

be deemed to be unrelated to, and independent of, the Asset Manager, the Affiliated Broker-Dealer and the Affiliated Trustee if such fiduciary represents that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for transactions described in Section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Asset Manager, the Affiliated Broker-Dealer or the Affiliated Trustee and represents that such fiduciary shall advise the Asset Manager if those facts change.

(2) Notwithstanding anything to the contrary in this Section II(g), a fiduciary is not independent if:

(i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Asset Manager, the Affiliated Broker-Dealer or the Affiliated Trustee;

(ii) such fiduciary directly or indirectly receives any compensation or other consideration from the Asset Manager, the Affiliated Broker-Dealer or the Affiliated Trustee for his or her own personal account in connection with any transaction described in this exemption;

(iii) any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Asset Manager, responsible for the transactions described in Section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Client Plan sponsor or of the fiduciary responsible for the decision to authorize or terminate authorization for transactions described in Section I. However, if such individual is a director of the Client Plan sponsor or of the responsible fiduciary, and if he or she abstains from participation in (A) the choice of the Plan's investment manager/adviser and (B) the decision to authorize or terminate authorization for transactions described in Section I, then Section II(g)(2)(iii) shall not apply.

(3) The term "officer" means a president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), or any other officer who performs a policy-making function for the entity.

(4) In the case of existing Client Plans in a Pooled Fund, at the time the Asset Manager provides such Client Plans with initial notice pursuant to this exemption, the Asset Manager will notify the fiduciaries of such Client Plans that they must advise the Asset Manager, in writing, if they are not

independent, within the meaning of this Section II(g).

(h) The term "security" shall have the same meaning as defined in section 2(36) of the Investment Company Act of 1940 (the 1940 Act), as amended (15 U.S.C. 80a-2(36) (1996)). For purposes of this exemption, mortgage-backed or other asset-backed securities rated by a Rating Organization will be treated as debt securities.

(i) The term "Eligible Rule 144A Offering" shall have the same meaning as defined in SEC Rule 10f-3(a)(4) (17 CFR 270.10f-3(a)(4)) under the 1940 Act.

(j) The term "qualified institutional buyer" or "QIB" shall have the same meaning as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)) under the 1933 Act.

(k) The term "Rating Organizations" means Standard & Poor's Rating Services, Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co., or Fitch IBCA, Inc., or their successors.

(l) The term "Affiliated Trustee" means the Applicants and any bank or trust company affiliate of the Applicants (as "affiliate" is defined in paragraph (c)(1)) that serves as trustee of a trust that issues securities which are asset-backed securities or as indenture trustee of securities which are either asset-backed securities or other debt securities that meet the requirements of this exemption, other than Section I (t), performing services as custodian, paying agent, registrar or in similar ministerial capacities is also considered serving as trustee or indenture trustee.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, interested persons should refer to the notice of proposed exemption published on May 22, 2003 at 68 FR 28018.

Written Comments: The only comments received by the Department with respect to the notice of proposed exemption (the Notice) were submitted by the Applicants.

With respect to section I(h), JP Morgan Chase Bank commented that pursuant to the prior exemptions that are being amended herein (*i.e.*, PTE 2000-25 and PTE 2000-27), it had previously solicited written authorization to engage in AUTs from many of its Client Plans. Because the transactions provided for in the Notice are substantially similar to those for which JP Morgan Chase Bank has already given notice and obtained written consent, because the seeking of written consent is costly and time-consuming, and because, in the

Applicants' view, the fact that the trustee is affiliated with the Asset Manager (*i.e.*, an ATT) is of far less consequence than where an Affiliate is a manager of the underwriting syndicate (*i.e.*, an AUT), the Applicants have requested that where they already have the written consent of a Client Plan for AUTs, they need only provide written notice and a termination form, terminating authorization for the additional ATT relief. The Department has accepted this comment³ and has modified section I(h) of this exemption accordingly.

In addition, the Applicants requested a clarification with respect to section I(o) of the Notice. Section I(o) of the Notice requires, in pertinent part, that each single Client Plan shall have total net assets with a value of at least \$50 million. In the case of a Pooled Fund, such \$50 million requirement will be deemed met if 50 percent or more of the units of beneficial interest in such Pooled Fund are held by plans having total net assets with a value of at least \$50 million. The Applicants commented that the "\$50/\$100 million" test of that section seems to contemplate "Pooled Funds" composed mostly or entirely of investments by plans. However, the Applicant state that this is not always the case with their Pooled Funds. The Applicants represent that they and many managers advise or manage commingled vehicles which have sufficient investments from plans (25% or more) for the vehicle to be a "look-through vehicle" under the Plan Asset Regulations,⁴ but also have more than 50% of their investments from non-plan investors. The Applicants note that it is possible to read the \$50/\$100 million test as causing the exemptions proposed in the Notice to be unavailable to a Pooled Fund where, for example, 49% of investments are from plans which are \$50/\$100 million in size, and 51% of investments are from non-plans which are \$50/\$100 million in size.

The Applicants request that the Department clarify that the exemptions, as amended herein, will apply to activity by Pooled Funds if each plan in the Pooled Fund meets the general requirement of \$50/\$100 million, even if

³ The Department encourages all appropriate Client Plan fiduciaries to review the disclosures required herein and take whatever actions are necessary to protect the interests of the Client Plan's participants and beneficiaries. In addition, the Department notes that Client Plan fiduciaries should assess, in a timely fashion, their ability to monitor and subject transactions and determine whether the conditions described herein are satisfied.

⁴ See the Department's regulation at 29 CFR part 2510.3-101, Definition of "plan assets"—plan investments.