

## Notice to Interested Persons

Sumitomo Mitsui Banking Corporation, on behalf of itself and its affiliates (collectively, “*SMBC*”), filed a request for final authorization under Prohibited Transaction Exemption (“*PTE*”) 96-62 (as published in 61 Fed. Reg. 39988 (July 31, 1996), as amended by 67 Fed. Reg. 44,622 (July 3, 2002)) with the United States Department of Labor (Department) to permit SMBC to engage in certain transactions with employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended (“*ERISA*”), and/or Section 4975 of the Internal Revenue Code of 1986, as amended (“*Code*”) (each, a “*Plan*”), in connection with SMBC arranging and syndicating revolving lines of credit to certain investment funds, secured by the capital commitments of investors in those funds.

The proposed transactions have met the requirements for tentative authorization under PTE 96-62. You are hereby notified that the Department is considering whether to provide final authorization for the above-described transactions pursuant to PTE 96-62. Upon final authorization by the Department, the restrictions of Section 406(a) of ERISA and/or the sanctions resulting from the application of Section 4975 of the Code, by reason of Section 4975(c)(1)(A) through (D) of the Code, shall not apply to the transactions. The proposed transactions, proposed conditions for final authorization and the summary of facts and representations are explained in the enclosed appendix entitled *Request for Final Authorization* (the “*Appendix*”).

As a person who may be affected by this request for final authorization, you have the right to comment by March 21, 2011.

Any transactions described above will only take place following final authorization by the Department, which is expected to occur on or after March 26, 2011.

All written comments by interested persons can be made to:

U.S. Department of Labor  
Employee Benefits Security Administration  
Office of Exemption Determinations  
Division of Individual Exemptions  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Attention: Karin Weng, Room N-5700  
Application Number: E-00662

Alternatively, interested persons may furnish their comments to the Department either via facsimile to (202) 219-0204 or via e-mail to [weng.karin@dol.gov](mailto:weng.karin@dol.gov), in each case to the attention of Karin Weng.

The citations for a substantially similar individual exemption and a substantially similar case receiving a final authorization number (“*FAN*”) under PTE 96-62 upon which the request for final authorization is based are as follows:

PTE 2004-02: Bank of America, N.A.  
Final Exemption: 69 Fed. Reg. 7,506 (Feb. 17, 2004)  
Proposed Exemption: 68 Fed. Reg. 56,008 (Sept. 29, 2003)

FAN 2005-19E: [Final Authorization granted July 22, 2005] Deutsche Bank AG, Deutsche Bank

FAN 2006-04E: [Final Authorization granted January 7, 2006] Wachovia Bank, N.A.

FAN 2007-07E: [Final Authorization granted August 8, 2007] Morgan Stanley Bank, Morgan Stanley Asset Funding, Inc.

FAN 2008-01E: [Final Authorization granted January 25, 2008] Royal Bank of Scotland plc

FAN 2008-06E: [Final Authorization granted May 30, 2008] Natixis Financial Products Inc., Natixis New York Branch

PTE 2004-02, FAN 2005-19E, FAN 2006-07E, FAN 2007-07E, FAN 2008-01E, and FAN 2008-06E (the “*Substantially Similar Cases*”) describe certain transactions between one or more lenders, who may be parties in interest with respect to ERISA-covered plans, and investment funds in which such plans invest. The Substantially Similar Cases provide relief from certain prohibited transaction provisions and allow the investment funds to borrow against the capital committed for investment by the ERISA-covered plans. The Substantially Similar Cases also permit the lenders to receive certain acknowledgments and consents from the ERISA-covered plans in connection with the establishment of the loans.

For the convenience of interested persons, an Appendix setting forth both the conditions that would be applicable upon final authorization by the Department under PTE 96-62 and the facts and representations that support final authorization is attached. SMBC strongly urges interested persons to read the attached Appendix.

## APPENDIX

### REQUEST FOR FINAL AUTHORIZATION

Based on the facts and representations made by Sumitomo Mitsui Banking Corporation, the Department of Labor (the “*Department*”) is considering whether to provide final authorization pursuant to Prohibited Transaction Exemption (“*PTE*”) 96-62 to Sumitomo Mitsui Banking Corporation and its current and future affiliates (collectively, “*SMBC*”)<sup>1</sup> to engage in the covered transactions described below.

#### Section I – Covered Transactions

The restrictions of Section 406(a) of the Employee Retirement Income Security Act of 1974, as amended (“*ERISA*”) and the sanctions resulting from the application of Section 4975 of the Internal Revenue Code of 1986, as amended (the “*Code*”), by reason of Code Sections 4975(c)(1)(A) through (D), shall not apply to:

- (A) The granting to SMBC, as an agent (the “*Agent*”) for one or more financial institutions (“*Lender(s)*,” which may include, without limitation, SMBC) or as sole Lender, that will fund a credit facility (“*Credit Facility*”) providing credit to certain investment funds (“*Fund(s)*”), by the 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*”), including employee benefit plans (“*Covered Plan(s)*”), as defined in Section III(A)), investing in the Fund;
- (B) Any collateral assignment and pledge by the Fund to the Agent or to SMBC as sole Lender, of its security interest in each Investor’s equity interest, including a Covered Plan’s equity interest, in the Fund;
- (C) The granting by the Fund to the Agent, or to SMBC as sole Lender, 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);<sup>2</sup>
- (D) The granting by the Fund and/or its general partner (“*General Partner*”) or manager (“*Manager*”) to the Agent, or to SMBC as sole Lender, of their right to make calls on Investors for Capital Contributions (“*Capital Call*”), which shall be in cash, under the operative “Fund Agreements” (as defined in Section III(C)), enforce the Capital Calls, collect the Capital Contributions, and apply them to any amount due under the Credit Facility; and

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<sup>1</sup> For purposes of this exemption, the term “affiliates” includes entities controlling, controlled by, or under common control with Sumitomo Mitsui Banking Corporation. An affiliate of Sumitomo Mitsui Banking Corporation may serve as the Agent for a group of Lenders or may act as the sole Lender in a Credit Facility.

<sup>2</sup> In most cases, all Investors will make Capital Contributions into the Collateral Account. However, in some cases, investors that are not plans may be directed to make Capital Contributions to the Agent, for the benefit of the Lenders, after an event of default, in some other manner.

- (E) The execution by a Covered Plan of an agreement (“*Investor Consent*”) consenting to the assignment by the Fund and General Partner (or Manager) to the Agent (or to SMBC as sole Lender), of their right to make Capital Calls, which may contain: (i) an acknowledgment by the Covered Plan of the assignment to the Agent (or to SMBC as sole Lender), of the right to make Capital Calls upon the Covered Plan, enforce the Capital Calls, collect the Capital Contributions, and apply them to any amount due under the Credit Facility; (ii) a consent (as either part of the Fund Agreements or as a separate agreement) by the Covered Plan 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; (iii) a representation that the Covered Plan has no knowledge of claims, offsets or defenses that would adversely affect its obligation to fund Capital Contributions under the Fund Agreements; and (iv) an agreement that the Covered Plan will fund Capital Contributions only into the Collateral Account; provided that with respect to all transactions described above, the conditions set forth below in Section II are met.

## Section II – Conditions

- (A) 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;
- (B) The decision to invest in the Fund on behalf of each Covered Plan and to execute an Investor Consent in favor of SMBC (either as sole Lender or Agent), is made by fiduciaries of the Covered Plan that are not included among, are independent of, and are unaffiliated with, the Lenders (including SMBC) and the Fund. For purposes of this authorization request, a fiduciary of a Covered Plan is not included among, is independent of, and unaffiliated with, a Lender (including SMBC) 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,<sup>3</sup> (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 authorization 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;
- (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

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<sup>3</sup> 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.

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 five percent (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 five percent (5%) limit applies to the aggregate assets of the commingled entity;
- (E) Neither SMBC 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 C.F.R. § 2510.3-21(c)) with respect to such investment;
- (F) If SMBC receives final authorization, SMBC will notify Covered Plans of such authorization, including the final authorization number, in the Investor Consent or other Fund Agreement and will be notified about the availability of the Notice to Interested Persons. Upon request, the Covered Plan fiduciaries must receive from SMBC a copy of this Notice to Interested Persons;
- (G) SMBC receives from the Covered Plan fiduciaries a written representation, or a written authorization that permits SMBC to rely on a written representation made to the Fund, that the conditions set forth above in Section II(B), (C), and (D) are satisfied for such transaction with respect to the Covered Plan for which they are fiduciaries; and
- (H) None of the Covered Transactions is part of an arrangement, agreement or understanding, designed to benefit a party in interest or disqualified person with respect to a Covered Plan.

### **Section III – Definitions**

- (A) The term “*Covered Plan*” means an investor in a Fund (as defined below) that is an employee benefit plan, as defined in ERISA Section 3(3) and that is covered by Title I, Part 4 of ERISA, or Code Section 4975, that satisfies the conditions set forth herein in Section II;
- (B) The term “*Fund*” 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;

- (C) 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 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;
- (D) The terms “*Covered Transaction*” or “*Covered Transactions*” mean any combination of transactions described in Section I(A)-(D), in conjunction with the Investor Consent described in Section I(E); and
- (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.

#### **Section IV – Summary of Facts and Representations**

1. Administrative Necessity for Authorization under PTE 96-62. SMBC arranges and syndicates revolving lines of credit (i.e., a “Credit Facility”) for certain Funds. These Credit Facilities are secured by the capital commitments of the Investors in the Funds. SMBC anticipates that it will continue to enter into such credit facility transactions. However, rather than submitting individual exemption requests for transactions on a case by case basis, SMBC requests that it be granted a more general authorization under PTE 96-62 which would permit SMBC to engage in a series of transactions without the need for recurring administrative approvals.
2. Parties to Credit Facilities. SMBC represents that each transaction will consist at a minimum of: (i) one or more Funds; (ii) one or more Investors in the Fund that may be an employee benefit plan subject to ERISA or a plan subject to Code Section 4975; and (iii) a Lender or group of Lenders. In each instance involving a group of Lenders, the Credit Facility will be arranged by SMBC, which will also be the Agent under the Credit Facility.
3. Funds. The borrower under the Credit Facility will be a Fund or an entity through which a Fund invests or in which a Fund owns a direct or indirect interest. A Fund may be a corporation, a limited partnership, a limited liability company, or another business entity authorized by applicable law. A Fund’s underlying assets will not consist of plan assets,

and SMBC requests no determination with respect thereto.<sup>4</sup>

Each Fund will be organized and operated through the Fund's organizing and governing documents (i.e., "Fund Agreements", as defined in Section III(C) above) such as a partnership agreement, subscription agreements, and other agreements or documents that govern the rights and responsibilities of each party in the Fund. A Fund will generally target equity or debt real estate investments or non-real estate investments. The investments may include, but will not be limited to, the following:

- (i) operating company ventures, both public and private;
- (ii) the acquisition and development of office, retail, industrial, multi-family, single family, parking garage, corporate real estate assets, and other types of real estate assets;
- (iii) the acquisition of interests in real estate or the acquisition of interests in public or private real estate investment trusts and corporations, limited partnerships and limited liability companies whose primary assets will be commercial real estate; or
- (iv) the acquisition of publicly-traded or privately-traded debt or equity securities of issuers whose primary assets are real estate.

Although it is contemplated that the Funds will generally target real estate investments exclusively or in combination with non-real estate investments, some Funds may not target any real estate-related investments.<sup>5</sup>

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<sup>4</sup> SMBC acknowledges that 29 C.F.R. § 2510.3-101, *et seq.*, as modified by ERISA Section 3(42) (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 B, of Title I of ERISA, and Code Section 4975. SMBC further acknowledges that should authorization be provided pursuant to PTE 96-62, such authorization would not constitute an opinion regarding whether the underlying assets of any Fund, as described herein, would be considered the assets of a plan under such regulations. In this regard, SMBC understands that if this submission receives final Department authorization, there will be no relief provided for either internal transactions involving the operation of the Fund or for transactions involving the Fund and third parties other than the specific relief proposed herein. 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.

<sup>5</sup> SMBC acknowledges that should authorization be provided pursuant to PTE 96-62, it should not be interpreted as 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 authorization 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 C.F.R. § 2550.404a-1).

4. Investors; Covered Plans. The Investors in the Fund may generally include, but are not limited to, private or public corporations, educational institutions, charitable trusts or foundations, tax-exempt trusts or other tax-exempt organizations, governmental employee benefit plans, insurance company general accounts, private individuals or trusts, and other private or public persons, entities, or associations. Such Investors will include “plans” subject to the provisions of ERISA and the Code, including Covered Plans. The term “Covered Plan” means a “plan” that meets the requirements of Section II(C) and (D). Any reference to a Covered Plan should be deemed, where appropriate, to include a reference to the Covered Plan’s fiduciary, representative, agent or investment vehicle, such as a trust, through which the plan’s assets are invested in the Fund. An Investor may invest directly in a Fund or indirectly, such as an investment through a special purpose vehicle, an intermediate limited partnership, an insurance company separate account, or otherwise. In some instances, these entities may contain “plan assets” subject to ERISA as a result of investments made by Covered Plans. For purposes of this request for authorization, a fiduciary of a Covered Plan is not included among, is independent of, and unaffiliated with, a Lender (including SMBC) 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) the fiduciary is not a corporation or partnership in which a person affiliated with the Fund or a Lender, as appropriate, is an officer, director, partner, or employee.
5. Lenders; Agent. In each transaction, SMBC will arrange the Credit Facility. For each Credit Facility, there will be one or more Lenders. SMBC will serve as the Agent under the Credit Facility, acting for the benefit of a group of Lenders that participate in the Credit Facility (of which, SMBC may be a Lender), or SMBC may be the sole Lender. In any event, one or more of the Lenders, including SMBC, may be a Party in Interest with respect to one or more of the Covered Plans invested in the Fund.
6. Credit Facility. The “*Credit Facility*” refers to an arrangement entered into by and among: (i) a Fund or Funds, generally as borrower(s) or guarantor(s); (ii) SMBC, as Agent or the sole Lender; and/or (iii) the Lenders. Under this arrangement, the Fund may be provided credit through direct or indirect borrowings, letters of credit and similar forms of credit arrangements. Generally, the Fund Agreements will permit the Fund to incur indebtedness for the acquisition of investments and for working capital purposes. For purposes of the transactions described herein, such indebtedness will include the Credit Facility. The Credit Facility will allow the Fund to 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.

The Fund will be able to use its credit under the Credit Facility by direct or indirect borrowings, by requesting that letters of credit be issued, by other similar forms of credit arrangements, or a combination of any of the foregoing. All Lenders will participate on a pro rata basis with respect to all loans, letters of credit, or other credit arrangements. All

loans, letters of credit, and other credit arrangements will be issued to the Fund or an entity in which the Fund owns a direct or indirect interest ("*Qualified Borrower*"),<sup>6</sup> and not to any individual Investor. All payments of principal and interest made by the Fund or a Qualified Borrower will be allocated pro rata among all Lenders.

The Credit Facility will generally have a stated maturity date, at which time the term of the facility may be extended, or the entire unpaid principal balance, plus any accrued but unpaid interest, will be due. Until the maturity date, only interest will generally be payable on the Credit Facility. Whether or not an extension of the facility is requested, the manner of repayment of the debt will be generally a combination of Capital Calls on the Investors, proceeds from mortgage financings, and proceeds from liquidation of investments. The Fund will not typically make a lump sum Capital Call on the day the debt is due. Generally, no Fund will attempt to liquidate all of its properties to pay the Credit Facility without making any Capital Calls.

In most instances, the Credit Facility will be a recourse obligation of the Fund. The recourse obligation of a Covered Plan to the Fund will not exceed the Covered Plan's initial capital commitment. Repayment of the Credit Facility may be secured by, among other things, a security interest in and lien on the Capital Commitments, the right to make Capital Calls, the right to collect and enforce the same, and a collateral account in the name of the Fund, into which Capital Contributions are funded (i.e., the Collateral Account), or any combination of the foregoing. In the event of a default under the Credit Facility, the Agent will have the right to make Capital Calls on the Investors to the extent of unfunded Capital Commitments and will apply Capital Contributions received from such Capital Calls to any amount due to any Lender under the Credit Facility.

7. Investor Consent. In connection with the Credit Facility, in any case in which an Investor executes an Investor Consent, the Investor Consent may contain, among other things:
  - (i) an acknowledgment by the Investor of the assignment by the Fund and its General Partner (or Manager) to SMBC, acting as Agent for the benefit of Lenders or as sole Lender, of the right to make Capital Calls upon the Investors, and to collect and enforce the same;
  - (ii) an agreement by the Investor 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;
  - (iii) 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; and
  - (iv) an agreement that the Investor will fund Capital Contributions only into the Collateral Account.

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<sup>6</sup> SMBC represents that Qualified Borrowers will be entities the indebtedness of which may be guaranteed by the Fund. When extensions of credit are made to a Qualified Borrower, the Fund will provide a guaranty agreement to the Lenders, under the terms of the Credit Facility.

Prior to obtaining Capital Commitments from the Investors, the Fund may negotiate with SMBC to provide the Credit Facility. With respect to the Fund and its activities, the only direct relationship between an Investor and SMBC or any Lender in connection with a Covered Transaction will be the execution of an Investor Consent. In this regard, the only provision in the Investor Consent which is not merely an acknowledgment of already-existing rights and obligations is the Investor's separate agreement 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. However, the Investor does retain its right to assert any such claim or defense in a separate action. Some Funds may include such a waiver of defenses to the funding of Capital Contributions by the Investors within the Fund Agreements, in which case the Investor will provide the Agent, or SMBC as sole Lender, with a separate document that will simply contain an acknowledgment of such agreement. All other aspects of the transaction, including the negotiation of all terms of the Credit Facility, will be exclusively between the Agent (for the benefit of the Lenders) or SMBC (as a sole Lender) and the Fund.

8. Investor Consent Integral to Credit Facility. SMBC represents that the delivery by each Investor of an Investor Consent is integral to the Credit Facility, and the Credit Facility will be an integral part of the Fund's investment program. Prior to, or at the time of, the decision by the fiduciaries of a plan to invest in the Fund, such fiduciaries will be aware that the Fund will have the power to borrow money and enter into a loan agreement under which the Fund may pledge its assets, including the Capital Commitments of the Investors and the right to make Capital Calls (giving the secured party the right, under certain circumstances, to make Capital Calls directly). In addition, the Fund Agreements will provide, or each fiduciary of a plan that becomes a Covered Plan will be notified prior to its decision to invest in the Fund, that each Investor may be required to execute documents that are customary for the type of financing involved in the class of transactions described herein. These documents may include an Investor Consent, pursuant to which the Investor agrees 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. If a fiduciary of a plan that may become a Covered Plan considers these provisions overly restrictive or unfavorable, it may decline to invest in the Fund. If the Investors refuse to execute Investor Consents, the terms of the Credit Facility may be less favorable to the Fund. The result may be an increase in the cost of credit to a Fund. In addition, the Credit Facility may no longer be made available to the Fund by the Lender. Thus, the Credit Facility structure without Investor Consent may result in an increase in the cost of financing the operations of the Fund and reduce the Investors' overall rate of return on their investments.
9. Credit Facility and Investor Consent Do Not Alter Plans' Risks. SMBC represents that the Investor Consent does not alter the Covered Plans' risk of investment in the Fund. If the Credit Facility were not provided, the Investor's Capital Contributions would be required for the Fund to make investments. The Covered Plan's Capital Commitment to the Fund is an unconditional absolute obligation to make Capital Contributions to the

Fund upon receipt of a Capital Call. Absent any malfeasance on the part of the Fund that would give rise to a defense in favor of the Covered Plan, the Covered Plan will be required unconditionally to honor a Capital Call from the Fund. The Covered Plan's payment of Capital Contributions upon receipt of a Capital Call alters the Covered Plan's risk of the Fund's malfeasance. Any malfeasance occurring prior to the Capital Call will allow the Covered Plan to raise any defenses arising from the malfeasance and refuse to honor the Capital Call. The payment of Capital Contributions upon receipt of a Capital Call subjects the Covered Plan to greater risk. If the Covered Plan later had a claim based on mismanagement or fraud by the Fund, it could not limit its risk by withholding the Capital Contributions for such investment because they would have already been made in response to earlier Capital Calls. The Covered Plan's recourse would be to sue for damages, for recovery of Capital Contributions, or other remedies.

In lieu of making Capital Calls, the Fund will enter into a Credit Facility with SMBC to obtain financing for its investments and operations. With the liquidity from the Credit Facility, the Fund can defer or forego issuing Capital Calls. Absent the Investor Consent, this reduces the Covered Plan's risk of the Fund's wrongful actions. At the time it executes the Investor Consent, the Covered Plan has committed its capital to the Fund. Although the Covered Plan agrees in the Investor Consent to pay its Capital Commitment in the event of a Capital Call by the Agent, without setoff, reduction, counterclaim, or defense, the only circumstance under which a Capital Call to repay the Credit Facility could be required occurs when advances were made thereunder to the Fund, to make investments which, absent the Credit Facility, would otherwise have been made with Capital Contributions of the Investors. Therefore, the Covered Plan would not otherwise have the opportunity to refuse to honor a Capital Call based on any setoff, reduction, counterclaim, or defense of any kind or nature, but would have to pursue available remedies to recover against the Fund. The Covered Plan retains the right to assert any such claim or defense in a separate action. The later repayment of the Credit Facility by making Capital Calls on the Investors permits the Fund to replace the Credit Facility with Capital Contributions. Thus, SMBC states that the Covered Plan is exposed to the same risk whether or not the Fund enters into the Credit Facility.

10. Credit Facility Will Not Generally Affect Right of Plan to Withdraw From Fund. SMBC states that the Fund's provisions concerning assignment of Capital Commitments and covenants to unconditionally honor Capital Calls will not affect the ability of an Investor to withdraw from the Fund.<sup>7</sup> Under the Fund Agreements, Investors will not be able to withdraw except in limited circumstances. Such circumstances would relate to changes that would cause adverse outcomes to the Investors under applicable law.<sup>8</sup> Although the Credit Facility will typically require notice of any intent to withdraw, it will not prohibit withdrawals. The Credit Facility will be structured so that, in most cases, an allocable

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<sup>7</sup> Please also see footnote 5.

<sup>8</sup> In this regard, the Fund Agreements may allow Fund Investors subject to ERISA, including Covered Plans, to withdraw from the Fund if the Investor would be in violation of ERISA, the Code or applicable regulations by continuing its investment in the Fund. While it is expected that such circumstances would be rare, if a future amendment to ERISA or interpretation of an existing ERISA requirement would be violated by a particular plan's continued investment in a Fund, that plan would be allowed to withdraw from the Fund.

portion (*i.e.*, the withdrawing Covered Plan's pro rata portion of the outstanding balance) of the facility will be repaid at the time of any withdrawal. The Credit Facility may also allow a withdrawing Investor's interest in the Fund to be transferred to an entity that meets the financial or legal requirements the Agent and Lenders have established for Investors whose committed capital secures the credit.

Under the Fund Agreements, transfers of interests in the Fund by Investors are usually also restricted. Generally, Investors will have the right to transfer their interests only with the consent of the Fund, or only to entities that meet certain financial or legal requirements that will be specified in the Fund Agreements. The Credit Facility typically requires the Fund to agree that no transfer of an Investor's interest will be made without prior written consent of the Agent, except for transfers permitted by the Fund Agreements. This provision is put in place so that the Agent will know the identity of the transferee, and is typically coupled with a requirement that repayment of an allocable portion of the Credit Facility be made in connection with the effectiveness of any transfer.

11. Benefits of Credit Facility and Investor Consent. SMBC represents that, absent the requested authorization, the economic loss resulting to the Covered Plans and their participants and beneficiaries results from the more onerous and expensive financing terms and conditions that would be required, absent the Investor Consent, for those plans to invest in these types of investment ventures. SMBC states that the types of Funds involved in the covered transactions are an important element of a large diversified investment portfolio of a qualified plan. The advantages of investments in real estate and other investments provided through such Funds are numerous, including long-term appreciation, hedges against inflation, and cash flow from operations. However, SMBC states that to minimize the risks involved in real estate investments, investment in a large diversified limited partnership or similar entity has many advantages over direct ownership of real estate properties and other securities, including limited liability with respect to such property. Most diversified real estate and other investment programs are carried out through partnerships or limited liability companies that are substantially similar to the Funds. The \$100 million minimum net asset value of a Covered Plan makes it likely the Covered Plans will be sponsored by large businesses and will have relationships with an extensive number of service providers, investment managers, and other entities that are related to financial institutions.

Although the Agent, for the benefit of the Lenders, may receive a pledge of the Capital Commitments of the Investors, the right to make Capital Calls, and the right to collect and enforce the same, in the event of default, the Agent may be required, without the Investor Consent, to foreclose on the collateral in order to effect a Capital Call for repayment of the Credit Facility. The Investor Consent permits the Agent to avoid the delay and expense of foreclosure proceedings, and to make a Capital Call immediately on the Investors for repayment. In addition, when the Fund Agreements themselves 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 contains such agreement, and permits Lenders to be repaid for amounts that were 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. SMBC states that this arrangement keeps the risk of the Fund's investment transactions between the Fund and the Investors.

Thus, if the Credit Facility were not provided, the Investor's Capital Contributions would be required for the Fund to make investments. In such instances, the Investor's capital would be used to make investments, and would be immediately at risk. If the Investor later had a claim based on mismanagement or fraud by the Fund, it could not limit its risk by withholding the Capital Contributions for such investment, since those contributions would have already been made in response to earlier Capital Calls. The Investors' recourse would be to sue for damages, for recovery of Capital Contributions, or other remedies.

The Fund will draw on the Credit Facility in lieu of making Capital Calls to fund investments. The later repayment of the Credit Facility by making Capital Calls on the Investors permits the Fund to replace the Credit Facility with Capital Contributions. Therefore, SMBC represents that the agreement in the Investor Consent to repay the Lenders without setoff, reduction, counterclaim, or defense of any kind or nature, keeps the risk of Fund mismanagement or fraud between the Fund and the Investors, where it would be were the Credit Facility not in place.

SMBC represents further that no more than five percent (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. 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), this five percent (5%) limit will be applied to the aggregate assets of the commingled entity.

12. Lender Will Not Be a Fiduciary of the Plan With Respect to Investment in the Fund. SMBC represents that, with respect to each Credit Facility covered by this request for authorization, no Lender which will participate, including SMBC, will be a fiduciary for any of the Covered Plans in connection with their investment in the Fund. The fiduciaries for Investors that may become Covered Plans will have to satisfy the conditions set forth in Section II(B), (C), and (D), above. In this regard, this authorization if finalized requires that the applicable fiduciaries provide a representation to SMBC that includes a statement that the fiduciary responsible for making the investment decision on behalf of the Covered Plan to invest in the Fund will be independent of the Lenders and their affiliates. In addition, neither the Lenders nor any of their affiliates will have any influence, authority or control over such Investor's investment in the Fund. Such representations will demonstrate that the fiduciaries responsible for investment decisions are completely independent of any Lender. Moreover, SMBC states that the independent decision of the fiduciaries of those plans that may become Covered Plans to enter into the transaction, with full knowledge of the Credit Facility and the Investor Consent, will be protective of the rights of participants and beneficiaries of Covered Plans.

SMBC represents that because the Lenders 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. A Lender's status as a Party in Interest to a Covered Plan may cause a transaction described herein to be a prohibited transaction under ERISA or the Code, even though all relationships between the Covered Plan and the Lender will be unrelated to the transaction and do not involve any conflict of interest or opportunity for improper benefit for the Lender. SMBC states that the affected Covered Plans' fiduciaries will be sophisticated investors represented by sophisticated investment advisors. Thus, all participants and beneficiaries of the affected Covered Plans will be adequately protected with respect to the transactions described herein. Finally, SMBC states that none of the Covered Transactions will be part of an overall arrangement, agreement or understanding designed to benefit a party in interest with respect to a Covered Plan.

13. Summary. In summary, SMBC represents that the proposed transactions will satisfy the statutory criteria of ERISA Section 408(a) for the following reasons:
- (i) Each transaction will 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;
  - (ii) The decision to invest on behalf of each Covered Plan, and the decision to execute an agreement for consent to the Fund's assignment to SMBC of the Fund's right to make Capital Calls, will be made by fiduciaries of the Covered Plan that are independent of, and unaffiliated with, the Lenders and the Fund;
  - (iii) At the time of the execution of an Investor Consent, a Covered Plan must have assets of not less than \$100 million (other than situations involving multiple plans maintained by the same employer or by members of a controlled group, whose assets are invested on a commingled basis, where this \$100 million threshold can be met by aggregating assets of the commingled entity);
  - (iv) Not more than five percent (5%) of the assets of any Covered Plan, measured at the time of the execution of the Investor Consent, will be invested in the Fund (other than 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, wherein this five percent (5%) limit will be applied to the aggregate assets of all such commingled entities);
  - (v) Neither SMBC, nor any Lender has any fiduciary authority or control with respect to a Covered Plan's investment in a Fund nor renders investment advice to a Covered Plan within the meaning of 29 C.F.R. § 2510.3-21(c);
  - (vi) The Covered Plan fiduciaries will receive from SMBC the final authorization

number of the submission under PTE 96-62 and will be notified about the availability of the Notice to Interested Persons. In addition, all appropriate fiduciaries of Covered Plans will receive, upon request, a copy of this Notice to Interested Persons; and

- (vii) SMBC will receive from the Covered Plan Fiduciaries a written representation that the Conditions set forth in Section II(B), (C), and (D) above are satisfied for each transaction with respect to the Covered Plan for which they are fiduciaries.