

Contributions only into the Borrower Collateral Account; provided that with respect to all transactions described above, the conditions set forth below in Section II are met.

Section II—Conditions

(A) The transaction must be on terms that are no less favorable to the Covered Plans than those which the Covered Plans could obtain in arm's-length transactions with unrelated parties;

(B) The decision to invest in the Fund on behalf of each Covered Plan and to execute an Investor Consent in favor of the Bank (either as sole Lender or Agent), must be made by fiduciaries of the Covered Plan that are not included among, are independent of, and are unaffiliated with, the Lenders (including the Bank) and the Fund;

(C) At the time of the execution of an Investor Consent, a Covered Plan must have assets of not less than \$100 million. In the case of multiple plans maintained by the same employer, or by members of a controlled group of corporations (within the meaning of Code section 414(b)) or members of a group of trades or businesses under common control (within the meaning of Code section 414(c)) (hereafter, referred to as "members of a controlled group"), whose assets are invested on a commingled basis (e.g., through a master trust), this \$100 million threshold will be applied to the aggregate assets of the commingled entity;

(D) Not more than five (5) percent of the assets of any Covered Plan, measured at the time of the execution of an Investor Consent, may be invested in the Fund. In the case of multiple plans maintained by the same employer, or by members of a controlled group, whose assets are invested on a commingled basis (e.g., through a master trust), the five (5) percent limit will be applied to the aggregate assets of the commingled entity;

(E) Neither the Bank nor any Lender has discretionary authority or control with respect to a Covered Plan's investment in the Fund nor renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such investment;

(F) Upon request, the Covered Plan fiduciaries must receive from the Bank a copy of this notice of proposed exemption and a copy of the final exemption, if granted. In addition, fiduciaries of Covered Plans will receive a copy of this proposed exemption, as published in the **Federal Register**, for Covered Transactions (as defined in Section III(D) below) that occur during the period from January 1, 2003 until

the date of the final exemption, if granted;

(G) The Bank must receive from the Covered Plan fiduciaries a written representation that the conditions set forth above in Section II (B), (C), and (D) are satisfied for such transaction with respect to the Covered Plan for which they are fiduciaries; and

(H) None of the Covered Transactions shall be part of an arrangement, agreement or understanding, designed to benefit a party in interest with respect to a Covered Plan.

Section III—Definitions

(A) The term "Covered Plan" means an investor in a Fund (as defined below) that is an employee benefit plan, as defined in section 3 (3) of the Act, that satisfies the conditions set forth herein in Section II;

(B) The term "Fund" means an investment opportunity or venture capital fund (organized as a corporation, limited partnership, limited liability company, or another business entity authorized by applicable law) in which one or more investors invest, including employee benefit plans or special purpose entities holding "plan assets" subject to the Act, as described herein, by making capital contributions in cash to such Fund, pursuant to specific capital commitments as established by the Fund Agreement(s) and other operative documents executed by the parties, for purposes of making certain real estate investments (including real estate-related investments, such as venture capital investments) or non-real estate investments;

(C) The terms "Fund Agreement" or "Fund Agreements" mean the written agreements under which a Fund (as defined above) will be formed (such as a limited partnership agreement, a limited liability company agreement or articles of incorporation, together with ancillary related agreements, such as subscription agreements) that will obligate each investor to make cash contributions of capital with respect to Capital Commitments, upon receipt of a call for Capital Contributions; and

(D) The terms "Covered Transaction" or "Covered Transactions" mean any combination of transactions described in Section I(A)–(D), in conjunction the Investor Consent described in Section I(E).

Effective Date: This proposed exemption, if granted, will be effective as of January 1, 2003. Such retroactive effective date was requested by the Applicant so that the Bank would be able to close on one or more Credit Facilities during a time period after such date, without the need for

obtaining separate individual exemptions for such transactions, prior to the date that this exemption would be granted.

Summary of Facts and Representations

1. **Administrative Necessity for Exemption.** The Bank is a market leader in arranging and syndicating credit facilities that are secured by capital commitments in investment opportunity and venture capital funds (i.e., a Fund). In the past, the Bank has applied for individual exemptions with respect to transactions that are similar to the transactions described herein.²

The Bank anticipates that it will continue to enter into such credit facility transactions. However, rather than continuing to submit individual exemption requests for transactions on a case by case basis, the Bank requests that it be granted a more general exemption which would permit the Bank to engage in a series of transactions without the need for recurring, administrative approvals.

2. **Parties to Credit Facilities.** The Bank represents that each transaction will consist at a minimum of: (i) One or more Funds; (ii) one or more investors (i.e., the Investors) in the Fund that may be an employee benefit plan subject to the Act; and (iii) a Lender or group of Lenders. In each instance involving a group of Lenders, the Credit Facility will be arranged by the Bank, which will also be the Agent under the Credit Facility.

3. **Funds.** The borrower under the Credit Facility will be a Fund. A Fund may be a corporation, a limited partnership, a limited liability company, or another business entity authorized by applicable law.

The Fund's underlying assets will not consist of plan assets, and the Bank requests no determination with respect thereto.³

² For example, see Prohibited Transaction Exemption (PTE) 2001–21, 66 FR 34466 (June 28, 2001); PTE 2000–22, 65 FR 33376 (May 23, 2000); and PTE 2000–10, 65 FR 10826 (February 29, 2000).

³ The Department notes that 29 CFR 2510.3–101, *et seq.* describes what constitutes assets of a plan with respect to a plan's investment in another entity for purposes of subtitle A, and Parts 1 and 4 of subtitle B, of Title I of the Act, and section 4975 of the Code. However, the Department expresses no opinion in this proposed exemption regarding whether the underlying assets of any Fund, as described herein, would be considered the assets of a plan under such regulations. In this regard, the Department notes that it is providing no relief for either internal transactions involving the operation of the Fund or for transactions involving the Fund and third parties other than the specific relief proposed herein. In addition, the Department encourages potential Plan investors and their independent fiduciaries to examine carefully all aspects of the Fund's organization, operation and