RETENTION AND DISPOSAL:

(1) The Archivist of the United States has approved the destruction of records maintained in the criminal file when the records indicate individuals have reached 80 years of age, and the destruction of records maintained in the civil file when the records indicate individuals have reached 75 years of age.

(2) Fingerprint cards and related arrest data in the system are destroyed seven years following notification of the death of an individual whose record is maintained *in* the system.

(3) Fingerprint cards submitted by state and local criminal justice agencies are returned upon *the request* of the submitting agencies. The return of a fingerprint card under this procedure results in the deletion from the system of all arrest information related to that fingerprint card.

(4) Fingerprint cards and related arrest data are removed from the Identification Division Records System upon receipt of Federal court orders for expunctions when accompanied by necessary identifying information. Recognizing lack of jurisdiction of local and state courts over an entity of the Federal Government, the Identification Division Records System, as a matter of comity, returns fingerprint cards and related arrest data to local and state criminal justice agencies upon receipt of orders of expunction directed to such agencies by local and state courts when accompanied by necessary identifying informations.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Federal Bureau of Investigation, 10th and Pennsylvania Avenue N.W., Washington, D.C. 20535.

NOTIFICATION PROCEDURE:

Address inquiries to the System Manager.

RECORD ACCESS PROCEDURES:

The Attorney General has exempted the Identification Division Records System from compliance with subsection (d) of the Act. However, pursuant to 28 C.F.R. 16.30–34, and Rules and Regulations promulgated by the Department of Justice on May 20, 1975 at 40 Fed. Reg. 22114 (Section 20.34) for Criminal Justice Information Systems, an individual is permitted access to his identification record maintained in the Identification Division Records System and procedures are furnished for correcting or challenging alleged deficiencies appearing therein.

CONTESTING RECORD PROCEDURES:

Same as the above.

RECORD SOURCE CATEGORIES:

See Categories of Individuals.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

The Attorney General has exempted this system from subsections *(c)(3) and (4); (d); (e)(1), (2), (3), (4)(G) and (H), (5) and (8); (f); and (g)* of the Privacy Act pursuant to 5 U.S.C. 552a(j). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register.**

[FR Doc. 81-2151 Filed 1-22-81; 8:45 am]

BILLING CODE 4410-02-M

Office of Juvenile Justice and Delinquency Prevention

Proposed OJJDP Guideline; Request for Comments

Action: Request for Comments on the Proposed OJJDP Guideline: Prevention of Juvenile Delinquency Through Capacity Building—Cycle II

Notice is hereby given that the Office of Juvenile Justice and Delinquency Prevention, pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. 5601, et. seq., proposes to issue a guideline.

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is inviting interested persons to comment on the proposed guideline, Prevention of Juvenile Delinquency through Capacity Building—Cycle II, and will consider all such written comments before the final publication of this guideline. The period for public comment on this proposed guideline is 30 days. After development of the final guideline, which is expected to be published in the **Federal Register** on or about March 15, 1981, it is anticipated that applicants will have approximately 30 days to develop concept papers. This will permit award of funds on or about August 30, 1981.

This notice and opportunity to submit written views and comments is provided pursuant to Executive Order No. 12044, Improving Government Regulations, to ensure that interested organizations, agencies and individuals have an opportunity to review the proposed guideline. Interested persons are invited to submit written comments or suggestions to Ms. Roberta Dorn, Office of Juvenile Justice and Delinquency Prevention, 633 Indiana Avenue NW, Room 442, Washington, D.C. 20531, on or before March 2, 1981.

Ira M. Schwartz,

Administrator Office of Juvenile Justice and Delinquency Prevention.

Program Announcement

The Prevention of Juvenile Delinquency Through Capacity Building—Cycle II

A. Purpose

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is sponsoring a second cycle of the Capacity Building Program. This cycle, Capacity Building II, is designed to increase the capacity of public and private not-for-profit youth serving agencies to better serve children and youth through the support and development of activities which will improve the effectiveness of the agencies involved.

B. Program Components

The Capacity Building strategies selected for funding under this initiative build upon the recommendations of the National Advisory Committee for Juvenile Justice and Delinquency Prevention as outlined in the recently issued *"Standards for the Administration of Juvenile Justice"*. Objectives sought by projects funded under this Guideline should be attainable within a 2 year period. Concept papers describing program activities incorporating one or more of the following strategies are invited:

1. Projects which seek to plan, coordinate and establish programs to utilize school facilities and resources by the local community during nonschool hours for the provision of delinquency prevention activities.

2. Projects which seek to increase the capacity of the schools to prevent delinquency by establishing school based programs to inform youth about juvenile law and increase awareness on the part of youth of the consequences of involvement with the juvenile justice system.

3. Projects which seek to enhance a public or private not-for-profit youth serving agency's capacity to serve youth through the use of adult and juvenile community volunteers to provide services, plan programs and monitor services provided by juvenile facilities.

4. Projects which seek to increase the capacity of agencies to provide effective participatory roles for youth in policy development and program implementation.

5. Projects which seek to improve the capacity of local public and private youth serving agencies to develop and implement management information

systems to improve the administration of youth services.

6. Projects which seek to increase the capacity of juvenile justice system agencies to identify, document and eliminate differential treatment of minority and female youth.

7. Projects which seek to enhance the capacity of an agency or group of agencies to better serve youth through the provision of intensive training of staff and volunteers in specialized areas of youth work such as gang intervention, teenage prostitution and monitoring of services provided by residential facilities. This does not include subsidy of academic education through degree granting educational institutions.

8. Projects which seek to increase the capacity of an agency or a group of agencies to serve youth by planning and implementing public awareness and education programs which will provide the community with timely and accurate information as to the need for youth services, and the role of community agencies in meeting those needs.

C. Dollar Range and Duration of Grants

1. The total amount of funds available for support of projects selected under this Guideline is 1.7 million dollars. Grants will be awarded for a one year period in amounts ranging from $50,000 to $150,000. Projects which perform satisfactorily in the first year will be considered for second year funding.

2. OJJDP will not fund projects beyond the two year project period and objectives sought should be attainable within this timeframe.

3. Applicants applying who have received OJJDP funds previously will be judged on the merits of the currently proposed concept paper and their performance under previously funded grants will be taken into consideration in making concept paper selections.

D. Eligible Applicants

Eligible applicants include all public and private youth serving agencies that have provided direct and indirect services to children and youth during the past two years.

E. Submission Requirements

1. *Procedures:* Concept papers must be submitted to the Office of Juvenile Justice and Delinquency Prevention in accordance with the following:

Deadline for Submission of Concept Papers: One original and two copies must be mailed or hand delivered to the Office of Juvenile Justice and Delinquency Prevention, LEAA, Room 442, 633 Indiana Avenue, NW., Washington, D.C. 20531 by midnight April 30, 1981. Concept papers sent by mail will be considered on time if sent by registered or certified mail as evidenced by the U.S. Postal Service postmark on the original receipt from the U.S. Postal Service.

2. Concept papers need not be submitted to the State Criminal Justice Councils or the A–95 Clearinghouses. If, the concept paper is selected for full application development, the applicant will be required to submit the application for comment to the appropriate State Criminal Justice Council and A–95 Clearinghouse.

3. *Concept Paper Narrative Requirements:* The concept paper should not exceed fifteen single spaced typed pages. The paper should provide a discussion of the proposed capacity building strategy following the outline below:

1. Purpose (Goals and Objectives).
2. Methodology (Strategy).
3. Need (Justification for the implementation of the proposed project by discussion or documentation).
4. Management and Staffing.

4. *Budget Requirements:* A one page budget estimate should be attached to the concept paper. The estimate should be broken out into two annual periods and reflect the following categories:

1. Personnel.
2. Fringe Benefits.
3. Travel.
4. Equipment.
5. Supplies.
6. Contractual.
7. Other.

F. Selection Procedures

Concept papers will be reviewed and selected for full application development by a panel. The authors of concept papers selected for application development will be contacted by OJJDP and will be provided with further instructions regarding final application submission requirements and procedures. The selection of a concept paper does not guarantee funding and each final application will be judged on competitive merit and in relation to its ability to fully and satisfactorily develop the concept presented and to meet all applicable OJJDP fiscal and programmatic application requirements.

G. Selection Criteria

1. Concept papers must propose projects to implement one or more of the capacity building strategies listed in Section B. The criteria which will be used to evaluate the concept papers are:

a. Responsiveness of the concept to the outlined strategies.

b. Clarity of the goals and objectives.

c. Clarity and practicality of the methodology.

d. Clarity and persuasiveness of the statement of need.

e. Potential for the capacity building activities to result in measurable improvements in the effectiveness of the youth serving agency and its capacity to provide service to youths.

f. Indications that agency may become self-sustaining after grant period.

g. Priority consideration to projects which have multiple or cooperative funding arrangements (i.e., private foundations, United Ways, etc.).

2. Not more than two concept papers from any single state will be selected for application development.

3. The decision of OJJDP regarding the selection of concept papers will be final and no further programmatic review of concept papers not selected for application development will occur following the notification of finalists.

H. Definitions

1. *Capacity Building:* A systematic approach which maximizes the ability of a group, agency, or organization to provide youth services relevant to the needs of youth and the degree to which the activities and services can be expanded and sustained.

2. *Public Youth Serving Agency:* Any agency, organization, or institution which functions as a part of a unit of government and is supported by public revenue, for the purpose of providing services to youth.

3. *Private Not-for-Profit Youth Serving Agency:* Any agency, organization, or institution with experience in serving youth, designated tax exempt by the Internal Revenue Service under Section 501(c)(3) of the IRS Code.

4. *Youth:* Youth are defined by each jurisdiction's definition as contained in the relevant welfare and juvenile codes.

5. *Management Information Systems:* Policies and procedures for the periodic collection and analysis of data on project activities designed for use in program management and decision making.

I. For Further Information

For further information or clarification regarding this Guideline, please contact: Ms. Roberta Dorn, Juvenile Justice Specialist, (202) 724–7755.

[FR Doc. 81–2530 Filed 1–22–81; 8:45 am]

BILLING CODE 4410–18–M

DEPARTMENT OF LABOR

Office of Pension and Welfare Benefit Programs

[Prohibited Transaction Exemption 81-8]

Class Exemption Covering Certain Short-Term Investments

AGENCY: Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This exemption permits employee benefit plans to engage in transactions involving certain short-term investments notwithstanding the prohibited transaction restrictions of the Employee Retirement Income Secrity Act of 1974 (ERISA or the Act). The exemption will affect participants and beneficiaries of employee benefit plans, persons who manage the assets of such plans, and other persons who provide services to such plans.

EFFECTIVE DATE: January 1, 1975. (Certain conditions to the availability of the exemption are effective April 23, 1981).

FOR FURTHER INFORMATION CONTACT: William A. Schmidt, Plan Beneftis Security Division, Office of the Solicitor, U.S. Department of Labor, (202) 523-8610. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: On April 25, 1980, notice was published in the **Federal Register** (45 FR 28017) of the pendency before the Department of Labor (the Department) of a proposed class exemption from the restrictions of section 406(a)(1) (A), (B), and (D) of the Act and from the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A), (B) and (D) of the Code. The proposed class exemption was requested in two applications for class exemption—one filed by the American Bankers Association,[1] and the other filed jointly by six insurance companies.[2] In addition, the proposed exemption also related to certain matters that were raised in an application for individual exemption filed by E. I. du Pont de Nemours and Company.[3] Public comments were received pursuant to the provisions of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).[4]

Discussion

The Department received eleven comments regarding the proposed exemption. All of the commentators generally supported the exemption, but each comment also suggested changes to it. The Department has made substantial changes to the proposed exemption in response to these suggestions, and these changes, together with the specific issues raised by the commentators, are discussed below. The discusion deals first with the three kinds of short-term investment covered by the proposed exemption—banker's acceptances, commercial paper, and repurchase agreements—and then deals with several issues raised by the commentators that relate to the scope of the exemption.

I. *Banker's Acceptances.* Two commentators suggested that the exemption for banker's acceptances be expanded to include banker's acceptances issued by foreign banks. According to these commentators, the fact that a bank is subject to supervision by the United States or a State would seem to have little bearing on a determination whether a transaction involves the types of conflict of interest abuses that the prohibited transaction provisions were designed to preclude, and it is unlikely that a foreign bank would be a party in interest. In addition, one commentator asserted that a determination to invest in instruments issued by a foreign bank involves questions of purdence which should be left to the plan fiduciary making the investment deceision on behalf of the plan.

The Department has retained as a condition of the exemption as applied to banker's acceptances the requirement that the banker's acceptance be issued by a bank that is supervised by the United States or a State. The condition was included in the proposed exemption because the Department believed that the existance of state or Federal regulation of a bank would provide at least some independent protection of the interests of the plan acquiring the investment. Although a foreign bank may also be subject to regulatory supervision that is at least as strict as that to which a domestic bank is subject, the commentators provided no indication of the kinds of foreign banks from which a plan might acquire a banker's acceptance or the regulation to which such banks are subject. Therefore, the Department does not believe that it has a sufficent basis for concluding that the acquisition of such instruments from a party in interest would be in the interest of affected plans or protective of such plans and their participants and beneficiaries. However, because retroactive applicaiton of the condition would apparantly disrupt existing transactions, the condition will apply only to transactions occurring on and after a date 90 days from the date of this exemption.

One commentator also requested that the Department expand the scope of the exemption to include banker's acceptances issued by agencies of banks. In connection with this point, the commentator expressed particular concern that the exemption extend to banker's acceptances that are issued by "Edge corporations"—*i.e.* corporations organized under Federal Law (12 U.S.C. 611-631) "for the purpose of engaging in international or foreign banking or foreign financial operaitons, or in banking or other financial operaitons in a dependency or insular possession of the United States . . ."

In the Departemnt's view, a banker's acceptance issued by an Edge corporation is within the scope of the exemption because such corporations are organized pursunt to provisions of the National Banking Act, and, although they engage primarily in foreign banking transactions, they are required to file periodic reports with the Board of Governors of the Federal Reserve System and are subject to examination by examiners apponted by the body.[5]

Another commentator requested that the Department either clarify that the exemption extends to secondary market transactions involving banker's acceptances or that the exemption be extended to include such transactions. In this regard, the Department believes that the exemption for banker's acceptances extends to secondary market transactions if the conditions of the exemption are met.

Finally, the Department has added a condition to the final exemption which provides that the purchase, sale or disposition of the banker's acceptance must be as favorable to the plan as an arm's length transaction with an unrelated party would be. This condition

[1] Exemption Application No. D-653.

[2] Exemption Application No. D-1204. The exemption requested by the insurance companies covers short-term investment of plan assets as well as a wide range of other transactions with periods who provide services to plans. This class exemption is not intended to deal with those other transactions. They will be addressed separately.

[3] Exemption Application No. D-1294.

[4] The applications for exemption were filed with the Internal Revenue Service, pursuant to Rev. Proc. 75-26, 1975-1 C.B. 722, as well as with the Department. However, the notice of proposed exemption was issued, and the exemption is being granted, solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue this type of exemption to the Secretary of Labor.

[5] 12 CFR 211.7(b), (c).

is included as an additional protection to plans and their participants and beneficiaries.

II. *Commercial Paper.*

A. *Guarantees of Commercial Paper.* One commentator requested that the Department modify the proposed exemption to make it clear that commercial paper that is guaranteed by a party in interest, but issued by another person, is covered by the exemption. With respect to this request, the commentator stated that a company may guarantee commercial paper that is issued by another company and this commercial paper might be purchased by an employee benefit plan with respect to which the guarantor is a party in interest. According to the commentator, there is little or no potential for abuse with respect to a plan's acquisition of such commercial paper in the circumstances contemplated by the exemption, and, if the exemption is not modified to clearly cover commercial paper guaranteed by a party in interest, many subsidiaries of large, reputable corporations, as well as other issuers, would be unable to borrow funds in the commercial paper market because many of the same problems exist in determining the existence of a prohibited transaction with respect to a guarantee of commercial paper as exist in connection with the mere issuance of commercial paper. The Department has modified the exemption in response to the commentator's request to make it clear that the exemption contemplates a plan's acquisition, holding or disposition of commercial paper that is guaranteed by a party in interest, provided the other conditions to the exemption are satisfied.

B. *The rating requirement.* A condition to the proposed exemption provided that an acquisition, holding or disposition of commercial paper would be subject to the exemption only if the commercial paper involved in the transaction were ranked in the highest category by at least two nationally recognized statistical rating services. Several commentators noted that commercial paper that does not meet the requirements of this condition may nonetheless be an acceptable investment for employee benefit plans and that, because the rating of an issue of commercial paper reflects the relative "riskiness" of the investment, higher rated paper generally carries relatively lower interest rates, and a lower rating will result in higher interest rates. According to the commentators, the rating requirement of the proposed exemption would have the practical effect of limiting employee benefit plans to investments *only* in commercial paper given the highest ranking by two nationally recognized rating services because the nature of the commercial paper market, in many cases, makes it impossible for a fiduciary or issuer to determine whether a transaction is prohibited under section 406(a) of ERISA.[6] Therefore, the commentators state, the imposition of a rating requirement would have the practical effect of preventing a plan fiduciary from making an independent judgment regarding appropriate commercial paper investments for the plan, and would limit the potential return that might be available to the plan with respect to such investments. Finally, one commentator also noted that commercial paper may be offered in a private transaction, and, even though such commercial paper may be an attractive investment for an employee benefit plan, it would not be rated by a nationally recognized rating service.

The Department has modified, but has not deleted, the rating condition in response to the comments summarized above. As modified, the condition requires that, with respect to transactions occurring on or after a date 90 days from the date the exemption is granted, commercial paper must be ranked in one of the three highest rating categories by at least one nationally recognized statistical rating service. This modification is intended to allow fiduciaries who make investment decisions regarding the short-term investments of a plan to choose from a broad range of issues of commercial paper while assuring that the quality of the issue has been assessed by an independent party. However, the Department does not intend to suggest that, merely because commercial paper may be acquired by a plan pursuant to the exemption, such an acquisition would necessarily be an appropriate investment for an employee benefit plan; that determination must be made by the responsible plan fiduciaries, taking into account all the relevant facts and circumstances.

With respect to unrated issues of commercial paper that are sold in a private offering, the extent to which commercial paper is issued in the ordinary course of business without being rated by an independent rating agency is unclear, and the comments received did not provide the Department with a basis for concluding that unrated private offerings of commercial paper have such protective characteristics that affected plans would not need the independent safeguards that the rating condition is intended to provide.

C. *The section 13 filing requirement.* Several commentators objected to the requirement contained in a condition of the proposed exemption that commercial paper be issued by a company required to file reports under section 13 of the Securities Exchange Act of 1934 (the 1934 Act). These commentators note that many insurance companies do not file periodic reports under section 13(a) of the 1934 Act because they are specifically exempt under section 12(g)(2)(G) of the 1934 Act from the registration requirements of section 12 of that act, and are not otherwise required to file such reports.[7]

In addition these commentators noted that the filing requirements of other paragraphs of section 13 of the 1934 Act—*i.e.* sections 13(d) and 13(g) (Generally applicable to purchasers and holders of more than five percent of a class of equity securities registered under section 12 of the 1934 Act), 13(e) (relating to registered issuers that purchase their own shares), and 13(f) (relating to institutional investment

[6] As described in the notice of proposed exemption, the applicants for the exemption stated in their application that in view of the nature of the short-term investment market and the way the investment decision making process in large plans is structured, it is not feasible for trustees and investment managers of these plans to know, or determine prior to consummation of the transaction, whether the issuer of an obligation is a party in interest or disqualified person with respect to a plan for which the acquisition is contemplated. The comments received by the Department also made this point. *See* comments of the American Bankers Association, dated June 24, 1980, and comments made on behalf of six life insurance companies and the American Council of Life Insurance, dated June 24, 1980.

[7] Section 12(g)(2)(G) of the 1934 Act states:

(2) The provisions [requiring registration] shall not apply in respect of—

* * *

[G] any security issued by an insurance company if all of the following conditions are met:

(i) Such insurance company is required to and does file an annual statement with the Commissioner of Insurance (or other officer or agency performing a similar function) of its domiciliary State, and such annual statement conforms to that prescribed by the National Association of Insurance Commissioners or in the determination of such State commissioner, officer or agency substantially conforms to that so prescribed.

(ii) Such insurance company is subject to regulation by its domiciliary State of proxies, consents, or authorizations in respect to securities issued by such company and such regulation conforms to that prescribed by the National Association of Insurance Commissioners.

(iii) After July 1, 1966, the purchase and sales of securities issued by such insurance company by beneficial owners, directors, or officers of such company are subject to regulation (including reporting) by its domiciliary State substantially in the manner provided in section 16 of this title [relating to securities transactions by certain directors, officers and principal shareholders of the issuer of such securities].

managers who exercise investment discretion over at least $100 million in publicly traded equity securities)—relate to specific occurrences or are only applicable in certain circumstances, and, therefore, many issuers of commercial paper may have no obligation to file under these requirements. The commentators also noted that application of the section 13 filing requirement would prevent plans from acquiring commercial paper issued by many privately-held companies and subsidiaries of other companies because such companies also are not required to file reports under section 13 of the 1934 Act. Finally, one commentator asserted that application of the 1934 Act filing requirement would effectively preclude a plan from investing in any commercial paper issued by a company that does not meet this requirement because in most commercial paper transactions it is not known whether the ultimate purchaser of the commercial paper is an employee benefit plan or whether the issuer or an affiliate thereof is a party in interest with respect to the plan.

In the Department's view, it is important that a plan fiduciary have access to relevant financial information regarding an issuer of commercial paper in order to make an informed decision on behalf of a plan. In addition, where such information is readily available, other interested persons will be able to monitor plan fiduciaries' investment decisions with respect to commercial paper. Nonetheless, the Department is persuaded by the comments received that commercial paper that is an appropriate investment for an employee benefit plan may be issued by companies that are not required to file reports under the 1934 Act, and that inclusion of the 1934 Act filing requirement as a condition to the exemption might unduly limit the short-term investment opportunities available to a plan. Therefore, the Department has deleted this condition in the final exemption. However, notwithstanding this change, the Department notes that a plan fiduciary has a general fiduciary duty, in determining whether to acquire commercial paper on behalf of a plan, to obtain and consider such information as is necessary to an informed decision on behalf of the plan.

D. *Stated Maturity.* One commentator noted that the condition in the proposed exemption which limited coverage to commercial paper with a stated maturity of 270 days or less appears to be derived from section 3(a)(3) of the Securities Act of 1933 (the 1933 Act), but that section 3(a)(3) contains additional language modifying the 270 day requirement which does not appear in the condition to the exemption.[8] This commentator suggested that the condition be revised to conform to the definition in the 1933 Act. The Department agrees with this comment and has revised the condition accordingly.

E. *Employer Securities.* One commentator suggested that the Department expand the exemption to include commercial paper issued by an employer of participants in a plan, or an affiliate of such an employer, provided it is a "marketable obligation" as defined in section 407(e) of ERISA and otherwise meets the percentage requirements of section 407. Another commentator suggested that the condition to the proposed exemption which required that commercial paper involved in a transaction subject to the exemption not be issued by an employer of participants in the plan (or an affiliate of such an employer) be coordinated with section 408(e) of ERISA which provides an exemption for certain transactions involving employer securities. In the Department's view, commercial paper issued by an employer of participants in a plan, or an affiliate of such an employer, may be a "marketable obligation," and, therefore, a plan's acquisition or sale of such commercial paper would be exempt from the prohibited transaction restrictions of section 406 of ERISA if the transaction meets the requirements of section 408(e).[9] Accordingly, the Department has decided not to revise the exemption in response to the commentator's suggestions because it believes that section 408(e), rather than the exemption being granted here, should govern the circumstances in which commercial paper issued by an employer may be purchased or sold by a plan.

III. *Repurchase Agreements.* Most of the commentators urged the Department to eliminate or substantially modify several of the conditions of the proposed exemption relating to repurchase agreements. These objections to the conditions and the Department's responses to the comments are discussed below.

A. *The requirement of a writing.* Four of the commentators suggested that the Department eliminate or modify the condition of the exemption that would require that a repurchase agreement covered by the exemption be embodied in, or pursuant to, a written agreement. These commentators noted that a repurchase agreement transaction, like other transactions involving short-term investments, is consummated very quickly, and, in addition, a repurchase agreement may be for as short a period as overnight. According to the commentators, the only written evidence of a separate repurchase agreement transaction may be a confirmation of the transaction, and, in the context of the market for repurchase agreements, it would be burdensome to require a written agreement for each transaction.

The condition relating to a written agreement was included in the proposed exemption because the Department had concluded that a written instrument defining the rights of the parties to the agreement was necessary both for the protection of plans (and their participants and beneficiaries) and in order to permit monitoring of a plan's compliance with the terms of the exemption. However, the Department did not intend that a separate agreement necessarily be entered into for each repurchase agreement transaction. Therefore, the Department has modified the language of the condition to more clearly state that a transaction entered into under a "blanket" written agreement would be sufficient to satisfy the condition. In addition, the Department has revised the condition to provide that receipt of a written confirmation of a transaction will be considered sufficient to meet the requirements of the condition for transactions occurring before a date 90 days from the date of this exemption.

B. *Financial statements.* The proposed exemption included a condition that would require the bank, broker-dealer or dealer entering into the repurchase agreement (the seller) to furnish the plan with its most recent statement of financial condition prior to entering into the agreement, and to represent that there has been no material adverse change in its financial condition since the date of such statement.

Several commentators objected to the proposed condition relating to the furnishing of financial statements,

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[8] Section 3(a)(3) of the 1933 Act provides as follows:

Section 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to the following classes of securities:

* * *

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

[9] The exemption granted here does not extend to conduct that is prohibited under section 406(b) of ERISA, while section 408(e) of ERISA, in certain circumstances, does provide relief from violations of sections 406(b)(1) and 406(b)(2). *See* 45 FR 51194 (August 1, 1980) (to be codified as 29 CFR § 2550.408e).

indicating that, because repurchase agreement transactions are entered into with great speed and for very short periods of time, it would be highly burdensome or impossible for a seller to comply with the condition. In addition, some of the commentators stated that the condition is not necesary for the protection of participants because sellers that are permitted to engage in repurchase agreement transactions pursuant to the terms of the exemption are highly regulated and the plan officials who are likely to engage in such transactions on behalf of a plan are sophisticated investors who would monitor the financial condition of the seller involved in a transaction.

The purpose of the condition relating to the furnishing of financial statements is similar to that underlying the condition to the proposed exemption that related to the filing of reports under the 1934 Act by issuers of commercial paper—*i.e.*, to assure that plan officials entering into such transactions have access to information that is necessary to evaluate the transaction, and to assure that other interested parties can assess the propriety of a plan's short-term investment activities. The Department is not prepared, on the basis of the comments received, to conclude that furnishing statements of the financial condition of a seller who engages in repurchase agreement transactions with a plan is unnecessary to accomplish these purposes. However, the Department is persuaded that the condition as proposed would create undue administrative burdens, and that application of the condition to transactions that may have already occurred would be inequitable. Therefore, the condition has been revised to apply only to transactions that are entered into on and after a date 90 days from the date of this exemption, and, in addition, the condition has been modified to reduce the burden of complying with it. In this regard, one commentator suggested that the condition might be revised to provide that the seller, prior to entering into its first repurchase agreement transaction with the plan, undertake to furnish the plan with statements of financial condition as issued, and, in connection with each repurchase agreement transaction, represent that there has been no material adverse change in the seller's financial condition since the date of the statement last furnished to the plan. Generally, the Department has adopted this suggestion. However, the condition also permits a seller to agree in the instrument pursuant to which the repurchase agreement transaction is entered into that, by entering into such transaction, the seller represents that there has been no material adverse change in its financial condition since the date of the last financial statement furnished to the plan that has not been previously disclosed to the fiduciary with whom the written agreement is made. This change is intended to allow the individuals who engage in repurchase agreement transactions that are covered by the exemption to consummate such transactions without offering or eliciting a separate affirmative representation regarding the seller's financial condition prior to each transaction.

C. *Securities other than obligations of the United States.* Four commentators objected to that portion of a condition in the proposed exemption which required that, in order for a repurchase agreement transaction to be covered by the exemption, the plan must receive securities issued or guaranteed by the United States or its agencies (United States obligations). According to these commentators, repurchase agreements frequently involve securities other than United States obligations and, if the Department limits the availability of the exemption to transactions involving such obligations, the condition would unduly restrict the investment opportunities available to employee benefit plans. Further, one of the commentators argued that it would be inappropriate for the exemption to preclude a plan from acquiring securities in a repurchase agreement transaction that it could acquire directly in a separate transaction.

The Department has modified the condition in response to the comments received because it is persuaded that marketable obligations other than United States obligations may, as collateral, provide sufficient protection of affected plans (and of their participants and beneficiaries). Therefore, under the final exemption, repurchase agreements may involve securities other than United States obligations, as well as banker's acceptances, commercial paper and certificates of deposit,[9a] provided: (1) the direct acquisition of the securities, banker's acceptances, commercial paper or certificates of deposit would not violate the restrictions imposed by ERISA on a plan's acquisition or holding of employer securities, and (2) any securities that are subject to the Securities Act of 1933 are obligations that are not restricted securities within the meaning of Rule 144 of that act.[10]

D. *Value of securities received and requirement for the delivery of additional securities.* Under the proposed exemption, in order for a repurchase agreement transacation to be exempt, a plan was required to have received securities whose market value was at least 102% of the purchase price paid by the plan. In addition, under another condition to the proposed exemption, if, during the course of a repurchase agreement, the market value of the underlying securities fell below 102 percent of the purchase price, the plan was required to receive from the seller, by the close of business on the following business day, additional securities the market value of which, together with the market value of securities previously delivered or sold to the plan under the repurchase agreement, equaled at least 102 percent of the purchase price paid to the plan.

With respect to the requirement that a plan receive at the beginning of a repurchase agreement securities whose fair market value is equal to at least 102% of the purchase price, several commentators noted that where a repurchase agreement involves the delivery of securities the fair market value of which is in excess of the purchase price, the purchaser might be required to accept a lower effective interest rate on the transaction. In addition, these commentators indated that sellers might be reluctant to engage in repurchase agreement transactions with plans if the plan is required to receive such "excess collateral."

With respect to the requirement that a plan receive additional securities by the close of the next business day when the fair market value of securities received under a repurchase agreement falls below 102% of the purchase price, many commentators indicated that repurchase agreements are often for a one-day or overnight period, and, that under such an overnight agreement, there would be no need to comply with the requirement

[9a] The Department has specifically included banker's acceptances, commercial paper, and certificates of deposit in order to make it clear that the exemption is available for repurchase agreements that involve such instruments. However, in specifically including these instruments, the Department does not intend to express an opinion regarding whether these instruments are, or are not, securities.

[10] In determining whether to engage in a repurchase agreement transaction that involves securities or instruments other than United States obligations, a plan fiduciary, in addition to ascertaining whether direct acquisition of such securities, banker's acceptances, commercial paper or certificates of deposit would violate the restrictions relating to employer securities and determining whether the securities or instruments are of appropriate quality for use in a repurchase agreement transaction, would also be required to evaluate the additional risks of the transaction in relation to the expected return.

to deliver additional securities because the agreement would be fully performed by the close of the next business day following the day on which the market value of the securities involved fell below 102% of the purchase price. In addition, these commentators stated that the requirement of daily "marking-to-market"—*i.e.*, daily determination of the sufficiency of the market value of the securities underlying a repurchase agreement—would present substantial administrative difficulties, and, therefore, imposition of such a requirement might place employee benefit plans at a competitive disadvantage in the repurchase agreement market.

The commentators suggested several different ways of modifying the "marking-to-market" requirement. Some suggested that the requirement be applicable only with respect to repurchase agreements whose term exceeds a specified period, such as 15 or 35 days, and that additional collateral only be required upon the expiration of a period longer than one day; others suggested that the requirement that additional collateral be delivered be related to a different event, such as a substantial decline in the fair market value of the securities received by the plan, or a decline in the value of such securities to 95% or less of the purchase price. Still other commentators suggested that this requirement be deleted in its entirety but that the requirement that the securities initially delivered have a fair market value of at least 102% of the purchase price be retained.

The requirement that the securities received by a plan have a fair market value equal to at least 102% of the purchase price and the requirement that additional securities be delivered as necessary to maintain the fair market value of securities in the possession of the plan at at least 102% of the purchase price were included in the proposed exemption because such "excess collateral," in the Department's view, would provide meaningful protection to affected plans and their participants against the possibility that a seller would be unable to meet its obligations under a repurchase agreement and that the proceeds from the sale of the underlying securities would be insufficient to provide the plan with the benefit of its bargain. However, the Department also believes that plan officials should be permitted the maximum discretion in choosing repurchase agreement opportunities that is consistent with the protection of plan participants and beneficiaries. Therefore, the Department has modified the exemption to require that, in order for a repurchase agreement transaction to be covered by the exemption, a plan must receive securities at the outset of the transaction whose fair market value is at least equal to 100 percent of the purchase price. In addition, the final exemption requires that, for future transactions, the written agreement pursuant to which the repurchase agreement transaction is entered into must provide that if, during the course of an agreement, the value of the underlying securities falls below the purchase price, the plan may require the seller to deliver, on the following business day, additional securities whose market value together with the market value of securities initially received by the plan equals at least 100 percent of the purchase price. These revisions are intended to assure that there is initially full security for the plan's investment while allowing plan fiduciaries some latitude where the market value of the securities initially received falls below the purchase price.[11]

E. *Other Matter Relating to Repurchase Agreements.* One commentator suggested that the condition providing that the exemption is not available with respect to a repurchase agreement where the seller or an affiliate of the seller has discretionary authority or control with respect to the investment of the plan assets involved in the transaction, or renders investment advice with respect to those assets, should be revised to make it clear that a determination of whether a person is providing "investment advice" will be made in accordance with the Department's regulation[12] dealing with the meaning of that phrase as it is used in the definition of the term "fiduciary" under section 3(21)(A)(ii) of ERISA. The Department has decided to adopt this suggestion, and has revised the condition accordingly. In addition, for the sake of uniformity, the Department has made the same revision to the analogous conditions of those portions of the exemption that deal with banker's acceptances, commercial paper and certificates of deposit.[13]

Another commentator noted that the securities underlying a repurchase agreement may not be held directly by the purchaser, but may be held by a third party as agent for the purchaser, or in escrow. This commentator requested that the Department make it clear that the conditions to the exemption do not require the purchaser to hold such securities directly. In the Department's view, a repurchase agreement transaction that involves the delivery of the underlying securities to an agent for the plan that is acquiring the securities pursuant to the agreement, or delivery of the securities to an independent third party in escrow, would be covered by the exemption, provided the other conditions relating to repurchase agreements are met, because, under such arrangements, the seller has relinquished possession of the securities and, in the case of an agent, the plan has control of the person who receives the securities, and, in the case of an escrow arrangement, an independent third person is obligated to deliver the securities to the plan upon the occurrence of specified events, (such as default by the seller). However, some arrangements may not actually involve a repurchase agreement. For example, an arrangement might be nominally a "repurchase agreement," but, because the securities have not been segregated, the plan would have to take legal action against the seller in order to take possession of them in the event of default, and other creditors of the seller might be able to proceed against them. Such transactions would not be covered by the exemption.

Finally, one commentator suggested that the Department revise the condition of the proposed exemption which required that a plan receive "interest at a rate no less than it would receive in a comparable transaction with an unrelated party" to provide that the condition would be satisfied if the fiduciary acquiring the security, acting in good faith, reasonably believes that the interest rate is no less than that which would be available at the time from unrelated parties. The Department has not adopted this suggestion because it believes that a fiduciary who causes a plan to engage in a repurchase agreement transaction of the kind described in the applications and in the comments received should have no difficulty in establishing his compliance with the condition as it was proposed.

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[11] The revised exemption does not prevent a plan from negotiating a repurchase agreement that provides for more stringent initial "collateralization" and "marking-to-market" terms—or both, and, depending on the financial condition of the seller and the character of the underlying securities, a fiduciary may be obligated to obtain such terms before engaging in the transaction. *See* section 404(a) of ERISA.

[12] 29 CFR 2510.3-21(c).

[13] See the discussion below regarding the inclusion in the final exemption of certain bank certificates of deposit.

IV. *Scope of the exemption.*

A. *Section 406(b).* One commentator suggested that the proposed exemption be expanded to permit a plan to invest in commercial paper or banker's acceptances issued by a plan fiduciary with respect to the assets involved in the transaction as well as to permit a plan to enter into a repurchase agreement with such a fiduciary. According to the commentator, the short-term investments that are permitted by the exemption are analogous to bank deposits described in section 408(b)(4) of ERISA, which provides an exemption that permits a fiduciary bank to invest plan assets in its own deposits in certain circumstances, and the proposed exemption should therefore be expanded to include relief for transactions involving banker's acceptances that is similar to that provided for deposits by section 408(b)(4). The commentator also stated that such relief would be appropriate because a short-term investment that involves a fiduciary with respect to the plan assets involved in the transaction (or an affiliate of such a fiduciary) may be the best investment available to the plan, and excluding such investments would result in a lower overall yield to the plan than would otherwise be available.

In addition, another commentator suggested that those portions of the exemption dealing with banker's acceptances and commercial paper be expanded to include relief from sections 406(b)(1) and 406(b)(2) of ERISA for transactions where a party in interest acquires such an instrument on behalf of a plan pursuant to the direction of another person. The commentator noted that, in most cases involving a "directed account" transaction, the fiduciary with authority to make the investment decision directs the party executing the trade to purchase commercial paper or a banker's acceptance, but does not require that the commercial paper be issued by a particular person or that the banker's acceptance be that of a particular bank. In such circumstances, the commentator stated, the directed fiduciary should not be required to "screen" the persons involved in its purchase of commercial paper on behalf of the plan in order to determine whether the purchase would violate sections 406(b)(1) or 406(b)(2). Accordingly, the commentator suggested that the exemption should extend to those sections as well as section 406(a) with respect to transactions of the kind described, provided that the directed fiduciary was precluded from purchasing its own instruments or from its own portfolio.

The Department has not expanded the scope of the exemption to allow a plan to make short-term investments in a person who is fiduciary with respect to the plan assets involved in the transaction because it does not believe that the kinds of investments permitted by this exemption are sufficiently analogous to the bank deposits described in section 408(b)(4) of ERISA to justify providing relief from the restrictions on fiduciary conduct in section 406(b) without additional independent safeguards.

With respect to directed accounts, a fiduciary who receives general investment instructions from another person, but who has discretion to choose from among several specific investments, may have interests that prevent him from exercising his independent judgment as a fiduciary in connection with an investment in the person from whom he receives his instructions.[14] In addition, since the person effecting the short term investment on behalf of the plan must necessarily be aware of the fiduciary from whom he receives investment instructions, it should not be burdensome for him to identify that fiduciary and the affiliates of that fiduciary. Therefore, the Department has also decided not to revise the exemption to provide relief from section 406(b) for short-term investment transactions that involve a fiduciary who receives investment instructions from another.

One commentator noted that a fiduciary, such as a bank, may receive funds belonging to a plan at a time at which access to markets for short-term investments is limited or non-existent (such as a Friday afternoon or the afternoon of a day preceding a legal holiday), and, according to the commentator, in these circumstances it might substantially benefit the plan to enter into a repurchase agreement with the fiduciary who receives the funds. The Department has not revised the exemption to provide relief for the transactions described by the commentator because it does not believe that the comment provides information sufficient to establish a basis for class relief regarding the circumstances in which it might be necessary for a fiduciary to cause a plan to engage in a repurchase agreement with itself in order to discharge its fiduciary obligations to the plan.

Another commentator noted that an issuer, seller or guarantor of a short-term investment might also manage a portion of the assets of a plan on whose behalf such investment is made (and would thus be a plan fiduciary), even though such issuer, seller or guarantor has no control over the assets involved in the transaction. The commentator expressed concern that such an issuer, seller or guarantor might, in such circumstances, be regarded as dealing with plan assets in its own interest or for its own account in violation of section 406(b)(1) of ERISA and 4975(c)(1)(E) of the Code, or acting on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan in violation of section 406(b)(2) of ERISA. Therefore, the commentator requested that the Department either specifically state that the conduct described would not constitute a violation of section 406(b)(1) and 406(b)(2) of ERISA (and 4975(c)(1)(E) of the Code), or that it expand the scope of the exemption to include relief from those provisions.

In the Department's view, if a fiduciary issues, sells, or guarantees a short term investment that is acquired by a plan, and if such fiduiciary uses none of the authority, control or responsibility that makes him a fiduciary in connection with the acquisition of the short term investment by the plan, he has not engaged in a transaction described in section 406(b)(1) of ERISA (and section 4975(c)(1)(E) of the Code). In addition, where a fiduciary issues, sells or guarantees a short-term obligation that is acquired by a plan, and such fiduciary is a fiduciary solely because he is an investment manager or provides investment advice with respect to plan assets other than the assets involved in the transaction, and does not use any of the authority, control or responsibility that makes him a fiduciary in connection with the plan's acquisition of the obligation, he has not engaged in a transaction that is prohibited under section 406(b)(2) of ERISA.

The same commentator also expressed concern that where a fiduciary with respect to a plan receives a fee for guaranteeing a short term obligation that is issued by another person, and the investment is acquired by the plan, the fiduciary might be considered to have received

[14] For example, a fiduciary in such circumstances may be affiliated with the person from whom he receives instructions, or the person giving the instructions may have discretion regarding the plan's continued use of the fiduciary's services, and these relationships may influence the fiduciary's decisions regarding the investment of plan assets in instruments issued or sold by the directing fiduciary or one of its affiliates. However, see the discussion below regarding certain transactions involving a fiduciary that do not violate sections 406(b)(1) or 406(b)(2) of ERISA.

consideration for his own personal account from a party dealing with the plan in a transaction involving the assets of the plan in violation of section 406(b)(3) of ERISA (and section 4975(c)(1)(F) of the Code) even though the fiduciary used none of his authority, control or responsibility as a fiduciary to cause the plan to acquire the obligation. In the Department's view, the mere receipt by a fiduciary of a fee for guaranteeing a short-term investment that is offered in an open market and is ultimately acquired by a plan does not constitute a violation of section 406(b)(3) of ERISA (or a transaction described in section 4975(c)(1)(F) of the Code) because the fiduciary received the fee for guaranteeing the investment and not in connection with the transaction that involved the assets of the plan (*i.e.* the plan's acquisition of the investment).[15] Therefore, no revisions have been made to the exemption in response to the request.

B. *Retroactivity.* Several commentators, while agreeing with the proposed January 1, 1975, effective date of the exemption, urged the Department to apply various conditions to the exemption only prospectively. As discussed above, the Department has made several revisions to the exemption in response to these comments.

C. *Certificates of Deposit.* One commentator suggested that the Department revise the exemption to permit the acquisition of a certificate of deposit that is issued by a bank which is supervised by the United States or a State if neither the bank nor any affiliate of the bank has discretionay authority or control with respect to the investment of plan assets involved in the transaction or renders investment advice with respect to the assets. In regard to this suggestion, the commentator noted that section 408(b)(4) of ERISA (and section 4975(d)(4) of the Code) provides an exemption from the prohibited transaction provisions of ERISA for the investment of a plan's assets in deposits of a bank or similar financial institution that is a fiduciary of the plan if the plan covers only employees of the bank or financial institution or if the investment is expressly authorized by a provision of the plan or by a fiduciary (other than the bank or similar financial institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to the investment. The commentator also noted that although the Department's regulations under section 408(b)(4)[16] describe what will constitute sufficient authorization of a plan's investment in a bank or other financial institution that makes the investments in its own deposits or in deposits of an affiliate, the regulation provides no guidance with respect to authorization of transactions occurring after November 1, 1977, where the deposit is with a party in interest bank or other financial institution other than the institution making the deposit (or an affiliate of that institution). Therefore, the commentator suggested, it would be appropriate for the Department to include such certificates of deposit in the scope of the exemption in order to make it clear that they are permitted.

The Department has, in general, adopted the commentator's suggestion and has revised the exemption accordingly. However, the Department has not adopted a portion of the commentator's suggested revision to the exemption which merely reiterates the requirements of the Department's regulations under section 408(b)(4).

D. *Other Matters.* One commentator urged the Department to expand the exemption to include investments in, among other things, loans for development of alternative energy sources, and loans that would promote employee ownership of corporations. These matters are outside the scope of the exemption.

General Information

The attention of interested persons is directed to the following:

1. The fact that a transaction is the subject of an exemption granted under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary of a plan to which the exemption is applicable from certain other provisions of the Act, 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, among other things, require a fiduciary to discharge his duties with respect to the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act.

2. The exemption granted here does not extend to transactions prohibited under section 406(b) of the Act and sections 4975(c)(1) (E) and (F) of the Code.

3. The exemption set forth herein is supplemental to, and not in derogation of, any other provisions of the Act, including statutory exemptions and transitional rules. 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.

4. The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

5. In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, including the written comments submitted in response to the notice of April 25, 1980, the Department makes the following determinations:

(i) The class exemption set forth herein is administratively feasible;

(ii) It is in the interests of plans and of their participants and beneficiaries; and

(iii) It is protective of the rights of participants and beneficiaries of plans.

Exemption

Accordingly, the following exemption is hereby granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975).

Effective January 1, 1975, the restrictions of sections 406(a)(1)(A), (B) and (D) of the Act, and the taxes imposed by reason of section 4975(c)(1)(A), (B) and (D) of the Code shall not apply to an investment of employee benefit plan assets which involves the purchase or other acquisition, holding, sale, exchange or redemption by or on behalf of an employee benefit plan of the following:

I. *Banker's Acceptances.* A banker's acceptance that is issued by a bank if:

A. The banker's acceptance has a stated maturity date of one year or less from date of issue or has a maturity date of one year or less from the date of purchase on behalf of the plan;

B. Neither the bank nor any affiliate of the bank has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

C. The terms of the transaction are at least as favorable to the plan as those of an arm's length transaction with an unrelated party would be; and,

D. With respect to transactions occurring on or after April 23, 1981 the bank issuing the banker's acceptance is

[15] However, receipt of such a fee could constitute a violation of section 406(b)(3) in certain circumstances; for example, a violation of section 406(b)(3) might occur where it is specifically contemplated by the parties at the time the fiduciary receives the fee for guaranteeing the obligation, that the plan will acquire the short-term investment.

[16] 29 CFR 2550.408b–4.

supervised by the United States or a State.

II. *Commercial Paper.* Commercial paper if:

A. It is not issued by an employer any of whose employees are covered by the plan or by an affiliate of such employer;

B. It has a stated maturity date of nine months or less from the date of issue, exclusive of days of grace, or is a renewal of an issue of commercial paper the maturity of which is likewise limited;

C. Neither the issuer of the commercial paper, any guarantor of the commercial paper, nor an affiliate of such issuer or guarantor, has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

D. With respect to an acquisition or holding of commercial paper (including an acquisition by exchange) occurring on or after April 23, 1981, at the time it is acquired, the commercial paper is ranked in one of the three highest rating categories by at least one nationally recognized statistical rating service.

III. *Repurchase Agreements.* A repurchase agreement (or securities or other instruments under cover of a repurchase agreement) in which the seller of the underlying securities or other instruments is a bank which is supervised by the United States or a State; a broker-dealer registered under the Securities Exchange Act of 1934; or a dealer who makes primary markets in securities of the United States government or any agency thereof and reports daily to the Federal Reserve Bank of New York its position with respect to government securities and borrowings thereon, if each of the following conditions are satisfied.

A. The repurchase agreement is embodied in, or is entered into pursuant to, a written agreement the terms of which are at least as favorable to the plan as an arm's length transaction with an unrelated party would be. For transactions occurring before April 23, 1981 a written confirmation of a repurchase agreement whose terms were at least as favorable to the plan as an arm's length transaction with an unrelated party would have been will be deemed to satisfy this condition.

B. The plan receives interest at a rate no less than that which it would receive in a comparable transaction with an unrelated party.

C. The repurchase agreement has a duration of one year or less.

D. The plan receives securities, banker's acceptances, commercial paper, or certificates of deposit having a market value equal to not less than 100 percent of the purchase price paid by the plan.

E. Upon expiration of the repurchase agreement and return of the securities or other instruments to the bank, broker-dealer or dealer (seller), the seller transfers to the plan an amount equal to the purchase price plus the appropriate interest.

F. Neither the seller nor an affiliate of the seller has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

G. The securities, banker's acceptances, commercial paper or certificates of deposit received by the plan—

(1) Could be acquired directly by the plan in a transaction not covered by this section III without violating sections 406(a)(1)(E), 406(a)(2) or 407(a) of the Act; and,

(2) If the securities are subject to the provisions of the Securities Act of 1933, they are obligations that are not "restricted securities" within the meaning of Rule 144 under that act.

H. With respect to transactions occurring on or after *April 23, 1981,*

(1) If the market value of the underlying securities or other instruments falls below the purchase price at any time during the term of the agreement, the plan may, under the written agreement required by paragraph A of this section, require the seller to deliver, by the close of business on the following business day, additional securities or other instruments the market value of which, together with the market value of securities previously delivered or sold to the plan under the repurchase agreement, equals at least 100 percent of the purchase price paid by the plan;

(2) If the seller does not deliver additional securities or other instruments as required above, the plan may terminate the agreement, and, if upon termination or expiration of the agreement, the amount owing is not paid to the plan, the plan may sell the securities or other instruments and apply the proceeds against the obligations of the seller under the agreement, and against any expenses associated with the sale; and,

(3) The seller agrees to furnish the plan with the most recent available audited statement of its financial condition as well as its most recent available unaudited statement, agrees to furnish additional audited and unaudited statements of its financial condition as they are issued and either: (A) agrees that each repurchase agreement transaction pursuant to the agreement shall constitute a representation by the seller that there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the plan fiduciary with whom such written agreement is made; or (B) prior to each repurchase agreement transaction, the seller represents that, as of the time the transaction is negotiated, there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the plan fiduciary with whom such written agreement is made.

(4) In the event of termination and sale as described in (2) above, the seller pays to the plan the amount of any remaining obligations and expenses not covered by the sale of the securities or other instruments, plus interest at a reasonable rate.

If a seller involved in a repurchase agreement covered by this exemption fails to comply with any condition of this exemption in the course of engaging in the repurchase agreement, the plan fiduciary who caused the plan to engage in such repurchase agreement shall not be deemed to have caused the plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the seller's failure to comply with the conditions of the exemption.

IV. *Certificates of Deposit.* A certificate of deposit that is issued by a bank which is supervised by the United States or a State if neither the bank nor any affiliate of the bank has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

For purposes of this exemption the term "affiliate" is defined in 29 CFR 2510.3–21(e).

Signed at Washington, D.C., this 16th day of January.

Ian D. Lanoff,

Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.

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Proposed Class Exemption To Permit Payment of Compensation To Plan Fiduciaries for the Provision of Securities Lending Services

AGENCY: Department of Labor.