

## PENSION AND WELFARE BENEFITS ADMINISTRATION

[Prohibited Transaction Exemption (PTE) 2001-45; Exemption Application No. D-10946]

### Grant of Individual Exemption To Amend PTE 99-45, Involving Donaldson, Lufkin & Jenrette Securities Corporation (DLJ), Located in New York, NY

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

**ACTION:** Grant of individual exemption to modify PTE 99-45.

**SUMMARY:** This document contains a final exemption before the Department of Labor (the Department) that amends PTE 99-45 (64 FR 61138, November 9, 1999), an exemption issued to DLJ. PTE 99-45, which is effective as of September 24, 1999, permits the (1) purchase or sale of a security between certain affiliates of DLJ which are foreign broker-dealers (the Foreign Affiliates) and employee benefit plans (the Plans) with respect to which the Foreign Affiliates are parties in interest, including options written by a Plan, DLJ or the Foreign Affiliates; (2) the extension of credit to the Plans by the Foreign Affiliates to permit the settlement of securities transactions that are effected on either an agency or a principal basis, or in connection with the writing of options contracts; and (3) the lending of securities to the Foreign Affiliates by the Plans. These transactions are described in a notice of pendency that was published by the Department on September 7, 2001 at 66 FR 46826 and clarified on September 17, 2001 by a Notice of Technical Correction (66 FR 48067), also issued by the Department.

The final exemption expands the scope of PTE 99-45 in order that it will apply to both current and future Foreign Affiliates of DLJ and Credit Suisse First Boston Corporation (CSFB) that are located in the United Kingdom and Australia and subject to the securities regulatory entities within these jurisdictions. In addition, the final exemption incorporates, by reference, many of the facts, representations and conditions contained in PTE 99-45, as well as certain revisions made in the Notice of Technical Correction.

**EFFECTIVE DATE:** This exemption is effective as of November 3, 2000.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S.

Department of Labor, telephone (202) 219-8881. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On September 7, 2001, the Department published a notice of proposed exemption in the *Federal Register* at 66 FR 46826, that would amend PTE 99-45. PTE 99-45 provides an exemption form certain prohibited transaction restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), as amended, by reason of section 4975(c)(1) of the Code. The proposed exemption was requested in an application filed on behalf of DLJ and CSFB pursuant to 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 32826, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this exemption is being issued solely by the Department.

The proposed exemption gave interested persons an opportunity to comment and to request a hearing. In this regard, all interested persons were invited to submit written comments or requests for a hearing on the pending exemption on or before October 22, 2001. All comments were to be made a part of the record. During the comment period, the Department received no comments or hearing requests from interested persons.

#### 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 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 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 require, among other things, a fiduciary to discharge his or her 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 requirements of section 401(a) of the

Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) The exemption does not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) In accordance with section 408(a) of the act, section 4975(c)(2), of the Code, and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990), the Department finds that the exemption is administratively feasible, in the interest of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(4) The exemption is supplemental to, and not in derogation of, any other provision of the Act and the Code, including statutory or administrative exemptions. 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

(5) This exemption is subject to the express condition that the facts and representations set forth in the notice of proposed exemption, the Notice of Technical Correction, and the proposed and final exemptions relating to PTE 99-45, accurately describe, where relevant, the material terms of the transactions to be consummated pursuant to this exemption.

#### Exemption

Under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990), the Department hereby amends PTE 99-45 as follow:

#### Section I. Covered Transactions

A. The restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective November 3, 2000, to any purchase or sale of a security between certain affiliates of Donaldson, Lufkin & Jenrette Securities Corporation (DLJ) or Credit Suisse First Boston Corporation (CSFB) which are foreign broker-dealers (the Foreign Affiliates, as defined below) and employee benefit plans (the Plans) with respect to which the Foreign Affiliates are parties in interest, including options written by a Plan, DLJ, CSFB, or a Foreign Affiliate, provided that the following conditions

and the General Conditions of Section II, are satisfied:

(1) The Foreign Affiliate customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer;

(2) The terms of any transaction are at least as favorable to the Plan as those which the Plan could obtain in a comparable arm's length transaction with an unrelated party; and

(3) Neither the Foreign Affiliate nor an affiliate thereof has discretionary authority or control with respect to the investment of the Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets, and the Foreign Affiliate is a party in interest or disqualified person with respect to the Plan assets involved in the transaction solely by reason of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code, or by reason of a relationship to a person described in such sections. For purposes of this paragraph, the Foreign Affiliate shall not be deemed to be a fiduciary with respect to Plan assets solely by reason of providing securities custodial services for a Plan.

B. The restrictions of sections 406(a)(1)(A) through (D) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective November 3, 2000, to any extension of credit to the Plans by the Foreign Affiliates to permit the settlement of securities transactions regardless of whether they are effected on an agency or a principal basis, or in connection with the writing of options contracts, provided that the following conditions and the General Conditions of Section II are satisfied:

(1) The Foreign Affiliate is not a fiduciary with respect to any Plan assets involved in the transaction, unless no interest or other consideration is received by the Foreign Affiliate or an affiliate thereof, in connection with such extension of credit; and

(2) Any extension of credit would be lawful under the Securities Exchange Act of 1934 (the 1934 Act) and any rules or regulations thereunder if such Act, rules or regulations were applicable.

C. The restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, effective November 3, 2000, to the lending of securities to the Foreign Affiliates by the Plans, provided that the

following conditions and the General Conditions of Section II are satisfied:

(1) Neither the Foreign Affiliate nor an affiliate thereof has discretionary authority or control with respect to the investment of Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(2) The Plan receives from the Foreign Affiliate (by physical delivery or by book entry in a securities depository, wire transfer, or similar means) by the close of business on the day on which the loaned securities are delivered to the Foreign Affiliate, collateral consisting of cash, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, or irrevocable U.S. bank letters of credit issued by persons other than the Foreign Affiliate or an affiliate of the Foreign Affiliate, or any combination thereof. All collateral shall be in U.S. dollars, or dollar-denominated securities or bank letters of credit, and shall be held in the United States;

(3) The collateral has, as of the close of business on the preceding business day, a market value equal to at least 100 percent of the then market value of the loaned securities (or, in the case of letters of credit, a stated amount equal to same);

(4) The loan is made pursuant to a written loan agreement (the Loan Agreement), which may be in the form of a master agreement covering a series of securities lending transactions, and which contains items at least as favorable to the Plan as those the Plan could obtain in an arm's length transaction with an unrelated party;

(5) In return for lending securities, the Plan either (a) receives a reasonable fee, which is related to the value of the borrowed securities and the duration of the loan, or (b) has the opportunity to derive compensation through the investment of cash collateral. In the latter case, the plan may pay a loan rebate or similar fee to the Foreign Affiliate, if such fee is not greater than the Plan would pay an unrelated party in a comparable arm's length transaction with an unrelated party;

(6) The Plan receives at least the equivalent of all distributions on the borrowed securities made during the term of the loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities that the Plan would have received (net of tax

withholdings)<sup>1</sup> had it remained the record owner of such securities.

(7) If the market value of the collateral as of the close of trading on a business day falls below 100 percent of the market value of the borrowed securities as of the close of trading on that day, the Foreign Affiliate delivers additional collateral, by the close of the Plan's business on the following business day, to bring the level of the collateral back to at least 100 percent. However, if the market value of the collateral exceeds 100 percent of the market value of the borrowed securities, the Foreign Affiliate may require the Plan to return part of the collateral to reduce the level of the collateral to 100 percent;

(8) Before entering into a Loan Agreement, the Foreign Affiliate furnishes to the independent Plan fiduciary (a) the most recent available audited statement of the Foreign Affiliate's financial condition, (b) the most recent available unaudited statement of its financial condition (if more recent than the audited statement), and (c) a representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition that has not been disclosed since the date of the most recent financial statement furnished to the independent Plan fiduciary. Such representation may be made by the Foreign Affiliate's agreeing that each loan of securities shall constitute a representation that there has been no such material adverse change;

(9) The Loan Agreement and/or any securities loan outstanding may be terminated by the Plan at any time, whereupon the Foreign Affiliate shall deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the Plan within (a) the customary delivery period for such securities, (b) five business days, or (c) the time negotiated for such delivery by the Plan and the Foreign Affiliate, whichever is least, or, alternatively such period as permitted by Prohibited Transaction Class Exemption (PTCE) 81-6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987), as it may be amended or superseded.<sup>2</sup>

<sup>1</sup> The Department notes the Applicants' representation that dividends and other distributions on foreign securities payable to a lending Plan may be subject to foreign tax withholdings and that the Foreign Affiliate will always put the Plan back in at least as good a position as it would have been in had it not lent the securities.

<sup>2</sup> PTCE 81-6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of

(10) In the event that the loan is terminated and the Foreign Affiliate fails to return the borrowed securities or the equivalent thereof within the time described in paragraph (9), the Plan may purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the Foreign Affiliate under the Loan Agreement, and any expenses associated with the sale and/or purchase. The Foreign Affiliate is obligated to pay, under the terms of the Loan Agreement, and does not pay, to the Plan, the amount of any remaining obligations and expenses not covered by the collateral, plus interest at a reasonable rate. Notwithstanding the foregoing, the Foreign Affiliate may, in the event it fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the then current market value of the collateral, provided that such replacement is approved by the independent Plan fiduciary; and

(11) The independent Plan fiduciary maintains the situs of the Loan Agreement in accordance with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404b-1. However, in the event that the independent Plan fiduciary does not maintain the situs of the Loan Agreement in accordance with the indicia of ownership requirements of section 404(b) of the Act, the Foreign Affiliate shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or the taxes imposed by section 4975(a) and (b) of the Code.

If the Foreign Affiliate fails to comply with any condition of this exemption in the course of engaging in a securities lending transaction, the Plan fiduciary which caused the Plan to engage in such transaction shall not be deemed to have caused the Plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the Foreign Affiliate's failure to comply with the conditions of the exemption.

## Section II. General Conditions

A. The Foreign Affiliate is a registered broker-dealer subject to regulation by a governmental agency, as described in

the Act and the corresponding provisions of section 4975 (c) of the Code for the lending of securities that are assets of an employee benefits plan to a U.S. broker-dealer registered under the 1934 Act (or exempted from registration under the 1934 Act as a dealer in exempt Government securities, as defined therein).

Section III. C., and is in compliance with all applicable rules and regulations thereof in connection with any transactions covered by this exemption;

B. The Foreign Affiliate, in connection with any transactions covered by this exemption, is in compliance with the requirements of Rule 15a-6 (17 CFR 240.15a-6) of the 1934 Act, and Securities and Exchange Commission interpretations thereof, providing for foreign affiliates a limited exemption from U.S. broker-dealer registration requirements.

C. Prior to the transaction, the Foreign Affiliate enters into a written agreement with the Plan in which the Foreign Affiliate consents to the jurisdiction of the courts of the United States for any civil action or proceeding brought in respect of the subject transactions.

D. The Foreign Affiliate maintains, or causes to be maintained, within the United States for a period of six years from the date of any transaction such records as are necessary to enable the persons described in paragraph E. to determine whether the conditions of this exemption have been met except that—

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

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

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

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

(2) Any fiduciary of a Plan;

(3) Any contributing employer to a Plan;

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

(5) Any participant or beneficiary of a Plan. However, none of the persons described above in paragraphs (2)–(5) of this paragraph E. shall be authorized to examine trade secrets of the Foreign Affiliate, or any commercial or financial

information which is privileged or confidential.

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

## Section III. Definitions

For purposes of this exemption,

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

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

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

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

(3) Any corporation or partnership of which such other person is an officer, director or partner. (For purposes of this definition, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

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

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

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

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

## Section IV. Effective Date

This exemption is effective as of November 3, 2000.

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

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

Signed at Washington, DC, this 31st day of October, 2001.

**Ivan L. Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2001-43; [Exemption Application No. D-10916 and D-10917, et al.]

### Grant of Individual Exemptions; The FHP International Corporation 401(k) Savings Plan; and The FHP International Corporation PAYSOP (Together, the Plans) et al.

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

**ACTION:** Grant of Individual Exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the code and the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

### The FHP International Corporation 401(k) Savings Plan; and The FHP International Corporation PAYSOP (together, the Plans)

Located in Santa Ana, California

[Prohibited Transaction Exemption 2001-43; Exemption Application Nos. D-10916 and D-10917]

### Exemption

The restrictions of sections 406(a), 406 (b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, from April 21, 1997 through May 20, 1997, to: (1) The past receipt by the Plans of certain rights (the Talbert Rights) to purchase shares of common stock, par value \$.01 per share, of Talbert Medical Management Holding Corporation (Talbert); (2) the past holding of the Talbert rights by the Plans; and (3) the disposition or exercise of the Talbert Rights by the Plans; provided that the following conditions are satisfied:

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

(B) With respect to Talbert Rights allocated to the Plans, the Talbert Rights were acquired solely for the accounts of participants who had directed investment of all or a portion of their

account balances in FHP Common Stock pursuant to Plan provisions for individually-directed investment of participant accounts; and

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

**EFFECTIVE DATE:** This exemption is effective from April 21, 1997 through May 20, 1997.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on September 7, 2001 at 66 FR 46840.

*Written Comments and Hearing Requests:* The Department received one letter from a commentator which did not address any issues relating to the proposed exemption, but sought more information concerning the transaction. The Department provided the additional information to the person via telephone. In addition, the Department received a number of telephone calls from other Plan participants requesting further information. Each of these inquiries was responded to by telephone and no additional questions were raised. The Department received no requests for a hearing with respect to the proposed exemption.

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

### Anthem Insurance Companies, Inc. (Anthem)

Located in Indianapolis, IN

[Prohibited Transaction Exemption 2001-44; Exemption Application No. D-10979]

### Exemption

#### Section I. Covered Transactions

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, effective October 24, 2001, to the receipt, by an employee benefit plan (the Plan) or by a Plan participant (the Plan Participant) that is an eligible