee’s fee) render this possibility remote.

In this regard, the Applicants state that the present conditions of the proposed exemption, which are based on the prior individual exemptions granted by the Department for an “AUT”, impose adequate safeguards as well for an “ATT” in order to prevent possible abuse. First, there are significant limitations on the quantity of securities that the Asset Manager may acquire for a Client Plan, meaning not only that there will be significant limitations on the ability of the Asset Manager to affect the fees of its Affiliate, but also insuring that significant numbers of independent investors also decided that the securities were an appropriate purchase. Second, the Asset Manager must obtain the consent of an independent fiduciary to engage in these transactions. Third, regular reporting of the subject transactions to an independent fiduciary will take place. Fourth, an independent fiduciary must be provided information on how securities purchased under the proposed exemption actually performed. Finally, the consent of the independent fiduciary may be revoked if it suspects that purchases by the Asset Manager have been motivated by a desire to generate fees for its Affiliated Trustee.

Investments in Offered Securities

15. The Applicants represent that the Asset Manager makes investment decisions on behalf of, or renders investment advice to, its Client Plans in accordance with the governing document of the particular Client Plan or Pooled Fund and the guidelines and objectives established in the investment management or advisory agreement. Since the Client Plans are covered by Title I of the Act, such investment decisions are also subject to the fiduciary responsibility provisions of the Act.⁹

the securities issued in the offering, the amount of the trustee’s fee would be, in fact, a fixed dollar amount that would be known to plan investors as part of disclosures made relating to the offering (e.g., the prospectus or private placement memorandum). The Department notes that plan fiduciaries would have a duty to adequately review, and effectively monitor, all fees paid to service-providers, including those paid to parties affiliated with an Asset Manager.

⁹ By proposing this exemption, the Department is not expressing an opinion regarding whether any investment decisions or other actions taken by an

Continued