

(17 CFR 240.15a-6) of the 1934 Act (as discussed further in Item 9, below), and SEC interpretations thereof, providing for foreign affiliates a limited exemption from U.S. registration requirements, will offer additional protections to the Plans.

3. The Applicant represents that it customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer or bank. Such trades are referred to as principal transactions. In the subject principal transactions with Plans, occurring in the context of a portfolio liquidation or restructuring, 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 Prohibited Transaction Exemption (PTE) 75-1 (40 FR 50845, October 31, 1975), Part II,¹ 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.² 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, neither the Applicant nor an affiliate thereof may have discretionary authority or control with respect to the investment of the Plan assets involved in the principal transaction, or render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets. However, one or more of the entities affiliated with the Applicant may be a directed trustee of the Plan (as discussed further in Item 5, below).

¹ 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."

² Deutsche Bank AG, and certain foreign affiliates thereof, filed Submission No. E-00194 and obtained authorization from the Department to engage in principal transactions, among other things, with employee benefit plans, pursuant to an authorization made under PTE 96-62 (61 FR 39988, July 31, 1996), and which was designated Final Authorization No. (FAN) 2000-28E, effective November 25, 2000. In this regard, the Department notes that the relief provided by FAN 2000-28E may not cover the principal transactions described in this proposed exemption.

In addition, this condition will be deemed met if the Applicant or an affiliate 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 or an affiliate 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 (*i.e.*, the list is substantially the same as would be provided to other similarly situated investors with similar objectives or consists of substantially the same securities as those in other existing investment portfolios managed in the same style).

Thus, the Applicant or an affiliate 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.³

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,⁴ 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 price⁵ 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

⁴ 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.

⁵ 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.

³ 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).