

The notice was published in the **Federal Register** on September 30, 1997 (62 FR 32376).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers produce bath tissue. New information provided by the State shows that some workers separated from employment at Kimberly-Clark Corporation, Winslow Plant, Winslow, Maine had their wages reported under two separate unemployment insurance (UI) tax accounts, at Guards-Mark, Boston, Massachusetts and Valmet Audiomotion, Westbrook, Maine. Workers from Guards-Mark provided security detail for the Winslow, Maine facility. Workers from Valmet Audiomotion provided computer support services to the Winslow Maine facility of Kimberly-Clark Corporation. Worker separations occurred at Guards-Mark and Valmet Audiomotion as a result of worker separations at Kimberly-Clark Corporation.

Accordingly, the Department is amending the certification to reflect this matter.

The intent of the Department's certification is to include all workers of Kimberly-Clark Corporation adversely affected by imports from Mexico.

The amended notice applicable to NAFTA-01801 is hereby issued as follows:

All workers of the Winslow Plant of Kimberly-Clark Corporation, located in Winslow, Maine, and leased workers of Northeast Laboratories, Winslow, Maine engaged in employment related to environmental testing for the production of bath tissue produced by the Winslow Plant of Kimberly-Clark Corporation located in Winslow, Maine and all workers of Guards-Mark, Boston, Massachusetts that provided security detail for the Winslow Plant of Kimberly-Clark Corporation, Winslow, Maine and all workers of Valmet Audiomotion, Westbrook, Maine that provided computer support services for the production of bath tissue produced by the Winslow, Maine plant of Kimberly-Clark Corporation, Winslow, Maine who became totally or partially separated from employment on or after July 7, 1996 through August 27, 1999 are eligible to apply for NAFTA-TAA under Section 250 of the Trade Act of 1974.

Signed at Washington, DC, this 20th day of March, 1998.

Grant D. Beale,

Acting Director, Office of Trade Adjustment Assistance.

[FR Doc. 98-8388 Filed 3-30-98; 8:45 am]

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. L-09583, et al.]

Proposed Exemptions; U S West, Inc.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions 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).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, on or before May 15, 1998. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (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. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform

interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

U S WEST, Inc. Located in Englewood, Colorado

[Application No. L-09583]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—Transactions Involving Contributions In-Kind

If the exemption is granted, effective March 31, 1994, the restrictions of sections 406(a)(1)(E), 407(a)(2), 406(b)(1), and 406(b)(2) of the Act shall not apply to voluntary contributions in-kind by U S WEST, Inc. and/or its affiliates (U S WEST) of certain shares of publicly traded common stock of U S WEST (the Stock) and/or any replacement publicly traded shares of such Stock to certain trusts (the Trusts or Trust) for the purpose of pre-funding post-retirement welfare benefits under one or more employee welfare benefit plans (the Plan or Plans) maintained by U S WEST, provided that:

(a) the Plan provisions explicitly authorize U S WEST to pre-fund benefits through in-kind contributions of Stock, and all contributions of Stock have been and will be made in conformity with such Plan provisions;

(b) neither the Plans nor the Trusts have paid nor will pay, whether in cash or in other property or in a diminution

of any funding obligation of U S WEST, any consideration for Stock contributed in-kind by U S WEST;

(c) U S WEST has no obligation to pre-fund welfare benefits provided to participants under any of the Plans, either pursuant to the plan documents, the terms of any collective bargaining agreement, or the provisions of the Act;

(d) none of the Plans have ceded, nor will cede, any right to receive cash contributions from U S WEST;

(e) none of the Plans or Trusts have paid, nor will pay, any commissions in connection with the contribution in-kind of Stock by U S WEST; and

(f) each of the conditions, as set forth below in Section III, have been satisfied and at all times will be satisfied.

Section II—Transactions Involving Purchases of Stock in Connection With Rebalancing of a Trust's Holding of Stock

If the exemption is granted, the restrictions of sections 406(a)(1)(E), 407(a)(2), 406(b)(1), and 406(b)(2) of the Act shall not apply to purchases of classes of Stock by any of the Trusts with all or part of (but no more than) the cash proceeds from prior sales of such Stock; provided that:

(a) all such purchases of Stock will occur in connection with rebalancing of a Trust's holding of Stock as part of the active management of such Stock by an independent, qualified fiduciary (the I/F);

(b) all sales and subsequent purchases of Stock in connection with rebalancing of a Trust's holding of Stock will occur in "blind" transactions with unrelated third parties on the open market at the fair market value of such Stock on the date of such transactions, or where appropriate to minimize any adverse market impact on the value of the Stock remaining in such Trust, in private transactions with persons who are not "parties in interest," as defined in section 3(14) of the Act, at the fair market value of such Stock on the date of such transactions; and

(c) each of the conditions, as set forth in Section III, below, at all times will be satisfied.

Section III—Conditions

The exemption is conditioned upon the adherence by U S WEST to the material facts and representations described in this notice of proposed exemption (the Notice) and upon satisfaction of the following requirements:

(a) all Stock contributed in-kind by U S WEST to any of the Trusts or acquired by such Trusts, as a result of the recapitalization of U S WEST

constituted qualifying employer securities (QES), as defined in section 407(d)(5) of the Act; and all Stock contributed in-kind in the future, any replacement publicly traded shares of such Stock, or any Stock acquired as a result of purchases in connection with rebalancing of a Trust's holding of Stock will constitute QES;

(b) stock contributed in-kind by U S WEST or acquired, as a result of the recapitalization of U S WEST have been held in Trusts, which are qualified under section 501(c)(9) of the Code, and which are established for the purpose of funding life, sickness, accident, and other welfare benefits for the participants and beneficiaries of the Plans, and all stock contributed in-kind in the future, any replacement publicly traded shares of such Stock, or any Stock acquired as a result of purchases in connection with rebalancing will be held in such Trusts;

(c) all Stock contributed in-kind by U S WEST to any Trust or acquired by any Trust as a result of the recapitalization of U S WEST has been held in a separate account (the Account or Accounts) under such Trust, and all Stock contributed in-kind in the future, any replacement publicly traded shares of such Stock, or any Stock acquired as a result of purchases in connection with rebalancing of the holding of Stock by a Trust will be held in an Account under such Trust. Such Accounts under a Trust have been and will be managed by an I/F, who is an independent, qualified investment manager, or any successor independent, qualified investment manager, and who has represented and will represent the interests of the Plans which are funded by such Trusts for all purposes with respect to the Stock for the duration of the Trust's holding of any of such Stock;

(d) the I/F of the Accounts in the Trusts which fund any welfare plan benefits, has accepted Stock from U S WEST through in-kind contributions and recapitalization of U S WEST, and will accept Stock through future in-kind contributions, through any replacement publicly traded shares of such Stock, or through purchases of Stock in connection with rebalancing of a Trust's holding of Stock, only after such I/F determines at the time of the transactions that such transactions are feasible, in the interest of, and protective of participants and beneficiaries of the Plans funded by such Trusts;

(e) the I/F has had sole responsibility and, at all times will have sole responsibility for the ongoing management of the Accounts under the Trusts which hold the Stock and has

taken and will take whatever action is necessary to protect the rights of the Plans funded by such Trusts, including but not limited to all decisions regarding the acceptance of contributions in-kind by U S WEST, the sale or retention of such Stock, the exercise of voting rights of such Stock, any purchases of such Stock in connection with rebalancing of a Trust's holding of Stock, and any other acquisition or dispositions of such Stock;

(f) any contributions in-kind of Stock made by U S WEST to any Trust, any acquisitions of Stock in connection with the recapitalization of U S WEST, did not cause immediately after each such transaction, and in the future any contributions in-kind of Stock, any replacement publicly traded shares of such Stock, or any Stock purchases in connection with rebalancing of a Trust's holding of Stock will not cause immediately after each such transaction the aggregate fair market value of such Stock, plus the fair market value of all qualifying employer real property (QERP), as defined by section 407(d)(4) of the Act, and the fair market value of all other QES held by such Trust to exceed 25 percent (25%) of the fair market value of the assets of such Trust as determined on the date of each such transaction;

(g) the percentage limitations, as set forth above in paragraph (f) of this Section III, have been and will be applied without regard to amounts of securities issued by U S WEST that may be held by an unrelated common or collective trust fund maintained by an independent manager in which any of the Plans through the Trusts may have invested or may invest, provided that the fair market value of the securities issued by U S WEST and held in such unrelated common or collective trust fund does not exceed 5 percent (5%) of the fair market value of each such common or collective trust fund; and provided further that the conditions of Prohibited Transaction Class Exemption 91-38 (PTCE 91-38)¹ are satisfied, including the requirement that the interests of the Plans in such unrelated common or collective trust fund does not exceed 10 percent (10%) of the total of all assets in such common or collective trust fund;

(h) nothing in the conditions, as set forth above in paragraph (f) of this Section III, shall preclude the holding by any Trust of Stock, any other QES

¹ The Notice of Proposed Exemption for exemption application number D-8414 was published at 56 FR 4856 on February 6, 1991. PTCE 91-38 was granted at 56 FR 31966 on July 12, 1991.

and QERP, in amounts in excess of 25 percent (25%) of the assets of such Trust, if the aggregate fair market value of such Stock, other QES and QERP exceeds 25 percent (25%) of the value of the assets of such Trust solely by reason of:

(1) a greater rate of appreciation to the value of such Stock, other QES and QERP relative to the rate of appreciation to the value of the assets in such Trust, other than the Stock, other QES and QERP; or

(2) a greater decline in the value of the other assets of the Trust relative to that of such Stock, other QES and QERP;

(i) none of the assets of any of the Trusts have reverted, nor at any time will any of the assets of such Trusts revert to the use or benefit of U S WEST.

Summary of Facts and Representations

1. U S WEST is a diversified, global telecommunications company with offices located in Englewood Colorado. As of December 31, 1995, it is represented that U S WEST had assets of approximately \$25.2 billion, and annual revenues of nearly \$10.7 billion. The domestic and international business activities of U S WEST are focused primarily in communications, data solutions, marketing services, and financial services. In this regard, a subsidiary of U S WEST provides communications and data services to more than twenty-five million residential and business customers in fourteen (14) western and mid-western states. Other subsidiaries are engaged in marketing activities, directory publishing, direct-mail listings, cellular mobile communications, paging, cable television, and financial services.

2. It is represented that the proposed exemption would affect a number of employee benefit plans sponsored by U S WEST providing current and post-retirement welfare benefits, including life insurance and health insurance, to employees and retirees of U S WEST.²

² As of November 15, 1993, the list of the Plans sponsored by U S West included: (a) U S WEST Group Life Insurance Plan; (b) U S WEST Retiree Health Care Medical Plan 1; (c) U S WEST Disability Benefit Plan; (d) U S WEST Retiree Health Care Medical Plan 2; (e) U S WEST Retiree Health Care Medical Plan 3; (f) U S WEST Retiree Health Care Medical Plan; (g) U S WEST Retiree Health Care Dental Plan 1; (h) U S WEST Retiree Health Care Dental Plan 2; (i) U S WEST Retiree Health Care Dental Plan 3; (j) U S WEST Retiree Health Care Dental Plan 4; (k) U S WEST Retiree Health Care Dental Plan 5; (l) U S WEST Business Travel Accident Plan No. 532; (m) U S WEST Business Travel Accident Plan No. 533; (n) U S WEST Health Care Plan; (o) U S WEST Enterprises, Inc. Sickness and Accident Disability Benefit Plan for Non-Salaried Employees. It is represented that the health plans sponsored by U S WEST were merged in December 1993, into a single plan, the

It is represented that the manner in which welfare benefits are provided to U S WEST's current and former employees is subject to periodic restructuring. Thus, the particular Plans affected by this exemption may be amended or terminated from time to time and new Plans may be added. Although U S WEST has reserved the right to amend, modify, or terminate any of the Plans, U S WEST has represented that it intends to provide benefits to employees and retirees under the Plans indefinitely.

It is represented that U S WEST serves as the plan administrator for each of the Plans. In this regard, the Board of Directors of U S WEST has delegated the administrative responsibilities of U S WEST to the U S WEST Employees' Benefit Committee, which has authority to establish and administer the Plans.

None of the Plans or applicable collective bargaining agreements require U S WEST to pre-fund the benefits provided by the Plans, nor does the Act require that the Plans be funded. However, effective on January 1, 1994, amendments to the Plans authorized U S WEST to pre-fund benefits with contributions, including contributions of QES, to one or more trusts that may be established by U S WEST for the benefit of the Plans. In this regard, U S WEST established the following Trusts to pre-fund a portion of the welfare benefits under the Plans: (1) the U S WEST Benefit Assurance Trust (the Assurance Trust); (2) U S WEST Management Benefit Assurance Trust (the Management Trust); and (3) U S WEST Life Insurance and Welfare Trust (the Life Insurance Trust).

It is represented that these three Trusts are voluntary employees' beneficiary associations which are tax-qualified under section 501(c)(9) of the Code. The trust agreement for each of these Trusts provides that such Trust will be administered by U S WEST. U S WEST also has sole responsibility for the investment or reinvestment of the assets of the Trusts, and authority to appoint one or more investment managers to manage any part of the assets of each of the Trusts. The Board of Directors of U S WEST has appointed a Trust Investment Committee to exercise general oversight of the Trusts.

It is represented that no assets of any of the Trusts may be used except for the exclusive purpose of providing life, sickness, accident, and other covered benefits to U S WEST employees, retirees, and their dependents and beneficiaries and for reasonable

U S WEST Health Care Plan, Plan Number 537 (the Health Plan).

expenses. It is represented that the trust agreements for all of these Trusts specifically prohibit U S WEST from obtaining any reversion of the assets of the Trusts.

As of December 31, 1992, the Assurance Trust has funded post-retirement medical and dental benefits for approximately 62,300 employees and retirees of U S WEST covered by collective bargaining agreements under various Plans providing medical and dental benefits to employees and retirees of U S WEST. As of the same date, the Management Trust has funded post-retirement medical and dental benefits to approximately 37,700 employees and retirees of U S WEST not covered by collective bargaining agreements under various medical and dental benefits plans for all employees and retirees of U S WEST. As of November 15, 1993, the Life Insurance Trust has funded life insurance benefits for approximately 100,000 current and former employees of U S WEST. It was further represented that the total number of participants covered by these three Trusts, as of December 12, 1996, had not changed materially since the application for exemption was filed.

As of November 30, 1996, the Assurance Trust and the Management Trust, respectively, held assets with a fair market value of approximately \$1.4 billion and \$200 million. As of November 30, 1996, the Life Insurance Trust held total assets with a fair market value of approximately \$529 million. It is represented that none of the assets of any of these Trusts are invested in any leases or loans to U S WEST. However, a small percentage of the assets of each of these Trusts is invested either directly or through certain index funds in securities of U S WEST which are represented to constitute QES. U S WEST maintains that the acquisition and holding of such securities by these Trusts is permitted by section 407(a) of the Act and the statutory exemption provided under section 408(e) of the Act.³

3. It is represented that the competitive environment in the telecommunications industry has reduced the cash available to U S WEST for discretionary expenditures. Accordingly, U S WEST does not anticipate at any time in the foreseeable

³ The Department expresses no opinion as to whether the securities of U S WEST held by these three Trusts are qualifying employer securities, as defined by section 407(d)(5) of the Act, whether the acquisition or holding of such securities was permitted by 407(a), or whether acquisition or holding was covered by the statutory exemption provided by section 408(e) of the Act. Further, the Department, herein, is offering no relief for transactions other than those proposed.

future pre-funding welfare benefits by making substantial cash contributions to its Plans. Instead, U S WEST has made in the past and proposes in the future to make in-kind contributions to the Trusts of shares of stock issued by U S WEST. U S WEST believes that such in-kind contributions offer a practical means of pre-funding the welfare benefits under the Plans.

4. It is represented that on March 31, 1994, U S WEST contributed in-kind approximately 4.6 million shares of the Stock to the Assurance Trust that funds part of the benefits provided under the Health Plan. It is represented that, as of the date of the contribution, such shares have been held in an Account under the Assurance Trust. It is represented that at the time of the in-kind contribution the Stock was valued on a per share basis at \$39.875 and that the aggregate fair market value for such shares totaled \$183,425,000. It is further represented that immediately after such in-kind contribution the aggregate fair market value of such shares constituted 23.71% of the assets of the Health Plan.⁴

Subsequently, on or before March 31, 1995, U S WEST made a second contribution in-kind (the Second Contribution) to the Assurance Trust of approximately 1.5 million shares of the Stock. It is represented that at the time of the Second Contribution the Stock was valued on a per share basis at \$40.50 and that the aggregate fair market value of the shares contributed totaled \$60,750,000. It is further represented that both contributions in-kind by U S WEST totaled 6.1 million shares with an aggregate value of \$244,175,000. It is represented that these shares also have been in an Account under the Assurance Trust. It is further represented that, immediately following the Second Contribution in-kind, no more than 22.8 percent (22.8%) of the aggregate fair market value of the assets of the Assurance Trust were invested in employer securities of any kind. It is further represented that other than the two in-kind contributions to the Assurance Trust described above, U S

WEST has made no additional contributions of Stock or other non-cash assets to the Assurance Trust or to any other trust. As of November 30, 1996, it is represented that the Stock comprised approximately 19.5 percent (19.5%) of the total assets of the Assurance Trust. It is further represented that, as of March 9, 1998, the Assurance Trust no longer holds any of the Stock contributed by U S WEST.

The Stock, at the time of each in-kind contribution and at all times thereafter, has been widely held and publicly traded on the New York Stock Exchange (NYSE) and on other major exchanges throughout the world. It is further represented that such Stock, at the time of each in-kind contribution and at all times thereafter, has been an "employer security," as defined by section 407(d)(1) of the Act,⁵ which has satisfied each of the requirements for a "qualifying employer security," as defined by section 407(d)(5) of the Act,⁶ and also has satisfied the requirements of section 407(f)(1) of the Act.⁷ It is represented that approximately 89 percent (89%) of such Stock has been and is held by persons who are independent of U S WEST.

5. Subsequent to the in-kind contributions made by U S WEST in March of 1994 and 1995, U S WEST shareholders voted on October 31, 1995, in favor of a proposal to create two classes of U S WEST securities. Accordingly, effective November 1, 1995, each share of Stock that had been contributed to the Assurance Trust was replaced with two shares which are targeted to specific areas of U S WEST's business (the Targeted Shares). The Targeted Shares are designated: (1) "C" shares (NYSE symbol USW); and (2) "M" shares (NYSE symbol UMG). Specifically, the "C" shares represent an interest in U S WEST Communications Group and reflect the business of U S WEST, primarily in its present 14-state

region, involving integrated communications, entertainment, information, and transaction services. The "M" shares represent an interest in U S WEST Media Group and reflect U S WEST businesses involving cable, wireless, directory, interactive, and international services. The "M" shares are not expected to pay dividends, but are anticipated to be growth securities that will be attractive to investors seeking capital appreciation.

6. As described above, U S WEST on two occasions in the past has made voluntary contributions in-kind of Stock to the Assurance Trust the value of which did not exceed 25 percent (25%) of the assets of the Assurance Trust at the time of such contributions. Subsequently, pursuant to the recapitalization of U S WEST, the Assurance Trust acquired "C" shares and the "M" shares in exchange for Stock previously contributed in-kind by U S WEST. Further, subject to the conditions set forth in this exemption, U S WEST anticipates in the future making additional in-kind contributions to any of the Trusts of Stock which will be held in Accounts under such Trusts.

With regard to any past and future in-kind contribution of Stock by U S WEST to the Trusts, it is represented that the I/F has and will be responsible for actively managing of any such Stock. In this regard, it is anticipated that from time to time a Trust may wish to rebalance its holding of Stock. Such "rebalancing," would entail a Trust selling all or a portion of the "C" shares and/or the "M" shares in its portfolio to unrelated third parties in "blind" transactions on the open market at the fair market value of such Stock on the date of such sale. In the alternative, where appropriate to minimize any adverse market impact on the value of the Stock remaining in a Trust, such Trust may sell such Stock in private transactions with persons who are not "parties in interest" at the fair market value of such Stock on the date of such transactions. Thereafter, an I/F with all or part of (but no more than) the cash proceeds from such prior sales of Stock, may purchase "C" shares and/or "M" shares at fair market value in subsequent "blind" transactions on the open market or in subsequent private transactions with persons who are not "parties in interest" at the fair market value of such Stock on the date of such transactions.

In the opinion of U S WEST each of the two prior in-kind contribution of Stock to the Assurance Trust may have resulted or any future contribution in-kind of Stock to any of the Trusts may result in an acquisition of QES where

⁴The applicant has represented that the assets of the Assurance Trust have been reported as assets of the Health Plan and that such assets have been held solely for the purpose of pre-funding post-retirement health benefits under the Health Plan. For this reason, the representation that the fair market value of the Stock contributed in-kind by U S WEST did not comprise more than 25 percent (25%) of the assets of the Health Plan immediately following each contribution is essentially correct. However, in light of the fact that the assets of the Assurance Trust could be used to fund benefits for any welfare plan established by U S WEST under a collective bargaining agreement, the Department has determined for the purpose of this exemption to apply the 25 percent limitation on the trust level, rather than to a particular welfare plan.

⁵Pursuant to section 407(d)(1) of the Act, an employer security means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer.

⁶Section 407(d)(5) of the Act provides that the term qualifying employer security means an employer security which is stock or a marketable obligation (as defined in subsection (e)). After December 17, 1987, in the case of a plan other than an eligible individual account plan, stock shall be considered a qualifying employer security only if such stock satisfies the requirements of subsection 407(f)(1).

⁷Pursuant to section 407(f)(1) of the Act, stock satisfies such requirements if, immediately following the acquisition of such stock—(A) no more than 25 percent of the aggregate amount of stock of the same class issued and outstanding at the time of acquisition is held by the plan, and (B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer.

immediately after such acquisition, the aggregate fair market value of the Stock, any other QES or QERP held by such Trust, exceeds 10 percent (10%) of the fair market value of the assets of such Trust. In order for U S WEST and the I/F to engage in contributions in-kind of Stock to the extent that such transactions have caused or will cause an acquisition of QES in the form of Stock the value of which exceeds the 10 percent (10%) limitation, as set forth under section 407(a)(2) of the Act, U S WEST has requested exemptive relief from the provisions of section 406(a)(1)(E) and 407(a)(2) of the Act. Because immediately after the first in-kind contribution of Stock to the Assurance Trust on March 31, 1994, the fair market value of such Stock constituted more than 10 percent (10%) of the assets of the Assurance Trust, U S WEST has requested retroactive exemptive relief, effective as of March 31, 1994. In addition, to the extent the 10 percent (10%) limit was exceeded as a result of: (1) The recapitalization of U S WEST; and/or (2) the Second Contribution of Stock to the Assurance Trust, U S WEST has also requested relief. Further, to the extent the 10 percent (10%) limit will be exceeded, U S WEST has requested relief: (1) for any future contributions of Stock to any Trust, any replacement publicly traded shares; and (2) for any purchases of Stock in connection with rebalancing of such Trust's holding of "C" shares and "M" shares.

In addition, in the opinion of U S WEST the contributions of QES in the form of Stock to any of the Trusts may be prohibited by section 406(b). Specifically, U S WEST, as the sponsoring employer of Plans, is a fiduciary to such Plans, pursuant to section 3(21) of the Act. Section 406(b)(1) of the Act prohibits a plan fiduciary from dealing with the assets of a plan in his own interest or for his own account. Section 406(b)(2) of the Act prohibits a plan fiduciary from acting in a transaction involving a plan on behalf of a party whose interests may be adverse to the interests of such plan, including such plan fiduciary's own interests. Thus, in the view of U S WEST, any transaction between it and any of the Plans may be deemed to involve self-dealing or a conflict of interest prohibited by section 406(b)(1) and 406(b)(2) for which relief has been requested.

7. With regard to the past two contributions in-kind, U S WEST represents that the aggregate fair market value of all Stock contributed by U S WEST to the Assurance Trust, or acquired as a result of the

recapitalization of U S WEST, plus the fair market value of all Stock, other QES and QERP held by the Assurance Trust did not exceed 25 percent (25%) of the fair market value of the assets of the Assurance Trust immediately after such transactions. Further, U S WEST proposes that it be permitted in the future to contribute amounts of Stock to any of the Trusts; provided that the aggregate fair market value of all Stock contributed by U S WEST, and/or acquired as a result of the replacement of such Stock or of purchases of Stock in connection with rebalancing of a Trust's holding of Stock, plus the fair market value of all Stock, other QES and QERP held by such Trust, does not exceed 25 percent (25%) of the fair market value of the assets of such Trust immediately after such transactions.

A Trust may hold Stock, other QES, and QERP in amounts above 25 percent (25%), if the aggregate fair market value of such Stock and other QES, and QERP exceeds 25 percent (25%) of the assets of such Trust solely by reason of: (1) A greater rate of appreciation to the value of such Stock, other QES and QERP relative to that of assets in that Trust other than such Stock and other QES and QERP; or (2) a greater decline in the value of the other assets of such Trust relative to that of such Stock, other QES, and QERP.

In addition, U S WEST represents that some or all of the Plans may have invested or may invest in one or more unrelated common or collective trust funds which are maintained by independent managers. As it is possible that securities issued by U S WEST, including the Stock, may be held in such funds (particularly in index-type passively managed funds), U S WEST wishes to ensure that the percentage limitations, as set forth in Section III(f) of the exemption, will be applied without regard to amounts of U S WEST securities that may be held by such funds in which a Plan may invest. In this regard, U S WEST estimates that the market value of the securities issued by U S WEST and held in such funds does not exceed 5 percent (5%) of the fair market value of each such fund and that no more than 10 percent (10%) of all interests in each such fund are held by Plans maintained by U S WEST. Further, U S WEST represents that the conditions of PTCE 91-38 have been and will at all times be satisfied. In the opinion of U S WEST, the limited nature of the investment by Plans in such funds demonstrates that the amount of U S WEST securities held by such funds, if any, is not subject to influence by U S WEST or the I/F of the Plans, as appears to be the intent in

section I(a)(1)(A) of PTCE 91-38.

Accordingly, paragraph (g) of Section III of this exemption provides that the percentage limitations, as set forth above in paragraph (f) of Section III, will be applied without regard to amounts of securities issued by U S WEST that may be held by unrelated common or collective trust funds which are maintained by independent managers and in which any of the Plans may have invested or may invest, provided that the fair market value of the securities issued by U S WEST and held in each such fund does not exceed 5 percent (5%) of the fair market value of such fund; that the interests of Plans maintained by U S WEST in each such fund does not exceed 10 percent (10%) of the total of all assets in such fund; and that the remaining conditions of PTCE 91-38 are satisfied.

8. U S WEST maintains that specific safeguards included in this exemption ensure that the rights of the participants and beneficiaries of the Plans have been and will be fully protected with respect to the transactions. In this regard, neither the Plans nor the Trusts have paid or will pay any consideration for the contributions in-kind of the Stock, either in cash, in other property, or in any diminution of a mandatory funding obligation of U S WEST. Further, neither the Plans nor the Trusts have paid any commissions, nor will the Plans or the Trusts pay any commissions with respect to such in-kind contributions. However, it is represented that the costs of preparing and filing the application for exemption were and will be allocated to the Plans, and the fees of the I/F of such Plans have been and will be borne by the Trusts.

9. U S WEST maintains that the transactions have been and will be administratively feasible and the level of oversight required by the Department has been and will be minimal. In this regard, it is represented that the Guidelines for the Trusts, the documents of the Plans, and the financial statements of the Trusts and of the Plans are readily available for inspection and have been and will be subject to the audit requirements of section 103(a)(3)(A) of the Act. Further, U S WEST represents that the transactions are in the interest of the Plans, as growth in the telecommunications industry will cause any Stock contributed to the Trusts to appreciate in value. For this reason, U S WEST believes the Stock to be a highly desirable investment. Further, U S WEST represents that the exemption is protective of the participants and beneficiaries, in that the transactions

also provide security regarding the continuation of benefits to current and former employees of U S WEST.

10. It is represented that acceptance of the past contributions of Stock on March 31, 1994, and on March 31, 1995, by U S WEST to the Assurance Trust was approved by an I/F. Further, it is represented that an I/F will approve any future in-kind contribution of such Stock into any of the Trusts.

In this regard, U S WEST appointed United States Trust Company of New York (U.S. Trust) to serve as I/F and as equity investment manager of the Account in the Assurance Trust which held the Stock contributed in-kind by U S WEST. U.S. Trust is a bank and trust company organized under the laws of New York. U.S. Trust represents that as an experienced employee benefits trust fiduciary with a large professional staff, it is qualified to serve as independent fiduciary. As of May 12, 1994, U.S. Trust had approximately \$393 billion of assets in custody and, as of June 19, 1995, had approximately \$40 billion in assets under discretionary management. U.S. Trust is independent in that it is totally unrelated to U S WEST and does not have any directors in common. Further, U.S. Trust represents that it receives less than one percent (1%) of its income from U S WEST.

It is represented that in its capacity as independent investment manager of the Accounts under the Assurance Trust, U.S. Trust acted as a fiduciary with responsibility: (1) For evaluating the appropriateness of accepting any contribution in-kind of Stock; (2) for establishing the value of such Stock contributions; and (3) for managing the Accounts on an ongoing basis, including making all decisions regarding acquisition, retention, or sale of the Stock contributed by U S WEST, including exercising any and all voting rights appurtenant to the Stock in accordance with the U S WEST Trust Investment Proxy Voting Policy. It is represented that U.S. Trust retained the right to delegate these responsibilities to its affiliate, U.S. Trust Company of California, N.A., a national financial institution providing specialized fiduciary services primarily to plans covered by the Act.

It is represented that after its appointment U.S. Trust had full discretion to manage the Accounts, subject to specific investment guidelines (the Guidelines), as mutually agreed between U S WEST and U.S. Trust, which were reevaluated at least annually by both parties. Such Guidelines specify that there would be no short sales, trading on margin, or lending of securities without the prior

approval of U S WEST. Further, the Guidelines specify that there are no requirements for or restrictions against realization of net investment gains or losses during the calendar year. It is represented that U.S. Trust has engaged in all transactions on behalf of the Trusts on an agency, rather than principal, basis.

The Guidelines specify that the assets in the Accounts are invested solely in QES, cash, cash equivalents, and/or other derivative financial investments to hedge the Accounts consistent with the Guidelines. In this regard, it is represented that cash equivalents are held for transactional purposes only and average no more than 5% of the portfolio of any of the Accounts. It is anticipated that the Stock will be held in the Accounts for long-term income or appreciation, unless U.S. Trust or its successor deems it imprudent to do so.⁸

It is represented that the emphasis in measurement under the Guidelines is on long-term performance. U.S. Trust or its successor is responsible for achieving a higher return over time than an appropriate market index chosen by U S WEST.⁹

Specifically, the Guidelines state that the ten (10) year average annual returns are expected to meet or exceed the return of U.S. Treasury Bills, plus five (5) percentage points per year. It is represented that returns are measured net of fees and have been and will be reported periodically by Boston Safe Deposit and Trust Company, as trustee of the Assurance Trust. In addition, regularly scheduled meetings between U.S. Trust and U S WEST have been held and information regarding investment results, strategies, and holdings have been reviewed quarterly.

It is represented that U.S. Trust began the process of determining whether and under what circumstances the Assurance Trust should accept the Stock contributed in-kind, by analyzing the investment needs of the Health Plan and the nature of the contribution.¹⁰

⁸Notwithstanding the fact that U.S. Trust and U S WEST have adopted a long term performance policy for the assets in the Accounts, U.S. Trust and any successor I/F remains subject to the fiduciary responsibility provisions of section 404 of the Act. In this regard, the Department expects that U.S. Trust and any successor I/F will use its authority to dispose of as much of the Stock as is necessary to comply with its fiduciary responsibilities at the appropriate time regardless of the policy that the assets of the Accounts be held for long term appreciation.

⁹The Department, herein, is not opining on the appropriateness of the index selected by U.S. Trust to evaluate the long term performance of the Accounts under the Guidelines.

¹⁰At the time U.S. Trust rendered its opinion the assets in the Assurance Trust were being used solely for the purpose of pre-funding post-retirement health benefits under the Health Plan.

With respect to the investment needs of the Health Plan, it is represented that U.S. Trust in its capacity as I/F: (1) Reviewed the investment allocation policy and investment guidelines of the Health Plan; (2) determined that it was appropriate to rely on such guidelines with respect to the percentage to be committed to the Stock; (3) determined the value of the assets of the Health Plan committed to equities at that time; and (4) determined that the Health Plan could accept the contribution of Stock without exceeding the guidelines relating to equity investments. In this regard, U.S. Trust determined: (1) that the allocation policy and investment guidelines of the Health Plan relating to investments in employer securities were appropriate; (2) that acceptance of the contribution in-kind of the Stock was within such allocation policy and investment guidelines; (3) that the contribution in-kind was not accepted in lieu of any other assets or cash contributions; (4) the contribution was accepted as part of an investment portfolio structured to meet the Health Plan's liquidity needs; and (5) the in-kind contribution of the Stock had no detrimental effect on the ability of the Health Plan to meet its liquidity needs.

With respect to the nature of the contribution in-kind, U.S. Trust represents that it undertook to perform an analysis of the Stock and of U S WEST, to value such Stock, and to analyze the acquisition of such Stock in light of the overall portfolio of the Assurance Trust. In making these analyses, U.S. Trust represents that it had access to all information on U S WEST that it reasonably required, including financial statements, annual reports, materials filed with the Securities and Exchange Commission, and independent research and reports. Based on this information, U.S. Trust concluded that U S WEST will remain a major player in the emerging telecommunications industry and that the near term prospects for the company remain favorable. U.S. Trust stated that the financial performance of U S WEST is likely to continue to improve in light of strong regional demand and the commitment of U S WEST to increasing internal efficiencies. Accordingly, in the opinion of U.S. Trust, the Stock offers good total return potential in a long-term investment horizon.

With respect to the fair market value of the Stock, U.S. Trust noted that such Stock is traded on the NYSE, and like other publicly traded shares, is subject to price fluctuations. In this regard, in order to establish the fair market value of the Stock and to ensure that the value of the Stock contributed on March 31,

1994, did not exceed 25 percent (25%) of the assets of the Health Plan, U.S. Trust determined to accept the value of the Stock at its closing price, as of the previous day, March 30, 1994. It is represented that the price utilized by U.S. Trust in valuing the Stock is verifiable by the publicly disclosed trading prices of such Stock on March 30, 1994. U.S. Trust believes that this method of determining the fair market value of such Stock was reasonable and appropriate.

U.S. Trust determined not to discount the value of the Stock, because the Stock comprised only slightly more than one percent (1%) of the issued and outstanding Stock. As such, in the opinion of U.S. Trust the amount of Stock contributed did not represent such a large block that it would not be possible to dispose of such Stock within a reasonable period of time. It is represented that the 4.6 million shares contributed by U S WEST constituted approximately five (5) days of normal trading volume of such Stock. Given the fluctuation in trading volume of such Stock from day to day, U.S. Trust concluded that a purchase or sale of this amount of Stock over a two to three week period would have little effect on the market price of such Stock.

Prior to the contribution in-kind of the Stock by U S WEST on March 31, 1994, it is represented that U.S. Trust was granted full authority to accept or reject any part of the in-kind contribution of Stock. In this regard, U.S. Trust analyzed the impact of the contribution in-kind on the risk and return characteristics of the Assurance Trust portfolio. In analyzing such impact, U.S. Trust reviewed: (1) The expected return of the portfolio; (2) the overall volatility of the portfolio; (3) the beta risk level or market risk of the portfolio. In addition, U.S. Trust compared the performance of five (5) modeled portfolios that included the Stock with the performance of comparable portfolios which excluded such Stock. Based on the results of its analysis, U.S. Trust concluded that by accepting the in-kind contribution of Stock, the risk/return tradeoff using traditional portfolio analysis was at least as favorable, and possibly more so, to the Health Plan than it would have been without such contribution of such Stock.

U.S. Trust concluded that the contribution in-kind of Stock satisfied two of the three conditions, as set forth in section 408(e) of the Act. Specifically, no commission was charged to the Health Plan or the Assurance Trust as a result of the contribution in-kind of the Stock that occurred on March 31, 1994.

Further, the Health Plan did not pay more than "adequate consideration" for such Stock, since no Plan or Trust has paid or will pay any consideration for the contribution, either in cash or other property, or in any diminution of a mandatory funding obligation of U S WEST. Moreover, as discussed above, U.S. Trust ensured that the value assigned to the Stock was the fair market value on the date of the contribution and that such amount represented less than 25 percent (25%) of the assets of the Health Plan, based on a valuation of the assets of the Health Plan performed by Boston Safe Deposit and Trust Company, as trustee of the Assurance Trust.

U.S. Trust also concluded that acquisition of Stock by the Health Plan on March 31, 1994, was not inconsistent with the diversification requirements of section 404(a)(1) of the Act, even though the value of such Stock contributed on March 31, 1994, represented approximately 25 percent (25%) of the assets of the Health Plan on that date. In the opinion of U.S. Trust, the ability of the Health Plan to pay benefits and expenses when due were not impaired by the acquisition of the Stock contributed in-kind on March 31, 1994. It is represented that U.S. Trust reached such conclusion mindful of the fact that U S WEST has no statutory or contractual obligation to pre-fund any of the benefits provided by the Health Plan and that pre-funding through the in-kind contribution of Stock necessarily provides better security to participants and beneficiaries of the Health Plan than would otherwise be required.

Based on its review and examination, it is the conclusion of U.S. Trust that it was in the interest of the Health Plan and protective of the participants and beneficiaries of the Health Plan to accept the contribution in-kind of Stock on March 31, 1994, at a total value of \$183,425,000 for the following reasons: (1) The Health Plan did not give up any rights to cash or other property in connection with its acceptance of the contribution of such Stock; (2) the contribution of such Stock will increase the assets available to pay benefits under the Health Plan at no cost to such plan; (3) the I/F is authorized to sell such Stock at any time; (4) as the Stock contributed on March 31, 1994, represents only slightly more than one percent (1%) of the total outstanding shares, such that if cash were needed to pay benefits under the Health Plan, the Stock could be liquidated over a relatively short period of time without adversely impacting the market price; (5) the Health Plan and the Assurance Trust paid no commission in connection

with the acquisition of the Stock; (6) the Stock was transferred to the Assurance Trust at fair market value as of the date of the contribution; and (7) the transaction was at least as favorable to the Health Plan as an arm's length transaction with an unrelated third party.

With respect to the Second Contribution of shares of Stock by U S WEST on March 31, 1995, U.S. Trust, in its capacity as independent fiduciary, evaluated the appropriateness of accepting such additional contribution of Stock and assessed the value of such Stock. It is represented that U.S. Trust began the process of determining whether and under what circumstances to accept the Second Contribution by: (1) Reviewing the terms of the Health Plan and the circumstances under which U S WEST made the first contribution in-kind; (2) reviewing the asset allocation policies and investment guidelines of the Health Plan and determining that acceptance of the Second Contribution by the Health Plan did not violate the terms and restrictions of such policies and guidelines; (3) verifying that the Second Contribution consisted of "qualifying employer securities," as defined by the Act; and (4) analyzing the value of the Stock. In fulfilling its responsibility, U.S. Trust represented that it had access to all information about U S WEST that it reasonably required and had sufficient information relating to the Stock to make an appropriate analysis. It was represented that given U S WEST's favorable operating environment, proactive competitive posture and future growth prospects, combined with its solid earnings base from the regional telephone business, in the opinion of U.S. Trust, the Stock offers good total return potential in a long-term investment horizon.

In order to establish the current fair market value of the Stock contributed on March 31, 1995, and to ensure that the value assigned to such Stock would comprise no more than 25 percent (25%) of the assets of the Assurance Trust, as of the date of the Second Contribution, U.S. Trust determined to accept the value of the Stock at its closing price on the NYSE, as of March 30, 1995, the day before the Second Contribution. U.S. Trust represented that this method of determining the fair market value of the Stock was reasonable and appropriate. It is represented that the price utilized by U.S. Trust in valuing the Stock is verifiable by the publicly disclosed trading prices of such Stock on March 30, 1995.

U.S. Trust determined not to apply a discount to the value of the Stock contributed on March 31, 1995. In this regard, U.S. Trust determined that no minority interest discount was necessary, because such Stock was already valued on a minority interest basis. A marketability discount was not applicable, in the opinion of U.S. Trust, because the Stock is registered and fully tradeable. Further, all of the Stock acquired in both contributions in-kind on March 31, 1994, and March 31, 1995, constituted less than 1.3 percent (1.3%) of the outstanding Stock. In the opinion of U.S. Trust the entire holding of Stock (totaling 6.1 million shares after completion of the Second Contribution) does not represent such a large block that it would not be possible to dispose of such Stock within a reasonable period of time. It is represented that the 6.1 million shares contributed by U S WEST represent approximately nine (9) days of normal trading volume of such Stock. Given the fluctuation in trading volume of the Stock from day to day, U.S. Trust concluded that a purchase or sale of this amount of Stock over a two to three week period would have little effect on the market price of such Stock.

With respect to the liquidity of the Health Plan, U.S. Trust determined that the ability of the Health Plan to pay benefits and expenses when due will not be impaired by the acceptance of the Second Contribution. With respect to diversification, U.S. Trust confirmed that the fair market value of the Stock contributed in-kind on March 31, 1995, comprised 22.8 percent (22.8%) of the assets of the Health Plan, as of that date.¹¹

Upon completion of its review of the Second Contribution, U.S. Trust concluded that it would be in the interest of the Health Plan and its participants and beneficiaries to accept the contribution of 1.5 million shares of Stock valued on a per share basis of \$40.50 and valued in the aggregate at \$60,750,000. In support of its conclusion, U.S. Trust gave the following reasons: (1) The Health Plan did not give up any rights to cash or other property in connection with its acceptance of the Second Contribution; (2) the Second Contribution will increase the assets available to pay benefits under the Health Plan at no cost to such plan; (2) there is no guarantee that U S WEST will make additional attempts to pre-fund the Health Plan in the future; (3) the I/F is authorized to sell the Stock at any time; (4) the combined holdings of the Assurance Trust represent only 1.3 percent (1.3%)

of the total outstanding Stock; (5) the Stock could be liquidated over a relatively short period of time if needed to pay benefits under the Health Plan without adversely impacting the market price of such Stock; (6) the Health Plan and the Assurance Trust paid no commissions in connection with the acquisition of the Stock; (7) acceptance of the Stock is consistent with the guidelines and the asset allocation policy applicable to the Assurance Trust; (8) the Stock was transferred to the Assurance Trust at fair market value, as of the date of the Second Contribution; (9) the Second Contribution was at least as favorable to the Health Plan as an arm's length transaction with an unrelated third party.

11. U.S. Trust served as the I/F with respect to the transactions which are the subject of this exemption and investment manager of the assets in the Account in the Assurance Trust from March 31, 1994, through October 31, 1995. However, it is represented that U.S. Trust was replaced by State Street Bank and Trust Company (State Street), headquartered in Boston, Massachusetts. In this regard, it is represented that the replacement of U.S. Trust did not create a gap in independent fiduciary oversight of the Assurance Trust and did not result from any dissatisfaction with the services provided by U.S. Trust. Rather, following its recapitalization, U S WEST made a determination to retain State Street as an independent fiduciary to undertake responsibility for the active management of employer securities in the portfolios of several U S WEST plans, including the Health Plan. U S WEST represents that as a result of the selection of State Street these Plans would receive at more competitive fees the sophisticated analytical ability and experience of State Street in managing employer securities portfolios.

Further, effective November 1, 1995, U S WEST retained State Street to act as the investment manager with respect to the active management of the assets held in the Assurance Trust including the Stock, consisting of the "C" shares and the "M" shares. As investment manager, State Street is responsible for all decisions regarding acquisitions, voting, tenders, conversions, exchanges, sales, and generally for the exercise of all rights, powers, and privileges with respect to the employer securities held by the Assurance Trust. State Street has represented that it understands and acknowledges its duties and responsibilities under the Act as a fiduciary in performing these services with respect to the Assurance Trust.

It is represented that in managing the portfolio of the Assurance Trust of "C" shares and "M" shares, State Street has utilized and will utilize an active management strategy as opposed to a more passive strategy generally utilized in stock accounts consisting of a single employer security. It is represented that the active management approach enables State Street to maximize value while attempting to minimize risk.

In general with regard to its active management strategy, State Street attempts to identify the difference between the underlying value of each stock compared to its market price. Using extensive market analysis tools, research and in-house investment expertise, State Street attempts to take advantage of market opportunities considering the projected growth, financial strength, and the future stream of earnings and dividends of such stock while carefully considering the volatility of each stock and the overall risk associated with the holding of such stock.

The application of the active management strategy would allow State Street to vary the relative mix of "C" shares and "M" shares in the portfolio. The change in the mix is accomplished either by selling "C" shares and reinvesting all or part of (but no more than) the cash proceeds from such sale in "M" shares, or selling "M" shares and reinvesting all or part of (but no more than) the cash proceeds from such sale in "C" shares. For example, if the market price of the "M" shares at a particular time is viewed as over-valued, and the market price of the "C" shares at that time is viewed as under-valued, State Street would sell a portion of the "M" shares and reinvest the proceeds in "C" shares thereby taking advantage of a market opportunity.

It is represented that to accomplish this active management strategy, a communication analyst at State Street monitors daily and analyzes the "C" shares, and a media analyst monitors daily and analyzes the "M" shares to evaluate the performance of each investment, identify any value opportunities, and determine the prudence of those shares as an investment. It is represented that these analysts will compare their conclusions, jointly evaluate the portfolio, present the portfolio performance, and recommend changes to the State Street Trust Investment Committee which in turn reports to the State Street Retirement Investment Services Fiduciary Committee for a final determination.

It is represented that as of March 9, 1998, the Assurance Trust no longer

¹¹ See footnote 4.

holds any of the shares of Stock contributed in-kind by U S WEST. As of the same date, U S WEST confirms that State Street has not engaged in any "rebalancing" transactions involving the repurchase of Stock. However, with regard to any shares of Stock which may in the future be contributed in-kind by U S WEST to any of the Trusts, it is anticipated that State Street may engage in "rebalancing" transactions for the benefit of such trust. In this regard, it is represented that all sales and subsequent purchases of Stock in connection with rebalancing of the holding of Stock by such Trusts will occur in "blind" transactions on the open market and that all Stock acquired in such transactions will be "qualifying employer securities" within the meaning of section 407(d)(5) of the Act. Further, in accordance with the condition of this exemption, as set forth in Section III(f) above, any acquisition of Stock, including any rebalancing of the holding of Stock by a Trust, must not cause immediately after such acquisition the fair market value of such Stock, plus the fair market value of all Stock and other QERP and QES held by such Trust to exceed 25 percent (25%) of the fair market value of its assets, on the date of such transaction.

It is represented that before accepting any future in-kind contributions of Stock from U S WEST, State Street will identify the other holdings in the Assurance Trust and review asset allocation for such trust as determined by U S WEST. In addition, State Street will review the structural process that U S WEST has in place to monitor the overall investment mix, the manner by which asset allocation determinations are made, and any changes or shifts in the asset allocation policy of U S WEST. Further, State Street will evaluate the Stock being contributed to determine if such contribution is prudent and will evaluate the effect of such contribution on the portfolio of the Assurance Trust. Specifically, State Street will review the impact such contributions have on the volatility of such portfolio and will make any necessary adjustments. It is represented that State Street will monitor the holding of the Stock in the Assurance Trust and will continue to hold the Stock only if such holding continues to be in the best interest of the Assurance Trust.

State Street represents that it is qualified to act as I/F and investment manager with respect to the assets held in the Assurance Trust (consisting of the "C" shares and the "M" shares) in that it has been in the business of serving as a discretionary fiduciary with respect to employer securities since 1985, and in

the past two years has created two business units dedicated exclusively to independent fiduciary transactions and the management of employer securities. The experience of State Street includes acting as discretionary fiduciary for more than \$30 billion in employer securities held in approximately ninety (90) qualified retirement plans. Further, State Street, as an independent fiduciary, has represented the interests of retirement plan participants in over eighty (80) transactions involving employer securities.

Although State Street currently provides administrative and investment management services to other plans sponsored by U S WEST, State Street represents that it is sufficiently independent of U S WEST to serve as I/F and investment manager for the Assurance Trust with respect to the management of the "C" shares and the "M" shares. In this regard, the total revenue received by State Street from U S WEST and its plans constitutes less than one-tenth of one percent (.1%) of the annual revenues of State Street.

12. In summary, the applicant represents that the proposed transactions meet the statutory criteria for an exemption under section 408(a) of the Act because:

(a) all Stock contributed in-kind by U S WEST to any of the Trusts or acquired by such Trusts, as a result of the recapitalization of U S WEST constituted QES; and all Stock contributed in-kind in the future, any replacement publicly traded shares of such Stock, or any Stock acquired as a result of purchases in connection with rebalancing of a Trust's holding of Stock will constitute QES;

(b) all purchases of Stock will only occur in connection with rebalancing of a Trust's holding of Stock and in connection with the active management of the Stock by an I/F;

(c) all sales and subsequent purchases of Stock in connection with rebalancing of a Trust's holding of Stock will occur in "blind" transactions with unrelated third parties on the open market at the fair market value of such Stock on the date of such transactions, or where appropriate to minimize any adverse market impact on the value of the Stock remaining in any Trust, will occur in private transactions with persons who are not "parties in interest" at the fair market value of such Stock on the date of such transactions;

(d) the Plan provisions explicitly authorize U S WEST to pre-fund benefits through in-kind contributions of Stock, and all contributions of Stock were, and will be made in conformity with such Plan provisions;

(e) Stock contributed in-kind by U S WEST or acquired as a result of the recapitalization of U S WEST has been held by Trusts which are qualified under section 501(c)(9) of the Code, and which are established for the purpose of funding life, sickness, accident, and other welfare benefits for the participants and beneficiaries of the Plans; and all Stock contributed in the future, any replacement publicly traded shares of such Stock, or any Stock acquired as a result of purchases in connection with rebalancing will be held in such Trusts;

(f) all Stock contributed in-kind by U S WEST to any Trust or acquired by any Trust as a result of the recapitalization of U S WEST has been held in separate Accounts under such Trusts and all Stock contributed in-kind in the future, any replacement publicly traded shares of such Stock, or any Stock acquired as a result of purchases in connection with rebalancing of a Trust's holding of Stock will be held in separate Accounts under such Trusts;

(g) the Accounts in such Trusts have been and will be managed by an I/F who is an independent, qualified investment manager, or a successor independent, qualified investment manager and who has represented and has represented and will represent the interests of the Plans which are funded by such Trusts for all purposes with respect to the Stock for the duration of the Trust's holding of any of such Stock;

(h) the I/F for the Accounts in any Trust which fund welfare plan benefits, has accepted and will accept contributions in-kind of Stock by U S WEST to any of the Trusts and has accepted acquisitions of Stock in connection with the recapitalization of U S WEST and will accept through future in-kind contributions, through any replacement publicly traded shares of such Stock, or through purchases of such Stock in connection with rebalancing of such Trust's holding of Stock, only after such I/F determines that such transactions are feasible, in the interest of, and protective of participants and beneficiaries of the Plans which are funded by such Trusts;

(i) an I/F has had sole responsibility and at all times will have sole responsibility for the ongoing management of the Accounts under the Trusts which hold the Stock has taken and will take whatever action is necessary to protect the rights of the Plans which are funded by such Trusts;

(j) any contributions in-kind of Stock by U S WEST to any Trust or acquisitions of Stock in connection with the recapitalization of U S WEST did not cause immediately after such

transactions the aggregate fair market value of such Stock, plus the fair market value of all other QERP and QES held by such Trust to exceed 25 percent (25%) of the fair market value of the assets of such Trust on the date of such transaction; and any future contributions in-kind of Stock by U S WEST to any Trust, any replacement publicly traded shares of such Stock, or any purchases of Stock in connection with rebalancing of any Trust's holding of Stock will not cause immediately after such transactions the aggregate fair market value of such Stock, plus the fair market value of all other QERP and QES held by such Trust to exceed 25 percent (25%) of the fair market value of the assets of such Trust on the date of such transaction;

(k) none of the assets of the Trust have reverted nor will revert to the use or benefit of U S WEST;

(l) neither the Plans nor the Trusts have paid nor will pay, whether in cash or in other property or in a diminution of any funding obligation of U S WEST, any consideration for Stock contributed in-kind by U S WEST;

(m) none of the Plans have ceded nor will cede any right to receive cash contributions from U S WEST;

(n) none of the Plans or the Trusts have paid nor will pay any commissions in connection with the contribution in-kind of Stock by U S WEST; and

(o) U S WEST has no obligation to pre-fund welfare benefits provided to participants under any of the Plans, either pursuant to the plan documents, the terms of any collective bargaining agreement, or the provisions of the Act.

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested exemption include all active employees of U S WEST and all retirees. It is represented that these two classes of interested persons will be notified through different methods.

In this regard, it is represented that notice will be provided, within sixty (60) calendar days of the date of publication of the Notice in the **Federal Register**, to all active employees of U S WEST by posting at those locations within the principal places of employment of U S WEST which are customarily used for notices regarding labor-management matters for review. Such posting will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the supplemental statement (the Supplemental Statement), as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such

interested persons of their right to comment and to request a hearing.

It is represented that notice will be provided to all retirees who participate in the Plans by mailing first class a retiree newsletter within sixty (60) calendar days of the date of publication of the Notice. Such newsletter will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such interested persons of their right to comment and to request a hearing. It is represented that the newsletter containing the Notice and the Supplemental Statement will be enclosed with the monthly retirement benefit checks to retirees.

It is represented that notice will be provided to all terminated participants in the Plans who are not yet receiving retirement benefits by mailing bulk rate mail within sixty (60) calendar days from the date of publication of the Notice, a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such interested persons of their right to comment and to request a hearing.

All written comments and requests for a hearing must be received by the Department no later than thirty (30) days from the date such interested persons receive a copy of the Notice and the Supplemental Statement.

For Further Information Contact:
Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (This is not a toll-free number.)

Union Bank of Switzerland (UBS/Swiss) and UBS Securities, LLC (UBS Securities) Located in Zurich, Switzerland and New York, New York, Respectively

[Exemption Application Nos. D-10459 and D-10460]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed (1) lending of securities

to UBS/Swiss, UBS Securities, UBS Ltd. (UBS/UK), and UBS Securities Limited (UBS/Japan), which are affiliated domestic or foreign broker-dealers of UBS Securities,¹² by employee benefit plans (the Client Plans or Plans), including commingled investment funds holding plan assets, for which UBS/Swiss, acting through its New York branch in connection with securities lending activities (UBS NY), an affiliate of the proposed UBS Borrowers, may serve as a securities lending agent, sub-agent, or as a custodian or a directed trustee to Client Plans under either of two securities lending arrangements, referred to herein as "Plan A" or "Plan B"; and (2) the receipt of compensation by UBS NY in connection with these transactions.

This proposed exemption is subject to the following conditions:

(a) For each Client Plan, neither UBS NY, any of the UBS Borrowers nor any affiliate of those entities has discretionary authority or control with respect to the investment of the Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

(b) With regard to—

(1) Plan A, under which UBS NY lends securities of a Client Plan to any UBS Borrowers in either an agency or sub-agency capacity, such arrangement is approved in advance by a Plan fiduciary who is independent of UBS NY and the UBS Borrower and is negotiated by UBS NY which acts as a liaison between the lender and the borrower to facilitate the securities lending transaction.¹³

(2) Plan B, under which the UBS Borrower directly negotiates the agreement with the fiduciary of a Client Plan, including a Plan for which UBS NY provides services with respect to the portfolio of securities to be loaned pursuant to an exclusive borrowing arrangement (the Exclusive Borrowing Arrangement), such Client Plan fiduciary is independent of both the UBS Borrower and UBS NY, and UBS NY does not participate in any such negotiations.

¹² For purposes of this proposed exemption, UBS/Swiss, UBS/UK and UBS/Japan are collectively referred to as the UBS Foreign Borrowers. In addition, UBS Securities and the UBS Foreign Borrowers are together referred to herein as the UBS Borrowers or individually as a UBS Borrower.

¹³ The Department, herein, is not providing exemptive relief for securities lending transactions engaged in by primary lending agents, other than UBS NY, beyond that provided pursuant to Prohibited Transaction Exemption (PTE) 81-6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) and PTE 82-63 (47 FR 14804, April 6, 1982).

(c) The independent fiduciary of a Client Plan approves the general terms of the securities loan agreement (the Loan Agreement) between the Client Plan and the UBS Borrower.

(d) The terms of each loan of securities by a Client Plan to a UBS Borrower are at least as favorable to such Plan as those of a comparable arm's length transaction between unrelated parties.

(e) A Client Plan may terminate the agency or sub-agency arrangement under Plan A or an Exclusive Borrowing Agreement under Plan B at any time, without penalty, on five business days notice, whereupon the UBS Borrowers will deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Client Plan within—

(1) The customary delivery period for such securities;

(2) Five business days; or

(3) The time negotiated for such delivery by the Client Plan and the UBS Borrowers, whichever is less.

(f) The Client Plan or its designee receives from each UBS Borrower by physical delivery or by book entry in a securities depository located in the United States, wire transfer or similar means by the close of business on or before the day the loaned securities are delivered to the UBS Borrower, collateral consisting of U.S. currency, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, or irrevocable bank letters of credit issued by a U.S. bank, other than UBS NY or an affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption (PTE) 81-6 (46 FR 7527, January 23, 1981) as it may be amended or superseded.

(g) The market value (or in the case of a letter of credit, a stated amount) of the collateral on the close of business on the day preceding the day of the loan is initially at least 102 percent of the market value of the loaned securities. The applicable Loan Agreement gives the Client Plan a continuing security interest in and a lien on the collateral. The level of collateral is monitored daily (either by UBS NY under Plan A, or by UBS NY or another designee of the Client Plan under Plan B). If the market value of the collateral, on the close of trading on a business day is less than 100 percent of the market value of the loaned securities at the close of business on that day, the UBS Borrower is required to deliver, by the close of business on the next day, sufficient

additional collateral to bring the level to at least 102 percent.

(h) Prior to entering into a Loan Agreement, the applicable UBS Borrower furnishes each Client Plan its most recently available audited and unaudited statements to UBS NY, and in turn, such statements are provided to the Client Plan before the Client Plan approves the terms of the Loan Agreement. The Loan Agreement contains a requirement that the applicable UBS Borrower must give prompt notice at the time of a loan of any material adverse changes in its financial condition since the date of the most recently furnished financial statements. If any such changes have taken place, UBS NY does not make any further loans to the UBS Borrower unless an independent fiduciary of the Client Plan is provided notice of any material change and approves the loan in view of the changed financial condition.

(i) In return for lending securities, the Client Plan either—

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

(2) Has the opportunity to derive compensation through the investment of cash collateral. (Under such circumstances, the Client Plan may pay a loan rebate or similar fee to UBS Borrowers, if such fee is not greater than the fee the Client Plan would pay in a comparable arm's length transaction with an unrelated party.)

(j) All procedures regarding the securities lending activities will, at a minimum, conform to the applicable provisions of PTEs 81-6 and 82-63 as well as to applicable securities laws of the United States, Switzerland, the United Kingdom or Japan.

(k) UBS NY agrees to indemnify and hold harmless the Client Plan in the United States (including the sponsor and fiduciaries of such Client Plan) for any transactions covered by this exemption with a UBS Borrower so that the Client Plan does not have to litigate, in the case of a UBS Foreign Borrower, in a foreign jurisdiction nor sue the UBS Foreign Borrower to realize on the indemnification. Such indemnification, by UBS NY, is against any and all reasonably foreseeable damages, losses, liabilities, costs and expenses (including attorney's fees) which the Client Plan may incur or suffer, arising from any impermissible use by the UBS Borrower of the loaned securities or the failure of the UBS Borrower to deliver loaned securities in accordance with the applicable Loan Agreement or to otherwise comply with the terms of

such agreement, except to the extent that such losses or damages are caused by the Client Plan's own negligence.

(1) If any event of default occurs, UBS NY, promptly and at its own expense (subject to rights of subrogation in, to the collateral and against such borrower), purchases or causes to be purchased, for the account of the Client Plan, securities identical to the borrowed securities (or their equivalent as discussed above). If the collateral is insufficient to accomplish such purchase, UBS NY indemnifies the Client Plan for any shortfall in the collateral plus interest on such amount and any transaction costs incurred (including attorney's fees of the Client Plan for legal actions arising out of the default on loans or failure to properly indemnify under this provision). Alternatively, if such replacement securities cannot be obtained on the open market, UBS NY pays the Client Plan the difference in U.S. dollars between the market value of the loaned securities and the market value of the related collateral on the date of the borrower's breach of its obligation to return the loaned securities.

(2) If, however, the event of default is caused by the UBS Borrower's failure to return the securities within the designated time, the Client Plan has the right to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price and any other expenses of the Plan associated with the sale and/or purchase.

(l) The Client Plan receives the equivalent of all distributions made to holders of the borrowed securities, including all interest and dividends on the loaned securities during the loan period.

(m) Prior to any Client Plan's approval of the lending of its securities to any UBS Borrower, a copy of this exemption, if granted, (and the notice of pendency) are provided to the Client Plan.

(n) Each Client Plan receives monthly reports with respect to securities lending transactions, including, but not limited to, the information described in Representation 26, so that an independent fiduciary of a Client Plan may monitor such transactions with the UBS Borrower.

(o) Only Client Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to UBS Borrowers; provided, however, that —

(1) In the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization

(the Related Client Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with UBS Borrowers, the foregoing \$50 million requirement is deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that, if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Client Plan investment in the commingled entity, which are in excess of \$100 million.

(2) In the case of two or more Client Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Client Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with UBS Borrowers, the foregoing \$50 million requirement is deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that the fiduciary responsible for making the investment decision on behalf of such group trust or other entity

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

(B) Has full investment responsibility with respect to Client Plan assets invested therein; and

(C) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Client Plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above must be formed for the sole purpose of making loans of securities.)

(p) With respect to any calendar quarter, at least 50 percent or more of the outstanding dollar value of securities loans negotiated on behalf of Client Plans will be to unrelated borrowers.

(q) In addition to the above, all loans involving UBS Foreign Borrowers, have the following requirements:

(1) Such Foreign Borrower is registered as a broker-dealer with the Securities and Futures Authority of the

United Kingdom (the SFA) in the case of UBS/UK, the Swiss Federal (the Swiss Banking Commission) in the case of UBS/Swiss, and the Ministry of Finance (the MOF), in the case of UBS/Japan;

(2) Such Foreign Borrower is in compliance with all applicable provisions of Rule 15a-6 (17 CFR 240.15a-6) under the Securities Exchange Act of 1934 (the 1934 Act) which provides for foreign broker-dealers a limited exemption from United States registration requirements;

(3) All collateral is maintained in United States dollars or U.S. dollar-denominated securities or letters of credit;

(4) All collateral is held in the United States and the situs of the securities lending agreements (either the Loan Agreement under Plan A or the Exclusive Borrowing Agreement under Plan B) is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1; and

(5) Prior to a transaction involving a UBS Foreign Borrower, the applicable UBS Foreign Borrower to—

(A) Agrees to submit to the jurisdiction of the United States;

(B) Agrees to appoint an agent for service of process in the United States, which may be an affiliate, (the Process Agent);

(C) Consents to service of process on the Process Agent; and

(D) Agrees to be indemnified in the United States for any transactions covered by this exemption.

(r) UBS NY and each UBS Foreign Borrower maintain, or cause to maintain within the United States for a period of six years from the date of such transaction, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described in paragraph (s)(1) to determine whether the conditions of the exemption have been met, except that —

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of UBS NY and/or its affiliates, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest other than UBS NY or its affiliates shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for

examination as required below by paragraph (s)(1).

(s)(1) Except as provided in subparagraph (s)(2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (r) are unconditionally available at their customary location during normal business hours by:

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

(B) Any fiduciary of a participating Client Plan or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any participating Client Plan or any duly authorized employee representative of such employer; and

(D) Any participant or beneficiary of any participating Client Plan, or any duly authorized representative of such participant or beneficiary.

(s)(2) None of the persons described above in paragraphs (s)(1)(B)–(s)(1)(D) of this paragraph (s)(1) are authorized to examine the trade secrets of UBS NY or its affiliates or commercial or financial information which is privileged or confidential.

Summary of Facts and Representations

Parties to the Proposed Transactions

1. UBS/Swiss and UBS Securities (together, the Applicants), UBS NY, UBS/UK and UBS/Japan, all of which are the parties to the proposed transactions, are described as follows:

(a) *UBS/Swiss*, a banking organization formed under Swiss law in 1912, is a major global bank. Headquartered in Zurich, Switzerland, an Organization for Economic Cooperation and Development (OECD) member country,¹⁴ UBS/Swiss is subject to regulatory oversight by the Swiss Banking Commission, the Federal Reserve Board and the New York Superintendent of Banking. As of December 31, 1996, UBS/Swiss had total assets that were in excess of \$324 billion.

(b) *UBS Securities*, an affiliate of UBS/Swiss, is a New York limited liability company. UBS Securities is registered with and regulated by the SEC as a broker-dealer and by the Commodity Futures Trading Commission as a futures commission merchant. UBS Securities is a member of the New York Stock Exchange, other principal securities exchanges in the United

¹⁴ According to the Applicants, an OECD member country is generally viewed as having a stable and regulated financial market.

States and the National Association of Securities Dealers. As of June 30, 1997, UBS Securities had total assets of approximately \$65.3 billion.

Acting as principal, UBS Securities actively engages in the borrowing and lending of securities, with daily outstanding loan volume averaging several billion dollars. UBS Securities uses borrowed securities to satisfy its trading requirements or to re-lend to other broker-dealers and others who need a particular security for various periods of time. All borrowings by UBS Securities must conform to applicable provisions of the Federal Reserve Board's Regulation T.¹⁵

(c) *UBS NY* is the New York-based affiliate of UBS/Swiss. UBS NY is subject to regulatory oversight by the Federal Reserve Board and the Superintendent of Banking in New York State. It provides a variety of banking services to its clients and it may serve as custodian, clearing agent or as a directed trustee. As of June 30, 1997, UBS NY had total assets of approximately \$19.75 billion.

(d) *UBS/UK*, an affiliate of UBS Securities and a wholly owned subsidiary of UBS/Swiss, is located in the United Kingdom, another OECD member country. UBS/UK is regulated by the SFA and is registered thereunder as a broker-dealer. As of June 30, 1997, UBS/UK had total assets of approximately \$26.5 billion.

(e) *UBS/Japan*, an affiliate of UBS Securities and a wholly owned subsidiary of UBS/Swiss, is located in Tokyo, Japan, an OECD-member country. UBS/Japan is regulated by the MOF and is registered as a broker-dealer. As of June 30, 1997, UBS/Japan had total assets of approximately \$11.6 billion.

Regulation of UBS Foreign Borrowers

2. UBS/UK is authorized to conduct an investment business in and from the United Kingdom as a broker-dealer regulated by the SFA. Although not registered with the SEC, UBS/UK is governed by the rules, regulations and membership requirements of the SFA. In this regard, UBS/UK is subject to rules relating to minimum capitalization, reporting requirements, periodic examinations, client money and safe custody rules and books and records requirements with respect to client accounts. These rules and regulations set forth by the SFA, share a common objective: the protection of

the investor by the regulation of the securities industry. The SFA rules require each firm which employs registered representatives or registered traders to have a positive tangible net worth and be able to meet its obligations as they may fall due. In addition, the SFA rules set forth comprehensive financial resource and reporting/disclosure rules regarding capital adequacy. Further, to demonstrate capital adequacy, the SFA rules impose reporting/disclosure requirements on broker-dealers with respect to risk management, internal controls, and transaction reporting and recordkeeping requirements to the effect that required records must be produced at the request of the SFA at any time. Finally, the rules and regulations of the SFA for broker-dealers impose potential fines and penalties which establish a comprehensive disciplinary system.

3. Similarly, UBS/Swiss is regulated by the Swiss Banking Commission whose powers include licensing banks, issuing directives to address violations by or irregularities involving banks, requiring information from a bank or its auditor regarding supervisory matters and revoking bank licenses. The Swiss Banking Commission exercises oversight over Swiss banks such as UBS/Swiss, through independent auditors known as "Recognized Auditors" which act on behalf of the Commission under detailed statutory provisions. Each Swiss bank, including UBS/Swiss, must appoint a Recognized Auditor and notify the Swiss Banking Commission of an intent to change its auditor. The Recognized Auditor may take action within a bank as deemed necessary or as instructed by the Swiss Banking Commission and must inform the Swiss Banking Commission of supervisory matters.

The Swiss Banking Commission ensures that UBS/Swiss has procedures for monitoring and controlling its worldwide activities through various statutory and regulatory standards. Among these standards are requirements for adequate internal controls, oversight, administration and financial resources. The Swiss Banking Commission reviews compliance with these limitations on operations and internal control requirements through an annual audit performed by the Recognized Auditor.

The Swiss Banking Commission obtains information on the condition of UBS/Swiss and its foreign offices and subsidiaries, by requiring submission of periodic, consolidated financial reports and through a mandatory annual report prepared by the Recognized Auditor. The Swiss Banking Commission also

receives information regarding capital adequacy, country risk exposure and foreign exchange exposures from UBS/Swiss.

Swiss banking law mandates penalties to ensure correct reporting to the Swiss Banking Commission. Recognized Auditors face penalties for gross violations of their duties in auditing, for reporting misleading information, omitting essential information from the audit report, failing to request pertinent information or failing to report to the Swiss Banking Commission.

In addition to regulation by the Swiss Banking Commission, the Applicants note that in approving UBS/Swiss' establishment of UBS NY, the Federal Reserve Board has concluded that UBS/Swiss is subject to comprehensive supervision and regulation by its home country supervisors. In making this determination, the Applicants represent that the Federal Reserve Board has considered, among other factors, the extent to which the country supervisors have (a) ensured that the bank has adequate procedures for monitoring and controlling its activities, worldwide; (b) obtained information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports or otherwise; (c) obtained information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic; (d) received from the bank financial reports that are consolidated on a worldwide basis, or comparable information that permits analysis of the bank's financial condition on a worldwide consolidated basis; and (e) evaluated prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis.

4. UBS/Japan is regulated by the MOF which has regulatory authority over both broker-dealers and banks in Japan. In applying the same analysis as that employed with Swiss regulatory authorities, the Applicants represent that the Federal Reserve Board has concluded that the MOF provides comprehensive supervision and regulation through (a) periodic examinations and inspections which focus on capital adequacy, asset quality, management, earnings, liquidity, compliance with applicable laws and risk management; (b) financial reporting requirements; and (c) the use of administrative sanctions to ensure compliance with applicable law or regulations.

5. In addition to the protections afforded by the SFA, the Swiss Banking Commission, the MOF, or for that matter, the Federal Reserve Board, UBS/UK and UBS/Japan will comply with all

¹⁵ Under Regulation T (12 CFR 220.6(h)), permitted borrowing purposes include making delivery of securities in the case of short sales or failures of a broker to receive securities it is required to deliver.

applicable provisions of Rule 15a-6 of the 1934 Act. Rule 15a-6 provides foreign broker-dealers with a limited exemption from SEC registration requirements and, as described below, offers additional protections. Specifically, Rule 15a-6 provides an exemption from U.S. broker-dealer registration for a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security (including over-the-counter equity and debt options) by a "U.S. institutional investor" or a "U.S. major institutional investor," provided that the foreign broker-dealer, among other things, enters into these transactions through a U.S. registered broker-dealer intermediary. The term "U.S. institutional investor," as defined in Rule 15a-6(b)(7), includes an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 (the Act) if (a) the investment decision is made by a plan fiduciary, as defined in section 3(21) of the Act, which is either a bank, savings and loan association, insurance company or registered investment adviser, or (b) the employee benefit plan is a self-directed plan with investment decisions made solely by persons that are "accredited investors" as defined in Rule 501(a)(1) of Regulation D of the Securities Exchange Act of 1933, as amended. The term "U.S. major institutional investor" is defined in Rule 15a-6(b)(4) as a person that is a U.S. institutional investor that has total assets in excess of \$100 million or an investment adviser registered under Section 203 of the Investment Advisers Act of 1940 that has total assets under management in excess of \$100 million.

6. The Applicants represent that under Rule 15a-6, a foreign broker-dealer that induces or attempts to induce the purchase or sale of any security by a U.S. institutional or major institutional investor must, among other things—

(a) Consent to service of process for any civil action brought by, or proceeding before, the SEC or any self-regulatory organization;

(b) Provide the SEC with any information or documents within its possession, custody or control, any testimony of any such foreign associated persons, and any assistance in taking the evidence of other persons, wherever located, that the SEC requests and that relates to transactions effected pursuant to Rule 15a-6; and

(c) Rely on the U.S. registered broker-dealer through which the transactions with the U.S. institutional and major institutional investors are effected to (among other things):

(1) Effect the transactions, other than negotiating their terms;

(2) Issue all required confirmations and statements;

(3) As between the foreign broker-dealer and the U.S. registered broker-dealer, extend or arrange for the extension of credit in connection with the transactions;

(4) Maintain required books and records relating to the transactions, including those required by Rules 17a-3 (Records to be Made by Certain Exchange Members) and 17a-4 (Records to be Preserved by Certain Exchange Members, Brokers and Dealers) of the 1934 Act;

(5) Receive, deliver and safeguard funds and securities in connection with the transactions on behalf of the U.S. institutional investor or U.S. major institutional investor in compliance with Rule 15c3-3 of the 1934 Act (Customer Protection—Reserves and Custody of Securities); and

(6) Participate in all oral communications (e.g., telephone calls) between the foreign associated person and the U.S. institutional investor (not the U.S. major institutional investor), and accompany the foreign associated person on all visits with both U.S. institutional and major institutional investors. By virtue of this participation, the U.S. registered broker-dealer would become responsible for the content of all these communications.

Securities Lending, Generally

7. As with UBS Securities, UBS/UK, UBS Japan and UBS/Swiss (i.e., the UBS Foreign Borrowers), acting as principals, actively engage in the borrowing and lending of securities, with daily outstanding loan volume averaging several billion United States dollars. The UBS Foreign Borrowers utilize borrowed securities to satisfy their trading requirements, or to re-lend to other broker-dealers and banks who need a particular security for various periods of time.

An institutional investor, such as a pension plan, lends securities in its portfolio to a broker-dealer or bank in order to earn a fee in addition to interest, dividends or other distributions paid on these securities. The lender generally requires that the security loans be fully collateralized and the collateral usually is in the form of cash or high quality liquid securities such as U.S. Government or Federal Agency obligations or certain bank letters of credit. When cash is the collateral, the lender generally invests the cash and rebates a portion of the earnings on the collateral to the borrower. The "fee" received by the lender will be the

difference between the earnings on the collateral and the amount of rebate paid to the borrower. When a loan of securities is collateralized with securities, a fee is paid directly by the borrower to the lender. Institutional investors often utilize the services of an agent in the performance of their securities lending transactions. The lending agent is paid a fee for its services which may be calculated as a percentage of the income earned by the investor from its securities lending activity. The Applicants believe that the essential functions which define a securities lending agent are the identification of appropriate borrowers of securities and the negotiation of the terms of a loan to the borrowers. There are services ancillary to securities lending which may include acting as custodian or directed trustee of the securities being loaned, monitoring the level of collateral and the value of the loaned securities and investing the collateral in some instances.

Request for Exemptive Relief

8. UBS/Swiss and UBS Securities request an exemption for the lending of securities to Client Plans under either of two distinct arrangements—Plan A (permitting UBS Borrowers to borrow securities from those Client Plans for which UBS NY will act as primary lending agent or sub-agent)¹⁶ or Plan B (permitting UBS Borrowers to enter into Exclusive Borrowing Agreements with Client Plans), following disclosure of the relationship between UBS/Swiss and UBS NY as well as UBS NY's affiliation with the UBS Borrowers. In addition, the Applicants request exemptive relief from the Department to allow UBS NY to receive compensation in connection with these transactions.

Because UBS NY is a branch of UBS/Swiss, an intended borrower, and because each of the other UBS Borrowers is an affiliate of UBS/Swiss, the lending of securities to UBS Borrowers by Plans for which UBS NY serves as securities lending agent (or may otherwise be a service provider to the Plans) could be deemed to be prohibited under the Act. Further, because UBS NY, under Plan A, would have discretion to lend Plan securities to UBS Borrowers and receive a fee, and because, under Plan B, the Client Plan

¹⁶ For the sake of simplicity, future references to UBS NY's performance of services as securities lending agent should be deemed to include its parallel performance as securities lending sub-agent and references to Client Plans should be deemed to also refer to those Client Plans for which UBS NY is acting as sub-agent with respect to securities lending activities, unless otherwise indicated specifically or by the context of the reference.

will receive a fee for the Exclusive Borrowing Agreement with the UBS Borrower (which may not necessarily be related to the value of the borrowed securities and the duration of the loan)¹⁷, and because all UBS Borrowers are not registered under the 1934 Act, the lending of securities to UBS Borrowers by Client Plans may be outside of the scope of relief provided by PTE 81-6 and PTE 82-63.¹⁸

Plan A

9. When acting as securities lending agent, UBS NY, pursuant to authorization from its client, will negotiate the terms of loans with borrowers and otherwise act as a liaison between the lender (and its custodian) and the borrower to facilitate the lending transaction. As securities lending agent, UBS NY will also have responsibility for monitoring receipt of all required collateral, marking such collateral to market daily so that adequate levels of collateral can be maintained, monitoring and evaluating on a continuing basis the performance and creditworthiness of the borrowers, and if authorized by the client, holding and investing cash collateral pursuant to investment guidelines established by the client. UBS NY may also act as a custodian or directed trustee for the Client Plan's portfolio of securities available to be lent. All procedures for lending securities will be designed to comply with applicable conditions of PTEs 81-6 and 82-63.

UBS NY may also be retained from time to time by primary lending agents to provide securities lending services in a sub-agent capacity with respect to portfolio securities of clients of such primary lending agents. As securities lending sub-agent, UBS NY's role under

the lending transactions would parallel its role under lending transactions for which it acts as a primary lending agent on behalf of its clients.

10. Where UBS NY is the direct securities lending agent, a fiduciary of a Client Plan who is independent of UBS NY and UBS Borrowers, will sign a securities lending agency agreement with UBS NY (the Agency Agreement) before the Client Plan participates in a securities lending program. The Agency Agreement will, among other things, describe the operation of the lending program, prescribe the form of securities Loan Agreement to be entered into on behalf of the Client Plan with borrowers, specify the securities which are available to be lent, specify the required margin and required daily marking-to-market, and provide a list of permissible borrowers, including UBS Borrowers. The Agency Agreement will also set forth the basis and rate for UBS NY's compensation from the Client Plan for the performance of securities lending services.

The Agency Agreement will contain provisions to the effect that if any UBS Borrower is designated by the Client Plan as an approved borrower (a) the Client Plan will acknowledge the relationship between the UBS Borrower and UBS NY and (b) UBS NY will represent to the Client Plan that each and every loan made to the UBS Borrower on behalf of the Client Plan will be at market rates which are no less favorable to the Client Plan than a loan of such securities, made at the same time and under the same circumstances, to an unrelated borrower.

11. When UBS NY is lending securities under a sub-agency arrangement, before the Client Plan participates in the securities program, the primary lending agent will enter into a securities lending agreement (the Primary Lending Agreement) with a fiduciary of a Client Plan who is independent of such primary lending agent, UBS NY and UBS Borrowers. The primary lending agent will be unrelated to UBS NY and UBS Borrowers. The Primary Lending Agreement will contain substantive provisions akin to those in the Agency Agreement relating to the description of the lending program, use of an approved form of Loan Agreement, specification of securities which are available to be lent, specification of the required margin and the requirement of daily marking-to-market, and provision of a list of approved borrowers (which will include one or more UBS Borrowers). In addition, the Primary Lending Agreement will specifically authorize the primary lending agent to appoint

sub-agents (which may include UBS NY), to facilitate its performance of securities lending agency functions. Under such circumstances, sub-agents may be appointed if the primary lending agent does not have the expertise or adequate systems to conduct securities lending activities or where the Client Plan desires to diversify lending responsibility among multiple entities. If UBS NY is to act as a sub-agent, the Primary Lending Agreement will expressly disclose that UBS NY is to so act. Further, the Primary Lending Agreement will set forth the basis and rate for the primary lending agent's compensation from the Client Plan for the performance of securities lending services and will authorize the primary lending agent to pay a portion of its fee, as the primary lending agent determines in its sole discretion, to any sub-agent(s) it retains (including UBS NY) pursuant to the authority granted under such agreement.

Pursuant to its authority to appoint sub-agents, the primary lending agent will enter into a securities lending sub-agency agreement (the Sub-Agency Agreement) with UBS NY under which the primary lending agent will retain and authorize UBS NY, as sub-agent, to lend securities of the primary lending agent's Client Plans, subject to the same terms and conditions as are specified in the Primary Lending Agreement. Thus, for example, the form of Loan Agreement and the list of permissible borrowers under the Sub-Agency Agreement (which will include one or more UBS Borrowers) will be limited to those approved borrowers listed as such under the Primary Lending Agreement.

UBS NY represents that the Sub-Agency Agreement will contain provisions which are in substance comparable to those described above in connection with an Agency Agreement in situations where UBS NY is the primary lending agent. In this regard, UBS NY will make the same representation in the Sub-Agency Agreement as described above with respect to arm's length dealing with UBS Borrowers. The Sub-Agency Agreement will also set forth the basis and rate for UBS NY's compensation to be paid by the primary lending agent.

12. In all cases, UBS NY will maintain, in the United States for a period of six years, such records as necessary to assure compliance with its representations that all loans to UBS Borrowers are effectively at arm's length terms. Such records will be provided to the appropriate Client Plan fiduciary in the manner and format agreed to with the lending fiduciary, without charge to the Client Plan.

¹⁷ The Applicants note that in an exclusive borrowing arrangement, the fee paid by a borrower need not necessarily be computed in the same manner as under a non-exclusive or Plan A arrangement. This is because there is additional value to a borrower in having an assured access to a supply of securities. Accordingly, the lender is able to exact different consideration, be it a premium, some form of a guaranteed return or otherwise.

¹⁸ PTE 81-6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to certain broker-dealers or banks which are parties in interest.

PTE 82-63 provides an exemption under specified conditions from section 406(b)(1) of the Act and section 4975(c)(1)(E) of the Code for the payment of compensation to a plan fiduciary for services rendered in connection with loans of plan assets that are securities. PTE 82-63 permits the payment of compensation to a plan fiduciary for the provision of securities lending services only if the loan of securities is not prohibited under section 406(a) of the Act.

In addition, UBS NY shall retain for six months tape recordings evidencing all securities loan transactions with UBS Borrowers. This will enable Client Plans and the Department to review UBS NY's adherence to its representation that all loans to UBS Borrowers are at arm's length.

13. A Client Plan may terminate the Agency Agreement (or the Primary Lending Agreement) at any time, without penalty to the Plan, on five business days notice whereupon the UBS Borrowers will deliver certificates for securities identical to the borrowed securities (or the equivalent in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities to the Client Plan within (a) the customary delivery period for such securities; (b) five business days; or

(c) the time negotiated for such delivery by the Client Plan and the UBS Borrowers, whichever is less.

14. UBS NY will enter into the same form of Loan Agreement with the applicable UBS Borrower on behalf of Client Plans as it does with all other borrowers. An independent fiduciary of the Client Plan will approve the terms of the Loan Agreement. The Loan Agreement will specify, among other things, the right of the Client Plan to terminate a loan at any time and the Plan's rights in the event of any default by a UBS Borrower. The Loan Agreement will explain the basis for compensation to the Client Plan for lending securities to the UBS Borrower under each category of collateral. The Loan Agreement also will contain a requirement that the UBS Borrower must pay all transfer fees and transfer taxes related to the security loans.

However, before entering into the Loan Agreement, the applicable UBS Borrower will furnish each Client Plan its most recently available audited and unaudited statements to UBS NY, and in turn, such statements are provided to the Client Plan before the Client Plan approves the terms of the Loan Agreement. The Loan Agreement will contain a requirement that the applicable UBS Borrower must give prompt notice at the time of a loan of any material adverse changes in its financial condition since the date of the most recently furnished financial statements.¹⁹ If any such changes have

taken place, UBS NY will not make any further loans to the UBS Borrower unless an independent fiduciary of the Client Plan approves the loan in view of the changed financial condition.

Conversely, if the UBS Borrower fails to provide notice of such a change in its financial condition, such failure will trigger an event of default under the Loan Agreement.

15. As noted above, the agreement by UBS NY to provide securities lending services, as agent, to a Client Plan will be embodied in the Agency Agreement. The Client Plan and UBS NY will agree to the arrangement under which UBS NY will be compensated for its services as lending agent. This fee arrangement will generally be a percentage of either the return earned on cash collateral by the Client Plan or, in the case of non-cash collateralized loans, a percentage of the fee paid to the Client Plan by the UBS Borrower. Several factors may impact the fee structures, such as industry practices and changes in the market, as well as the types of securities being lent (e.g., domestic versus foreign securities). Such agreed upon fee arrangement will be set forth in the Agency Agreement and thereby will be subject to the prior written approval of a fiduciary of the Client Plan who is independent of the UBS Borrower and UBS NY. In any event, the securities lending fee to be paid to UBS NY will, at all times, comply with PTE 82-63.²⁰ In addition, an independent fiduciary of the Client Plan may authorize UBS NY to act as custodian or directed trustee of the Client Plan's portfolio of securities available for lending and to receive a reasonable and customary fee for such services.

Similarly, with respect to arrangements under which UBS NY is acting as securities lending sub-agent, the agreed upon fee arrangement of the primary lending agent will be set forth in the Primary Lending Agreement, and such agreement will specifically authorize the primary lending agent to pay a portion of its fee (the portion to be determined by the primary lending agent, in its sole discretion) to any sub-

capitalization levels would constitute an event of default under the Loan Agreement, thereby enabling a Client Plan to exercise remedies by terminating the loans, liquidating the collateral and applying the collateral against the purchase of replacement securities.

²⁰ Conditions (c) and (d) of PTE 82-63 require that the payment of compensation to a "lending fiduciary" is made under a written instrument and is subject to prior written authorization of an independent "authorizing fiduciary." In the event that a commingled investment fund will participate in the securities lending program, the special rule applicable to such funds concerning the authorization of the compensation arrangement set forth in paragraph (f) of PTE 82-63 will be satisfied.

agent, including UBS NY, which is to provide securities lending services to the Client Plan. The Client Plan will be provided with any reasonably available information which is necessary for the Plan fiduciary to make a determination whether to enter into or continue to participate under the Agency Agreement (or the Primary Lending Agreement) and any other reasonably available information which the Plan fiduciary may reasonably request.

16. Each time a Client Plan lends securities to a UBS Borrower pursuant to the Loan Agreement, UBS NY will reflect in its records the material terms of the loan, including the securities to be loaned, the required level of collateral and the fee or rebate payable. The terms of the fee or rebate payable for each loan will be at least as favorable to the Client Plan as those of a comparable arm's length transaction between unrelated parties.

17. The Client Plan will be entitled to the equivalent of all distributions made to holders of the borrowed securities, including interest and dividends during the loan period.²¹ The Loan Agreement will provide that the Client Plan may terminate any loan at any time. Upon a termination, the UBS Borrower will be contractually obligated to return securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Client Plan within five business days of written notification of termination or, if sooner, within the normal settlement period in the principal market in which the loaned securities are traded (unless a longer period of time permitted pursuant to an applicable Department exemption). The Loan Agreement will give the Client Plan a continuing security interest in and a lien on the collateral. If the UBS Borrower fails to return the securities within the designated time, the Client Plan will have the right under the Loan Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price and any other expenses of the Plan associated with the sale and/or purchase.

²¹ The Applicants represent that dividends and other distributions on foreign securities payable to a lending Client Plan are subject to foreign tax withholdings. Under these circumstances, the applicable UBS Borrower, where necessary, will gross-up the in-lieu-of-payment (in respect of such dividend or distribution it makes) to the Client Plan so that the Client Plan will receive back what it otherwise would have received (by way of dividend or distribution) had it not loaned the securities.

¹⁹ With respect to capital adequacy rules, it is represented that UBS NY monitors the creditworthiness of all borrowers and adjusts exposure limits to such UBS Borrowers where necessary. Under the Loan Agreement, the UBS Borrower represents that it will comply, at all times, with all applicable laws and regulations of applicable regulatory and self-regulatory organizations. Noncompliance with required

18. UBS NY will establish each day a written schedule of lending fees²² and rebate rates²³ with respect to new loans of designated classes of securities, such as U.S. government securities, U.S. equities and corporate bonds, international fixed income securities and international equities, in order to assure uniformity of treatment among borrowing brokers and to limit the discretion UBS NY would have in negotiating securities loans to UBS Borrowers. Loans to all borrowers of a given security on that day will be made at rates or lending fees on the relevant daily schedules or at rates or lending fees which may be more advantageous to the Client Plans. It is represented that in no case will loans be made to UBS Borrowers at rates or lending fees that are less advantageous to the Client Plans than those on the schedule. In addition, it is represented that the method of determining the daily securities lending rates (fees and rebates), the minimum lending fees payable by UBS Borrowers and the maximum rebate payable to UBS Borrowers will be specified in an exhibit attached to the Agency Agreement to be executed between the independent fiduciary of the Client Plan and UBS NY in cases where UBS NY is the direct securities lending agent.

19. The rebate rates with respect to cash-collateralized loans made by Client Plans will also take into account the potential demand for loaned securities, the applicable benchmark cost of funds indices (typically, Federal Funds, overnight repo rate or the like) and anticipated investment return on overnight investments which are permitted by the relevant Client Plan fiduciary. Further, the lending fees with respect to loans made by Client Plans collateralized by other than cash will be set daily to reflect conditions as influenced by potential market demand.

20. UBS NY will negotiate rebate rates for cash collateral payable to each borrower, including UBS Borrowers, on behalf of a Client Plan. Where cash collateral is derived from a loan with an expected maturity date (i.e., a term loan)

and is intended to be invested in instruments with maturities corresponding generally to the maturity of the term loan, the aggregate rebate over the life of the loan will be less than the total investment return (assuming no investment default). Where cash collateral is derived from a loan with an overnight maturity or an open maturity (i.e., no specified maturity date), the aggregate rebate will be less than the total investment return (assuming no investment default) for the period during which the securities were outstanding on loan. For example, where cash collateral derived from an overnight loan is intended to be invested in a generic repurchase agreement, any rebate determined with respect to an overnight purchase agreement benchmark will be set below the "ask" quotation therefor.

With respect to any loan to a UBS Borrower, UBS NY, at the inception of such loan, will not negotiate and agree to a rebate rate with respect to such loan which would produce a zero or negative return to the Client Plan over the life of the loan (assuming no default on the investments made by UBS NY where it has investment discretion over the cash collateral or on investments expected to be made by the Client Plan's designee, where UBS NY does not have investment discretion). In this regard, with respect to each designated class of securities, the maximum daily rebate rate will generally be the lower of (a) the overnight repo rate or Federal Funds rate, minus a stated percentage and (b) the actual investment rate for the relevant cash collateral, minus a stated percentage. As noted above, UBS NY will disclose the formula for determining the maximum daily rebate rate to an independent fiduciary of a Client Plan for approval before lending any securities to UBS Borrowers on behalf of the Plan.

21. If UBS NY reduces the lending fee or increases the rebate rate on any outstanding loan to an affiliated borrower (except for any change resulting from a change in the value of any third party independent index with respect to which the fee or rebate is calculated), UBS NY, by the close of business on the date of such adjustment, will provide the independent fiduciary of the Client Plan with notice that it has reduced such fee or increased the rebate rate to such affiliated borrower and that the Client Plan may terminate such loan at any time. In addition, UBS NY will provide the independent fiduciary of the Client Plan with such information as the fiduciary may reasonably request regarding such adjustment.

With respect to any calendar quarter, at least 50 percent or more of the outstanding dollar value of securities loans negotiated on behalf of Client Plans will be to unrelated borrowers. Thus, the competitiveness of the loan fee will be continuously tested in the marketplace. Accordingly, the Applicants believe that loans to UBS Borrowers should result in competitive rate income to the lending Client Plan.

22. At all times, UBS NY will effect loans in a prudent and diversified manner. While UBS NY will normally lend securities to requesting borrowers on a "first come, first served" basis, as a means of assuring uniformity of treatment among borrowers, it should be recognized that in some cases it may not be possible to adhere to a "first come, first served" allocation. This can occur, for instance where (a) the credit limit established for such borrower by UBS NY and/or the Client Plan has already been satisfied; (b) the "first in line" borrower is not approved as a borrower by the particular Client Plan whose securities are sought to be borrowed; or (c) the "first in line" borrower cannot be ascertained, as an operational matter, because several borrowers spoke to different UBS NY representatives at or about the same time with respect to the same security.²⁴ In situations (a) and (b), loans would normally be effected with the "second in line." In situation (c), securities would be allocated equitably among all eligible borrowers.

23. UBS NY agrees to indemnify and hold harmless the applicable Client Plan (including the sponsor and fiduciaries of such Client Plan) in the United States for any transactions covered by this exemption with the UBS Borrower so that the Client Plan does not have to litigate, in the case of a UBS Foreign Borrower, in a foreign jurisdiction nor sue the UBS Foreign Borrower to realize on the indemnification. Such indemnification by UBS NY will be against any and all reasonably foreseeable damages, losses, liabilities, costs and expenses (including attorney's fees) which the Client Plan may incur or suffer arising from any impermissible use by the UBS Borrower of the loaned securities. The applicable UBS Borrower

²² UBS NY will adopt minimum daily lending fees for non-cash collateral payable by UBS Borrowers to UBS NY on behalf of a Client Plan. Separate minimum daily lending fees will be established with respect to loans of designated classes of securities, such as those identified above. With respect to each designated class of securities, the minimum lending fee will be stated as a percentage of the principal value of the loaned securities. UBS NY will submit such minimum daily lending fees to an independent fiduciary of the Client Plan for approval before initially lending any securities to UBS Borrowers on behalf of such Client Plan.

²³ Separate maximum daily rebate rates will be established with respect to loans of securities within the designated classes identified above.

²⁴ According to the Applicants, the "first come, first served" allocation would not apply where UBS NY is not acting as a securities lending agent, but rather is acting as, for example, a custodian or directed trustee to a Client Plan that has entered into an exclusive arrangement with the borrower as described under Plan B. In such a situation, the Applicants note that the UBS Borrower would be choosing from whom to borrow and UBS NY has no right or obligation to lend to the UBS Borrower the securities from other clients or lend the securities which are subject to such Exclusive Borrowing Agreements.

will also be liable to the Client Plan for breach of contract for any failure by such UBS Borrower to deliver loaned securities when due in accordance with the provisions of the Loan Agreement or to otherwise comply with the terms of the Loan Agreement.

If any event of default occurs, UBS NY, promptly and at its own expense, will purchase, or cause to be purchased on the open market, for the account of the Client Plan securities identical to the borrowed securities (or their equivalent as discussed above). If the collateral is insufficient to accomplish such purchase, UBS NY will indemnify the Client Plan for any shortfall in the collateral plus interest on such amount and any transaction costs incurred (including attorney's fees of the Client Plan for legal actions arising out of the default on the loans or failure to indemnify properly under this provision). Alternatively, if such replacement securities cannot be obtained on the open market, UBS NY will pay the Client Plan the difference in dollars between the market value²⁵ of the loaned securities and the market value of the collateral on the date of the borrower's breach of its obligation to return the loaned securities.

If, however, as noted in Representation 17, the event of default is caused by the UBS Borrower's failure to return the securities within the designated time, the Client Plan will have the right to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price and any other expenses of the Plan associated with the sale and/or purchase.

24. The Client Plan, or its designee, will receive collateral from each UBS Borrower by physical delivery, book

entry in a U.S. securities depository, wire transfer or similar means by the close of business on or before the day the loaned securities are delivered to the UBS Borrower. All collateral will be received by the Client Plan, or its designee, in the United States. The collateral will consist of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, or irrevocable bank letters of credit issued by a U.S. bank other than UBS NY or an affiliate thereof, or any combination thereof, or other collateral permitted under PTE 81-6, as amended, modified, supplemented or superseded by Department exemption or promulgation.

The market value (or, in the case of a letter of credit, a stated amount) of the collateral on the close of business on the day preceding the day of the loan will be at least 102 percent of the market value of the loaned securities. The Loan Agreement will give the Client Plan a continuing security interest in and a lien on the collateral. UBS NY will monitor the level of the collateral daily. If the market value of the collateral, on the close of trading on a business day, is less than 100 percent (or such greater percentage as agreed to by the parties) of the loaned securities at the close of business on that day, UBS NY will require the UBS Borrowers to deliver by the close of business on the next day sufficient additional collateral to bring the level back to at least 102 percent.

25. UBS NY will maintain the situs of the Loan Agreements (evidencing the Client Plan's right to return of the loaned securities and the Plan's continuing interest in and lien on the collateral) in the United States and, prior to a transaction involving a UBS Foreign Borrower, the applicable UBS Foreign Borrower will (a) agree to submit to the jurisdiction of the courts of the United States; (b) agree to appoint a Process Agent for service of process in the United States, which may be an affiliate; (c) consent to service of process on the Process Agent; and (d) agree to be indemnified in the United States for any transaction covered by this exemption.

26. Unless otherwise agreed, each Client Plan participating in the lending program will be sent a monthly transaction report. Such report will provide a list of all security loans outstanding and closed for a specified period. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or loan premium (as the case may be) at which the security is loaned, and the number

of days the security has been on loan. In addition, if requested by the lending customer, UBS NY will provide daily confirmations of securities lending transactions and weekly reports setting forth for each transaction made or outstanding during the relevant reporting period, the loaned securities, the related collateral, rebates and loan premiums and such other information in such format as shall be agreed to by the parties. Further, prior to a Client Plan's approval of a securities lending program, UBS NY will provide a Plan fiduciary with copies of the proposed exemption and notice granting the exemption.

27. In order to provide the means for monitoring lending activity, rates on loans to UBS Borrowers compared with loans to other brokers and the level of collateral on the loans, it is represented that the monthly report will show, on a daily basis, the market value of all outstanding security loans to UBS Borrowers and to other borrowers as compared to the total collateral held for both categories of loans. Further, the monthly report will state the daily fees where collateral other than cash is utilized and will specify the details used to establish the daily rebate payable to all brokers where cash is used as collateral. The monthly report also will state, on a daily basis, the rates at which securities are loaned to UBS Borrowers compared with those at which securities are loaned to other brokers. This statement will give an independent fiduciary information which can be compared to that contained in the daily rate schedule.

28. To ensure that any lending of securities to a UBS Borrower will be monitored by an independent fiduciary of above average experience and sophistication in matters of this kind, only Client Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to UBS Borrowers. However, in the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization (i.e., the Related Client Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with UBS Borrowers, the foregoing \$50 million requirement will be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million. However, if the fiduciary responsible for making the investment decision on behalf of such master trust

²⁵ In relevant part, the "market value" of any securities listed on a national securities exchange in the U.S. will be the last sales price on such exchange on the preceding business day (the Business Day) or, if there is no sale on that day, the last sale price on the next preceding Business Day on which there is a sale on such exchange, as quoted on the consolidated tape (the Consolidated Tape). If the principal market for securities to be valued is the over-the-counter market, their market value will be the closing sale price as quoted on the National Association of Securities Dealers Automated Quotation System (NASDAQ) on the preceding Business Day or the closing price on such Business Day if the securities are issues for which last sale prices are not quoted on NASDAQ. If the securities to be valued are not quoted on NASDAQ, their market value shall be the highest bid quotation appearing in The Wall Street Journal, National Quotation Bureau pink sheets, Salomon Brothers quotation sheets, quotation sheets of registered market makers and, if necessary, dealers' telephone quotations on the preceding Business Day. (In each case, if the relevant quotation does not exist on such day, then the relevant quotation on the next preceding Business Day in which there is such a quotation would be the market value.)

or other entity is not the employer or an affiliate of the employer, such fiduciary will be required to have total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Client Plan investment in the commingled entity, which are in excess of \$100 million.

In the case of two or more Client Plans which are not maintained by the same employer, controlled group of corporations or employee organization (i.e., the Unrelated Client Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with UBS Borrowers, the foregoing \$50 million requirement will be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million. However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity (a) must not be the sponsoring employer, a member of the controlled group of corporations, the employee organization, or an affiliate; (b) must have full investment responsibility with respect to plan assets invested therein; and (c) must have total assets under its management and control, exclusive of the \$50 million threshold amount attributable to Client Plan investment in the commingled entity, which are in excess of \$100 million.

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

29. The Applicants represent that the conditions set forth in this proposed exemption will subject UBS NY and UBS Borrowers to all of the conditions imposed on broker-dealers under PTE 81-6, other than registration under the 1934 Act with respect to the UBS Foreign Borrowers. The Applicants note that such conditions in PTE 81-6 include requirements relating to daily marking to market, setting collateral at 100 percent of the market value of the securities, the rules for termination of the loan and the return of the borrowed securities.

Plan B

30. UBS Borrowers may directly negotiate Exclusive Borrowing Agreements with fiduciaries of Client Plans, including Plans for which UBS NY will serve as custodian or directed trustee or provide other related services with respect to the portfolio of securities to be loaned, where such fiduciary is independent of the UBS Borrowers and

UBS NY. Under such an Agreement, UBS Borrowers will have exclusive access for a specified period of time to borrow certain securities of the Client Plan pursuant to certain conditions. UBS NY will not participate in the negotiation of the Exclusive Borrowing Agreement. The involvement of UBS NY, if any, will be limited to such activities as holding securities available for lending, handling the movement of borrowed securities and collateral and investing or depositing any cash collateral and supplying the Client Plan with certain reports. The Applicants represent that, under the Exclusive Borrowing Agreement, neither UBS NY nor UBS Borrowers will perform for Client Plans, the functions which constitute the essential functions of a securities lending agent.

31. On or prior to delivery of loaned securities to a UBS Borrower, the Client Plan or its designee, will receive from the UBS Borrower by physical delivery, book entry in a securities depository, wire transfer or similar means. The collateral will consist of those types of collateral permitted under PTE 81-6, as amended, modified, supplemented or superseded by Department exemption or promulgation.

The market value of the collateral on the day the loan settles will be at least 102 percent of the market value of the loaned securities. The Exclusive Borrowing Agreement will give the Client Plan a continuing security interest in and a lien on the collateral. UBS NY, or another designee of the Client Plan, will monitor the level of the collateral daily and, if its market value falls below 100 percent, the UBS Borrower will deliver sufficient additional collateral by the following day such that the market value of all collateral will equal at least 102 percent of market value of the loaned securities.

32. The UBS Borrower will maintain, or cause to be maintained, the situs of the Exclusive Borrowing Agreement (evidencing the Client Plan's right to return the loan securities and the Plan's continuing interest in and lien on the collateral) in the United States, and prior to a transaction involving a UBS Foreign Borrower, the applicable UBS Foreign Borrower will (a) agree to submit to the jurisdiction of the courts of the United States; (b) agree to appoint a Process Agent for service of process in the United States, which may be an affiliate; (c) consent to service of process on the Process Agent; and (d) agree to be indemnified in the United States for any transaction covered by this exemption.

33. Before entering into an Exclusive Borrowing Agreement, the UBS

Borrower will furnish to the Client Plan the most recent publicly-available audited and unaudited statements of its financial condition. The Exclusive Borrowing Agreement will also contain a representation by the UBS Borrower that, as of each time it borrows securities, there have been no material adverse changes in its financial condition. Further, all procedures under the Exclusive Borrowing Agreement will, at a minimum, conform to the applicable provisions of PTE 81-6 and PTE 82-63 (except as otherwise noted herein).

Unless otherwise agreed, the UBS Borrower or, in the case of some Client Plans, UBS NY, will provide a monthly report to the Client Plan showing, on a daily basis, the aggregate market value of all outstanding security loans to each UBS Borrower and the aggregate market value of the collateral.

34. With regard to those Client Plans for which UBS NY provides custodial, trustee, clearing and/or reporting functions relative to securities loans, an independent Plan fiduciary shall review and approve any fees which may be paid to UBS NY for such services. Any such fee would be in addition to any fee UBS NY has negotiated to receive from any such Client Plan for standard custodial or other services unrelated to the securities lending activity. The arrangement to have UBS NY provide such services relative to securities loans to a UBS Borrower under an Exclusive Borrowing Agreement will be terminable by the Client Plan within five business days of receipt of written notice, without penalty to the Client Plan, other than any return to the UBS Borrower of the portion of the fee paid by the UBS Borrower to the Client Plan if the Client Plan also terminates its Agreement with the UBS Borrower. Procedures similar to those described under Plan A (see Representation 13) will be followed.

Before entering into or renewing an Exclusive Borrowing Agreement with a Client Plan to provide such administrative services relative to securities loans to UBS Borrowers, UBS NY will furnish to the Client Plan any publicly available information which it believes is necessary for the Client Plan to determine whether to enter into or renew the Agreement.

35. In exchange for the exclusive right to borrow certain securities from a Client Plan, the UBS Borrower will pay the Client Plan either a flat fee, or a minimum flat fee plus a percentage (to be negotiated at the time the Exclusive Borrowing Agreement is entered into) of the total balance outstanding of borrowed securities, or a percentage of

the total balance outstanding without any flat fee. In light of this arrangement, all earnings generated by cash collateral will be returned to the UBS Borrower.

36. As under Plan A, the Client Plan will be entitled, under Plan B, to the equivalent of all interest, dividends or other distributions on any borrowed securities that the Client Plan would have received had it remained the record owner of the securities (see Representation 17 as well as the representations regarding foreign tax withholdings). In addition, as under Plan A, the same asset limitations and investor sophistication requirements that are set forth in Representation 28 as well as the conditions of PTE 81-6, except as otherwise noted herein, will be applicable.

37. The Exclusive Borrowing Agreement may be terminated by either party to the agreement at any time. Each UBS Borrower will agree that upon termination, it will deliver any borrowed securities back to the Client Plan within five business days of written notification of termination or, if sooner, within the normal settlement period in the principal market in which the loaned securities are traded (unless a longer period is permitted pursuant to an applicable Department exemption). If the UBS Borrower fails to return the securities or the equivalent thereof, the Client Plan will have certain rights under the Agreement to realize upon the collateral.

38. Under the Exclusive Borrowing Agreement, UBS NY will indemnify and hold harmless the Client Plan in the United States (including the sponsor and fiduciaries of such Client Plan) for any transactions covered by this exemption with a UBS Borrower so that the Client Plan does not have to litigate, in the case of a UBS Foreign Borrower, in a foreign jurisdiction nor sue the UBS Foreign Borrower to realize on the indemnification. Such indemnification, by UBS NY, will be against any and all reasonably foreseeable damages, losses, liabilities, costs and expenses (including attorney's fees) which the Client Plan may incur or suffer, arising from any impermissible use by the UBS Borrower of the loaned securities or the failure of the UBS Borrower to deliver loaned securities in accordance with the applicable Loan Agreement or to otherwise comply with the terms of such agreement, except to the extent that such losses or damages are caused by the Client Plan's own negligence. In the event any default occurs with respect to the borrowed securities, UBS NY will follow the procedures described above in Representation 23.

39. In summary, the Applicants represent that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) Plan A requires that the form of the Loan Agreement pursuant to which any loan is effected will be approved by a fiduciary of the Client Plan who is independent of UBS NY and UBS Borrowers before a Client Plan lends any securities to UBS Borrowers, while under Plan B, UBS Borrowers will directly negotiate Exclusive Borrowing Agreements with a Client Plan, the fiduciary of which is also independent of UBS NY and the UBS Borrowers.

(b) The lending arrangements under both Plan A and Plan B will permit Client Plans to lend to UBS Borrowers and will enable such Plans to diversify the list of eligible borrowers and earn additional income from the loaned securities on a secured basis, while continuing to receive dividends, interest payments and other distributions due on those securities.

(c) With respect to securities lending transactions in which a UBS Foreign Borrower is the borrower, the proposed exemption will enable Client Plans to realize low-risk returns on securities that otherwise would remain idle, as in securities lending transactions executed pursuant to PTE 81-6, by broker-dealers registered in the United States, and the proposed exemption generally imposes terms and conditions upon transactions entered into by UBS Foreign Borrowers which are the same as or comparable to those imposed on U.S. borrowers under PTE 81-6, except as otherwise noted herein.

(d) Under both Plan A and Plan B, the Client Plan will receive sufficient information concerning each UBS Borrower's financial condition before the Client Plan lends any securities to such UBS Borrower.

(e) Under both Plan A and Plan B, the collateral on each loan to a UBS Borrower initially will be at least 102 percent of the market value of the loaned securities, which is in excess of the 100 percent collateral required under PTE 81-6, and the collateral levels will be monitored daily by UBS NY under Plan A and by UBS NY or another custodian under Plan B.

(f) Under both Plan A and Plan B, the Client Plans will receive agreed upon periodic reports (prepared no less frequently than monthly) containing information on loan activity, fees, the level of the collateral and loan return/yield.

(g) Under both Plan A and Plan B, UBS NY and UBS Borrowers will have no discretionary authority or control

over the Client Plan's acquisition or disposition of securities available for loan.

(h) Under both Plan A and Plan B, the applicable fee or rebate payable for each loan and other terms of the loan will be at least as favorable to the Client Plans as those of a comparable arm's length transaction between unrelated parties.

(i) Under both Plan A and Plan B, all of the procedures under the proposed transactions will, at a minimum, conform to the applicable provisions of PTE 81-6, PTE 82-63 and Rule 15a-6, except as otherwise noted herein, and also will be in compliance with the applicable securities laws of the United States, the United Kingdom, Switzerland and Japan.

Notice to Interested Persons

Notice of the proposed exemption will be provided to interested persons by UBS NY within five (5) days of the publication of the notice of proposed exemption in the **Federal Register**. Such notice will be provided to appropriate trustees or fiduciaries of Client Plans which have an interest in lending securities to UBS Borrowers by first-class mail or by hand delivery. The notice will include 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(b)(2). The supplemental statement will inform interested persons of their right to comment on and/or to request a hearing with respect to the pending exemption. Written comments and hearing requests are due within thirty-five (35) days of the publication of the proposed exemption in the **Federal Register**.

For Further Information Contact: Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Beer Nuts, Inc. Profit Sharing Plan (the Plan) Located in Bloomington, Illinois

[Exemption Application No. D-10531]

Proposed Exemption

The Department is considering granting a retroactive exemption under the authority of section 408(a) of the Act and 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). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the sale (the Sale) by the Plan of certain limited partnership interests (the

Interests) to Beer Nuts, Inc. (Beer Nuts), a party in interest and a disqualified person with respect to the Plan, provided that the following conditions were satisfied:

(a) the terms of the Sale were at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party;

(b) the Sale was a one-time transaction for cash;

(c) the Plan paid no commissions or other expenses relating to the Sale; and

(d) The Sale price was not less than the fair market value of the Interests as determined by a qualified independent appraiser.

Effective Date: If granted, the proposed exemption will be effective as of December 30, 1996.

Summary of Facts and Representations

1. The Plan is a profit sharing plan with 59 participants. The Plan is sponsored and administered by Beer Nuts, manufacturer of a specialty line of snack nuts. The trustees (the Trustees) of the Plan are Mr. James A. Shirk, President and CEO of Beer Nuts, and Mr. Russell O. Shirk, Chairman of the Board of Directors for Beer Nuts. As of December 31, 1996, the Plan held assets valued at \$5,413,988.

2. Beer Nuts seeks a retroactive exemption for its December 30, 1996 purchase of the Interests from the Plan. The Interests consisted of 100 units of the Balcor Equity Pension Investors I (Balcor I) limited partnership and 200 units of the Balcor Pension Investors VI (Balcor VI) limited partnership. The limited partnerships, established in and subject to the laws of the State of Illinois, were designed to invest in real estate. The general partner is the Balcor Company of Deerfield, Illinois.

According to the applicant, the Plan originally purchased the Balcor I units in 1983 for \$50,000, or \$500 per unit. While holding the units, the Plan received \$37,347, or \$373.47 per unit, in total distributions. On December 30, 1996, Beer Nuts purchased the Balcor I units from the Plan for \$32,067, or \$320.67 per unit. Thus, the Plan received a total of \$69,414 (\$694.14 per unit) on an investment of \$50,000.

The Plan also purchased the 200 Balcor VI units in 1983, paying a total of \$50,000, or \$250 per unit. While holding these units, the Plan received \$48,072, or \$240.36 per unit, in total distributions. The Plan sold the Balcor VI units to Beer Nuts on December 30, 1996 for \$19,100, or \$95.50 per unit. Therefore, the plan received a total of \$67,172 (\$335.86 per unit) on an investment of \$50,000.

3. The Plan's need to sell the Interests arose primarily out of the decision by the Trustees to transfer the Plan's administrative duties to the Principal Mutual Life Insurance Company (the Principal), and to purchase a group annuity contract therefrom. The Interests could not be held under the group annuity contract, but would instead be considered "outside assets" by the Principal, resulting in additional expenses related thereto. Furthermore, the Trustees wanted to liquidate underperforming assets and reinvest in an asset providing for a higher rate of return.

Acting on the advice of their insurance agent, the Trustees decided to obtain an appraisal for the Interests and then purchase them directly from the Plan. Accordingly, the Trustees consulted the September 30, 1996 appraisal which was jointly performed by two firms, Valuation Counselors Group, Inc. and Darby and Associates (VCG-Darby). Each firm has had extensive experience in valuing partnership interests and was independent of Beer Nuts. VCG-Darby had been hired by the Balcor Company to value, on an ongoing basis, partnership interests issued by 16 of the Balcor Company's partnerships, including Balcor I and Balcor VI.

Adjusted for the October 1996 distributions,²⁶ the Balcor I units had a net value of \$320.67 per unit, and the Balcor VI units had a net value of \$95.50 per unit. Before undertaking the transaction, however, the Plan received an unsolicited offer for the Balcor I units on December 2, 1996 from an unrelated third party, the First Trust Company, LP (First Trust). First Trust offered to purchase up to 4.9% of the limited partnership interests in Balcor I at a price of \$200 per unit. Because the amount of the offer was significantly lower than the VCG-Darby valuation, Beer Nuts opted to purchase the Interests from the Plan using VCG-Darby's figures.

In further support of its claim that it acted in good faith, the applicant points to three subsequent offers for the Interests. On January 1, 1997, First Trust submitted an unsolicited offer to buy up to 4.9% of the Balcor VI units for \$61 per unit. On March 6, 1997, Madison Partnership Liquidity Investors CC, LLC (Madison) offered to purchase up to

4.9% of the Balcor I units for \$110 per unit, and up to 4.9% of the Balcor VI units for \$36 per unit. Beer Nuts believes that the fact it paid an amount significantly in excess of the First Trust and Madison offers demonstrates that it conducted the transaction in a manner designed to protect the interests of the Plan and those of the participants and beneficiaries.

4. According to the applicant, neither the Trustees of the Plan nor the officers of Beer Nuts involved in the transaction were aware of the prohibited nature of the transaction until contacting their accountant, Mr. Bruce Breitweiser, in early 1997 about changing the Plan year to a calendar year in conjunction with the transfer of the Plan's assets to the Principal. While reviewing the Plan's records, Mr. Breitweiser discovered the prohibited transaction. Upon informing the applicant, Mr. Breitweiser learned that the Trustees engaged in the transaction on the advice of their insurance agent. Soon thereafter, he contacted the legal department at the Principal, which agreed with his conclusion as to the prohibited nature of the transaction. At this point, Mr. Breitweiser began obtaining all of the documentation from Beer Nuts and the Principal pertaining to the transaction. After doing so, he contacted the Department about securing retroactive exemptive relief.

5. The applicant represents that the transaction was administratively feasible in that it was a one-time transaction for cash. Furthermore, the applicant states that the transaction was in the interests of the Plan and its participants and beneficiaries because it provided for the consolidation of the Plan's assets, reduced record-keeping costs, ensured that the Plan received a return on the Interests in excess of its original investment, and disposed of illiquid and underperforming assets facilitating the investment of the proceeds in an asset better suited to the needs of the Plan and its participants and beneficiaries. Finally, the applicant represents that the transaction was protective of the rights of the participants and beneficiaries because the Plan received for the Interests an amount determined by a qualified, independent appraiser.

6. In summary, the applicant represents that the subject transaction satisfied the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (a) the terms of the Sale were at least as favorable to the Plan as those obtainable in an arm's-length transaction with an unrelated party; (b) the Sale was a one-time transaction for cash; (c) the Plan

²⁶ According to documents submitted by the applicant, the unadjusted September 30, 1996 VCG-Darby valuation for the Interests was \$366 per unit for the Balcor I units and \$122 per unit for the Balcor VI units. However, adjustments were made for subsequent distributions from the partnership of \$45.33 per Balcor I unit and \$26.50 per Balcor VI unit.

paid no commissions or other expenses relating to the Sale; and (d) the Sale price was not less than the fair market value of the Interests as determined by a qualified, independent appraiser.

Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due on or before May 15, 1998.

For Further Information Contact: Mr. James Scott Frazier of the Department, telephone (202) 219-8891 (this is not a toll-free number).

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of 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 exemptions, 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 exemptions, 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.

Signed at Washington, DC, this 25th day of March 1998.

Ivan Strasfeld,

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

[FR Doc. 98-8197 Filed 3-30-98; 8:45 am]

BILLING CODE 4510-29-P

NATIONAL LABOR RELATIONS BOARD

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: National Labor Relations Board.

TIME AND DATE: 3:00 p.m., Tuesday, March 17, 1998.

PLACE: Board Conference Room, Eleventh Floor, 1099 Fourteenth St., N.W., Washington, D.C. 20570.

STATUS: Closed to public observation pursuant to 5 U.S.C. Section 552b(c)(2) (internal personnel rules and practices); and (c)(6) (personnel information where disclosure would constitute a clearly unwarranted invasion of personal privacy).

MATTERS TO BE CONSIDERED: Personal matters.

CONTACT PERSON FOR MORE INFORMATION: John J. Toner, Executive Secretary, Washington, D.C. 20570; Telephone: (202) 273-1940.

Dated: Washington, D.C., March 25, 1998.
By direction of the Board.

John J. Toner,

Executive Secretary, National Labor Relations Board.

[FR Doc. 98-8511 Filed 3-27-98; 11:38 am]

BILLING CODE 7545-01-M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-327 and 50-328]

In the Matter of Tennessee Valley Authority; Sequoyah Nuclear Plant Units 1 and 2; Exemption

I

The Tennessee Valley Authority (TVA or the licensee) is the holder of Facility

Operating License Nos. DPR-77 and DPR-79, which authorize operation of the Sequoyah Nuclear Plant (SQN), Units 1 and 2, respectively. The licenses provide, among other things, that the licensee is subject to all rules, regulations, and orders of the Commission now or hereafter in effect.

The facility consists of two pressurized-water reactors at the licensee's site located in Hamilton County, Tennessee.

II

Section 70.24 of Title 10 of the Code of Federal Regulations, "Criticality Accident Requirements," requires that each licensee authorized to possess special nuclear material (SNM) shall maintain a criticality accident monitoring system in each area where such material is handled, used, or stored. Subsections (a)(1) and (a)(2) of 10 CFR 70.24 specify detection and sensitivity requirements that these monitors must meet. Subsection (a)(1) also specifies that all areas subject to criticality accident monitoring must be covered by two detectors. Subsection (a)(3) of 10 CFR 70.24 requires licensees to maintain emergency procedures for each area in which this licensed SNM is handled, used, or stored and provides that (1) the procedures ensure that all personnel withdraw to an area of safety upon the sounding of a criticality accident monitor alarm, (2) the procedures must include drills to familiarize personnel with the evacuation plan, and (3) the procedures designate responsible individuals for determining the cause of the alarm and placement of radiation survey instruments in accessible locations for use in such an emergency. Subsection (b)(1) of 10 CFR 70.24 requires licensees to have a means to identify quickly personnel who have received a dose of 10 rads or more. Subsection (b)(2) of 10 CFR 70.24 requires licensees to maintain personnel decontamination facilities, to maintain arrangements for a physician and other medical personnel qualified to handle radiation emergencies, and to maintain arrangements for the transportation of contaminated individuals to treatment facilities outside the site boundary. Paragraph (c) of 10 CFR 70.24 exempts Part 50 licensees from the requirements of paragraph (b) of 10 CFR 70.24 for SNM used or to be used in the reactor. Paragraph (d) of 10 CFR 70.24 states that any licensee who believes that there is good cause why he should be granted an exemption from all or part of 10 CFR 70.24 may apply to the Commission for such an exemption and shall specify the reasons for the relief requested.