

3. Administrative Capability

a. The applicant organization demonstrates experience managing a variety of programs.

b. The applicant organization has administered, or will work with an organization that has administered, a number of different Federal and/or State grants over the past five years.

c. The application is complete, including forms, budget detail, narrative and workplan, and required attachments.

4. Budget

a. The budgeted costs are reasonable.

b. The proposed non-Federal matching share for the first year is at least 10% of the total budget for Institutional Competency Building Grant applications.

c. The budget complies with Federal cost principles (which can be found in applicable OMB Circulars) and with OSHA budget requirements contained in the grant application instructions.

d. The cost per trainee is less than \$500 and the cost per training hour is reasonable.

In addition to the factors listed above, the Assistant Secretary will take other items into consideration, such as the geographical distribution of the grant programs and the coverage of populations at risk.

How Much Money is Available for Grants?

Once the fiscal year 2001 appropriations bill becomes law, approximately \$4.7 million will be available for the Institutional Competency Building Grants. The average Federal award for first year activities will be \$250,000. Grants will be awarded annually for competency building programs for periods of up to five years.

How Long are Grants Awarded for?

The multi-year Institutional Competency Building Grants program will fund selected organizations for a period of up to five years in order to assist them in developing their safety and health training, education and related assistance capacity. Annual refunding is dependent on the grantee's satisfactory performance, the availability of funds, and an increasing non-Federal matching share.

How do I get a Grant Application Package?

Grant application instructions may be obtained from the OSHA Office of Training and Education, Division of Training and Educational Programs, 1555 Times Drive, Des Plaines, Illinois

60018. The application instructions are also available at <http://www.osha-slc.gov/Training/sharwood/sharwood.html>.

When and Where are Applications to be Sent?

The application deadline is 4:30 p.m. Central Time, Friday, October 27, 2000.

Applications are to be sent to the Division of Training and Educational Programs, OSHA Office of Training and Education, 1555 Times Drive, Des Plaines, IL 60018. Applications may be sent by fax to (847) 297-6636.

How will I be Told if my Application was Selected?

Organizations selected as grant recipients will be notified by a representative of the Assistant Secretary, usually from an OSHA Regional Office. An applicant whose proposal is not selected will be notified in writing.

Notice that an organization has been selected as a grant recipient does not constitute approval of the grant application as submitted. Before the actual grant award, OSHA may enter into discussions concerning such items as program components, funding levels, and administrative systems. If the negotiations do not result in an acceptable submittal, the Assistant Secretary reserves the right to terminate the negotiation and decline to fund the proposal.

Signed at Washington, DC, this 10th day of August 2000.

Charles N. Jeffress,

Assistant Secretary of Labor.

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. L-10667, et al.]

Proposed Exemptions; Kwik-Copy Corporation Employees Welfare Benefit Plan and Trust (the Plan)

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, NW., Washington, DC 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.

Kwik-Copy Corporation Employees Welfare Benefit Plan and Trust (the Plan), Located in Cypress Creek, TX

[Application No. L-10667]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act 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) of the Act shall not apply to the cash sale by the Plan of certain recreational facilities (the Recreational Facilities) to the International Center for Entrepreneurial Development, Inc. (ICED), the parent of Kwik-Copy Corporation (Kwik-Copy),¹ the Plan sponsor, and a party in interest with respect to the Plan.²

This proposed exemption is subject to the following requirements:

(a) The proposed sale is a one-time transaction for cash.

(b) The fair market value of the Recreational Facilities has been determined by qualified, independent appraisers who propose to update their valuation of the Recreational Facilities on the date of the sale.

(c) On the date of the sale, the Plan receives an amount which is equal to the greater of the fair market value of the Recreational Facilities or the Plan's total acquisition costs.

(d) The Plan pays no fees or commissions in connection with the proposed sale.

Summary of Facts and Representations

1. The Plan was established by Kwik-Copy on February 25, 1983 to provide welfare benefits, such as health benefits and life insurance, to employee-participants of Kwik-Copy. The Plan constitutes a VEBA in which benefits

are funded only when they are incurred. In this regard, employer contributions are immediately "passed through" to the Plan to pay current welfare benefits and there is no build-up of the trust corpus. As a VEBA, the Plan is exempt from taxation under section 501(c)(9) of the Code³ and, as noted previously, it is not qualified under section 401(a) of the Code.⁴

As of January 31, 2000, the Plan had 120 participants and net assets available for benefits of approximately \$313,431. The persons who have investment discretion over the Plan's assets are F. C. Hadfield, Chairman of the Board of ICED, and Stephen B. Hammerstein, President of ICED. Both Messrs. Hadfield and Hammerstein also serve as the plan trustees (the Trustees).

2. Kwik-Copy, the Plan sponsor, is the franchiser of printing centers in various parts of the world. It conducts business under the principal trademarks "Kwik Copy Printing" and "Kall Kwik Printing." Kwik-Copy assists individuals in acquiring and operating these printing centers. Kwik-Copy maintains its principal place of business at One Kwik-Copy Way, Cypress, Texas.

3. ICED also maintains its principal place of business at One Kwik-Copy Way, Cypress, Texas. Kwik-Copy is a wholly owned subsidiary of ICED. ICED is engaged in the business of franchising printing centers and other businesses.

4. On April 26, 1984, the Plan entered into a written agreement (the License) with Kwik-Copy which entitled the Plan to use a portion of a tract of land that is adjacent to the Kwik-Copy's offices for recreational purposes.⁵ The entire tract of land is legally described as "106.0936 acres of land out of the O.T. Taylor Survey, Abstract 759, and the Alexander Burnett Survey, Abstract 109, Harris County, Texas." The land is located along the west line of Telge Road at Cypress Creek in Northwest

Harris County, Cypress Creek, Texas, and is owned in its entirety by Kwik-Copy. The portion of the vacant land that was allocated to the Plan for purposes of the License consisted of 0.4226 acres or 18,585 square feet.

The initial term of the License was 10 years, which commenced on May 1, 1984 and ended on April 30, 1994. On May 1, 1994, the License was extended by the parties for an additional 10 year term, which will end on April 30, 2004. The current License term may also be extended again by the parties unless the Plan gives Kwik-Copy three months advance notice of its intention to terminate the License arrangement.

Since its execution, the License has required the Plan to pay Kwik-Copy \$1.00 in annual consideration each January 1. However, no such payments have ever been made by the Plan.

The License requires Kwik-Copy to keep the underlying property in good order, make all repairs and take such other actions as may be necessary or appropriate for the maintenance of such property. In addition, Kwik-Copy is required to keep the property insured and it has named both itself and the Plan as the insureds under such policy.

4. Between 1984 and 1989, the Trustees had the Recreational Facilities constructed on the parcel of land that was subject to the License. The Recreational Facilities consist of a cafeteria, swimming pool and tennis courts, and they constitute the sole assets of the Plan. The Recreational Facilities were constructed in order to provide recreational benefits to participants pursuant to applicable provisions under the Plan.⁶ In this regard, section 8.16(a) of the Plan document expressly states that—

Participants shall be entitled to the use of a recreation and vacation facility to be acquired or constructed by the Trustees within the State of Texas with Trust assets. Said facility, which shall be owned by the Trustees and subject to the Trustees' control and disposition, shall provide Participants with healthy activities of a nature tending to encourage relaxation and thus assist in combating fatigue by the Participants, thereby protecting against contingencies interrupting or impairing Participants' earning power. It is intended that said facility provide recreational benefits such as tennis

³ Section 501(c)(9) of the Code provides an exemption from federal taxation for a VEBA which provides for the payment of life, sick, accident, or other benefits to the members of such VEBA or their dependents or their designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

⁴ Section 401(a) of the Code sets forth the qualification requirements for pension, profit sharing and stock bonus plans and prescribes special rules thereunder.

⁵ In a letter dated October 17, 1983 to the Internal Revenue Service regarding the Plan's tax-qualified status, one of the former Trustees, Mr. Joe A. Lambert, confirmed that Kwik-Copy would own the underlying land since property values in the Houston area had appreciated substantially and a sale of the underlying land to the Plan would have ultimately increased the cost of the Recreational Facilities that are described herein and reduced the amount of cash needed to provide other benefits to Plan participants.

⁶ The Department notes that section 404(a)(1) of the Act requires, among other things, that a fiduciary of a plan act prudently, and solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries. However, in this proposed exemption, the Department expresses no opinion on whether the Plan's investment in the Recreational Facilities has satisfied the requirements of section 404(a)(1) of the Act or has otherwise violated certain fiduciary responsibility provisions of Part 4 of Title I of the Act.

¹ Unless otherwise noted, Kwik-Copy and ICED are together referred to as the Applicants.

² Because the Plan is a voluntary employees' beneficiary association trust (VEBA), it is not qualified under section 401 of the Code. Therefore, there is no jurisdiction under Title II of the Act pursuant to section 4975 of the Code. However, the Department is assuming, for purposes of this proposal, that there is jurisdiction under Title I of the Act pursuant to section 3(1) of the Act.

courts, swimming pool(s), a fishing pond, billiard and ping-pong tables, etc.

5. The Trustees caused the Recreational Facilities to be constructed on behalf of the Plan based upon cash contributions that the Plan received from Kwik-Copy and for which Kwik-Copy took corresponding tax deductions. In this regard, Kwik-Copy contributed \$505,434 to the Plan for the construction of the cafeteria building, \$63,128 for the construction of the swimming pool and \$22,714 for the construction of the tennis courts, thereby bringing the aggregate contribution to the Plan for the construction of the Recreational Facilities to \$591,276. This total contribution for the Recreational Facilities was in addition to amounts that were contributed by Kwik-Copy to the Plan for medical and life insurance benefits.

The Plan has incurred no out-of-pocket expenses in connection with its ownership of the Recreational Facilities nor has it received any additional income. All maintenance expenses that are associated with the Recreational Facilities have been paid by Kwik-Copy.

According to the Applicants, under Texas law, the Plan's title to the Recreational Facilities has not merged into the underlying real property owned by Kwik-Copy. Therefore, the Recreational Facilities have not become fixtures.⁷ Also, the Applicants represent that under applicable Treasury Regulations,⁸ the Recreational Facilities cannot revert to Kwik-Copy on the Plan's termination because the assets

⁷ The Applicants explain that Texas case law and not Texas statutory law governs whether property affixed to a parcel of land by a licensee remains the property of the licensee or becomes the property of the landowner upon the termination of the license. The Applicants represent that the general rule in Texas is that property affixed to the land of another under a license from the owner remains the personal property of the licensee, unless the licensee has intended otherwise. To illustrate this principle, the Applicants cite *Wright v. McDonnell*, 30 SW 907 (Tex. 1895), which involved buildings affixed to land.

In addition, the Applicants note that the line of Texas cases pertaining to the issue of whether personalty has merged into the dominant estate have all involved a dispute between a landowner and a licensee as to the ownership of certain property at the end of the license. The Applicants indicate that, in the present case, there is no such dispute or claim to that effect because Kwik-Copy has agreed that it does not, and will not, own the affixed assets at the end of the License. Thus, the Applicants conclude that the intent of the parties is that the Recreational Facilities are personalty owned by the Plan.

⁸ The last sentence of Treasury Regulations Section 1.501(c)(9)-4(d) generally provides that if, upon termination of a VEBA, the VEBA's assets are distributed to its contributing employer, a prohibited inurement will exist and the VEBA will fail to qualify under section 501(c)(9) of the Code.

must be expended to provide benefits to Plan participants.

6. During 1998, efforts were underway to sell either ICED or Kwik-Copy to unrelated parties. Although there was no purchaser, the Applicants believe that this transaction could resurface at any time. Therefore, in the interim, the Applicants propose to have ICED purchase the Recreational Facilities from the Plan and hereby request an administrative exemption from the Department for such transaction. The Applicants represent that the sale proceeds will be used to satisfy future health claims of the participants until such amounts have been exhausted. Then, the Applicants contemplate terminating the Plan in order to facilitate the sale of Kwik-Copy's entire business premises, including the Recreational Facilities, to an unrelated party.

7. The Recreational Facilities were initially appraised by Gary Brown, M.A.I., President of Gary Brown & Associates, Inc. of Houston, Texas. Mr. Brown is an independent fee appraiser who has been actively involved, among other things, in real property valuation, lease negotiations and rendering expert witness testimony. Mr. Brown is unrelated to Kwik-Copy, ICED and their principals.

In an appraisal report dated February 15, 1998, Mr. Brown placed the fair market value of the Recreational Facilities in an "as is" condition at \$280,000 as of February 3, 1998. In valuing the Recreational Facilities, Mr. Brown utilized the Cost Approach to valuation due to the "special use" nature of the Recreational Facilities, the fact that the Recreational Facilities are not replaceable through purchase or lease, and the lack of sales of comparable properties by which to assess fair market value. Mr. Brown also determined that the "highest and best use" of the Recreational Facilities was their "value in use" and that an individual component sale would result in a "liquidation value" for such properties.

In an addendum to the appraisal report dated August 11, 1998, Mr. Brown again concluded that the fair market value of the Recreational Facilities was \$280,000. He noted that the Recreational Facilities were an integral part of Kwik-Copy's world headquarters and that these structures could not stand alone as a separate economic unit. Therefore, Mr. Brown emphasized that the "highest and best use" of the Recreational Facilities was in conjunction with the other improvements comprising Kwik-Copy's property.

In a full, updated appraisal report dated November 24, 1999, Mr. Brown and his colleague, Mr. Michael E. Gentry, Associate Appraiser, also a qualified, independent appraiser with Gary Brown & Associates, Inc., indicated that they had personally inspected the Recreational Facilities, conducted required investigations, gathered necessary data and analyzed the information in order to determine the appropriate fair market value. Messrs. Brown and Gentry noted that due to the specific use and design of the Recreational Facilities, it would take approximately 18 months to market the subject improvements to a limited number of potential purchasers. Therefore, on the basis of these findings, Messrs. Brown and Gentry placed the fair market value of the Recreational Facilities at \$300,000 as of November 24, 1999, again using the Cost Approach to valuation.

8. The Applicants contemplate that the proposed sales price for the Recreational Facilities will be equal to the greater of the independently appraised value of such improvements as of the date of the sale or their total acquisition cost. The consideration will be paid by ICED in cash. In addition, Messrs. Brown and Gentry will be required to update their valuation of the Recreational Facilities on the day the sale is consummated. Further, the Plan will not be required to pay any real estate fees or commissions in connection with such transaction.

Thus, based upon the foregoing, because the \$591,276 total cost for the Recreational Facilities is in excess of their \$300,000 current fair market value, the Applicants state that ICED will pay the Plan the greater amount for such property.

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

(a) The proposed sale will be a one-time transaction for cash.

(b) The fair market value of the Recreational Facilities has been determined by qualified, independent appraisers who will update their valuation of the Recreational Facilities on the date of the sale.

(c) On the date of sale, the Plan will receive an amount which is equal to the greater of the fair market value of the Recreational Facilities or the Plan's total acquisition costs.

(d) The Plan will pay no fees or commissions in connection with the proposed sale.

Notice to Interested Persons

Notice of the proposed exemption will be provided to interested persons within 30 days after the publication of the proposed exemption in the **Federal Register**. Notice will be given to active employees of Kwik-Copy by hand delivery and by first class mail to each participant who is not actively working for Kwik-Copy. The 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 with respect to the proposed exemption. Comments with respect to the proposed exemption are due within 60 days of 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.)

DuPont Capital Management Corporation, Located in Wilmington, DE

[Exemption Application Nos.: D-10744 through D-10746]

Proposed Exemption

The Department of Labor 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 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).⁹

I. Transactions

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply to a transaction between a party in interest with respect to certain plans (the Former DuPont Related Plans), as defined in Section II(e), below, and an investment fund in which such plans have an interest (Investment Fund), as defined in Section II(k), below, provided that DuPont Capital Management Corporation (DCMC) has discretionary authority or control with respect to the plan assets involved in the transaction and the following conditions are satisfied:

(a) DCMC is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total assets, including in-house plan assets (In-house Plan Assets), as defined in Section II(g), below, under its management and control in excess of \$100 million and either:

(1) shareholders' or partners equity, as defined in Section II(j), below, in excess of \$750,000; or

(2) payment of all its liabilities, including any liabilities that may arise by reason of a breach or violation of a duty described in sections 404 or 406 of the Act, is unconditionally guaranteed by—a person with a relationship to DCMC, as defined in Section II(a)(1), below, if DCMC and such affiliate have, as of the last day of their most recent fiscal year, shareholders' equity, in the aggregate, in excess of \$750,000;

(b) At the time of the transaction, as defined in Section II(m), below, the party in interest or its affiliate, as defined in Section II(a), below, does not have, and during the immediately preceding one (1) year has not exercised, the authority to—

(1) Appoint or terminate DCMC as a manager of any of the Former DuPont Related Plans' assets; or

(2) Negotiate the terms of the management agreement with DCMC (including renewals or modifications thereof) on behalf of the Former DuPont Related Plans;

(c) The transaction is not described in—

(1) Prohibited Transaction Class Exemption 81-6 (PTCE 81-6)¹⁰ (relating to securities lending arrangements);

(2) Prohibited Transaction Class Exemption 83-1 (PTCE 83-1)¹¹ (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Class Exemption 82-87 (PTCE 82-87)¹² (relating to certain mortgage financing arrangements);

(d) The terms of the transaction are negotiated on behalf of the Investment Fund by, or under the authority and general direction of, DCMC, and either DCMC, or (so long as DCMC retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by DCMC, makes the decision on behalf of the Investment Fund to enter into the transaction;

(e) At the time the transaction is entered into, and at the time of any

subsequent renewal or modification thereof that requires the consent of DCMC, the terms of the transaction are at least as favorable to the Investment Fund as the terms generally available in arm's length transactions between unrelated parties;

(f) Neither DCMC nor any affiliate thereof, as defined in Section II(b), below, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in DCMC is a person who, within the ten (10) years immediately preceding the transaction, has been either convicted or released from imprisonment, whichever is later, as a result of:

(1) any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization;

(2) any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(3) income tax evasion;

(4) any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or

(5) any other crimes described in section 411 of the Act.

For purposes of this Section I(f), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether the judgment remains under appeal;

(g) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(h) The party in interest dealing with the Investment Fund:

(1) Is a party in interest with respect to the Former DuPont Related Plans (including a fiduciary) solely by reason of providing services to the Former DuPont Related Plans, or solely by reason of a relationship to a service provider described in section 3(14)(F),(G),(H), or (I) of the Act;

(2) Does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR § 2510.3-21(c)) with respect to those assets; and

(3) Is neither DCMC nor a person related to DCMC, as defined in Section II(i), below;

(i) DCMC adopts written policies and procedures that are designed to assure

⁹ For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to the corresponding provisions of the Code.

¹⁰ 46 FR 7527, January 23, 1981.

¹¹ 48 FR 895, January 7, 1983.

¹² 47 FR 21331, May 18, 1982.

compliance with the conditions of the exemption;

(j) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act and who so represents in writing, conducts an exemption audit, as defined in Section II(f), below, on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the Former DuPont Related Plans presenting its specific findings regarding the level of compliance with the policies and procedures adopted by DCMC in accordance with Section I(i), above, of this exemption; and

(k)(1) DCMC or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the persons described in Section I(k)(2), below, to determine whether the conditions of this exemption have been met, except that (a) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of DCMC and/or its affiliates, the records are lost or destroyed prior to the end of the six (6) year period, and (b) no party in interest or disqualified person other than DCMC shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by Section I(k)(2), below, of this exemption.

(2) Except as provided in Section I(k)(3), below, of this exemption, and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in Section I(k)(1), above, of this exemption are unconditionally available for examination at their customary location during normal business hours by:

(A) any duly authorized employee or representative of the Department or of the Internal Revenue Service;

(B) any fiduciary of any of the Former DuPont Related Plans investing in the Investment Fund or any duly authorized representative of such fiduciary;

(C) any contributing employer to any of the Former DuPont Related Plans investing in the Investment Fund or any duly authorized employee representative of such employer;

(D) any participant or beneficiary of any of the Former DuPont Related Plans investing in the Investment Fund, or any duly authorized representative of such participant or beneficiary; and,

(E) any employee organization whose members are covered by such Former DuPont Related Plans;

(3) None of the persons described in Section I(k)(2)(B) through (E), above, of this exemption shall be authorized to examine trade secrets of DCMC or its affiliates or commercial or financial information which is privileged or confidential.

II. Definitions

(a) For purposes of Section I (a) and (b), above, of this exemption, an "affiliate" of a person means—

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

(2) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, 5 percent (5%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets. A named fiduciary, within the meaning of section 402(a)(2) of the Act, of a Plan, and an employer any of whose employees are covered by the plan, will be considered affiliates with respect to each other for purposes of Section I(b), if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(b) For purposes of Section I(f), above, of this exemption, an "affiliate" of a person means—

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

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent (5%) or more partner or owner, and

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent (10%) or more of the yearly wages of such person), or

(B) Has direct or indirect authority, responsibility or control regarding the

custody, management, or disposition of plan assets.

(c) For purposes of Section II(e) and (g), below, of this exemption an "affiliate" of DCMC includes a member of either:

(1) a controlled group of corporations, as defined in section 414(b) of the Code, of which DCMC is a member, or

(2) a group of trades or businesses under common control, as defined in section 414(c) of the Code, of which DCMC is a member; provided that "50 percent" shall be substituted for "80 percent" wherever "80 percent" appears in section 414(b) or 414(c) of the rules thereunder.

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

(e) "Former DuPont Related Plans" mean:

(1) CONSOL Inc. Employee Retirement Plan (the CONSOL Plan);

(2) the Pension Plan for Consolidation Coal Company Local 5400 Union Employees (the CONSOL Union Plan);

(3) the Investment Plan for Salaried Employees of CONSOL, Inc. (the CONSOL DC Plan);

(4) the Thrift Plan for Employees of Conoco, Inc. (the Conoco DC Plan);

(5) any plan the assets of which include or have included assets that were managed by DCMC, as an in-house asset manager (INHAM), pursuant to Prohibited Transaction Class Exemption 96-23 (PTCE 96-23)¹³ but as to which PTCE 96-23 is no longer available because such assets are no longer held under a plan maintained by an affiliate of DCMC (as defined in Section II(c), above, of this exemption); and

(6) any plan (the Add-On Plan) that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of DCMC (as defined in Section II(c), above, of this exemption); provided that: (A) The assets of the Add-On Plan are invested in a commingled fund (the Commingled Fund) with the assets of a plan or plans, described in Section II(e)(1)-(5), above; and (B) the assets of the Add-On Plan in the Commingled Fund do not comprise more than 25 percent (25%) of the value of the aggregate assets of such Fund, as measured on the day immediately following the commingling of their assets.

(f) "Exemption audit" of any of the Former DuPont Related Plans must consist of the following:

(1) A review of the written policies and procedures adopted by DCMC,

¹³ 61 FR 15975 (April 10, 1996).

pursuant to Section I(i), above, of this exemption for consistency with each of the objective requirements of this exemption, as described in Section II(f)(5), below:

(2) A test of a representative sample of the subject transactions in order to make findings regarding whether DCMC is in compliance with:

(A) the written policies and procedures adopted by DCMC, pursuant to Section I(i), above, of this exemption; and

(B) the objective requirements of this exemption;

(3) A determination as to whether DCMC has satisfied the requirements of Section I(a), above, of this exemption;

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings; and

(5) For purposes of Section II(f) of this exemption, the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by DCMC to assure compliance with each of these requirements:

(A) the requirements of Section I(a), above, of this exemption regarding registration under the Investment Advisers Act of 1940, total assets under management, and shareholders' or partners' equity;

(B) the requirements of Part I and Section I(d) of this exemption, regarding the discretionary authority or control of DCMC with respect to the asset of the Former DuPont Related Plans involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the Former DuPont Related Plans to enter into the transaction;

(C) the transaction is not entered into with any person who is excluded from relief under Section I(h)(1), above, of this exemption, Section I(h)(2) to the extent such person has discretionary authority or control over the plan assets involved in the transaction, or Section I(h)(3); and

(D) the transaction is not described in any of the class exemptions listed in Section I(c), above, of this exemption.

(g) "In-house Plan Assets" means the assets of any plan maintained by an affiliate of DCMC, as defined in Section II(c), above, of this exemption and with respect to which DCMC exercises discretionary authority or control.

(h) The term, "party in interest," means a person described in section 3(14) of the Act and includes a "disqualified person," as defined in section 4975(e)(2) of the Code.

(i) DCMC is "related" to a party in interest for purposes of Section I(h)(3) of

this exemption, if the party in interest (or a person controlling, or controlled by, the party in interest) owns a 5 percent (5%) or more interest in DCMC, or if DCMC (or a person controlling, or controlled by DCMC) owns a 5 percent (5%) or more interest in the party in interest.

For purposes of this definition:

(1) The term, "interest," means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation,

(B) The capital interest or the profits interest of the entity if the entity is a partnership; or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest.

(j) For purposes of Section I(a) of this exemption, the term, "shareholders'" or "partners' equity," means the equity shown in the most recent balance sheet prepared within the two (2) years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

(k) "Investment Fund" includes a single customer and pooled separate account maintained by an insurance company, individual trust and common collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of DCMC) is subject to the discretionary authority of DCMC.

(l) The term, "relative," means a relative as that term is defined in section 3(15) of the Act, or a brother, sister, or a spouse of a brother or sister.

(m) The "time" as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after the date when the grant of this exemption is published in the **Federal Register** or a renewal that requires the consent of DCMC occurs on or after such publication date and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be

satisfied thereafter with respect to the transaction. Nothing in this subsection shall be construed as exempting a transaction entered into by an Investment Fund which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of this exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption. In determining compliance with the conditions of the exemption at the time that the transaction was entered into for purposes of the preceding sentence, Section I(h) of this exemption will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

Temporary Nature of Exemption

The Department has determined that the relief provided by this proposed exemption is temporary in nature. The exemption, if granted, will be effective upon the date the final exemption is published in the **Federal Register** and will expire on the day which is six (6) years from the date of such publication. Accordingly, the relief provided by this proposed exemption will not be available upon the expiration of such six-year period for any new or additional transactions, as described herein, after such date, but would continue to apply beyond the expiration of such six-year period for continuing transactions entered into within the six-year period. Should the applicant wish to extend, beyond the expiration of such six-year period, the relief provided by this proposed exemption to new or additional transactions, the applicant may submit another application for exemption.

Summary of Facts and Representations

1. DCMC, a wholly owned subsidiary of DuPont, is organized as a Delaware corporation with its principal office in Wilmington, Delaware. DCMC is an investment adviser registered under the Investment Advisers Act of 1940. As of December 31, 1998, DCMC had total assets under its management with an aggregate market value of approximately \$20.7 billion. It is represented that DCMC either has shareholders' equity in excess of \$750,000 or payment of all its liabilities, including any liabilities that may arise by reason of a breach or violation of a duty described in sections 404 or 406 of the Act, is unconditionally guaranteed by an affiliate of DCMC, as defined in Section II(a)(1) of this proposed exemption, if DCMC and such

affiliate have, as of the last day of their most recent fiscal year, shareholders' equity, in the aggregate, in excess of \$750,000.

DCMC provides investment management services to employee benefit plans, including plans sponsored by DuPont and its subsidiaries and affiliates (the DuPont Group), with respect to a spectrum of investments consisting primarily of domestic and international equities, fixed-income securities, and various alternative investments (including real estate, venture capital and commodity futures). DCMC primarily utilizes value-based investment strategies with the objective of achieving maximum return consistent with levels of risk suitable to each plan. In this regard, DCMC uses the services of investment professionals employed by DuPont Pension Fund Investment (DPFI), a division of DuPont.

2. In July of 1997, DCMC replaced DPFI as investment manager for the assets of the DuPont Pension Trust Fund (the Trust). In this regard, DCMC represents that it qualified as an INHAM, as defined in section IV(a) of PTCE 96-23, and relied on the relief provided by that class exemption in connection with its management of the assets of the Trust.¹⁴ As of December 31, 1997, the value of the assets held by the Trust was approximately \$17.7 billion.

3. It is represented that CONSOL, Inc. (CONSOL) was a member of the DuPont Group prior to November 5, 1998. At that time, the Trust held the assets of the CONSOL Plan and the CONSOL Union Plan both of which are sponsored by CONSOL. As of December 31, 1997, approximately \$184 million of the assets held by the Trust related to the CONSOL Plan and approximately \$759,000 related to the CONSOL Union Plan. On November 5, 1998, DuPont divested substantially all of its holdings in CONSOL. As of March 3, 1999, the CONSOL Plan and the CONSOL Union Plan had approximately 6,703 and 44 participants and beneficiaries, respectively. Based on the success of DCMC's investment strategy and the long term experience with DCMC's investment professionals, as of June 1, 1999, CONSOL determined that it was in the best interest of the CONSOL Plan and the CONSOL Union Plan for DCMC

to continue to manage the assets of such plans.¹⁵

As a result of the divestiture of CONSOL, the relief provided to DCMC, as an INHAM, pursuant to PTCE 96-23, ceased to be available with respect to DCMC's management of the assets of the CONSOL Plan and CONSOL Union Plan, because under section IV(a) of PTCE 96-23, after the divestiture DCMC was no longer an affiliate of the employer maintaining such plans. The applicant represents that during the period since June 1, 1999, DCMC has, in managing assets of the CONSOL Plan and the CONSOL Union Plan, investigated whether counterparties to proposed transactions involving the assets of such plans were parties in interest with respect to such plans. Further, DCMC has not authorized any such transactions with counterparties that were found to be parties in interest, unless a statutory or administrative exemption (other than PTCE 84-14 or PTCE 96-23) was available.

It is represented that prior to 1999, Conoco, Inc. (Conoco), a wholly-owned subsidiary of DuPont was a member of the DuPont Group. Accordingly, at that time the Trust held the assets of a non-contributory defined benefit plan (the DuPont Pension Plan) which covered substantially all of the employees of DuPont and its subsidiaries, including Conoco. Approximately 21,763 participants and beneficiaries of the DuPont Pension Plan were attributed to employees of Conoco and their beneficiaries. In September 1999, DuPont divested substantially all of its holdings in Conoco. On July 1, 2000, assets having a value of approximately \$820,000,000 were transferred from the DuPont Pension Plan to a separate trust for the Retirement Plan of Conoco Inc. (The Conoco Plan), a qualified defined benefit pension plan covering substantially all of the employees of Conoco Inc. As a result of DuPont's divestiture of Conoco, the relief provided to DCMC, as an INHAM, pursuant to PTCE 96-23, ceased to be available with respect to DCMC's management of the assets of the Conoco Plan, because under PTCE 96-23, as of September 1999, DCMC no longer is an affiliate of the employer maintaining such plan. It is represented that during the period since July 1, 2000, all steps

necessary to avoid violations of the Act have been taken by the Conoco Plan.

In addition to managing pension assets held in the Trust, DPFI, prior to 1997, also managed a portion of the assets of two defined contribution plans, the CONSOL DC Plan and the Conoco DC Plan. Subsequently, DCMC assumed the management of the assets of the CONSOL DC Plan and the Conoco DC Plan. It is represented that the assets of these plans have been managed by the same investment personnel both before and after the substitution of DCMC for DPFI. The investment management activities in the case of each of these plans involved the management of assets held in a fixed income fund that was one of the investment options available to participants in these plans. It is further represented that in managing the assets of the CONSOL DC Plan and the Conoco DC Plan, DCMC and DPFI have taken all steps necessary to avoid violations of the Act.

With respect to the CONSOL DC Plan, the substitution of DCMC for DPFI did not occur until CONSOL had ceased to be an affiliate of DuPont. With respect to the Conoco DC Plan, DCMC began managing the assets of the plan at a time when Conoco was still an affiliate of DuPont. However, it is represented that the INHAM audits required, pursuant to PTCE 96-23, did not cover the Conoco DC Plan. Accordingly, DCMC never managed the assets of either the CONSOL DC Plan or the Conoco DC Plan, as an INHAM, pursuant to PTCE 96-23.

Because the CONSOL DC Plan and the Conoco DC Plan were never managed by DCMC as an INHAM, these two plans do not fit within the definition of Former DuPont Related Plans, as set forth in Section II(e)(5) of this proposed exemption, nor does either plan fit within the definition of an Add On Plan, as set forth in this proposed exemption under Section II(e)(6). Therefore, the applicant has requested that the CONSOL DC Plan and the Conoco DC Plan be specifically included under the definition of Former DuPont Related Plans by listing each plan separately by name. The applicant believes that to the extent DCMC is appointed as an investment manager of the assets of the CONSOL DC Plan and the Conoco DC Plan, DCMC should have the same degree of flexibility in managing these assets as it will have with respect to the assets of the pension plans sponsored by CONSOL and Conoco which are also under the management of DCMC.

4. DCMC seeks an exemption which would provide appropriate relief for any prospective transactions with certain

¹⁴ The Department expresses no opinion in this proposed exemption as to whether DCMC has met, or will continue to meet, the conditions necessary for relief under PTCE 96-23 for transactions with parties in interest with respect to the Trust, or whether DCMC qualifies or has qualified as an INHAM with regard to the management of the assets in the Trust.

¹⁵ The Vice President for Human Resources of CONSOL represents that since 1988 the long term investment performance of DCMC and its predecessor, as manager of plan assets that were part of the Trust, compares favorably with other alternatives. In addition, the Director of Investment Services of DCMC represents that investment return on the Trust has exceeded the performance benchmark for seven of the eight years during the period since 1992.

parties in interest (as described in Section I(h), above) in order to manage, after the divestiture of CONSOL, the assets of the CONSOL Plan, the CONSOL Union Plan, the CONSOL DC Plan, and after the divestiture of Conoco, to manage the assets of the Conoco Plan and the Conoco DC Plan, subject to the conditions discussed herein. Further, DCMC requests relief which would permit it to manage the assets of other Former DuPont Related Plans. In this regard, the Former DuPont Related Plans covered by this exemption include, in addition to those plans specifically mentioned above: (1) Any plan, the assets of which have been managed by DCMC, as an INHAM, but as to which PTCE 96-23 is no longer available because such plan is no longer maintained by an affiliate of DCMC; and (2) any Add-On Plan that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of DCMC; provided certain conditions, as set forth in this proposed exemption are satisfied.

Given the large number of service providers with which the Former DuPont Related Plans engage, the breadth of the definition of "party in interest" under 3(14) of the Act, and the wide array of investment and related services offered by DCMC, it is represented that it would not be uncommon for DCMC, as investment manager, to propose transactions that involve parties in interest to one or more of the Former DuPont Related Plans. In this regard, the transactions for which DCMC seeks an exemption include, but are not limited to, sale and exchange transactions, leasing and other real estate transactions, foreign currency trading transactions, and transactions involving the furnishing of goods, services, and facilities. It is anticipated that relief will most likely be necessary where DCMC has discretion over investments in real estate, mortgages, foreign currency, futures, commodities and over-the-counter options, as there is no other class exemption which would permit DCMC, as investment manager, to purchase property from, sell or lease property to, or borrow money from most parties in interest to the Former DuPont Related Plans.

Without the requested relief, DCMC would be unable to offer the full range of investment opportunities that were available to the Former DuPont Related Plans prior to divestiture, which could substantially reduce DCMC's overall effectiveness and adversely affect the Former DuPont Related Plans' investment returns. In the absence of the exemption, it would be necessary to examine each transaction to determine

whether it might involve a party in interest.¹⁶ Such examinations could prove burdensome for DCMC because of the myriad of persons that may be parties in interest as service providers to large plans, such as the Former DuPont Related Plans. Moreover, it is represented that certain transactions which would be beneficial to the Former DuPont Related Plans might involve parties in interest and be prohibited, thereby depriving such plans of a potentially favorable investment opportunity.

5. The proposed exemption will be modeled after Prohibited Transaction Class Exemption 84-14 (PTCE 84-14),¹⁷ which, in general, permits various parties in interest with respect to an employee benefit plan to engage in a transaction involving plan assets, if the transaction is authorized by a qualified professional asset manager (QPAM) and if certain other conditions are met. Specifically, DCMC seeks an individual exemption for transactions that are described, pursuant to Part I of PTCE 84-14.¹⁸ In this regard, Part I of PTCE 84-14 provides relief from the restrictions of section 406(a)(1)(A)-(D) of the Act and 4975(c)(1)(A)-(D) of the Code for transactions between a party in interest with respect to an employee benefit plan and an investment fund in which the plan has an interest and which is managed by a QPAM, provided certain conditions are satisfied. One such condition (the Diverse Clientele Test), as set forth in Part I(e) of PTCE 84-14, requires that:

The transaction is not entered into with a party in interest with respect to any plan whose assets managed by QPAM, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof * * *) or by the same employee organization, and managed by the QPAM, represent more than 20 percent of the total client assets managed by the QPAM at the time of the transaction.

DCMC represents that, as of December 31, 1998, it met the definition of a QPAM, as set forth in Part V(a) of PTCE 84-14. With respect to the capitalization requirement, DuPont has agreed to unconditionally guarantee the payment

¹⁶ As noted above, DCMC has investigated since June 1, 1999, whether the counterparties to proposed transactions involving the assets of the CONSOL Plan and the CONSOL Union Plan were parties in interest with respect to such plans. Further, with respect to the Conoco Plan (since July 1, 2000), the CONSOL DC Plan, and the Conoco DC Plan, DCMC and DPFI have taken all steps necessary to avoid violations of the Act.

¹⁷ 49 FR 9494 (March 13, 1984), as amended, 50 FR 41430 (October 10, 1985).

¹⁸ DCMC is not requesting an administrative exemption for the transactions described in Part II, Part III, and Part IV of PTCE 84-14.

of DCMC's liabilities, including any liabilities that may arise by reason of a breach or violation of a duty described in sections 404 or 406 of the Act, for any year that DCMC's shareholders' equity as of the last day of its preceding fiscal year falls below \$750,000. Further, DCMC represents that it is an investment adviser registered under the Investment Advisers Act of 1940. In order to be a QPAM, a registered investment adviser must, among other requirements, have as of the last day of its most recent fiscal year total client assets under its management and control in excess of \$50 million. The proposed exemption would include "In-house Plan Assets," as defined in Section II(g), in the calculation of total assets under DCMC's management for purposes of meeting the assets under management test required herein (see Section I(a), above). DCMC represents that it currently manages assets, including In-house Plan Assets with a value in excess of \$100 million.

In the absence of an individual exemption, DCMC is uncertain whether it would be deemed to satisfy the Diverse Clientele Test, as required for a QPAM to obtain relief for party in interest transactions, pursuant to PTCE 84-14 (see Part I(e) of PTCE 84-14). DCMC is concerned that the assets for which it serves as an INHAM are not "client assets" for purposes of serving as a QPAM for plan assets of Former DuPont Related Plans. In this regard, although DCMC manages the assets of the CONSOL Plan and CONSOL Union Plan which in the aggregate comprise substantially less than 20 percent (20%) of the total assets under its management, the remaining assets which DCMC manages consist entirely of plan assets for which DCMC acts as an INHAM. As a result, DCMC believes that the relief provided by PTCE 84-14 may not be available for the transactions which are the subject of this exemption.¹⁹

6. It is represented that the conditions of the proposed exemption provide safeguards for the protection of the rights of participants and beneficiaries of the Former DuPont Related Plans. In this regard, the proposed exemption incorporates all but one of the conditions found in PTCE 84-14. Specifically, except for the Diverse Clientele Test, DCMC represents that it will comply with the remaining conditions, as set forth in Part I of PTCE 84-14. Moreover, DCMC, although it

¹⁹ The Department expresses no opinion as to whether DCMC would qualify as a QPAM for purposes of PTCE 84-14 and Part I(e) following DuPont's divestiture of CONSOL and Conoco or with respect to any of the Former DuPont Related Plans or other unaffiliated plan.

will no longer be an INHAM with respect to the assets of the Former DuPont Related Plans, will remain subject to the procedural requirements of the INHAM class exemption, as set forth in PTCE 96-23. DuPont will be required to maintain written policies and procedures designed to ensure compliance with the objective requirements of the exemption and to retain an independent auditor experienced and proficient with the fiduciary provisions of the Act to conduct an exemption audit. It is the responsibility of the independent auditor to evaluate DuPont's compliance with such policies and procedures and to report annually its findings to each of the Former DuPont Related Plans.

7. Furthermore, the proposed exemption contains several additional conditions which are designed to ensure the presence of adequate safeguards. First, the transactions which are the subject of this proposed exemption cannot be part of an agreement, arrangement, or understanding designed to benefit a party in interest. Second, neither DCMC nor a person related to DCMC may engage in transactions with the Investment Fund. Further, a party in interest (including a fiduciary) which deals with the Investment Fund, may only be a party in interest by reason of providing services to the Former DuPont Related Plans, or by having a relationship to a service provider, and such party in interest may not have discretionary authority or control with respect to the investment of plan assets involved in the transaction nor render investment advice with respect to those assets.

8. DCMC represents that the requested exemption is administratively feasible because it would not impose any administrative burdens on either DCMC or the Department which are not already imposed by PTCE 84-14 or PTCE 96-23. Further, DCMC will maintain and make available certain records necessary to enable the Department, the Internal Revenue Service, and other interested parties to determine whether the conditions of the exemption, if granted, have been met.

9. The applicant represents that the proposed exemption is in the interest of the Former DuPont Related Plans and their participants and beneficiaries, because it will allow DCMC, on behalf of the Former DuPont Related Plans, to negotiate transactions with parties in interest where the transactions are beneficial to such plans. Absent the exemption, the Former DuPont Related Plans would be precluded from engaging in such transactions, even though such transactions may offer

favorable investment or diversification opportunities.

The applicant states that denial of the exemption could deprive DCMC of its ability to provide a full range of investment opportunities to the Former DuPont Related Plans without undue administrative costs. Further, denial of the exemption would place DCMC in a undue competitive disadvantage in seeking to manage the assets of the Former DuPont Related Plans.²⁰

10. In summary, the applicant represents that the transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code because, among other things:

(a) DCMC is an investment adviser registered under the Investment Advisers Act of 1940 that has under its management and control total assets, including In-house Plan Assets (as defined in Section II(g)), in excess of \$100 million, and either has shareholders' equity, in excess of \$750,000 or a unconditional guarantee of payment of liabilities in that amount from an affiliate;

(b) At the time of the transaction and during the year preceding, the party in interest or its affiliate dealing with the Investment Fund does not have and has not exercised, the authority to appoint or terminate DCMC as a manager of any of the Former DuPont Related Plans' assets, or to negotiate the terms on behalf of the Former DuPont Related Plans (including renewals or modifications) of the management agreement with DCMC;

(c) The transaction is not described in PTCE 81-6; PTCE 83-1; or PTCE 82-87;

(d) The terms of the transaction are negotiated on behalf of the Investment Fund by, or under the authority and general direction of DCMC, and either DCMC, or a property manager acting in accordance with written guidelines established and administered by DCMC, makes the decision on behalf of the Investment Fund to enter into the transaction;

(e) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(f) At the time the transaction is entered into, renewed, or modified that

²⁰ While it is represented that DCMC receives no fees from the DuPont Pension Plan, other than reimbursement of certain expenses (to the extent permitted by the Act), no special restrictions would apply to its receipt of fees for managing assets of the Former DuPont Related Plans, once their sponsors no longer have any ownership affiliation with the DCMC, provided that the provision of such services and the receipt of fees related thereto meet the conditions necessary for relief under section 408(b)(2) and the regulations thereunder.

requires the consent of DCMC, the terms of the transaction are at least as favorable to the Investment Fund as the terms generally available in arm's length transactions between unrelated parties;

(g) Neither DCMC nor any affiliate, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in DCMC is a person who, within the ten (10) years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of any felony, as set forth in Section I(f) of this proposed exemption;

(h) The party in interest with respect to the Former DuPont Related Plans that deals with the Investment Fund is a party in interest (including a fiduciary) solely by reason of being a service provider to the Former DuPont Related Plans, or having a relationship to a service provider, and such party in interest does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice with respect to those assets;

(i) Neither DCMC nor a person related to DCMC engages in the transactions which are the subject of this proposed exemption;

(j) DCMC adopts written policies and procedures that are designed to assure compliance with the conditions of the proposed exemption;

(k) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act and who so represents in writing, conducts an exemption audit on an annual basis and issues a written report to the Former DuPont Related Plans presenting its specific findings regarding the level of compliance with the policies and procedures adopted by DCMC; and

(l) DCMC or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the Department, the IRS, and other persons to determine whether the conditions of this exemption have been met.

Notice to Interested Persons

The applicant will furnish a copy of the Notice of Proposed Exemption (the Notice) along with the supplemental statement, described at 29 CFR § 2570.43(b)(2), to the investment committee or trustees of each of the Former DuPont Related Plans to inform them of the pendency of the exemption, by hand delivery or first class mailing, within fifteen (15) days of the

publication of the Notice in the **Federal Register**. Comments and requests for a hearing are due on or before 45 days from the date of publication of the Notice in the **Federal Register**. A copy of the final exemption, if granted, will also be provided to the CONSOL Plan, the CONSOL Union Plan, the CONSOL DC Plan, the Conoco Plan and the Conoco DC Plan. Further, DCMC will furnish a copy of the final exemption to any of the other Former DuPont Related Plans at the time the exemption becomes applicable to the management of the assets of such plan.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (this is not a toll-free number).

General Motors Investment Management Corporation Located in New York, NY

[Exemption Application Nos.: D-10782 through D-10785]

Proposed Exemption

The Department of Labor 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 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).²¹

I. Transactions

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply, as of May 28, 1999, to a transaction between a party in interest with respect to certain plans (the Transition Plans), as defined in Section II(e), below, and an investment fund in which such plans have an interest (the Investment Fund), as defined in Section II(k), below, provided that General Motors Investment Management Corporation or its successor (collectively, GMIMCO) has discretionary authority or control with respect to the plan assets involved in the transaction and the following conditions are satisfied:

(a) GMIMCO or its successor is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total assets, including in-house plan assets (the In-house Plan

Assets), as defined in Section II(g), below, under its management and control in excess of \$100 million and shareholders' or partners' equity, as defined in Section II(j), below, in excess of \$750,000;

(b) At the time of the transaction, as defined in Section II(m), below, the party in interest or its affiliate, as defined in Section II(a), below, does not have, and during the immediately preceding one (1) year has not exercised, the authority to—

(1) Appoint or terminate GMIMCO as a manager of any of the Transition Plans' assets, or

(2) Negotiate the terms of the management agreement with GMIMCO (including renewals or modifications thereof) on behalf of the Transition Plans;

(c) The transaction is not described in—

(1) Prohibited Transaction Class Exemption 81-6 (PTCE 81-6)²² (relating to securities lending arrangements);

(2) Prohibited Transaction Class Exemption 83-1 (PTCE 83-1)²³ (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Class Exemption 82-87 (PTCE 82-87)²⁴ (relating to certain mortgage financing arrangements);

(d) The terms of the transaction are negotiated on behalf of the Investment Fund by or under the authority and general direction of GMIMCO, and either GMIMCO, or (so long as GMIMCO retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by GMIMCO, makes the decision on behalf of the Investment Fund to enter into the transaction;

(e) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of GMIMCO, the terms of the transaction are at least as favorable to the Investment Fund as the terms generally available in arm's length transactions between unrelated parties;

(f) Neither GMIMCO nor any affiliate thereof, as defined in Section II(b), below, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in GMIMCO is a person who, within the ten (10) years immediately preceding the transaction, has been either convicted or released from imprisonment, whichever is later, as a result of:

(1) any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization;

(2) any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(3) income tax evasion;

(4) any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or

(5) any other crimes described in section 411 of the Act.

For purposes of this Section I(f), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether the judgment remains under appeal;

(g) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(h) The party in interest dealing with the Investment Fund:

(1) Is a party in interest with respect to the Transition Plans (including a fiduciary) solely by reason of providing services to the Transition Plans, or solely by reason of a relationship to a service provider described in section 3(14)(F),(G),(H), or (I) of the Act;

(2) Does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR § 2510.3-21(c)) with respect to those assets; and

(3) Is neither GMIMCO nor a person related to GMIMCO, as defined in Section II(i), below;

(i) GMIMCO adopts written policies and procedures that are designed to assure compliance with the conditions of the exemption;

(j) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act and who so represents in writing, conducts an exemption audit, as defined in Section II(f), below, on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the Transition Plans presenting its specific findings regarding the level of compliance with the policies and procedures adopted by GMIMCO in accordance with Section I(i), above, of this exemption; and

²¹ For purposes of this exemption, references to specific provisions of Title I of the Act unless otherwise specified, refer to the corresponding provisions of the Code.

²² 46 FR 7527, January 23, 1981.

²³ 48 FR 895, January 7, 1983.

²⁴ 47 FR 21331, May 18, 1982.

(k)(1) GMIMCO or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the persons described in Section I(k)(2) to determine whether the conditions of this exemption have been met, except that (a) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of GMIMCO and/or its affiliates, the records are lost or destroyed prior to the end of the six (6) year period, and (b) no party in interest or disqualified person other than GMIMCO shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or are not available for examination, as required by Section I(k)(2), below, of this proposed exemption.

(2) Except as provided in Section I(k)(3), below, and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in Section I(k)(1), above, of this exemption are unconditionally available for examination at their customary location during normal business hours by:

(A) any duly authorized employee or representative of the Department or of the Internal Revenue Service;

(B) any fiduciary of any of the Transition Plans investing in the Investment Fund or any duly authorized representative of such fiduciary;

(C) any contributing employer to any of the Transition Plans investing in the Investment Fund or any duly authorized employee representative of such employer;

(D) any participant or beneficiary of any of the Transition Plans investing in the Investment Fund, or any duly authorized representative of such participant or beneficiary; and,

(E) any employee organization whose members are covered by such Transition Plans;

(3) None of the persons described in Section I(k)(2)(B) through (E), above, of this exemption shall be authorized to examine trade secrets of GMIMCO or its affiliates or commercial or financial information which is privileged or confidential.

II. Definitions

(a) For purposes of Section I(b) of this exemption, an "affiliate" of a person means—

(1) Any person directly or indirectly, through one or more intermediaries,

controlling, controlled by, or under common control with the person,

(2) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, 5 percent (5%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets. A named fiduciary (within the meaning of section 402(a)(2) of the Act) of a plan, and an employer any of whose employees are covered by the plan, will also be considered affiliates with respect to each other for purposes of Section I(b) if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(b) For purposes of Section I(f), above, of this exemption, an "affiliate" of a person means—

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

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent (5%) or more partner or owner, and

(4) Any employee or officer of the person who —

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent (10%) or more of the yearly wages of such person), or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management, or disposition of plan assets.

(c) For purposes of Section II(e) and (g), below, of this exemption an "affiliate" of GMIMCO includes a member of either:

(1) a controlled group of corporations, as defined in section 414(b) of the Code, of which GMIMCO is a member, or

(2) a group of trades or businesses under common control, as defined in section 414(c) of the Code, of which GMIMCO is a member; provided that "50 percent" shall be substituted for "80 percent" wherever "80 percent" appears in section 414(b) or 414(c) of the rules thereunder.

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

(e) "Transition Plans" mean:

(1) the Delphi Retirement Program for Salaried Employees; Delphi Hourly-Rate Employees Pension Plan; Delphi Automotive Systems Corporation Personal Savings Plan, Delphi Automotive Systems Corporation Income Security Plan, Delphi Automotive Systems Corporation Savings-Stock Purchase Program, Packard-Hughes Interconnect Non-Bargaining Retirement Plan, Packard-Hughes Interconnect Bargaining Retirement Plan, Packard-Hughes Interconnect Foley-Alabama Facility Retirement Plan, and ASEC Manufacturing Retirement Program (collectively, the Delphi Plans);

(2) any plan the assets of which include or have included assets that were managed by GMIMCO, as an in-house asset manager (INHAM), pursuant to Prohibited Transaction Class Exemption 96-23 (PTCE 96-23);²⁵ but as to which PTCE 96-23 is no longer available because such assets are no longer held under a plan maintained by an affiliate of GMIMCO (as defined in Section II(c), above, of this exemption); and

(3) any plan (an Add-On Plan) that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of GMIMCO, (as defined in Section II(c), above, of this exemption); provided that: (A) the assets of the Add-On Plan are invested in a commingled fund (the Commingled Fund) with the assets of a plan or plans, described in Section II(e)(1) or Section II(e)(2), above; and (B) the assets of the Add-On Plan in the Commingled Fund do not comprise more than 25 percent (25%) of the value of the aggregate assets of such fund, as measured on the day immediately following the commingling of their assets.

(f) "Exemption audit" of any of the Transition Plans must consist of the following:

(1) A review of the written policies and procedures adopted by GMIMCO, pursuant to Section I(i) of this exemption, for consistency with each of the objective requirements of this exemption, as described in Section II(f)(5), below;

(2) A test of a representative sample of the subject transactions in order to make findings regarding whether GMIMCO is in compliance with:

²⁵ 61 FR 15975 (April 10, 1996)

(A) the written policies and procedures adopted by GMIMCO, pursuant to Section I(i), above, of this exemption; and

(B) the objective requirements of this exemption;

(3) A determination as to whether GMIMCO has satisfied the requirements of Section I(a), above, of this exemption;

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings; and

(5) For purposes of Section II(f) of this exemption, the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by GMIMCO to assure compliance with each of these requirements:

(A) the requirements of Section I(a), above, of this exemption regarding registration under the Investment Advisers Act of 1940, total assets under management, and shareholders' or partners' equity;

(B) the requirements of Part I and Section I(d) of this exemption, regarding the discretionary authority or control of GMIMCO with respect to the assets of the Transition Plans involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the Transition Plans to enter into the transaction;

(C) the transaction is not entered into with any person who is excluded from relief under Section I(h)(1), above, of this exemption, Section I(h)(2) to the extent such person has discretionary authority or control over the plan assets involved in the transaction, or Section I(h)(3); and

(D) the transaction is not described in any of the class exemptions listed in Section I(c), above, of this exemption.

(g) "In-house Plan Assets" means the assets of any plan maintained by an affiliate of GMIMCO, as defined in Section II(c), above, of this exemption and with respect to which GMIMCO exercises discretionary authority or control.

(h) The term, "party in interest," means a person described in section 3(14) of the Act and includes a "disqualified person," as defined in section 4975(e)(2) of the Code.

(i) GMIMCO is "related" to a party in interest for purposes of Section I(h)(3) of this exemption, if the party in interest (or a person controlling, or controlled by, the party in interest) owns a 5 percent (5%) or more interest in GMIMCO, or if GMIMCO (or a person controlling, or controlled by GMIMCO) owns a 5 percent (5%) or more interest in the party in interest.

For purposes of this definition:

(1) The term, "interest," means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation,

(B) The capital interest or the profits interest of the entity if the entity is a partnership; or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest.

(j) For purposes of Section I(a) of this exemption, the term, "shareholders' or partners' equity," means the equity shown in the most recent balance sheet prepared within the two (2) years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

(k) "Investment Fund" includes a single customer and pooled separate account maintained by an insurance company, individual trust and common collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of GMIMCO) is subject to the discretionary authority of GMIMCO.

(l) The term, "relative," means a relative as that term is defined in section 3(15) of the Act, or a brother, sister, or a spouse of a brother or sister.

(m) The "time" as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after the date when the grant of this exemption is published in the **Federal Register** or a renewal that requires the consent of GMIMCO occurs on or after such publication date and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this subsection shall be construed as exempting a transaction entered into by an Investment Fund which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of this exemption

were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption. In determining compliance with the conditions of the exemption at the time that the transaction was entered into for purposes of the preceding sentence, Section I(h) of this exemption will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

Temporary Nature of Exemption

The Department has determined that the relief provided by this proposed exemption is temporary in nature. The exemption, if granted, will be effective May 28, 1999, and will expire on the day which is five (5) years from the date of the publication of the final exemption in the **Federal Register**. Accordingly, the relief provided by this proposed exemption will not be available upon the expiration of such five-year period for any new or additional transactions, as described herein, after such date, but would continue to apply beyond the expiration of such five-year period for continuing transactions entered into within the five-year period. Should the applicant wish to extend, beyond the expiration of such five-year period, the relief provided by this proposed exemption to new or additional transactions, the applicant may submit another application for exemption.

Summary of Facts and Representations

1. GMIMCO, a wholly-owned subsidiary of General Motors Corporation (GM), is organized as a Delaware corporation with its principal office in New York, New York. GMIMCO is an investment adviser registered under the Investment Advisers Act of 1940. As of December 31, 1998, GMIMCO had total assets under its management with an aggregate market value of approximately \$100 billion.

GMIMCO provides investment management services to employee benefit plans and corporate clients that are not employee benefit plans. Clients include plans sponsored by GM and its subsidiaries and affiliates (the GM Group). Investments managed by GMIMCO include domestic and international equities, fixed-income securities, real estate, venture capital investments, futures, and other alternative investments. GMIMCO has been providing these services to the GM Group since 1992,²⁶ and is generally the

²⁶ It is represented that GMIMCO has been a registered investment advisor since 1992.

named fiduciary for investment purposes under the Act with respect to the pension plans sponsored by the GM Group.

2. GMIMCO manages the assets of the following U.S. employee benefit plans: (a) General Motors Hourly-Rate Employees Pension Plan, (b) General Motors Retirement Program for Salaried Employees, (c) General Motors Savings-Stock Purchase Program for Salaried Employees in the United States, (d) General Motors Personal Savings Plan for Hourly-Rate Employees in the United States, (e) Saturn Individual Retirement Plan for Represented Team Members, (f) Saturn Personal Choices Retirement Plan for Non-Represented Team Members, (g) Saturn Individual Savings Plan for Union Represented Employees, (h) Employees' Retirement Plan for GMAC Mortgage Corporation, and (i) plans participating in the General Motors Welfare Benefit Trust (collectively, the GM Plans). In this regard, GMIMCO represents that it has qualified as an INHAM, as defined in section IV(a) of PTCE 96-23, and has relied on the relief provided by that class exemption in connection with its management of the assets of the GM Plans.²⁷ In addition, GMIMCO manages the assets of corporate clients that are members of the GM Group, most significantly Motors Insurance Corporation for which GMIMCO has over \$4 billion in assets under management.

3. On or after January 1, 1999, Delphi Automotive Systems Corporation (Delphi) and its subsidiaries sponsored the Delphi Plans for the benefit of their employees. As of April 30, 1999, the estimated number of participants in the Delphi Plans was 173,931 and the approximate aggregate fair market value of the assets of the Delphi Plans was \$10,337,453,634. It is represented that Delphi was at that time a subsidiary of GM and a member of the GM Group and that the assets of the Delphi Plans were managed by GMIMCO, pursuant to PTCE 96-23.

On May 28, 1999, GM totally divested all of its holdings in Delphi. After the divestiture, Delphi requested that GMIMCO continue to act as investment manager for the assets of the Delphi Plans. However, because GM had divested itself of its holdings in Delphi,

the relief provided to GMIMCO, as an INHAM, pursuant to PTCE 96-23, ceased to be available with respect to GMIMCO's management of the assets of the Delphi Plans, because under section IV(a) of PTCE 96-23, GMIMCO would not be an affiliate of the employer maintaining such plans.²⁸

4. GMIMCO seeks an exemption, effective as of May 28, 1999, to continue, after the divestiture of Delphi, to manage the assets of the Delphi Plans. Further, GMIMCO requests relief which would permit it to manage the assets of other Transition Plans. In this regard, in addition to the Delphi Plans, the Transition Plans covered by this exemption include: (1) Any plan the assets of which have been managed by GMIMCO, as an INHAM but as to which PTCE 96-13 is no longer available, because such plan is no longer maintained by an affiliate of GMIMCO; and (2) any Add-On Plan that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of GMIMCO; provided certain conditions, as set forth in this proposed exemption, are satisfied.

Given the large number of service providers (particularly financial institutions) which the Delphi Plans and most large employee benefit plans engage, the breadth of the definition of "party in interest" under 3(14) of the Act, and the wide array of investment and related services offered by GMIMCO, it would not be uncommon for GMIMCO, as investment manager, to propose transactions that involve parties in interest to one or more Transition Plans. In this regard, the transactions for which GMIMCO seeks an exemption include, but are not limited to, sale and exchange transactions, leasing and other real estate transactions, foreign currency trading transactions, and transactions involving the furnishing of goods, services, and facilities. It is anticipated that relief will most likely be necessary where GMIMCO has discretion over investments in real estate, mortgages, foreign currency, futures, commodities, and over-the-counter options, or other types of investments not covered by specific exemptions or other class exemptions which would permit GMIMCO, as investment manager, to purchase property from, sell or lease property to, or borrow money from most parties in interest with respect to the Transition Plans.

Without the requested relief, GMIMCO would be unable to offer the

full range of investment opportunities that were available to the Delphi Plans prior to the divestiture, which could substantially reduce GMIMCO's overall effectiveness and adversely affect the Delphi Plan's investment returns. In the absence of the exemption, it would be necessary to examine each transaction to determine whether it might involve a party in interest. Such examinations could prove burdensome for GMIMCO, because of the myriad of persons that may be parties in interest as service providers to large plans, such as the Delphi Plans. Moreover, it is represented that certain transactions which would be beneficial to the Transition Plans might involve parties in interest and be prohibited, thereby depriving such plans of a potentially favorable investment opportunity.

5. GMIMCO has requested that the proposed exemption be modeled after PTCE 84-14, which, in general, permits various parties in interest with respect to an employee benefit plan to engage in a transaction involving plan assets, if the transaction is authorized by a qualified professional asset manager (QPAM) and if certain other conditions are met. Specifically, GMIMCO seeks an individual exemption for transactions that are described, pursuant to Part I of PTCE 84-14.²⁹ In this regard, Part I of PTCE 84-14 provides relief from the restrictions of section 406(a)(1)(A)-(D) of the Act and 4975(c)(1)(A)-(D) of the Code for transactions between a party in interest with respect to an employee benefit plan and an investment fund in which the plan has an interest and which is managed by a QPAM, provided certain conditions are satisfied. One such condition (the Diverse Clientele Test), as set forth in Part I(e) of PTCE 84-14, requires that:

The transaction is not entered into with a party in interest with respect to any plan whose assets managed by QPAM, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof * * *) or by the same employee organization, and managed by the QPAM, represent more than 20 percent of the total client assets managed by the QPAM at the time of the transaction.

GMIMCO represents that, as of the effective date for the requested exemption, it met all of the requirements of the definition of a QPAM, as set forth in Part V(a) of PTCE 84-14, other than the Diverse Clientele Test. In this regard, GMIMCO represents that it has been capitalized in excess of \$750,000 to meet the capitalization requirement on its own, as of the date

²⁷ The Department expresses no opinion in this proposed exemption as to whether GMIMCO has met, or will continue to meet, the conditions necessary for relief under PTCE 96-23 for transactions with parties in interest with respect to the GM Plans, or whether GMIMCO qualifies or has qualified as an INHAM with regard to the management of the assets of the GM Plans in such transactions.

²⁸ The Department expresses no opinion on whether GMIMCO qualifies or has qualified as an INHAM with regard to the management of the assets of the Delphi Plans.

²⁹ GMIMCO is not requesting an administrative exemption for the transactions described in Part II, Part III, and Part IV of PTCE 84-14.

of the requested relief. Further, GMIMCO represents that it is an investment adviser registered under the Investment Advisers Act of 1940 and that it currently manages in excess of \$100 million in assets, including In-house Plan Assets, as defined in Section II(g), above of this proposed exemption.

However, GMIMCO is uncertain whether it would be deemed to satisfy the Diverse Clientele Test found in Part I(e) of PTCE 84-14 with respect to the Delphi Plans or other Transition Plans that might become clients of GMIMCO during the period of GMIMCO's transition from a wholly-owned in-house clientele to a full range of clients. In this regard, GMIMCO is concerned that the assets for which it serves as an INHAM are not "client assets" for purposes of Part I(e) of PTCE 84-14. Although GMIMCO manages assets of the Delphi Plans which comprise substantially less than 20 percent (20%) of the total assets under its management, the remaining assets which GMIMCO manages consist entirely of plan assets for which GMIMCO acts as an INHAM. As a result, GMIMCO believes that it may be precluded from acting as a QPAM with respect to the Delphi Plans and any other unaffiliated plans that might temporarily exceed the 20% limit, if the test is based solely on assets of unaffiliated plans and other non-GM related parties, even though such assets might be insignificant in relation to total assets managed by GMIMCO.³⁰

6. It is represented that the conditions of the proposed exemption provide safeguards for the protection of the rights of participants and beneficiaries of the Transition Plans. In this regard, the proposed exemption incorporates all but one of the conditions found in PTCE 84-14. Except for the Diverse Clientele Test, GMIMCO represents that it will comply with the remaining conditions, as set forth in Part I of PTCE 84-14. Moreover, GMIMCO, although it will no longer be an INHAM with respect to the assets of the Transition Plans, will remain subject to the procedural requirements of the INHAM class exemption, as set forth in PTCE 96-23. In this regard, GMIMCO will be required to maintain written policies and procedures designed to ensure compliance with the objective requirements of the exemption and to retain an independent auditor experienced and proficient with the fiduciary provisions of the Act to

³⁰ The Department expresses no opinion as to whether GMIMCO would qualify as a QPAM for purposes of PTCE 84-14 and Part I(e) with respect to the Delphi Plans after the divestiture of Delphi or with respect to any Transition Plans or other unaffiliated plans.

conduct an exemption audit. It is the responsibility of the independent auditor to evaluate GMIMCO's compliance with such policies and procedures and to report annually its findings to each of the Transition Plans.

7. Furthermore, the proposed exemption contains several additional conditions which are designed to ensure the presence of adequate safeguards. First, the transactions which are the subject of this proposed exemption cannot be part of an agreement, arrangement, or understanding designed to benefit a party in interest. Second, neither GMIMCO nor a person related to GMIMCO may engage in transactions with the Investment Fund. Further, a party in interest (including a fiduciary) which deals with the Investment Fund, may only be a party in interest by reason of providing services to the Transition Plans, or by having a relationship to a service provider, and such party in interest may not have discretionary authority or control with respect to the investment of plan assets involved in the transaction nor render investment advice with respect to those assets.

8. GMIMCO represents that the requested exemption is administratively feasible because it would not impose any administrative burdens on either GMIMCO or the Department which are not already imposed by PTCE 84-14 or PTCE 96-23. Further, GMIMCO will maintain and make available certain records necessary to enable the Department, the Internal Revenue Service, and other interested parties to determine whether the conditions of the exemption, if granted, have been met.

9. The proposed exemption is in the interest of the Transition Plans and participants and beneficiaries of such plans, because it will allow GMIMCO, on behalf of the Transition Plans, to negotiate transactions with parties in interest where the transactions are beneficial to such plans. Absent the exemption, the Transition Plans would be precluded from engaging in such transactions, even though such transactions may offer favorable investment or diversification opportunities.

The applicant represents that denial of the exemption could deprive GMIMCO of its ability to provide a full range of investment opportunities to the Transition Plans without undue administrative costs. Further, denial of the exemption would place GMIMCO in a undue competitive disadvantage in seeking to manage the assets of the Transition Plans.³¹

³¹ While it is represented that GMIMCO receives no fees from the GM Plans or the Delphi Plans,

10. In summary, the applicant represents that the transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code because, among other things:

(a) GMIMCO or its successor is an investment adviser registered under the Investment Advisers Act of 1940 that has under its management and control total assets in excess of \$100 million and has shareholders' equity, in excess of \$750,000;

(b) At the time of the transaction and during the year preceding, the party in interest or its affiliate dealing with the Investment Fund, does not have and has not exercised, the authority to appoint or terminate GMIMCO as a manager of any of the Transition Plans' assets, or to negotiate the terms on behalf of the Transition Plans (including renewals or modifications) of the management agreement with GMIMCO;

(c) The transaction is not described in PTCE 81-6; PTCE 83-1; or PTCE 82-87;

(d) The terms of the transaction are negotiated on behalf of the Investment Fund by, or under the authority and general direction of, GMIMCO, and either GMIMCO, or a property manager acting in accordance with written guidelines established and administered by GMIMCO, makes the decision on behalf of the Investment Fund to enter into the transaction;

(e) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(f) At the time the transaction is entered into, renewed, or modified that requires the consent of GMIMCO, the terms of the transaction are at least as favorable to the Investment Fund as the terms generally available in arm's length transactions between unrelated parties;

(g) Neither GMIMCO nor any affiliate, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in GMIMCO is a person who, within the ten (10) years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of any felony, as set forth in Section I(f) of this exemption;

(h) The party in interest with respect to the Transition Plans that deals with the Investment Fund is a party in

other than reimbursement of certain expenses (to the extent permitted by the Act), no special restrictions would apply to its receipt of fees for managing assets of the Delphi Plans in the future or any other Transition Plans that do not have any affiliation with GMIMCO, provided that the provision of such services and the receipt of fees related thereto meet the conditions necessary for relief under section 408(b)(2) of the Act and the regulations thereunder.

interest (including a fiduciary) solely by reason of being a service provider to the Transition Plans, or having a relationship to a service provider and such party in interest does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice with respect to those assets;

(i) Neither GMIMCO nor a person related to GMIMCO engages in the transactions which are the subject of this proposed exemption;

(j) GMIMCO adopts written policies and procedures that are designed to assure compliance with the conditions of the proposed exemption;

(k) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act and who so represents in writing, conducts an exemption audit on an annual basis and issues a written report to the Transition Plans presenting specific findings regarding the level of compliance with the policies and procedures adopted by GMIMCO; and

(l) GMIMCO or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the Department, the IRS, and other persons to determine whether the conditions of this proposed exemption have been met.

Notice to Interested Persons

GMIMCO will furnish a copy of the Notice of Proposed Exemption (the Notice) along with the supplemental statement described at 29 CFR § 2570.43(b)(2) to the investment committee or trustees of each of the Delphi Plans to inform them of the pendency of the exemption, by hand delivery or first class mailing, within fifteen (15) days of the publication of the Notice in the **Federal Register**. Comments and requests for a hearing are due on or before 45 days from the date of publication of the Notice in the **Federal Register**. A copy of the final exemption, if granted, will also be provided to the Delphi Plans. Further, GMIMCO will furnish a copy of the final exemption to any other Transition Plans at the time the exemption becomes applicable to the management of the assets of such plans.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (this is not a toll-free number).

Columbia Energy Group (Columbia) Located in Herndon, Virginia

[Application No. D-10802]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act 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 section 406(a) and (b) of the Act shall not apply to the reinsurance of risks and the receipt of premiums therefrom by Columbia Insurance Corporation, Ltd. (CICL) in connection with an insurance contract sold by Employers Insurance of Wausau (Wausau), or any successor insurance company to Wausau which is unrelated to Columbia, to provide long-term disability benefits to participants in Columbia's Long Term Disability Plan (the Plan), provided the following conditions are met:

(a) CICL—

(1) Is a party in interest with respect to the Plan by reason of a stock or partnership affiliation with Columbia that is described in section 3(14)(E) or (G) of the Act;

(2) Is licensed to sell insurance or conduct reinsurance operations in at least one State as defined in section 3(10) of the Act;

(3) Has obtained a Certificate of Authority from the Insurance Commissioner of its domiciliary state which has neither been revoked nor suspended;

(4)(A) Has undergone an examination by an independent certified public accountant for its last completed taxable year immediately prior to the taxable year of the reinsurance transaction; or

(B) Has undergone a financial examination (within the meaning of the law of its domiciliary State, Vermont) by the Insurance Commissioner of the State of Vermont within 5 years prior to the end of the year preceding the year in which the reinsurance transaction occurred; and

(5) Is licensed to conduct reinsurance transactions by a State whose law requires that an actuarial review of reserves be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority;

(b) The Plan pays no more than adequate consideration for the insurance contracts;

(c) No commissions are paid by the Plan with respect to the direct sale of such contracts or the reinsurance thereof;

(d) In the initial year of any contract involving CICL, there will be an immediate and objectively determined benefit to the Plan's participants and beneficiaries in the form of increased benefits;

(e) In subsequent years, the formula used to calculate premiums by Wausau or any successor insurer will be similar to formulae used by other insurers providing comparable long-term disability coverage under similar programs. Furthermore, the premium charge calculated in accordance with the formula will be reasonable and will be comparable to the premium charged by the insurer and its competitors with the same or a better rating providing the same coverage under comparable programs;

(f) The Plan only contracts with insurers with a rating of A or better from A. M. Best Company (Best's). The reinsurance arrangement between the insurers and CICL will be indemnity insurance only, *i.e.*, the insurer will not be relieved of liability to the Plan should CICL be unable or unwilling to cover any liability arising from the reinsurance arrangement;

(g) CICL retains an independent fiduciary (the Independent Fiduciary), at Columbia's expense, to analyze the transaction and render an opinion that the requirements of sections (a) through (f) have been complied with. For purposes of this proposed exemption, the Independent Fiduciary is a person who:

(1) Is not directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with Columbia or CICL (this relationship hereinafter referred to as an "Affiliate");

(2) Is not an officer, director, employee of, or partner in, Columbia or CICL (or any Affiliate of either);

(3) Is not a corporation or partnership in which Columbia or CICL has an ownership interest or is a partner;

(4) Does not have an ownership interest in Columbia or CICL, or any of either's Affiliates;

(5) Is not a fiduciary with respect to the Plan prior to the appointment; and

(6) Has acknowledged in writing acceptance of fiduciary responsibility and has agreed not to participate in any decision with respect to any transaction in which the Independent Fiduciary has an interest that might affect its best judgment as a fiduciary.

For purposes of this definition of an "Independent Fiduciary," no organization or individual may serve as an Independent Fiduciary for any fiscal year if the gross income received by such organization or individual (or

partnership or corporation of which such individual is an officer, director, or 10 percent or more partner or shareholder) from Columbia, CICL, or their Affiliates (including amounts received for services as Independent Fiduciary under any prohibited transaction exemption granted by the Department) for that fiscal year exceeds 5 percent of that organization or individual's annual gross income from all sources for such fiscal year.

In addition, no organization or individual who is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder, may acquire any property from, sell any property to, or borrow funds from Columbia, CICL, or their Affiliates during the period that such organization or individual serves as Independent Fiduciary, and continuing for a period of six months after such organization or individual ceases to be an Independent Fiduciary, or negotiates any such transaction during the period that such organization or individual serves as Independent Fiduciary.

Preamble

On August 7, 1979, the Department published a class exemption [Prohibited Transaction Exemption 79-41 (PTE 79-41), 44 FR 46365] which permits insurance companies that have substantial stock or partnership affiliations with employers establishing or maintaining employee benefit plans to make direct sales of life insurance, health insurance or annuity contracts which fund such plans if certain conditions are satisfied.

In PTE 79-41, the Department stated its views that if a plan purchases an insurance contract from a company that is unrelated to the employer pursuant to an arrangement or understanding, written or oral, under which it is expected that the unrelated company will subsequently reinsure all or part of the risk related to such insurance with an insurance company which is a party in interest with respect to the plan, the purchase of the insurance contract would be a prohibited transaction under the Act.

The Department further stated that as of the date of publication of PTE 79-41, it had received several applications for exemption under which a plan or its employer would contract with an unrelated company for insurance, and the unrelated company would, pursuant to an arrangement or understanding, reinsure part or all of the risk with (and cede part or all of the premiums to) an insurance company affiliated with the

employer maintaining the plan. The Department felt that it would not be appropriate to cover the various types of reinsurance transactions for which it had received applications within the scope of the class exemption, but would instead consider such applications on the merits of each individual case.

Summary of Facts and Representations

1. Columbia was organized under the laws of the State of Delaware on September 30, 1926, and is a registered holding company under the Public Utility Holding Company of 1935, as amended. Its headquarters are located in Herndon, Virginia. Columbia is one of the nation's largest integrated natural gas systems engaged in the production of natural gas and oil. Columbia is also engaged in related energy businesses including the marketing of natural gas and electricity, the generation of electricity, primarily fueled by natural gas, and the distribution of propane. Columbia derives substantially all of its revenues and earnings from the operating results of its 18 direct subsidiaries.

2. CICL is a wholly-owned subsidiary of Columbia. In November, 1996, it was formed and issued a Certificate of Authority by the Commonwealth of Bermuda permitting it to transact the business of a Class 3 insurance company. The applicant represents that a Class 3 insurer in Bermuda is authorized to write any type of business that is described in its business plan. Class 1 and Class 2 insurers are restricted in the amount of unrelated business that can be written. Besides the differences in the types of business that can be written, Class 3 insurers have higher minimum capital and surplus, and more stringent examination requirements, than either Class 1 or Class 2 insurers. ARS Management, Ltd. (ARS), an entity which is independent of Columbia and CICL, has responsibility for accounting functions, records retention and other management and administrative services for CICL. As of December 31, 1999, total capital and surplus of CICL was \$1,143,635 and earned premium was \$5,996,265.

3. In 1999, CICL formed a branch (Branch) which obtained a license in the State of Vermont. ARS, which is authorized to manage captives in the State of Vermont, will also handle the management functions for Branch. The applicant represents that an actuary on the staff of ARS, the management firm for CICL, has conducted reviews of the reserves held by CICL in the past. When CICL became a Class 3 insurer and established Branch in Vermont, it became subject to the laws in both

jurisdictions requiring annual certification of reserves by an independent actuarial firm. Watson, Wyatt (WW), an independent, qualified international actuarial and benefits consulting firm has been retained to provide actuarial services to Branch. WW's responsibilities will include examining, on an annual basis, the reserves that will be established by Branch in connection with the employee benefit business reinsured by CICL through Branch to ensure that amounts required by the State of Vermont are met. The initial reserve study has been conducted by Christopher George, FSA, MAAA (Mr. George) of the Wellesley Hills, Massachusetts office of WW (see rep. 12, below).

4. Columbia maintains the Plan, a long-term disability program for approximately 10,000 of its employees. Prior to changes made in anticipation of implementation of the subject transaction, the Plan promised a benefit of 30 percent of salary up to the current Social Security wage base and 60 percent of salary over that threshold. However, combined disability income from all sources, including Social Security, could not exceed 70 percent of earnings, and Social Security benefits paid to family members counted towards that limitation.

5. The Plan has been historically insured with Aetna Life Insurance Company. However, at the beginning of 1999, Columbia formulated a plan to utilize CICL for the reinsurance of benefits and has made substantial improvements to the Plan in anticipation of that transaction. Specifically, the new benefit is 60 percent of salary across the board, and the reduced percentage for earnings up to the Social Security wage base has been eliminated. In addition, the 70 percent maximum now does not include Social Security benefits paid to family members. Moreover, there has been a liberalization of the definition of the term "disability." The prior definition required that an employee demonstrate that he or she could not perform "any reasonable type of job." Under the new definition, an employee qualifies for benefits in the first two years if he or she cannot perform his or her own job, or another that pays at least 80% of the amount the employee was earning before the disability.

6. The Plan is now insured by Wausau. Wausau was recently acquired by Liberty Mutual Insurance Company (Liberty), an A+ rated (by Best's) carrier located in Boston, Massachusetts. Liberty is rated by Moody's as Aa3 (Excellent) and by Standard & Poor's as

AA-(Very Strong). Wausau is also rated A+ by Best's. The applicant represents that if the Plan chooses another insurer in the future, that insurer will carry similar ratings. It is anticipated that upon the granting of the exemption proposed herein, Wausau will enter into a reinsurance agreement with CICL, through Branch. Wausau will continue to insure the Plan, with the enhanced new benefits. However, Wausau will reinsure 100% of the risk with CICL through Branch.

The Plan will pay no more than adequate consideration for the insurance contracts with Wausau or any successor insurer. The formula used to calculate premiums by Wausau or any successor insurer³² will be similar to formulae used by other insurers providing long-term disability coverage under similar programs. Furthermore, the premium charge calculated in accordance with the formula will be reasonable and will be comparable to the premium charged by the insurer and its competitors with the same or a better rating providing the same coverage under comparable programs.

7. In connection with this exemption request, CICL has engaged the services of Milliman and Robertson (M&R), which is an international firm of consultants and actuaries with expertise in all facets of employee benefits, including insurance, as the Independent Fiduciary for the Plan. Charles M. Waldron, FSA (Mr. Waldron), a Principal and Consulting Actuary employed by M&R, has signed the Independent Fiduciary representations on behalf of M&R. M&R's consultants are frequently retained to advise corporations on the insurance arrangements underlying their benefit programs and have considerable expertise in the area of reinsurance and captive insurers.

8. For purposes of demonstrating independence, Mr. Waldron has represented that:

(a) Neither he nor M&R is an Affiliate of Columbia, Wausau or CICL;

(b) He is not an officer, director, employee of, or partner in Columbia, CICL or Wausau;

(c) M&R is not a corporation in which Columbia, CICL or any of the other insurers involved in the proposed transaction has an ownership interest or is a partner;

(d) neither he nor M&R has an ownership interest in Columbia, CICL, or Wausau, or in any Affiliate of those firms;

(e) he was not a fiduciary with respect to the Plan prior to his appointment for this transaction;

(f) he has acknowledged in writing on behalf of M&R its acceptance of fiduciary obligations and has agreed not to participate in any decision with respect to any transaction in which either he or M&R has an interest that might affect their fiduciary duty;

(g) gross income received by Mr. Waldron and M&R separately and combined from Columbia, CICL, or Wausau does not exceed 5 percent of Mr. Waldron's or M&R's gross annual income from all sources for any fiscal year; and

(h) neither M&R nor Mr. Waldron has acquired any property from, sold property to, or borrowed funds from Columbia, CICL, or Wausau or their Affiliates.

9. Mr. Waldron represents that CICL is registered in Bermuda and has been conducting business in Bermuda since 1996 reinsuring property and casualty risks. CICL's reserves have been reviewed by ARS, which is a firm independent of CICL and Columbia. These reports cover the last two reporting periods prior to the proposed transaction. In addition, Mr. Waldron has received assurances from Columbia and CICL that all future reserves in the Vermont branch of CICL (*i.e.*, Branch) will be certified by a qualified actuary approved by the State of Vermont. Mr. Waldron has confirmed that CICL has undergone an examination by Arthur Andersen & Co., an independent certified public accountant, for its last completed taxable year.

10. Mr. Waldron has concluded that, as a result of the reinsurance agreement described in representation 6, above, the Plan's risks will be 100% covered by Wausau, a carrier rated A+ by Best's, even if CICL were unable or unwilling to cover the Plan's liabilities it is assuming as a result of the reinsurance agreement. Mr. Waldron represents that he has reviewed the terms of the proposed reinsurance agreement between Wausau and CICL, and it provides for the risk retained by CICL to revert back to Wausau at no further cost to the Plan should CICL be unable or unwilling to pay the benefits.

11. Mr. Waldron has represented that he reviewed the Plan benefits before the reinsurance transaction and the benefits implemented in anticipation of the reinsurance transaction. He has concluded that there is an immediate benefit to the Plan participants from the reinsurance transaction. Benefits have been increased from 30% of monthly earnings up to the Social Security wage base plus 60% of basic monthly

earnings above the Social Security wage base, to 60% of the basic monthly earnings without regard to the Social Security wage base. In addition, the family benefit from Social Security will no longer be used to offset the Plan benefits if the combined benefits exceed 70% of basic monthly earnings.

12. The applicant makes the following representations concerning the determination of the initial premium to the Plan under the proposed arrangement. The Plan contacted Wausau and was quoted a rate based on Wausau's evaluation of the risk. When CICL considered reinsuring the Plan's risk, it asked its consultants, WW and ARS, to evaluate the risk and the Wausau premium based on their best estimates of expected claims and expenses, respectively. Mr. Waldron represents that M&R has reviewed the report by Mr. George of WW (see rep. 3, above), who was retained to develop the expected claims for the year 2000 based on the covered participants as of December 31, 1999. In addition, M&R had a discussion regarding that report with Mr. George to obtain more information concerning the details of the methods he used, and M&R relied on this report for its accuracy of data and calculation. With respect to ARS' evaluation of expenses, M&R reviewed the types of expenses to ensure that all types of expenses that would be expected were provided for. M&R represents that the premium developed for the Plan follows a methodology of adding to the expected claims, a small provision for adverse deviation and the estimated expenses of the Plan, including premium tax. Mr. Waldron states that this method is one of many methods used within the industry. The expected claims were estimated to be at the midpoint of M&R's claims model, relating to such claims, which was based on modifications to the 1987 Group Long Term Disability Table. The modifications were based in part on the actual historical experience of the Plan. Expenses were developed from actual costs incurred by the Plan, or by contractual agreements between the parties. Expenses include administrative costs, including claims handling expenses, fronting and placement fees, and premium taxes.

In summary, M&R represents that it has reviewed the analysis of the Wausau rate by WW and ARS, and has concluded that the rate being charged by Wausau is consistent with the actuarial projections. M&R represents that the formula used to calculate the premiums is similar to formulae used by other insurers providing long-term disability coverage under similar plans.

³² The applicant states that any successor insurer would be a legal reserve life insurance company with assets of such a size as to afford similar protection and responsibility.

Furthermore, it is Mr. Waldron's opinion that the premium is below the midpoint of the range of premiums charged by other insurers providing similar coverage under similar programs. The applicant represents that the independent fiduciary will confirm on an annual basis that the Plan is paying a rate comparable to that which would be charged by a comparably-rated insurer for a program of the approximate size of the Plan with comparable claims experience.

13. M&R will represent the interests of the Plan as the Independent Fiduciary at all times.³³ M&R will monitor compliance by the parties with the terms and conditions of the proposed reinsurance transaction, and will take whatever action is necessary and appropriate to safeguard the interests of the Plan and of its participants and beneficiaries.

14. The applicant represents that the proposed reinsurance transaction will meet the following conditions of PTE 79-41 covering direct insurance transactions:

(a) CICL is a party in interest with respect to the Plan (within the meaning of section 3(14)(G) of the Act) by reason of stock affiliation with Columbia, which maintains the Plan;

(b) Branch is licensed to do conduct reinsurance transactions by the State of Vermont. The law under which Branch is licensed requires that all business written in a branch captive must have an annual certification by a qualified actuary;

(c) CICL has undergone an examination by the independent certified public accountant firm of Arthur Andersen & Co. for its last completed taxable year;

(d) Branch has received a Certificate of Authority from its domiciliary state, Vermont, which has neither been revoked nor suspended;

(e) The Plan will pay no more than adequate consideration for the insurance. In addition, in the initial year of the proposed reinsurance transaction, there will be an immediate increase in benefits to the Plan's participants and beneficiaries; and

(f) No commissions will be paid by the Plan with respect to the reinsurance arrangement with CICL, through Branch, as described herein.

³³ In this regard, the applicant makes a representation regarding a successor independent fiduciary. Specifically, if it becomes necessary in the future to appoint a successor independent fiduciary (the Successor) to replace M&R and Mr. Waldron, the applicant will notify the Department sixty (60) days in advance of the appointment of the Successor. Any Successor will have the responsibilities, experience and independence similar to those of M&R and Mr. Waldron.

In addition, the Plan's interests will be represented by a qualified, independent fiduciary (*i.e.*, M&R or its Successor), who has initially determined that such transaction will be in the best interests, and protective, of the Plan and its participants and beneficiaries. The independent fiduciary will also confirm on an annual basis that the Plan is paying a rate comparable to that which would be charged by a comparably-rated insurer for a program of the approximate size of the Plan with comparable claims experience.

15. In summary, the applicant represents that the proposed transaction will meet the criteria of section 408(a) of the Act because: (a) Plan participants and beneficiaries are afforded insurance protection by Wausau, a carrier rated A+ by Best's, at competitive market rates arrived at through arm's-length negotiations; (b) CICL, which through Branch will enter into the reinsurance transaction with Wausau, is a sound, viable insurance company which has been in business since 1996; (c) the protections described in representation 14, above, provided to the Plan and its participants and beneficiaries under the proposed reinsurance transaction are based on those required for direct insurance by a "captive" insurer, under the conditions of PTE 79-41 (notwithstanding certain other requirements related to, among other things, the amount of gross premiums or annuity considerations received from customers who are not related to, or affiliated with the insurer);³⁴ (d) Mr. Waldron, the Plan's independent fiduciary, has reviewed the proposed

³⁴ The proposal of this exemption should not be interpreted as an endorsement by the Department of the transactions described herein. The Department notes that the fiduciary responsibility provisions of Part 4 of Title I of the Act apply to the fiduciary's decision to engage in the reinsurance arrangement.

Specifically, section 404(a)(1) of the Act requires, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of the plan. In this regard, the Department is not providing any opinion as to whether a particular insurance or investment product, strategy or arrangement would be considered prudent or in the best interests of a plan, as required by section 404 of the Act. The determination of the prudence of a particular product or arrangement must be made by a plan fiduciary after appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular product or arrangement involved, including the plan's potential exposure to losses and the role a particular insurance or investment product plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties and responsibilities (see 29 CFR 2550.404a-1).

reinsurance transaction and has determined that the transaction is appropriate for, and in the best interests of, the Plan and that there will be an immediate benefit to the Plan participants as a result thereof by reason of an improvement in benefits under the terms of the Plan; and (e) M&R will monitor compliance by the parties with the terms and conditions of the proposed reinsurance transaction, and will take whatever action is necessary and appropriate to safeguard the interests of the Plan and of its participants and beneficiaries.

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

American Mutual Holding Company (AMHC)

Located in Des Moines, IA
[Application No. D-10874]

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 in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).³⁵

Section I. Covered Transactions

If the exemption is granted, the restrictions of section 406(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 (D) of the Code, shall not apply to (1) the receipt of certain common stock (Common Stock) issued by AMHC, or (2) the receipt of cash (Cash) or policy credits (Policy Credits), by or on behalf of a policyowner of AMHC (the Eligible Member), which is an employee benefit plan (the Plan), other than a Plan maintained by AMHC and/or its affiliates, in exchange for such Eligible Member's membership interest in AMHC, in accordance with the terms of a plan of conversion (the Plan of Conversion), implemented under Iowa law.

This proposed exemption is subject to the following conditions set forth below in Section II.

Section II. General Conditions

(a) The Plan of Conversion is subject to approval, review and supervision by the Iowa Commissioner of Insurance

³⁵ For purposes of this proposed exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(the Commissioner) and is implemented in accordance with procedural and substantive safeguards that are imposed under Iowa law.

(b) The Commissioner reviews the terms and options that are provided to Eligible Members of AMHC as part of such Commissioner's review of the Plan of Conversion and the Commissioner approves the Plan of Conversion following a determination that such Plan is fair and equitable to Eligible Members and is not detrimental to the general public.

(c) Each Eligible Member has an opportunity to vote to approve the Plan of Conversion after full written disclosure is given to the Eligible Member by AMHC.

(d) Any determination to receive Common Stock, Cash or Policy Credits by an Eligible Member which is a Plan, pursuant to the terms of the Plan of Conversion, is made by one or more Plan fiduciaries which are independent of AMHC and its affiliates and neither AMHC nor any of its affiliates exercises any discretion or provides investment advice, within the meaning of 29 CFR 2510.3-21(c), with respect to such decisions.

(e) After each Eligible Member entitled to receive Common Stock is allocated at least 20 shares, additional consideration is allocated to Eligible Members who own participating policies based on actuarial formulas that take into account each participating policy's contribution to the surplus and asset valuation reserve of AMHC, which formulas have been approved by the Commissioner.

(f) All Eligible Members that are Plans participate in the transactions on the same basis as all Eligible Members that are not Plans.

(g) No Eligible Member pays any brokerage commissions or fees in connection with their receipt of Common Stock or Policy Credits or in connection with the implementation of the commission-free program (the Program).

(h) All of AMHC's policyholder obligations remain in force and are not affected by the Plan of Conversion.

Section III. Definitions

For purposes of this proposed exemption:

(a) The term "AMHC" means American Mutual Holding Company and any affiliate of AMHC as defined in paragraph (b) of this Section III.

(b) An "affiliate" of AMHC includes—

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

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

(2) Any officer, director or partner in such person, and

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

(c) The term "Eligible Member" means a person who is (or, collectively, persons who are) the owner(s) of one or more "eligible policies" (the Eligible Policy or Eligible Policies) on the adoption date of the Plan of Conversion. An "Eligible Policy" is defined as a policy that has been in force for at least one year prior to the adoption date and that remains in force on the effective date of the Plan of Conversion. A mutual member of AMHC who owns both an Eligible Policy and a policy that is not an Eligible Policy will be an Eligible Member only with respect to the Eligible Policy.

(d) The term "Policy Credit" means either an increase in the accumulation account value (to which no surrender or similar charge will be applied) or an increase in a dividend accumulation on a policy or contract issued by AmerUs Life Insurance Company (AmerUs Life).

Summary of Facts and Representations

1. AMHC is a mutual insurance holding company that was organized under Iowa law on June 30, 1996. AMHC was formed incident to the conversion of AmerUs Life, from a mutual insurance company to a stock life insurance company under a plan of reorganization that was approved by the Commissioner and AmerUs Life members. As required under Section 521A.14 of the Iowa Code (which governs the formation of mutual insurance holding companies), and as provided in that plan of reorganization, AmerUs Life policyowners ceased to have any membership interests in AmerUs Life and instead became mutual members of AMHC.

2. AmerUs Life was originally organized in 1896 as a mutual insurance company under the name "Central Life Assurance Society of the United States." In 1902, AmerUs Life was converted to a stock company in 1902 and again reverted to a mutual company in 1919. In 1994, AmerUs Life's name was changed to American Mutual Life Insurance Company when it merged with a previously unrelated company of that name. On June 30, 1996, the insurer's name was finally changed to "AmerUs Life Insurance Company." As of March 31, 2000, AmerUs Life had the following financial-strength ratings: "A"

(by A.M. Best); "Baa1" (by Moody's); and "A" (by Standard & Poor's).

3. Currently, AmerUs Life has approximately 16,000 outstanding contracts held in connection with employee benefit plan policyowners which are members of AMHC. None of the Plans is sponsored by AmerUs Life or any AMHC affiliate.

In certain cases, AmerUs Life or one of its affiliates may provide limited administrative or recordkeeping services to the Plans. These services include the preparation of required tax forms (such as IRS Forms 1099-R and 5948), tracking of regular contributions made to Roth IRAs, and, in prior years, provision of prototype plan documents. However, neither AmerUs Life nor any of its affiliates is in the business of providing administrative, recordkeeping or fiduciary services to Plans.

As of December 31, 1999, AmerUs Life, together with its subsidiaries, had approximately \$4.674 billion in assets, more than \$4 billion of assets under management, and more than \$33 billion of individual life insurance in force.

4. The principal products of AmerUs Life include life insurance and annuity contracts. Some of these contracts are sold to Plans that are subject to Title I of the Act or described in section 4975(e)(1) of the Code. The Plans generally include qualified plans and qualified annuity plans, described in sections 401(a) and 403(a) of the Code (including 401(k) plans and Keogh plans); individual retirement arrangements (IRAs) described in Code section 408 (including simplified employee pensions); Roth IRAs described in Code section 408A; tax-sheltered annuities described in Code section 403(b); and welfare plans. Because no employee benefit plan sponsored by AMHC or its affiliates owns a life insurance or annuity contract issued by AmerUs Life, no in-house Plans of these entities will be involved in the demutualization and merger transactions (collectively, the Restructuring) described herein.

5. As part of the 1996 reorganization, all of the capital stock of AmerUs Life was issued to AMHC. Subsequently, AMHC transferred all of that stock to its subsidiaries. At present, AmerUs Life is a wholly owned subsidiary of AmerUs Life Holdings, Inc. (AMH), a publicly-traded insurance holding company. AMH also owns Delta Life Corporation, AmVestor Financial Corporation and several non-life subsidiaries. The direct and indirect subsidiaries of AMH (other than those that are inactive or that serve only as holding companies) are all involved in the business of life

insurance or in related financial services.

AMH is approximately 58 percent owned by AmerUs Group Co. (Group), a wholly owned subsidiary of AMHC, and approximately 42 percent owned by public investors. Group also owns a number of non-life subsidiaries. Subsidiaries of AmerUs Life include CLA Assurance Company, Centralife Annuity Services, Inc. and American Vanguard Life Insurance Company.

6. An AmerUs Life policyowner's membership interest in AMHC consists of the rights to vote, to participate in the distribution of AMHC's surplus in the event of AMHC's voluntary dissolution or liquidation, and to receive consideration in the event of AMHC's demutualization. The voting rights of such members are equal, with each member having only one vote regardless of the number of policies owned by that member. In addition, members have the right to vote for the election of AMHC's Board of Directors and to vote on any proposition that the Board of Directors submits to a vote of members or that is required to be submitted to such a vote under Iowa law. A person ceases to be a member of AMHC when such person ceases to be an AmerUs Life policyowner.

7. Because the mutual holding company structure no longer agrees with the strategic business plan of AMHC and AMH, AMHC intends to convert from a mutual company to a stock company and then merge AMH into AMHC (*i.e.*, the Restructuring) in accordance with the "Plan of Conversion of American Mutual Holding Company" which was adopted by the AMHC Board of Directors on December 17, 1999. The principal purpose of the Restructuring is to enhance AMHC's financial flexibility. In addition, the Restructuring will provide members who are eligible to receive consideration under the Restructuring (*i.e.*, the Eligible Members) with an opportunity to receive shares of Common Stock issued by AMHC, Cash or Policy Credits, in exchange for such Eligible Member's illiquid membership interests, which will be extinguished. In this regard, Eligible Members will realize economic value from their membership interests that is not currently available to them as long as AMHC remains a mutual holding company. The proposed Restructuring will not affect the rights of AmerUs Life policyowners under their insurance and annuity contracts. All of AmerUs Life's insurance and annuity contracts will remain in force and all policyowners will be entitled to receive all benefits under their contracts to which they

would have been entitled without regard to the Restructuring. In other words, the Restructuring will not, in any way, change premiums or reduce policy benefits, values, guarantees or other policy obligations of AmerUs Life to its policyowners. Policy dividends will continue to be paid as declared.

8. Accordingly, AMHC requests an administrative exemption from the Department that would cover the receipt of Common Stock, Cash or Policy Credits by Eligible Members that are Plans in exchange for such Eligible Member's existing membership interests in AMHC. As noted above, AMHC is not requesting an exemption for distributions of consideration to "in house" Plans maintained by it or its affiliates for their own employees because these Plans do not own life insurance or annuity contracts that are issued by AmerUs Life.

9. Under Section 521.14(b)(5) of the Iowa Code, AMHC is treated as a mutual entity and it may be converted to a stock company under chapter 508B of the Iowa Code. Chapter 508B, which applies to AMHC's Plan of Conversion, sets forth procedural and substantive requirements to ensure that the Restructuring will be fair and equitable to AmerUs Life policyowners.

Specifically, Section 508B.2 of the Iowa Code provides that a mutual life insurance company may become a stock life insurance company under a plan of conversion established and approved in the manner provided by Chapter 508B. Section 508B.2 and Section 508B.3 also provide that, in lieu of selecting a plan of conversion provided for in Chapter 508B, a mutual company may convert to a stock company pursuant to a plan approved by the Commissioner. (The Restructuring of AMHC will be conducted in accordance with these latter provisions.)

Under Section 508B.3 of the Iowa Code, the Commissioner must determine the fairness and equity of a plan of conversion with respect to policyowners of a company undergoing demutualization. More specifically, Section 508B.7 of the Iowa Code requires that the Commissioner review the plan of conversion to determine whether it complies with all provisions of law, is fair and equitable to the mutual company and its policyowners, and whether the reorganized company will have the amount of capital and surplus deemed by the Commissioner to be reasonable necessary for its future solvency. Additionally, Section 508B.7 of the Iowa Code permits the Commissioner to order a hearing on the fairness and equity of the terms of the plan of conversion after giving written

notice of the hearing to the mutual company, its policyowners, and other interested persons—all of whom have a right to appear at the hearing.

Section 508B.6 of the Iowa Code requires that a plan of conversion be approved by two-thirds of the policyowners of the mutual company who are entitled to vote on the conversion. The statute requires notice to be given to the policyowners and permits voting by ballot, in person, or by proxy. The notice of meeting and election must contain a copy of the plan of conversion or a summary of the plan of conversion. Section 508B.4 of the Iowa Code defines the class of policyowners entitled to receive notice and to vote on the plan of conversion as generally including policyowners whose policies or contracts are in force on the date of adoption of the plan of conversion.

Finally, Section 508B.9 of the Iowa Code provides that, after the plan of conversion has been approved by the Commissioner and the policyowners, the reorganized company will be a continuation of the mutual company and the conversion will not annul or modify any of the mutual company's existing suits, contracts, or liabilities except as provided in light of the plan of conversion.

All rights, franchisees and interests of the mutual company in and to property, assets and other interests will be transferred to and vest in the reorganized company. The reorganized company will assume all obligations and liabilities of the mutual company.

Consistent with these requirements of chapter 508B, the Plan of Conversion provides for AMHC to file an application with the Commissioner under Section 508B.2 of the Iowa Code to reorganize as a stock holding company and to merge with AMH (with AMHC as the surviving entity). In the present case, the Commissioner will hold a public hearing on the fairness and equity of the terms of the Plan of Conversion and on whether AMHC will have the amount of capital and surplus necessary for its future solvency.

The Plan of Conversion also provides for members to comment on such Plan at the hearing and for policyowners who are entitled to vote on the Plan to do so at a special members' meeting. Further, the Plan of Conversion requires AMHC to provide notice to its members of both the public hearing and the members' meeting.

10. Thus, subject to the approval of the Commissioner and the voting members, the Plan of Conversion will include the following actions:

- Group will liquidate into AMHC.

- AMHC will convert to a stock corporation.
- AMHC will provide Common Stock, Cash or Policy Credits to Eligible Members as consideration for their membership interests.

- AMH will merge into AMHC with AMHC as the surviving corporation and with shareholders of AMH receiving stock of AMHC in exchange for their shares of AMH.

- AmerUs Life will become a wholly owned subsidiary of AMHC (which will be renamed "AmerUs Group Co.").³⁶ Shares of the successor entity will be traded on the New York Stock Exchange. Thus, there will be no initial public offering of AMHC stock as a result of the Restructuring.

On June 22, 2000, the voting members of AMHC approved the Plan of Conversion with approximately 100,000 policyowners voting on such Plan. On the same day, the shareholders of AMH approved the merger of AMH into AMHC. On June 23, 2000, the Commissioner held a public hearing on the Plan of Conversion. The Commissioner is expected to approve the Plan of Conversion during August 2000 and it is anticipated AMHC will demutualize on or before September 30, 2000.

11. Under the Plan of Conversion, all Eligible Members will receive consideration in exchange for their membership interests in AMHC.³⁷ The

³⁶ AMHC is in the process of combining with Indianapolis Life Insurance Company (ILICO), a mutual life insurance company. AMHC expects that ILICO will be converted to a stock company under a "sponsored demutualization" after the Restructuring of AMHC. The sponsored demutualization of ILICO will result in certain ILICO policyowners receiving Common Stock, Cash or Policy Credits. It is anticipated that a plan of conversion for the demutualization of ILICO will be filed with the Indiana Insurance Commissioner in August 2000 and that an exemption request will be subsequently filed with the Department.

³⁷ AMHC represents that, consistent with section 508B.1.4 of the Iowa Code, the Plan of Conversion generally provides that the policyowner eligible to participate in the distribution of Common Stock, Cash or Policy Credits resulting from the Plan of Conversion generally is the owner of a policy as "determined by [AMHC] on the basis of AmerUs Life's records." AMHC further represents that an insurance or annuity policy that provides benefits under an employee benefit plan typically designates the employer that sponsors the plan, or a trustee acting on behalf of the plan, as the owner of the policy. In regard to insurance or annuity policies that designate the employer or trustee as owner of the policy, AMHC represents that it is required under the foregoing provisions of the Iowa Code and the Plan of Conversion to make distributions resulting from the Plan of Conversion to the employer or trustee as owner of the policy.

In general, it is the Department's view that, if an insurance policy (including an annuity contract) is purchased with assets of an employee benefit plan, including participant contributions, and if there exist any participants covered under the plan (as defined at 29 CFR 2510.3-3) at the time when

decision to vote on the Plan of Conversion and the decision to elect the form of consideration to be received by a Plan in connection with the Restructuring will be made by a Plan fiduciary which is independent of AMHC and its affiliates. In this respect, neither AMHC nor its affiliates will exercise investment discretion or render "investment advice," within the meaning of 29 CFR 2510.3-21(c), with respect to such decisions.

The total consideration given to the Eligible Members will be equal in value to the assets of AMHC, net of its liabilities and other obligations. For purposes of allocating the total consideration among Eligible Members, each Eligible Member will be allocated (but not necessarily issued) shares of Common Stock equal to the sum of (a) a fixed component equal to 20 shares of Common Stock; and (b) a variable component of consideration equal to the portion, if any, of the "aggregate variable component" allocated to any variable component policy owned by the Eligible Member.³⁸

12. The aggregate variable component will be allocated among variable component policies by multiplying an "equity share" for each variable component policy by the number of shares of Common Stock constituting the aggregate variable component. The "equity share" for a variable component policy will be equal to the ratio of the "actuarial contribution" for that policy to the sum of all actuarial contributions for all variable component policies. The "actuarial contribution" for a policy is the contribution that the policy has made (and is expected to make) to AmerUs Life's statutory surplus and asset valuation reserve, as calculated under the principles, assumptions and methodologies set forth in the Plan of Conversion and the actuarial contribution memorandum referred to in the Plan of Conversion.

13. After shares of Common Stock have been allocated in the manner described above, consideration will be paid to Eligible Members as follows:

- First, in the case of policies and contracts held by IRAs described in Code section 408(b) and tax-sheltered annuities described in Code section 403(b) and in the case of individual

AMHC incurs the obligation to distribute Common Stock, Cash or Policy Credits, then such consideration would constitute an asset of such Plan. Under these circumstances, the appropriate Plan fiduciaries must take all necessary steps to safeguard the assets of the Plan in order to avoid engaging in a violation of the fiduciary responsibility provisions of the Act.

³⁸ A "variable component policy" is a policy eligible to participate in the divisible surplus of AmerUs Life.

annuity contracts and individual life insurance policies issued directly to participants under qualified plans described in Code section 401(a), consideration will be paid *only* in Policy Credits.

- Second, in the case of other Eligible Members who hold policies known by AMHC to be subject to a creditor lien (other than a policy loan) or a bankruptcy proceeding or whose addresses as shown in the records of AMHC are outside the United States or are addresses at which mail is undeliverable, consideration will be paid *only* in Cash.

- Third, in the case of other Eligible Members who so elect, by making an affirmative election, consideration generally will be paid in Common Stock.

- Fourth, in all other cases, consideration generally will be paid in Cash. (In other words, an Eligible Member, who is not described in bulleted paragraph One or Two above, and who *does not make* an affirmative election to receive Common Stock, as described in bulleted paragraph Three above, will receive Cash.)

Section 6.3(d) of the Plan of Conversion provides special rules for satisfying the Cash and Common Stock preferences of Eligible Members.³⁹ In this regard, the Plan of Conversion limits the total amount of Cash available for payment of consideration to Eligible Members and provides for an allocation of Cash and Common Stock among Eligible Members (other than those described in the first two categories) in the event that the amount of available Cash is not adequate to meet Cash preferences. This allocation will be made as follows:

- First, Cash will be distributed to those "Cash Preference" Eligible Members who are allocated no more than the number of shares of Common Stock constituting the fixed component of consideration.

³⁹ The special rules are intended to apply on a uniform basis without regard to whether the Eligible Member entitled to receive consideration is a Plan. The reason for the special rules is that the Plan of Conversion limits both the total number of shares of Common Stock available for distribution in connection with the Restructuring and the total funds available for distribution as Cash or Policy Credits. In this regard, the total number of shares of Common Stock available under the Plan of Conversion is 17,390,165 shares. This number is equal to the number of AMH shares currently held by AMHC. The total funds available for distribution as Cash or Policy Credits is the "net cash proceeds" of AMHC (*i.e.*, the cash balances of AMHC immediately prior to the effective date of the Plan of Conversion less expenses relating to the Plan of Conversion, all other expenses of AMHC accrued as of the effective date of the Plan of Conversion, and the liabilities of AMHC).

- Then, Cash will be distributed continuing to the highest level of share allocation at which Cash preferences can be satisfied.

- If Cash preferences cannot be satisfied for "Cash Preference" Eligible Members entitled to receive the same number of shares of Common Stock, Cash will be distributed on a *pro rata* basis to such Eligible Members (but with Cash paid only to the extent of whole shares of Common Stock).

- Any consideration not paid in Cash under the first through third bulleted paragraphs set forth above, will be paid in shares of Common Stock.

At present, AMHC anticipates that the satisfaction of Cash preferences with Common Stock will become applicable only with respect to "Cash Preference" Eligible Members who are allocated in excess of 100 shares of Common Stock.

14. Eligible Members who do not receive Cash consideration under the aforementioned allocation method may receive consideration in the form of Common Stock. Therefore, it is possible that Eligible Members who "state a Cash preference," by not affirmatively electing to receive Common Stock, may receive Common Stock as consideration for their membership interests.

In addition, the Plan of Conversion limits the total number of shares of Common Stock available for payment to Eligible Members and provides for Cash and Common Stock to be allocated among Eligible Members in a fair and equitable manner in the event the amount of available Common Stock is not adequate to meet the Common Stock preferences.⁴⁰

15. Where consideration is to be paid in the form of Cash or Policy Credits, the amount of Cash or Policy Credits will be determined by multiplying the number of shares of Common Stock allocated to the Eligible Member by the "stock price" of the Common Stock. Under the Plan of Conversion, the

"stock price" is defined as the greater of the closing price per share of the Common Stock on the effective date of the Plan of Conversion or the average of the closing price per share of the Common Stock for each of the first ten trading days beginning with the effective date of the Plan of Conversion.

16. Where consideration is to be paid in the form of Common Stock, AMHC will issue to the Eligible Member, in book-entry form as uncertificated shares, the shares of Common Stock allocated to the Eligible Member for which the Eligible Member will not receive consideration in the form of Cash or Policy Credits and will mail notice that a designated number of shares of Common Stock have been registered in the Eligible Member's name. Upon request of the registered holder of such shares, AMHC will mail a stock certificate representing such shares. No Eligible Member will pay a brokerage commission or fee in connection with the receipt of Common Stock under the Plan of Conversion.

17. The Plan of Conversion permits AMHC to establish a commission-free program beginning within one year of the effective date of the Plan of Conversion and continuing for at least three months. Pursuant to the Program, each Eligible Member who receives not more than 99 shares of Common Stock will be entitled to sell, at prevailing market prices all such shares received under the Restructuring without paying brokerage commissions, mailing charges, registration fees, or other administrative or similar expenses.

Additionally, Eligible Members receiving fewer than 99 shares of Common Stock will be entitled to purchase, at prevailing market prices, additional shares to round-up their holdings to 100 shares without paying brokerage commissions, mailing charges, registration fees or other administrative or similar expenses. However, the decision to sell or purchase shares under the Program will be made by an independent Plan fiduciary and neither AMHC nor its affiliates will exercise investment discretion or render "investment advice" within the meaning of 29 CFR 2510.3-21(c).

18. In summary, it is represented that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Plan of Conversion will be implemented in accordance with stringent procedural and substantive safeguards that are imposed under Section 508B of the Iowa Code and will be subject to the review and supervision of the Commissioner.

(b) The Commissioner will review the terms and options that are provided to Eligible Members of AMHC as part of such Commissioner's review of the Plan of Conversion and the Commissioner will approve the Plan of Conversion following a determination that such Plan is fair and equitable to Eligible Members (including Plans) and is not detrimental to the general public.

(c) One or more independent Plan fiduciaries will have an opportunity to vote to approve the terms of the Plan of Conversion (or to comment on such Plan), and will be solely responsible for all such decisions after receiving full and complete disclosure from AMHC.

(d) The proposed exemption will allow Eligible Members that are Plans to receive Common Stock, Cash or Policy Credits, in exchange for their membership interests in AMHC and neither AMHC nor any of its affiliates will exercise investment discretion or provide "investment advice," within the meaning of 29 CFR 2510.3-21(c), with respect to such decisions.

(e) All Plans that are Eligible Members will participate in the transactions and on the same basis as Eligible Members that are not Plans.

(f) No Eligible Member will pay any brokerage commissions or fees in connection with the receipt of Common Stock or Policy Credits or in connection with the implementation of the Program.

(g) All of AMHC's policyholder obligations will remain in force and will not be affected by the Plan of Conversion such that no benefits, guarantees, or other rights and interests (apart from membership in AMHC) will be compromised.

Notice to Interested Persons

AMHC will provide notice of the proposed exemption to Eligible Members which are Plans within 21 days of the publication of the notice of pendency in the **Federal Register**. Such notice will be provided to interested persons by first-class mail and will include a copy of the notice of proposed exemption, as published in the **Federal Register**, including a supplemental statement, as required pursuant to 20 CFR 2570.43(b)(2) which shall inform interested persons of their right to comment on the proposed exemption. Comments with respect to the notice of proposed exemption are due within 51 days after the date of publication of this pendency notice 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.)

⁴⁰ Specifically, Section 6.3(d) of the Plan of Conversion provides special rules for the limited satisfaction of Common Stock preferences with Cash. These rules apply in the event Eligible Members elect to receive consideration in the form of Common Stock in such a way that the net cash proceeds of AMHC would not be fully utilized and the shares of Common Stock issued in connection with the Restructuring would exceed 17,390,165 shares. In this event, the number of shares of Common Stock to be issued to the Eligible Members who have elected to receive Common Stock (the Stock Preference Members) will be reduced to 17,390,165 shares "in a fair and equitable manner" and an amount of funds necessary to reduce the undistributed net cash proceeds to zero will be distributed to Stock Preference Members "in a fair and equitable manner." AMHC expects that the Common Stock preferences of all Stock Preference Members will be satisfied with shares of Common Stock so the foregoing rules will not apply in connection with the Restructuring.

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 10th day of August, 2000.

Ivan Strasfeld,

*Director of Exemption Determinations,
Pension and Welfare Benefits,
Administration, U.S. Department of Labor.*
[FR Doc. 00-20741 Filed 8-16-00; 8:45 am]

BILLING CODE 4510-29-P

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC-24596; 812-9618]

XSource, Inc.

August 11, 2000.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for an order under sections 6(c), 17(b) and 23(c) of the Investment Company Act of 1940 (the "Act") granting an exemption from sections 17(a), 18(d), 21(b), 23(a) through (c), and 30 of the Act; and under section 17(d) of the Act and rule 17d-1 under the Act permitting certain joint transactions.

SUMMARY OF APPLICATION: Applicant proposes to operate as a managerial strategic investment company ("MSIC").

FLING DATES: The application was filed on May 31, 1995, and amended on September 25, 1995, September 4, 1996, and January 20, 2000.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless to SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on September 5, 2000 and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street N.W., Washington, D.C. 20549-0609. Applicant, 153 East 53rd Street, Suite 5900, New York, New York, 10022.

FOR FURTHER INFORMATION CONTACT: Mary Kay Frech, Branch Chief, (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 5th Street N.W., Washington, D.C. 20549 0102 (telephone 202-942-8090).

Applicant's Representations

1. Applicant, a Delaware corporation, is an indirect wholly-owned subsidiary of Millicom International Cellular, S.A.

("Millicom"), a Luxembourg corporation engaged in the cellular telephone business. Applicant currently holds majority equity interests in nine companies engaged in electronics, media, providing integrated network services for telecommunication data and internet network businesses.¹ The present business of applicant dates back to 1993, when Millicom transferred substantially all of its non-cellular operations to applicant (then known as American Satellite Network, Inc., and later known as Great Universal Incorporated).

2. In 2000, upon the exercise of certain warrants, applicant no longer will be a wholly-owned subsidiary of Millicom and will become a public company. At that time, applicant states that it plans to change its business to operate as an MSIC. As an MSIC, applicant states that it will provide a long-term source of financial support and managerial assistance to public companies seeking to improve their competitiveness. Applicant will acquire long-term substantial minority equity holdings in selected public companies ("strategic portfolio companies") and then apply applicant's experience and resources to help manage those companies. Applicant plans to be actively involved in the management of the strategic portfolio companies through board representation; by having applicant's officers and employees serve as officers or consultants to the strategic portfolio companies; and by providing direct financial assistance to the companies.

3. Applicant states that, as an MSIC, it may come within the definition of investment company in section 3(a)(1)(C) of the Act because more than 40% of applicant's holdings may consist of minority interests that constitute "investment securities," as that term is defined in section 3(a)(2) of the Act. If applicant comes within the definition of investment company in section 3(a)(1)(C) of the Act, and is unable to rely on an exemptive rule under the Act, applicant will register under the Act as a closed-end management investment company.

4. Applicant states that, although it would be registered under the Act,

¹ Currently, XSource's principal holdings include 100% ownership of Get.2.Net Corporation, Integrated Systems and Internet Solutions, Inc., Basset Telecom Solutions AB, Diator Netcom Consultants AB, Multinational Automated Clearing House U.S.A. Inc., Netcom Consultants (UK) Ltd., Netcom Latin America BV, Netcom Asia BV and Praesidium Incorporated as well as a 55% interest in Savera Systems Incorporated. XSource also holds a 45% interest in Modern Cartoons, Ltd. (together with wholly-owned and majority-owned subsidiaries, "Current Holdings").