

DEPARTMENT OF LABOR**Employee Benefits Security Administration****[Application No. D-11122]****Notice of Proposed Individual Exemption To Replace Prohibited Transaction Exemption 97-63 (PTE 97-63) Involving State Street Bank and Trust Company (State Street) Located in Boston, MA****AGENCY:** Employee Benefits Security Administration, Department of Labor.**ACTION:** Notice of proposed individual exemption to replace PTE 97-63.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual exemption which, if granted, would replace PTE 97-63 (62 FR 66689, December 19, 1997). The exemption, as proposed, would permit securities lending transactions between State Street, its United States (U.S.) domiciled affiliates, and certain employee benefit plans (the Client Plan(s)), including commingled investment funds holding plan assets, for which State Street, through any division or U.S. affiliate of State Street or of its parent acts as securities lending agent (or sub-agent). The exemption, as proposed, would also permit receipt of compensation by an U.S. registered introducing broker affiliated with State Street (the Introducing Broker) in connection with an arrangement whereby securities are lent to an unrelated U.S. registered broker-dealer (the Clearing Broker) who in turn lends such securities to clients of the Introducing Broker; provided that certain conditions are satisfied.

In addition, State Street has requested that this exemption incorporate various modifications to specific terms and conditions of PTE 97-63. The replacement of PTE 97-63 will affect the participants and beneficiaries of the Client Plans participating in securities lending transactions and the fiduciaries with respect to such Client Plans.

EFFECTIVE DATE: If granted, the exemption will be effective as of the date this notice of proposed exemption (the notice) is published in the **Federal Register**.

DATES: Written comments and requests for a public hearing should be received by the Department on or before 45 days from the date of the publication in the **Federal Register** of this notice.

ADDRESSES: All written comments and requests for a public hearing (preferably, three copies) should be sent to the

Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Application No. D-11122. The application pertaining to this notice and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone number (202) 693-8540. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed exemption that would replace PTE 97-63. The proposed exemption has been requested in an application filed on behalf of State Street and its U.S. affiliates (the Applicants), pursuant to section 408(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1, 1995) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this proposed exemption is issued solely by the Department.

PTE 97-63 provides an exemption from certain prohibited transaction restrictions of section 406 of the Act and from the sanctions resulting from the application of section 4975 of the Code, as amended, by reason of section 4975(c)(1) of the Code. Specifically, PTE 97-63 provides relief from the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, for:

(1) The lending of securities to State Street, acting through its Financial Markets Group (FMG) (formerly the Money Market Division of the Capital Markets Area) or acting through any other division or U.S. affiliate of State Street that is a successor to the activities of FMG; and for the lending of securities to any U.S. registered broker-dealer affiliated with State Street (the Affiliated

Broker Dealer(s))¹ by certain Client Plans (the Client Plans or the Client Plan), including commingled investment funds holding plan assets, for which State Street, through its Master Trust Services Division, acts as directed trustee or custodian, and for which State Street, through its Global Securities Lending Division or any other similar division of State Street or U.S. affiliate of State Street or of its parent (collectively, GSL) acts as securities lending agent (or sub-agent), and (2) the receipt of compensation by GSL in connection with such securities lending transactions; provided that certain conditions are satisfied.

The Applicants have confirmed that the representations, as set forth in paragraphs 18, 19, 20, 21, 22, and 23 of the summary of facts and representations of the notice of proposed exemption relating to PTE 97-63 (62 FR 51684, at 51686, October 2, 1997) continue to accurately describe the material terms of the transactions to be consummated, pursuant to this proposed exemption, except that (i) the factual statements contained in the second and third sentences of paragraph 21 related to market conditions at the time, may not be accurate currently and should be deleted, and (ii) the provisions of paragraph 22 that contemplate that an affirmative approval or consent will be given by the Client Plan will be overridden by the negative consent procedure contained in conditions (p) and (q) of this proposed exemption to the extent that the requirements thereof have been satisfied. Accordingly, the Department, hereby, incorporates by reference such representations (as adjusted by the preceding sentence) into the preamble of this proposed exemption.

The proposed exemption would replace PTE 97-63 and expand the relief beyond that already provided, pursuant to PTE 97-63. In this regard, it is represented that one of State Street's Affiliated Broker Dealers proposes to act as a "prime broker" with respect to certain of its clients, including hedge fund clients (the Prime Brokerage Client(s)). As a prime broker, the Affiliated Broker Dealer will provide a wide range of services to its Prime Brokerage Clients, including daily trade reporting, trade break resolution, consolidated position and profit and loss reporting, custodial services, risk analytics, and performance reporting.

Because these Prime Brokerage Clients frequently engage in short sales of securities (*i.e.*, the sale of securities that are not owned by the seller), such

¹ FMG, any division or U.S. affiliate of State Street that becomes a successor to the activities of FMG, and U.S. registered broker-dealers affiliated with State Street (the Affiliated Broker Dealer(s)) are collectively referred to, herein, as the "SSB Group."