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Signed at Washington, DC, this 1 day of August 2002.

**Carl J. Poleskey,**

*Chief, Branch of Construction Wage Determinations.*

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Application No. D-10989, et al.]

### Proposed Exemptions; Investors Savings Bank Pension Plan (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 requests 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.

**ADDRESS:** All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration (PWBA), 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. Interested persons are also invited to submit comments and/or hearing requests to PWBA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "[moffittb@pwba.dol.gov](mailto:moffittb@pwba.dol.gov)", or by FAX to (202) 219-0204 by the end of the scheduled comment period. 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-1513, 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.

### Investors Savings Bank Pension Plan (the Plan) Located in Milburn, New Jersey

[Application No. D-10989]

### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the past sales by the Plan of certain securities (the Securities) to Investors Savings Bank (the Employer), a party in interest with respect to the Plan, provided that the following conditions were satisfied: (1) Each sale was a one-time transaction for cash; (2) the Plan paid no commissions nor other expenses relating to the sales; (3) for each Security that was publicly traded, the Plan received an amount equal to the highest, as of the date of the sale, of (a) the Plan's cost, (b) the book value, or (c) the fair market value of the Security, as determined by an independent, third-party market source; and (4) for each Security that was not publicly traded, the Plan received an amount equal to its cost for the Security, which was in excess of the fair market value of the Security on the date of the sale.

**EFFECTIVE DATE:** The proposed exemption, if granted, will be effective as of January 4, 1999.

**Summary of Facts and Representations**

1. The Plan was a defined benefit plan sponsored by the Employer. As of January 4, 1999, the Plan had approximately 280 participants and 340 beneficiaries. As of that date, the Plan had total assets of approximately \$21,500,000. The trustees of the Plan were Patrick J. Grant, Stephen J. Szabatin, Doreen R. Byrnes, and Joseph H. Shepard III, who had responsibility for investment of the Plan's assets. The Plan was terminated in 1999 and its

assets transferred to the multiple employer plan administered by the Pentegra Group (Pentegra).

2. Among the assets of the Plan were the Securities. The trustees had purchased the Securities on the open market in the belief that the purchases were consistent with the Plan's investment objectives at the time.<sup>1</sup>

In 1999, the Employer terminated the Plan in the belief that Pentegra can provide more efficient administration at less cost than would be available with a single employer plan. According to the Employer, it purchased the Securities from the Plan in order to facilitate the transfer of the Plan's assets to Pentegra,

which wanted the Plan's assets in cash. The Employer represents that the terms of each sale were at least as favorable to the Plan as terms the Plan could have obtained in an arm's length transaction with an unrelated party.

3. The Securities purchased by the Employer from the Plan for cash during the period between January 4, 1999 and February 10, 1999, are listed in the chart below. The Plan's cost for the Securities, and the Employer's purchase price for the Securities, appear in the columns with the headings "Cost" and "Purchase Price," respectively.

| Security                                      | Cost           | Purchase price | Yield |
|---|----------------|----------------|-------|
| Federal Nat'l Mortgage Ass'n Bonds .....      | \$3,125,135.04 | \$4,500,426.98 | 6.91  |
| Federal Home Loan Mortgage Corp. Bonds .....  | 364,879.80     | 629,063.83     | 8.25  |
| Gen'l Nat'l Mortgage Ass'n Certificates ..... | 828,861.30     | 882,198.64     | 8.963 |
| Money Store (2d Mortgages) .....              | 97,099.22      | 97,099.22      | 9.65  |
| U.S. Government Obligations .....             | 300,000.00     | 400,000.00     | 12.21 |

For the Securities that were publicly traded, the Employer paid an amount equal to the closing price for each Security on the previous day, as quoted by Paine Webber's Million Plus trading desk as fair market value for a "whole lot" (generally more than one million dollars remaining value). The fair market value was greater than the Plan's cost for these Securities, as demonstrated by the chart above.

With respect to the Money Store Second Mortgages (the Second Mortgages), there was no established market for these Securities (due to the small dollar amount). Thus, the Employer paid an amount equal to the Plan's cost for the Second Mortgages. The Employer represents that KPMG, the Plan's independent auditor, had always carried the Second Mortgages on the Plan's balance sheet at cost, due to their lack of marketability. Further, the Employer represents that the Plan's cost for the Second Mortgages, i.e., \$97,099, was the best possible price for the Plan, since the Second Mortgages had been repaid by approximately 80 percent and had an outstanding balance that was significantly less than their face value.

The Plan paid no commissions nor other expenses relating to the sales of the Securities, which represented a significant savings to the Plan in transaction costs. In addition, the Employer represents that the sales of the Securities were in the best interests of the Plan and of its participants and

beneficiaries because they facilitated the transfer of Plan assets to the Pentegra multiple employer plan.

4. In summary, the applicant represents that the subject transactions satisfied the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (1) Each sale of the Securities by the Plan to the Employer was a one-time transaction for cash; (2) the Plan paid no commissions nor other expenses relating to the sales; (3) for each Security that was publicly traded, the Plan received an amount equal to the highest, as of the date of the sale, of (a) the Plan's cost, (b) the book value, or (c) the fair market value of the Security, as determined by an independent, third-party market source; and (4) for each Security that was not publicly traded, the Plan received an amount equal to its cost for the Security, which was in excess of the fair market value of the Security on the date of the sale.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karin Weng of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

**Twin City Iron Workers Apprenticeship and Training Fund (the Trust Fund) Located in St. Paul, Minnesota**

[Application No. L-10929]

**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, 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 effective May 22, 2000 to the past purchase of a certain parcel of unimproved real property (the Property) by the Trust Fund from the Twin City Union No. 512 of Bridge, Structural and Ornamental Workers, Inc. (the Building Corporation), a party in interest with respect to the Trust Fund, provided that the following conditions are met:

(a) The purchase of the Property by the Trust Fund was a one-time transaction for cash;

(b) The Trust Fund paid no more than the lesser of: (i) \$48,000; or (ii) the fair market value of the Property as determined at the time of the transaction;

(c) The fair market value of the Property was established by an independent, qualified, real estate appraiser that was unrelated to the Building Corporation or any other party in interest with respect to the Trust Fund;

(d) The Trust Fund did not pay any commissions or other expenses with respect to the transaction;

(e) Standard Valuations, Inc. (SVI), acting as an independent, qualified fiduciary for the Trust Fund, determined that the transaction was in

<sup>1</sup> The Department expresses no opinion herein as to whether the acquisition and holding of the Securities by the Plan violated any of the provisions

of Part 4 of Title I of the Act. However, the Department notes that section 404(a) of the Act requires, among other things, that a plan fiduciary

act prudently and solely in the interest of the plan and its participants and beneficiaries when making investment decisions on behalf of the plan.

the best interest of the Trust Fund and its participants and beneficiaries;

(f) SVI monitored various aspects of the purchase of the Property until closing, including the environmental reports concerning the Property, and took whatever action was necessary to protect the interests of the Trust Fund; and

(g) The purchase price paid by the Trust Fund for the Property represented no more than 25 percent of the Trust Fund's total assets at the time of the transaction.

### Summary of Facts and Representations

1. The Trust Fund is an apprenticeship training plan, the assets of which are subject to the fiduciary responsibility provisions of Part 4 of Title I of the Act. The Trust Fund is also established and administered pursuant to the provisions of section 302 of the Labor Management Relations Act of 1947. Currently, there are approximately 972 participants and beneficiaries covered by the Trust Fund. As of December 31, 1999, the Trust Fund had total assets of \$715,108.76. The Building Corporation is a Minnesota non-profit corporation under the control and supervision of the Twin City Iron Workers Local Union No. 512.

2. The Property is a parcel of unimproved real property located at Lots 10 & 21, Block 5, Winter's Addition to St. Paul, Ramsey County, Minnesota.

The Property is approximately 10,720 square feet. The dimensions of the site are 40 feet by 268 feet. The Property is rectangularly shaped and the topography of the property is generally level and at street grade.

3. The Trust Fund decided to construct a training facility for use by Trust Fund members on a site consisting of several contiguous parcels of real estate owned by the Trust Fund. Certain adjoining lots, however, were owned by the Building Corporation. Construction of a training facility large enough to accommodate current needs of Trust Fund membership required a facility that is larger than that which could be constructed on the parcels of real estate currently owned by the Trust Fund. Economic conditions in the geographic area in which the Trust Fund operates indicated that the need for skilled workers would continue to multiply, thus, making it necessary for the Trust Fund to have a facility which would be able to accommodate current as well as future needs. For example, it was necessary that the Trust Fund secure a storage facility for purpose of housing supplies and equipment necessary for the Trust Fund's programs. To facilitate construction and ultimate management

and use of the facility, the Trust Fund determined that all parcels should be owned by a single entity. Ownership by a single entity would encourage administrative efficiency in the construction process, as well as in the ultimate use and operation of the facility. Because the facility would be managed and operated by the Trust Fund, it was desirable that the Trust Fund holds title to the Property. Ownership of the parcels by the Trust Fund would give the Trust Fund full control of the buildings and grounds and would enable the Trust Fund to make improvements to the Property as needed.<sup>2</sup>

4. The Property was appraised by Lisa I. Lang and R. David Lang, Minnesota licensed Certified General Real Property Appraisers of Lang & Associates (the Appraisers), a real estate appraisal firm located in Minnetonka, Minnesota. The Appraisers determined that the fair market value of the Property was approximately \$48,000, as of January 10, 2000.

The Appraisers utilized a sales comparison methodology in valuing the Property. The Appraisers compared the Property with recent sales of three other industrial zoned properties, all within immediate and/or competitive market areas of the Property. In order to equate these three transactions with the Property, the Appraisers made adjustments for various comparative factors including appreciation/depreciation over time, location, zoning, frontage/access, off-site improvements, current easements and restrictions, physical characteristics, and size. After making the necessary adjustments, the Appraisers concluded that the unencumbered fee simple interest in the Property would have a fair market value of approximately \$48,000. The Appraisers also concluded that an industrial complex, such as the Trust Fund's proposed training facility, would represent the highest and best use of the Property.

5. The Building Corporation, on May 22, 2000, sold the Property to the Trust Fund for \$48,000 in cash, subject to the

<sup>2</sup>The Department expresses no opinion herein concerning the application of section 404 of the Act to the amount of expenditures and/or the need for construction of a training facility. In this regard, the Department notes that the fact that a transaction is the subject of an exemption under section 408(a) of the Act does not relieve a fiduciary or other party in interest from the general fiduciary responsibility provisions of section 404 of the Act. Section 404(a)(1)(A) and (B) of the Act requires, among other things, that a fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Accordingly, it is the responsibility of the Trust Fund's fiduciaries to determine the appropriateness of the construction of the facility.

review and approval of an independent fiduciary (see Paragraph 6 below). The parties obtained an updated appraisal of the Property from the Appraisers at the time of the proposed transaction to ensure that the appraised amount (i.e., \$48,000) still reflected the fair market value of the Property at that time. The parties have agreed that the \$48,000 paid by the Trust Fund represented the fair market value of the Property at the time of the transaction. In addition, the applicant states that the Trust Fund did not pay any commissions, transaction costs, or other expenses associated with the sale of the Property by the Building Corporation, other than the fees necessary for the services of the Trust Fund's independent fiduciary, SVI. Thus, the Building Corporation paid, among other things, the costs of the title search and title insurance premiums, the cost of recording the deeds conveying title to the Property to the Trust Fund, all sales and transfer taxes (including the conveyance tax), the escrow fees, and the cost of the appraisal.

6. SVI was appointed by the Trust Fund Trustees to act as an independent fiduciary for the Trust Fund for the transaction. SVI represents that it is a company organized under the laws of Minnesota and that it exercises fiduciary powers similar to those of national banks. SVI stated that it is an experienced fiduciary in matters concerning Taft-Hartley funds subject to the Act and is also experienced with real estate transactions and investments. SVI acknowledged its duties, responsibilities and liabilities in acting as a fiduciary for the Trust Fund for purposes of the proposed transaction. SVI represents that it is an independent fiduciary and not an affiliate of, or related to, the entities involved in the subject transaction. In this regard, SVI certifies that: (i) Less than one (1) percent of its total deposits, or outstanding loans, are attributable to the deposits of, or loans to, the Building Corporation and its affiliates; and (ii) less than one (1) percent of its annual income (measured on the basis of the prior year's income) comes from business derived from The Building Corporation and its affiliates.

7. SVI has reviewed all of the terms and conditions of the proposed purchase of the Property by the Trust Fund. SVI states that the Appraisers have considered all of the factors necessary to accurately determine the fair market value of the Property, including the applicable zoning restrictions for industrial usage, and the offsite improvements surrounding the Property. Based on this review and

analysis, SVI concluded that the transaction was in the best interests of the Trust Fund and its participants and beneficiaries. In this regard, SVI stated that the purchase of the Property was a prudent transaction taking into consideration that the Trust Fund will be using this site as a training facility. SVI stated that the agreed upon purchase price of \$48,000, based on the Appraisers determination of value accurately reflected the fair market value of the Property at the time of the purchase.

SVI stated further that it would monitor the Property and will take whatever actions are necessary to protect the interests of the Trust Fund's participants and beneficiaries with regard to the transaction. To this end, SVI represented that the current appraisal of the Property was updated at the time of the transaction and that the Trust Fund paid no more than the fair market value of the Property. SVI also ensured that the purchase price paid by the Trust Fund represents no more than 25 percent of the Trust Fund's total assets at the time of the transaction.

SVI represents that the Trust Fund will be able to meet all of its current expenses after the transaction and that the transaction has not adversely affected the Trust Fund's liquidity needs. By letter dated May 6, 2000, SVI states it reviewed the essential documents associated with the transaction and determined that the transaction was in the best interest of the Trust Fund and its participants and beneficiaries.

8. In summary, the applicant states that the transaction has satisfied the statutory criteria of section 408(a) of the Act because: (a) The purchase of the Property by the Trust Fund was a one-time transaction for cash; (b) the Trust Fund did not pay more than the fair market value of the Property as determined at the time of the transaction; (c) the fair market value of the Property was established by an independent, qualified real estate appraiser; (d) the Trust Fund did not pay any commissions or other expenses with respect to the transaction, other than the services of an independent fiduciary (as described herein); (e) SVI, acting as the Trust Fund's independent fiduciary, determined that the proposed transaction was in the best interest of the Trust Fund and its participants and beneficiaries; and (f) the purchase price paid by the Trust Fund for the Property represented no more than 25 percent of the Trust Fund's total assets at the time of the transaction.

**EFFECTIVE DATE:** This exemption, if granted, is effective as of May 22, 2000.

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

**FOR FURTHER INFORMATION CONTACT:** Mr. Khalif I. Ford of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

**Child Health Corporation America (CHCA) Located in Shawnee Mission, KS**

[Application No. L-10939]

**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) and 406(b) of the Act shall not apply to the (1) purchase, by a welfare plan (the Plan), whose hospital sponsor (the Hospital) is a member of CHCA, of third party insurance, through CHCA, the broker of record and a party in interest with respect to such Plan; and (2) the receipt of an insurance sales commission by CHCA from the third party insurance company, in connection with the purchase of an insurance policy with the assets of the Plan attributed to participant (*i.e.*, employee) contributions.

This proposed exemption is subject to the following conditions:

(a) The transactions are effected by CHCA in the ordinary course of its business.

(b) Each Plan pays no more than adequate consideration for an insurance policy that is brokered by CHCA.

(c) Prior to the execution of the transactions, CHCA provides each Hospital, which serves as the independent fiduciary of a Plan it sponsors, with the following written documentation:

(1) A statement setting forth the insurance sales commissions, expressed as a percentage of the gross annual premium payments that will be paid by the insurance company to CHCA with respect to the purchase of the insurance policy;

(2) A description of the charges, fees, discounts, penalties or adjustments which may be imposed under the insurance policy in connection with the

purchase, holding, exchange, termination or sale of such policy; and

(3) A full description of CHCA's procedure for offsetting a Plan's allocable portion of insurance sales commissions that are received by CHCA and which are attributable to Plan assets against the amounts otherwise payable by such Plan for future premium contributions (the Premium Adjustment; the Premium Adjustment Procedure).

(d) Following the receipt of such information, the Hospital independent fiduciary acknowledges receipt of such information to CHCA, in writing, and approves the transactions on behalf of the respective Plan.

(e) On an annual basis, CHCA discloses all direct expenses it has incurred to independent Plan fiduciaries of its member Hospitals, including any Premium Adjustments that have been made.

(f) The transactions are on terms that are at least as favorable to a Plan as those available in arm's length transactions with an unrelated party.

(g) The combined total of all fees, insurance sales commissions and other consideration received by CHCA in connection with the purchase of insurance policies issued by a third party insurer or the provision of services to a Plan is not in excess of "reasonable compensation" within the contemplation of section 408(b)(2) and 408(c)(2) of the Act.

(h) There is no increased cost to a Plan nor any diminution in any benefit received by a Plan participant or beneficiary as a result of CHCA's receipt of insurance sales commissions.

(i) The Plan receives a Premium Adjustment based upon the excess of insurance sales commissions over direct costs, if any, incurred by CHCA, in accordance with the Premium Adjustment Procedure, the steps of which are as follows:

(1) At the end of each calendar year, CHCA separates the total premiums paid between each Hospital and its respective Plan.

(2) CHCA calculates the commissions that are paid based on the premiums.

(3) CHCA calculates the amount available for the patronage dividend by subtracting aggregate direct expenses incurred under its insurance program from the total commissions.

(4) CHCA calculates a breakdown of the commissions on a percentage basis.

(5) CHCA allocates the amounts available for the patronage dividend based upon the percentages determined above in paragraph (i)(4).

(6) CHCA sends a check to the insurer with instructions to allocate such amount on a per Hospital basis to be

applied against a Plan participant's insurance rate schedule.

(7) CHCA requests written confirmation from the insurer that the Premium Adjustment has been made.

(j) CHCA establishes and maintains a system of internal and external accounting controls for the Premium Adjustment Procedure.

(k) CHCA retains an independent auditor to audit, on an annual basis, the Premium Adjustments made to the affected Plans.

(l) Within 90 days following the publication, in the **Federal Register**, of the notice granting the final exemption, CHCA makes full restitution to the participants of each affected Plan whose assets are attributed to CHCA's past fee arrangement with an independent broker (the Independent Broker) and its subsequent compensation arrangement with the UNUM Life Insurance Company (UNUM).

(m) CHCA maintains for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons described in paragraph (n) to determine whether the conditions of this exemption have been met, except that—

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

(2) No party in interest, other than CHCA, shall be subject to the civil penalty that may be assessed under section 502(i), or the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (m).

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

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

(B) Any fiduciary of a Plan which has the authority to purchase an insurance policy by or on behalf of a Plan or any duly authorized employee or representative of such fiduciary; and

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

(2) None of the persons described above in paragraph (n)(1)(B) or (C) shall be authorized to examine the trade secrets of CHCA or commercial or

financial information which is privileged or confidential.

### Summary of Facts and Representations

1. CHCA, a taxable cooperative organization located at 803 West 64th Street, Shawnee Mission, Kansas, is owned by 38 different not-for-profit hospitals. The Hospitals are located in various cities around the United States and they specialize in the medical treatment of children. Each member Hospital owns 2.63 percent of CHCA and no member Hospital is in a position to influence or control the actions of CHCA or the entire Hospital group.<sup>3</sup> (A table showing the Hospitals participating under CHCA's insurance program, the Plans they sponsor and the respective participant totals is presented in the Appendix.)

2. As a cooperative organization, CHCA acts as a purchasing agent and makes products and services, including insurance, available to its member Hospitals at discounted rates. Each Hospital is, however, free to purchase any product or service elsewhere, if it desires. At the end of each year, if CHCA receives a "profit," as confirmed by an independent auditor, it typically pays a patronage dividend to each Hospital.<sup>4</sup> Under such circumstances, CHCA's eleven member Board of Directors, consisting of CHCA's Chief Executive Officer and the Chief Executive Officers of ten member Hospitals, will determine whether such dividend will be paid, the amount, the components (*i.e.*, cash, retained surplus in CHCA, or equity interests in other entities that are associated with CHCA), and the percentage distribution of the dividend amount among the various components.<sup>5</sup>

3. Among the goods and services provided by CHCA are insurance policies, including property and casualty insurance, workers compensation, disability insurance and group life insurance. Many of CHCA's member Hospitals maintain disability plans provided through group disability insurance obtained through CHCA. These Hospitals also maintain group life

<sup>3</sup> CHCA is subject to the provisions of Subchapter T of the Code, specifically to Code sections 1381-1388 and section 521 which provides special exemptions for cooperative organizations from taxes.

<sup>4</sup> The profitability or net income of CHCA is defined as revenues less expenses. CHCA represents that its financial records are presented in conformity with Generally-Accepted Accounting Principles.

<sup>5</sup> The Board of Directors also approves the third party insurer, the contract with such insurer and authorizes other business functions. Members of the Board of Directors are not compensated for their services.

insurance plans provided through life insurance obtained through CHCA.

The insurance is obtained on a group basis. To allow the Hospitals the benefit of a group rate, CHCA is the master policy holder. Each Hospital is a participating employer in the policy. Thus, CHCA will make a recommendation to the Hospitals on who the ultimate insurance carrier will be and it will establish a relationship the Hospitals may access. The individual Hospitals will then have the sole discretion on whether or not to participate in CHCA's insurance program. CHCA will also exercise discretionary authority regarding the type of insurance to be purchased and made available to its membership.

CHCA notes that the amount of insurance premiums paid by individual member Hospital may be different from that paid by other member Hospitals. In this regard, CHCA explains that some Hospitals may choose to pay all or most of the insurance costs for its employees while others may pass all or a significant portion of the insurance costs on to their employees. Still other Hospitals may choose not to provide any disability and/or life insurance coverage at all.

4. Prior to May 1, 2000, member Hospitals participating in CHCA's insurance program placed insurance through an independent insurance broker with UNUM, a third party insurer.<sup>6</sup> UNUM set the premiums for the insurance and negotiated the commissions to be paid to the Independent Broker. Under this arrangement with the Independent Broker, CHCA acted primarily as a liaison between the Hospitals, the Independent Broker and UNUM. In this regard, between 1998 and May 2000, CHCA received fees from the Independent Broker totaling \$1,137,000 for the administrative and marketing services it performed while the Independent Broker received a 7 percent commission.

5. CHCA has obtained a brokerage license to sell insurance and after May 2000, it became the broker of record. Rather than having the commissions paid by UNUM to the Independent Broker, CHCA has been retaining the commissions within the cooperative group in order to increase the cooperative's net profits as well as the amount of the patronage dividend. As a

<sup>6</sup> UNUM's current financial strength ratings, as denoted by Moody's Standard and Poor's, A.M. Best, and Fitch/Duff & Phelps are as follows: "A2" or "Good Financial Security" (Moody's); "AA" or "Very Strong" (Standard & Poor's); "A" or "Excellent" (A.M. Best); and "AA/" or "Very Strong" (Fitch/Duff & Phelps).

consequence, the commissions previously paid to the Independent Broker are currently being paid to CHCA. The amount of the commissions payable to CHCA by UNUM represents 10 percent of the total premiums for disability insurance and 5 percent of the total premiums for life insurance. CHCA states that the commissions are negotiated on an arm's length basis with UNUM and are market-based. CHCA also does not expect that a Plan's costs will be increased by the present arrangement.

6. To provide a direct benefit to Plan participants with respect to the distribution of patronage dividends, CHCA proposes to amend its policy of allocating net income to each of the member Hospitals. Under the contemplated arrangement, CHCA intends to take a portion of the net income attributable to the commissions paid by Plan participants and then transfer such commissions to each Plan in accordance with the Premium Adjustment Procedure described herein. In general, CHCA will make a payment to UNUM, or a successor third party insurance carrier, on behalf of Plan participants to ensure that the participants will benefit from its action. The amount of the Premium Adjustment will represent a *pro rata* portion of the commissions paid by the Plan participants to the commissions paid on the aggregate premium contribution.

More specifically, during its normal year-end patronage dividend calculation, CHCA will make a special allocation for the commission dollars it has received from its current long-term disability and life insurance program (and possibly commission dollars derived from other health and welfare plans in the future). The calculation will then determine the net patronage dividend dollar that pertains to the commissions derived from Plan participant contributions to the overall commission dollars earned by CHCA. The dollar amount will then be paid directly to UNUM and applied as a direct reduction in the rate paid by the Plan participant for future insurance premium contributions.

In effect, CHCA will implement its Premium Adjustment Procedure as follows:

- At the end of each calendar year, CHCA will separate the total premiums paid between each Hospital and its respective Plan.

- CHCA will calculate the commissions that are paid based upon the premiums.

- CHCA will calculate the amount available for the patronage dividend by subtracting the aggregate direct

expenses incurred under its insurance program<sup>7</sup> from the total commissions.

- CHCA will calculate a breakdown of the commissions on a percentage basis.

- CHCA will allocate the amounts available for the patronage dividend based upon the percentages determined in the previous step.

- CHCA will send a check to UNUM (or a successor third party insurer) with instructions to allocate such amount on a per Hospital basis that will be applied against a Plan participant's insurance rate schedule.

- CHCA will request written confirmation from UNUM (or the successor third party insurer) that the Premium Adjustment has been made.

(For a further explanation of CHCA's Premium Adjustment Procedure, refer to the example in the Appendix.)

7. CHCA states that the payment of insurance commissions that are attributable to plan assets, the payment of patronage dividends and the Premium Adjustment Procedure may violate certain provisions of sections 406(a) and 406(b) of the Act. In this regard, since a member Hospital will receive a patronage dividend which is derived, in part, from plan assets attributable to insurance commissions paid to CHCA, CHCA is of the view that the purchase of insurance for a Hospital-sponsored, disability or life insurance Plan may be construed as fiduciary self-dealing both on the part of CHCA and a member Hospital in violation of section 406(b)(1) of the Act. In addition, CHCA observes that its actions may further result in the involvement of a member Hospital and thereby be construed as the Hospital's receiving consideration from a party (*i.e.*, CHCA) which has been dealing with a participating Plan in connection with a transaction involving the assets of such Plan, in violation of section 406(b)(3) of the Act.

Accordingly, CHCA requests an administrative exemption from the Department to permit (a) the purchase of third party insurance by a Plan through CHCA, as the broker of record; and (b) the receipt of insurance sales

<sup>7</sup> CHCA represents that the "direct expenses" associated with its insurance program are those expenses which are unique to CHCA that would not be incurred if the program were not in place. Regulation section 29 CFR 2550.408c-2(b)(3) provides that an expense is not a direct expense to the extent it would have been sustained had the service not been provided or if it represents an allocable portion of overhead costs. Although CHCA represents that it intends to comply with the foregoing regulation, the Department is expressing no opinion herein on whether the expenses identified by CHCA in the operation of its insurance program are "direct expenses" as contemplated by the regulation.

commissions by CHCA from UNUM in connection with such purchase. Further, CHCA represents that within 90 days of publication, in the **Federal Register**, of the notice granting the final exemption, it will make full restitution to the participants of each affected Plan whose assets are attributed to CHCA's past fee arrangement with the Independent Broker and its current insurance brokerage arrangement with UNUM.

CHCA anticipates that the foregoing purchase and insurance brokerage transactions will recur on an annual basis. Although the basic parameters of the transactions will not change from year to year, the amount of the annual premium, the amount of the brokerage commissions and the amount of the patronage dividend are expected to differ.

8. The proposed exemption is subject to a number of safeguards. In pertinent part,

- The transactions will be effected by CHCA in the ordinary course of its business.

- No Plan will pay more than adequate consideration for an insurance policy that is brokered by CHCA.

- Prior to the execution of the transactions covered by the exemption, CHCA will provide each Hospital, which serves as the independent fiduciary of a Plan it sponsors, with written disclosures describing the insurance sales commissions and fees, discounts, penalties or adjustments which may be imposed under the recommended insurance policy in connection with the purchase, holding, exchange, termination or sale of the insurance policy, as well as the Premium Adjustment Procedure.

- Following the receipt of such information, the Hospital fiduciary will acknowledge receipt of such information to CHCA in writing and approve the transactions on behalf of the Plan.

- On an annual basis, CHCA will disclose, in writing, the direct expenses it has incurred to independent Plan fiduciaries of its member Hospitals, including any Premium Adjustments that have been made.

- The transactions will be on terms that are at least as favorable to a Plan as those available in arm's length transactions with an unrelated party.

- The combined total of all fees, commissions and other consideration received by CHCA in connection with the purchase of insurance policies issued by a third party insurer or the provision of services to a Plan has not been and will not be in excess of "reasonable compensation" within the

contemplation of section 408(b)(2) and 408(c)(2) of the Act.

9. CHCA will establish a system of internal and external accounting controls with respect to the Premium Adjustment Procedure. In this regard, internal audit employees of CHCA will review appropriate records. In addition, CHCA will retain the services of Baird, Kurtz & Dobson, CPA, P.C., an independent accounting firm, to audit, on an annual basis, the Premium Adjustment Procedure. The audits will provide independent verification of the proper crediting of the insurance sales commissions attributed to the assets of the participating Plans. Specifically, the independent auditors will be instructed to (a) review and test compliance with the operational controls established by CHCA for purposes of implementing the Premium Adjustment Procedure; (b) verify, on a test basis, the Premium Adjustments that are made; and (c) recompute, on a test basis, the amounts adjusted at the discretion of the auditors. In the event any shortfalls are uncovered during the course of an audit as a result of errors it has made, CHCA will provide a cash payment to the Plan equal to the amount of the error plus market rate interest for the period of time of the error until the correction is made. Any excess Premium Adjustments will be corrected by corresponding future adjustments in the amount of the excess and will not require that the Plan pay any interest.

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

- (a) The transactions will be effected by CHCA in the ordinary course of its business.
- (b) A Plan will pay no more than adequate consideration for an insurance policy that is brokered by CHCA.
- (c) Prior to the execution of the transactions, CHCA will provide each Hospital, serving as the independent fiduciary of the Plan it sponsors, with written disclosures describing the insurance sales commissions and fees,

discounts, penalties or adjustments which may be imposed under the insurance policy, including a written description its Premium Adjustment Procedure. Such disclosures will also be approved by the independent Plan fiduciary.

(d) On an annual basis, CHCA will provide independent Plan fiduciaries of its member Hospitals with written disclosures of the direct expenses CHCA has incurred, including any Premium Adjustments that have been made.

(e) The transactions will be on terms that are at least as favorable to a Plan as those available in arm's length transactions with an unrelated party.

(f) The combined total of all fees, commissions and other consideration received by CHCA in connection with the purchase of insurance policies issued by UNUM (or another third party insurer) or the provision of services to a Plan will not be in excess of "reasonable compensation" within the contemplation of section 408(b)(2) and 408(c)(2) of the Act.

(g) There will be no increased cost to a Plan nor any diminution in any benefit received by a Plan participant or beneficiary since Plan participants and beneficiaries will receive the same insurance benefits regardless of whether the insurance sales commissions stay within the cooperative group and are used for the payment of patronage dividends to the member Hospitals.

(h) The Plan will receive a Premium Adjustment based upon the excess of insurance commissions over direct costs, if any, incurred by CHCA, in accordance with CHCA's Premium Adjustment Procedure.

(i) CHCA will maintain a system of internal accounting controls with respect to the Premium Adjustment Procedure, and will retain an independent auditor outside of the control of CHCA to audit, on an annual basis, the Premium Adjustments that are made on behalf of the affected Plans.

(k) Within 90 days following the publication, in the **Federal Register**, of the notice granting the final exemption,

CHCA will make full restitution to the participants of each affected Plan whose assets are attributed to CHCA's past and continuing compensation arrangements with the Independent Broker and UNUM.

(l) CHCA will maintain, for a period of six years and in a manner that is accessible for audit and examination, written records of the transactions covered by this exemption to enable certain authorized persons to determine whether the conditions of the exemption have been met.

**Notice to Interested Persons**

Notice of the proposed exemption will be provided to participants and beneficiaries in each Plan sponsored by a member Hospital within 30 days after publication of the notice of proposed exemption in the **Federal Register**. The notice will include a copy of the proposed exemption, as published in the **Federal Register**, and 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. Each member Hospital will give notice (a) to active participants in their respective Plans, by posting copies of the proposed exemption and supplemental statement on bulletin boards normally used for employee notices; and (b) to retirees, by forwarding copies of the proposed exemption and supplemental statement, by first-class mail. Comments regarding the proposed exemption will be due within 60 days of the publication of the notice of pendency in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 693-8556. (This is not a toll-free number.)

**Appendix**

**A. Table Showing CHCA Hospitals, Plans and Participants Enrolled in CHCA's Insurance Program**

| Hospital  | Name of plan   | Total participants |
|---|--|--------------------|
| Children's Hospital Medical Center of Akron .....     | Children's Hospital Medical Center of Akron/Flexible Benefits Program. | 6,315              |
| Children's Healthcare of Atlanta .....                | Children's Healthcare of Atlanta Welfare Benefit Plan .....            | 11,831             |
| The Children's Hospital of Alabama .....              | The Children's Hospital of Alabama Group Life Insurance Plan           | 7,704              |
| Children's Hospital (Boston) .....                    | Group Life, Optional Life, Dependent Life & Weekly Indemnity Plan.     | 10,145             |
|   | Children's Hospital Long Term Disability Plan .....                    | 3,866              |
| The Children's Memorial Hospital (Chicago) .....      | Children's Memorial Hospital Life & LTD Plan .....                     | 5,584              |
| Children's Hospital Medical Center (Cincinnati) ..... | Children's Hospital Medical Center Long Term Disability Plan           | 3,556              |
| Children's Hospital (Columbus) .....                  | Group Life Plan for Employees of Children's Hospital .....             | 7,231              |
|   | Group Long Term Disability Plan for Employees of Children's Hospital.  | 1,834              |

| Hospital  | Name of plan  | Total participants |
|---|---|--------------------|
| Driscoll Children's Hospital (Corpus Christi) .....     | R. Driscoll & J. Driscoll & R. Driscoll, Jr. Foundation Plan .....                          | 6,658              |
| Children's Medical Center of Dallas .....               | Children's Group Life & Health Insurance Plan .....   | 6,642              |
| The Children's Medical Center (Dayton) .....            | Children's Medical Center Life & Add. Plan .....  | 3,717              |
| The Children's Hospital (Denver) .....                  | The Children's Hospital Long Term Disability Plan .....                                     | 1,473              |
|   | The Children's Hospital Life Insurance Plan .....   | 6,919              |
| Cook Children's Medical Center (Ft. worth) .....        | Cook Children's Health Care System Group LTD Plan .....                                     | 7,968              |
| Texas Children's Hospital (Houston) .....               | Texas Children's Hospital Match Plan .....  | 11,953             |
| Children's Hospital Los Angeles .....                   | Children's Hospital Los Angeles Long Term Disability and Group Life Insurance Plans.        |                    |
| St. Jude Children's Research Hospital (Memphis) .....   | St. Jude Children's Research Hospital—Employees' Group Long Term Disability Insurance Plan. | 1,739              |
| Miami Children's Hospital .....                         | Miami Children's Hospital Optional Life Plan .....  | 7,106              |
| Children's Hospital of Wisconsin (Milwaukee) .....      | Children's Health System of Wisconsin, Inc. Benefits Plan .....                             | 3,795              |
| Children's Hospital (New Orleans) .....                 | Children's Hospital Long Term Disability Insurance Plan .....                               | 981                |
| Children's Healthcare Services (Omaha) .....            | Children's Hospital Employee Life Insurance Plan .....                                      | 2,354              |
|   | Children's Hospital Group Long Term Disability Plan .....                                   | 687                |
|   | Children's Hospital Employee Life Plan .....  | 2,036              |
|   | Children's Healthcare Services Short Term Disability Plan .....                             | 124                |
| Phoenix Children's Hospital .....                       | Phoenix Children's Hospital Benefits Plan .....   | 1,489              |
| All Children's Hospital (St. Petersburg) .....          | All Children's Health System Life, Accidental Death and Dismemberment Plan.                 |                    |
| Children's Hospital and Health Center (San Diego) ..... | All Children's Health System Long Term Disability Plan .....                                |                    |
| Children's National Medical Center (DC) .....           | Children's Life & LTD Plan .....  | 7,244              |

**B. Example Showing CHCA's Rebate Procedure Where the Plan Sponsors and the Participants Pay Their Proportionate Share of the Insurance Premiums**

- *Step 1*—Separate total premiums paid by each employer Hospital and its respective Plan participants.

| Hospital | Hospital-paid premiums |           | Participant-paid premiums |     |
|----------|------------------------|-----------|---------------------------|-----|
|          | Life                   | LTD       | Life                      | LTD |
| A .....  | \$130,000              | \$0       | \$110,000                 | \$0 |
| B .....  | 350,000                | 280,000   | 60,000                    | 0   |
| C .....  | 250,000                | 450,000   | 490,000                   | 0   |
| D .....  | 250,000                | 300,000   | 250,000                   | 0   |
| E .....  | 400,000                | 800,000   | 0                         | 0   |
|          | 1,380,000              | 1,830,000 | 910,000                   | 0   |

- *Step 2*—Calculate the commissions paid to CHCA based on the premiums shown in Step 1. The commission rates are 5% for Life and 10% for LTD insurance.

| Hospital | Commissions based on hospital-paid premiums |         | Commissions based on participant-paid premiums |     |
|----------|---|---------|--|-----|
|          | Life  | LTD     | Life   | LTD |
| A .....  | \$6,500                                     | \$0     | \$5,500  | \$0 |
| B .....  | 17,500                                      | 28,000  | 3,000  | 0   |
| C .....  | 12,500                                      | 45,000  | 24,500   | 0   |
| D .....  | 12,500                                      | 30,000  | 12,500   | 0   |
| E .....  | 20,000                                      | 80,000  | 0  | 0   |
|          | 69,000                                      | 183,000 | 45,500   | 0   |

- *Step 3*—Calculate the net contribution of the CHCA's Insurance Program.  
Total Commissions (\$69,000 + \$183,000 + \$45,500) = \$297,500 Direct Expenses Unique to CHCA's Insurance Program = \$75,000 (\$297,500—\$75,000) = \$222,500. This is the amount available for the Patronage Dividend. (For purposes of this example, assume that the Patronage Dividend will be in cash and that the adjustment will be in cash.)
- *Step 4*—Calculate the breakdown of the commissions paid by each Hospital and Plan Participants on a percentage basis.

| Hospital | Commission percentages based on hospital-paid premiums % |       | Commission percentages based on participant-paid premiums % |      |
|----------|--|-------|---|------|
|          | Life   | LTD   | Life  | LTD  |
| A .....  | 2.18   | 0.00  | 1.85  | 0.00 |
| B .....  | 5.88   | 9.41  | 1.01  | 0.00 |
| C .....  | 4.20   | 15.13 | 8.24  | 0.00 |
| D .....  | 4.20   | 10.08 | 4.20  | 0.00 |
| E .....  | 6.72   | 26.89 | 0.00  | 0.00 |



| Hospital | Commission percentages based on hospital-paid premiums % |       | Commission percentages based on participant-paid premiums % |      |
|----------|--|-------|---|------|
|          | Life   | LTD   | Life  | LTD  |
|          | 23.18  | 61.51 | 15.30   | 0.00 |

- Step 5—Allocate the amount available for the Patronage Dividend based upon the Step 4 percentages.

| Hospital | Life    | LTD     | Allocation of patronage dividends to participant-paid premiums |     |
|----------|---------|---------|--|-----|
|          |         |         | Life   | LTD |
| A .....  | \$4,851 | \$0     | \$4,116  | \$0 |
| B .....  | 13,083  | 20,937  | 2,247  | 0   |
| C .....  | 9,345   | 33,664  | 18,334   | 0   |
| D .....  | 9,345   | 22,428  | 9,345  | 0   |
| E .....  | 14,952  | 59,830  | 0  | 0   |
|          | 51,576  | 136,042 | 34,042   | 0   |

(To compute the Patronage Dividend amount that is attributable to Participant-Paid Premiums for Life Insurance, under Hospital A, the \$5,500 commission attributable to Participant-Paid Premiums for Life Insurance is divided by the \$297,500 Total Commission payable to CHCA. The quotient, 1.85%, is then multiplied by the \$222,500 amount available for the Patronage Dividend to arrive at the product, \$4,116. The amounts for Hospitals B–E are also similarly calculated.)

• *Step 6*—CHCA will send a check to the insurance carrier for \$34,042 with instructions to allocate the amount on a per Hospital basis that will be applied against the employee Participants' premium rate schedule. CHCA will also request written confirmation from the insurer that the Premium Adjustment has been made.

**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 6th day of August, 2002.

**Ivan Strasfeld,**

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

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**DEPARTMENT OF LABOR**

**Pension and Welfare Benefits Administration**

**[Prohibited Transaction Exemption 2002-35; Exemption Application No. D-10987]**

**Grant of Individual Exemptions; Metropolitan Life Insurance Company (MetLife)**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemption.

**SUMMARY:** This document contains an exemption issued by the Department of Labor (the Department) 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).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, 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 proposed to the Secretary of Labor.

**Statutory Findings**

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon