



DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Exemption Application No. D-12003]

Proposed Exemption for Certain Prohibited Transaction Restrictions Involving the Mitsubishi UJF Trust and Banking Corporation

Located in New York, NY

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of Proposed Exemption.

SUMMARY: This document provides notice of the pendency before the Department of Labor (the Department) of a proposed individual exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

DATES: If granted, the exemption will be in effect as of the date the grant notice is published in the Federal Register. Written comments and requests for a public hearing on the proposed exemption should be submitted to the Department by [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: All written comments and requests for a hearing should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Attention: Application No. D-12003 via email to e-

OED@dol.gov or online through the Federal eRulemaking Portal: <http://www.regulations.gov>. Any such comments or requests should be sent by the end of the scheduled comment period. The application for exemption and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1515, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See SUPPLEMENTARY INFORMATION below for additional information regarding comments.

FURTHER INFORMATION CONTACT: Frank Gonzalez of the Department, telephone (202) 693-8553. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Comments:

In light of the current circumstances surrounding the COVID-19 pandemic caused by the novel coronavirus which may result in disruption to the receipt of comments by U.S. Mail or hand delivery/courier, persons are encouraged to submit all comments electronically and not to follow with paper copies. Comments should state the nature of the person's interest in the proposed exemption and the manner in which the person would be adversely affected by the exemption, if granted. Any person who may be adversely affected by an exemption can request a hearing on the exemption. A request for a hearing must state: (1) The

name, address, telephone number, and email address of the person making the request; (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption; and (3) a statement of the issues to be addressed and a general description of the evidence to be presented at the hearing. The Department will grant a request for a hearing made in accordance with the requirements above where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing. A notice of such hearing shall be published by the Department in the Federal Register. The Department may decline to hold a hearing if: (1) The request for the hearing does not meet the requirements above; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form. WARNING: All comments received will be included in the public record without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be

confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the <http://www.regulations.gov> website is an "anonymous access" system, which means EBSA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EBSA without going through <http://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the Internet.

Background: The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011).¹ If the proposed exemption is granted, the restrictions of ERISA sections 406(a)(1)(A)

¹ For purposes of this proposed exemption, references to the provisions of section 406 of Title I of ERISA, unless otherwise specified, should be read to refer as well to the corresponding provisions of Code section 4975.

through (D), and the sanctions resulting from the application of Code section 4975, by reason of Code sections 4975(c)(1)(A) through (D), shall not apply to certain transactions arising from credit arrangements involving Mitsubishi UFJ Trust and Banking Corporation and its indirectly wholly-owned subsidiary MUFG Alternative Fund Services (Cayman) Limited and the investment funds in which employee benefit plans invest.

SUMMARY OF FACTS AND REPRESENTATIONS²

1. Mitsubishi UFJ Trust and Banking Corporation is a foreign banking corporation organized under the laws of Japan, and a subsidiary of Mitsubishi UFJ Financial Group. MUFG Alternative Fund Services (Cayman) Limited is an ordinary resident company organized under the laws of the Cayman Islands, and is an indirectly wholly-owned subsidiary of Mitsubishi UFJ Trust and Banking Corporation (collectively, Mitsubishi Bank or the Applicant). Mitsubishi Bank may act as the sole lender (a Lender) or agent for a Lender (an Agent) in arranging revolving lines of credit (Credit Facilities) that are used by certain investment vehicles (the Funds). The Funds may be

² The Department notes that availability of this exemption, is subject to the express condition that the material facts and representations contained in application D-12003 are true and complete, and accurately describe all material terms of the transactions covered by the exemption. If there is any material change in a transaction covered by the exemption, or in a material fact or representation described in the application, the exemption will cease to apply to the covered transactions as of the date of such change.

structured as limited partnerships, limited liability companies, or other business entities organized under applicable law. Investors in the Funds (the Investors) include employee benefit plans subject to ERISA and plans subject to Code section 4975 (the Covered Plans). The Covered Plans invest in the Funds, and the Funds, in turn, may invest directly or indirectly in private equity investments, real estate or real estate related investments, non-real estate operating company ventures, or other investment opportunities.³

2. The Funds may use capital calls to facilitate Fund investments. A capital call (Capital Call) is when a Fund exercises its right to call on Investors to make cash capital contributions to the Fund. These cash capital contributions from Investors to a Fund (Capital Contributions) enable the Fund to make its investments. Investors typically have 10 to 15 days after a Capital Call

³ This proposed exemption is not an endorsement by the Department of the transactions described herein. The fiduciary responsibility provisions of Part 4 of Title I of ERISA apply to a Covered Plan fiduciary's decision to invest in a Fund. Specifically, ERISA section 404(a)(1) requires, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of the plan. Such an exemption would not constitute an opinion as to whether a particular investment strategy, or arrangement, would be considered prudent or in the best interests of a plan, as required by ERISA section 404. The determination of the prudence of a particular investment must be made by a plan fiduciary, after appropriate consideration of those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know, are relevant to the particular investment involved, including the plan's potential exposure to losses, and the role a particular investment plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties and responsibilities (see 29 CFR 1550.404a-1).

to make a Capital Contribution. A Fund's use of Capital Calls to make investments can take days, thereby reducing a Fund's investing flexibility and increasing costs to the Fund's Investors, including the Covered Plans.

3. In addition to Capital Calls, a Fund may use a Credit Facility to facilitate investments. For purposes of this proposed exemption, a Credit Facility is a secured revolving line of credit between Mitsubishi Bank, as sole Lender, or as Agent, and one or more Funds (or an entity through which a Fund invests). The Fund may use its credit under the Credit Facility for: (a) direct or indirect borrowings; (b) requesting letters of credit; (c) other similar forms of credit arrangements; or (d) a combination of any of the foregoing.⁴

4. Mitsubishi may be a party in interest to a Covered Plan investing in a Fund that uses a Credit Facility with respect to which Mitsubishi is a Lender or Agent for one or more Lenders. However, Mitsubishi will not be a fiduciary with respect to the Covered Plan when relying on the exemption.

5. In most instances, the Credit Facility will be a recourse obligation of a Covered Plan to the Fund that will not exceed the Covered Plan's capital commitment. The

⁴ The phrase "other similar forms of credit arrangements" is a catch-all in the event the needs of the Fund change. Occasionally, a Credit Facility might provide variations on extensions of credit, for example, banker's acceptances, which are similar to letters of credit and are commonly used in some non-US jurisdictions.

following will secure the Fund's repayments to the Credit Facility: (a) a pledge and assignment of all the rights of the Fund and its general partner (General Partner) or manager (Manager), including the right to call for and receive payments of capital committed by Investors, and rights against defaulting Investors; (b) the right to make Capital Calls on Investors, and apply the proceeds to the repayment obligations of the Fund under the Credit Facility, in the event of a default under the Credit Facility; (c) a pledge or first priority security interest in an account (the Collateral Account) that the Fund maintains with a financial institution or entity into which capital contributions are made; and (d) Investor agreements evidencing, among other things, the Investor's acknowledgement of the assignment of rights to the Lenders by the General Partner (or the Manager) and the Fund (the Investor Consent).

6. In connection with securing a Credit Facility, and to the extent Mitsubishi Bank requests or requires, either as sole Lender or Agent, an Investor will execute an Investor Consent consenting to, acknowledging, and confirming certain aspects of the Credit Facility. The Investor Consent may include the following documentation: (a) an acknowledgment and confirmation of the Investor's obligation to deliver the Investor's financial information statements to Mitsubishi Bank, as sole Lender or Agent; (b)

an acknowledgment, and confirmation, of the Investor's unpaid, and owing, capital commitment amount, and of the Investor's obligation to contribute capital (up to its unfunded capital commitment amount) to satisfy the indebtedness the Fund incurred under the Credit Facility;

(c) an Investor's acknowledgment of the Fund's, and its General Partner's (or Manager's), assignment and pledge to Mitsubishi Bank as sole Lender or Agent, of the right to make Capital Calls upon the Investors, and to collect and enforce the same; (d) an Investor's agreement to make Capital Contributions to the Fund without setoff, reduction, counterclaim, or defense of any kind or nature, for the purpose of repayment of the Credit Facility; (e) a representation that the Investor has no knowledge of claims, offsets, or defenses that would adversely affect its obligation to fund Capital Contributions under the Fund Agreements, or events, which with the passage of time would constitute a default, or would constitute a defense to, or right of offset against the Investor's obligation to fund its capital commitment to the Fund; and (f) an agreement that the Investor will fund Capital Contributions only into the Collateral Account (except in certain limited circumstances).

7. With respect to the Fund and its activities, the only direct contractual relationship between an Investor and Mitsubishi Bank, or any Lender, will be the execution

of the Investor Consent. The Investor will separately agree in an "Agreement to Fund" that, in the event of default under the Credit Facility, the Investor will make its Capital Contribution to the Collateral Account in response to a Capital Call for repayment of the Credit Facility, without setoff, reduction, counterclaim, or defense of any kind or nature.

8. The Investor Consent acknowledges, and confirms, existing rights of the Lenders that are created by operation of the Fund Agreements. The Agreement to Fund does not limit the Investor's right to assert any claim, or defense, in a separate action against either the Fund or the General Partner (or Manager).

9. An executed Investor Consent is integral to the Credit Facility, and the Credit Facility is an integral part of the Fund's investment program. Prior to, or at the time of, a plan fiduciary's decision to invest in the Fund, the plan fiduciaries will be aware that the Fund will have: (a) the power to borrow money; (b) enter into a loan agreement in which the Fund may pledge its assets, including the capital commitments of the Investors; and (c) have the right to make Capital Calls, thereby giving the secured party the right, under certain circumstances, to make Capital Calls, directly.

10. A Fund Agreement is the written organizing and governing document forming a Fund that obligates each

Investor to make Capital Contributions, with respect to capital commitments, upon receipt of a Capital Call from Mitsubishi Bank, either as sole Lender or as Agent. The Fund Agreement will also allow the Fund, or its general partner (the General Partner), or its manager (the Manager), to make Capital Calls for any lawful purpose of the Fund that is consistent with the terms of the Fund Agreement and other governing documents.

11. Generally, the Fund Agreement will allow the Fund to: (a) incur indebtedness (including indebtedness related to a Credit Facility) for the acquisition of investments, and to provide the Fund with working capital, among other things; and (b) consummate investments quickly without having to finalize the debt/equity structure for an investment, or arrange, for interim or permanent financing, prior to making an investment, and will have additional advantages to the Investors and the Fund.

12. Some Fund Agreements contain an Agreement to Fund (or similar language) in which case the Investor Consent merely acknowledges and confirms the Investor's funding obligation. All other aspects of the transaction, including the negotiation of all terms of the Credit Facility, will be exclusively between Mitsubishi Bank, as sole Lender or Agent, and the Fund.

Exemption Request

13. The Applicant is requesting an exemption that would permit:

(a) The granting by the Funds to Mitsubishi Bank, as sole Lender or Agent for one or more Lenders (including Mitsubishi Bank) that will fund a Credit Facility, of a security interest in and lien on the Capital Commitments, reserve amounts, and Capital Contributions of Investors that are Covered Plans investing in the Fund;

(b) Any Fund's collateral assignment and pledge to Mitsubishi Bank, as sole Lender or Agent, of the Fund's security interest in an Investor/Covered Plan's equity interest in such Fund;

(c) The Fund's granting to Mitsubishi Bank, as sole Lender or Agent, of a security interest in a collateral account (Collateral Account) to which all Capital Contributions in the Fund will be deposited when paid (except in certain limited circumstances that do not involve Covered Plans);⁵

(d) The granting by the Fund and/or its General Partner or Manager to Mitsubishi Bank, as sole Lender or Agent, of its right to make Capital Calls under the operative Fund Agreements, to enforce the Capital Calls,

⁵ In most cases, all Investors will make Capital Contributions into the Collateral Account. However, in some cases, investors that are not Covered Plans may be directed to make Capital Contributions to the sole Lender or the Agent, for the benefit of the Lenders, after an event of default, in some other manner.

collect the Capital Contributions, and apply them to any amount due under the Credit Facility; and

(e) A Covered Plan's execution of the Investor Consent, consenting to the assignment by the Fund and General Partner (or Manager) to Mitsubishi Bank, as sole Lender or Agent, of their right to make Capital Calls.

Prohibited Transactions.

14. Absent an administrative exemption, these transactions may violate ERISA section 406(a)(1)(A) through (D), and the corresponding provisions of the Code. The Applicant represents that since the Lenders, including Mitsubishi Bank, will be generally large, national, and international financial institutions, it is likely that, in any given Credit Facility, one or more Lenders will have a relationship with a Covered Plan, making it a party in interest with respect to the Covered Plan. However, as a condition of this exemption, no Lender, including Mitsubishi Bank, will be a fiduciary for any of the Covered Plans in connection with their investment in the Fund.

15. ERISA section 406(a)(1)(A) prohibits a sale, exchange, or lease, of any property between a plan and a party in interest. Pursuant to the Investor Consent, a Covered Plan will make cash contributions to the Collateral Account for the benefit of a Lender. Because the cash contribution may come from the Covered Plan's assets, the

execution of the Investor Consent agreement involves an exchange of property between the Covered Plan and the Lender, which includes Mitsubishi Bank, as sole Lender or Agent, in violation of section 406(a)(1)(A) of ERISA.

16. In addition, ERISA section 406(a)(1)(B) prohibits the lending of money, or other extension of credit, between a plan and a party in interest. The Credit Facility's direct extension of credit to the Fund, resulting in an indirect extension of credit to Covered Plans investing in that Fund, pursuant to the Investor Consent, violates section ERISA 406(a)(1)(B).

17. Further, ERISA section 406(a)(1)(C) prohibits the furnishing of goods, services, or facilities between a plan and a party in interest. By servicing the loans under the Credit Facility, Mitsubishi Bank provides indirect services to the Covered Plan Investor. Furthermore, from time to time, there may be interactions between Mitsubishi Bank Lenders and the Covered Plan Investors which involve Mitsubishi's provision of services. For example, Covered Plan Investors may inquire about the status and/or request information from Mitsubishi Bank Lenders with respect to the Credit Facility and the outstanding obligations thereunder, although, typically, such communications would be relayed by the Covered Plan Investors through the Fund to Mitsubishi Bank Lenders, and not made directly.

18. Finally, ERISA section 406(a)(1)(D) prohibits, the transfer to, or use by, or for the benefit of a party in interest of any assets of a plan. Because an Investor will make cash contributions to the Collateral Account for the benefit of the Lender, which includes Mitsubishi Bank, as sole Lender or Agent, cash contribution from Plan assets would be considered a transfer of Plan assets to a party in interest, in violation of ERISA section 406(a)(1)(D).

Benefits of the Credit Facility and Investor Consent

19. According to the Applicant, absent the requested exemption, the inability to use the financing structure described above will result in economic loss to Investors that are Covered Plans, and their participants and beneficiaries, due to more onerous, and expensive, financing terms and conditions that would be required for Plans to invest in these types of investment ventures. In this regard, the types of Funds involved in the Covered Transactions are an important element of a Covered Plan's diversified investment portfolio. Real estate investments can be valuable components of plan portfolios. However, investments in a large, diversified limited partnership or similar entity may have advantages over direct ownership of real estate properties, and other securities, including limited liability with respect to such property, if risks

are minimized. Most diversified real estate and other investment programs are carried out through partnerships or limited liability companies that are substantially-similar to the Funds.

20. According to the Applicant, a Credit Facility will allow a Fund to manage its Capital Calls on a scheduled basis and to move quickly to fund desired investments likely resulting in a more favorable investment portfolio for the Fund and its Investors, and a potentially higher return, without appreciably higher risk. In addition, the ability of the Investors to delay payment on capital commitments allows such amounts to remain in other investments of the Investor and allows the Investor to achieve greater overall investment returns.

21. Mitsubishi Bank, as sole Lender or Agent, may receive a pledge of the Investors' capital commitments, and rights to make Capital Calls and to collect and enforce the same, in the event of default. The Investor Consent is an important component of the Credit Facility arrangement. Absent the Investor Consent, Mitsubishi Bank may be required to foreclose on the collateral in order to effect a Capital Call for repayment of the Credit Facility. The Investor Consent, which would be required by this exemption, enables Mitsubishi Bank, as sole Lender or Agent, to make a Capital Call immediately on the Investors

for repayment, without the need to first foreclose on the collateral.

22. When the Fund Agreements do not contain the agreement of the Investors to make capital commitments without setoff, reduction, counterclaim, or defense of any kind or nature, the Investor Consent will contain this agreement, thereby permitting Lenders to be repaid for amounts that have been extended to the Fund prior to the time Capital Contributions are called, without the risk of repayment being challenged, or delayed, by claims the Investors may have against the Fund. This arrangement will keep the risk of the Fund's investment transactions between the Fund and the Investors.

Conditions for Exemptive Relief

23. The proposed exemption will be subject to a number of substantive conditions. The decision to invest in the Fund on behalf of each Covered Plan and to execute an Investor Consent in favor of Mitsubishi Bank, as sole Lender or Agent, will be made by fiduciaries of the Covered Plan that are not included among, are independent of, and are unaffiliated with, the Lenders (including Mitsubishi Bank) and the Fund. Further, in each Credit Facility covered under this proposed exemption, no Lender, including Mitsubishi Bank, will be a fiduciary for any of the Covered Plans in connection with their investment in the Fund. Relief in this proposed exemption does not extend to Funds

that contain "plan assets" for purposes of ERISA or Code section 4975.⁶

24. Each transaction must be on terms that are no less favorable to the Covered Plans than those which the Covered Plans could obtain in arm's-length transactions with unrelated parties. At the time of the execution of an Investor Consent, the Covered Plan must have assets of not less than \$100 million. Not more than 5% of the assets of any Covered Plan, measured at the time of the execution of an Investor Consent, may be invested in the Fund.

25. The proposed exemption requires that the applicable fiduciaries for Covered Plans that are Investors provide a representation to Mitsubishi Bank, including a statement, that such fiduciary is responsible for making the Covered Plan's decision to invest in the Fund, and is and will be independent of, and unaffiliated with, the Lenders.

26. In addition, no Lender may have any influence, authority, or control over a Client Plan's investment in

⁶ The Plan Assets Regulation describes what constitutes assets of a plan with respect to a plan's investment in another entity for purposes of subtitle A, and Parts 1 and 4 of subtitle 1 of ERISA, and Code section 4975. Should the Department approve this proposed exemption, such approval would not constitute an opinion regarding whether the underlying assets of any Fund would be considered the assets of a plan under such regulations. Further, this exemption, if granted, does not provide relief for either the internal transactions involving the operation of the Fund, or for transactions involving the Fund and third parties other than the specific relief proposed herein. Covered Plan Investors, and their independent fiduciaries, should examine carefully all aspects of the Fund's organization, operation, and investment programs in order to determine whether the requirements of the Department's regulations will be met. See 29 CFR Part 2510.3-101 (51 FR 41280, Nov. 13, 1986), as amended at 51 FR 47226, (Dec. 31, 1986).

the Fund. No Covered Transaction may be part of an arrangement, agreement or understanding, designed to benefit a party in interest or disqualified person with respect to a Covered Plan. Finally, any service covered by the exemption must be necessary for the establishment or operation of the plan, and no more than reasonable compensation may be paid therefor. Finally, all the facts and representations set forth in the Summary of Facts and Representations must be true and accurate.

Statutory Findings

27. "The Proposed Exemption is Administratively Feasible." The Department has tentatively determined that the requested exemption is administratively feasible because it would cover a class of transactions between Covered Plans and Lenders when each Covered Plan will be independently represented by a fiduciary and will have an independent investment advisor.

28. "The Proposed Exemption is in the Interests of." The Department has tentatively determined that the proposed exemption is in the interest of Covered Plans because, absent the exemption, a Fund's use of Capital Calls to make investments may take days, thereby reducing the Fund's investing flexibility and increasing costs to the Fund's Investors, including the Covered Plans.

28. "The Proposed Exemption is Protective of." The Department has tentatively determined that the proposed

exemption is protective of the rights of the Plan participants and beneficiaries because, among other things, a fiduciary independent of Mitsubishi Bank and any other Lender will make the decision to invest in the Fund and determine whether to accept the credit facility arrangement and terms.

Summary

30. Based on the record developed in connection with this proposed exemption, the Department has tentatively determined that the relief sought by the Applicant satisfies the statutory requirements for an exemption under ERISA section 408(a).

NOTICE TO INTERESTED PERSONS

Notice of the proposed exemption will be given to all interested persons within 15 days of the publication of the notice of proposed exemption in the Federal Register, by electronic mail (if electronic mail is the usual and customary method by which Mitsubishi Bank corresponds with the interested person) and/or first class U.S. mail to the last known address of these individuals. The notice will contain a copy of the notice of proposed exemption, as published in the Federal Register, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons

of their right to comment on the pending exemption.

Written comments are due within 45 days of the publication of the notice of proposed exemption in the Federal Register.

All comments will be made available to the public.

WARNING: If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

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 of the Act and/or 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, 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) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the 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; and

(4) The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately

describes all material terms of the transaction which is the subject of the exemption.

PROPOSED EXEMPTION

Section I. Transactions

If the proposed exemption is granted, the restrictions of ERISA sections 406(a)(1)(A)-(D), and the sanctions resulting from the application of Code section 4975, by reason of section Code section 4975(c)(1)(A)-(D), shall not apply to:

(a) The granting by the Funds to Mitsubishi UFJ Trust and Banking Corporation (Mitsubishi Bank), as an agent (Agent) for one or more financial institutions (Lender(s)), which may include, without limitation, Mitsubishi Bank) or as sole Lender, that will fund a credit facility (Credit Facility) providing credit to certain investment funds (Fund(s)), of a security interest in and lien on the capital commitments (Capital Commitments), reserve amounts, and capital contributions (Capital Contributions) of certain investors (Investors) that are employee benefit plans (Covered Plan(s), as defined in Section II(a)), investing in the Fund;

(b) Any Fund's collateral assignment and pledge to Mitsubishi Bank, as sole Lender or Agent, of the Fund's security interest in an Investor Covered Plan's equity interest in such Fund;

(c) The Fund's grant to Mitsubishi Bank, as sole Lender or Agent, of a security interest in a collateral account (Collateral Account) to which all Capital Contributions in the Fund will be deposited when paid (except in certain limited circumstances that do not involve Covered Plans);⁷

(d) The granting by the Fund and/or its general partner (General Partner) or manager (Manager) to Mitsubishi Bank, as sole Lender or Agent, of its right to make calls on Covered Plan Investors for Capital Contributions (the Capital Call), which shall be in cash, under the operative Fund Agreements (as defined in Section II(d)), enforce the Capital Calls, collect the Capital Contributions, and apply them to any amount due under the Credit Facility; and

(e) A Covered Plan's execution of an agreement (the Investor Consent) consenting to the assignment by the Fund and General Partner (or Manager) to Mitsubishi Bank, as sole Lender or Agent, of their right to make Capital Calls.

Section II. Definitions

(a) The terms "Covered Plan" or "Covered Plans" means an investor in a Fund (as defined below) that is an employee benefit plan, as defined in ERISA section 3(3) and

⁷ In most cases, all Investors will make Capital Contributions into the Collateral Account. However, in some cases, Investors that are not Covered Plans may be directed to make Capital Contributions to the sole Lender or the Agent, for the benefit of the Lenders, after an event of default, in some other manner.

that is covered by Title I, Part 4 of ERISA, and/or a plan defined in Code section 4975, that satisfies the conditions set forth herein in Section II;

(b) The terms "Covered Transaction" or "Covered Transactions" mean any combination of transactions described in Section I(a) through (d), in conjunction with the Investor Consent described in Section I(e);

(c) The terms "Fund" or "Funds" means an investment or venture capital fund (organized as a corporation, limited partnership, limited liability company, or another business entity authorized by applicable law) in which one or more investors invest, including employee benefit plans or special purpose entities holding "plan assets" subject to ERISA, as described herein, by making capital contributions in cash to such Fund, pursuant to specific Capital Commitments as established by the Fund Agreement(s) and other operative documents executed by the parties, for purposes of making certain real estate investments (including real estate-related investments, such as venture capital investments) or non-real estate investments (including, without limitation, assets and/or interests relating to infrastructure, maritime, energy, etc.).

Each Covered Plan investing in such special purpose entity must satisfy the conditions set forth herein in Section II. The term "Fund" includes an entity created by the Fund that may borrow, or receive, funds from the Credit

Facility, provided that such entity is considered an affiliate of the Fund as a subsidiary or other controlled entity;

(d) The terms "Fund Agreement" or "Fund Agreements" mean the written agreements under which a Fund (as defined above) is formed (such as a limited partnership agreement, a limited liability company agreement, trust agreement, or articles of incorporation, together with ancillary related agreements, such as subscription agreements) that obligate each Investor to make cash contributions of capital with respect to Capital Commitments, upon receipt of a call for Capital Contributions;

(e) The term "officer" means a president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), or any other officer who performs a policy-making function for the entity;

(f) The term "Mitsubishi Bank" means Mitsubishi UJF Trust and Banking Corporation, which is a foreign banking corporation organized under the laws of Japan, and its indirectly wholly-owned subsidiary named MUFG Alternative Fund Services (Cayman) Limited, an ordinary resident company incorporated and existing under the laws of the Cayman Islands. This exemption is intended to cover Mitsubishi Bank, and all of its current and future branches;

(g) For purposes of determining whether a fiduciary is not included among, is independent of, and unaffiliated with, a Fund, the term Fund shall be deemed, as appropriate, to include the governing entity of the Fund, or a member of the governing body of the Fund, as appropriate, e.g., a general partner of a partnership, a manager of a limited liability company, a member of a member-managed limited liability company, or a member of the board of directors of a corporation. For purposes of this exemption request, a fiduciary of a Covered Plan is not included among, is independent of, and unaffiliated with, a Lender (including Mitsubishi Bank) or a Fund, as applicable, if:

(i) The fiduciary is not, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such Lender or Fund;

(ii) The fiduciary is not an officer, director, employee or relative of, or partner in, such Lender or Fund; and

(iii) No officer, director, highly-compensated employee (within the meaning of Code Section 4975(e)(2)(H)), or partner of the Fund, or any officer, director or highly-compensated employee, or partner of the Lender who is involved in the transactions described in Section I of the exemption request, is also an officer,

director, highly-compensated employee, or partner of the fiduciary. However, if such individual is a director of the Lender, and if he or she abstains from participation in, and is not otherwise involved with, the decision made by the Covered Plan to invest in the Fund, then this condition shall be deemed satisfied.

Section III. Conditions.

(a) The decision to invest in the Fund on behalf of each Covered Plan and to execute an Investor Consent in favor of Mitsubishi Bank, as sole Lender or Agent, is made by fiduciaries of the Covered Plan that are not included among and are independent of and unaffiliated with, the Lenders (including Mitsubishi Bank) and the Fund;

(b) The transaction is on terms that are no less favorable to the Covered Plans than those which the Covered Plans could obtain in arm's-length transactions with unrelated parties;

(c) At the time of the execution of an Investor Consent, the Covered Plan has assets of not less than \$100 million. In the case of multiple plans maintained by the same employer, or by members of a controlled group of corporations (within the meaning of Code Section 414(b)), or members of a group of trades or businesses under common control (within the meaning of Code Section 414(c)) (hereafter, referred to as "members of a controlled

group"), whose assets are invested on a commingled basis (e.g., through a master trust), this \$100 million threshold applies to the aggregate assets of the commingled entity;

(d) Not more than 5% of the assets of any Covered Plan, measured at the time of the execution of an Investor Consent, is invested in the Fund. In the case of multiple plans maintained by the same employer, or by members of a controlled group, whose assets are invested on a commingled basis (e.g., through a master trust), the 5% limit applies to the aggregate assets of the commingled entity;

(e) Neither Mitsubishi Bank, nor any Lender, has discretionary authority or control with respect to a Covered Plan's investment in the Fund nor renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to such investment;

(f) Upon request, the Covered Plan fiduciaries must receive from Mitsubishi Bank, a copy of this notice of proposed exemption and a copy of the final exemption, as published in the Federal Register;

(g) Mitsubishi Bank receives from the Covered Plan fiduciaries a written representation, or a written authorization, that permits Mitsubishi Bank to rely on a written representation made to the Fund, that the conditions set forth above in Section III(a), (c), and (d) are satisfied for such transaction with respect to the Covered Plan for which they are fiduciaries;

(h) No Covered Transaction is part of an arrangement, agreement or understanding, designed to benefit a party in interest or disqualified person with respect to a Covered Plan.

(i) The Funds will not hold "plan assets" for purposes of ERISA or Code section 4975;⁸

(j) Any service covered by the exemption must be necessary for the establishment or operation of the plan, and no more than reasonable compensation may be paid;

(k) No Lender will have any influence, authority, or control over a Client Plan's investment in the Fund; and

(l) All the facts and representations set forth in the Summary of Facts and Representations are true and accurate.

EFFECTIVE DATE: The proposed exemption, if granted, will be effective as of the date that the notice of final exemption is published in the Federal Register.

Signed at Washington, DC, this 22nd day of June, 2021.

Christopher Motta,
Chief, Division of Individual
Exemptions,
Office of Exemption
Determinations,
Employee Benefits Security
Administration,

U.S. Department of Labor.

⁸ See the Department's Plan Assets Regulation. 29 CFR Part 2510.3-101 (51 FR 41280, Nov. 13, 1986), as amended at 51 FR 47226, (Dec. 31, 1986).

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