

(1) A party in interest with respect to a Plan, other than the Foreign Affiliate, shall not be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) or (b) of the Code, if such records are not maintained, or are not available for examination, as required by paragraph E.; and

(2) A prohibited transaction shall not be deemed to have occurred if, due to circumstances beyond the control of the Foreign Affiliate, such records are lost or destroyed prior to the end of such six year period;

E. Notwithstanding the provisions of subsections (a)(2) and (b) of section 504 of the Act, the Foreign Affiliate makes the records referred to above in paragraph D., unconditionally available for examination during normal business hours at their customary location to the following persons or an authorized representative thereof:

(1) The Department, the Internal Revenue Service or the SEC;

(2) Any fiduciary of a Plan;

(3) Any contributing employer to a Plan;

(4) Any employee organization any of whose members are covered by a Plan; and

(5) Any participant or beneficiary of a Plan.

However, none of the persons described above in paragraphs (2)–(5) of this paragraph E. shall be authorized to examine trade secrets of the Foreign Affiliate, or any commercial or financial information which is privileged or confidential.

F. Prior to any Plan's approval of any transaction with a Foreign Affiliate, the Plan is provided copies of the proposed and final exemption with respect to the exemptive relief granted herein.

Section III. Definitions

For purposes of this proposed exemption,

A. The terms "DLJ" or "CSFB" as referred to in Section I., mean Donaldson, Lufkin & Jenrette Securities Corporation or Credit Suisse First Boston Corporation.

B. The term "affiliate" of another person shall include:

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

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

(3) Any corporation or partnership of which such other person is an officer, director or partner. (For purposes of this

definition, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

C. The term "Foreign Affiliate," shall mean a current or future affiliate of DLJ or CSFB that is subject to regulation as a broker-dealer by—

(1) The Securities and Futures Authority, in the United Kingdom; or

(2) The Australian Securities & Investments Commission in Australia.

D. The term "security" shall include equities, fixed income securities, options on equity and on fixed income securities, government obligations, and any other instrument that constitutes a security under U.S. securities laws. The term "security" does not include swap agreements or other notional principal contracts.

Section IV. Effective Date

If granted, this proposed exemption will be effective as of November 3, 2000.

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

For a more complete statement of the facts and representations supporting the Department's decision to grant PTE 99–45, refer to the proposed exemption and the grant notice which are cited above.

Signed at Washington, DC, this 4th day of September, 2001.

Ivan L. Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D–10762, et al.]

Proposed Exemptions; Key Trust Company of Ohio (Key Trust) et al.

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, within 45 days from the date of publication of this **Federal Register** Notice. 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 the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Avenue, NW., Washington, DC 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, 5 U.S.C. App. 1 (1996), 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.

**Key Trust Company of Ohio (Key Trust),
Located in Cleveland, OH**

[Application No. D-10762]

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, August 10, 1990).¹

I. Covered Transactions

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 making of interest-free loans to a defined contribution plan (the Plan) by its respective sponsor (the Plan Sponsor) pursuant to the terms of a credit facility arrangement (the Credit Facility Arrangement), established by Key Trust and its affiliates (collectively, KeyBank), which enables daily transactions, such as participant investment transfers, distributions or participant loans, in connection with the Plan's unitized employer stock fund (the Unitized Employer Stock Fund or Fund) within KeyBank; and (2) the repayment, by the Plan to the Plan Sponsor, of any interest-free loan within 90 days with cash proceeds received from the sale of employer stock (Employer Stock) held in the Unitized Employer Stock Fund.

II. General Conditions

(a) Each loan made under the Credit Facility Arrangement provides short-term funds to the Plan for a period of no longer than 90 days for the purpose of facilitating Plan participant transfers,

distributions, loans and other participant transactions involving the Plan's Unitized Employer Stock Fund.

(b) The maximum amount of short-term funds available to a Plan under the Credit Facility Arrangement, in the aggregate, does not exceed 25 percent of the fair market value of the Plan's Unitized Employer Stock Fund.

(c) Each loan made under the Credit Facility Arrangement is repaid with proceeds from the sale of Employer Stock held in the Unitized Employer Stock Fund.

(d) For purposes of repaying a loan under the Credit Facility Arrangement, the sales price for the Employer Stock is based upon its fair market value as determined on the New York Stock Exchange (the NYSE) or other applicable securities exchange where such Employer Stock is primarily traded on the date of the transaction, as calculated by an independent pricing service.

(e) Each loan made under the Credit Facility Arrangement is unsecured and no commitment fees, interest or commissions are paid by the Plan.

(f) In the event of a loan default or delinquency, the Plan Sponsor has no recourse against the Plan.

(g) Each loan is initiated, accounted for and administered by KeyBank, the independent fiduciary, which will monitor the terms and conditions of the exemption on behalf of the Plan, at all times.

(h) KeyBank maintains for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons described in paragraph (i) to determine whether the conditions of this 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 KeyBank, such records are lost or destroyed prior to the end of such six year period; and

(2) No party in interest, other than KeyBank, shall be subject to the civil penalty that may be assessed under section 502(i), or 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 by paragraph (h).

(i)(1) Except as provided in paragraph (h)(2) and notwithstanding anything to the contrary in sections 504(a)(2) and (b) of the Act, the records referred to in paragraph (h) are unconditionally available for examination during normal business hours by—

(A) Any duly authorized employees or representatives of the Department or the Internal Revenue Service;

(B) Any fiduciary of a Plan or any duly authorized employee or representative of such fiduciary; and

(C) Any participant or beneficiary of a Plan or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described above in paragraph (i)(1)(B) or (C) shall be authorized to examine the trade secrets of KeyBank or commercial or financial information which is privileged or confidential.

III. Definitions

(a) The term "KeyBank" refers Key Trust Company of Ohio and its affiliates.

(b) An "affiliate" of KeyBank includes—

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

(2) Any officer, director, employee, relative or partner in KeyBank; and

(3) Any corporation or partnership of which KeyBank is an officer, director, partner or employee.

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

(d) The term "closing price" means the final price at which Employer Stock has traded on the NYSE (or such other exchange on which Employer Stock is primarily traded) on the date of the transaction as may be reported to KeyBank using an independent pricing service for the reporting of final prices.

(e) The term "Employer Stock" refers to common stock issued by a Plan Sponsor, an affiliate of the Plan Sponsor, a former Plan Sponsor, or an affiliate of the former Plan Sponsor.²

(f) The term "Plan Sponsor" refers to an employer (or an affiliate of the employer) sponsoring a defined contribution plan which has entered into a Unitized Employer Stock Fund Investment Policy Agreement (the Policy Agreement) with KeyBank in order to structure the investment by the Plan's Unitized Employer Stock Fund in Employer Stock.

(g) The term "Unitized Employer Stock Fund" refers to an investment fund established by KeyBank whose assets will consist primarily of shares of Employer Stock.

(h) The "trading day" refers to any day on which KeyBank and the NYSE

¹ Unless otherwise noted, references to specific sections of the Act refer also to the corresponding provisions of the Code.

² The Department notes that the term "Employer Stock," as defined in this proposal, may not satisfy the definition of "employer security" contained in section 407(d)(1) of the Act.

are open for business and are able to transact trades involving Employer Stock as a Plan investment. The close of trading day will be the time of the close on the NYSE. In the event that either KeyBank or the NYSE (or any other exchange on which the Employer Stock is primarily traded) is incapable of processing trades involving Employer Stock, or in the event trading in Employer Stock is suspended, the close of the trading day will be the last time by which transactions involving Employer Stock are processed on any such day.

(i) The term "drift allowance" refers to the range of percentages, comprised of a maximum and minimum percentage, which is determined and established by the Plan Sponsor as being the proper percentages within which the liquidity component of the Unitized Employer Stock Fund should represent of the entire market value of such Fund on any given day.

(j) The term "liquidity component" means the short-term investment vehicle which is selected by the Plan Sponsor and used to invest any uninvested cash in the Plan's Unitized Employer Stock Fund.

(k) The term "target percentage" means the number, expressed as a percentage, which is determined and established by the Plan Sponsor, as being the proper percentage that the liquidity component of the Unitized Employer Stock Fund will represent of the entire market value of such Fund (including the liquidity component and the Employer Stock). The target percentage will take into consideration factors such as the daily market volume for trading in the Employer Stock and the average daily trading activity of such stock in the Unitized Employer Stock Fund.

(l) The term "transaction valuation date" refers to any day on which KeyBank and the NYSE (or any other national securities exchange on which Employer Stock is primarily traded) are open for business and are able to transact trades.

Summary of Facts and Representations

1. *KeyBank*, which serves as trustee, custodian and/or recordkeeper to employee benefit plans, includes Key Trust and its affiliates. KeyBank maintains its principal place of business at 127 Public Square, Cleveland, Ohio. Currently, KeyBank has tax-exempt assets under management in excess of \$53.6 billion and is trustee for more than \$14.5 billion in defined contribution plan assets.

KeyBank has been providing services to defined contribution plans for more

than 40 years. In this regard, KeyBank maintains records for approximately 1,120 daily valued plans. KeyBank also serves as trustee to 61 defined contribution plans which permit participant-directed investments. As of December 31, 2000, these Plans had approximately 135,000 participants and beneficiaries. Although the fair market value of each Plan's assets varies in amount, as of December 31, 2000, the aggregate fair market value of Plan assets that were invested in Unitized Employer Stock Funds under management by KeyBank was \$1.76 billion. Further, KeyBank has experience in maintaining Unitized Employer Stock Funds similar to those described herein.

As discussed in Representation 15 of this proposed exemption, KeyBank has agreed to serve as the independent fiduciary for existing and future client Plans wishing to participate in the Credit Facility Arrangement described herein. KeyBank represents that it is (or will be) independent of each Plan Sponsor and the fees that it receives from a Plan or a Plan Sponsor for fiduciary, custodial or recordkeeping services constitute (or will constitute) less than one percent of its total fiduciary funds and fund management revenues. Further, KeyBank represents that it will not receive any additional fees from a Plan as a result of its oversight of a Credit Facility Arrangement.

2. *Key Trust* is a trust company also headquartered at 127 Public Square, Cleveland, Ohio. Key Trust and its affiliates, which are collectively referred to herein as "KeyBank," are subsidiaries of KeyCorp, a bank holding company.

3. *The Plans* that will engage in the subject Credit Facility Arrangement will consist of defined contribution plans for which KeyBank currently (or in the future) serves as trustee, custodian and/or recordkeeper. Each Plan will permit participant-directed investment of account balances among various investment funds, including a Unitized Employer Stock Fund. Thus, each Plan will be an "individual account plan" or a "defined contribution plan" within the meaning of section 3(34) of the Act and will be subject to the provisions of Titles I and II of the Act. Further, each Plan will be qualified under section 401(a) of the Code and may have a cash or a deferred compensation arrangement, as provided under section 401(k) of the Code. Although a Plan is required to permit participant investment direction of account balances, such Plan will not necessarily be subject to the provisions of section 404(c) of the Act.

4. Each Unitized Employer Stock Fund³ established for a Plan will be invested primarily in stock issued by a Plan's sponsor, an affiliate of the Plan sponsor, a former Plan Sponsor, or an affiliate of a former Plan Sponsor (collectively, the Plan Sponsor). A portion of the Fund may be invested in cash or cash equivalents. (Alternatively, the Unitized Employer Stock Fund may be funded solely with Employer Stock.) The actual percentage of a Unitized Employer Stock Fund that is invested in cash or cash equivalents will be determined by the Plan Sponsor based on the liquidity needs of the Fund.⁴

If it is determined that the Unitized Employer Stock Fund is to operate in a daily environment, sufficient liquidity must be created so that participant requests may be settled on the day on which they are requested. In other words, the Plan Sponsor must determine both a "target percentage" and a "drift allowance" for the "liquidity component."⁵ Then, funds consisting of cash and cash equivalents, which have been allocated to the liquidity component, will be placed in a money market fund selected by the Plan Sponsor.⁶ In making his or her determinations, the Plan Sponsor will consider such factors as (a) the last six months of trading activity for the Employer Stock, (b) the total number of

³ For a simplified example showing how the Unitized Employer Stock Fund will operate, see the Appendix.

⁴ Sufficient liquidity is defined as having enough cash on hand so that net daily activity may be transacted at the net asset value (NAV) of the day the transactions are requested.

⁵ Section III(i)-(k) of this proposed exemption defines the terms "drift allowance," "target percentage," and "liquidity component" as follows:

(i) The term "drift allowance" refers to the range of percentages, comprised of a maximum and minimum percentage, which is determined and established by the Plan Sponsor as being the proper percentages within which the liquidity component of the Unitized Employer Stock Fund should represent of the entire market value of such Fund on any given day.

(j) The term "liquidity component" means the short-term investment vehicle which is selected by the Plan Sponsor and used to invest any uninvested cash in the Plan's Unitized Employer Stock Fund.

(k) The term "target percentage" means the number, expressed as a percentage, which is determined and established by the Plan Sponsor, as being the proper percentage that the liquidity component of the Unitized Employer Stock Fund will represent of the entire market value of such Fund (including the liquidity component and the Employer Stock).

⁶ According to KeyBank, the Plan Sponsor generally will select a KeyBank money market fund. Any interest earned on assets invested in such fund will be used for the benefit of those participants who have invested in a Plan's Unitized Employer Stock Fund. Although a KeyBank money market fund will not charge a Plan any fees in connection with the cash assets invested, KeyBank will receive an account-level fee as part of its overall trustee compensation.

shares in the Unitized Employer Stock Fund versus the total number of shares held in the market, and (c) past and anticipated daily transaction volumes.

5. A participant's interest in a Unitized Employer Stock Fund will consist of "units." The underlying Employer Stock of a Plan Sponsor that is held on behalf of a Plan in the Unitized Employer Stock Fund will constitute a security for which there is a "generally-recognized market" within the meaning of section 3(18) of the Act. However, the Employer Stock may be thinly-traded or considered appropriate to sell in the market over a period of time.

6. KeyBank and the Plan Sponsor will enter into an individually-customized, Policy Agreement in order to structure a Unitized Employer Stock Fund's investment in Employer Stock. The Policy Agreement will be developed in a manner which is consistent with the Plan, participant self-direction, applicable provisions of the Act, and the Department's regulations. In particular, the Policy Agreement will establish certain administrative procedures that KeyBank will utilize in order to effect Plan transactions involving a Unitized Employer Stock Fund, including purchases or sales of Employer Stock held by such Fund. For example, a Plan may provide that participants may sell (or purchase) units of the Unitized Employer Stock Fund on a daily basis and buy (or sell) units or shares of another investment fund under the Plan, with the sales and purchases settling on a daily basis. In addition, a Plan may provide that participants may sell units of the Unitized Employer Stock Fund to receive participant distributions and loans. Further, the Policy Agreement will define the target and drift allowance comprising the liquidity component and include any rebalancing parameters that may be applicable.

7. The Policy Agreement will also describe how KeyBank, as Plan trustee, will process participant transactions. In this regard, the Policy Agreement will set forth a cash position which the Plan Sponsor believes will provide sufficient liquidity in the Unitized Employer Stock Fund. This will enable KeyBank to effect participant transactions on a daily basis. When a Plan participant sells units of a Unitized Employer Stock Fund, the value of the units will be made available to the participant on a specified transaction date. If the cash or cash equivalents of the Unitized Employer Stock Fund are not sufficient, after netting out participant purchases and sales with respect to the Unitized Employer Stock Fund on the transaction date, Employer Stock held in the Fund

may be sold by KeyBank over a period of time in order to complete the participant's transaction and to minimize, as much as possible, a depressed price for Employer Stock.⁷

In other words, if the percentage of the liquidity component falls within the drift allowance specified in the Policy Agreement, KeyBank will do nothing more. However, if the percentage rises above the maximum drift allowance, KeyBank will purchase sufficient Employer Stock in order to bring the liquidity component back into target. Conversely, if the percentage of the liquidity component falls below the minimum drift, KeyBank will sell Employer Stock sufficient to bring the liquidity component back into target.

On most days, however, KeyBank notes that net participant activity will not result in the liquidity component drifting above or below the allowance range. As such, KeyBank will not have to go into the open market each day to purchase or sell shares of Employer Stock.

8. On occasion, KeyBank represents that net participant activity may exceed the balance of the liquidity component. If this happens, an overdraft will occur in the Plan's Unitized Employer Stock Fund. Under such circumstances, KeyBank states that it has several alternatives it can pursue. For example, KeyBank may immediately—

- Sell shares of Employer Stock sufficient in amount to cover the overdraft and bring the liquidity component back to its target. Such trades will ordinarily be transacted on a next business day settlement period.
- Sell shares of Employer Stock sufficient in amount to cover the overdraft as well as bring the liquidity component back within the drift allowance.
- Request that the Plan Sponsor buy back sufficient shares of Employer Stock to cover the overdraft as well as bring the liquidity component back within the drift allowance for next day settlement. In order to do so, KeyBank represents

⁷To the extent that Employer Stock is sold to the Plan Sponsor or an affiliate of an existing Plan Sponsor, KeyBank represents that such sale will be conducted in accordance with section 408(e) of the Act and the regulations promulgated thereunder. However, the Department expresses no opinion herein on whether the sale of Employer Stock to the Plan Sponsor or to an affiliate of an existing Plan Sponsor will satisfy the terms and conditions of section 408(e) of the Act.

In addition, the Department notes that the timing of such sales will be subject to the general fiduciary responsibility provisions of Part 4 of Title I of the Act. In this regard, section 404 of the Act requires, among other things, that a fiduciary of a plan act prudently and solely in the interest of the plan and its participants and beneficiaries when making investment decisions on behalf of the plan.

that the Plan Sponsor must (i) be permitted to buy back shares of Employer Stock, (ii) be interested in building its treasury position, (iii) have sufficient cash to do so, (iv) pay a fair market price for the shares, and (v) not apply any transaction costs. The overdraft will then be reflected on the Plan's records for at least one business day.

- Borrow money from an independent lender and charge the cost of the temporary loan to the Plan's Unitized Employer Stock Fund. Under this alternative, KeyBank states that once shares of Employer Stock sufficient to cover the overdraft are sold and the liquidity component is brought back to its target position, it will pay back the third party lender for the amount of the loan as well as the loan fee. Under this alternative, a loan agreement will be required which will include parameters dictating whether KeyBank will be required to sell shares of Employer Stock on a next day basis or within the standard settlement time frame.

9. Assuming it must effect sales of Employer Stock in order to fund participant requests in the event of an overdraft situation, KeyBank proposes to adopt an interim solution. Under KeyBank's proposal, a Plan Sponsor would be permitted to make periodic, short-term, interest-free loans to its respective Plan under a Credit Facility Arrangement established by KeyBank. The Credit Facility Arrangement, whose terms will be embodied in the Policy Agreement, will be offered by KeyBank as a service to help the Plan Sponsor address the liquidity needs of the Plan's Unitized Employer Stock Fund in a daily trading environment. The Credit Facility Arrangement will facilitate participant transfers (e.g., the transfer of all or part of a participant's interest from the Unitized Employer Stock Fund to another investment fund, or individual shares of stock if permitted by the Plan), distributions, loans, and other participant transactions within the Unitized Employer Stock Fund.

In other words, the Credit Facility Arrangement is directed at net participant activity (i.e., the liquidity needs of the Unitized Employer Stock Fund as a whole rather than individual participant activity). The Credit Facility Arrangement will allow a Plan to—

- Obtain short-term funds from the Plan Sponsor in order to implement participant directions with respect to daily transactions involving the Unitized Employer Stock Fund, as of a specified transaction valuation date (see Representation 10).
- Effect sales of Employer Stock held in the Unitized Employer Stock Fund in

an orderly fashion. Without the Credit Facility Arrangement, the KeyBank might be required to sell a large block of Employer Stock held in the Plan's Unitized Employer Stock Fund on a specified date at a depressed price.

- Repay amounts borrowed from the Plan Sponsor with proceeds received from the sale of Employer Stock.

By participating in the Credit Facility Arrangement, a Plan will not be subject to restrictions that will impact on the transferability of units in the Unitized Employer Stock Fund or curtail daily trading by participants. Also, by participating in the Credit Facility Arrangement, the Plan will not have to obtain credit from an unrelated, third party and pay a loan fee to such lender. Accordingly, KeyBank requests an administrative exemption from the Department with respect to the implementation of such arrangement.

10. As noted in Representation 9, the proposed Credit Facility Arrangement will facilitate daily trading of the Unitized Employer Stock Fund by providing required liquidity. This will enable a Plan's Unitized Employer Stock Fund to execute participant transactions at the fair market value of the Fund units. The valuation will be based on a specified transaction valuation date that has been established under the Plan and the Policy Agreement.

Typically, the transaction valuation date for a Plan with daily trading will be any day on which KeyBank and the NYSE (or any other national securities exchange on which Employer Stock is primarily traded) are open for business and are able to transact trades. The value of units in a Unitized Employer Stock Fund (including the value of Employer Stock, cash or cash equivalents and accrued, but not payable, dividends or earnings) will be based on the closing price of the Employer Stock for the trading day coinciding with, or immediately proceeding the transaction valuation date. The closing price will be the final price at which the Employer Stock has been traded on the NYSE (or other applicable exchange on which Employer Stock is primarily traded). KeyBank will determine a per unit value (*i.e.*, the NAV) by dividing the total value of the Unitized Employer Stock Fund by the total number of units held by Plan participants. KeyBank will make appropriate adjustments for accruals and expenses of the Unitized Employer Stock Fund.

11. Generally, participant transactions that are initiated by KeyBank on a given day (*i.e.*, prior to 4:00 p.m.) will be processed after the close of market at the

day's NAV for the Unitized Employer Stock Fund. Should a KeyBank representative become aware of an overdraft problem at the beginning of the next business day, the representative will determine if the overdraft situation is within the parameters of the Policy Agreement. The KeyBank representative will then inform the Plan Sponsor of the overdraft and the Plan Sponsor will make an interest-free loan to the Plan under the Credit Facility Arrangement in order to provide the necessary liquidity to the Plan's Unitized Employer Stock Fund. The loan amount will be determined by KeyBank and such loan will be made by the Plan Sponsor to the Plan through wire transfer or account debit authorization.

12. For purposes of effecting sales of Employer Stock, KeyBank will use unaffiliated brokers unless the Plan Sponsor specifically requires the use of a KeyBank affiliated broker. If an affiliated broker is utilized, KeyBank represents that it will comply with the terms and conditions of Prohibited Transaction Class Exemption (PTCE) 86-128, 51 FR 41686 (November 18, 1986).⁸

Thus, in most cases, KeyBank expects that it will sell Employer Stock on a three day settlement basis and on the same day as the loan is made to the Plan. However, in some cases, an orderly liquidation of the Employer Stock may need to occur over a longer period of time.

Generally, the amount of Employer Stock sold by KeyBank at one time will not be more than 25-30 percent of the daily trading activity in the Employer

Stock.⁹ However, in rare cases,¹⁰ an orderly liquidation of the Employer Stock may need to occur over a period of weeks or a few months depending upon the size of the block of Employer Stock and the trading volume of such stock. It is expected that a KeyBank broker will obtain the best execution and price for the sale of the Employer Stock within a given time frame as well as within the Plan's requirements.

As noted above, the price at which the Employer Stock will be sold by KeyBank will be determined on a transactional basis.¹¹ Any Employer

⁹ This percentage parameter also applies to KeyBank's purchases of Employer Stock for a Plan. KeyBank has adopted an internal policy to the effect that purchases of Employer Stock will be made in accordance with Rule 10b-18 (Rule 10b-18) of the Securities and Exchange Act of 1934 (the 1934 Act). Rule 10b-18 serves as a "safe harbor" for an issuer or affiliated purchaser to purchase shares of the issuer without violating the anti-manipulation (e.g., market-making) provisions of sections 9(a)(2) or 10(b) of the 1934 Act. In general, purchases are made in accordance with Rule 10b-18 if each of the following conditions is met: (a) the volume of purchases, other than block purchases, on any given day does not exceed 25 percent of the trading volume of the security; (b) the purchase price may not be more than (i) for listed stocks, the higher of the current independent bid quotation or the last independent sale price on the exchange, and (ii) for stocks traded over the counter, the lowest current independent offer quotation; (c) the purchases may not be the opening transaction on the market or occur during the last half hour of the scheduled close of trading on the market; and (d) the purchases are made from or through one broker on a single day, unless the purchase was not solicited on behalf of the issuer or affiliated purchaser.

The percentage parameter for purchases or sales of Employer Stock by KeyBank may be exceeded through an exception to Rule 10b-18 volume limitation. In this regard, Rule 10b-18 does not count block purchases (*i.e.*, a quantity of stock that either has a purchase price of \$200,000 or more or is at least 5,000 shares and has a purchase price of at least \$50,000) toward the volume limitation. Normally, however, KeyBank will not exceed the percentage parameters because its policy is not to open the market or move the market when it trades Employer Stock.

¹⁰ The liquidity needs of the Unitized Employer Stock Fund and the market for Employer Stock will necessitate the situation in which an orderly liquidation of Employer Stock may need to occur over a period of months or a few weeks. For example, (a) if it is known that a 10 percent shareholder is liquidating his or her interest in the Plan Sponsor in the market, large sales of Employer Stock will typically yield a lower price than smaller sales over a period of weeks or a few months; (b) if a large amount of Employer Stock is to be sold by the Plan (e.g., part of the business is sold and a large number of employees become eligible for and elect to receive distributions from the Plan), an orderly sale of Employer Stock by the Plan would normally yield a higher price; or (c) if the Plan Sponsor determines that it would be imprudent or unlawful to sell the Employer Stock at a particular time (e.g., it jeopardizes the Plan's qualified tax status or it would violate a securities law), then sales of Employer Stock would be made as prudent and lawful as possible and would be extended over a period of time.

¹¹ In contrast, participant transactions involving the Unitized Employer Stock Fund, which are

⁸ In pertinent part, PTCE 86-128 permits a plan fiduciary to effect or execute securities transactions on behalf of a plan in return for a fee, provided that certain enumerated conditions are met. The Department is, however, providing no opinion on whether such transactions satisfy the terms and conditions of PTCE 86-128.

Stock sold on the open market by KeyBank will be at the market price. Occasionally, KeyBank may sell the Employer Stock in a private sale. The price will still be determined on a transactional basis and will reflect such stock's current fair market value.

13. The proposed exemption will be subject to a number of structural safeguards. First, each loan made under the Credit Facility Arrangement will provide short-term funds to the Plan for a period of no longer than 90 days, and the purpose of each loan will be to facilitate participant transfers, distributions, loans and other participant transactions involving the Plan's Unitized Employer Stock Fund. Second, to provide liquidity to facilitate daily transactions with a Plan's Unitized Employer Stock Fund, the maximum amount of short-term funds available to the Plan under the Credit Facility Arrangement, in the aggregate, will not exceed 25 percent of the fair market value of the Plan's Unitized Employer Stock Fund.¹² Third, each loan made under the Credit Facility Arrangement will be repaid with proceeds from the sale of Employer Stock held in the Unitized Employer Stock Fund. Fourth, each loan made under the Credit Facility Arrangement will be unsecured and no commitment fees, interest or commissions will be paid by the Plan. Fifth, in the event of a loan default or delinquency, the Plan Sponsor will have no recourse against the Plan. Sixth, as described in Representation 15, each loan will be initiated, accounted for and administered by KeyBank, as the independent fiduciary, which will maintain written records of each Credit Facility Arrangement and monitor, on behalf of the affected Plan, the terms and conditions of the exemption, at all times.

14. Absent the requested exemption, KeyBank is concerned that loans to the Plan from the Plan Sponsor and the repayment of such loans will constitute prohibited transactions under sections 406(a) and 406(b) of the Act, as such provisions relate to extensions of credit by a party in interest to a plan, the transfer of assets between a plan and a party in interest, and self-dealing by a plan fiduciary. In addition, KeyBank

described above in Representations 10 and 11 of this proposed exemption, will be made after the close of market based on the unit value of the Unitized Employer Stock Fund at the closing price of the Employer Stock held by the Unitized Employer Stock Fund. Participants will also receive confirmation of the unit price at which their transactions (e.g., distributions, transfers, etc.) are made.

¹² KeyBank notes that the percentage parameter for purchases and sales of Employer Stock has no correlation to the referenced condition.

represents that short-term extensions of credit to facilitate securities transactions are covered under PTCE 80-26 (45 FR 28545, April 29, 1980).¹³ However, KeyBank notes that PTCE 80-26 would cover loans entered into under the Credit Facility Arrangement only if the loan proceeds are used to pay benefits or if the loans are limited in duration to three business days. Therefore, KeyBank states that an individual exemption is needed to facilitate participant transfers and loans with a Unitized Employer Stock Fund under the Credit Facility Arrangement. This will allow loan periods to exceed three business days and permit the sale of Employer Stock in an orderly fashion.

15. As the independent fiduciary, KeyBank believes the Credit Facility Arrangement will be in the best interests of a Plan and its participants and beneficiaries. With the Credit Facility Arrangement, KeyBank represents that the Plan will be able to obtain, without payment of interest or costs associated under a similar arrangement with an unrelated party, short-term funds from the Plan Sponsor which will enable participants to make daily transactions to and from the Unitized Employer Stock Fund as of the transaction valuation date. In forming its opinion, KeyBank will consider the Plan's overall investment portfolio, liquidity requirements and investment objectives and policies. KeyBank will determine whether the Credit Facility Arrangement is consistent with and furthers each of these aspects of a Plan.

KeyBank agrees to monitor the Credit Facility Arrangement throughout its duration on behalf of the Plan and take any appropriate actions to safeguard the interests of the Plan. In this regard, KeyBank will be given the authority to monitor, at all times, the Credit Facility Arrangement as part of its arrangements with the Plan Sponsor under the Policy Agreement regarding the structure of the Unitized Employer Stock Fund. In this regard, KeyBank will—

- Monitor the amount of cash contained in the Unitized Employer Stock Fund and provide the Plan Sponsor with information regarding this matter. In turn, the Plan Sponsor will determine the amount of cash necessary to provide sufficient liquidity for KeyBank to process Plan transactions.

¹³ PTCE 80-26 permits parties in interest to make interest-free loans to an employee benefit plan (a) to facilitate the payment of ordinary operating expenses of the plan, including the payments of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract or (b) for a period of not more than three days, for a purpose incidental to the ordinary operation of the plan.

- Review and report the proportion of cash to Employer Stock held within the Unitized Employer Stock Fund at the completion of each transaction involving such Fund.

- Sell sufficient shares of Employer Stock as are necessary to bring the cash portion of the Fund within the target percentage.

- Consent to a modification of the cash position of the Unitized Employer Stock Fund if KeyBank and the Plan Sponsor determine that such revised position is appropriate based on overall Plan activity and KeyBank's standard operating procedures.

- Have sole responsibility (i) with respect to the unaffiliated broker and the primary exchange through which the purchase and sale of Employer Stock will occur; and (ii) whether to execute the transaction as one or a series of more than one trade.

- Use best efforts to effectuate trades involving Employer Stock in an efficient manner which is consistent with its obligations under the Act.

In addition, KeyBank will provide each Plan fiduciary with an Independent Fiduciary Statement reflecting KeyBank's determinations prior to permitting the Credit Facility Arrangement to become effective. Unless a particular application of the Credit Facility Arrangement to an overdraft situation does not meet the standards set forth in the Policy Agreement, the interest-free loan will be processed in accordance with the Policy Agreement.

KeyBank represents that its ongoing independent involvement in, and oversight of, the Credit Facility Arrangement program will also provide protection for the Plan and its participants and beneficiaries. Consistent with the relevant Plan provisions, KeyBank will be solely responsible for determining when and how much to borrow under the Credit Facility Arrangement as established by the Plan Sponsor pursuant to the Policy Agreement between KeyBank and Plan Sponsor, and to cause the Plan to repay loan amounts within the 90 day period. As stated above, KeyBank will receive no additional fee or other compensation as a result of the Credit Facility Arrangement.

16. KeyBank represents that the proposed transactions will satisfy the statutory conditions for an exemption under section 408(a) of the Act because:

(a) The Credit Facility Arrangement will enhance a Plan Sponsor's ability to provide Plan participants with a Unitized Employer Stock Fund featuring daily transactions and valuations, thereby affording participants the

flexibility of moving into or out of the Fund on a daily basis, with the fair market value of Fund units established as of an established transaction valuation date.

(b) The Credit Facility Arrangement will allow the Plan Sponsor to make short-term funds available to a Plan in order to facilitate Plan participant transactions with the Unitized Employer Stock Fund.

(c) The Credit Facility Arrangement will permit the orderly sale of Employer Stock thereby enhancing the Unitized Employer Stock Fund's asset value for all Plan participants and permitting a better return to the Fund than could be achieved if sales were to be made as of a given trading day to complete participant transactions.

(d) Each loan made under the Credit Facility Arrangement will provide short-term funds to the Plan for a period of no longer than 90 days and the purpose of each loan will be to facilitate participant transfers, distributions, loans and other participant transactions involving the Plan's Unitized Employer Stock Fund.

(e) The maximum amount of short-term funds available to the Plan under the Credit Facility Arrangement will, in the aggregate, not exceed 25 percent of the Plan's Unitized Employer Stock Fund.

(f) Each loan made under the Credit Facility Arrangement will be repaid with proceeds from the sale of Employer

Stock held in the Unitized Employer Stock Fund.

(g) For purposes of repaying loans under the Credit Facility Arrangement, the sales price for the Employer Stock will be based upon its fair market value as determined on the NYSE or other applicable securities exchange on which Employer Stock is primarily traded, as of the date of the transaction.

(h) Each loan made under the Credit Facility Arrangement will be unsecured and no commitment fees, interest, commissions will be paid by the Plan.

(i) In the event of a loan default or delinquency, the Plan Sponsor will have no recourse against the Plan.

(j) Each loan will be initiated, accounted for and administered by KeyBank, the independent fiduciary, which will maintain written records of each Credit Facility Arrangement and monitor the terms and conditions of the exemption, on behalf of the affected Plan, at all times.

Notice to Interested Persons

Notice of the proposed exemption will be provided by first-class mail to each known Plan Sponsor within 30 days after the publication of the notice of proposed exemption in the **Federal Register**. Such notice will include a copy of the notice of proposed exemption, as published in the **Federal Register**, as well as a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which shall inform

interested persons of their right to comment on and/or to request a hearing. Comments and hearing requests with respect to the proposed exemption are due 60 days after the date of 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.)

Appendix

Following is a simplified example illustrating the drift allowance, the target position and the liquidity component.

Suppose that the initial funding of the ABC Company Stock Option (Day One) is a cash and an in-kind contribution of \$10 million.

At the establishment of the option, the Plan Sponsor, following discussions with KeyBank, sets the liquidity component at 1 percent and the drift allowance at 0.2 percent.

As such, the in-kind portion of the \$10 million contribution is \$9.9 million. \$100,000 of the contribution will be made in cash and will be kept "liquid." The \$100,000 amount will be invested in a short-term investment fund with KeyBank. Assuming shares of Employer Stock cost \$9 per share (closing price on Day One), the in-kind contribution will be 1.1 million shares.

The Unitized Employer Stock Fund's balance sheet will be created. In addition, an initial unit value will be determined. For these purposes, KeyBank has assumed a \$10 unit value to start, which may bear no direct relationship to the actual value of the Employer Stock. Thus:

	MV	Units	Unit value
Initial Balance (at close Day One)	\$10,000,000	1,000,000	\$10.00

On Day One, net participant activity received prior to the cut-off time (i.e., 4:00 p.m.) including contributions, distributions and transfers is acted upon and totaled after the close of the market on Day One. Then, prior to the market opening on the next business day (Day Two) such amount is either added or subtracted from the balance of the Unitized Employer Stock Fund.

This may be illustrated as follows:

	MV	Units	Unit value
Opening Balance	\$10,000,000	1,000,000	\$10.00
E/ee Contributions	5,000	500	10.00
E/er Contributions	10,000	1,000	10.00
Transfers In	7,000	700	10.00
Distributions	(8,000)	(800)	10.00
Loans	(3,000)	(300)	10.00
Transfers Out	(12,000)	(1,200)	10.00
(Sub-Total)	9,999,000	999,000	10.00

Total Net Participant Activity = (\$1,000) (i.e., \$5,000 + 10,000 + 7,000 - [8,000 + 3,000 + 12,000])

KeyBank next determines the new balance in the liquidity component by posting the net activity against it. In this example,

\$100,000 (representing the cash portion of the in-kind contribution)—\$1,000 (representing net participant activity) = \$99,000.

Prior to market opening on the next business day (Day Two), the liquidity component is \$99,000/\$9,999,000 or

0.0099009. Since the liquidity component is within the 1 percent target, KeyBank does not need to do anything on Day Two.

At the close of market on Day Two, KeyBank will determine the value of the Unitized Employer Stock Fund (both in

terms of dollars and unit value) by pricing the shares of the Employer Stock, adding the value of the liquidity

component, adding any actual or accrued earnings, and subtracting actual

expenses occurring on Day Two. Thus, using the following assumptions,

The 1.1 million shares, priced at \$9.25 (the new closing price for the Employer Stock) =	\$10,175,000
The liquidity component =	99,000
Earnings =	5,000
Expenses (occurring on Day Two) =	(15,000)
	\$10,264,000

	MV	Units	Unit value
Opening Balance	\$10,000,000	1,000,000	\$10.00
E/ee Contributions	5,000	500	10.00
E/er Contributions	10,000	1,000	10.00
Transfers In	7,000	700	10.00
Distributions	(8,000)	(800)	10.00
Loans	(3,000)	(300)	10.00
Transfers Out	(12,000)	(1,200)	10.00
(Sub-Total)	9,999,000	999,900	10.00
Earnings	5,000		
Expenses	(15,000)		
Unrealized Apprec	275,000		
Closing Balance	\$10,264,000	999,900	10.2650

Net participant activity received prior to cut-off time on Day Two would be processed after the close of the market on Day Two at the \$10.2650 unit value. Assume for purposes of the illustration that there was no net participant activity on Day Two.

Once the Unitized Employer Stock Fund is valued, KeyBank will determine what percentage of the liquidity

component is the value of the overall Fund. This is done so that KeyBank can determine whether it is necessary to trade shares of the Employer Stock on Day Three in order that the liquidity component can stay within its target allowance. As such, $\$99,000 / \$10,264,000 = .0096453$.

Since the liquidity component on Day Two is within the appropriate range,

i.e., less than 1.2 percent but more than 0.8 percent, KeyBank will do nothing more to create (or reduce) additional liquidity.

On the other hand, if the net outflow of participant activity received prior to the cut-off time on Day One is more than the liquidity component, for example, \$110,000, the following will happen:

	MV	Units	Unit value
Opening Balance	\$10,000,000	1,000,000	\$10.00
E/ee Contributions	0	0	10.00
E/er Contributions	0	0	10.00
Transfers In	0	0	10.00
Distributions	(50,000)	(5,000)	10.00
Loans	(5,000)	(500)	10.00
Transfers Out	(55,000)	(5,500)	10.00
(Sub-Total)	9,890,000	989,000	10.00

KeyBank will then post the net activity against the liquidity component of the Unitized Employer Stock Fund. Using the foregoing example, the account is overdrawn by \$10,000, i.e., \$100,000 less net activity of \$110,000.

Prior to market opening on the next business day (Day Two), the liquidity component is negative.

Under this circumstance, KeyBank will refer to the Policy Agreement to determine what actions it should undertake to clear the overdraft and restore the Unitized Employer Stock Fund's liquidity component back to the target allowance.

KeyBank must determine how much liquidity the Unitized Employer Stock

Fund requires to bring it back to target. In addition, KeyBank must clear the \$10,000 overdraft. As such,

$$1\% \text{ of } \$9,890,000 = \$98,900 + \$10,000 = \$108,900.$$

$$1.2\% \text{ of } \$9,890,000 = \$118,680 + \$10,000 = \$128,680.$$

Thus, KeyBank will be required to sell shares of Employer Stock sufficient in amount to be at least \$108,900 but not exceeding \$128,680.

Brookshire Brothers, Ltd. (Brookshire),
Located in Lufkin, Texas

[Application No. D-10894]

Proposed Exemption

Based on the facts and representations set forth in the application, 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, August 10, 1990).

Section I. Transaction

If the exemption is granted, the restrictions of section 406(a)(1)(A)

through (D) 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 (D) of the Code, shall not apply to the establishment by Brookshire of a minimum price guarantee (the Minimum Price Guarantee) for the valuation and purchase by Brookshire of Profit Sharing Stock owned by the Brookshire Brothers Employee Stock Ownership Plan (the ESOP), provided the conditions set forth in Section II are satisfied:

Section II. Conditions

A. The ESOP shall pay no consideration, interest or other fee or expense in connection with the Minimum Price Guarantee.

B. The Minimum Price Guarantee shall expire on the first date after December 22, 1999 upon which the fair market value of a share of the Profit Sharing Stock exceeds the minimum price per share established by the Minimum Price Guarantee.

Section III. Definitions

A. The term "Brookshire" means Brookshire Brothers, Ltd., a Texas limited partnership with headquarters in Lufkin, Texas.

B. The term "Profit Sharing Plan" means the Brookshire Brothers Profit Sharing Plan, as amended and restated effective April 30, 1988.

C. The term "Profit Sharing Stock" means approximately 600,182 shares of the common stock of Brookshire Brothers Holding, Inc., Brookshire's parent company, transferred from the Profit Sharing Plan to the ESOP on December 19, 1999.

D. The term "Minimum Price Guarantee" means the guarantee established pursuant to the ESOP whereby the value of the Profit Sharing Stock will be equal to the price of such stock prior to December 22, 1999 plus a 4% annual increase.

Effective Date: The proposed exemption, if granted, will be effective December 19, 1999.

Summary of Facts and Representations

1. Brookshire Brothers, Ltd. (Brookshire), has its principal place of business in Lufkin, Texas, and is engaged in the retail grocery industry.

2. Brookshire is the sponsor of the Brookshire Brothers Employee Stock Ownership Plan (the ESOP), adopted effective April 26, 1998. The ESOP has approximately 6,416 participants and approximately \$47,385,548 in assets.

3. Brookshire also sponsors the Brookshire Brothers Profit Sharing Plan (the Profit Sharing Plan). As of December 19, 1999, the Profit Sharing

Plan held approximately 600,182 shares of the common stock (the Stock) of Brookshire Brothers Holding, Inc. (Holding), Brookshire's parent company. Holding's Stock is not publicly traded.

4. On December 19, 1999, the Stock was transferred from the Profit Sharing Plan to the ESOP. Participants' respective interests in the Stock were credited to separate profit sharing accounts in the name of each participant established under the ESOP (Profit Sharing Accounts).

5. On December 22, 1999, the ESOP purchased 2,746,255 additional shares of the Stock from approximately 300 to 350 stockholders (the Historical Stockholders), which represented a controlling interest in Holding, in a cash-out merger (Cash-Out Merger).¹⁴ To accomplish the Cash-Out Merger, the ESOP formed a subsidiary which then merged with and into Holding, with Holding surviving the merger. The Historical Stockholders of Holding received approximately \$15.46 in cash, \$2.44 in a note and .32 shares of Holding common stock for each share of the Stock owned prior to the Cash-Out Merger.¹⁵ After the Cash-Out Merger,

¹⁴ Brookshire represents that the acquisition of Holding's stock by the ESOP was exempt by reason of the statutory exemption under section 408(e). In relevant part, section 408(e) of the Act provides that sections 406 and 407 of the Act shall not apply to the acquisition or sale by a plan of qualifying employer securities as defined in section 407(d)(5) of the Act, if no commission is charged and the plan is an eligible individual account plan. Section 407(d)(5) of the Act defines a "qualifying employer security" to mean an employer security that is stock, a marketable obligation or an interest in a publicly traded partnership. An "employer security" is defined in section 407(d)(1) of the Act as a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. Section 407(d)(7) of the Act sets forth the circumstances under which an entity will be considered an affiliate of another entity, and states in relevant part: "A corporation is an affiliate of an employer if it is a member of any controlled group of corporations [as defined in section 1563(a) of the Code] * * * of which the employer who maintains the plan is a member. * * * An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary." In this regard, Brookshire represents that Brookshire and Holding are members of the same controlled group of corporations under section 1563(a) of the Code and, therefore, are affiliates for purposes of section 407(d)(7) of the Act. The Department expresses no opinion in this proposed exemption as to whether the acquisition and holding by the ESOP of Holding's common stock would be covered by section 408(e) of the Act and the regulations thereunder. The Department is not providing any relief herein for the acquisition and holding by the ESOP of Holding's common stock.

¹⁵ The ESOP did not receive this consideration with respect to the Profit Sharing Stock. The ESOP held the Profit Sharing Stock prior to the Cash-Out Merger. The ESOP then acquired additional shares in the Cash-Out Merger, which was treated as a stock purchase for federal income tax purposes. Since the ESOP was the purchaser of additional shares, the Profit Sharing Stock already held by the ESOP was not cashed out.

the ESOP owned approximately 71.8% of Holding and the Historical Stockholders owned 28.2% of Holding. In order to purchase the shares, the ESOP borrowed \$62,765,907 from Brookshire and \$9,900,000 from Holding, in transactions that Brookshire represents complied with the statutory exemptions contained in section 408(b)(3) of the Act and section 4975(d)(3) of the Code.¹⁶

6. The incurrence of debt in the Cash-Out Merger leveraged Brookshire and has depressed Holding's stock price. The value of the Stock as of April 22, 1999 was \$22 per share, while the value of the Stock immediately following the Cash-Out Merger was approximately \$14 per share. As of April 29, 2000, the value of the Stock was \$15.21 per share. The 2000 appraisal was performed by Willamette Valuation Services.

7. To counteract the effect of the debt on the Profit Sharing Plan participants who had account balances prior to the Cash-Out Merger, the ESOP was designed to guarantee that the value of the Stock in the Profit Sharing Accounts would be at least equal to the price of such Stock before the Cash-Out Merger transaction (i.e., \$22 per share) plus a 4% annual increase (the Minimum Price Guarantee). This would ensure that in the short run the Profit Sharing Plan participants would not be negatively impacted by the Cash-Out Merger transaction.

8. The Minimum Price Guarantee applies to the price per share that will be received by ESOP participants and beneficiaries for the Stock in their Profit Sharing Accounts upon a distribution of their Profit Sharing Accounts due to their retirement, death, disability or termination of employment. Participants do not have the right to a distribution from their Profit Sharing Accounts in the form of Stock; accordingly, if a distribution is to be made, the ESOP's trustee will put the Stock to Brookshire and the value of the Profit Sharing Account will be distributed to the participant in cash. Brookshire will bear the cost of any difference between the

¹⁶ The Department expresses no opinion as to whether the loans satisfied section 408(b)(3) of the Act and section 4975(d)(3) of the Code. The Department also wishes to note that ERISA's general standards of fiduciary conduct would apply to the purchase of the Stock by the ESOP and the accompanying extensions of credit, and that satisfaction of the conditions of this proposal, if granted, should not be viewed as an endorsement of the entire transaction by the Department. Section 404(a) of the Act requires, among other things, that a plan fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries in a prudent fashion. Accordingly, the plan fiduciary must act prudently with respect to the decision to enter into an investment transaction.

actual value of the Stock and its value pursuant to the Minimum Price Guarantee.

9. The Minimum Price Guarantee will not take effect unless a prohibited transaction exemption is received from the Department. The Minimum Price Guarantee will expire as of the first date that the fair market value of Holding Stock exceeds the minimum price established by the guarantee following the Cash-Out Merger (*i.e.*, \$22 per share plus the 4% annual increase).

10. Under the terms of the ESOP, the Stock will be valued by the independent trustee at least annually on the last day of the plan year, and on such other date or dates deemed necessary by the plan administrator. The trustee is LaSalle Bank, N.A., which has no other relationship with Brookshire or Holding. The trustee is required to determine the value of the Stock in good faith and based on all relevant factors for determining the fair market value of securities. The trustee's determination will include an appraisal of the Stock by an independent appraiser hired by the trustee.

11. In summary, it is represented that the proposed transaction satisfies the statutory criteria for an exemption under section 408(a) of the Act as follows:

(a) The exemption is administratively feasible because it involves only the application of the Minimum Price Guarantee;

(b) the exemption is in the interests of the ESOP and its participants and beneficiaries because such participants and beneficiaries will be protected until the value of the Stock recovers; and

(c) the exemption is protective of the rights of the ESOP's participants and beneficiaries because the total cost of the Minimum Price Guarantee will be borne by Brookshire.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons by first class mail or personal delivery within 30 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). Comments and requests for a public hearing are due within sixty (60) days following the publication of the proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Karen Lloyd of the Department, telephone (202) 219-8194. (This is not a toll-free number).

The Golden Comprehensive Security Program (the Security Program), The Golden Retirement Savings Program (the Savings Program); and (collectively, the Plans); Located in New York, New York

[Application Nos. D-10913; D-10914]

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, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective January 27, 2000, to the past acquisition and holding by the Savings Program of 1,896,294 publicly traded warrants and by the Security Program of 2,073,554 publicly traded warrants (the Warrants) of Golden Books Family Entertainment, Inc. (the Employer), a party in interest with respect to the Plans, provided that the following conditions were met:

(a) The acquisition and holding of the Warrants by the Plans occurred in connection with the Employer's bankruptcy proceeding (the Bankruptcy) pursuant to which all holders of the old common stock (the Old Stock) of the Employer were treated in the same manner;

(b) The Plans had little, if any, ability to affect the negotiation of the Employer's plan of reorganization with respect to the bankruptcy proceeding;

(c) The Warrants were acquired automatically and without any action on the part of the Plans; and

(d) The Plans did not pay any fees or commissions in connection with the receipt of the Warrants, nor did the Plans pay any fees or commissions in connection with the holding of the Warrants.

Effective Date: This exemption, if granted, will be effective as of January 27, 2000.

Summary of Facts and Representations

1. The Employer is a Delaware corporation with its principal place of business in New York, New York. It publishes, produces, licenses and markets an extensive range of children's and family-related media and entertainment products. The Employer has two business segments, which it operates primarily through its principal operating subsidiary, Golden Books Publishing: (i) Consumer Products, which includes its Children's

Publishing division, and (ii) Entertainment, which operates as the Golden Books Entertainment Group division. As of June 16, 2000, the Employer employs approximately 560 individuals, calculated on a full-time equivalent basis.

2. The Savings Program and the Security Program are both defined contribution profit sharing plans maintained by Golden Books Publishing pursuant to sections 401(a) and 401(k) of the Code. The Savings Program covers groups of employees of Golden Books Publishing and any other United States subsidiary of Golden Books Publishing to which the Savings Program has been extended by his or her employer, either unilaterally or through collective bargaining. Participants under the Savings Program generally include part-time and full-time hourly employees and retired hourly (collectively bargained and non-collectively bargained) employees. The Savings Program is administered by the GBPC Benefit Plans Administration Committee (the Committee) appointed by the Employer. As of December 31, 1999, the Savings Program had approximately 639 participants and total assets in excess of \$31 million.

The Security Program generally covers salaried employees (*i.e.*, employees whose basic compensation for services is paid in fixed amounts at stated intervals without regard to the number of hours worked) of Golden Books Publishing and any other United States subsidiary of Golden Books Publishing to which the Security Program has been extended by his or her employer. Employees who belong to a collective bargaining unit of employees represented by a collective bargaining representative are not eligible to participate in the Security Program. The Security Program is administered by the Committee. As of December 31, 1999, the Security Program had approximately 822 participants and total assets in excess of \$64 million.

At the time of the transaction, the percentage of the fair market value of the total assets of the Security Program that was involved in the transaction was less than 1%. The percentage of the fair market value of the total assets of the Savings Program that was involved in the transaction was less than 1%.

3. Putnam Fiduciary Trust Company (the Trustee), a trust company having its principal place of business in Boston, Massachusetts, is the trustee for the Plans. All money and such other property as shall be acceptable to the Trustee as shall from time to time be paid or delivered to the Trustee, all investments made therewith and

proceeds thereof and all earnings and profits thereon, less the payments which shall have been made by the Trustee, are held under the Western Publishing Group, Inc. Master Retirement Trust, the Plans' trust. The Trustee exercises no investment discretion over the assets involved in the transaction.

4. Under each of the Plans, participants previously could elect to have a portion or all of their tax deferred contributions, employer matching contributions and participant after-tax contributions invested in one or more investment funds established by the Committee, including the Parent Company Stock Fund, which invested solely in shares of Old Common Stock. In addition, employer profit sharing contributions could be, until the amendment of the Plans to eliminate the Parent Company Stock Fund as an investment alternative, invested by the Committee in the Parent Company Stock Fund. Approximately 473 participants out of a total of approximately 1,461 participants in the Plans have assets invested in the Parent Company Stock Fund.

5. In February 1999, the Employer reached an agreement with its major creditors pursuant to which its then existing long-term debt would be significantly reduced and its existing trade obligations would be paid in full. In accordance with that agreement, the Employer, as well as Golden Books Publishing and Golden Books Home Video, Inc. (the Debtors) filed petitions for reorganization under Chapter 11 of the United States Bankruptcy Code on February 26, 1999. Under an order dated September 24, 1999, the Bankruptcy Court confirmed the Debtor's Amended Joint Plan of Reorganization (the Reorganization Plan). Significant components of the Reorganization Plan were approved by the Bankruptcy Court on December 22, 1999. On January 27, 2000 (the Effective Date), the Debtors formally emerged from protection under the Bankruptcy Code upon the consummation of the Reorganization Plan.

The Reorganization Plan (i) divided claims and equity interests into various classes, (ii) set forth the treatment afforded to each class, and (iii) provided the means by which the Debtors would be reorganized under Chapter 11 of the Bankruptcy Code. Under the Reorganization Plan, the Debtors significantly reduced their long-term debt, secured a \$60 million financing arrangement and are paying all trade debt in full with interest.

Specifically, the Reorganization Plan provided for, among other things, the cancellation of all of the approximately

28 million shares of Old Common Stock outstanding at January 27, 2000 and the issuance to all holders of Old Common Stock, including the Plans, as of such date of 175,000 Warrants, in the aggregate.¹⁷ The Warrants have normal and customary terms for a security of this nature.

Approximately 473 participants (the Participants) under the Plans were effected by the cancellation of the Old Common Stock and the issuance of the Warrants. On the Effective Date, the Participants held through the Parent Company Stock Fund 731,753.322 shares of Old Common Stock and upon consummation of the Reorganization Plan the Participants received in the aggregate 3,969,848 Warrants to purchase an equal number of shares of New Common Stock. The Savings Program holds 1,896,294 Warrants and the Security Program holds 2073.554 Warrants.

The Reorganization Plan was approved by the affirmative vote of a majority of the more than 28 million outstanding shares of Old Common Stock entitled to vote on the Reorganization Plan. Because of the nominal amount of Old Common Stock held by the Plans in relation to the other stockholders of the Employer, the Plans had little, if any, ability to affect the negotiation of the Reorganization Plan. The acquisition and holding of the Warrants by the Plans occurred in connection with the Employer's bankruptcy proceeding pursuant to which all holders of the Old Stock of the Employer were treated in the same manner as a result of the Reorganization Plan. The Warrants were acquired by the Plans automatically and without any action on the part of the Plans. The Plans did not pay any fees or commissions in connection with the receipt and holding of the Warrants.

6. Currently, the disposition of the Warrants is pending the Bankruptcy. To the extent that there is or will be any discretion to be exercised regarding the Warrants, all decisions regarding the holding and disposition of the Warrants by the Plans will be made by the individual plan participants whose accounts in the Plans received the Warrants in connection with the Bankruptcy proceeding.

7. It is represented that the Warrants do not constitute qualifying employer

securities for purposes of section 407(d)(5) of the Act. The Employer represents that the Warrants held by the Plans would constitute an "employer security" within the meaning of 407(d)(1) of the Act but not a "qualifying employer security" under section 407(d)(5) of the Act inasmuch as the Warrants do not fall within any of the covered categories. Therefore, the Employer requests retroactive exemptive relief from the Department.

8. In summary, it is represented that the proposed transaction meets the statutory criteria of section 408(a) of the Act because:

(a) The acquisition and holding of the Warrants by the Plans occurred in connection with the Employer's bankruptcy proceeding pursuant to which all holders of the Old Stock of the Employer were treated in the same manner;

(b) The Plans had little, if any, ability to affect the negotiation of the Employer's plan of reorganization with respect to the bankruptcy proceeding;

(c) The Warrants were acquired automatically and without any action on the part of the Plans; and

(d) The Plans did not pay any fees or commissions in connection with the receipt of the Warrants, nor did the Plans pay any fees or commissions in connection with the holding of the Warrants.

Notice to Interested Persons: Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the Employer and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Khalif Ford of the Department, telephone (202) 219-8883 (this is not a toll-free number).

The FHP International Corporation 401(k) Savings Plan (the Plan); and The FHP International Corporation PAYSOP (the PAYSOP; together, the Plans), Located in Santa Ana, California

[Application Nos. D-10916 and D-10917]

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), 406(b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application

¹⁷ The Department also wishes to note that ERISA's general standards of fiduciary conduct would apply to the past acquisition and holding of the Old Stock by the Plans. In this regard, section 404(a) of the Act requires, among other things, that a plan fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries in a prudent fashion.

of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, from April 21, 1997 through May 20, 1997, to: (1) The past receipt by the Plans of certain rights (the Talbert Rights) to purchase shares of common stock (the Talbert Common Stock), par value \$.01 per share, of Talbert Medical Management Holding Corporation (Talbert); (2) the past holding of the Talbert Rights by the Plans; and (3) the disposition or exercise of the Talbert Rights by the Plans; provided that the following conditions are satisfied:

(A) The Plans' acquisition and holding of the Talbert Rights resulted from independent acts of FHP International Corporation (FHP) and Talbert as corporate entities, and all holders of common stock of FHP (FHP Common Stock) were treated in a like manner, including the Plans;

(B) With respect to Talbert Rights allocated to the Plans, the Talbert Rights were acquired solely for the accounts of participants who had directed investment of all or a portion of their account balances in FHP Common Stock pursuant to Plan provisions for individually-directed investment of participant accounts; and

(C) With respect to Talbert Rights allocated to the Plans, all decisions regarding the holding, disposition or exercise of the Talbert Rights were made, in accordance with Plan provisions for individually-directed investment of participant accounts, by the individual Plan participants whose accounts in the Plan received Talbert Rights, including all determinations regarding the exercise or sale of the Talbert Rights, except for those participants who failed to file timely and valid instructions concerning the exercise of the Talbert Rights (in which event the Talbert Rights were sold).

Effective Date: This exemption, if granted, will be effective from April 21, 1997 through May 20, 1997.

Summary of Facts and Representations

1. Prior to February 14, 1997, PacifiCare Operations, Inc. (formerly named "PacifiCare Health Systems, Inc.") (Old PacifiCare) was a publicly traded corporation, with shares of its common stock traded on the NASDAQ National Market. Old PacifiCare and its affiliated employers were engaged in the operation of numerous health maintenance organizations (HMOs), health plans and other similar businesses. Prior to February 14, 1997, FHP was a publicly traded corporation, with shares of its common stock traded on the NASDAQ National Market. FHP and its affiliated employers were

actively engaged in the operation of numerous HMOs, health plans and other similar businesses.

2. Pursuant to the Amended and Restated Agreement and Plan of Reorganization among Old PacifiCare, N-T Holdings, Inc., Neptune Merger Corp., Tree Acquisition Corp. and FHP, dated as of November 20, 1996, (the Merger Agreement), Old PacifiCare and FHP became subsidiaries of a new corporation, PacifiCare Health Systems, Inc. (New PacifiCare) on February 14, 1997 (the Merger).

3. Prior to the Merger, Old PacifiCare caused N-T Holdings, Inc., Neptune Merger Corp. and Tree Acquisition Corp. to be formed and organized in anticipation of the Merger Agreement. Neptune Merger Corp. and Tree Acquisition Corp. were each formed as wholly-owned subsidiaries of N-T Holdings, Inc. Upon the consummation of the Merger on February 14, 1997, Neptune Merger Corp. was merged into and with Old PacifiCare, and Old PacifiCare became a wholly-owned subsidiary of New PacifiCare. Simultaneously, Tree Acquisition Corp. was merged into and with FHP, and FHP became a wholly-owned subsidiary of New PacifiCare. N-T Holdings, Inc. was then renamed "PacifiCare Health Systems, Inc.," and, after the consummation of the Merger, was the parent company of Old PacifiCare and FHP. Shares of common stock of New PacifiCare are traded on the NASDAQ National Market.

4. As consideration for the Merger, holders of shares of FHP Common Stock, par value \$.05 per share, including the Plans, received cash, shares of New PacifiCare Class A common stock, par value \$.01 per share, shares of New PacifiCare Class B common stock, par value \$.01 per share, and were eligible to receive Talbert Rights in exchange for the shares of FHP Common Stock held on the date of the Merger.

5. Also, in connection with the Merger, Talbert Medical Management Corporation (TMMC) and Talbert Health Services Corporation (THSC), which were indirect, wholly-owned subsidiaries of FHP prior to February 14, 1997, became wholly-owned subsidiaries of Talbert. Subsequent to the Merger, Talbert became a privately held corporation with no affiliation with FHP, Old PacifiCare or New PacifiCare. However, the applicant represents that Talbert was an employer of employees covered by the Plan at the time of the issuance of the Talbert Rights.¹⁸

¹⁸ Section 407(d)(1) of the Act defines the term "employer security" as a security issued by an

6. The issuance of the Talbert Rights was commenced by Talbert effective as of April 21, 1997. Talbert Rights were issued pursuant to a public offering of such rights, and the Talbert Rights issued to the Plans were registered with the Securities and Exchange Commission. Participants (and the beneficiaries of deceased participants) in the Plans were offered the opportunity to direct the independent trustee of the Plans (the Trustee) to exercise or sell the Talbert Rights credited to their accounts in the Plans in accordance with the Plans' procedures, described below. Upon their issuance, and until the closing of the Talbert Rights offering period on May 20, 1997, Talbert Rights were tradable on the NASDAQ National Market. When the offering was completed on May 20, 1997, all of the Talbert Rights held by the Plans had been exercised or sold on or before that date. The shares of Talbert Common Stock received upon the exercise of the Talbert Rights, and the proceeds received upon the sale of the Talbert Rights, were allocated to the accounts of participants and beneficiaries in accordance with the terms of the Plans, described below.

7. In September, 1997, MedPartners, Inc., an unrelated party, commenced a tender offer for the outstanding shares of Talbert Common Stock, including the shares of Talbert Common Stock held by the Plans. Participants (and the beneficiaries of deceased participants) in the Plans were offered the opportunity to direct the Trustee with respect to the tender of shares of Talbert Common Stock credited to their accounts in the Plans in accordance with procedures described in the Plans. The Plan Committees directed the Trustee with respect to the tender of shares of Talbert Common Stock credited to the accounts of participants and beneficiaries for which tender directions were not received. The tender offer closed and the Plans received cash for shares of Talbert Common Stock tendered by the Plans on September 19, 1997. Effective as of the closing of the tender offer, Talmed Merger Corporation, a wholly-owned subsidiary of MedPartners, Inc., merged into Talbert, and all of the remaining shares

employer of employees covered by the plan, or by an affiliate of such employer. Section 3(5) of the Act defines the term "employer" to include any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan. In this regard, the Department is providing no opinion in this proposed exemption as to whether the Talbert Rights were considered an "employer security" at the time of their issuance by Talbert.

of Talbert Common Stock held by the Plans were converted to cash. Effective upon such merger, Talbert became a wholly-owned subsidiary of MedPartners, Inc.

8. Prior to February 14, 1997, FHP and its affiliated employers maintained the FHP International Corporation Employee Stock Ownership Plan (the Prior Plan). The Prior Plan consisted of three separate, but complementary, parts which were designed to satisfy the specific rules applicable to each part. The first part was an employee stock ownership plan intended to qualify under Code sections 401 and 4975(e)(7), the second part was a stock bonus plan intended to qualify under Code section 401, which included a cash or deferred arrangement intended to qualify under section 401(k), and the third part was a payroll-based tax credit employee stock ownership plan intended to qualify under Code sections 41, 401, 409 and 4975(e)(7). No additional employer contributions were allocated to the third part of the Prior Plan as of any date after December 31, 1986.

9. Effective as of February 14, 1997, the third part of the Prior Plan, which was a payroll-based tax credit employee stock ownership plan, was "spun off" into the PAYSOP as a separate plan. The PAYSOP was terminated effective as of February 14, 1997. FHP and certain of its subsidiaries continue to maintain the PAYSOP pending the complete termination and winding up of the PAYSOP. The estimated number of PAYSOP participants affected by the exemption proposed herein is 771. The percentage of the fair market value of the total assets of the PAYSOP involved in the subject transaction is 2.75%.

10. The first and second parts of the Prior Plan were continued as the Plan (which was renamed "The FHP International Corporation 401(k) Savings Plan" at that time). Effective as of February 14, 1997, the Plan was converted to a profit sharing plan intended to qualify under section 401 of the Code which includes a cash or deferred arrangement intended to qualify under Code section 401(k). Also, effective as of February 14, 1997, the Plan was amended to eliminate those provisions necessary for it to qualify as a stock bonus plan, an employee stock ownership plan or payroll-based tax credit employee stock ownership plan, to eliminate distributions in shares of FHP common stock, and to change certain other provisions. The estimated number of Plan participants affected by the exemption proposed herein is 9,060. The percentage of the fair market value of the total assets of the Plan involved in the subject transaction is 1.65%.

11. On or about April 1, 1999, account balances under the Plan not attributable to "Talbert Individuals" (as defined in the Employee Benefits and Compensation Allocation Agreement,¹⁹ dated as of February 14, 1997) were transferred to the PacificCare Health Systems, Inc. Savings and Profit Sharing Plan. As of April 15, 1999, FHP's sponsorship of the Plan terminated, and the then-members of the Administrative Committee were removed. Under the Assumption Agreement dated March 31, 1999, MedPartners, Inc. (MedPartners) became the sponsor of the Plan, but FHP retained all liability for making required filings relating to the period of time during which the FHP was a participating employer in the Plan. After the assumption of the Plan by MedPartners, MedPartners changed its name to "CareMark Rx, Inc.," and in May, 1999, the Plan was merged into another plan maintained by CareMark Rx, Inc. called the CareSave 401(k) Retirement Plan.

12. The FHP International Corporation 401(k) Savings Plan and The FHP International Corporation PAYSOP (i.e., the Plans) permitted participants to direct the investments of their accounts in the Plans into investment funds established under the Plans. Effective as of February 14, 1997, the Plans provided for investment in shares of New PacificCare Class A Common Stock, shares of New PacificCare Class C Common Stock, Talbert Rights and shares of Talbert Common Stock in accordance with the terms therein. The Plans provided that Talbert Rights, when issued to each Plan's Trustee, were to be allocated to the Talbert Common Stock Investment Fund, and were to be exercised or sold in accordance with the Plans' provisions. The Plans provided that a participant would have the opportunity to direct the exercise or sale of some or all of the Talbert Rights credited to such participant's accounts in the Plans. However, a physician in a position to make referrals to Talbert Health Services Corporation was not provided the opportunity to direct the exercise of the Talbert Rights credited to his or her accounts, and the Talbert Rights credited to such a participant's accounts were to be sold by the Plans if the Talbert Rights had value at the time of the sale.

13. A participant entitled to direct the exercise or sale of the Talbert Rights credited to his or her account could

make such direction in accordance with a telephonic procedure not later than 1 p.m. Pacific Daylight Time on May 13, 1997.²⁰ Materials were provided to the participants by letter dated April 21, 1997. Thus, participants had approximately 20 days in which to act. The materials received by the participants included: (a) Final Prospectus dated April 21, 1997 relating to shares of Talbert Common Stock and the Talbert Rights pursuant to the Talbert Rights offering; (b) Summary Plan Description for the FHP International Corporation Employee Stock Ownership Plan (the ESOP); (c) Prospectus Supplement dated April 21, 1997 for the Plan and the PAYSOP; and (d) March 10, 1997 letter describing the changes in the ESOP. In the case of a participant who failed to make a timely direction in accordance with such telephonic procedure, the Plans provided that the Talbert Rights credited to his or her account were to be sold by the Plan if the Talbert Rights had value at the time of the sale.

14. The Plans provided that in the case of a participant who directed the exercise of some or all of the Talbert Rights credited to his or her accounts, the amounts held in the other investment funds in which such participant's accounts were invested (i.e., those investment funds other than the investment funds in which the Talbert Rights or shares of New PacificCare stock were held) would be liquidated proportionately to the extent necessary to provide the exercise price with respect to Talbert Rights being exercised. In the event all of such investments were liquidated, the participant's Plan or PAYSOP investments in New PacificCare Class A Common Stock and New PacificCare Class B Common Stock would be liquidated to the extent necessary to provide such exercise price.

15. The decision whether to sell the Talbert Rights allocated to a particular participant's account was made by the participant. Once the decision to sell had been made by the Plans' participants, the Plan Committees then directed the Trustee when, during the five trading days beginning on May 14, 1997 and ending on May 20, 1997, the Talbert Rights would be sold (if they had value at the time of the sale). The reason the Talbert Rights were sold over a five-day period (instead of all at once) was to avoid adversely affecting the price of the rights. The Plan

¹⁹ Talbert Individuals are defined in that Agreement to include, essentially, active employees and former employees of Talbert, TMMC and THSC, their dependents, beneficiaries, and alternate payees under qualified domestic relations orders.

²⁰ In the case of such a participant who was a resident of Guam and who gave his or her direction in writing, such direction had to have been received not later than May 8, 1997.

Committees, assisted by Buck Consultants (Buck), established a special telephone line containing a menu driven voice response system. The line was manned by employees of Buck. Participants were notified in writing that their elections were to be made through the use of this telephone system. The elections were collected by Buck, and aggregate results for the Plans were forwarded to the Plans' Trustee, Wells Fargo Bank (the Bank). The Bank then exercised and sold the appropriate number of Talbert Rights in accordance with the Participants' directions. Each Talbert Right sold was to be treated as having been sold for the average sale price (net of selling expenses) of the Talbert Rights sold by the Plans. The proceeds from the sale of the Talbert Rights credited to a participant's accounts were to be invested in accordance with such participant's existing investment directions applicable to new contributions, and if there were no such directions, in an investment fund designated under the Plan if the Talbert Rights had value at the time of the sale. Talbert Rights held as unallocated forfeitures were to be sold by the Plans if the Talbert Rights had value at the time of the sale.

16. In summary, the applicant represents that the transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (a) The Plans' acquisition of the Talbert Rights resulted from the independent acts of FHP and Talbert as corporate entities; (b) all holders of FHP Common Stock, including the Plans, were treated in a like manner with respect to the Talbert Rights; (c) with respect to Talbert Rights allocated to the Plans, the Talbert Rights were acquired solely for the accounts of participants who had directed investment of all or a portion of their account balances in FHP Common Stock pursuant to plan provisions for individually-directed investment of participant accounts; (d) the Talbert Rights offering period extended only from April 21, 1997 through May 20, 1997, so the Talbert Rights were held by the Plans for no more than 30 days; (e) the Plans' participants and beneficiaries were afforded a reasonable opportunity to direct the sale or exercise of the Talbert Rights credited to their accounts; (f) the Plans' participant direction procedure was administered by an independent fiduciary (*i.e.*, the Bank); and (g) the Plan Committees exercised investment discretion only with respect to undirected investments in Talbert Rights and acted only in accordance with the procedures specified in the disclosures made to the

Plan participants who received the Talbert Rights.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions 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 4th day of September, 2001.

Ivan Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-10997]

Notice of Proposed Individual Exemption To Modify Prohibited Transaction Exemption 97-08 (PTE 97-08) Involving Morgan Stanley Dean Witter & Co. Incorporated (MSDW&Co) Located in New York, NY

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

ACTION: Notice of proposed individual exemption to modify PTE 97-08.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual administrative exemption which, if granted, would amend PTE 97-08 (62 FR 4811, January 31, 1997), an exemption which was granted to Morgan Stanley & Co., Incorporated (MSC), a subsidiary of MSDW&Co. PTE 97-08 provided relief for certain securities lending, principal transactions, and extensions of credit. If granted, this proposed exemption to modify PTE 97-08 would permit a U.S. affiliate of a foreign broker-dealer to guaranty the obligations of such broker-dealer that arise in connection with transactions described in PTE 97-08 and would affect the participants and beneficiaries of certain employee benefit plans (the Plans or Plan) participating in such transactions and the fiduciaries with respect to such plans.

EFFECTIVE DATE: If granted, the proposed amendments will be effective, as of August 25, 1995, the effective date of PTE 97-08.

DATES: Written comments and requests for a public hearing should be received by the Department on or before October 22, 2001.

ADDRESSES: All written comments and requests for a public hearing (preferably, three copies) should be sent to the Office of Exemption Determinations, Pension and Welfare Benefits Administration, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Application No. D-10997.