

**DEPARTMENT OF LABOR****Employee Benefits Security Administration**

[Prohibited Transaction Exemption 2003-19 Application No. D-11122]

**Grant of 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:** Grant of individual exemption to replace PTE 97-63.

**SUMMARY:** This document contains a final exemption before the Department of Labor (the Department) which replaces PTE 97-63 (62 FR 66689, December 19, 1997). This exemption permits securities lending transactions between State Street, its United States (U.S.) domiciled affiliates, and certain employee benefit plans (the Client Plan(s)) and/or commingled investment funds holding plan assets (CIF(s)); provided State Street, through any division or U.S. affiliate of State Street or of its parent acts as securities lending agent (or sub-agent). This exemption also permits receipt of compensation by a 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, this exemption incorporates various modifications to specific terms and conditions of PTE 97-63. The replacement of PTE 97-63 affects the participants and beneficiaries of the Client Plans participating in securities lending transactions and the fiduciaries with respect to such Client Plans.

**EFFECTIVE DATE:** This exemption is effective as of February 6, 2003, the date when the Notice of Proposed Exemption (the Notice) was published in the **Federal Register**.

**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:** On February 6, 2003, the Department published in the **Federal Register** the

notification that it was considering replacing PTE 97-63.

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)) 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 exemption was 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 final exemption is issued solely by the Department.

In the notice, the Department invited all interested persons to submit written comments and/or requests for hearing on the proposed replacement of PTE 97-63 within forty-five (45) days of the date of the publication of the Notice in the **Federal Register** on February 6, 2003. All comments and/or requests for a hearing were due by March 24, 2003.

By letter dated April 30, 2003, the Applicants confirmed that a copy of a

cover letter, a copy of the Notice, and a copy of the Supplemental Statement (the Supplemental Statement), as described at 29 CFR 2570.43(b)(2) of the Department's regulations, were delivered by first class mail on or before February 21, 2003, to each known sponsor of a Client Plan that on that date was a direct client of GSL, informing the sponsors of such Client Plans of the right to comment and/or request a hearing by March 24, 2003. Such Client Plans are interested persons with respect to the transactions which are the subject of this exemption.

In a telephone conversation on February 20, 2003, the Applicants identified other interested persons with respect to the transactions which are the subject of this exemption. In this regard, the Applicants informed the Department that a Client Plan which participates in an index fund (the Index Fund(s)) or a model-driven fund (the Model-Driven Fund(s)) managed by State Street or any division or U.S. affiliate of State Street would also be an interested person. The Applicants further indicated that notification to Client Plans that participate in Index Funds or Model-Driven Funds, including a copy of the cover letter, a copy of the Notice, and a copy of the Supplemental Statement, would not be mailed until March 6, 2003. In light of the fact that the notification to the Client Plans that participate in Index Funds or Model-Driven Funds managed by State Street or any division or U.S. affiliate of State Street would not be provided until March 6, 2003, and in order to give all interested persons the benefit of the full thirty (30) day comment period the Department required, and the Applicants agreed to, an extension until April 10, 2003, of the deadline when comments and/or requests for hearing would be due on the proposed exemption.

In a telephone conversation on April 3, 2003, the Applicants informed the Department that: (1) The notification to some Client Plans that participate in Index Funds or Model-Driven Funds managed by State Street or any division or U.S. affiliate of State Street was mailed on March 7, 2003, rather than on March 6, 2003; (2) the notification indicated that the comment period would close on April 7, 2003, rather than April 10, 2003, as agreed to by the Applicants; and (3) a cover letter attached to the notification included a few sentences that deviated from the form of the cover letter that had been previously approved by the Department.

In light of the above, and in order to give all interested persons an opportunity to comment and/or request

a hearing on the proposed exemption, the Department required, and the Applicants agreed, that the Client Plans that participate in Index Funds or Model-Driven Funds managed by State Street or any division or U.S. affiliate of State Street would again be notified of the pendency of the Notice in the **Federal Register**. It was agreed that: (1) Such notification would be sent by a first class mailing to the fiduciary of each Client Plan that participates in an Index Fund or a Model-Driven Fund managed by State Street or any division or U.S. affiliate of State Street; (2) such mailing would contain a copy of a cover letter the contents of which was approved by the Department in advance; and (3) such mailing would contain a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2). The Department determined that, as the Client Plans that participate in Index Funds or Model-Driven Funds managed by State Street or any division or U.S. affiliate of State Street had already received a copy of the Notice in the mailing on March 6, or March 7, 2003, that it was not necessary for the Applicants to include an additional copy of the Notice in this second mailing; provided that the cover letter included: (1) An offer from the Applicants to provide another copy of the Notice upon request; and (2) a website address where a copy of the Notice could be found.

In order to give all interested persons the benefit of the full thirty (30) day comment period the Department required, and the Applicants agreed to, an extension until May 15, 2003, of the deadline when comments and/or requests for hearing would be due on the proposed exemption.

The Applicants confirmed by letter dated April 30, 2003, that a copy of the cover letter and a copy of the Supplemental Statement were delivered by first class mail on or before April 15, 2003, to each known sponsor of a Client Plan that on that date was invested in an Index Fund or Model-Driven Fund that was authorized to engage in securities lending activities and was managed by State Street or any division or U.S. affiliate of State Street. The sponsors of such Client Plans were informed of the right to comment and/or request a hearing by May 15, 2003.

During the comment period the Department received no requests for a hearing. However, the Department did receive several comment letters from the Applicants. In this regard, in a letter dated March 7, 2003, the Applicants requested certain changes to the operant language of the exemption, as published in the Notice. Subsequently, in letters

dated April 1, April 30, and May 21, 2003, the Applicants clarified the position taken in their March 7, 2003, comment letter.

A discussion of the points raised in the Applicants' comment letters, as clarified, and the Department's response, thereto are set forth in the numbered paragraphs below.

1. The Applicants requested an amendment to the language of section II(e) of the exemption. In this regard, the Applicants asked that the words, "on the following day," as set forth in the Notice, on page 6202, column 3, line 20, be revised to read "on the following business day." The Applicants maintain that this change would be consistent with both the corresponding references to "business day," in section II(e) of the Notice, on page 6202, column 3, on lines 8 and 13, and consistent with the practical realities of operating a securities lending program.

The Department concurs and in the final exemption has amended the language of section II(e), accordingly.

2. The Applicants requested that the exemption be modified to permit the indemnification required by section II(g) of the exemption to be provided by State Street's parent corporation. In this regard, the Applicants asked that the phrase, "State Street will agree to indemnify," as set forth in section II(g) of the notice, on page 6202, column 3, line 41, be revised to read "State Street or its parent corporation will agree to indemnify." Subsequently, in a letter, dated April 1, 2003, State Street withdrew the request.

The Department concurs with the withdrawal of the Applicants' request.

3. The Applicants requested a change in the language of section II(j)(1) and section II(j)(2), as set forth in the notice, in the following locations:

(a) In section II(j)(1) on page 6203, column 1, lines 39–40;

(b) in section II(j)(2) on page 6203, column 1, lines 64–66; and

(c) in section II(j)(2) on page 6203, column 2, lines 4–6. In this regard, the Applicants, asked that in each of these locations the phrase, "the fiduciary responsible for making the investment decision," be revised in the final exemption to read, "the fiduciary responsible for making the decision to authorize the Client Plan to engage in securities lending." In the opinion of the Applicants, this change would more accurately describe the appropriate fiduciary contemplated in these sections and would also cause the fiduciary referred to in these provisions to be the same as the fiduciary referred to in other sections of the exemption (e.g., the

fiduciary described in section II(b) of the exemption).

In a letter dated, April 30, 2003, the Applicants submitted a revision of their requested wording of section II(j)(1) and (j)(2). In this regard, the Applicants believe that in the context of securities lending the revised wording would be consistent with the actual operation of entities (the Entities), as described in section II(j), including a master trust, a group trust, or other entity the assets of which are "plan assets" under 29 CFR 2510.3–101 of the Department's regulations. In particular, the Applicants believe that the language of section II(j) of the notice, as drafted, incorrectly focuses on the fiduciary who is responsible for making investment decisions on behalf of such Entities. In the opinion of the Applicants, the focus should be on the fiduciary who is making the decision to authorize such Entities to engage in securities lending, to retain GSL as the lending agent, and to authorize the loans made pursuant to the subject exemption, whether or not such fiduciary makes "investment decisions" with respect to the assets involved in the securities lending program. Accordingly, the Applicants propose that the language of section II(j), as set forth in the notice on page 6203, column 1, lines 40, 44, 47, 65–66; and on page 6203, column 2, lines 4–6, 8–11, and 14–15, be revised as set forth below. Words that have been stricken from the text of the notice appear in closed brackets, and additions to the text of the notice appear in bold italics.

(j) Only Client Plans with total assets having an aggregate market value of at least \$50 million will be permitted to lend securities to the SSB Group or to the Clearing Broker, as applicable; provided, however that—

(1) In the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3–101 (the Plan Asset Regulation), which entity is engaged in a securities lending arrangement with GSL, the foregoing \$50 million requirement shall be deemed satisfied, if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for [making the investment decision] **authorizing the securities lending arrangement with GSL** on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its overall management and control, exclusive of the \$50 million threshold amount attributable to plan investment in [the] **such** commingled entity, which are in excess of \$100 million.

(2) In the case of two or more Client Plans which are not maintained by the same

employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in a securities lending arrangement with GSL, the foregoing \$50 million requirement is satisfied, if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Client Plan with respect to which the fiduciary responsible for [making the investment decision] **authorizing the securities lending arrangement with GSL** on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Client Plan or an employee organization whose members are covered by such Client Plan) [However], **provided** that the fiduciary responsible for [making] **authorizing** the [investment decision] **securities lending arrangement** on behalf of such group trust or other entity—

[(A) Has full investment responsibility with respect to plan assets invested therein; and

(B) Has] **has** total assets under its **overall** management and control, exclusive of the \$50 million threshold amount attributable to plan investment in [the] **such** commingled entity **and the assets referred to in the foregoing parenthetical**, which are in excess of \$100 million.

The Department continues to believe that the appropriate focus in section II(j) is the investment manager of the Entities described therein, including a master trust, a group trust, or other entity the assets of which are "plan assets" under 29 CFR 2510.3–101 of the Department's regulations. Accordingly, the Department has not changed the language, section II(j), as set forth in the final exemption, with the exception that throughout section II(j), the terms, "Client Plan(s)," "employee benefit plan(s)" or "plan(s)," have been used where appropriate.

4. The Applicants have requested an amendment of the language of section II(p). Section II(p), as set forth in the notice, on page 6204, column 1, lines 8–28, reads as follows:

If an independent fiduciary of a Client Plan has given the initial affirmative authorization and approval for such plan to engage in securities lending transactions, pursuant to the terms of PTE 97–63, or pursuant to section II(b), above, of this exemption, then any subsequent authorization or approval contemplated under this exemption shall be deemed to have been given, if such independent fiduciary has not objected in writing to GSL within 30 days following disclosure to the independent fiduciary of all material information required in connection with said authorization or approval, a statement appraising the independent fiduciary that PTE 97–63 has been replaced by this exemption, and a copy of this Notice, and a copy of the final exemption, if granted.

In this regard, the Applicants wish to clarify what information must be provided to independent fiduciaries in connection with any subsequent authorization or approval, pursuant to section II(p) of the subject exemption. It is the Applicants' view that only in the case of an independent fiduciary whose initial authorization was obtained pursuant to PTE 97–63 that the provision of the statement appraising the independent fiduciary that PTE 97–63 has been replaced by the subject exemption and the disclosure of the additional information (*i.e.*, a copy of the notice and a copy of the final exemption) would be relevant. In this regard, the Applicants maintain that any independent fiduciary whose initial authorization was given pursuant to the subject exemption would have already been provided a copy of the Notice and a copy of the final exemption, in accordance with section II(i). In addition, the statement indicating that PTE 97–63 has been replaced would be irrelevant to any independent fiduciary whose initial authorization was given pursuant to the subject exemption.

Accordingly, the Applicants requested that the language of section II(p), as set forth in the Notice, on page 6204, column 1, lines 23–28 be amended: (1) To insert a period between the word, "approval," and the words, "a statement;" (2) to delete the phrase:

A statement appraising the independent fiduciary that PTE 97–63 has been replaced by this exemption, and a copy of this Notice, and a copy of the final exemption, if granted;

and (3) to substitute the following phrase:

In the case of an independent fiduciary whose initial authorization was pursuant to PTE 97–63, the independent fiduciary should, in connection with its initial authorization to lend securities pursuant to this exemption, be provided a statement indicating that PTE 97–63 has been replaced by this exemption, a copy of this notice, and a copy of the final exemption, if granted.

Subsequently, based upon a conversation with the Department, the Applicants in a letter dated April 1, 2003, substituted the following revised wording for the language quoted in item (3), above:

In addition, before an independent fiduciary, whose initial authorization was given pursuant to PTE 97–63, may give its first subsequent authorization or approval under this exemption in accordance with the procedures contained in this section II(p), such independent fiduciary must be provided with a statement indicating that PTE 97–63 has been replaced by this exemption, a copy of this Notice, and a copy of the final exemption, if granted.

In order to maintain consistent language throughout the exemption, the Department has determined in the final exemption to adopt the following wording for section II(p):

In addition, before an independent fiduciary of a Client Plan (and/or the independent fiduciary of a CIF, as applicable), whose initial authorization was given pursuant to PTE 97–63, may give its first subsequent authorization or approval under this exemption in accordance with the procedures contained in this section II(p), such independent fiduciary must be provided with a statement indicating that PTE 97–63 has been replaced by this exemption, and a copy of the Notice, and a copy of the final exemption.

5. The Applicants requested amendment of the language of section II(a), section III(d), and section III(e), as set forth in the Notice, in the following locations:

(a) In section II(a) on page 6202, column 1, line 9;

(b) In section III(d) on page 6205, column 2, line 11; and

(c) In section III(e) on page 6205, column 2, line 43.

Specifically, the Applicants requested that the phrase, "managed by," in section II(a) be revised to read "trusteed, managed, or advised by." Further, in section III(d) and in section III(e), the Applicants requested the phrase, "trusteed, or managed by" should be revised (in both instances) to read, "trusteed, managed, or advised by." As support for the requested changes, the Applicants point out that State Street would have even less discretionary authority with respect to an Index Fund or a Model-Driven Fund that is "advised by" State Street, as compared to the minimal degree of discretionary authority that State Street has with respect to such a fund that is "managed by" State Street.

Subsequently, in a letter dated, May 21, 2003, the Applicants withdrew their previous request and proposed that the language of section II(a), as set forth in the Notice on page 6201, column 3, lines 57–59 and on page 6202, column 1, lines 1–11, be revised as set forth below. Words that have been stricken from the text of the Notice appear in closed brackets, and additions to the text of the notice appear in bold italics.

Section II(a) of this exemption will be deemed satisfied notwithstanding the fact that State Street or any division or affiliate of State Street has or exercises discretionary authority or control [or renders investment advice] in connection with an index fund (the Index Fund(s)), as defined, below, in section III(d) of this exemption, or a model-driven fund (the Model-Driven Fund(s)), as defined, below, in section III(e) of this exemption, [managed by] **as to which** State

Street or any division or U.S. affiliate of State Street **serves as discretionary trustee or manager and** \* \* \*.

The Department concurs and in the final exemption has amended the language of section II(a), as requested in the May 21, 2003, letter from the Applicants. In addition, in order to maintain consistent language throughout the exemption, the Department has determined to make a conforming changes to the definition of the term, "Index Fund(s)," as set forth in the notice in section III(d) on page 6205, column 2, line 11; and in the definition of the term, "Model-Driven Fund(s)," as set forth in the notice in section III(e) on page 6205, column 2, line 43. Accordingly, in the final exemption, the Department has adopted the following language for section III(d) and section III(e). Words that have been stricken from the text of the notice appear in closed brackets, and additions to the text of the notice appear in bold italics.

II(d) The term, "Index Fund(s)," refers to any investment fund, account or portfolio [sponsored, maintained, trustee, or managed by] **as to which** State Street or a U.S. affiliate **serves as discretionary trustee or manager and** in which one or more investors invest, and

(1) which is designed to track the rate of return, risk profile, and other characteristics of an Index, as defined, below, in section III(f) of this exemption, by either:

(A) replicating the same combination of securities which compose such Index, or

(B) sampling the securities which compose such Index based on objective criteria and data;

(2) for which State Street or its affiliate does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) that contains "plan assets" subject to the Act, pursuant to the Plan Asset Regulation; and

(4) that involves no agreement, arrangement, or understanding regarding the design or operation of the fund which is intended to benefit State Street or its affiliate or any party in which State Street or its affiliate may have an interest;

II(e) The term, "Model-Driven Fund(s)," refers to any investment fund, account, or portfolio [sponsored, maintained, trustee, or managed by] **as to which** State Street or a U.S. affiliate **serves as discretionary trustee or manager and** in which one or more investors invest, and

(1) which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third-party data, not within the control of State Street or an affiliate, to transform an Index;

(2) which contains "plan assets" subject to the Act, pursuant to the Plan Asset Regulation; and

(3) that involves no agreement, arrangement, or understanding regarding the design or operation of the fund or the utilization of any specific objective criteria which is intended to benefit State Street, any affiliate of State Street, or any party in which State Street or any affiliate may have an interest;

6. The Department notes that the subject exemption provides relief for the lending of securities by a Client Plan or Client Plans (and/or by a CIF or CIFs, as applicable); provided State Street, through GSL, acts as securities lending agent. In order to describe the subject transaction with more clarity, the Department has decided to change the language of section I, as set forth in the notice at the following locations: (a) In section I(a)(2) on page 6201, column 2, line 58; (b) in section I(a)(2) on page 6201, column 3, line 2; and (c) in section I(c) on page 6201, column 3, lines 31–32. Accordingly, in the final exemption, the Department has adopted the following language for section I(a)(2) and section I(c). Words that have been stricken from the text of the notice appear in closed brackets, and additions to the text of the notice appear in bold italics.

I(a)(2) to any U.S. registered broker-dealers affiliated with State Street (the Affiliated Broker Dealer(s)); by an employee benefit plan (the Client Plan(s)), [including any] **and/or by a** commingled investment fund holding plan assets [for which] **(the CIF(s)); provided** 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);

I(c) the restrictions of section 406 of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of 4975(c)(1) of the Code shall not apply to an arrangement whereby a U.S. registered broker-dealer affiliated with State Street (the Introducing Broker) receives compensation from **a clearing broker** (the Clearing Broker), **as defined in section III(g)**, in connection with, or as a direct or indirect result of, the lending of securities to the Clearing Broker by [an employee benefit plan] **a Client Plan (and/or a CIF, as applicable)**, for which GSL acts as securities lending agent; provided that the conditions, set forth in section II, below, are satisfied.

Further, throughout the notice, many references are made to the term, "Client Plan(s)." For some such references, the Department intended the term to include both a Client Plan and a CIF. For other such references, the Department intended the term only to refer to a Client Plan and not to a CIF. To eliminate ambiguity, the Department has determined to change the language, as set forth in the notice. Accordingly,

throughout the final exemption, the Department has used the phrase, "a Client Plan (and/or a CIF, as applicable)."

For further information regarding the matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-11122) that the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received from the Applicants by the Department are made available for public inspection in the Public Disclosure Room of the Employee Benefit Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption to replace PTE 97-63, as amended.

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which require, among other things, a fiduciary to discharge his or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990), and based upon the entire record, the Department finds that the exemption is administratively feasible, in the interest of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) This exemption is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions. Furthermore, the fact that a transaction is subject to an

administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) This exemption is subject to the express condition that the Summary of Facts and Representations, as set forth in the notice, and the Summary of Facts and Representations, as set forth in the notice of Proposed Exemption relating to PTE 97-63, accurately describe the material terms of the transactions to be consummated pursuant to this exemption.

### Exemption

Based on the facts and representations set forth in the application, under the authority of 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), the Department of Labor (the Department) hereby replaces Prohibited Transaction Exemption 97-63 (PTE 97-63), as set forth below.

#### I. Transactions

(a) 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 4975(c)(1)(A) through (E) of the Code,<sup>1</sup> shall not apply to the lending of securities:

(1) to State Street Bank and Trust Company (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 United States (U.S.) domiciled affiliate, as defined in this exemption in section III(a)(1), below, of State Street that is a successor to the activities of FMG; or

(2) to any U.S. registered broker-dealers affiliated with State Street (the Affiliated Broker Dealer(s));<sup>2</sup> by an employee benefit plan (the Client Plan(s)), and/or by a commingled investment fund holding plan assets (the CIF(s)); provided 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);<sup>3</sup>

(b) 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 4975(c)(1)(A) through (E) of the Code, shall not apply to the receipt of compensation by GSL in connection with any securities lending transaction, as described, above, in section I(a) of this exemption; and

(c) the restrictions of section 406 of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of 4975(c)(1) of the Code shall not apply to an arrangement whereby a U.S. registered broker-dealer affiliated with State Street (the Introducing Broker) receives compensation from a clearing broker (the Clearing Broker), as defined in section III(g), in connection with, or as a direct or indirect result of, the lending of securities to the Clearing Broker by a Client Plan (and/or a CIF, as applicable), for which GSL acts as securities lending agent; provided that the conditions, set forth in section II, below, are satisfied.

#### II. Conditions

Section I of this exemption applies only if the conditions of Section II of this exemption are satisfied.

(a) Neither State Street, the SSB Group, GSL, the Clearing Broker, nor any other division or U.S. affiliate of State Street or of the Clearing Broker has or exercises discretionary authority or control with respect to the investment of the assets of a Client Plan (and/or a CIF, as applicable), involved in the transactions which are the subject of this exemption (other than with respect to the investment of cash collateral after securities have been loaned and collateral received), nor renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to such assets, including decisions concerning the acquisition or disposition of securities available for loan by a Client Plan (and/or a CIF, as applicable).

Section II(a) of this exemption will be deemed satisfied notwithstanding the fact that State Street or any division or affiliate of State Street has or exercises discretionary authority or control in

<sup>3</sup> For the sake of simplicity, future references to GSL's performance of services as securities lending agent should be deemed to include its parallel performance as securities lending sub-agent, and references to Client Plans (and/or CIFs, as applicable) should be deemed to refer to Client Plans (and/or CIFs, as applicable) for which GSL is acting as sub-agent with respect to securities lending activities, unless otherwise indicated specifically or by the context of reference.

connection with an index fund (the Index Fund(s)), as defined, below, in section III(d) of this exemption, or a model-driven fund (the Model-Driven Fund(s)), as defined, below, in section III(e) of this exemption, as to which State Street or any division or U.S. affiliate of State Street serves as discretionary trustee or manager and in which Client Plans (and/or CIFs, as applicable) invest. An Index Fund or a Model-Driven Fund with multiple Client Plan (and/or CIF, as applicable) investors is referred to herein as a commingled Index Fund or a commingled Model-Driven Fund (the Commingled Index Fund(s) or the Commingled Model-Driven Fund(s));

(b) Except as otherwise provided, below, in section II(q) of this exemption with respect to Commingled Index Funds or Commingled Model-Driven Funds, before a Client Plan (and/or a CIF, as applicable) participates in a securities lending program, and before any loan of securities to the SSB Group or the Clearing Broker is effected, pursuant to this exemption, the fiduciary of the Client Plan (and/or the fiduciary of the CIF, as applicable) who is independent of State Street, GSL, the SSB Group, the Clearing Broker, and any other division or affiliate of State Street or the Clearing Broker must have:

(1) Authorized and approved the securities lending authorization agreement with GSL (the Agency Agreement), where GSL is acting as the direct securities lending agent; or

(2) Authorized and approved the primary securities lending authorization agreement (the Primary Lending Agreement) with the primary lending agent, where GSL is lending securities under a sub-agency arrangement with the primary lending agent;<sup>4</sup> and

(3) Approved the general terms of the securities loan agreement (the Loan Agreement) between the Client Plan (and/or CIF, as applicable) and the SSB Group or the Clearing Broker, as applicable, the specific terms of which are negotiated and entered into by GSL;

(c)(1) Each Client Plan (and/or CIF, as applicable) may terminate the Agency Agreement or the Primary Lending Agreement at any time, without penalty to such Client Plan (and/or CIF, as applicable), on five (5) business days notice, whereupon the borrower shall deliver certificates for securities

<sup>1</sup> For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

<sup>2</sup> FMG, any division or U.S. affiliate of State Street that becomes a successor to the activities of FMG, and the Affiliated Broker Dealers are collectively referred to, herein, as "the SSB Group."

<sup>4</sup> The Department, herein, is not providing relief for securities lending transactions engaged in by primary lending agents, other than GSL, beyond that provided, pursuant to Prohibited Transaction Exemption 81-6 (PTE 81-6) (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) and Prohibited Transaction Exemption 82-63 (PTE 82-63) (47 FR 14804, April 6, 1982).

identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Client Plan (and/or CIF, as applicable) within: (A) The customary delivery period for such securities, (B) five (5) business days, or (C) the time negotiated for such delivery by the Client Plan (and/or CIF, as applicable) and the borrower, whichever is lesser. With respect to a Commingled Index Fund or a Commingled Model-Driven Fund in which a Client Plan (and/or CIF, as applicable) invests, termination is pursuant to the procedure, as set forth, below, in section II(q) of this exemption;

(2) If any event of default occurs (e.g., a loan is terminated and the borrower fails to return the borrowed securities or the equivalent thereof within the time described, above, in section II(c)(1) of this exemption), to the extent that (A) liquidation of the pledged collateral, or (B) additional cash received from the SSB Group or the Clearing Broker, as applicable, does not provide sufficient funds on a timely basis, a Client Plan (and/or CIF, as applicable), including a Commingled Index Fund, or a Commingled Model-Driven Fund in which a Client Plan (and/or CIF, as applicable) invests, will have the right under the terms of the Loan Agreement to purchase securities identical to the borrowed securities (or their equivalent as discussed above) and may apply the collateral to the payment of the purchase price, any other obligations of the borrower under the agreement, and any expenses associated with the sale and/or purchase. If the collateral is insufficient to accomplish such purchase, State Street will indemnify the Client Plan (and/or CIF, as applicable), including a Client Plan (and/or CIF, as applicable) invested in a Commingled Index Fund or Commingled Model-Driven Fund, pursuant to section II(g) of this exemption;

(d) Each Client Plan (and/or CIF, as applicable), including a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan (and/or CIF, as applicable) invests will receive from the SSB Group or the Clearing Broker, as applicable, (either by physical delivery, or by book entry in a securities depository, wire transfer or similar means) by the close of business on or before the day the loaned securities are delivered to the SSB Group or the Clearing Broker, as applicable, collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, an

irrevocable bank letter of credit issued by a person other than State Street, the Clearing Broker, or an affiliate thereof, or any combination thereof, or other collateral permitted under PTE 81-6 (as amended from time to time or, alternatively, any superseding class exemption that may be issued to cover securities lending by employee benefit plans). The collateral will be held on behalf of such Client Plan (and/or CIF, as applicable) in a manner that causes such collateral to be (i) segregated from and not commingled with the general assets of State Street, the Clearing Broker, or any of their affiliates, and (ii) identifiable and reachable by such Client Plan (and/or CIF, as applicable);

(e) The market value of the collateral (or in the case of a letter of credit the stated amount) must, as of the close of business on the preceding business day, initially equal at least 102 percent (102%) of the market value of the loaned securities. If the market value of the collateral, on the close of trading on a business day, is less than 100 percent (100%) (or such greater percentage as agreed to by the parties) of the market value of the loaned securities at the close of business on that day, the SSB Group or the Clearing Broker, as applicable, is required to deliver by the close of business on the following business day sufficient additional collateral such that the market value of the collateral will again equal at least 102 percent (102%). The applicable Loan Agreement will give Client Plans (and/or CIFs, as applicable), including a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan (and/or CIF, as applicable) invests, a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral and a lien on the collateral. GSL will monitor the level of the collateral daily;

(f) All GSL's procedures regarding securities lending activities will at a minimum conform to PTE 81-6 and PTE 82-63 (as amended from time to time or, alternatively, any superseding class exemption that may be issued to cover securities lending by employee benefit plans);

(g) State Street will agree to indemnify and hold harmless each lending Client Plan (and/or CIF, as applicable) (including the sponsor and fiduciaries of each such Client Plan (and/or CIF, as applicable), and any Client Plan (and/or CIF, as applicable) invested in a Commingled Index Fund or Commingled Model-Driven Fund) against any and all damages, losses, liabilities, costs, and expenses (including attorneys' fees) which such

Client Plan (and/or CIF, as applicable) may incur or suffer directly arising out of the lending of the securities to the SSB Group or the Clearing Broker, as applicable; provided that this condition does not require State Street to indemnify a Client Plan (and/or CIF, as applicable) against any potential investment losses associated with the investment of cash collateral received by such Client Plan (and/or CIF, as applicable) in connection with such securities lending transactions;

(h) Each Client Plan (and/or CIF, as applicable), including a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan (and/or CIF, as applicable) invests, will receive the equivalent of all distributions made to holders of the borrowed securities during the term of any loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities, or other distributions;

(i) Each Client Plan (and/or CIF, as applicable), including a Client Plan (and/or CIF, as applicable) invested in a Commingled Index Fund or Commingled Model-Driven Fund, will receive prior to any approval of the lending of securities to the SSB Group or the Clearing Broker, as applicable, a copy of the Notice of Proposed Exemption (the Notice), a copy of the final exemption, a copy of PTE 97-63, and a copy of the Notice of Proposed Exemption related to PTE 97-63 (the Previous Notice);

(j) Only Client Plans with total assets having an aggregate market value of at least \$50 million will be permitted to lend securities to the SSB Group or to the Clearing Broker, as applicable; provided, however that—

(1) In the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in a securities lending arrangement with GSL, the foregoing \$50 million requirement shall be deemed satisfied, if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Client

Plan investment in the commingled entity, which are in excess of \$100 million.

(2) In the case of two or more Client Plans which are not maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in a securities lending arrangement with GSL, the foregoing \$50 million requirement is satisfied, if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any employee benefit plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such plan or an employee organization whose members are covered by such plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(A) Has full investment responsibility with respect to plan assets invested therein; and

(B) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Client Plan investment in the commingled entity, which are in excess of \$100 million.

(3) In the case of two or more Client Plans whose assets are commingled for investment purposes in an entity, whether or not through an entity described, above, in section II(j)(1) or (j)(2) of this exemption, the \$50 million requirement shall be deemed satisfied if 50 percent (50%) or more of the units of beneficial interest in such entity are held by investors each having total net assets of at least \$50 million. Such investors may include employee benefit plans, entities described, above, in section II(j)(1) or (j)(2) of this exemption, or other investors that are not employee benefit plans covered by section 406 of the Act, or section 4975 of the Code.

In addition, none of the entities described above are formed for the sole purpose of making loans of securities;

(k) The terms of each loan of securities by a Client Plan (and/or by a CIF, as applicable), including by a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan (and/or CIF, as applicable) invests, to the SSB Group or the Clearing Broker, as applicable, will be at least as favorable to such Client

Plan (and/or CIF, as applicable) or to the Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan (and/or CIF, as applicable) invests, as those of a comparable arm's-length transaction between unrelated parties;

(l) Each Client Plan (and/or CIF, as applicable), including a Client Plan (and/or CIF, as applicable) invested in a Commingled Index Fund or Commingled Model-Driven Fund, will receive quarterly reports with respect to the securities lending transactions which are the subject of this exemption, including but not limited to the information described in paragraph 26 of the Previous Notice, so that an independent fiduciary of the Client Plan (and/or CIF, as applicable) may monitor the securities lending transactions with the SSB Group and, if applicable, the Clearing Broker. In the event the identity of the Clearing Broker has changed since the issuance of the report for the immediately preceding calendar quarter, the report for the current calendar quarter must contain the name of the new Clearing Broker and the most recently available audited and unaudited financial statements of such Clearing Broker;

(m) Except in the case of a Commingled Index Fund or Commingled Model-Driven Fund subject to the requirements, as set forth, below, in section II(q) of this exemption, before entering into the Loan Agreement and before a Client Plan (and/or a CIF, as applicable) lends any securities to the SSB Group or to the Clearing Broker, as applicable, an independent fiduciary of the Client Plan (and/or the independent fiduciary of the CIF, as applicable) will receive sufficient information, concerning the financial condition of State Street and, if applicable, the Clearing Broker, including but not limited to the most recently available audited and unaudited financial statements of State Street's parent corporation and, if applicable, the Clearing Broker. In the event of a change in the identity of the Clearing Broker, the name of such Clearing Broker and the information required by this section (m) with respect to the new Clearing Broker must be provided to the independent fiduciary of the Client Plan (and/or the independent fiduciary of the CIF, as applicable) before such Client Plan (and/or CIF, as applicable) lends any securities to the new Clearing Broker;

(n) Except in the case of a Commingled Index Fund or Commingled Model-Driven Fund subject to the requirements, as set forth, below, in section II(q) of this exemption,

the SSB Group and, if applicable, the Clearing Broker, will provide to a Client Plan (and/or to a CIF, as applicable) prompt notice at the time of each loan by such Client Plan (and/or CIF, as applicable) of any material adverse changes in State Street's and, if applicable, the Clearing Broker's financial condition, since the date of the most recently furnished financial statements.

If any such material adverse changes have taken place, GSL will not make any further loans to the Affiliated Broker Dealers and, if applicable, the Clearing Broker, unless an independent fiduciary of the Client Plan (and/or the independent fiduciary of the CIF, as applicable) is provided notice of the material change and approves the continuation of the lending arrangement in view of the changed financial condition.

In the case of a Client Plan (and/or CIF, as applicable) which is not invested in a Commingled Index Fund or Commingled Model-Driven Fund, if the independent fiduciary of the Client Plan (and/or the independent fiduciary of the CIF, as applicable), objects to any material adverse change, as disclosed pursuant to section II(n) of this exemption, such Client Plan (and/or CIF, as applicable) may terminate its participation in the Agency Agreement or the Primary Lending Agreement, without penalty to such Client Plan (and/or CIF, as applicable), pursuant to section II(c), above, of this exemption. In the case of a Client Plan (and/or CIF, as applicable) invested in a Commingled Index Fund or Commingled Model-Driven Fund, termination is pursuant to the procedure described, below, in section II(q)(2), of this exemption;

(o) With respect to any calendar quarter, at least 50 percent (50%) or more of the outstanding dollar value of securities loans negotiated on behalf of all securities lending clients of GSL will be to borrowers unrelated to both State Street and the Clearing Broker;

(p) If an independent fiduciary of a Client Plan (and/or an independent fiduciary of a CIF, as applicable) has given the initial affirmative authorization and approval for such Client Plan (and/or CIF, as applicable) to engage in securities lending transactions, pursuant to the terms of PTE 97-63, or pursuant to section II(b), above, of this exemption, then any subsequent authorization or approval contemplated under this exemption shall be deemed to have been given, if such independent fiduciary has not objected in writing to GSL within 30 days following disclosure to such independent fiduciary of all material

information required in connection with said authorization or approval. In addition, before an independent fiduciary of a Client Plan (and/or an independent fiduciary of a CIF, as applicable), whose initial authorization was given pursuant to PTE 97-63, may give its first subsequent authorization under this exemption in accordance with the procedures contained in this section II(p), such independent fiduciary must be provided with a statement indicating that PTE 97-63 has been replaced by this exemption, and a copy of the Notice, and a copy of the final exemption;

(q) In the case of a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan (and/or a CIF, as applicable) invests:

(1) The requirement, as set forth, above, in section II(b) of this exemption, shall not apply, provided that the information described in sections II(b), II(i), and II(m), above, of this exemption, including a description of the proposed securities lending arrangement, shall be furnished by GSL to a fiduciary who is independent of State Street, GSL, the SSB Group, the Clearing Broker, and any other division or affiliate of State Street or the Clearing Broker with respect to each Client Plan (and/or each CIF, as applicable) whose assets are invested in the Commingled Index Fund or Commingled Model-Driven Fund, not less than 30 days prior to implementation of any such securities lending arrangement, or any material changes thereto, and, thereafter, upon the reasonable request of the independent fiduciary of the Client Plan (and/or the independent fiduciary of the CIF, as applicable) whose assets are invested in the Commingled Index Fund or Commingled Model-Driven Fund.

In the event of a material adverse change in the financial condition of the SSB Group, or the Clearing Broker, as applicable, GSL will make a decision, using the same standards of credit analysis GSL would use in evaluating unrelated borrowers, whether to terminate existing loans and whether to continue making additional loans to the SSB Group, or the Clearing Broker, as applicable.

For purposes of section II(q) of this exemption, any requirement that the fiduciary be independent of State Street and its affiliates shall not apply in the case of an employee benefit plan sponsored and maintained by State Street and/or an affiliate for its own employees (the State Street Plan(s)), as defined, below, in section III(c) of this exemption; provided such State Street Plan is invested in a Commingled Index Fund or Commingled Model-Driven

Fund, and provided further that at all times the value of the aggregate holdings of all State Street Plans in such fund comprises less than 10% of the value of the total assets of such fund;

(2) In the event that the independent fiduciary of a Client Plan (and/or the independent fiduciary of a CIF, as applicable) whose assets are invested in a Commingled Index Fund or Commingled Model-Driven Fund submits a notice in writing within 30 days after receipt of notification of implementation of any such securities lending arrangement, or any material changes thereto, to GSL, as securities lending agent to the Commingled Index Fund or Commingled Model-Driven Fund, objecting to the implementation of, material change in, or continuation of the securities lending arrangement, the Client Plan (and/or CIF, as applicable) on whose behalf the objection was tendered is given the opportunity to terminate its investment in the Commingled Index Fund or Commingled Model-Driven Fund, without penalty to such Client Plan (and/or CIF, as applicable), no later than 35 days after the notice of withdrawal is received.

In the case of a Client Plan (and/or CIF, as applicable) that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the securities lending arrangement; but an existing securities lending arrangement need not be discontinued by reason of such Client Plan (and/or CIF, as applicable) electing to withdraw. If a Client Plan's (and/or CIF's, as applicable) withdrawal necessitates a return of securities to the Commingled Index Fund or Commingled Model-Driven Fund, the SSB Group or the Clearing Broker, as applicable, will transfer securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, or merger of the issuer of the borrowed securities) to the Commingled Index Fund or Commingled Model-Driven Fund within:

(A) The customary delivery period for such securities;

(B) five (5) business days; or

(C) the time negotiated for such delivery by GSL, as lending agent to the Commingled Index Fund or Commingled Model-Driven Fund, and the SSB Group or Clearing Broker, as applicable, whichever is least; and

(3) In the case of a Client Plan (and/or CIF, as applicable) whose assets are proposed to be invested in a Commingled Index Fund or Commingled Model-Driven Fund

subsequent to the implementation of the securities lending arrangement, the Client Plan's (and/or CIF's, as applicable) investment in the Commingled Index Fund or Commingled Model-Driven Fund shall be authorized in the manner described, above, in section II(b) of this exemption;

(4) The provisions of section II(q) of this exemption shall not apply to a Commingled Index Fund or Commingled Model-Driven Fund, if more than ten percent (10%) of the ownership interests in such fund are held by State Street Plans;

(5) In the case of a Commingled Index Fund or Commingled Model-Driven Fund subject to the requirements of section II(q) of this exemption, GSL will furnish upon reasonable request to the independent fiduciary of any Client Plan (and/or to the independent fiduciary of any CIF, as applicable) invested in such fund,<sup>5</sup> the most recently available audited and unaudited financial statements of the parent corporation of State Street and, if applicable, the Clearing Broker (or any new Clearing Broker) prior to the authorization of the securities lending program, and annually after such authorization;

(r) In return for lending securities, a Client Plan (and/or CIF, as applicable), including a Commingled Index Fund or Commingled Model-Driven Fund in which a Client Plan (and/or CIF, as applicable) invests, either—

(1) receives a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan; or

(2) Has the opportunity to derive compensation through the investment of cash collateral. (Under such circumstances, such Client Plan (and/or CIF, as applicable) may pay a loan rebate or similar fee to the SSB Group or the Clearing Broker, as applicable, if such fee is not greater than the fee such Client Plan (and/or CIF, as applicable), would pay in a comparable arm's length transaction with an unrelated party);

(s) State Street and/or its affiliates maintain, or cause to be maintained, within the United States for a period of six (6) years from the date of each transaction which is subject to this exemption, in a manner that is convenient and accessible for audit and

<sup>5</sup> The Department notes that it is the responsibility of the independent fiduciary of the Client Plan (and/or the independent fiduciary of the CIF, as applicable) to periodically monitor any material changes in the securities lending program, including but not limited to a change in the Clearing Broker or in the Clearing Broker's financial status, that may occur after an initial authorization to participate in the program, pursuant to this exemption.

examination, such records as are necessary to enable the persons described, below, in section II(t)(1), to determine whether the conditions of this exemption have been met, except that—

(1) This record-keeping condition shall not be violated if, due to circumstances beyond the control of State Street and/or its affiliates, the records are lost or destroyed prior to the end of the six-year period; and

(2) No party in interest other than State Street and its affiliates shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by section II(t)(1) of this exemption; and

(t)(1) Except as provided in section II(t)(2), below, of this exemption and notwithstanding any provisions of sections (a)(2) and (b) of section 504 of the Act, the records referred to in section II(s) of this exemption are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission;

(B) Any fiduciary of a participating Client Plan, (and/or a CIF, as applicable), or a State Street Plan, or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any participating Client Plan, State Street Plan, or any duly authorized employee or representative of such employer; and

(D) Any participant or beneficiary of any participating Client Plan, State Street Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in section II(t)(1)(B)–(t)(1)(D) are authorized to examine the trade secrets of State Street or its affiliates or commercial or financial information which is privileged or confidential.

### III. Definitions

For purposes of this exemption, the following definitions shall apply:

(a) The term, “affiliate” or “affiliates,” means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee;

(b) The term, “control,” means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term, “State Street Plan(s),” refer to employee benefit plans covered by the Act sponsored and maintained by State Street and/or an affiliate for its own employees;

(d) The term, “Index Fund(s),” refers to any investment fund, account or portfolio as to which State Street or a U.S. affiliate serves as discretionary trustee or manager and in which one or more investors invest, and

(1) which is designed to track the rate of return, risk profile, and other characteristics of an Index, as defined, below, in section III(f) of this exemption, by either:

(A) Replicating the same combination of securities which compose such Index, or

(B) sampling the securities which compose such Index based on objective criteria and data;

(2) for which State Street or its affiliate does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) that contains “plan assets” subject to the Act, pursuant to the Plan Asset Regulation; and

(4) that involves no agreement, arrangement, or understanding regarding the design or operation of the fund which is intended to benefit State Street or its affiliate or any party in which State Street or its affiliate may have an interest;

(e) The term, “Model-Driven Fund(s),” refers to any investment fund, account, or portfolio as to which State Street or a U.S. affiliate serves as discretionary trustee or manager and in which one or more investors invest, and

(1) which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third-party data, not within the control of State Street or an affiliate, to transform an Index;

(2) which contains “plan assets” subject to the Act, pursuant to the Plan Asset Regulation; and

(3) that involves no agreement, arrangement, or understanding regarding the design or operation of the fund or the utilization of any specific objective criteria which is intended to benefit State Street, any affiliate of State Street, or any party in which State Street or any affiliate may have an interest;

(f) The term, “Index,” refers to a securities index that represents the

investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) The organization creating and maintaining the index is—

(A) engaged in the business of providing financial information, evaluation, advice, or securities brokerage services to institutional clients,

(B) a publisher of financial news or information, or

(C) a public stock exchange or association of securities dealers;

(2) the index is created and maintained by an organization independent of State Street; and

(3) the index is a generally accepted standardized index of securities which is not specifically tailored for the use of State Street; and

(g) The term, “Clearing Broker,” means a U.S. broker-dealer registered under the Securities Exchange Act of 1934 that is unrelated to State Street or its affiliates, that has net capital equal to at least \$10 million and that regularly serves as a clearing broker for introducing brokers in the ordinary course of its business, but only in the context, and to the extent, of its service as a clearing broker for an Affiliated Broker Dealer that is acting as introducing broker.

For a complete statement of the facts and representations supporting the Department’s decision to grant PTE 97–63, refer to the proposed exemption (62 FR 51684, October 2, 1997) and the final exemption (62 FR 66689, December 19, 1997). For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption replacing PTE 97–63, refer to the notice (68 FR 6197, February 6, 2003).

Signed at Washington, DC, this 19th day of June, 2003.

**Ivan L. Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
Department of Labor.*

[FR Doc. 03–15930 Filed 6–23–03; 8:45 am]

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. D–11079, et al.]

### Proposed Exemptions; Kinder Morgan, Inc.

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of proposed exemptions.