

annual burden for this collection is 1,222 hours.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: January 31, 2005.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

Notice of Proposed Amendment; Prohibited Transaction Exemption (PTE) 99-29 Involving Bankers Trust Company, Deutsche Bank Trust Company Americas (DBTCA), and Deutsche Bank, AG

[Application No. D-11246]

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual exemption, which, if granted, would amend PTE 99-29 (64 FR 40623, July 27, 1999), an exemption granted to Bankers Trust Company. PTE 99-29 permits DBTCA (formerly known as Bankers Trust Company) to continue to function as a qualified professional asset manager (QPAM) under PTE 84-14 (49 FR 9494, March 13, 1994). If granted, the proposed exemption would affect participants and beneficiaries and fiduciaries of employee benefit plans to which DBTCA served as custodian.

EFFECTIVE DATE: If adopted, the proposed amendment will be effective as of January 31, 2003.

DATES: Written comments and requests for a public hearing should be received by the Department on or before March 21, 2005.

ADDRESSES: All written comments and requests for a public hearing should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210, (Attention D-11246), by fax to (202) 219-0204, or by e-mail to moffitt.betty@dol.gov. The application pertaining to the proposed exemption and the comments received will be available for public inspection in

EBSA's Public Documents Room, U.S. Department of Labor, Room N-1513, 200 Constitution Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Allison Padams Lavigne, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210 at (202) 693-8540. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed exemption that would amend PTE 99-29. Section I of PTE 99-29 conditionally permits Banks Trust Company¹ to continue to function as a QPAM pursuant to PTE 84-14, notwithstanding its failure to satisfy section I(g) of PTE 84-14. Section I(g) specifies that:

Neither the QPAM nor any affiliate thereof (as defined in section V(d)), nor any owner, direct or indirect, of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of: Any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any other crime described in section 411 of the Employee Income Retirement Security Act of 1974 (ERISA or the Act). For purposes of this section (g), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

Section I of PTE 99-29 was effective for the period beginning on the date of sentencing with respect to the charges to which Bankers Trust Company pled guilty on March 11, 1999 and ending on July 27, 2004, as a result of the conviction of Bankers Trust Company for felonies described in the March 11, 1999 felony information entered in the U.S. District Court for the Southern District of New York (the Information), provided that the conditions of the PTE 99-29 were met.²

¹ On June 4, 1999, Deutsche Bank, AG acquired Bankers Trust Corporation. DBTA is indirectly wholly owned by Deutsche Bank, AG. Thus, any reference to Bankers Trust Company should be read to mean DBTCA.

² For additional information regarding the Information, interested persons should refer to the

The conditions of section I of PTE 99-29 include the following:

(a) The exemption is not applicable if Bankers Trust Company becomes affiliated with any person or entity convicted of any of the crimes described in section I(g) of PTE 84-14;

(b) The exemption is not applicable if Bankers Trust Company is convicted of any crimes described in section I(g) of PTE 84-14, other than those felonies discussed in the Information;

(c) The custody operations that were part of Bankers Trust Company at the time of the March 11, 1999 information, and which have subsequently been reorganized as part of Global Institutional Services (GIS), are subject to an annual examination of its abandoned property and escheatment policies, procedures and practices by an independent public accounting firm. The examination required by this condition shall determine whether the written procedures adopted by Bankers Trust Company are properly designed to assure compliance with the requirements of ERISA. The annual examination shall specifically require a determination by the auditor as to whether the Bank has developed and adopted internal policies and procedures that achieve appropriate control objectives and shall include a test of a representative sample of transactions, fifty percent of which must involve ERISA covered plans, to determine operational compliance with such policies and procedures. The auditor shall issue a written report describing the steps performed by the auditor during the course of its examination. The report shall include the auditor's specific findings and recommendations. This requirement shall continue to be applicable to the custody operations that were part of Bankers Trust Company as of March 11, 1999, notwithstanding any subsequent reorganization of the custody operation function during the term of the exemption.

(d) With respect to the independent audit report described in section I(c) above: (1) Bankers Trust Company shall provide notice to the Department of any instances of the Bank's noncompliance with the written policies and procedures reviewed by the auditor within 10 business days after such noncompliance is determined by the auditor notwithstanding the fact that the examination may not have been completed as of that date. Upon request, the auditor shall provide the Department with all of the relevant

notice of proposed exemption at 64 FR 30360, June 7, 1999.

work papers reflecting the instances of noncompliance. The work papers should identify whether and to what extent the assets of ERISA plans were involved in the instances of noncompliance, and (2) any information relating to the Bank's noncompliance with the written policies and procedures that is required by Federal and/or State banking authorities to be reported to the State and/or Federal banking agencies shall also be reported by Bankers Trust Company to the Department within the same time frames that such information is otherwise required to be reported to those agencies.

(e) The annual examination described in section I(c) above will be provided to the Department not later than 90 days following the 12 month period to which it relates, and will be unconditionally available for examination by any duly authorized employee or representative of the Department, Internal Revenue Service, Securities and Exchange Commission or Department of Justice or other relevant regulators and any fiduciary of a plan for which Bankers Trust Company performs services.

The proposed amendment has been requested in an application filed on behalf of DBTCA. DBTCA is a New York banking corporation providing a wide range of banking, fiduciary, record keeping custodial, brokerage and investment services to corporations, institutions, governments, employee benefit plans, governmental retirement plans, and private investors worldwide. Deutsche Bank, AG indirectly wholly owns DBTCA.

In its application for an amendment to PTE 99-29, the applicant represents that on January 23, 2003, Deutsche Bank sold its global custody business to State Street. Deutsche Bank's sale of its custody operations to State Street included the books and records underlying the business, as well as its employees. Except as discussed below, the applicant represents that as of January 15, 2004, DBTCA no longer is a custodian for ERISA covered plans.

The applicant represents that the Private Bank of Deutsche Bank will continue to serve as custodian for certain small ERISA covered plans. State Street will serve as subcustodian and perform all recordkeeping on behalf of these plans. The Private Bank is a division of DBTCA. Prior to the sale of DBTCA's custody business to State Street, the assets of the Private Bank's ERISA clients were custodied by DBTCA. That custody was transferred to State Street in 2003. In this regard, the applicant states that DBTCA has no ability to influence the operations and

procedures of State Street's custodial operations. Like DBTCA, the Private Bank no longer has any direct custody functions. To the extent that it holds the title of custodian for any ERISA account, it does not have control (except as an investment manager, without possession or record ownership) over any of that plan's assets. All Private Bank plan assets are subcustodied at State Street. No securities, cash or other assets of ERISA plans are custodied at DBTCA, in the Private Bank, or otherwise.

In addition, the applicant represents that Deutsche Bank did not sell its foreign branches. The Deutsche Bank AG branches provide worldwide subcustody for other global custodians and are not subject to the five-year limited exemption granted to Bankers Trust Company in Section I of PTE 99-29. The applicant states that these branches were not involved in the felony (and indeed were unrelated to Bankers Trust Company when the felony occurred), and their relationship with other global custodians is not governed by, subject to, or otherwise related to, DBTCA and never has been. These Deutsche Bank branches are independent of, and have never been supervised or controlled by, DBTCA.

Deutsche Bank seeks an amendment of PTE 99-29 that would modify section I(c) of PTE 99-29. The applicant has requested this condition be modified to remove the annual audit requirement after the date on which DBTCA ceased to have custody of ERISA plan assets.³ The applicant also seeks a five-year extension of the relief provided by the exemption.⁴ The Department has proposed to modify the exemption such that DBTCA shall be subject to the audit requirements through January 15, 2004. The Department has also proposed that the effective date of the exemption be extended to July 27, 2009.

Lastly, the applicant seeks clarification on whether the relief provided by the exemption will continue to be available now that records are maintained by State Street, and if so, whether or not State Street must maintain these records for fifteen years. As noted in the summary of facts and representations of the notice of proposed exemption for PTE 99-29, (64 FR 30360, 30364, June 7, 1999), the applicant represented that check ledgers, cancelled checks and class action records are to be maintained for

15 years. Further, all escheatment records are to be kept indefinitely.

In its application for amendment of PTE 99-29, Deutsche Bank states that it continues to maintain escheatment records indefinitely, but it no longer has access to check ledgers, cancelled checks and class actions records because they are now owned and maintained by State Street. The applicant states that it would be burdensome for State Street to maintain the records for the fifteen-year period because that time period is inconsistent with State Street's own seven-year record retention policies. The applicant requests that the record-keeping requirements be made consistent with the six-year time period found in section 107 of ERISA. The Department concurs with the applicant that as a result of Deutsche Bank's sale to State Street, the fifteen-year record retention policy described in PTE 99-29 is no longer feasible. The Department believes that the six-year period described in section 107 of ERISA would provide a sufficient time period to enable individuals to obtain the information contained in these records. In this regard, Deutsche Bank should take reasonable steps to ensure that such records are maintained by State Street for the time specified in ERISA section 107, and are available to those individuals seeking such information.⁵

Notice to Interested Persons

With respect to notification of interested persons, the applicant will distribute notice of the proposed amendment by first class mail to an independent plan fiduciary for each ERISA covered plan for which DBTCA and its subsidiaries provide or provided fiduciary services, including trustee services and/or the provision of investment advice, at the time DBTCA sold its custodial business to State Street, and each owner of an IRA account to which DBTCA and its subsidiaries provide or provided investment advisory services at the time DBTCA sold its custody business to State Street. The applicant will distribute the notice to all participants in its own ERISA pension plans, either by return receipt of electronic mail or by first class mail. All notification will be mailed or electronically mailed within three business days after publication of this proposed amendment in the **Federal Register**. The applicant will also use its best efforts to notify an

³ DB states that it will maintain copies of these of audits for the time period required under ERISA.

⁴ The Department noted in footnote 4 of PTE 99-29, "Prior to the expiration of this exemption, Bankers Trust Company may apply for an extension of the exemption." (64 FR 40625, July 27, 1999)

⁵ It is the Department's understanding that copies of the audits that were conducted pursuant to PTE 99-29 will be maintained by DBTCA for the time period specified by section 107 of ERISA.

independent fiduciary for each ERISA pension plan client of DBTCA.

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/or 4975(c)(2) of the Internal Revenue Code of 1986 (the Code) does not relieve a fiduciary or other party in interest with respect to a plan to which the exemption is applicable from certain other provisions of the Act and/or the Code. These provisions include any prohibited transaction provisions to which the exemption does not apply and the general fiduciary provisions of section 404 of the Act which, among other things, requires a fiduciary to discharge his or her duties respecting the plan solely in the interests 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) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or Code, including statutory or administrative 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;

(3) The availability of this exemption, if granted, is subject to the express condition that the material facts and representations contained in the application are true and complete and accurately describe all material terms of the transaction which is the subject of this exemption. In the case of continuing transactions, if any of the material facts or representations described in the application 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; and

(4) Before an exemption may be granted under section 408(a) of ERISA, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its beneficiaries and protective of the rights or participants and beneficiaries of the plan.

Proposed Exemption

Based on the facts set forth in the application, and 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 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990), the Department proposes to modify PTE 99–29 as set forth below:

Section I is amended to read as follows: “Bankers Trust Company (now known as DBTCA) shall not be precluded from functioning as a “qualified professional asset manager” pursuant to Prohibited Transaction Exemption 84–14 (49 FR 9494, March 13, 1994) (PTE 84–14) for the period beginning on the date of sentencing with respect to the charges to which Bankers Trust Company pled guilty on March 11, 1999 and ending July 27, 2009, solely because of a failure to satisfy section I(g) of PTE 84–14 as a result of the conviction of Bankers Trust Company for felonies described in the March 11, 1999 felony information (the Information) entered in the U.S. District Court for the Southern District of New York, provided that:”

Section I(c) is amended to read as follows: “The custody operations that were part of Bankers Trust Company at the time of the March 11, 1999 information, and which have subsequently been reorganized as part of Global Institutional Services (GIS), are subject to an annual examination of its abandoned property and escheatment policies, procedures and practices by an independent public accounting firm. The examination required by this condition shall determine whether the written procedures adopted by Bankers Trust Company are properly designed to assure compliance with the requirements of ERISA. The annual examination shall specifically require a determination by the auditor as to whether the Bank has developed and adopted internal policies and procedures that achieve appropriate control objectives and shall include a test of a representative sample of transactions, fifty percent of which must involve ERISA covered plans, to determine operational compliance with such policies and procedures. The auditor shall issue a written report describing the steps performed by the auditor during the course of its examination. The report shall include the auditor's specific findings and recommendations. This requirement shall continue to be applicable to the custody operations that were part of Bankers Trust Company as of March 11, 1999, notwithstanding any subsequent

reorganization of the custody operation function during the term of the exemption. *Such audit requirements shall be applicable for any year or part thereof in which DBTCA held ERISA covered plan assets in custody.*”

Section III(a) is amended to read as follows: “For purposes of this exemption, the term “Bankers Trust Company” includes Bankers Trust Company, and any entity that was affiliated with Bankers Trust Company prior to the date of the acquisition of Bankers Trust Corporation by Deutsche Bank AG, other than BT Alex. Brown Incorporated and its subsidiaries. *This term also refers to Deutsche Bank Trust Company Americas (DBTCA).*”

For a more complete statement of facts and representations supporting the Department's decision to grant PTE 99–29, refer to the proposed exemption (64 FR 30360, June 7, 1999) and the grant notice (64 FR 40623, July 27, 1999).

Signed at Washington, DC, this 31st day of January 2005.

Ivan L. Strasfeld,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

Prohibited Transaction Exemption 2005–01; [Exemption Application No. D–11211] et al.; Grant of Individual Exemptions; J.C.O., Inc. Retirement Plan and Trust (the Plan)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The