

DEPARTMENT OF LABOR**Office of the Secretary****Submission for OMB Review; Comment Request**

December 21, 2001.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13), 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation contact Darrin King on (202) 693-4129 or e-mail: *King.Darrin@dol.gov*.

Comments should be sent to Office of Information and Regulatory Affairs,

Attn: OMB Desk Officer MSHA, Office of Management and Budget, Room 10235, Washington, DC 20503 ((202) 395-7316), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- * Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- * Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- * Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Type of Review: Extension of a currently approved collection.

Agency: Mine Safety and Health Administration (MSHA).

Title: Respirator Program Records—30 CFR 56.5005 and 57.5005.

OMB Number: 1219-0048.

Affected Public: Business or other for-profit.

Frequency: On occasion, Annually, and Monthly.

Type of Reporting: Recordkeeping.

Number of Respondents: 310.

Requirement	Annual responses	Average response time (hours)	Estimated annual burden (hours)
Develop a respirator program	310	5	1,550
Fit-testing records	1,500	.25	375
Respirator inspection records	3,720	.83	310
Total	5,530	2,235

Total Annualized Capital/Startup Costs: \$0.

Total Annual Costs (operating/maintaining systems or purchasing services): \$156,350.

Description: Where protective equipment or respirators are required because of exposure to harmful substances, 30 CFR 56.5005 and 57.5005 require a written respirator program that addresses such issues as selection, fitting, use, and maintenance of respirators to ensure that workers are properly and effectively using the equipment, and that such equipment offers adequate protection for workers. Records of fit-testing are essential for determining that the worker is wearing the proper respirator. Certain records are also required to be kept in connection with respirators, including records of the date of issuance of the respirator, and fit-test results. The fit-testing records are essential for determining that the worker is wearing the proper respirator.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 02-48 Filed 1-2-02; 8:45 am]

BILLING CODE 4510-43-M

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration**

[Application No. D-10886, et al.]

Proposed Exemptions; Morgan Stanley & Co. Incorporated (MS&Co)

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.

ADDRESSES: 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*", 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, N.W., 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.

Morgan Stanley & Co. Incorporated (MS&Co) Located in New York, New York

[Exemption Application No. D-10886]

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 406(b)(2) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the September 16, 1998 acquisition (the Acquisition), on behalf of the Central States, Southeast and Southwest Areas Pension Fund (the Fund), of certain Argentine bonds (the Bonds) from MS&Co, a party in interest with respect to the Fund, by the Capital Asset

Trust (the Trust) at the direction of Alliance Capital Management L.P. (Alliance), an investment manager for the Fund, provided the following conditions are satisfied:

- (a) The Acquisition was a one-time transaction for cash;
- (b) The Fund paid no more than the current fair market value of the Bonds as of the date of the Acquisition;
- (c) The Fund paid no commissions or expenses with respect to the Acquisition;

(d) The Acquisition and subsequent sale of the Bonds (the Sale) resulted in the Fund's receipt of a one-day profit totaling \$147,250.01;

(e) Upon identifying the Acquisition as a "prohibited transaction", MS&Co and Alliance acted promptly to comply with the relevant provisions of ERISA and the Code;

(f) Alliance and MS&Co took whatever actions were necessary to ensure that the Fund was adequately protected with respect to the Acquisition;

(g) Subsequent to the Acquisition, Alliance implemented an internal computer system designed to prevent transactions between client plans and named fiduciaries with respect to such plans; and

(h) The transaction was not part of an agreement, arrangement or understanding designed to benefit a party in interest.

EFFECTIVE DATE OF EXEMPTION: The effective date of this proposed exemption, if granted, is September 16, 1998.

Summary of Facts and Representations

1. The Fund is a jointly managed Taft-Hartley Plan established in 1955. As of September 30, 1998, the Fund had approximately 375,604 participants and beneficiaries and an approximate fair market value of \$17 billion.

2. At the time of the Acquisition, the named fiduciary for the Fund was Morgan Stanley Dean Witter & Co. (MSDW). MSDW is a worldwide financial services firm that provides services, either directly or through its subsidiaries, to corporations, governments, and individual investors. MSDW became the Fund's named fiduciary as a result of a court order issued pursuant to a consent decree (the Consent Decree) that, among other things, prohibited the Fund's investment managers from engaging in transactions with "parties in interest" such as MS&Co.¹

MS&Co is a wholly-owned subsidiary of MSDW having business offices in

New York and other cities worldwide. MS&Co is, among other things, a registered broker-dealer, a member of the National Association of Securities Dealers, and a member of most major United States and foreign commodity exchanges.

3. Pursuant to an agreement dated May 2, 1994 (the Agreement), MSDW (through its predecessor-in-interest, the Morgan Stanley Group, Inc.) appointed Alliance as an investment manager with respect to a portion of the assets in the Fund. In this regard, at the time of the Acquisition, Alliance acted as a "qualified professional asset manager"² with respect to certain Fund assets invested in the Trust, a Massachusetts trust in which the Fund was a participant.³ Specifically, Alliance was hired to manage a particular type of asset class, International Fixed Income-Emerging Markets Debt. The applicant represents that Alliance, an investment adviser registered with the Securities and Exchange Commission, is entirely independent of MSDW and its affiliates and does not have any management or ownership relationship with such entities.

Relevant sections of the Agreement provided that Alliance would: (a) invest Fund assets held in the Trust in accordance with investment objectives specified in writing by MSDW; (b) act in accordance with the Consent Decree and ERISA and not engage in any unexempted "prohibited transaction"; and (c) comply with all federal or state law requirements that are imposed with respect to transactions involving the assets of the Fund.

In addition, the applicant represents that MSDW delivered to Alliance, on a regular basis, a "prohibited transaction" notice. According to the applicant, such notice specifically advised that Alliance should not, among other things, execute trades through MS&Co. Furthermore, the applicant represents that Alliance's "Current Investment Guidelines" for the Trust, dated October 31, 1997, provided that Alliance: would not effect a prohibited transaction; and would not deal with any MSDW entity.

4. The applicant represents that, on September 16, 1998, Alliance learned through news reports that the

¹ As such term is defined in Section V(a) of the Department's Prohibited Transaction Class Exemption 84-14 (49 FR 9494 (1984)).

² The applicant represents that the beneficial interests of the Trust were held by two employee benefit plans subject to ERISA and thus the Trust itself was an entity the assets of which were subject to ERISA. At the time of the Acquisition, the Fund owned approximately 98.1% of the beneficial interests in the Trust, and the Marsh & McLennan US Retirement Plan owned approximately 1.9% of such interests.

³ The Consent Decree was issued pursuant to *Raymond J. Donovan, Secretary of Labor, v. Frank Fitzsimmons, et al.*, Civil Action No. 78 C 342.

International Monetary Fund and certain banks were preparing a package of loans worth \$4.5 billion for Argentina. The applicant states that Alliance believed the news would have a positive effect on Argentine fixed income securities. As a result, Alliance contacted MS&Co and asked for an "offering" on the Bonds in contravention of the safeguards described above. The applicant represents that the Bonds are \$9,500,000 Face Amount Argentina Floating Rate Bonds due March 31, 2005.

According to the applicant, as a result of inadvertent errors made by personnel involved in the Acquisition, MS&Co agreed to fill the order. Alliance's purchase of the Bonds was made for settlement on September 21, 1998 for \$7,566,947.91 (the Acquisition Price). Of this amount, \$7,262,750.00 consisted of principal and \$304,197.91 consisted of accrued interest.

5. At the time of the Acquisition, MS&Co was a market maker in the Bonds. The applicant represents, however, that the Bonds were not in MS&Co's inventory at the time of the Acquisition. In this regard, the applicant states that a market maker will, from time to time, go into the market to replenish a particular security which the market maker has sold out of its inventory. Similarly, in this instance, MS&Co made a business decision to sell the Bonds at the Acquisition Price to Alliance even though it did not contemporaneously hold the Bonds. The applicant states that MS&Co committed itself to the Acquisition Price based on the belief that it could go into the market and obtain the Bonds at a discount relative to such price.

However, in meeting its obligations with respect to the Acquisition, MS&Co was ultimately required to purchase the Bonds at a price higher than the Acquisition Price. In this regard, despite its commitment to sell the Bonds to Alliance for \$7,566,947.91, market conditions were such that MS&Co was forced to acquire the Bonds in two separate trades for a total cost of approximately \$7,714,000. In so doing, the applicant represents, MS&Co lost approximately \$147,000.

6. The applicant represents that the Acquisition Price represented the Bonds' fair market value at the time of the Acquisition. In this regard, it is represented that in providing the Acquisition price to Alliance, the MS&Co trader responsible for the emerging markets fixed income desk used pricing mechanisms commonly employed in the over-the-counter fixed income markets such that the purchase price was fair and reasonable.

Specifically, the Acquisition Price was determined in consideration of: Bid and ask prices for the Bonds available on interdealer computer screens;⁴ news events relating to Argentina's receipt of potential economic relief; prior bid and ask data historically furnished by interdealer brokers; certain volume requirements; and other objective criteria.

The applicant states that at the time the Acquisition occurred, the Bonds traded in relatively high volumes and were well known and well followed. As a result, the market for the Bonds was extremely "transparent" at the time of the Acquisition with only a nominal spread between relevant bid and ask prices. In consideration of these and other factors such as Alliance's status as a valued MS&Co client, the MS&Co trader offered to sell the Bonds to Alliance at the Acquisition Price.

7. Shortly after the Acquisition, Alliance decided to sell the Bonds. In this regard, during the course of the September 16, 1998 trading day, Alliance observed significant fluctuations in the price of the Bonds. The applicant states that when relevant bond prices rose to the extent that Alliance believed selling the Bonds would be in the best interest of the Fund, Alliance sold the Bonds. In this regard, Alliance sold the Bonds to Goldman, Sachs & Co. (Goldman, Sachs) for \$7,714,197.92 (the Sale). The applicant notes that the Fund, through the Trust, made a profit of \$147,250.01 on the Acquisition and Sale.⁵

8. In certifying its compliance with the Agreement to MSDW, Alliance noted that the Acquisition may have constituted a "prohibited transaction". Upon being so alerted, the applicant represents that MS&Co filed a Form 5330 with the Internal Revenue Service on June 30, 1999, and paid an excise tax of \$1,135,042.19 (15% of \$7,566,947.91). The applicant notes that the Acquisition was fully disclosed in the Fund's audited financial statements

⁴ The applicant states that interdealer brokers, who are independent of the approximately 30-40 securities dealers that comprise the major market makers, collect and post dealer quotes (and execute trades between dealers). Information concerning dealer quotes is updated via computer monitors available to each of the primary securities dealers.

⁵ The applicant states that although there was one other participant in the Trust, the Trust implemented separate accounting such that all of the profit attributable to the Acquisition and Sale went solely to the Fund. In this regard, the Department is not providing relief to any other participant in the Trust, nor is it expressing any opinion as to representations made by the applicant concerning the composition and operations of the Trust.

and was corrected within the meaning of section 4975(f)(5) of the Code.⁶

9. The applicant states that neither Alliance nor MS&Co intended to engage in a "prohibited transaction" when consummating the Acquisition. In this regard, various mechanisms were in place to prevent Alliance from inadvertently violating the "prohibited transaction" provisions of ERISA, all of which failed, the applicant represents, in an unforeseeable and improbable manner.⁷ Subsequent to the Acquisition, Alliance has devised an internal computer system in an effort to ensure that future "prohibited transactions" do not similarly occur. Such system identifies situations when a specific trade is placed between a client plan and a party in interest who is a named fiduciary. The system flags the trade and alerts Alliance's compliance department.

10. The applicant represents that the proposed exemption is administratively feasible in that the Bonds were sold on the same day they were acquired. In addition, the applicant states that the transaction was in the interests of the Fund's participants and beneficiaries since the Acquisition and Sale resulted in the Fund's receipt of a one-day profit totaling \$147,250.01. Finally, the applicant represents that the Acquisition was fair to the Fund since the Fund paid no more than the current fair market value for the Bonds at the time of the Acquisition.

11. In summary, the applicant represents that the requested retroactive individual exemption will satisfy the criteria of section 408(a) of the Act for the following reasons:

- (a) The Acquisition was a one-time transaction for cash;
- (b) The Fund paid no more than the current fair market value of the Bonds as of the date of the Acquisition;
- (c) The Fund paid no commissions or expenses with respect to the Acquisition;
- (d) The Acquisition and the Sale resulted in the Fund's receipt of a one-day profit totaling \$147,250.01;

⁶ The Department is expressing no opinion as to whether the Acquisition was corrected in accordance with relevant provisions of the Code.

⁷ In addition to the safeguards discussed above, the applicant states that Morgan Stanley Dean Witter Investment Management Inc., a wholly owned subsidiary of MSDW, had provided materials to Alliance at the outset of its appointment as an investment manager for the Fund which noted the restrictions on trading with MS&Co. In addition, prior to the Transaction, Mellon Bank, N.A., the Fund's custodian, had created and implemented a prohibited transaction surveillance system designed to reject attempted trades on behalf of the Fund and the Trust with parties with whom the Fund or the Trust were prohibited from dealing, including MSDW and its affiliates.

(e) Upon identifying the Acquisition as a "prohibited transaction", MS&Co and Alliance, an investment manager for the Fund, acted promptly to comply with the relevant provisions of ERISA and the Code;

(f) Alliance and MS&Co took whatever actions were necessary to ensure that the Fund was adequately protected with respect to the Acquisition;

(g) Subsequent to the Acquisition, Alliance implemented an internal computer system designed to prevent transactions between client plans and named fiduciaries with respect to such plans; and

(h) The transaction was not part of an agreement, arrangement or understanding designed to benefit a party in interest.

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

Union Bank of California (UBOC), Located in San Francisco, California

[Application No. D-10976]

Proposed Exemption

Section I—Retroactive and Prospective Exemption for In-Kind Redemption of Assets

If the proposed exemption is granted, the restrictions of section 406(a) and 406(b) of ERISA and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1) (A) through (F) of the Code, shall not apply, as of June 15, 2001, to certain in-kind redemptions (the Redemptions) by the Union Bank of California Retirement Plan or any other employee benefit plan sponsored by UBOC or an affiliate of UBOC (an In-house Plan) of shares (the Shares) of proprietary mutual funds (the Portfolios) offered by the HighMark Funds or other investment companies (the Funds) for which HighMark Capital Management, Inc. or an affiliate thereof (the Adviser) provides investment advisory and other services, provided that the following conditions are met:

(A) The In-house Plan pays no sales commissions, redemption fees, or other similar fees in connection with the Redemptions (other than customary transfer charges paid to parties other than UBOC and affiliates of UBOC (UBOC Affiliates));

(B) The assets transferred to the In-house Plan pursuant to the Redemptions consist entirely of cash and Transferable Securities. Notwithstanding the foregoing, Transferable Securities which are odd lot securities, fractional shares

and accruals on such securities may be distributed in cash;

(C) With certain exceptions defined below, the In-house Plan receives a pro rata portion of the securities of the Portfolio upon a Redemption that is equal in value to the number of Shares redeemed for such securities, as determined in a single valuation performed in the same manner and as of the close of business on the same day in accordance with the procedures established by the Funds pursuant to Rule 2a-4 under the Investment Company Act of 1940, as amended from time to time (the 1940 Act), (using sources independent of UBOC and UBOC Affiliates);

(D) UBOC, the Adviser, or any affiliate thereof, does not receive any fees, including any fees payable pursuant to Rule 12b-1 under the 1940 Act in connection with any redemption of the Shares;

(E) Prior to a Redemption, UBOC provides in writing to an independent fiduciary, as such term is defined in Section II (an Independent Fiduciary), a full and detailed written disclosure of information regarding the Redemption;

(F) Prior to a Redemption, the Independent Fiduciary provides written approval for such Redemption to UBOC, such approval being terminable at any time prior to the date of the Redemption without penalty to the In-house Plan, and such termination being effectuated by the close of business following the date of receipt by UBOC of written or electronic notice regarding such termination (unless circumstances beyond the control of UBOC delay termination for no more than one additional business day);

(G) Before approving a Redemption, based on the disclosures provided by the Portfolios to the Independent Fiduciary and discussions with appropriate operational personnel of the In-house Plan, UBOC, and the Adviser as necessary to form a basis for making the following determinations, the Independent Fiduciary determines that the terms of the Redemption are fair to the participants of the In-house Plan and comparable to and no less favorable than terms obtainable at arms-length between unaffiliated parties;

(H) Not later than thirty (30) business days after the completion of a Redemption, UBOC or the relevant Fund provides to the Independent Fiduciary a written confirmation regarding such Redemption containing:

(i) The number of Shares held by the In-house Plan immediately before the Redemption (and the related per Share net asset value and the total dollar value of the Shares held),

(ii) The identity (and related aggregate dollar value) of each security provided to the In-house Plan pursuant to the Redemption, including any security valued in accordance with the Funds' procedures for obtaining current prices from independent market-makers,

(iii) The current market price of each security received by the In-house Plan pursuant to the Redemption, and

(iv) The identity of each pricing service or market-maker consulted in determining the value of such securities;

(I) The value of the securities received by the In-house Plan for each redeemed Share equals the net asset value of such Share at the time of the transaction, and such value equals the value that would have been received by any other investor for shares of the same class of the Portfolio at that time;

(J) Subsequent to a Redemption, the Independent Fiduciary performs a post-transaction review which will include, among other things, testing a sampling of material aspects of the Redemption deemed in its judgment to be representative, including pricing. For Redemptions occurring on June 15, 2001, the Independent Fiduciary's review included testing a limited sampling of certain material aspects of the Redemption deemed in its judgment to be representative;⁸

(K) Each of the In-house Plan's dealings with: the Funds, the Adviser, the principal underwriter for the Funds, or any affiliated person thereof, are on a basis no less favorable to the In-house Plan than dealings between the Funds and other shareholders holding shares of the same class as the Shares;

(L) UBOC maintains, or causes to be maintained, for a period of six years from the date of any covered transaction such records as are necessary to enable the persons described in paragraph (M) below to determine whether the conditions of this exemption have been met, except that (i) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of UBOC, the records are lost or destroyed prior to the end of the six-year period, (ii) no party in interest with respect to the In-house Plan other than UBOC 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 such records are not maintained or are not available for examination as required by paragraph (M) below.

⁸The reason for this difference is to conform to the language used in the initial independent fiduciary agreement that U.S. Trust and UBOC entered into with respect to the June 15, 2001 transactions.

(M)(1) Except as provided in subparagraph (2) of this paragraph (M), and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (L) above are unconditionally available at their customary locations for examination during normal business hours by (i) any duly authorized employee or representative of the Department of Labor, the Internal Revenue Service, or the Securities and Exchange Commission, (ii) any fiduciary of the In-house Plan or any duly authorized representative of such fiduciary, (iii) any participant or beneficiary of the In-house Plan or duly authorized representative of such participant or beneficiary, (iv) any employer with respect to the In-house Plan, and (v) any employee organization whose members are covered by such In-house Plan.

(2) None of the persons described in paragraphs (M)(1)(ii) through (v) shall be authorized to examine trade secrets of UBOC, the Funds, or the Adviser, or commercial or financial information which is privileged or confidential.

(3) Should UBOC, the Funds, or the Adviser refuse to disclose information on the basis that such information is exempt from disclosure pursuant to paragraph (M)(2) above, UBOC, the Funds, or the Adviser shall, by the close of the 30th day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section II—Definitions

For purposes of this proposed exemption,

(A) The term “affiliate” means:

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

(2) Any officer, director, employee, relative, or partner in any such person; and

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

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

(C) The term “net asset value” means the amount for purposes of pricing all purchases and sales calculated by dividing the value of all securities, determined by a method as set forth in the Portfolio’s prospectus and statement of additional information, and other assets belonging to the Portfolio, less the liabilities charged to each such

Portfolio, by the number of outstanding shares.

(D) The term “Independent Fiduciary” means a fiduciary who is: (i) Independent of and unrelated to UBOC and its affiliates, and (ii) appointed to act on behalf of the In-house Plan with respect to the in-kind transfer of assets from one or more Portfolios to or for the benefit of the In-house Plan. For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to UBOC if: (i) such fiduciary directly or indirectly controls, is controlled by or is under common control with UBOC; (ii) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption; (except that an Independent Fiduciary may receive compensation from UBOC in connection with the transactions contemplated herein if the amount or payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary’s ultimate decision); and (iii) more than 1 percent (1%) of such fiduciary’s gross income, for federal income tax purposes, in its prior tax year, will be paid by UBOC and its affiliates in the fiduciary’s current tax year.

(E) The term “Transferable Securities” shall mean securities (1) for which market quotations are readily available as determined pursuant to procedures established by the Funds under Rule 2a-4 of the 1940 Act; and (2) which are not: (i) securities which may not be publicly offered or sold without registration under the Securities Act of 1933; (ii) securities issued by entities in countries which (a) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the Funds, or (b) permit transfers of ownership of securities to be effected only by transactions conducted on a local stock exchange; (iii) certain portfolio positions (such as forward foreign currency contracts, futures and options contracts, swap transactions, certificates of deposit and repurchase agreements) that, although they may be liquid and marketable, involve the assumption of contractual obligations, require special trading facilities or can only be traded with the counter-party to the transaction to effect a change in beneficial ownership; (iv) cash equivalents (such as certificates of deposit, commercial paper and repurchase agreements; and (v) other assets which are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable).

(F) The term “relative” means a “relative” as that term is defined in section 3(15) of ERISA (or a “member of the family,” as that term is defined in section 4975(e)(6) of the Code), or a brother, sister, or a spouse of a brother or a sister.

Summary of Facts and Representations

1. UnionBanCal Corporation (UNBC) is a bank holding company headquartered in San Francisco, California, the majority of the shares of which are owned by The Bank of Tokyo—Mitsubishi, Ltd., which in turn is wholly owned by Mitsubishi Tokyo Financial Group, Inc. UBOC, a federally chartered bank also headquartered in San Francisco, is a wholly owned subsidiary of UNBC. As of December 31, 2000, UNBC had approximately \$35.2 billion in total assets.

2. UBOC is the trustee of the Union Bank of California Retirement Plan (the Retirement Plan). The Retirement Plan is an In-house defined benefit Plan maintained by UBOC for certain current and former employees of UBOC and UBOC Affiliates. As of January, 2001, the Retirement Plan had approximately 13,895 participants. As of May 31, 2001 the Retirement Plan had approximately \$616 million in assets.

3. According to the applicant, UBOC’s Employee Deferred Compensation and Benefit Plans Administrative Committee (the Committee) determined previously that the Retirement Plan would benefit from the investment of its assets in certain Portfolios of the HighMark Funds⁹ (the HighMark Portfolios). The HighMark Portfolios are mutual fund portfolios organized within the HighMark Funds. The HighMark Funds and any other Funds to which the exemption may apply are open-end investment companies registered under the 1940 Act with respect to which HighMark Capital Management, Inc. or an affiliate (the Adviser) acts as an investment adviser.

At the time, the Committee considered the HighMark Portfolios to be an appropriate vehicle for diversifying the Retirement Plan’s assets. In addition, the Committee determined that investment in the HighMark Portfolios by the Retirement Plan would allow the Retirement Plan to continue to use in-house investment managers that had provided investment services to the Plan. As a result, the Committee decided to invest Retirement Plan assets in the HighMark Portfolios in accordance with Prohibited

⁹ The HighMark Funds formerly were known as The HighMark Group.

Transaction Exemption 77-3 (PTE 77-3, 42 FR 18734 (1977)).¹⁰

4. The applicant states that the Committee decided recently to reallocate the management of Retirement Plan assets among the affiliated and unaffiliated investment managers who would manage such assets on a separate account basis.¹¹ The allocation of assets among the managers was based on a revised, comprehensive asset allocation strategy and policy developed by the Committee with the assistance of an independent consulting firm. The applicant notes such management avoids mutual fund fees and regulatory costs associated with investment in SEC-registered mutual fund portfolios.

5. HighMark Capital Management, Inc., a wholly-owned subsidiary of UNBC (HCM), serves as investment adviser to each of the Portfolios of the HighMark Funds. HCM is registered under the Investment Advisers Act of 1940 (the Advisers Act). The applicant describes the HighMark Funds and Portfolios as follows:

HighMark Funds, a Massachusetts business trust, is an open-end management investment company registered under the 1940 Act. HighMark Funds currently is comprised of thirteen portfolios, including the following three Portfolios:

- (i) HighMark Value Momentum Fund
- (ii) HighMark Growth Fund
- (iii) HighMark Small Cap Value Fund

As previously noted, HCM serves as investment adviser to each of the HighMark Portfolios listed above. The applicant represents that, in addition, HCM, UBOC, and UBOC Affiliates may provide other services to the HighMark

¹⁰ The applicant has not requested exemptive relief with respect to any investment in the HighMark Portfolios by the Retirement Plan. The applicant notes that the Retirement Plan may acquire or redeem shares in the HighMark Portfolios or any other Funds pursuant to Prohibited Transaction Exemption (PTE) 77-3. In this regard, PTE 77-3 permits the acquisition or sale of shares of a registered, open-end investment company be an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter, provided certain conditions are met. The Department is expressing no opinion in this proposed exemption regarding whether any transactions with the Funds by the Retirement Plan or any other In-house Plan is covered by PTE 77-3.

¹¹ The affiliated managers would include HighMark Capital Management, Inc. The applicant states that HighMark Capital Management, Inc. manages any separate account holding In-house Plan assets outside the Funds without compensation from the In-house Plan, other than reimbursement of direct expenses as permitted by ERISA.

Funds and the HighMark Portfolios, including accounting, administration, and shareholder services.

6. The applicant also represents that, as of June 15, 2001:

- (i) A total of approximately \$63.2 million in Retirement Plan assets was invested in the HighMark Value Momentum Fund (representing a 10.51% ownership in such Portfolio);
- (ii) A total of approximately \$46.1 million in Retirement Plan assets was invested in the HighMark Growth Fund (representing a 12.40% ownership interest in such Portfolio); and
- (iii) A total of approximately \$61.7 million in Retirement Plan assets was invested in the HighMark Small Cap Value Fund (representing a 43.94% ownership interest in such Portfolio).¹²

7. The applicant represents that, on June 15, 2001, the Retirement Plan redeemed all of its Shares in the HighMark Value Momentum Fund and the HighMark Growth Fund and approximately \$40 million of its Shares of the HighMark Small Cap Value Fund (the June 15, 2001 Redemptions). The applicant further represents that the June 15, 2001 Redemptions were an appropriate means of effectuating this diversification of investment managers and the shift to separate account management for the Retirement Plan. In this regard, the applicant represents that the HighMark Funds, under the supervision of the HighMark Funds' board of trustees (none of whom are directors, officers or employees of UBOC, HCM, or their affiliates), had the option to determine whether to effect the June 15, 2001 Redemptions in cash or in kind, and determined to effect such Redemptions in kind.¹³

¹² As previously noted, the Department is expressing no opinion regarding the applicability of PTE 77-3 to the acquisition of the Shares by the Retirement Plan. In addition, the Department is expressing no opinion as to the applicability of section 404 of ERISA to the acquisition of the Shares by the Retirement Plan. In this regard, the Department directs the applicant's attention to an advisory opinion issued to Federated Investors [Advisory Opinion 98-06A (July 30, 1998)], in which the Department noted that if the decision by a plan fiduciary to enter into a transaction is not "solely in the interest" of the plan's participants and beneficiaries, e.g., if the decision is motivated by the intent to generate seed money that facilitates the marketing of the mutual fund, then the plan fiduciary would be liable for any loss resulting from such breach of fiduciary responsibility, even if the acquisition of mutual fund shares was exempt by reason of PTE 77-3.

¹³ The applicant represents that the HighMark Funds' board of trustees in 2000 adopted a resolution establishing objective procedures for in-kind redemptions intended to conform with the requirements set forth in a no-action letter issued by the staff of the Securities and Exchange Commission re *Signature Financial Group, Inc.* (1999 SEC No-Act.LEXIS 981, avail. 12/28/99) ("the Signature Financial letter") governing in-kind

8. The applicant represents that it is possible that the Committee or other fiduciaries of the Retirement Plan or other In-house Plans¹⁴ may at a later date determine that it is in the best interest of the Retirement Plan or other In-house Plan and its participants and beneficiaries to redeem such Plan's interest in HighMark Portfolios or other Funds, other than those described in Paragraphs 5 and 6 above, for which UBOC or a UBOC Affiliate provides investment advisory services. Consequently, in the event that this proposed exemption is granted, and to the extent that all of the terms and conditions of the exemption, as granted, are met, the relief requested herein shall apply to any such future redemption that is effected in-kind.

9. The applicant states that the June 15, 2001 Redemptions involved ministerial transactions performed in accordance with pre-established, objective procedures. As a result, the applicant represents that the transactions did not permit UBOC or a UBOC Affiliate to use its influence or control to purchase particular securities from the HighMark Portfolios. In addition, the applicant states that all Shares are offered and sold exclusively through the use of prospectuses and materials provided pursuant to the requirements of the Securities Act of 1933 and the 1940 Act and the rules and regulations thereunder.

10. The applicant states that, to the extent possible, the Retirement Plan transferred Shares in return for a proportionate share of the securities

redemptions of shares held by "affiliated shareholders" of the HighMark Funds. The procedures require, among other things, that the redemption be effected on a pro rata basis, based on the relevant HighMark Portfolios' current net assets at the time of redemption, and that the board of trustees verify that an in-kind redemption is effected in accordance with the procedures.

¹⁴ The applicant informed the Department that on November 26, 2001, an in-kind distribution was made of the Retirement Plan's entire investment in the HighMark International Fund, U.S. Trust served as the independent fiduciary for this transaction. The applicant represents that UBOC also sponsors a 401(k) Plan which permits participants to direct the investment of their plan accounts among various investment options, including several HighMark Funds. According to the applicant, the 401(k) plan intends to redeem all of its shares in the Highmark Growth Fund and the HighMark Large Cap Value Fund (formally known as the Income Equity Fund) in connection with a change of investment options. The applicant has been informed by the Funds that it will effect the requested redemptions in-kind. According to the applicant, the securities will be distributed to mutual funds that replace the Highmark Growth Fund and the Highmark Large Cap Value Fund as investment options under the 401(k) Plan. UBOC anticipates that these redemptions would occur on or about December 14, 2001, subject to completion of the independent fiduciaries review and approval of the transactions.

held by each HighMark Portfolio in the June 15, 2001 Redemptions. According to the applicant, the Retirement Plan received only cash and Transferable Securities pursuant to the June 15, 2001 Redemptions. In this regard, each Transferable Security subject to a Redemption was transferred in-kind to the Retirement Plan. However odd lot securities, fractional shares and accruals on such securities were transferred in cash.¹⁵ The applicant states that the June 15, 2001 Redemptions were carried out, to the extent possible, on a pro rata basis as to the number and kind of securities transferred to the Retirement Plan.¹⁶

11. The applicant represents that, for purposes of the June 15, 2001 Redemptions, the values of the HighMark Portfolio securities were determined based on the current market price of such securities as of the close of business on June 15, 2001 (the Valuation Date). As required by the no action letter re Signature Financial Group, Inc. issued by the staff of the Securities and Exchange Commission, the value of the securities in each Portfolio were determined by using the valuation procedures established by the HighMark Funds in accordance with Rule 2a-4 under the 1940 Act.¹⁷ In this

¹⁵ According to the report submitted by the Independent Fiduciary, none of the HighMark Portfolios held securities which were not Transferable Securities at the time of the June 15, 2001 Redemptions, and, therefore, there was no cash adjustment to reflect the value of such securities. The applicant states, however, that such cash adjustments may be made with respect to future Redemptions to the extent relevant Fund holds such excluded securities.

¹⁶ According to the applicant, the securities transferred from each HighMark Portfolio in the June 15, 2001 Redemptions were selected under a "first in, first out" (FIFO) procedure. Under this procedure, "tax lots" of securities to be distributed in kind in satisfaction of the in-kind redemption were selected on the basis of when the securities were acquired for the Portfolio, with the securities held longest by the Portfolio being distributed first, until distribution of the Plan's pro rata share of such security was completed. The applicant represents that the FIFO procedure is the one normally used by the High Mark Funds equity and fixed income funds for selecting securities to be sold or distributed in kind. The applicant further represents that with respect future in-kind redemptions pursuant to this exemption, securities will also be selected on a "first in, first out" basis or similar objective, ministerial procedure.

¹⁷ In the no action letter to Signature Financial Group, Inc. discussed above, the Division of Investment Management of the SEC states that it will not recommend enforcement action pursuant to Section 17(a) of the Investment Company Act of 1940 for certain in-kind distributions of portfolio securities to an affiliate of a mutual fund. Funds seeking to use this "safe harbor" must value the securities to be distributed to an affiliate in an in-kind distribution "in the same manner as they are valued for purposes of computing the distributing fund's net asset value." The applicant represented that, having adopted the Signature Financial Letter procedures for use in its affiliate transactions, it

regard, responsibility for valuations rests with the HighMark Funds' administrator (the Administrator), which is unrelated to UBOC. The Administrator has contracted with independent, third-party pricing agents approved by the HighMark Funds' board of trustees to provide security quotations.¹⁸

12. The applicant represents that, in connection with the June 15, 2001 Redemptions, U.S. Trust Company, N.A. (U.S. Trust), a federally chartered bank, confirmed its independence from UBOC and is qualified to serve as an Independent Fiduciary, as that term is defined in Section II of the proposed exemption. U.S. Trust, in turn, represented that it understood and accepted the duties, responsibilities and liabilities in acting as a fiduciary under ERISA for the Retirement Plan.

U.S. Trust represents that it was responsible for (i) determining whether the terms of each Redemption of Shares of the HighMark Portfolios was fair to the participants of the Retirement Plan and comparable to and no less favorable than terms that would be reached at arms' length between unaffiliated parties, and (ii) opining as to the fairness and reasonableness of each such Redemption, as compared to a redemption for cash and subsequent reinvestment of such cash. This determination and opinion was set forth in a written report (the Report) dated June 8, 2001. Specifically, in the Report, U.S. Trust stated that:

(a) the Redemptions would not involve certain transaction costs

must use those procedures for transactions with its in-house plans, as these in-house plans are affiliates of the mutual fund. The Department agreed to the use of the Signature Financial Letter procedures for determining the value of the securities in this kind transaction, with certain limitations.

The Signature Financial Letter requires pro rata distribution of the securities. The letter does not address the marketability of such securities. The range of securities distributed pursuant to this "safe harbor" may therefore be broader than range of securities covered by SEC Rule 17a-7, 17 CFR Sec. 270.17a-7. In granting past exemptive relief with respect to in-kind transactions involving mutual funds, the Department has required that the securities being distributed in-kind fall within Rule 17a-7. One of the requirements of Rule 17a-7 is that the securities are those for which "market quotations are readily available." SEC Rule 17a-7(a). The Department has determined, and the applicant agrees, that exemptive relief in this case will also be limited to in-kind distribution of securities for which market quotations are readily available. The value of any other securities will be paid to the plan in cash.

¹⁸ Under the exemption requested by UBOC, the Plan will receive only securities for which market quotations are readily available (as determined pursuant to the Funds' procedures described above) or cash.

otherwise incurred in a cash redemption;¹⁹

(b) the Shares and cash associated with the Redemptions would be valued in accordance with procedures established by the HighMark Funds and applicable law, and that the same procedures are used to determine the net asset value of the HighMark Portfolios; and

(c) U.S. Trust reviewed a written document detailing the procedures for in-kind redemptions for affiliated parties, and concluded that it matched its understanding of procedures for in-kind redemptions.

¹⁹ The Report states that, with respect to the Redemptions involving Shares of the HighMark Value Momentum Fund and the HighMark Growth Fund, if the Retirement Plan were to receive cash rather than securities pursuant to the transaction, substantially all (in the case of the HighMark Value Momentum Fund) or the majority (in the case of the HighMark Growth Fund) of that cash would be reinvested in securities which would result in brokerage commissions and a buy-sell spread, the costs of which would be incurred by the Retirement Plan. The Report states further that depending on the form and timing of the Redemptions, part of the Portfolios' selling costs might be absorbed by the Retirement Plan as a shareholder in the Portfolios. Therefore, according to U.S. Trust, to the extent that the Redemption of the Retirement Plan's Shares of the HighMark Value Momentum Fund and the HighMark Growth Fund were effected in-kind, those costs would be avoided.

U.S. Trust notes, however, that the Retirement Plan would sell substantially all of the securities received in redemption of its Shares of the HighMark Small Cap Value Fund shortly after the Redemption. In this regard, the applicant represents that the unaffiliated investment manager appointed to manage the "small capitalization stock" portion of the Retirement Plan's assets on a separate account basis after the June 15, 2001 Redemptions pursues an investment strategy that is different from that pursued by the HighMark Small Cap Value Fund. Accordingly, the Retirement Plan, at the request of the new manager, sold substantially all of the securities it received from the HighMark Small Cap Value Fund in connection with the June 15, 2001 Redemptions. However, UBOC contributed a cash payment to the Retirement Plan in an amount estimated by U.S. Trust to be equal to the difference between the transaction costs associated with the Retirement Plan's in-kind redemption of Shares of the HighMark Small Cap Value Fund and the transaction costs associated with a hypothetical cash redemption of such Shares. In calculating the transaction costs of a hypothetical cash redemption, U.S. Trust assumed that, prior to the cash redemption, the Fund would raise cash by selling the securities that were, in fact, distributed in kind. Under this scenario, those selling costs would be allocated proportionately across all shareholders in the Fund (including the Retirement Plan) before the Retirement Plan received its cash distribution. U.S. Trust concluded that UBOC's cash payment to the Retirement Plan made the Retirement Plan whole for redeeming its HighMark Small Cap Value Fund Shares in kind rather than in cash and, consequently, the redemption of such shares was fair to Retirement Plan participants.

In connection with the November 26, 2001 in-kind distribution from the HighMark International Fund, the same issue arose, i.e., the new investment manager choose not to retain most of the securities distributed in kind. As in the earlier Small Cap Value Fund transaction, UBOC has agreed to make a cash payment sufficient to make the Retirement Plan whole.

In the Report, U.S. Trust stated that, based upon its review of the methodology of the Redemptions of Shares of each of the HighMark Portfolios and an analysis of the costs associated with the Redemptions versus a cash redemption for the Retirement Plan's assets held by the HighMark Portfolios (and, with respect to the HighMark Small Cap Value Fund, the cash payment to the Retirement Plan noted above), the Redemptions would be fair to the participants of the Retirement Plan. The Report also stated that the methodology used to conduct the Redemptions would be comparable to and no less favorable than a similar in kind redemption reached at arms' length between unaffiliated parties. Therefore, U.S. Trust approved the Redemptions from the HighMark Portfolios, provided the Redemptions were conducted in accordance with the information provided to it by UBOC and the HighMark Funds.

The Report also states that, if the Redemptions were thereafter undertaken, U.S. Trust would confirm in writing whether each such Redemption was effectuated consistent with the required criteria and procedures set forth in the Report, based on representations requested from UBOC and testing a limited sampling of certain material aspects of the Redemptions, deemed in U.S. Trust's judgment to be representative. Accordingly, subsequent to the June 15, 2001 Redemptions, U.S. Trust conducted the post-transaction review described above and concluded, based on information provided to it, that the Retirement Plan received its pro rata portion of each Transferable Security (rounded to the nearest round lot) held by the HighMark Portfolios and its pro rata portion of cash that the HighMark Portfolios held based on the Plan's ownership percentage of each such Portfolio (or, in the case of the Small Cap Fund, the percentage of the Small Cap Fund that the Redemption amount represented), and that the June 15, 2001 Redemptions were effectuated in a manner consistent with the required criteria and procedures set forth in the Report.

13. In summary, it is represented that the June 15, 2001 and November 26, 2001 Redemptions satisfied, and any Redemptions to occur in the future will satisfy, the statutory criteria for an exemption under section 408(a) of ERISA for the following reasons:

(A) The In-house Plan pays no sales commissions, redemption fees, or other similar fees in connection with the Redemptions (other than customary

transfer charges paid to parties other than UBOC and UBOC Affiliates);

(B) The assets transferred to the In-house Plan pursuant to the Redemptions consist entirely of cash and Transferable Securities. Notwithstanding the foregoing, odd lot securities, fractional shares and accruals on such securities may be distributed in cash;

(C) With certain exceptions defined below, the In-house Plan receives a pro rata portion of the securities of the Portfolio upon a Redemption that is equal in value to the number of Shares redeemed for such securities, as determined in a single valuation performed in the same manner and as of the close of business on the same day in accordance with the procedures established by the Funds pursuant to Rule 2a-4 under the 1940 Act (using sources independent of UBOC and UBOC Affiliates);

(D) UBOC, or any UBOC affiliate, does not receive any fees, including any fees payable pursuant to Rule 12b-1 under the 1940 Act, in connection with any Redemption of the Shares;

(E) Prior to a Redemption, UBOC provides in writing to the Independent Fiduciary a full and detailed written disclosure of information regarding the Redemption;

(F) Prior to a Redemption, the Independent Fiduciary provides written approval of such Redemption to UBOC, such approval being terminable at any time prior to the date of the Redemption without penalty to the In-house Plan, and such termination being effectuated by the close of business following the date of receipt by UBOC of written or electronic notice regarding such termination (unless circumstances beyond the control of UBOC delay termination for no more than one additional business day);

(G) Before approving a Redemption, based on the disclosures provided by the Portfolios to the Independent Fiduciary and discussions with appropriate operational personnel of the In-house Plan, UBOC, and the Adviser as necessary to form a basis for making the following determinations, the Independent Fiduciary determines that the terms of the Redemption are fair to the participants of the In-house Plan and comparable to and no less favorable than terms obtainable at arms-length between unaffiliated parties;

(H) Not later than thirty (30) business days after the completion of a Redemption, the relevant Fund provides to the Independent Fiduciary a written confirmation regarding such Redemption containing:

(i) the number of Shares held by the In-house Plan immediately before the

Redemption (and the related per Share net asset value and the total dollar value of the Shares held),

(ii) the identity (and related aggregate dollar value) of each security provided to the In-house Plan pursuant to the Redemption, including any security valued in accordance with the Funds' procedures for obtaining current prices from independent market-makers,

(iii) the current market price of each security received by the In-house Plan pursuant to the Redemption, and

(iv) the identity of each pricing service or market-maker consulted in determining the value of such securities;

(I) The value of the securities received by the In-house Plan for each redeemed Share equals the net asset value of such Share at the time of the transaction, and such value equals the value that would have been received by any other investor for shares of the same class of the Portfolio at that time;

(J) Subsequent to a Redemption, the Independent Fiduciary performs a post-transaction review which will include, among other things, testing a sampling of material aspects of the Redemption deemed in its judgment to be representative, including pricing; and

(K) Each of the In-house Plan's dealings with the Funds, the Investment Adviser, the principal underwriter for the Funds, or any affiliated person thereof, are on a basis no less favorable to the In-house Plan than dealings between the Funds and other shareholders holding shares of the same class as the Shares.

Notice to Interested Persons

The applicant will provide notice of the proposed exemption within 30 days after publication thereof in the **Federal Register** (i) to active participants in the Retirement Plan by electronic communication through applicant's online employee intranet service and by posting at major job sites, and (ii) to retiree participants in pay status in the Retirement Plan by first class mail. Notices posted at major job sites will include a copy of the proposed exemption as published in the **Federal Register**. The notices will inform interested persons of their right to comment and/or request a hearing. Comments and requests for a hearing must be received by the Department not later than 60 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

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

Cargill, Incorporated and Associated Companies Salaried Employees' Pension Plan, et al (the Original Plans) Located in Minneapolis, Minnesota

[Application Nos. D-11017 through D-11023]

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 proposed exemption is granted, effective October 18, 1996, the restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act, and the sanctions resulting from section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) the acquisition (the Stock Acquisition) and holding of certain shares of Cargill, Incorporated common stock (the Common Stock) by the Cargill, Incorporated and Associated Companies Master Pension Trust (the Master Trust); and (2) the acquisition, holding and, where relevant, exercise by the Master Trust of a certain irrevocable put option associated with the Common Stock (the Put Option); provided that the following conditions are satisfied:

(A) Prior to the Stock Acquisition, a qualified, independent fiduciary acting on behalf of the Master Trust (the Independent Fiduciary) determined that the Stock Acquisition was appropriate for, and in the best interests of, the Original Plans and the Master Trust.

(B) The \$178.75 per share purchase price the Master Trust paid for each share of Common Stock pursuant to the Stock Acquisition equaled the August 31, 1996 fair market value of each such share as determined by a qualified, independent appraiser selected by the Independent Fiduciary.

(C) Subsequent to the Stock Acquisition, the Independent Fiduciary represented the interests of the Master Trust with respect to the Master Trust's holding of the Common Stock and the Master Trust's holding of the Put Option, and will continue to represent such interests as long as the Master Trust holds such stock and Put Option.

(D) Subsequent to the Stock Acquisition, the Independent Fiduciary took and will take whatever action is necessary to protect the rights of the Master Trust with respect to the Master Trust's holding of the Common Stock and the Master Trust's holding of the Put Option.

(E) Upon request by the Independent Fiduciary, Cargill, Incorporated (Cargill)

purchased, or will purchase, all or a portion of the Common Stock held by the Trust, in accordance with the terms of the Put Option, for the greater of: (1) the price of the Common Stock as of the date of the Stock Acquisition; or (2) the fair market value of the Common Stock as of the date the Put Option is exercised.

(F) Subsequent to the Stock Acquisition, the Common Stock did not, at any time, represent more than ten percent (10%) of the total fair market value of the assets held by: (1) any Original Plan; or (2) after the Original Plans were merged into each other on January 1, 1997, any remaining Original Plan that continued to have an undivided interest in the assets of the Master Trust (a Remaining Plan).

(G) For purposes of securing its obligations with respect to the Put Option, Cargill established, and will continue to maintain, an escrow account containing cash and/or U.S. government securities amounting to at least 25 percent (25%) of the total current fair market value of the Common Stock held by the Master Trust.

(H) All transactions between Cargill and the Master Trust, or between Cargill and any Original Plan or Remaining Plan (collectively, the Plans), arising in connection with the Stock Acquisition, were no less favorable to the Master Trust or Plan than arm's-length transactions involving unrelated parties.

(I) Cargill reimbursed the Master Trust, with interest (the Reimbursement), for the Master Trust's payment of certain legal expenses associated with the Master Trust's holding of the Common Stock (the Legal Fees).

(J) Cargill paid, and will continue to pay, the fees of the Independent Fiduciary and its financial advisor to the extent such fees relate to either the Stock Acquisition or the continued holding of the Common Stock and the Put Option by the Master Trust.

(K) At no time subsequent to the Stock Acquisition has the Master Trust held more than 25% of the aggregate amount of Common Stock issued and outstanding.

(L) Cargill adopts written procedures which require that a Remaining Plan fiduciary: (1) review all expenses submitted for payment by the Master Trust; and (2) approve the payment of only those expenses that are reasonable and necessary for the administration of a Remaining Plan.

(M) Cargill adopts written procedures which require that independent legal counsel provide Cargill with a written opinion regarding the payment by the Master Trust or a Remaining Plan of

expenses associated with a transaction between Cargill and a Remaining Plan.

(N) In the event this proposed exemption is granted, Cargill, within 60 days of the date of such grant, files Form 5330 with the Internal Revenue Service and pays the applicable excise taxes with respect to the Master Trust's payment of the Legal Fees.

EFFECTIVE DATE: The effective date of this proposed exemption, if granted, is October 18, 1996.

Summary of Facts and Representations

1. Cargill is a Delaware corporation established in 1865 by William W. Cargill (Mr. Cargill). Cargill is engaged in, among other things, the wholesaling of agricultural and other bulk commodities. As of February 28, 2001, Cargill had approximately 85,000 employees and annual revenues in excess of \$47 billion.

2. By October of 1993, Cargill had established certain tax qualified defined benefit plans (the Original Plans). At that time, the Original Plans were comprised as follows:

a. Cargill, Incorporated and Associated Companies Salaried Employees' Pension Plan (the Salaried Employees' Pension Plan);

b. Cargill, Incorporated Pension Plan for Seaboard Grain Miller Represented Employees (the Seaboard Grain Miller Employees' Pension Plan);

c. Cargill, Incorporated and Associated Companies Pension Plan for Grain Miller Represented Employees (the Grain Miller Employees' Pension Plan);

d. Cargill, Incorporated and Associated Companies Pension Plan for Union Represented Hourly Wage Employees (the Hourly Wage Employees' Pension Plan);

e. Cargill, Incorporated and Associated Companies Pension Plan for Production Employees (the Production Employees' Pension Plan);

f. Cargill, Incorporated and Associated Companies Pension Plan for Poultry Products Employees (the Poultry Products Employees' Pension Plan); and

g. Cargill, Incorporated and Associated Companies Pension Plan for Union Represented Poultry Products Employees (the Union Poultry Products Employees' Pension Plan);

3. The Common Stock is one of five classes of stock authorized by Cargill. Each share of Common Stock, and, generally, each share of Cargill's other classes of stock, is entitled to one vote. In addition, holders of the Common Stock are entitled to receive dividends on their shares in an amount decided annually by Cargill's Board of Directors.

4. Prior to October 18, 1996, the Common Stock was held solely by the lineal descendants of Mr. Cargill and their spouses and ex-spouses (the Cargill Common Stock Holders), either directly or indirectly through corporations and trusts of which they are beneficiaries.²⁰ On October 18, 1996, the Original Plans obtained a portion of the Common Stock through the Stock Acquisition.²¹ In this regard, on that date, the Master Trust acquired 167,832 shares of the Common Stock pursuant to the Stock Acquisition, for a purchase price of \$178.75 per Share. The applicant represents that the Original Plans paid cash for the Common Stock, the aggregate value of which was \$29,999,970 as of the date of the Stock Acquisition. According to the applicant, immediately after the Stock Acquisition, the Common Stock represented less than 10% of the assets in the Master Trust.²²

5. The applicant represents that State Street Bank and Trust Company (State Street) acted as Independent Fiduciary for purposes of the Stock Acquisition. State Street represents that it is independent of Cargill and receives less than 1% of its aggregate annual gross revenue from Cargill. In addition, State Street represents that it is qualified to act as Independent Fiduciary on behalf of the Master Trust due to its status as one of the country's largest trust companies and its extensive experience in managing retirement plan assets. The applicant represents that, subsequent to the Stock Acquisition, State Street has acted as Independent Fiduciary with respect to the Plans' continued holding of the Common Stock and the Put Option.

²⁰ As a result, the Common Stock did not satisfy the definition of "qualifying employer security". In this regard, with respect to defined benefit plans, 407(d)(5)(A) of the Act defines a "qualifying employer security" as, among other things, "stock" which satisfies the requirements of section 407(f)(1) of the Act. Section 407(f)(1)(b) of the Act states that "stock" meets the requirements of that section to the extent that at least 50 percent of the aggregate amount of stock of the same class issued and outstanding at the time of acquisition is held by persons independent of the issuer.

²¹ Since the Common Stock was not a "qualifying employer security", the Stock Acquisition violated section 407(a)(1)(A) of the Act which provides that a plan may not acquire or hold any employer security which is not a qualifying employer security. In violating section 407(a) of the Act, the Stock Acquisition also violated section 406(a)(1)(E) of the Act which provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction involving the acquisition, on behalf of the plan, of any employer security in violation of section 407(a) of the Act.

²² The applicant states that, as of November 30, 2000, the Common Stock represented approximately 4% of the total assets held by the Master Trust.

6. The applicant represents that, for purposes of the Stock Acquisition, the Cargill Common Stock Holders proposed a price of \$178.75 per share. The applicant states that the Independent Fiduciary retained a qualified, independent advisor for the purpose of determining whether: (1) the proposed \$178.75 per share sale price exceeded the fair market value of such shares; and (2) the terms of the proposed Stock Acquisition were fair and reasonable to the Master Trust from a financial point of view. In this regard, the applicant states that the Independent Fiduciary selected Duff & Phelps Financial Consulting Co. (Duff & Phelps) to make such determinations.

In a letter dated October 18, 1996, Duff and Phelps stated that, in its capacity as financial advisor to the Independent Fiduciary for purposes of the Stock Acquisition, it reviewed, among other things: audited financial statements of Cargill; unaudited interim financial statements of Cargill for the three months ended August, 31, 1996; and certain internal documents and analyses provided by Cargill management. In carrying out its duties, Duff and Phelps stated that it additionally reviewed relevant financial and operating information for specific publicly traded companies which it deemed comparable in whole or in part to Cargill.

Upon this review, Duff and Phelps compared Cargill's historical results and future prospects against several sets of publicly traded companies. Duff and Phelps stated that the fair market value of the Common Stock was thereafter determined upon reviewing the relative performance and pricing multiples of such companies and discounting the derived common stock value to reflect the illiquidity of the Common Stock. In the October 18, 1996 letter, Duff and Phelps concluded that: (a) the price of \$178.75 per share to be paid by the Master Trust was not in excess of fair market value within the meaning of ERISA; and (b) the terms of the proposed Stock Acquisition were fair and reasonable to the Master Trust from a financial point of view.

The applicant represents that, upon the Independent Fiduciary's review of the information provided by Duff and Phelps, the Independent Fiduciary determined that, as of October 18, 1996, the Stock Acquisition was appropriate for, and in the best interests of, the Original Plans and the Master Trust. The applicant states that, in consideration of this, on that date, the Independent Fiduciary directed that the Master Trust acquire the Common Stock pursuant to the Stock Acquisition.

7. The applicant represents that at no time subsequent to the Stock Acquisition did the Common Stock represent more than 10% of the fair market value of any Original Plan or, after the merging of the Original Plans (see paragraph 9), any Remaining Plan. The applicant additionally represents that the Master Trust has never held, and will never hold, more than 25% of the aggregate amount of Cargill's issued and outstanding Common Stock.

8. In addition to receiving the Common Stock pursuant to the Stock Acquisition, the Trust received the Put Option. In this regard, the Trust received an option which requires that Cargill, at the direction of the Independent Fiduciary, purchase from the Master Trust any or all of the Common Stock held by the Master Trust. According to the terms of the Put Option, the price of any share sold pursuant to a Put Option shall be the greater of: (1) the price at which the Master Trust acquired the Common Stock; or (2) the fair market value of the Common Stock as of the date the Put Option is exercised. The applicant represents that the Put Option has remained in effect since the Stock Acquisition and will continue to remain in effect to the extent the Master Trust continues to hold any of the Common Stock.

9. After the Stock Acquisition, Cargill decided to merge certain of the Original Plans. In this regard, on January 1, 1997, the Seaboard Grain Miller Employees' Pension Plan, the Grain Miller Employees' Pension Plan, and the Union Poultry Products Employees' Pension Plan were merged into the Salaried Employees' Pension Plan. In addition, at the same time, the Poultry Products Employees' Plan was merged into the Production Employees' Pension Plan. Thus, after the mergers, the following plans remained: the Salaried Employees' Pension Plan having 22,726 participants and \$652,213,466 in total assets as of December 31, 1999; the Production Employees' Pension Plan having 6,564 participants and \$48,773,333 in total assets as of December 31, 1999; and the Hourly Wage Employees' Pension Plan having 8,449 participants and \$147,72,972 in total assets as of December 31, 1999.

10. Subsequent to the Stock Acquisition, State Street retained responsibility for monitoring the Master Trust's continued ownership of the Common Stock. Thus, for as long as the Master Trust held the Common Stock, State Street, as Independent Fiduciary, was required to determine whether it would be in the interests of the Master Trust for the Master Trust to exercise

the Put Option. State Street was, therefore, responsible for monitoring the financial status of Cargill at regular intervals to determine whether the Common Stock continued to be a stable and prudent investment for the Plans and the Master Trust.

State Street was also given full investment discretion with respect to the Common Stock. As a result, State Street had the authority to: (1) Direct the trustee of the Master Trust with respect to the exercise of voting rights, conversion rights or tender offers; (2) join in or oppose voting trusts, mergers, consolidations, foreclosures, reorganizations, recapitalizations and liquidations and (3) exercise any and all rights relating to the Common Stock. The applicant represents that State Street will continue to have each of these responsibilities for as long as the Master Trust and the Plans hold the Common Stock.

11. Cargill established, and continues to maintain, an escrow account (the Escrow Account) to secure Cargill's obligations under the Put Option. The applicant represents that the Escrow Account will remain in effect for the duration of the Trust's ownership of any of the Common Stock and will be maintained at an independent banking institution approved by State Street. The purpose of the Escrow Account, the applicant states, is to ensure that the Master Trust will receive a price for the Common Stock that is in accordance with the terms of the Put Option. Specifically, pursuant to any exercise of the Put Option by the Master Trust, State Street is entitled, as Independent Fiduciary, to draw upon the Escrow Account to satisfy Cargill's obligations under the terms of the Put Option in the event Cargill fails to purchase the Common Stock at the price required by such option. According to the applicant, the Escrow Account contains only cash and/or United States government securities amounting to at least 25% of the total fair market value of the Common Stock held by the Master Trust. Subsequent to the Stock Acquisition, the Master Trust has at all times had, the applicant states, a lien against the assets in the Escrow Account that gives the Master Trust priority over all creditors of Cargill with respect to the assets in the Escrow Account. The applicant represents that this lien will remain in place to the extent the Master Trust continues to hold any of the Common Stock.

12. Cargill previously received temporary exemptive relief, pursuant to Prohibited Transaction Exemption (PTE) 94-23 (59 FR 10830 (March 8, 1994)), for the purchase and holding of

Common Stock by the Master Trust.²³ Subsequent to the publication of the proposed exemption in the **Federal Register** (58 FR 58194 (October 29, 1993), the Department received a written comment objecting to the Master Trust's payment of the fees of State Street and Duff and Phelps. In response, as noted in PTE 94-23, Cargill agreed to pay such fees in order to avoid the depletion of the assets of the Master Trust.

Cargill failed to meet this requirement when it inadvertently caused the Master Trust to pay the Legal Fees. In this regard, subsequent to the Stock Acquisition, Cargill directed that the Master Trust pay certain of the Independent Fiduciary's legal fees, the amount of which totaled \$80,791. The applicant represents that such payment was due, in part, to certain personnel changes occurring within Cargill. Since Cargill failed to act in accordance with the representations it made in response to a commentator under PTE 94-23, the relief provided by the exemption ceased to be available. As a result, the applicant is seeking retroactive relief for the Stock Acquisition, as well as the Plans' subsequent holding of the Common Stock, and the acquisition, holding and potential exercise of the Put Option, by means of this proposed exemption.

13. The applicant states that Cargill has taken the appropriate steps to reimburse the Master Trust for its payment of the Legal Fees. In this regard, the applicant represents that the Master Trust was reimbursed \$80,791 for the Legal Fees. The applicant states that, in addition, Cargill paid certain interest to the Master Trust. According to the applicant, the amount of such interest, \$36,696, represented the Master Trust's overall rate of return on its entire portfolio of investments from the date the Legal Fees were paid by the Master Trust to the date the Legal Fees were refunded to the Master Trust.

The applicant represents that Cargill will undertake certain steps to prevent future inappropriate payments of expenses by the Master Trust. In this regard, the applicant represents that, if this proposed exemption is granted, Cargill will designate a fiduciary, as such term is defined by the Act, to review all expenses submitted for payment by the Master Trust. The applicant represents that, only upon such fiduciary's determination that an expense is reasonable and necessary for

²³In this regard, the relief provided by PTE 94-23 expired on March 8, 1999 with respect to the acquisition of Common Stock by the Master Trust. As noted in the granted exemption, however, the Master Trust was allowed to hold the Common Stock subsequent to the end of the five year period.

the administration of a Remaining Plan will the fiduciary approve, in writing, the payment of the expense. In addition, the applicant represents that no expense associated with any transactions between Cargill and a Remaining Plan will be paid by such Remaining Plan unless Cargill obtains a written opinion from independent legal counsel.

14. In summary, that applicant represents that the proposed exemption is protective of, and in the best interests of, the Remaining Plans and the Master Trust since:

(A) Prior to the Stock Acquisition, the Independent Fiduciary determined that the Stock Acquisition was appropriate for, and in the best interests of, the Original Plans and the Master Trust.

(B) The \$178.75 per share purchase price the Master Trust paid for each share of Common Stock pursuant to the Stock Acquisition equaled the August 31, 1996 fair market value of each such share as determined by a qualified, independent appraiser selected by the Independent Fiduciary.

(C) Subsequent to the Stock Acquisition, the Independent Fiduciary represented the interests of the Master Trust with respect to the Master Trust's holding of the Common Stock and the Master Trust's holding of the Put Option, and continues to represent such interests as long as the Master Trust holds such stock and Put Option.

(D) Subsequent to the Stock Acquisition, the Independent Fiduciary protected the rights of the Master Trust with respect to the Master Trust's holding of the Common Stock and the Master Trust's holding of the Put Option, and will continue to protect such rights as long as the Master Trust holds such stock and Put Option.

(E) Upon request by the Independent Fiduciary, Cargill purchased, or will purchase, all or a portion of the Common Stock held by the Trust, in accordance with the terms of the Put Option, for the greater of: (1) The price of the Common Stock as of the date of the Stock Acquisition; or (2) the fair market value of the Common Stock as of the date any Put Option is exercised.

(F) Subsequent to the Stock Acquisition, the Common Stock did not, at any time, represent more than ten percent (10%) of the total fair market value of the assets held by any Original Plan or any Remaining Plan.

(G) For purposes of securing its obligations with respect to the Put Option, Cargill established, and will continue to maintain, an escrow account containing cash and/or U.S. government securities amounting to at least 25% of the total current fair market value of the

Common Stock held by the Master Trust.

(H) All transactions between Cargill and the Master Trust; or between Cargill and a Plan, arising in connection with the Stock Acquisition, were no less favorable to the Master Trust or Plan than arm's-length transactions involving unrelated parties.

(I) Cargill reimbursed the Master Trust, with interest (i.e., the Reimbursement), for the Legal Fees.

(J) Cargill paid, and will continue to pay, the fees of the Independent Fiduciary and its financial advisor to the extent such fees relate to either the Stock Acquisition or the continued holding of the Common Stock and the Put Option by the Master Trust.

(K) At no time subsequent to the Stock Acquisition has the Master Trust held more than 25% of the aggregate amount of Common Stock issued and outstanding.

(L) Cargill adopts written procedures requiring that a plan fiduciary: (1) review all expenses submitted for payment by the Master Trust; and (2) approve the payment of only those expenses that are reasonable and necessary for the administration of a Remaining Plan.

(M) Cargill adopts written procedures requiring that independent legal counsel provide Cargill with a written opinion regarding the payment by the Master Trust or a Remaining Plan of expenses associated with a transaction between Cargill and a Remaining Plan.

(N) In the event this proposed exemption is granted, Cargill, within 60 days of the date of such grant, files Form 5330 with the Internal Revenue Service and pays the applicable excise taxes with respect to the Master Trust's payment of the Legal Fees.

Notice to Interested Persons: The applicant represents that notice to interested persons will be made within twenty (20) business days following publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than sixty (60) days from the date of publication of this notice of proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Christopher Motta of the Department, telephone (202) 693-8544. (This is not a toll-free number.)

Blue Cross and Blue Shield of Kansas, (the Company) and Anthem Insurance Companies, Inc. (Anthem), Located in Topeka, KS and Indianapolis, IN, Respectively

[Application No. D-11030]

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 (or ERISA) 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).²⁴

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 the receipt of cash (Cash), including without limitation, Cash held in an escrow fund (the Escrow Fund), by any eligible policyholder (the Eligible Policyholder) of the Company and Anthem, the Company's future parent,²⁵ which is an employee benefit plan (the Plan), as well as the Blue Cross and Blue Shield of Kansas, Inc. Health Benefit Plan (the Company Health Plan), which is sponsored by the Company, in exchange for the termination of such Plan's membership interest in the Company, in accordance with the terms of a plan of conversion (the Plan of Conversion) adopted by the Company and implemented pursuant to Article 40, Chapter 40 of the Kansas Statutes Annotated (the K.S.A.)

The proposed exemption is subject to the general conditions set forth below in Section II.

Section II. General Conditions

(a) The Plan of Conversion is implemented in accordance with procedural and substantive safeguards that are imposed under Kansas Insurance Law for a "sponsored demutualization" and is subject to review and approval by the Kansas Insurance Commissioner (the Commissioner).

(b) The Commissioner reviews the terms of the options that are provided to Eligible Policyholders of the Company

²⁴ For purposes of this proposed exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

²⁵ For purposes of this proposed exemption, references to the Company will generally include references to Anthem, unless noted, or unless the context requires otherwise.

as part of such Commissioner's review of the Plan of Conversion, and only approves the Plan following a determination that —

(1) Such Plan is (i) fair and equitable to policyholders, (ii) complies with the requirements of Kansas law, and

(iii) does not unjustly enrich any officer, director, agent or employee of the company; and

(2) The new stock insurer meets the minimum requirements to obtain a certificate of authority to transact business in Kansas and its operation is not hazardous to existing or future policyholders or the public.

(c) Each Eligible Policyholder has an opportunity to vote at a special meeting to approve the Plan of Conversion after receiving full written disclosure from the Company.

(d) With the exception of the Company Health Plan, one or more independent fiduciaries of a Plan that is an Eligible Policyholder elects to receive Cash pursuant to the terms of the Plan of Conversion and neither the Company 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 acquisition.

(e) In the case of the Company Health Plan, a committee (the Company Health Plan Committee), comprised of management-level employees of the Company, determines whether to vote for or against the implementation of the Plan of Conversion, but does not otherwise exercise investment discretion over the Company Health Plan's assets.

(f) All Eligible Policyholders that are Plans participate in the demutualization on the same terms and conditions as other Eligible Policyholders that are not Plans.

(g) One-third of the total Cash consideration is distributed to an Eligible Policyholder on a *pro rata* basis as the "fixed component" and the remaining two-thirds Cash consideration is allocated among each Eligible Policyholder as the "variable component" in accordance with a fair and objective standard, based upon actuarial formulas which take into account a policy's past and future contributions to the Company's surplus.

(h) No Eligible Policyholder pays any brokerage commissions or fees in connection with the receipt of the demutualization consideration.

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

(j) The terms of the transactions are at least as favorable to the Plans as an

arm's length transaction with an unrelated party.

Section III. Definitions

For purposes of this proposed exemption,

(a) The term "Blue Cross and Blue Shield of Kansas, Inc." means the Company and its future parent, Anthem, unless otherwise noted, or unless the context requires otherwise.

(b) An "affiliate" of the Company includes —

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

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

(c) The term "Eligible Policyholders" means persons who, according to the Company's records, are the holders of certain in force group and non-group insurance policies of the Company on the date on which the Company's Board of Directors approves and adopts the Plan of Conversion.

Summary of Facts and Representations

Description of the Parties

1. The Company, which is located in Topeka, Kansas, is a mutual insurance company organized in 1992 under Kansas law. Through its operating divisions and subsidiaries, the Company is engaged in a variety of activities including providing accident and health coverage to subscribers, substantially all of whom are residents of the State of Kansas. The Company also performs administrative services and claims processing for other Blue Cross and Blue Shield plans' subscribers and for programs such as Medicare, Medicaid and the Federal Employee Health Benefits Program. As of December 31, 2000, the Company had total assets of approximately \$731 million. As of February 9, 2001, the Company's most recent financial strength rating from A.M. Best Company, Inc. was "A—" or "Excellent."

As a mutual insurance company, the Company does not have capital stock but instead has members (Members) who are owners of policies and contracts issued by the Company. A policyholder's membership interest in the Company includes the right to vote, and to participate in the distribution of the Company's surplus in the event of the Company's voluntary dissolution or liquidation. Each Member has one vote.

Pursuant to Article 40, Chapter 40 of the Kansas Statutes Annotated (i.e., the K.S.A.), the Company may be converted to a stock company under a process called "demutualization." In the event of such a demutualization, Eligible Policyholders of the Company may receive Cash consideration (some or all of which may be held in an escrow fund, as described below) in exchange for their mutual membership interests in the Company. The Company's demutualization will not affect the rights of policyholders under their insurance contracts. In addition, only the Company's policyholders, and not policyholders of an affiliate of the Company, may vote and receive Cash consideration in connection with the demutualization.

2. The Company provides a variety of insurance products to both non-group and group policyholders. As of October 25, 2001, the Company had 171,403 Eligible Policyholders. The non-group policyholders include 124,347 Medicare Supplement policyholders and 36,317 policyholders holding non-group major medical policies or specialty policies such as "cancer only" indemnity policies. The remaining 10,739 are group policyholders. Of the group policyholders, approximately 6,000 are ERISA-covered welfare plans.

3. Anthem, which will become the ultimate parent of the Company pursuant to the Plan of Conversion, maintains its principal place of business in Indianapolis, Indiana. Anthem is currently organized as a stock insurance company under the laws of the State of Indiana. Together with its subsidiaries, Anthem is one of the nation's largest health benefits companies. As an independent licensee of the Blue Cross Blue Shield Association (BCBSA), Anthem and its affiliates offer BCBSA-branded products throughout Indiana, Ohio, Kentucky, Connecticut, Colorado, Nevada, New Hampshire and Maine. In addition, Anthem and its affiliates provide health care coverage or services to over 7 million people in these states. As of December 31, 2000, Anthem had approximately \$5.7 billion in assets, \$3.8 billion in liabilities and surplus of \$1.9 billion.

4. The Company sponsors the Company Health Plan, a welfare plan which is expected to be an Eligible Policyholder entitled to receive consideration in connection with the implementation of the Plan of Conversion discussed herein. The Company Health Plan provides health insurance benefits to approximately 2,200 employee and retiree participants (and their respective dependents) through three separate benefit programs

based on the participants' location within Kansas: (a) a health maintenance organization program with a self-referral benefit; (b) a preferred provider program; and (c) a traditional major medical program. Each program includes coverage for medical care, hospitalization, prescription drugs, and dental care, subject to the terms and conditions of the program. Thus, the Company Health Plan's assets consist solely of insurance and premiums withheld from employees which are remitted to the insurers and there is no valuation of the assets of such Plan.

Active employees do not have an option among these three programs. Instead, those living in the service area of the health maintenance organization are enrolled in that coverage, and those outside the service area are enrolled in the preferred provider program. Retirees in the health maintenance organization service area can choose between that coverage and the traditional major medical program. Retirees living outside that service area are enrolled in the preferred provider program. The Company pays 75 percent of the cost of coverage of employees, retirees and their respective dependents. Under the Plan of Conversion, the Company may receive approximately \$1,178,000 in the distribution if the total distribution is \$321 million. The Company intends to use the entire amount of the distribution in respect of the Company Health Plan to defray employee and retiree costs of coverage within a year of the distribution.

The Company Restructuring

5. On May 24, 2001, the Company's Board of Directors (the Board) authorized management to develop a plan of demutualization (i.e., the Plan of Conversion) pursuant to which the Company would be converted from a mutual insurance company to a stock insurance company. The Plan of Conversion, which was adopted by the Board on October 25, 2001, provides for the conversion (the Conversion) of the Company into a stock insurance company and the sale by the Company, pursuant to an Alliance Agreement, dated as of May 30, 2001 (the Alliance Agreement), of certain newly-issued shares of common stock to Anthem, Anthem West, Inc., an Indiana company and a wholly-owned subsidiary of Anthem, or to Anthem, Inc., a newly-formed public holding company and the parent of Anthem, to hold all of the shares of its common stock.²⁶ In the

²⁶ Anthem has separately applied to the Department for an administrative exemption in

Continued

Conversion, all policyholders' membership interests in the Company will be extinguished in exchange for a special distribution (the Special Distribution), to the extent declared by the Board, plus an additional amount of Cash that will be deposited into the Escrow Fund (described in Representation 9 of the proposal) and distributed, after resolution of a potential contingent litigation matter (the Contingent Litigation Matter) of the Company, to the Eligible Policyholders as provided in the Plan of Conversion.

The Board believes that the Company's Conversion into a stock corporation and the sale of the Company to Anthem, which makes possible the distribution of the value of the Company to Eligible Policyholders, is in the best interests of the Company's policyholders. If the Company is to continue to provide high quality insurance services at reasonable costs to its policyholders in a health insurance market that has become national in scope, it must spread its costs over a sufficiently large policyholder base. The Company, however, holds a certificate of authority to sell insurance only in Kansas.

Even if it were to seek to sell coverage in other states, it could not use the Blue Cross and Blue Shield names and service marks to do so, for those names and service marks are controlled by the BCBSA, whose licensees are provided exclusive areas within which they may use those names and service marks.

In addition to being unable to expand geographically, the Company finds that its potential customer base within the state shrinks every year, as national corporations purchase or supplant local businesses. The Company is also unable to diversify its risks geographically. An adverse local illness, or adverse local legislation, or a natural disaster could have substantial impact on its financial soundness. The Conversion, wherein the Company will become a part of a substantially larger, multi-state insurer, will benefit the Company and its policyholders in several ways:

- The Conversion will provide the Company with sufficient capital to compete with national commercial companies as well as access to a larger total capital pool with which to acquire other health plans or related businesses.
- The Conversion will enable the Company to take advantage of economies of scale by eliminating duplicative resources and streamlining

connection with its contemplated demutualization. On November 6, 2001, the Department issued a final exemption (Prohibited Transaction Exemption 2001-44) to Anthem at 66 FR 56133.

its compliance efforts in an increasingly complex regulatory environment.

- By virtue of the Company's becoming part of the diversified geographical base of Anthem that results from the demutualization, the Company will have increased flexibility in responding to localized adverse risk events, avoiding the twin perils of decreased financial stability or excessive increases in rates to avoid financial instability. By having such a diversified base, the Company will have the ability to participate better in insurance offerings to multi-state accounts.

- The Conversion will result in the Company being able to offer a greater variety of career paths to its employees and the potential for greater and more varied challenges, which in turn should permit it to continue to attract and retain the kinds of employees needed to provide its policyholders with quality service.

- The Conversion will allow the Company to take advantage of best practices in health insurance from Anthem and its health insurance affiliates.

- The Conversion will allow the Company to maintain a significant level of local employment.

- The Conversion will provide for sustained local input into medical policy.

- The Conversion will provide Eligible Policyholders with an opportunity to receive Cash in exchange for their otherwise illiquid membership interests, which will be extinguished. Thus, Eligible Policyholders will realize economic value from their membership interests that is not currently available to them so long as the organization remains a mutual company.

6. Accordingly, the Company requests an administrative exemption from the Department which, if granted, will permit the receipt of Cash (including, without limitation, the Cash consideration to be held in the Escrow Fund described herein) by an Eligible Policyholder that is a Plan, including the Company Health Plan, in exchange for such Eligible Policyholder's membership interest in the Company, in accordance with the Plan of Conversion adopted by the Company and implemented pursuant to Kansas Insurance Law.

The Company represents that the receipt of Cash by a Plan, in exchange for such Eligible Policyholders' mutual membership interest in the Company, may be viewed as a prohibited sale or exchange of property between the Plan and the Company in violation of section 406(a)(1)(A) of the Act. Moreover, the

Company states that the transaction may also be construed as a transfer of plan assets to, or a use of plan assets by or for the benefit of, a party in interest in violation of section 406(a)(1)(D) of the Act.

The proposed exemption is conditioned upon a number of substantive safeguards. Among the safeguards is the requirement that distributions to Plans pursuant to the exemption must be on terms that are no less favorable to the Plans than Eligible Policyholders that are not Plans. In this regard, Plans that are Eligible Policyholders must participate in the demutualization transaction on the same terms and conditions as Eligible Policyholders that are not Plans. Further, the demutualization will not, in any way, change premiums or reduce policy benefits, guarantees or other policy obligations of the Company to its policyholders and contractholders.

Procedural Requirements under Kansas Insurance Law for Restructuring

7. Kansas Insurance Law provides a regulatory framework for the conversion of a mutual insurance company into a stock company, including a "sponsored demutualization," whereby all of the stock of an insurer is acquired by another company in return for cash. It is represented that the Company's proposed Conversion will be in the nature of a "sponsored demutualization."

K.S.A. 40-4002 requires the demutualizing insurer's board of directors to adopt, by a two-thirds majority, a resolution stating the reasons a conversion to a stock insurance company would be in the best interests of the policyholders of the mutual insurance company. Following adoption of the resolution, a detailed plan of conversion will be developed and approved by a two-thirds majority of the board. The plan of conversion must also be submitted to the Kansas Insurance Commissioner for approval, subject to certain hearing requirements.

Additionally, such plan must be approved by two-thirds of the policyholders of the mutual insurer (or by a simple majority, if a majority of policyholders vote) at a meeting called for the purpose of considering the plan of conversion.²⁷ Policyholders may vote in person or by proxy. A copy of the plan of conversion and any information the Commissioner deems necessary to

²⁷ It is represented that neither the Company 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 any election made by an Eligible Policyholder that is a Plan.

policyholder understanding, including a summary of the plan of conversion, must be furnished to policyholders.

K.S.A. 40-4003a sets forth alternative structures which may be used for a conversion, including a plan in which policyholders exchange their membership interests for cash or other consideration, and requires the insurer to file a plan of conversion complying with the terms and conditions set forth for such structure. Existing policyholders of a converting insurer have their rights protected under K.S.A. 40-4003c, which provides for policies in force on the effective date of conversion remaining in force, with only voting rights, assessment provisions, and rights to share in surplus being extinguished.

The Commissioner is required to hold a hearing regarding the plan of conversion, giving not less than 20 days' notice to the insurer and the policyholders of the insurer of the hearing. The Commissioner must approve the plan if she finds it is fair and equitable to policyholders, complies with the requirements of the law, does not unjustly enrich any director, officer, agent or employee of the company, and the new stock insurer would meet the minimum requirements to obtain a certificate of authority to transact business in Kansas and its operation would not be hazardous to existing or future policyholders or the public. The amount of consideration provided to policyholders is deemed to be fair and equitable if it is at least equal to the amount of statutory surplus contributed by policyholders. If the Commissioner approves the plan of conversion, he or she will issue a new certificate of authority to the converted insurer and the date of such issuance is deemed to be the conversion date.

In addition to the provisions governing conversion to a stock company, because this transaction involves Anthem's acquisition of the Company's stock, it will also be subject to review under K.S.A. 40-3304. This provision of the statute regulates the acquisition of a domestic insurer and requires Commissioner review and public hearings.

As far as timing is concerned, between November 19 and November 27, 2001, the Company sent notices to policyholders regarding a January 11, 2002 policyholder meeting to consider the Plan of Conversion. The Company anticipates that the Commissioner will hold a hearing on the Plan of Conversion between January 7 and January 9, 2002 and that the Commissioner will approve such Plan during the first quarter of 2002.

Distributions to Eligible Policyholders

8. Under the proposed transaction, Eligible Policyholders of the Company will be entitled to receive total Cash consideration, currently estimated at \$321 million, in exchange for their mutual membership interests in the Company.²⁸ The Cash consideration will consist of two components. In this regard, one-third of the Cash consideration will be distributed to Eligible Policyholders, *pro rata*, as the "fixed component" while the remaining two-thirds will be allocated among Eligible Policyholders as the "variable component." Such latter allocation will be made in accordance with a fair and objective standard, based upon actuarial formulas which will take into account a policy's past and estimated future contributions to the Company's surplus.

On the effective date of the Conversion (the Conversion Date), Eligible Policyholders will be entitled to receive \$190 million in exchange for their mutual membership interests in the Company. Of this amount, Anthem will pay \$48 million in Cash to the Escrow Fund. In addition, at or prior to the closing, the Company will declare the Special Distribution, which will be payable after the closing to the Eligible Policyholders, in an amount equal to the excess of the Company's consolidated closing book value over \$155 million, subject to certain rounding considerations.²⁹

²⁸ The proceeds of the demutualization will belong to the Plan if they would be deemed to be owned by the Plan under ordinary notions of property rights. See ERISA Advisory Opinion 92-02A, January 17, 1992 (assets of plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law). It is the view of the Department that, in the case of an employee welfare benefit plan with respect to which participants pay a portion of the premiums, the appropriate plan fiduciary must treat as plan assets the portion of the demutualization proceeds attributable to participant contributions. In determining what portion of the proceeds are attributable to participant contributions, the plan fiduciary should give appropriate consideration to those facts and circumstances that the fiduciary knows or should know are relevant to the determination, including the documents and instruments governing the plan and the proportion of total participant contributions to the total premiums paid over an appropriate time period. In the case of an employee pension benefit plan, or where any type of plan or trust is the policyholder, or where the policy is paid for out of trust assets, it is the view of the Department that all of the proceeds received by the policyholder in connection with a demutualization would constitute plan assets." See ERISA Advisory Opinion 2001-02A, February 15, 2001.

²⁹ The Alliance Agreement formerly provided that in the event the Special Distribution equal to the entire excess of the closing book value over \$155 million was not paid, the purchase price would be increased by 30 percent of the excess of the undistributed closing book value over \$155 million. Under the Alliance Agreement, as amended, and

The amount of this excess is currently estimated to be approximately \$131 million. The Special Distribution, together with 7 percent interest from the Conversion Date, will be paid directly to the Eligible Policyholders as soon as is reasonably practicable following the resolution of the closing balance sheet used to calculate the amount of the Special Distribution.

As stated above, of the \$190 million purchase price, \$48 million will be held in the Escrow Fund pending the resolution of the Contingent Litigation Matter, involving a subpoena dated February 28, 2001 received by the Company from the Office of the Inspector General, U.S. Department of Health and Human Services. The subpoena seeks documents related to an investigation of possible improper claims against Medicare. The amounts held in the Escrow Fund will be used to pay all costs, expenses and liabilities related to the Contingent Litigation Matter, to pay related taxes which might become payable, and to pay all costs and expenses of the escrow, with any remaining amounts to be distributed to Eligible Policyholders following the final resolution of such matter.³⁰ At present, the Company has been responding to the subpoena which underlies the Contingent Litigation Matter through the production of documents, which production is nearly complete, except for certain issues with respect to which the Company is awaiting clarification from the U.S. Department of Justice.

Both the Special Distribution and any amounts remaining in escrow will be distributed to Eligible Policyholders in accordance with the distribution principles set forth in the Plan of Conversion. The Board has received an opinion from Dresdner Kleinwort

pursuant to a resolution adopted by the Company on October 25, 2001, the Special Distribution is currently equal to the excess of the closing book value over \$155 million.

The parties expect that the full amount of the Special Distribution will be paid. It is represented that it is a condition to the company's obligation to close that the Commissioner must grant "any required approval to the payment of the Special Distribution" or the Company will be required to obtain an opinion from its financial advisor confirming the fairness, from a financial point of view, of the purchase price to the Eligible Policyholders in the absence of the Special Distribution.

³⁰ Even if the entire Escrow Fund were applied to costs related to the Contingent Litigation Matter, it is represented that Eligible Policyholders would still receive \$142 million plus the Special Distribution amount (currently estimated at \$131 million) within 90 to 120 days after the Conversion Date. Thus, the Company asserts that there is no possibility that Eligible Policyholders will receive nothing in return for their mutual membership interests.

Wasserstein, independent financial advisors to the Company, that the purchase price payable to the Eligible Policyholders and into the Escrow Fund for the benefit of the Eligible Policyholders pursuant to the Alliance Agreement is "fair" to the Eligible Policyholders, from a financial point of view.

The Escrow Fund

9. The Alliance Agreement provides that \$48 million of the \$190 million purchase price to be received by the Company from Anthem will be deposited by the Company (or Anthem or its specified affiliate on the Company's behalf) into the Escrow Fund. The Escrow Fund will be a separately-designated, interest-bearing deposit account established on or prior to the Conversion Date, under the terms of an escrow agreement (the Escrow Agreement) which will be entered into by and among the Company, Anthem and an escrow agent (the Escrow Agent).³¹ The Escrow Agent will be an unrelated New York bank with trust powers that is selected by the Company, and accepted by Anthem, to act as Escrow Agent under the Escrow Agreement.

The Company will deposit, into the Escrow Fund, amounts recovered from insurers with respect to the Contingent Litigation Matter, net of any reasonable out-of-pocket costs and expenses incurred in effecting such recovery. The Escrow Fund will also provide funding for the payment of (a) the net after-tax amount of costs and expenses attributable solely to the Contingent Litigation Matter and (b) such other amounts as may be specified in the Escrow Agreement or in the Alliance Agreement. Following the satisfaction of all such costs and expenses, the Escrow Agreement will provide for the payment of Cash consideration by the Company to Eligible Policyholders. Tax benefits related to the costs and expenses will be determined once they are finally realized by the Company. However, the Company may withdraw amounts, from time to time, to cover such costs and expenses.

The Escrow Fund will continue until the Contingent Litigation Matter has been finally disposed of by binding settlement or court order, all tax

³¹ It is represented that the Escrow Fund was required due to the difficulty in estimating the potential costs related to the Contingent Litigation Matter and to assure Eligible Policyholders that the acquisition offers received by the Company did not reflect any discount to the value of the Company due to the Contingent Litigation Matter. Thus, the Escrow Fund is intended to facilitate the Anthem transaction without diminishing potential returns to policyholders.

amounts have been finally determined, all amounts that are reasonably recoverable from any insurer in respect of the Contingent Litigation Matter are recovered, and all amounts in the Escrow Fund have been paid or distributed by the Escrow Agent in accordance with the Escrow Agreement and the Alliance Agreement. Upon delivery by the Company and the Policyholder Committee of a certificate certifying that all such amounts have been paid, the Escrow Fund will terminate and all remaining amounts held in the Escrow Fund will be distributed to Eligible Policyholders in accordance with the Plan of Conversion. No amounts need be distributed if the Policyholder Committee determines that it would be impractical to do so, taking into account the costs of distribution in relation to the amounts to be distributed. Any amounts that are not so distributed will instead be distributed to a charitable foundation selected by the Policyholder Committee.

Amounts held in the Escrow Fund will be invested by the Escrow Agent solely in obligations of, or obligations fully guaranteed as to timely payment of principal and interest by, the United States of America or an agency or instrumentality thereof with a maturity date of one year or less from the date of investment. All costs and expenses of maintaining the Escrow Fund, including the fees and expenses of the Escrow Agent, the costs and expenses of making distributions out of the Escrow Fund and the fees and expenses of the Policyholder Committee, will be borne by the Escrow Fund. The rights of Eligible Policyholders to amounts held in the Escrow Fund will not be represented by any form of certificate or instrument and will not be transferable or assignable except by will, the laws of intestacy or by other operation of law.

A committee comprised of five individuals who were members of the Board of Directors of the Company prior to the Conversion Date and are acceptable to Anthem (the Policyholder Committee) will oversee the conduct of the Contingent Litigation Matter.³² The Policyholder Committee will also certify amounts payable to the Company out of the Escrow Fund for the indemnification of costs incurred by the Company related to the Contingent Litigation Matter. The Policyholder Committee may then dispute the amounts claimed by the Company. However, once the dispute is settled

³² It is represented that no members of the Policyholder Committee will serve on the Company Health Plan Committee that is described in Representation 10.

pursuant to provisions in the Alliance Agreement, the Policyholder Committee will certify the indemnification amounts payable to the Company.

In addition, the Commissioner will retain regulatory oversight over the investment and distribution of the assets held in the Escrow Fund to ensure that the interests of Eligible Policyholders are protected.

The Company expects that less than 25 percent of the interests in the Escrow Fund will be held by "benefit plan investors" within the meaning of the Department's Plan Asset Regulations, 29 CFR 2510.3-101(f), and, accordingly, the assets of the Escrow Fund should not constitute "plan assets" subject to the Act. If the Company determines that 25 percent threshold has been exceeded by Plan investors, it will inform the Department of this determination.

Company Health Plan Oversight

10. The Company has arranged for the retention of a committee, comprised of three management-level employees, to act as a fiduciary for the Company Health Plan in connection with the implementation of the Plan of Conversion. The Company Health Plan Committee will determine whether to vote for or against the implementation of the Plan of Conversion. The Company Health Plan Committee's vote on behalf of the Company Health Plan will represent one vote out of the approximately 171,403 votes which may be cast by Eligible Policyholders. The Company does not believe that the Company Health Plan Committee will exercise any investment discretion with respect to the type of consideration to be distributed in the demutualization, since the compensation will consist solely of Cash.

11. 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 procedural and substantive safeguards that are imposed under Kansas law and will be subject to review and supervision of the Commissioner.

(b) The Commissioner will review the terms and options that are provided to Eligible Policyholders, including Plans, 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, among other things, the Plan of Conversion is fair and equitable to policyholders.

(c) The Plan of Conversion will provide the Company with access to new sources of capital that should help

sustain the Company's financial strength, increase its ability to conduct its business efficiently and improve the Company's competitive position in the insurance industry.

(d) With the exception of the Company Health Plan, one or more independent Plan fiduciaries will determine whether to vote for or against the implementation of the Plan of Conversion, following the receipt of full written disclosure from the Company.

(e) In the case of the Company Health Plan, the Company Health Plan Committee will determine whether to vote for or against the implementation of the Plan of Conversion, but it will not otherwise exercise investment discretion over the Company Health Plan's assets.

(f) Each Eligible Policyholder will have an opportunity to comment on the Plan of Conversion and will be solely responsible for any decisions that may be permitted under the Plan of Conversion regarding the Cash consideration to be received in the demutualization.

(g) The proposed exemption will allow Eligible Policyholders that are Plans to receive Cash in exchange for their membership interests in the Company, which will be extinguished, and neither the Company 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.

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

(i) The demutualization will not, in any way, change premiums or reduce policy benefits, guarantees or other policy obligations of the Company to its policyholders and contractholders.

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

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the

interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 27th day of December, 2001.

Ivan Strasfeld,

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

[FR Doc. 02-24 Filed 1-2-02; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-237 and 50-249]

Exelon Generation Company, LLC; Notice of Issuance of Amendments to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 191 to Facility Operating License No. DPR-19 and Amendment No. 185 to Facility Operating License No. DPR-25, issued to Exelon Generation Company, LLC (the licensee), which revised the Operating License (OL) and Technical Specifications (TS) for operation of the Dresden Nuclear Power Station, Units 2 and 3 (DNPS) located in Grundy

County, Illinois. The amendment is effective as of the date of issuance.

The amendment modified the OL and TS to allow an increase of the authorized operating power level from 2527 megawatts thermal (MWt) to 2957 MWt at DNPS. The change represents an increase of approximately 17 percent above the current rated thermal power and is considered an extended power upgrade.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing in connection with this action was published in the **Federal Register** on November 20, 2001 (66 FR 58183). No request for a hearing or petition for leave to intervene was filed following this notice.

The Commission has prepared an Environmental Assessment related to the action and has determined not to prepare an environmental impact statement. Based upon the environmental assessment, the Commission has concluded that the issuance of the amendment will not have a significant effect on the quality of the human environment (66 FR 65752).

Further details with respect to the action may be found in (1) The application for amendment dated December 27, 2000, as supplemented by letters dated February 12; April 6 and 13; May 3, 18, and 29; June 5, 7, and 15; July 6 and 23; August 7, 8, 9, 13 (two letters), 14 (two letters), 29, and 31 (two letters); September 5 (two letters), 14, 19, 25, 26, and 27 (two letters); October 17; November 2, 16, and 30; and December 10, 17 and 18, 2001, (2) Amendment Nos. 191 and 185 to License Nos. DPR-19 and DPR-25, respectively, (3) the Commission's related Safety Evaluation, and (4) the Commission's Environmental Assessment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, <http://>