(1) The aggregate unrecovered principal of the Notes plus accrued, but unpaid, interest on the Notes as of the dates of default, calculated through December 31, 1997;

(2) An additional amount representing interest on the unrecovered principal of Notes 2 and 3, originally scheduled for maturity in 1999, from January 1998 until the date the Restoration Payment is made; and

(3) Lost opportunity costs associated with Note 1, which was originally scheduled for maturity in 1997, from January 1998 until the date the Restoration Payment is made.

(c) Any Recapture Payments are restricted solely to the amounts, if any, recovered by the Plan with respect to the Notes in litigation or otherwise.

(d) The Restoration Payment is made to resolve potential claims for breach of fiduciary duty relating to the management of the Plan.

(e) The Employer receives a favorable ruling from the Internal Revenue Service that the Restoration Payment does not constitute a ''contribution'' or other payment that will disqualify the Plan.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on June 29, 1998 at 63 FR 35281.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

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/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions 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 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 requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 24th day of August, 1998.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 98–23283 Filed 8–28–98; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 98–40; Exemption Application No. D–10429]

Grant of Individual Exemption to Amend and Replace Prohibited Transaction Exemption (PTE) 96–14 Involving Morgan Stanley & Co. Incorporated (MS&Co) and Morgan Stanley Trust Company (MSTC), Located in New York, NY

AGENCY: Pension and Welfare Benefits Administration, U.S. Department of Labor.

ACTION: Grant of individual exemption to modify and replace PTE 96–14.

SUMMARY: This document contains a final exemption which amends and replaces PTE 96–14 (61 FR 10032, March 12, 1996). PTE 96–14, as clarified by a Notice of Technical Correction dated June 4, 1996 (61 FR 28243), permits the lending of securities to MS&Co and to any other U.S. registered broker-dealers affiliated with MSTC (the Affiliated Broker-Dealers; collectively, the MS Broker-Dealers) by employee benefit plans with respect to which the MS Broker-Dealer who is borrowing such securities is a party in interest or for which MSTC acts as directed trustee or custodian and securities lending agent. In addition, PTE 96–14 permits MSTC to receive compensation in connection with securities lending transactions. These transactions are described in a notice of pendency (the Old Notice) that was published in the **Federal Register** on August 11, 1995 at 60 FR 41118.

The current exemption replaces PTE 96–14 but incorporates by reference the facts, representations and virtually all of the conditions that are contained in the Old Notice, the final exemption with respect thereto and the technical correction, except where modified.

EFFECTIVE DATE: This exemption is effective as of March 12, 1996 for transactions that are covered by PTE 96–14.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, telephone (202) 219–8881. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On January 26, 1998, the Department of Labor (the Department) published a notice of proposed exemption (the New Notice) in the **Federal Register** (63 FR 3767) that would amend and replace PTE 96–14. PTE 96–14 provides an exemption from certain prohibited transaction restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), as amended, by reason of section 4975(c)(1) of the Code. The proposed exemption was requested in an application filed on behalf of MS&Co and MSTC (collectively, the Applicants) pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures (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 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this replacement exemption is being issued solely by the Department.

The New Notice gave interested persons an opportunity to comment on the proposed exemption and to request a public hearing. The only written comment submitted to the Department during the comment period was provided by the Applicants.

In their comment, the Applicants state that they wish to modify the operative language of the New Notice by adding MS&Co to the lending agent entities. The Applicants also wish to clarify that the exemption would cover situations where MSTC and MS&Co, as securities lending agents, act in a custodial or non-custodial capacity with respect to loaned securities. The Applicants believe the modification is necessary because MSTC and MS&Co may both act, from time to time, as non-custodial securities lending agents. As securities lending agents, the Applicants note that both MSTC and MS&Co would be confronted with the same issues under the prohibited transaction provisions of the Act and the Code if they were to lend client-plan securities to an MS Broker-Dealer, even though neither MSTC or MS&Co would have physical custody of the collateral for the securities loan. Under such circumstances, the Applicants explain that the collateral pledged by the MS Broker-Dealer would be held in a short-term investment vehicle selected by the client-plan's fiduciary which would be independent of MSTC, MS&Co and the affiliated borrower. The Applicants also point out that in its expanded scope, the exemption would still be subject to the same terms and conditions as set forth in the New Notice.

The Department concurs with the changes requested by the Applicants and has amended the operative language of the current exemption to read as follows:

The restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (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, shall not apply, effective March 12, 1996, to (1) the lending of securities to Morgan Stanley & Co. Incorporated (MS&Co) and to any other U.S. registered broker-dealers affiliated with Morgan Stanley Trust Company (MSTC) or MS&Co (the Affiliated Broker-Dealer; collectively, the MS Broker-Dealers) by employee benefit plans with respect to which the MS Broker-Dealer who is borrowing such securities is a party in interest or for which (a) MSTC acts as directed trustee, (b) MSTC or MS&Co acts as custodian and securities lending agent, or (c) MSTC or MS&Co acts as noncustodial securities lending agent; and (2) the receipt of compensation by MSTC or MS&Co in connection with these transactions, provided that the following conditions are met:

Similarly, the Department has revised the first sentence of Representation 5 of the Old Notice as follows:

5. MSTC and MS&Co request an exemption for the lending of securities owned by certain pension plans (client-plans) for which (a) MSTC will serve as directed trustee, (b) MSTC or MS&Co will serve as custodian and securities lending agent, or (c) MSTC or MS&Co will serve as noncustodial securities lending agent to the MS Broker-Dealers,[1] following disclosure of MSTC's and MS&Co's affiliation with the MS Broker-Dealers, under either of the two arrangements described as Plan A and Plan B, and for the receipt of compensation by MSTC or MS&Co in connection with such transactions.

In addition to the foregoing changes and to reflect the expanded scope of the exemption, the Applicants have requested that the Department include references to MS&Co in Footnote 2 as well as in Conditions 3, 7 and 13 of the New Notice.

In response, the Department has decided to adopt the suggested modifications.

The Applicants also comment that Condition 12(b) of the New Notice unnecessarily restricts the ability of a client-plan to effect securities loans under the Applicants' lending program, particularly where the independent investment manager's in-house plan wishes to invest in the commingled investment vehicle. After careful consideration, the Department has decided to revise Condition (12)(b) of the New Notice. As currently drafted, Condition (12)(b) provides that—

In the case of two or more plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), 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 securities lending arrangements with MS Broker-Dealers, 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 the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(i) Is neither the sponsoring employer, a member of the controlled group of corporations, the employee organization, nor an affiliate;

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

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

[1] The Old Notice refers to the MS Broker-Dealers as the ''MS Group'' in Representation 5. Because the Applicants believed that the use of the term ''MS Group'' would cause confusion since clients and internal personnel often refer to Morgan Stanley Group, Inc. (the parent entity of MS&Co and MSTC) as the ''MS Group,'' they requested that all references to the MS Group be replaced with term ''MS Broker-Dealers.'' The Department did not object to this change and made the requested modification in the final exemption.

Accordingly, the Department has modified the Condition (12)(b) to read as follows:

In the case of two or more plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), 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 securities lending arrangements with the MS Broker-Dealers, 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 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—

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

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

The Department wishes to emphasize that although the independent investment manager's own plan may participate in the commingled investment vehicle, for purposes of determining whether the $50 million aggregation requirement is met, the assets of such plan must not be counted.

Therefore, after giving full consideration to the entire record, including the written comment provided by the Applicants, the Department has made the aforementioned changes to the New Notice and has decided to grant the replacement exemption as modified herein.

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) The exemption will not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) In accordance with section 408(a) of the Act, section 4975(c)(2) of the Code, the Procedures cited above, and based upon the entire record, the Department finds that the exemption is administratively feasible, in the interest of the plan and its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(4) This exemption will be 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

(5) This exemption is subject to the express condition that the New Notice, the Old Notice and the final exemption underlying PTE 96–14, and the notice of technical correction to PTE 96–14, accurately describe, where relevant, the material terms of the transactions to be consummated pursuant to this exemption.

Exemption

Under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the Procedures cited above, the Department hereby replaces PTE 96–14 as follows.

Section I. Covered Transactions

The restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (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, shall not apply, effective March 12, 1996, to (1) the lending of securities to Morgan Stanley & Co. Incorporated (MS&Co) and to any other U.S. registered broker-dealers affiliated with Morgan Stanley Trust Company (MSTC) or MS&Co (the Affiliated Broker-Dealer; collectively, the MS Broker-Dealers) by employee benefit plans with respect to which the MS Broker-Dealer who is borrowing such securities is a party in interest or for which (a) MSTC acts as directed trustee, (b) MSTC or MS&Co acts as custodian and securities lending agent, or (c) MSTC or MS&Co acts as noncustodial securities lending agent; and (2) the receipt of compensation by MSTC or MS&Co in connection with these transactions, provided that the following conditions are met:

(1) Neither MS&Co nor MSTC will have any discretionary authority or control over a client-plan's assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

(2) The terms of each loan of securities by a client-plan to the MS Broker-Dealer will be at least as favorable to such plan as those of a comparable arm's length transaction between unrelated parties;

(3) Any arrangement for MSTC or MS&Co to lend plan securities to the MS Broker-Dealers will be approved in advance by a plan fiduciary who is independent of MSTC, MS&Co and the MS Broker-Dealers;[2] (In this regard, the independent fiduciary also will approve the general terms of the securities loan agreement between the client-plan and the MS Broker-Dealer, the specific terms of which will be negotiated and entered into by MSTC or MS&Co which will act as a liaison between the lender and the borrower to facilitate the lending transaction.)

(4) A client-plan may terminate the arrangement at any time without penalty on five business days notice;

(5) The client-plans will receive collateral consisting of cash, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, bank letters of credit or other collateral permitted under PTE 81–6 or any successor, from the MS Broker-Dealers by physical delivery, 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 MS Broker-Dealers;

(6) The market value of the collateral will initially equal at least 102 percent of the market value of the loaned securities and, if the market value of the collateral falls below 100 percent, the MS Broker-Dealers will deliver additional collateral on the following day such that the market value of the collateral will again equal 102 percent;

(7) Prior to entering into a loan agreement, the MS Broker-Dealer will furnish its most recent publicly-available audited and unaudited financial statements to MSTC or MS&Co, which, in turn, will provide the statements to the client-plan before the plan is asked to approve the terms of the loan agreement. The loan agreement will contain a requirement that the MS Broker-Dealer must promptly notify lenders at the time of a loan of any material adverse changes in its financial condition since the date of the most recently furnished financial statements. If any such changes have taken place, MSTC or MS&Co will not make any further loans to the MS Broker-Dealer unless an independent fiduciary of the client-plan approves the loan in view of the changed financial condition;

(8) In return for lending securities, the client-plan either will—

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

(b) Have the opportunity to derive compensation through the investment of cash collateral. (Under such circumstances, the client-plan may pay a loan rebate or similar fee to the borrowing MS Broker-Dealer, if such fee is not greater than the fee the Client Plan would pay in a comparable arm's length transaction with an unrelated party.)

(9) All procedures regarding the securities lending activities will, at a minimum, conform to the applicable provisions of PTE 81–6 and PTE 82–63;

(10) The MS Broker-Dealer will indemnify and hold harmless each lending client-plan against any and all losses, damages, liabilities, costs and expenses (including attorney's fees) incurred by such plan in connection with the lending of securities to the MS Broker-Dealers;

(11) The client-plan will receive the equivalent of all distributions made to holders of the borrowed securities during the term of the 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;

(12) Only plans with total assets having an aggregate market value of at least $50 million will be permitted to lend securities to the MS Broker-Dealers; provided, however that—

(a) In the case of two or more plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in

[2] The Department, herein, is not providing exemptive relief for securities lending transactions engaged in by primary lending agents, other than MSTC or MS&Co, beyond that provided pursuant to Prohibited Transaction Exemption (PTE) 81–6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) and PTE 82–63 (47 FR 14804, April 6, 1982).

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 securities lending arrangements with the MS Broker-Dealers, 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 plan investment in the commingled entity, which are in excess of $100 million, or

(b) In the case of two or more plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), 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 securities lending arrangements with the MS Broker-Dealers, 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 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—

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

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

(In addition, none of the entities described above must be formed for the sole purpose of making loans of securities.)

(13) No loan of securities will be made by MSTC or MS&Co as securities lending agent to any MS Broker-Dealer on any day on which the market value of the securities proposed to be loaned, when added to the market value of all client-plan securities subject to outstanding loans to MS Broker-Dealers, exceeds 50 percent of the market value of all client-plan securities subject to securities loans, including the market value of securities proposed to be loaned to the MS Broker-Dealer. (For purposes of this paragraph, market value shall be determined in U.S. dollars, based on the last preceding business day's closing prices of the securities and the last preceding business day's closing foreign exchange rates, if applicable.);

(14) With regard to the ''exclusive borrowing'' agreement, the MS Broker-Dealer will directly negotiate the agreement with a plan fiduciary who is independent of the MS Broker-Dealers and MSTC, and such agreement may be terminated by either party to the agreement at any time;

(15) Prior to any plan's approval of the lending of its securities to an MS Broker-Dealer, a copy of this exemption (and the notice of pendency) will be provided to the client-plan;

(16) Each client-plan will receive monthly reports with respect to securities lending transactions so that an independent fiduciary of a client-plan may monitor such transactions with the MS Broker-Dealer;

Section II. General Conditions

(1) MS Broker-Dealers will maintain, or cause to be maintained, for a period of six years from the date of such transactions, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described in paragraph (2) to determine whether the conditions of this exemption have been met, except that—

(a) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the MS Broker-Dealers, the records are lost or destroyed prior to the end of the six year period, and

(b) No party in interest other than the MS Broker-Dealers 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 below by paragraph (2);

(2) Notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (1) are unconditionally available at their customary location during normal business hours by—

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

(ii) Any fiduciary of a participating client-plan or any duly authorized representative of such fiduciary, and

(iii) Any contributing employer to any participating client-plan or any duly authorized employee representative of such employer;

(3) None of the persons described above in paragraphs (ii)–(iii) of paragraph (2) are authorized to examine the trade secrets of MS&Co or its affiliates or commercial or financial information which is privileged or confidential.

Section III. Definitions

For purposes of this exemption,

(1) An ''affiliate'' of a person includes—

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

(b) Any officer, director, or partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and

(c) Any corporation or partnership of which such other person is an officer, director or partner.

(2) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

EFFECTIVE DATE: This exemption is effective as of March 12, 1996.

The availability of this exemption is subject to the express condition that the material facts and representations contained in the application for exemption are true and complete and accurately describe all material terms of the transactions. In the case of continuing transactions, if any of the material facts or representations described in the applications change, the exemption will cease to apply as of the date of such change. In the event of any such change, an application for a new exemption must be made to the Department.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the New Notice, the Old Notice and the final exemption underlying PTE 96–14, and the notice of technical correction to PTE 96–14, all of which are cited above Signed at Washington, D.C., this 24th day of August, 1998.

Ivan L. Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 98–23284 Filed 8–28–98; 8:45 am]

BILLING CODE 4510–29–P