

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

[Application No. D-10848, et al.]

Proposed Exemptions; Bank of America Corporation (BAC) et al.**AGENCY:** Pension and Welfare Benefits Administration, Labor.**ACTION:** Notice of proposed exemptions.

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

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. ____, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5638, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of

proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Bank of America Corporation (BAC) Located in Dallas, Texas

[Application No. D-10848]

Proposed Exemption*Section I—Exemption for In-Kind Redemption of Assets*

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, effective August 1, 2001,¹ to certain in-kind redemptions (the Redemptions) by the NationsBank Cash Balance Plan (the In-house Plan) of shares (the Shares) of proprietary mutual funds (the Portfolios) offered by investment companies for which Bank of America, N.A. (Bank of America) or an affiliate thereof provides investment advisory and other services (the Nations Funds), 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 Bank of America and affiliates of Bank of America (Bank of America Affiliates));

(B) The assets transferred to the In-house Plan pursuant to the Redemptions consist entirely of cash and Transferrable Securities. Notwithstanding the foregoing,

Transferrable 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 set forth in Rule 17a-7 under the Investment Company Act of 1940, as amended from time to time (the 1940 Act) (using sources independent of Bank of America and Bank of America Affiliates);

(D) Bank of America, 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, Bank of America 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 authorization for such Redemption to Bank of America, such authorization 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 Bank of America of written or electronic notice regarding such termination (unless circumstances beyond the control of Bank of America delay termination for no more than one additional business day);

(G) Before authorizing a Redemption, based on the disclosures provided by the Portfolios to the Independent Fiduciary, 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, and that the Redemption is in the best interest of the In-house Plan and its participants and beneficiaries;

(H) Not later than thirty (30) business days after the completion of a Redemption, the relevant Fund will provide to an independent fiduciary acting on behalf of the Plan (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 each security valued in accordance with Rule 17a-7(b)(4),

(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, a random sampling of the pricing information supplied by Bank of America; and

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

(L) The Bank 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 Bank of America, 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 Bank of America 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.

(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, and (iii) any participant or beneficiary of the In-house Plan or duly authorized representative of such participant or beneficiary.

(2) None of the persons described in paragraphs (M)(1)(ii) and (iii) shall be authorized to examine trade secrets of Bank of America or the Nations Funds, or commercial or financial information which is privileged or confidential.

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 Bank of America 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 Bank of America if: (i) Such fiduciary directly or indirectly controls, is controlled by or is under common control with Bank of America, (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 Bank of America 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 Bank of America 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 under Rule 17(a)-7 of the 1940 Act; and (2) which are not: (i) Securities which may not be publicly offered or sold without registration under the 1933 Act; (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 Nations Funds, or (b) permit transfers of ownership or 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. BAC is a bank holding company headquartered in Charlotte, North Carolina and organized as a Delaware corporation. Bank of America, a federally chartered bank and trust company also headquartered in Charlotte, North Carolina, is an indirect, wholly-owned subsidiary of BAC. As of August 31, 1999, Bank of America had approximately \$231,300,000 in total fiduciary assets under management.

2. Bank of America is the trustee of the In-house Plan. The In-house Plan is a cash balance plan maintained by BAC for certain current and former employees of BAC and Bank of America Affiliates. As of April 14, 2000, the In-house Plan had approximately 204,000 participants and \$8.2 billion in assets.

3. According to the applicant, in 1992, BAC's Corporate Benefits Committee (the Committee) determined that the In-house Plan would benefit from the investment of its assets in the Portfolios. The Portfolios are mutual fund portfolios organized within the Nations Funds. The Nations Funds are open-end investment companies registered under the 1940 Act with respect to which a BAC subsidiary acts as an investment adviser and an investment sub-adviser.

At the time, the Committee considered the Portfolios to be an appropriate vehicle for diversifying the In-House Plan's assets. In addition, the Committee determined that investment in the Portfolios by the In-house Plan would allow the In-house Plan to continue to use certain in-house investment management services which otherwise might not have been available. As a result, the Committee decided to invest In-house Plan assets in the Portfolios in accordance with Prohibited Transaction Exemption 77-3 (PTE 77-3, 42 FR 18734 (1977)).²

4. The applicant states that the Committee recently decided to reconsider the investment strategy implemented on behalf of the In-house Plan. Such reconsideration was the result, in large part, of a substantial increase in the total amount of assets held by the In-house Plan. In this regard, the applicant states that several defined benefit plans have recently merged into the In-house Plan. For example, on December 31, 1998, the Bank America Pension Plan merged with the In-house Plan, nearly doubling the amount of assets held by the In-house Plan.

Ultimately, the Committee and Bank of America determined that given the

current size of the In-house Plan's assets, Bank of America may now separately manage the assets underlying the Shares on a cost-effective basis.³ Such management would avoid, the applicant notes, the mutual fund fees and regulatory costs paid by the In-house Plan in association with its investment in SEC-registered mutual fund portfolios. Thus, following a Redemption, Bank of America intends to provide direct in-house investment management services with respect to the In-house Plan's assets.

5. The applicant represents that the Redemptions, as proposed, are the appropriate means of effectuating this shift in investment strategy. In this regard, the applicant represents that effecting redemptions of the Shares for cash, as provided for in PTE 77-3, followed by the reinvestment of such cash for securities similar to the securities underlying the redeemed Shares, would cause the In-house Plan to incur certain costs, including potentially large brokerage expenses. As a result, BAC represents that the proposed Redemptions, being on an in-kind basis having no associated brokerage commission or other fees or expenses (other than customary transfer charges paid to parties other than Bank of America Affiliates), are a cost-effective means of implementing the investment strategy sought by Bank of America.

6. If this proposed exemption is granted, BAC anticipates the immediate Redemption of certain Portfolio Shares offered by two of the Nations Funds. Such Portfolios are both advised and subadvised by a BAC subsidiary. In this regard, Bank of America Advisors, Inc. (BAAI), a wholly-owned subsidiary of BAC, serves as investment adviser to each of the affected Portfolios, and TradeStreet Investment Associates, Inc. (TradeStreet), another wholly-owned subsidiary of BAC, serves as investment sub-adviser to each of the affected Portfolios. BAAI and TradeStreet (collectively, the Investment Advisers) are each registered under the Investment Advisers Act of 1940 (the Advisers Act). The applicant describes these immediately affected Nations Funds and Portfolios as follows:

(A) The Nations Fund Trust (NFT), a Massachusetts business trust, is an open-end management investment company registered under the 1940 Act.

NFT is currently comprised of 37 portfolios including the following seven Portfolios:

- (i) Nations Capital Growth Fund
- (ii) Nations Value Fund
- (iii) Nations Disciplined Equity Fund
- (iv) Nations Managed Index Fund
- (v) Nations Equity Index Fund
- (vi) Nations Emerging Growth Fund
- (vii) Nations Managed SmallCap Value Index Fund

(B) The Nations Fund, Inc. (NFI), a Maryland corporation, is an open-end management investment company registered under the 1940 Act. NFI is currently comprised of seven portfolios including the following Portfolio:

- (i) Nations Small Company Growth Fund

As previously noted, BAAI serves as investment adviser and TradeStreet serves as investment subadviser to each of the Portfolios listed above. The applicant represents that, in addition, Bank of America and Bank of America Affiliates provide other services to the Nations Funds and the Portfolios, including co-administration and sub-transfer agency services.

7. The applicant also represents that, as of August 31, 1999:

- (i) A total of approximately \$144,071,000 in In-house Plan assets was invested in the Nations Capital Growth Fund (representing a 17% ownership interest in such Portfolio);
- (ii) A total of approximately \$364,266,000 in In-house Plan assets was invested in the Nations Value Fund (representing a 17% ownership interest in such Portfolio);
- (iii) A total of approximately \$215,182,000 in In-house Plan assets was invested in the Nations Disciplined Equity Fund (representing a 40% ownership interest in such Portfolio);
- (iv) A total of approximately \$320,642,000 in In-house Plan assets was invested in the Nations Managed Index Fund (representing a 45% ownership interest in such Portfolio);
- (v) A total of approximately \$424,183,000 in In-house Plan assets was invested in the Nations Equity Index Fund (representing a 41% ownership interest in such Portfolio);
- (vi) A total of approximately \$112,622,000 in In-house Plan assets was invested in the Nations Emerging Growth Fund (representing a 50% ownership interest in such Portfolio);
- (vii) A total of approximately \$40,322,000 in In-house Plan assets was invested in the Nations Managed SmallCap Value Index Fund (representing a 20% ownership interest in such Portfolio); and
- (viii) A total of approximately \$216,341,000 in In-house Plan assets

² The applicant has not requested exemptive relief with respect to any investment in the Nations Funds by the In-house Plan. The applicant notes that the In-house Plan may acquire or redeem shares in the Nations Funds pursuant to PTE 77-3. In this regard, PTE 77-3 permits the acquisition or sale of shares of a registered, open-end investment company by 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 Nations Funds by the In-house Plan is covered by PTE 77-3.

³ BAC represents that in the event that this exemption is not granted, or in the event that the Independent Fiduciary does not give a favorable opinion with respect to the Redemptions, BAC intends to proceed with a redemption of the Shares for cash, and, thereafter, BAC intends to subsequently reinvest the proceeds.

was invested in the Nations Small Company Growth Fund representing a 43% ownership interest in such Portfolio).⁴

8. BAC represents that it is possible that the In-house Plan fiduciaries may at a later date determine that it is in the best interest of the In-house Plan and its participants and beneficiaries to redeem the In-house Plan's interest in Portfolios, other than those described in Paragraphs 6 and 7 above, for which a BAC subsidiary 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.

9. The applicant states that the proposed Redemptions involve ministerial transactions to be performed in accordance with pre-established objective procedures. As a result, the applicant represents that the proposed transactions do not permit the trustee or any affiliate of the trustee to use its influence or control to purchase particular securities from the Portfolios.⁵ In addition, the applicant states that all Portfolio 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 In-house Plan will transfer Shares in return for a proportionate share of the securities held by each Portfolio. According to the applicant, the In-house Plan will receive only cash and Transferrable Securities

pursuant to any Redemption. In this regard, each Transferrable Security subject to a Redemption will be transferred in-kind to the In-house Plan. However odd lot securities, fractional shares and accruals on such securities may be transferred in cash. In addition, securities which are not Transferrable Securities will be transferred in cash. The applicant states that the proposed Redemptions will be therefore be carried out, to the extent possible, on a pro rata basis as to the number and kind of securities transferred to the In-house Plan.⁶

11. The applicant represents that, for purposes of the Redemptions, the values of the Portfolio securities will be determined based on the current market price of such securities as of the close of business on the date of the Redemption request (the Valuation Date). The value of the securities in each Portfolio will be determined by using the valuation procedures described in Rule 17a-7 under the 1940 Act. In this regard, the "current market price" for specific types of securities held by the Nations Funds will be determined as follows:

a. If the security is a "reported security" as the term is defined in Rule 11Aa3-1 under the Securities Exchange Act of 1934 (the 1934 Act), the last sale price with respect to such security reported in the consolidated transaction reporting system (the Consolidated System) for the Valuation Date; or, if there are no reported transactions in the Consolidated System that day, such price will equal the average of the highest current independent bid and the lowest current independent offer for such security (reported pursuant to Rule 11Ac1-1 under the 1934 Act), as of the close of business on the Valuation Date.

b. If the security is not a reported security, and the principal market for such security is an exchange, the "current market price" will equal the price of the last sale on such exchange on the Valuation Date or, if there were no reported transactions on such exchange that day, such price will equal the average of the highest current independent bid and lowest current independent offer on the exchange as of the close of business on the Valuation Date.

c. If the security was not a reported security and was quoted in the NASDAQ system, the "current market price" will equal the average of the highest current independent bid and

lowest current independent offer reported on NASDAQ as of the close of business on the Valuation Date.

d. For all other securities, the "current market price" will equal the average of the highest current independent bid and lowest current independent offer, as of the close of business on the Valuation Date, determined on the basis of reasonable inquiry. For securities in this category, BAC intends to obtain quotations from at least three sources that are broker-dealers or pricing services independent of and unrelated to BAC. When more than one valid quotation is available, BAC intends to use the average of the quotations to value the securities, in conformance with interpretations by the SEC and practices under Rule 17a-7.

12. The applicant represents that, not later than 30 business days after completion of a Redemption, the Nations Funds will confirm in writing to the Independent Fiduciary the following: (i) The number of Portfolio shares held by the In-house Plan immediately before the Redemption (and the related per Share net asset value and the aggregate dollar value of the shares held); (ii) the identity (and related aggregate dollar value) of each security provided to the In-house Plan upon the Redemption, including each security that was valued in accordance with Rule 17a-7(b)(4), as described above; (iii) the price of each such security for purposes of the Redemption; and (iv) the identity of each pricing service or market-maker consulted in determining the value of such securities. In accordance with the conditions of this proposed exemption, similar procedures will be implemented with respect to any future Redemptions of Shares of the Portfolios by an employee benefit plan maintained by BAC for the benefit of certain of its employees or the employees of its affiliates.

13. BAC represents that Independent Fiduciary Services, Inc. (IFS), a registered investment adviser under the 1940 Act, has confirmed its independence from BAC and is qualified to serve as an independent fiduciary as that term is defined in Section II. IFS, in turn, represents that it understands and will accept the duties, responsibilities and liabilities in acting as a fiduciary under the Act for the In-house Plan.

IFS represents that, initially, it was responsible for: (i) analyzing, from an investment perspective, the fairness and reasonableness of the methodology used with respect to each Redemption, and (ii) giving its opinion as to the fairness and reasonableness of such

⁴ As previously noted, the Department is expressing no opinion regarding the applicability of PTE 77-3 to the acquisition of the Shares by the In-house 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 In-house 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.

⁵ BAC represents that Bank of America's predecessor, NationsBank, N.A., determined to discontinue offering discretionary trustee and investment management services to third party employee benefit plans in September of 1997. As a result, all but a de minimus amount of third party employee plan assets have been redeemed from the Nations Funds.

⁶ According to the applicant, the securities actually transferred from any particular Portfolio may have different purchase dates and tax bases attached to them as compared with otherwise identical securities remaining in the Portfolio.

methodology, as compared with a redemption for cash and subsequent reinvestment of such cash, based on such analysis. This analysis and opinion was set forth in a written report (the Report) dated March 1, 2000.⁷ Specifically, in the Report, IFS stated that:

(a) the Redemptions would likely avoid certain transactions costs otherwise incurred in a cash redemption;⁸

(b) The Shares and cash associated with the proposed Redemptions will be calculated based on the Portfolios' respective statements of assets and liabilities, valued in accordance with Rule 17a-7. In this regard, IFS has reviewed a sample spreadsheet developed by BAC to calculate the exact number of Shares and the residual cash to be transferred, and believes the information provided to be conceptually and mathematically correct;

(c) All securities held by the Portfolios, other than the non-Transferrable Securities, are qualifying securities. The securities held by the Portfolios will be identified from a listing supplied by the Nations Funds' custodian, the Bank of New York. The Bank of New York has stated that the Portfolios that will be subject to the Redemptions currently holds no bonds or other securities (that are not non-Transferrable Securities) whose value is normally quoted as a percent of par, or in any way other than price per share.

(d) The proposed transactions would be in compliance with the In-house Plan's investment guidelines.

⁷ The Redemptions, as originally proposed and with respect to which IFS expressed an opinion, included the redemption of In-house Plan shares of the International Growth Fund (offered by NFI) and the International Value Fund (offered by Nations Reserves, an open end investment management company advised by BAAI). Bank of America subsequently determined not to include the redemption of such shares as part of the proposed Redemptions.

⁸ The Report states that if the In-house Plan were to receive cash rather than securities pursuant to the transaction, substantially all 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 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 In-house Plan as a shareholder in the Portfolios. Therefore, according to IFS, to the extent that the In-house Plan effects the Redemption for retained securities, those costs will be avoided. IFS notes, however, that the In-house Plan may sell up to \$400 million of the redeemed securities within a few months of the Redemptions. In this regard, the Department notes that the fiduciaries must determine, consistent with their fiduciary duties under section 404 of ERISA, whether it is prudent to accept an in-kind redemption of Shares of the Portfolios where the In-house Plan may incur transaction costs in connection with the disposition of such redeemed securities shortly after receipt.

The Independent Fiduciary represents that, if this proposed exemption is granted and the Redemptions are thereafter undertaken, it will be responsible for updating its findings and opinions to confirm whether such findings and opinions are applicable as of the anticipated date(s) of the Redemptions. In this regard, IFS states that it will review each Redemption and confirm in writing whether such Redemption was effectuated consistent with the required criteria and procedures set forth in the Report. In carrying out this duty, IFS represents that, if the proposed exemption is granted, it will conduct a post-exemption review, which will include: (i) Reviewing the In-house Plan's current investment policy guidelines, (ii) reviewing the In-house Plan's investment portfolio and the Portfolios' assets as of the most recent common date for which such data is available, (iii) estimating whether the Excluded Assets are consistent with the types of securities so defined, and whether the amount of these securities might be material, and (iv) ascertaining whether the policies, procedures and controls established for effectuating the transfers remain unchanged. Moreover, IFS represented that it will conduct a post-transfer review to provide an additional safeguard to the In-house Plan. In this regard, IFS will evaluate and test whether the transfer was effectuated consistent with the required criteria and procedures and confirm this in writing. Consistent with this, IFS represents that if exemption is granted, it will update the findings and opinions as set forth in the Report so as to confirm whether they still apply as of the expected date(s) of the transfer(s).

In the Report, IFS stated its opinion that the proposed Redemption methodologies are fair to the In-house Plan and reasonable in all material respects. In addition, IFS stated that the proposed Redemptions are in the interests of the participants and beneficiaries of the In-house Plan since the anticipated costs savings is likely to be material. IFS concluded that if the exemption is granted, and all other essential facts and circumstances of the Redemptions remain materially unchanged at the time Bank of America seeks to effectuate the Redemptions, it will issue a favorable recommendation regarding the commencement of such effectuation.

13. In summary, it is represented that the proposed Redemptions satisfy the statutory criteria for an exemption under section 408(a) of the Act 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 Bank of America and Bank of America Affiliates);

(B) The assets transferred to the In-house Plan pursuant to the Redemptions consist entirely of cash and Transferrable 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 set forth in Rule 17a-7 under the 1940 Act (using sources independent of Bank of America and Bank of America Affiliates);

(D) Bank of America, 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, Bank of America provides in writing to IFS a full and detailed written disclosure of information regarding the Redemption;

(F) Prior to a Redemption, IFS provides written authorization for such Redemption to Bank of America, such authorization 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 Bank of America of written or electronic notice regarding such termination (unless circumstances beyond the control of Bank of America delay termination for no more than one additional business day);

(G) Before authorizing a Redemption, based on the disclosures provided by the Portfolios to IFS, IFS 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, and that the Redemption is in the best interest of the In-house Plan and its participants and beneficiaries;

(H) Not later than 30 business days after the completion of a Redemption, the relevant Fund will provide to IFS 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 each security valued in accordance with Rule 17a-7(b)(4),

(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, IFS performs a post-transaction review which will include, among other things, a random sampling of the pricing information supplied by Bank of America; and

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

Notice to Interested Persons: The applicant represents that because those potentially interested participants and beneficiaries cannot all be identified, the most practical means of notifying such participants and beneficiaries of this proposed exemption, in addition to the publication of this notice in the **Federal Register**, is by notifying active participants by an individual direct interoffice mailing, and by notifying participant retirees in pay status. The applicant represents such notification covers more than 160,000 of the In-house Plan's 204,000 and that the time and expense of notifying the remaining participants would be substantial. 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: Mr. Christopher J. Motta of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Sierra Health Services, Inc. Profit Sharing Plan (the Plan) Located in Las Vegas, Nevada

[Applicant No. D-10884]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, will not apply to the proposed sale by the Plan of certain limited partnership interests (collectively, the Interest(s)) to Sierra Health Services, Inc., (the Employer) the sponsor of the Plan and a party in interest with respect to the Plan, provided that the following conditions are met:

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

(b) The Plan pays no commissions or any other expenses relating to the sale;

(c) The sales price is the greater of (i) the fair market value of the Interests as determined by a qualified, independent, appraiser (ii) the value of the Interests, as determined by the general partner of each partnership and reported on the most recent account statements available at the time of the sale or

(iii) the Plan's original acquisition and holding costs.

(d) The Plan suffers no loss, as a result of its acquisition and holding of the Interests, taking into account all cash distributions received by the Plan as a result of owning the Interests.

Summary of Facts and Representations

1. The Employer is a diversified health care company that, through its subsidiaries, provides and administers the delivery of managed care benefit plans for employers, government groups, and individuals. The Employer is the sponsor of the Plan. The Plan is a defined contribution profit sharing plan. The Plan has 4,570 participants with account balances and approximately \$70,964,714.73 in total assets, as of September 30, 2000. The non-liquid assets consist of the four limited partnership units, the Interests.

2. Prior to the second quarter of 1999, Dreyfus Management, Inc. (Dreyfus) acted as the trustee of the Plan holding only the employees' contributions while the Employer acted as the trustee of the Plan holding the Employer's

contributions to the Plan. During the second quarter of 1999, assets held in the Employer directed account were transferred to Dreyfus. As of December 1999, the Employer combined the previously segregated Employer contributions with employee's contributions into a single fund under the control of an independent trustee, with the exception of the Interests. A group of employees makes up the 401(k) committee, which approves the guidelines for investment of the Employer directed fund. The 401(k) committee retains control over the assets involved in the proposed exemption transaction.

The Employer and the 401(k) committee represents that there is no ready market for the Interests. The trustee fees for holding the Interests temporarily until they can be disposed of is \$15 per participant, per year, which amounts to \$29,190 annually based upon 1,946 participants as of December 31, 1998. Allowing the Employer to purchase the Interests would eliminate the trustee fees to the participants and the current administrative burden upon the Employer caused by having to account for the illiquid assets outside of the Plan administrator's custody. The Employer's efforts to find a buyer for the Interests have been unsuccessful. As a result, the Plan now proposes to sell the Interests for the greater of: (i) The "adjusted cost basis" of the Plan's investment in each Interest (the Adjusted Cost); (ii) the fair market value of the Interests, as determined on the date of the proposed sale by an independent, qualified, appraiser; or (iii) the estimated value of the Interests, as determined by the general partner of each partnership and reported on the most recent account statements available at the time of the sale. The partnerships and their general partners are unrelated to the Employer.

3. The Interests consist of:

(a) A 4.92% interest in the Centennial Parkway/Bufalo Drive Limited Partnership (Centennial LP), holding 10 acres of unimproved land in Clark County, Nevada. The Interest has not been used by the Plan. The Interest was acquired by the Plan for investment purposes on October 1, 1983 for \$13,548.54 from the Centennial LP, an unrelated party. The Centennial LP has generated \$8,359 in income and incurred a total of \$3,422 in expenses. Therefore, the Adjusted Cost of Centennial LP is \$18,485.54 as of June 26, 2000 (\$13,548.54 + \$8,359 - \$3,422 = \$18,485.54);

(b) A 5.74% interest in the Great North Limited Partnership (Great North LP) holding 37.66 acres of unimproved

land in Clark County, Nevada. The Interest has not been used by the Plan. The Interest was acquired by the Plan for investment purposes on August 12, 1981 for \$41,670 from the Great North Limited Partnership, an unrelated party. The Great North LP has generated \$19,057 in income and incurred a total of \$9,137 in expenses. Therefore, the Adjusted Cost of Great North LP is \$51,590 as of June 26, 2000 (\$41,670 + \$19,057 - \$9,137 = \$51,590); and

(c) A 4.92% interest in the Nevada Rainbow Limited Partnership (Nevada Rainbow LP) holding 38.39 acres of unimproved land in Clark County, Nevada. The Interest has not been used by the Plan. The Interest was acquired by the Plan for investment purposes on October 1, 1983 for \$43,891.18 from the Nevada Rainbow Limited Partnership, an unrelated party. The Plan received \$30,000 on December 31, 1999. The Nevada Rainbow LP has generated \$6,155 in income and incurred a total of \$8,767 in expenses. Therefore, the Adjusted Cost of Nevada Rainbow LP is \$41,279.18 as of June 26, 2000

(\$43,891.18 + \$6,155 - \$8,767 = \$41,279.18).

The value of the Interests, as determined by the Adjusted Cost is \$111,354.72 (\$18,485.54 + \$51,590 + \$41,279.18 = \$111,354.72).

4. William P. Geary (Mr. Geary), an accredited appraiser with R.O.I. Appraisal, Ltd., located in Henderson, Nevada, performed the appraisal (the Appraisal) of the Interest on June 26, 2000. Mr. Geary states that he is a full time qualified, independent, appraiser, as demonstrated by his status as a Certified General Appraiser, licensed by the State of Nevada. In addition, Mr. Geary represents that both he and his firm are independent of the employer.

In the Appraisal, Mr. Geary estimated the fair market value of each of the Interests, taking into account commissions, expenses, and discounts for the partial interest nature of these assets. Mr. Geary analyzed the net asset value of each of the real estate limited partnerships, based upon standard deductions for expenses, including commissions, return of principal,

preferred returns to limited partners, preferred returns to general partners, and the remaining profits to limited partners. Mr. Geary also analyzed the net asset value on a per unit basis for each of the Interests owned by the Plan. After analyzing all relevant data, Mr. Geary determined that the fair market value of Centennial LP is \$57,210, the fair market value of Great North LP is \$114,450, and the fair market value of Nevada Rainbow LP is \$112,990. Therefore, the Appraisal value is \$284,650 as of June 26, 2000 (\$57,210 + \$114,450 + \$112,990 = \$284,650).

5. The value of the Interests, as determined by the general partners (GPs) of each partnership as of December 31, 1999 is the following:

- (a) Centennial LP = \$73,250;
- (b) Great North LP = \$111,056; and
- (c) Nevada Rainbow LP = \$121,500.

Therefore the price of Interests as valued by the GPs is \$305,806 (\$73,250 + \$111,056 + \$121,500 = \$305,806).

6. The Interests have been evaluated as follows:

	Adjusted cost	Appraisal	GPs valuation
Centennial LP	\$18,485.54	\$57,210	\$73,250
Great North LP	51,590	114,450	111,056
Nevada Rainbow LP	41,279.18	112,990	121,500

7. After selecting the greater price of the (i) the Appraisal, (ii) the GPs valuation, or (iii) the Adjusted Cost, the sales price of the Interests is \$309,200 (\$73,250 + \$114,450 + \$121,500 = \$309,200).

8. The Employer represents that the subject transaction is in the interest of the Plan because the Plan could not at this time sell the Interests to an unrelated third party at other than a substantial discount.

9. In summary, the Employer represents that the subject transaction satisfies the statutory criteria for an exemption under section 408 of the Act for the following reasons: (a) The sale will be a one-time transaction for cash; (b) the Plan will not pay commissions nor other expenses relating to the sale; (c) the Plan suffers no loss, as a result of its acquisition and holding of the Interests, taking into account all cash distributions received by the Plan as a result of owning the Interests; and (d) the sale price for each Interest will be the greater of: (i) The fair market value of the Interests as determined by a qualified, independent, appraiser, (ii) the value as determined by the general partner of each partnership and reported on the most recent account statements

available at the time of the sale, or (iii) the Adjusted Cost.

Notice to Interested Persons: Notice of the proposed exemption shall be given to all interested persons by personal delivery and by first-class mail within 10 days of publication of the notice of pendency 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/or request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 40 days of the date of publication of the notice in the **Federal Register**.

For Further Information Contact: Mr. Khalif I. Ford of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

Riggs Bank N.A., Located in Washington, D.C.

[Exemption Application No. D-10928]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section

4975(c)(2) of the Code in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

Section I—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: (a) The extension of credit (the Advance or Advances) by Riggs Bank N.A. (Riggs) to a participant-directed individual account plan (Plan); and (b) the Plan's repayment of an Advance or Advances, plus accrued interest.

Section II—Conditions

The relief provided under Section I is available only if the following conditions are met:

(a) Each Advance is made in connection with the administration of a portion of the Plan's assets by Riggs as a unitized fund (Unitized Fund) in order to facilitate redemptions from the Unitized Fund.

(b) Each Advance is made in accordance with the terms of a written agreement (the Agreement) that describes terms and procedures for the

Advances, including standing instructions addressing the initiation, amount, repayment and formula or method for determining the interest rate payable with respect to each Advance and is approved in writing by a fiduciary of the Plan who is independent of and not an affiliate of Riggs (Independent Plan Fiduciary).

(c) Interest payable by the Plan on each Advance is determined in accordance with an objective formula or method described in the Agreement.

(d) The Plan repays each Advance and accrued interest in accordance with the terms of the Agreement within ten (10) business days after the initiation of the Advance.

(e) Each Advance is unsecured.

(f) The aggregate amount advanced on any business day that an Advance is initiated does not, after the Advance is made, exceed 25% of the total market value of the Unitized Fund.

(g) On the date that an Advance is initiated, Riggs provides the Independent Plan Fiduciary with notice of the amount of the Advance and the actual interest rate to be applied.

(h) Within ten (10) days after an Advance is fully repaid, Riggs provides the Independent Plan Fiduciary with a confirmation statement which includes the date of repayment, the amount of the Advance, the actual interest rate applied, and the total amount of interest paid by the Plan.

(i) The Agreement may be terminated by the Independent Plan Fiduciary at any time, subject to the Plan's repayment of any outstanding Advances.

(j) The Advances are made on terms at least as favorable to the Plan as those the Plan could obtain in an arm's-length transaction with an unrelated party.

(k) Neither Riggs nor its affiliate has or exercises any discretionary authority or control with respect to the initiation of an Advance, the amount of an Advance, the interest rate payable on an Advance, or the repayment of the Advance.

(l) The fair market value of the assets in the Unitized Fund is determined by an objective method specified in the Agreement. In the case of employer stock, such stock must be stock for which market quotations are readily available from independent sources.

(m) Riggs or its affiliate is not (i) a trustee of the Plan (other than a nondiscretionary trustee who does not render investment advice with respect to the assets of the Unitized Fund), (ii) a plan administrator (within the meaning of section 3(16)(A) of the Act and Code section 414(g)), (iii) a fiduciary who is expressly authorized in

writing to manage, acquire or dispose of on a discretionary basis any assets of the Unitized Fund, or (iv) an employer any of whose employees are covered by the Plan.

(n) (a) Riggs will maintain or cause to be maintained for a period of six years from the date of the granting of the exemption proposed herein the records necessary to enable the persons described in paragraph (b) to determine whether the conditions of this exemption have been met, except that:

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

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

(b)(1) Except as provided in paragraph (b)(2) and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (a) are unconditionally available at their customary location for examination during normal business hours by: (A) Any duly authorized employee or representative of the Department or the Internal Revenue Service; (B) Any fiduciary of the Plan, or any duly authorized employee or representative of such fiduciary; and (C) Any participant or beneficiary of the Plan or duly authorized representative of such participant or beneficiary.

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

Section III—Definitions

(a) The term "affiliate" means (i) any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person; (ii) any officer, director, or partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and (iii) any corporation or partnership of which such other person is an officer, director or partner.

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

Effective Date: If the proposed exemption is granted, the exemption will be effective as of September 11, 2000.

Summary of Facts and Representations

1. Riggs is a wholly-owned subsidiary of Riggs National Corporation, a Washington, DC-based financial services holding company incorporated in the State of Delaware. Riggs provides diverse products and services within the financial services industry, including traditional banking services to retail, corporate and commercial customers, international banking, trust services, and investment management services. In 1999, Riggs earned \$31.6 million in net income and had total assets of \$5.7 billion at year-end, with more than 1,500 employees.

In addition to its traditional banking services, Riggs provides fiduciary and administrative services to employee benefit plans through its financial services division, Riggs & Company. Riggs's employee benefit plan customers include tax-qualified defined benefit plans and welfare plans, and, as here relevant, tax-qualified defined contribution plans (e.g., 401(k) plans) that offer participants the opportunity to direct the investment of their individual accounts among a selection of investment options (Plans). Riggs's services to Plans include trustee and custodial services, recordkeeping, and other administrative services, including as here relevant, unitization services.

As described more fully below, unitization services facilitate daily trading between investment options offered under a plan by permitting daily trading of plan investment options that would otherwise not be able to be traded or settled within one day. A Unitized Fund would generally consist of an investment that is not traded on a daily basis (e.g., company stock) and liquid investments (e.g., money market fund shares). Unitization services permit daily transactions by establishing "units" representing undivided interests in all of the assets of the Unitized Fund. Riggs establishes a daily unit value by dividing the market value of the Unitized Fund by the number of units held by participants, and on a daily basis, processes participant contributions to and withdrawals from the Unitized Fund as purchases and sales of units at the daily unit value. When cash is required to settle transactions in units resulting from participant withdrawals and exchanges of units from the Unitized Fund, the cash requirements are satisfied first from the liquid investments of the Unitized Fund and then, shares of the

Unitized Fund investments may be sold to restore the liquidity. Riggs proposes to offer Plans the opportunity to receive short-term cash advances (Advance or Advances) from Riggs if the cash portion of a Unitized Fund is insufficient to cover unit redemption requests on a particular business day.

2. Riggs's services to participant-directed Plans are provided primarily in connection with the DCXchange® trading system. DCXchange® is a proprietary system owned by PFPC Inc., the fund servicing subsidiary of PNC Bank Corp., and is unrelated to Riggs. DCXchange® is maintained and operated by PFPC Distributors, a registered broker-dealer and a PFPC Inc. affiliate.

Generally, Plans participate in DCXchange® through a third-party administrator or other service provider that performs the Plan's recordkeeping services (the recordkeeper). DCXchange® provides an automated link between the recordkeeper's participant recordkeeping system and mutual fund transfer agents. This linkage allows participant investment transactions (e.g., contributions, withdrawals and exchanges between investment options) to be transmitted to and processed by mutual funds on a daily basis.

DCXchange® is linked to more than 700 different mutual funds and also can be linked to other types of investments, if the investment is administered to permit daily trading. For example, investments available for daily trading through DCXchange® include interests in certain collective trust funds maintained by banks. In providing unitization services, Riggs administers other types of Plan investments to permit daily trading on DCXchange®.

3. Riggs provides a variety of services to Plans participating in DCXchange®. Where a Plan engages Riggs to serve as a trustee or custodian and as recordkeeper to provide participant recordkeeping services, Riggs uses DCXchange® to process the Plan's investment transactions. Plans receiving trust or custodial and recordkeeping services from Riggs may invest among a broad selection of mutual funds, including mutual funds advised by Riggs Investment Management Corporation (RIMCO), a Riggs affiliate, as well as mutual funds not affiliated with Riggs.

In other cases, Riggs may be engaged as trustee or custodian to a Plan that has engaged a recordkeeper that is not affiliated with Riggs. In still other cases, another bank or trust company that maintains the direct contractual relationship with the Plan and provides

participant recordkeeping (or engages a recordkeeper for the Plan) may subcontract with Riggs to provide custodial services.⁹ In these cases, the recordkeeper maintains participant records, receives participant investment instructions, and submits the Plan's investment transactions through DCXchange®. Riggs, as trustee or custodian, holds the Plan's assets and transfers and receives Plan funds as needed to settle the Plan's investment transactions in accordance with DCXchange® procedures.¹⁰

Riggs may provide unitization services to Plans where Riggs is a trustee or custodian (whether or not Riggs is recordkeeper). In some cases, Riggs may be engaged by the Plan solely to provide unitization services and Riggs would have custody of the Plan's assets only to the extent required for the administration of the Unitized Fund.

4. Because participant-directed Plans generally offer mutual funds as investment options, procedures for investments, exchanges and redemptions under these Plans (including procedures established for DCXchange®) accommodate mutual fund trading practices. Under procedures established for DCXchange®, participant investment transactions would generally be processed as follows:

(a) After the close of business on each trade date, mutual fund transfer agents calculate the daily net asset value (NAV) at which shares may be purchased or redeemed for each mutual fund; recordkeepers receive the daily NAV for each mutual fund through the DCXchange® system;

(b) The recordkeeper processes participant instructions for exchanges between investment options and Plan

withdrawals that are submitted to the recordkeeper before a cut-off time (e.g., 3 p.m.) on any business day (the trade date or T), and purchase orders resulting from new Plan contributions received on the trade date, using the daily NAV provided for each mutual fund at the close of business on that trade date;

(c) The recordkeeper aggregates participant transaction information to create a single Plan purchase or redemption order for each mutual fund offered as a Plan investment option. The recordkeeper submits these orders to the mutual funds through DCXchange® during the night, or possibly, very early on the next business day (T+1);

(d) On T+1, the purchase and redemption transactions are settled through DCXchange® by the transfer of money from the master contributions account for purchases to the mutual funds and the collection of the redemption proceeds from the mutual funds which are held in the master disbursement account. Redemption proceeds are reinvested on T+1 if the redemption transaction is processed as part of an exchange between Plan investment options, or transferred to the Plan trustee if withdrawn from the Plan;

(e) In the case of an exchange between investment options offered under a Plan, the recordkeeper may process the exchange as a simultaneous redemption and purchase transaction on T, and both transactions are settled on T+1.

These procedures are successful because mutual funds meet two important requirements: The transfer agent establishes a daily NAV for processing purchases and redemptions; and mutual funds maintain liquidity that permits payment of redemption proceeds on T+1. Interests in collective trust funds also may be traded on a daily basis under these procedures if administered to allow daily contributions and withdrawals.

Some investment options that Plan sponsors may wish to offer participants do not meet requirements for daily trading. For example:

(a) Purchase and sale transactions involving employer stock owned by a Plan typically settle on a "T+3" basis, which means that proceeds upon the sale of employer stock may not be received for three business days after the day of a sale transaction.

(b) "Stable value funds" typically hold insurance company guaranteed investment contracts (GICs) or other investments that provide a benefit-responsive guarantee (e.g., so-called "alternative" stable value contracts, such as "synthetic GICs"), which may require up to ten (10) days notice for withdrawals.

⁹ Banks and trust companies "outsource" custody and settlement responsibilities to Riggs because Riggs has developed computer systems and internal expertise that allow Riggs to provide custody and transaction settlement services efficiently in connection with DCXchange® trading platform.

¹⁰ Riggs also serves as a "master custodian" for Plan assets as funds are transferred between Plans and mutual funds to settle investment transactions through DCXchange®. In this regard, trustees of Plans that participate in DCXchange® engage Riggs to act as master custodian under a standardized master custody agreement to hold Plan funds in certain "master" accounts maintained in connection with DCXchange®. A master contributions account temporarily holds new contributions pending investment (DCXchange® does not process orders for purchases of mutual funds shares unless the purchase amount is on deposit in the contributions account). A master disbursement account holds redemption proceeds from mutual funds temporarily until the proceeds are reinvested or forwarded to a Plan trustee for distribution to participants in accordance with the Plan terms. Riggs's services as master custodian are separate and apart from its provision of unitization and other services to Plans.

(c) Withdrawals from a Plan account managed by an investment manager within the meaning of section 3(38) of the Act (managed account) might require sales of securities owned in the managed account. Like employer stock, sales of securities from a managed account generally would settle on a "T+3" basis.

Unitization services provided by Riggs allow participants to engage in daily transactions involving these types of Plan investment options by providing a daily price and liquidity that permits withdrawals on any business day.

5. Unitized Fund administration is a ministerial service that Riggs performs under specific instructions from a Plan fiduciary independent of Riggs (Independent Plan Fiduciary). The Independent Plan Fiduciary may be the Plan administrator described in section 3(16)(A) of the Act, another Plan fiduciary responsible for determining the Plan's investment options, or an investment manager described in section 3(38) of the Act appointed for a Plan. All of the Independent Plan Fiduciary's instructions are provided in, or in accordance with, a written unitization agreement (the Agreement) made between Riggs and the Independent Plan Fiduciary. Among other things, the Agreement provides standing instructions addressing the initiation, amount, repayment and formula or method for determining the interest rate payable with respect to each Advance. The terms of the Agreement are approved in writing by the Independent Plan Fiduciary.

Riggs has developed criteria to determine when unitization is appropriate, which include factors such as Plan asset size, number of Plan participants, the size of the Unitized Fund, and the type and nature of the Unitized Fund assets (e.g., whether exchange-traded and readily available, or less liquid). In the case of employer stock, the stock must be a "qualifying employer security" as described in section 407(d)(5) of the Act and the Plan's ownership of the employer stock must be permitted under section 407 of the Act. Additionally, such employer stock must be stock for which market quotations are readily available from independent sources.

Under the Agreement, the Independent Plan Fiduciary directs Riggs to establish a Unitized Fund consisting of the assets that are the primary investment under the Plan investment option to be unitized and cash, or cash equivalent investments, that provide liquidity for the Unitized Fund (the cash portion) in order to facilitate daily trading. For example, a

unitized employer stock fund would consist of shares of employer stock and a cash portion; a unitized stable value fund would consist of GICs and/or alternative stable value contracts and a cash portion, and a unitized managed account would consist of investments selected and managed by the Plan's investment manager and a cash portion. In addition, if a Plan wishes to offer a mutual fund that does not participate in DCXchange®, the Independent Plan Fiduciary may direct Riggs to establish a Unitized Fund consisting of shares of the mutual fund and a cash portion.

In most cases, the Independent Plan Fiduciary directs Riggs to invest the cash portion in shares of the Riggs Prime Money Market Fund (the RIMCO Money Market Fund), a unit investment trust managed by RIMCO. In this regard, Riggs is able to submit redemption orders for shares of the RIMCO Money Market Fund on any business day and receive cash on the Plan's behalf on the same business day, which allows Riggs to transfer funds to settle redemptions from the Unitized Fund on T+1 as required under the DCXchange® procedures. The Independent Plan Fiduciary may direct Riggs to invest the cash portion of a Unitized Fund in investments other than the RIMCO Money Market Fund, provided that the investment offers similar liquidity.

Riggs's fees for unitization services are also described in the Agreement. Generally, the fees may include an initial set-up charge and an annual administration charge which may be a fixed amount, a fee based on the value of assets in the unitized account, or a combination of both.

In no event will Riggs have any discretionary authority or control or provide any investment advice (as described by section 3(21) of the Act and regulations thereunder) with respect to the selection of the assets of a Unitized Fund. In this regard, the Independent Plan Fiduciary or an investment manager appointed in accordance with Plan terms and independent of Riggs would be solely responsible for determining the investments of the Unitized Fund, and as further described below, providing Riggs with specific instructions regarding the operation of the Unitized Fund. In addition, Riggs does not provide any asset allocation or other services that may affect or influence participant transactions involving a Unitized Fund.

6. To establish a Unitized Fund, the Independent Plan Fiduciary directs Riggs in the Agreement to calculate the market value of assets owned by the Plan in connection with the investment

option to be unitized (e.g., the employer stock or other investments of the option and the cash portion) on the first day that the option is unitized (the unitization date) and then establish "units" of the Unitized Fund by dividing the market value by a proposed initial unit value. Typically, an initial number of units is determined by dividing the current market value of the combined assets by \$10. On the unitization date, the recordkeeper allocates the units to participant accounts based on each participant's pro rata interest in the Unitized Fund.

Each business day after the unitization date, the Agreement requires Riggs to establish a daily unit price based on the current market value of the Unitized Fund. Procedures for determining current market value are specified in the Agreement and would require an objective method so that Riggs does not have any discretion in determining the market value of the Unitized Fund or unit price. For example, in the case of employer stock, the Agreement may require Riggs to value the stock at the closing price on the New York Stock Exchange. Securities issued by mutual funds would be valued at the daily net asset value published by the mutual fund. In the case of GICs or alternative stable value contracts, the Agreement would generally direct Riggs to use book value as reported by the contract issuer. In the case of a managed account, the investment manager may value the managed account, or Riggs may determine the value if Riggs has custody of the managed account assets.

Riggs provides the daily unit price for each Unitized Fund to DCXchange® after the close of each business day. DCXchange® makes the unit price available to the Plan's recordkeeper for purposes of processing new participant investments in the Unitized Fund, withdrawals from the Unitized Fund, and participant-directed exchanges involving the Unitized Fund.

7. Each business day, the Plan's recordkeeper aggregates all participant investment transactions involving the Unitized Fund to create a Plan purchase and redemption order for units of the Unitized Fund. The recordkeeper submits the purchase and redemption orders to DCXchange® on the same basis that the recordkeeper submits orders for the mutual fund investment options offered under the Plan. DCXchange® then transmits the orders to Riggs.¹¹

¹¹ Generally, the Plan's recordkeeper is party to the Agreement and agrees to process participant investment transactions involving the Unitized Fund in accordance with requirements that

Upon receipt of a purchase order through DCXchange®, Riggs increases the total number of units of the Unitized Fund by the number of units purchased and accepts funds transferred to Riggs to pay for the units purchased. Upon receipt of a unit redemption order, Riggs reduces the number of units accordingly and forwards funds to settle the unit redemptions.

8. The Agreement includes specific instructions for the management of liquidity of a Unitized Fund. Specifically, the Independent Plan Fiduciary must specify a "target liquidity," which specifies the intended size of the cash portion in comparison with the total assets of a Unitized Fund. The target liquidity would be established at a level that reasonably provides enough cash to accommodate the expected volume of redemption transactions generated by participants in the ordinary course. A typical target liquidity may range from 1% to 10%, depending on factors such as the size of the Unitized Fund, the average trading volume of assets held in the Unitized Fund, the number of participants with an interest in the Unitized Fund, and the relative size of each participant's interest in the Unitized Fund.

The Agreement also specifies a "liquidity variance" that defines the range within which the actual value of the cash portion as compared to total value of the Unitized Fund (actual liquidity) may vary from the target liquidity. If the actual liquidity exceeds the target liquidity by more than the liquidity variance, excess amounts must be immediately invested. If the actual liquidity is less than the target liquidity by more than the target variance, then some Unitized Fund investments must be liquidated to increase the cash portion.

The Agreement always provides Riggs with specific instructions for making new investments on behalf of the Unitized Fund or liquidating investments of a Unitized Fund. In the case of employer stock, Riggs is generally directed to place a purchase or sell order to restore the Unitized Fund to target liquidity on the business day that the excess liquidity or liquidity shortfall is identified. For unitized stable value funds, the Independent Plan Fiduciary must provide Riggs with specific instructions as to which

contracts Riggs should make deposits to or request withdrawals from. In the case of a managed fund, the Agreement generally requires Riggs to notify the Plan's investment manager of excess liquidity or a liquidity shortfall and the manager is responsible for buying or selling account assets to restore the actual liquidity of the managed account to the permitted range.

9. Whenever the actual liquidity of a Unitized Fund falls below the target liquidity by more than the liquidity variance, assets of the Unitized Fund must be liquidated to restore the target liquidity. If employer stock or other securities, which settle on a "T+3" basis, are sold, the sale proceeds usually would be received after three business days. Some transactions may take longer to settle, for example, withdrawals from GICs or alternative stable value contracts may require up to ten days. Nevertheless, as long as the cash portion of the Unitized Fund is sufficient to cover unit redemption requests submitted to Riggs on each business day, unit redemptions can be processed and settled on a daily basis in accordance with DCXchange® procedures.

From time to time, the actual liquidity of a Unitized Fund may not provide sufficient liquidity for the unit redemption requests on a business day. If requests for redemptions exceed the actual liquidity of the Unitized Fund, the Agreement generally requires Riggs to reject all requests for unit redemptions submitted to the Unitized Fund for that business day and immediately proceed to sell assets to obtain the liquidity necessary to satisfy the rejected requests. Once actual liquidity is increased to the amount required to satisfy the rejected unit redemption requests, Riggs notifies the recordkeeper to resubmit the redemption orders through DCXchange®. The redemptions are processed at the unit price established the business day on which the redemptions are resubmitted.¹²

Riggs's experience is that it is expensive and burdensome to Plans and participants to reject unit redemptions due to insufficient liquidity for several reasons. First, the reversal of a transaction is an exception from typical administrative procedures and, therefore, must be processed and reconciled manually rather than on automated recordkeeping systems; this increases recordkeeping expenses incurred by Plans and participants and

increases the opportunity for recordkeeping and reconciliation errors. Second, until the reversed transaction is posted to participant accounts, participant account records (which are available to participants on a daily basis) will be inaccurate.

Most important, the unit redemption requests are likely to be requested in connection with a participant's request for an exchange from a Unitized Fund to another Plan investment option. If the Unitized Fund redemption requests cannot be settled, the corresponding purchases of shares or units of the other Plan investment options also must be reversed. As noted, Riggs does not receive unit redemption orders from DCXchange® until T+1, by which time, a corresponding purchase order would also have been received by the mutual fund transfer agent. In many cases, it is not possible to stop a purchase of mutual fund shares. Instead, the shares must be resold at the then current market price. If there has been a one-day change in share price, the Plan may be liable for the difference.

One way to reduce the risk that any unit redemptions may be rejected is to increase the Unitized Fund's target liquidity. In this regard, the Agreement generally requires Riggs to notify the Independent Plan Fiduciary each time that unit redemptions are rejected so that the Independent Plan Fiduciary can evaluate whether target liquidity is appropriate and increase target liquidity as needed. However, increasing target liquidity affects the risk and return characteristics of the Unitized Fund, which is an undesirable result in the view of many Plan fiduciaries. In many cases, increases in the portion of a fund invested in cash and cash equivalents reduces the fund's investment return over the long-term as compared to the return that could be obtained by a fund with a smaller cash portion.

10. To avoid the administrative difficulties and expense that may result from rejecting unit redemptions and reversing corresponding purchases from a mutual fund or Unitized Fund, Riggs proposes to offer Plans Advances from Riggs if the cash portion of a Unitized Fund is insufficient to cover unit redemption requests on a particular business day. The proposed exemption requires the Plan to repay the principal amount of an Advance and accrued interest within ten business days after the initiation of the Advance.

As a service provider to Plans, Riggs is a party in interest to such Plans. Therefore, Riggs represents that Advances by Riggs to Plans in connection with its unitization services, and the receipt by Riggs of interest

accommodate Riggs's provision of unitization services, as described by the Agreement. In the case of a managed account, the investment manager may also be party to the Agreement and would agree to assist Riggs in providing unitization services by, e.g., providing daily valuation information and selling assets of the managed account when required for liquidity purposes.

¹² Generally, the Agreement would instruct Riggs to continue to accept unit purchase orders even if unit redemption orders have been rejected.

thereon, may raise issues under section 406(a) of the Act. To resolve this issue, Riggs is requesting an exemption from the prohibitions of section 406(a) of the Act that would permit Riggs to make Advances to Plans to facilitate the administration of a Unitized Fund, and to earn interest on the Advances.

11. The Advances would be available under procedures reviewed and approved by the Independent Plan Fiduciary and incorporated into the Agreement. The Agreement will describe the terms and procedures for the Advances, including standing instructions addressing the initiation, amount, repayment and formula or method for determining the interest rate payable with respect to each Advance. For example, the Agreement might specify a formula for determining the interest on Advances based on a published indexed interest rate established by an independent third party (e.g., the London Interbank Offered Rate or the U.S. Federal Reserve's Cost of Funds Index) and provide for daily accrual of interest until the Advance is repaid. Riggs will not have or exercise any discretion with respect to how the rate is determined under the formula or method. Interest on Advances will be an operating expense of a Unitized Fund and will be paid from the assets of the Unitized Fund.

12. The Agreement governing the Advances will limit the total amount that Riggs may advance to a Plan to 25% of the total market value of the Unitized Fund on the business day that any Advance is made. Such limits will be imposed because Advances are intended to facilitate the administration of a Unitized Fund in the ordinary course of business. If the liquidity needed to settle redemption requests on a particular business day exceeds a limit set on Advances, Plan fiduciaries would wish to review whether the Plan should continue "daily trading" in participant interests in the Unitized Fund. The fair market value of the assets of the Unitized Fund is determined by an objective method specified in the Agreement.

13. Advances will not be secured or collateralized. Riggs will generally be directed under the Agreement to automatically sell or redeem assets of a Unitized Fund on any business day that the actual liquidity of a Unitized Fund falls below the target liquidity by more than the liquidity variance. Further, Riggs generally will be directed by the Agreement to automatically collect the amount of an Advance and accrued interest from proceeds received upon the sale or redemption of those assets.

14. The Agreements are not expected to include provisions governing actions to be taken if an Advance is not repaid. Riggs does not anticipate that a situation would arise in which Riggs would not be repaid from the proceeds of the sale or redemption of assets for the unitized account in accordance with the Agreement.

15. Riggs will provide notice to the Independent Plan Fiduciary about each Advance at the time the Advance is made and after the Advance is repaid. Specifically, on the date that an Advance is initiated, Riggs will notify the Independent Plan Fiduciary of the principal amount of the Advance and the interest rate to be applied. Within ten days after an Advance is fully repaid, Riggs will provide the Independent Plan Fiduciary with a confirmation including the date of repayment, the amount of the Advance, the actual interest rate applied, and the total amount of interest paid by the Plan.

16. The Agreement may be terminated by the Independent Plan Fiduciary at any time, subject to the Plan's repayment of any outstanding Advances made as required by the terms of the Agreement. The Advances will be made on terms at least as favorable to the Plan as those the Plan could obtain in an arm's-length transaction with an unrelated party.

17. Neither Riggs nor an affiliate may have or exercise any discretionary authority or control with respect to the initiation of an Advance, the amount of an Advance, the interest rate payable on an Advance, or the repayment of an Advance. These circumstances are determined by the Independent Plan Fiduciary and are set forth in the Agreement. In addition, Riggs or an affiliate may not be (i) a trustee of the Plan (other than a nondiscretionary trustee who does not render investment advice with respect to the assets of the Unitized Fund), (ii) a Plan administrator, (iii) a fiduciary who is expressly authorized in writing to manage, acquire, or dispose of, on a discretionary basis, any assets of the Unitized Fund, or (iv) an employer any of whose employees are covered by the Plan.

18. In summary, the applicant represents that the subject transactions satisfy the criteria contained in section 408(a) of the Act for the following reasons:

(a) The requested exemption will be administratively feasible because the Advances will be monitored by the Independent Plan Fiduciary of each Plan. Thus, the level of oversight

required by the Department will be minimal.

(b) The requested exemption will be in the interests of Plan participants and beneficiaries because it will allow Plans to avoid rejections of the Unitized Fund redemption transactions because of insufficient liquidity. This will protect Plan participants and beneficiaries from the expense, inconvenience, possible recordkeeping errors, and potential Plan exposure for trading losses on corresponding purchase transactions for other Plan investments, which could result if Unitized Fund liquidity is insufficient to settle the redemption on a requested business day.

(c) The requested exemption will protect participants' and beneficiaries' rights because (i) the terms and conditions of Advances will be clearly disclosed in a written Agreement between Riggs and an Independent Plan Fiduciary, which will specifically describe the procedures under which Advances will be made and repaid, the amount of each Advance, and the formula or method for determining interest; (ii) the terms on which Advances would be made must be at least as favorable to the Plan as a similar third-party arm's-length transaction; (iii) the Agreement permitting the Advances can be terminated by the Independent Plan Fiduciary at any time, without penalty; (iv) Riggs will provide to the Independent Plan Fiduciary on the business day that an Advance is made, a notice describing the amount of the Advance and the interest rate payable, and within 10 business days of the repayment of each Advance, notice confirming the amount of the Advance, the date of repayment and the actual amount of interest paid by the Plan. These notices provide an Independent Plan Fiduciary the ability to monitor each Advance and ensure the Advances are appropriate and in the best interest of the Plan's participants and beneficiaries; and (v) Riggs will not have or exercise any discretionary authority or control over the assets of the Plan invested in a Unitized Fund and will act solely at the direction of an Independent Plan Fiduciary. In addition, Riggs may not have a relationship to a Plan receiving Advances that might provide Riggs any discretionary authority or control with respect to the investment of the assets of the Unitized Fund or Advances to be made to the Plan.

FOR FURTHER INFORMATION CONTACT:

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

The Savings Plan for Employees of Florida Progress Corporation (the Plan) Located in St. Petersburg, FL

[Application No. D-10953]

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). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) and section 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective November 30, 2000, to (1) the receipt, by the Plan, of contingent value obligations (the CVOs), as a result of the Plan's ownership of certain common stock (the Florida Progress Stock) in Florida Progress Corporation (Florida Progress), the Plan sponsor; (2) the continued holding of the CVOs by the Plan; and the (3) potential resale of the CVOs by the Plan to Progress Energy, Inc. (Progress Energy), a party in interest with respect to the Plan.

This proposed exemption is subject to the following conditions:

(a) The Plan received one CVO for each share of Florida Progress Stock on the effective date of the share exchange between Florida Progress and CP&L Energy, Inc. (CP&L Energy), the predecessor entity to Progress Energy.

(b) All Florida Progress shareholders, including Plan participants, received the CVOs in the same manner, so that the Plan participants and beneficiaries were not in a less advantageous position than other Florida Progress shareholders.

(c) The Plan's receipt of the CVOs, including other share exchange consideration consisting of cash and/or shares of CP&L Energy stock (the CP&L Energy Stock), resulted from shareholder approval and did not relate to any unilateral exercise of discretion by a Plan fiduciary.

(d) Salomon Smith Barney, Inc. (Salomon Smith Barney) advised Florida Progress that the consideration to be received by Florida Progress shareholders in exchange for their shares of Florida Progress Stock was "fair," from a financial point of view.

(e) The Plan did not pay any fees or commissions in connection with the acquisition of the CVOs, nor will it pay any fees or commissions in connection

with the holding or potential sale of the CVOs to Progress Energy.

(f) An independent fiduciary, United States Trust Company, N.A. (U.S. Trust)—

(1) Has overseen, and continues to oversee, the Plan's holding or disposition of any CVOs for which the Plan does not receive any investment direction and determines whether it is appropriate for the Plan to sell the CVOs; and

(2) Retains the services of an independent appraiser to calculate the price at which the CVOs are sold to Progress Energy in order to ensure that adequate consideration is received.

(g) Plan participants have the same rights and flexibility as unrelated parties and they may sell their CVOs at any time.

Effective Date: If granted, this proposed exemption will be effective as of November 30, 2000.

Summary of Facts and Representations

1. Florida Progress is a Florida corporation with its principal offices located in St. Petersburg, Florida. Florida Progress is a diversified electric utility holding company. Florida Power Corporation (Florida Power), a subsidiary of Florida Progress, is a regulated public utility that is engaged in the generation, purchase, transmission, distribution and sale of electricity. Florida Power provides electric services to approximately of 1.3 million customers in central and north Florida. In 1999, Florida Power accounted for 68 percent of the consolidated revenues of Florida Progress, 77 percent of that company's assets and 84 percent of its net income. As of March 31, 2000, Florida Progress had total consolidated assets of approximately \$6.5 billion and total consolidated common stock equity of approximately \$2.0 billion. In addition, as of September 30, 2000, Florida Progress had 98,616,919 shares of Florida Progress Stock issued and outstanding.

Besides Florida Power, Florida Progress has diversified, non-utility operations which are owned, directly or indirectly, through Progress Capital Holdings, Inc., a Florida corporation and another wholly owned subsidiary of Florida Progress. The diversified, non-utility operations segment includes Electric Fuels Corporation, an energy and transportation company, which owns and operates four synthetic fuel plants (the EARTHCO Plants).

2. The Plan, which is sponsored by Florida Progress, is a defined contribution plan. As of September 30, 2000, the Plan had 6,471 participants

and assets having an aggregate fair market value of the \$624.6 million. Of the Plan's total assets, \$152.8 million (24.5 percent) consisted of 2,887,714 shares of Florida Progress Stock which represented 2.9 percent of the shares of such stock that were issued and outstanding.

The trustee (the Trustee) of the Plan is The Vanguard Group, Inc., a mutual fund company, which provides trustee services to the Plan through its affiliate, the Vanguard Fiduciary Trust Company. A Plan investment committee, comprised of principals of Florida Progress, has the authority to manage and control the assets, operation and administration of the Plan.

The Plan provides participants with a variety of investment options, one of which is a fund invested solely in Florida Progress Stock (the Florida Progress Stock Fund). Each participant may direct the Trustee to invest or reinvest his or her account in each available fund on a daily basis.

3. Progress Energy, which was formerly known as "CP&L Energy, Inc." (or CP&L Energy as otherwise defined herein), is a North Carolina corporation and the holding company for Carolina Power & Light Company (CP&L). Progress Energy is engaged in the utility business and it operates primarily through various direct and indirect subsidiaries. At the time of the share exchange transaction described in this proposed exemption, Progress Energy, then known as CP&L Energy, operated through three subsidiaries, CP&L, North Carolina Natural Gas Corporation (NCNGA), and Interpath Communications, Inc. (ICI). Also, prior to the closing date of the transaction, none of these entities were related to Florida Progress or its affiliates.

CP&L, which currently has a 90 percent interest in two of the EARTHCO Plants, is a North Carolina public service corporation that provides electricity and energy-related services to more than 1.2 million customers in North Carolina and South Carolina. NCNGC, a wholly owned subsidiary of CP&L, provides natural gas, propane and related service to approximately 178,000 customers in south-central and eastern North Carolina. ICI, also a wholly owned subsidiary of CP&L, is primarily engaged in providing internet-based services.

As of March 31, 2000, CP&L Energy had total consolidated assets of approximately \$9.4 billion and total consolidated shareholders' equity of approximately \$3.4 billion.

4. On March 3, 2000, Florida Progress entered into an Amended and Restated Agreement and Plan of Exchange (the

Exchange Agreement) with CP&L Energy and CP&L. The Exchange Agreement provided for the acquisition, by CP&L Energy, of all of the outstanding shares of Florida Progress Stock pursuant to a statutory share exchange. The share exchange was structured so that Florida Progress and its affiliates would all become subsidiaries of Progress Energy. The terms of the Exchange Agreement were negotiated on an arm's length basis by the parties and approved by the shareholders of both Florida Progress and CP&L Energy.

5. In accordance with the terms of the Exchange Agreement, each Florida Progress shareholder could elect to receive (for each share of Florida Progress Stock he or she owned) (a) \$54.00 per share in cash; or (b) a specified number of shares of CP&L Energy Stock equal to an exchange ratio (the Exchange Ratio)¹³ designed to provide Florida Progress shareholders with CP&L Energy Stock having a fair market value of \$54.00, subject to certain adjustments; or (c) a combination of cash and CP&L Energy Stock.

In addition to the cash and/or stock consideration, each Florida Progress shareholder would be entitled to receive one CVO for each share of Florida Progress Stock surrendered. The CVOs are general, unsecured, contingent payment obligations of CP&L Energy and its successor, Progress Energy, that are subordinate in right of payment to all senior indebtedness of these entities. The CVOs were issued in accordance with the terms of the Contingent Value Obligation Agreement (the CVO Agreement) which was entered into between CP&L Energy and The Chase Manhattan Bank, N.A. (Chase), as CVO trustee on November 30, 2000. Each CVO represents the right of its holder to receive contingent payments based on the net after-tax cash flow to CP&L Energy and its affiliates (and later, to Progress Energy and its affiliates) that is generated by the EARTHCO Plants. As noted in the exemption application,

both Florida Progress and CP&L Energy believed that the EARTHCO Plants were qualifying synthetic fuel plants which would entitle their owners to federal income tax credits based on the barrel of oil equivalent of the synthetic fuel produced and sold by the plants.

6. Although it was not possible to calculate precisely the value of the CVOs at the time of the share exchange (a per unit value of \$0.545 was ultimately determined¹⁴) or to predict their potential marketability, in the aggregate, the holders of the CVOs would be entitled to receive payments equal to 50 percent of any net after-tax cash flow generated by the EARTHCO Plants in excess of \$80 million per year for each of the years 2001 through 2007. However, the total amount of the net after-tax cash flow for any year would depend upon the final determination of the income tax savings realized and income taxes incurred after completion of income tax audits of CP&L Energy and its affiliates (and later, Progress Energy and its affiliates), as owners of the EARTHCO Plants.

As of March 15 of each year from 2002 through 2008, Progress Energy will estimate the total net after-tax cash flow attributable to the EARTHCO Plants for the prior year and will deposit with Chase an amount equal to 50 percent of the excess of that amount over \$80 million. After Progress Energy files its tax returns for the prior year, both it and Chase will adjust the amount on deposit with Chase. Holders of CVOs will be entitled to receive accumulated earnings on the amounts held on deposit with Chase and quarterly reports describing the results of operations for the EARTHCO Plants for the prior quarter and updating material developments.

In the event Progress Energy fails to pay amounts when due on the CVOs, all unpaid amounts will bear interest at a rate equal to the three month London Interbank Offered Rate (as published in *The Wall Street Journal*) plus 300 basis points. Except for payments made as a result of the sale of all or a portion of the EARTHCO Plants, payments on the CVOs will not be made until Progress Energy's tax audit matters are resolved. Progress Energy anticipates payments on the CVOs will not begin before 2007.

The CVOs are generally freely tradable by their holders. Although there is no commitment to have the CVOs listed on a national stock exchange or to cause them to be included in any interdealer quotation

system, until issued on the effective date of the share exchange (i.e., November 30, 2000, as discussed in Representation 8), the CVOs were traded on a "when, as and if issued" basis on the OTC Bulletin Board.¹⁵ The CVOs are not subject to redemption, in whole or in part. Progress Energy may, however, acquire the CVOs on the open market or in privately-negotiated purchases.

7. An independent investment banking firm, i.e., Salomon Smith Barney, advised Florida Progress that the consideration, consisting of cash and/or CP&L Energy Stock, and CVOs, which was to be received by Florida Progress shareholders in exchange for their shares of Florida Progress Stock was "fair," from a financial point of view.¹⁶ In making its determinations, Salomon Smith Barney, among other things, (a) reviewed the Exchange Agreement and the CVO Agreement; (b) held discussions with senior officers, directors, representatives and advisers of Florida Progress, and CP&L concerning the respective businesses, operations and prospects of Florida Progress and CP&L; (c) examined financial forecasts and other information and data for both companies; (d) reviewed the financial terms of the share exchange as set forth in the Exchange Agreement and the CVO Agreement; (e) reviewed current and historical market prices and trading volumes of both Florida Progress Stock and CP&L Energy Stock; (f) reviewed the historical and projected earnings and other operating data of both entities; (g) reviewed the capitalization and financial condition of Florida Progress and CP&L; and (g) conducted other analyses and examinations and considered other financial, economic

¹⁵ According to Florida Progress, the phrase "when, as and if issued" and its abbreviated form "when issued," refers to a conditional transaction wherein a security is authorized for issuance but is not actually issued. Because the CVOs were issued in connection with the closing, Florida Progress represents that the term no longer applies.

Florida Progress states that the OTC Bulletin Board is a regulated quotation service that displays real-time quotes, last-sale prices and volume information in over-the-counter equity securities. An OTC equity security generally includes any equity that is not listed or traded on the NASDAQ or a national securities exchange. The OTC Bulletin Board, which was approved by the Securities and Exchange Commission on a permanent basis in April 1997, provides access to more than 6,500 securities, includes more than 400 participating market makers, electronically transmits real-time quote, price and volume information on domestic securities, foreign securities and American Depositary Receipts, and displays indications of interest.

¹⁶ Similarly, Merrill Lynch, Pierce, Fenner & Smith Incorporated advised CP&L Energy and CP&L that the consideration to be paid by CP&L Energy pursuant to the exchange was "fair," from a financial point of view to these entities.

¹³ According to the Joint Proxy Statement/Prospectus issued by CP&L Energy and Florida Progress, the Exchange Ratio was determined by dividing \$54.00 by the average of the closing sale price per share of CP&L Energy Stock as reported on the New York Stock Exchange Composite Tape on each 20 consecutive trading days ending with the fifth trading day before the closing of the share exchange. The Exchange Ratio was also subject to adjustment if the average closing price of CP&L Energy Stock exceeded \$45.39 or fell below \$37.13. However, the 20 day average closing price of CP&L Energy Stock was \$40.08. This amount was well within the high and low figures. Thus, the Exchange Ratio was determined by dividing \$54 by \$40.08, i.e., 1.3473. On November 30, 2000, the closing price for CP&L Energy Stock on the New York Stock Exchange was \$43 per share.

¹⁴ The CVO value of \$0.545 on November 30, 2000 represented the average of the reported high and low trading prices on the OTC Bulletin Board on that date.

and market criteria as it deemed appropriate in arriving at its opinion.

In rendering its opinion, Salomon Smith Barney assumed and relied, without independent verification, upon the accuracy and completeness of all information provided. Salomon Smith Barney also assumed, with the consent of Florida Progress, that the exchange with CP&L Energy and CP&L would be effected in accordance with its terms and that in the course of obtaining regulatory approvals from various federal and state governmental agencies for the share exchange, no limitations, restrictions or conditions would be imposed that would have an adverse material effect on the contracting parties or to the combined company. Further, Salomon Smith Barney assumed that the terms of the CVOs would not differ materially from the terms set forth in a draft CVO Agreement. Finally, Salomon Smith Barney did not make (and it was not provided with) an independent evaluation of the financial status of Florida Progress or CP&L or did it physically inspect the properties or assets owned by these entities.

Salomon Smith Barney's opinion and analyses were one of the many factors considered by Florida Progress' Board of Directors in its evaluation of the merits of the share exchange. The Board of Directors ultimately voted that the stock exchange was fair and in the best interests of the shareholders, and recommended that the shareholders approve the exchange transaction.

8. Thus, as a result of approval by the shareholders of the share exchange, on November 30, 2000, each holder of Florida Progress Stock received cash and/or CP&L Energy Stock consideration, plus one CVO for each share of Florida Progress Stock tendered. A total of 87,191,315 shares of Florida Progress Stock was actually tendered by Florida Progress shareholders. Those shareholders who elected "all cash" consideration received cash while those shareholders who elected stock consideration, received an approximately 94.7 percent distribution of CP&L Energy Stock and the remainder in cash. Those shareholders who did not submit an election received "all cash" consideration.¹⁷ However, as noted above, all shareholders received CVOs in addition to cash and/or CP&L Energy Stock.

¹⁷ For those shareholders not tendering their Florida Progress Stock at the time of the share exchange, the amount of cash and CVOs attributable to such shareholders was placed in an escrow account. This amount is to be paid out upon the actual tender of shares of Florida Progress Stock.

Plan participants were given the same consideration options as the other shareholders of Florida Progress. At the time of the share exchange, the Plan received \$84,970,701.43 in cash, 1,247,340 shares of CP&L Energy Stock (valued at approximately \$67.3 million, and 2,499,339 CVOs (valued at approximately \$1.3 million). Of the total consideration received, it is estimated that approximately 40 percent of the Plan participants elected to receive CP&L Energy Stock and approximately 60 percent of the participants elected (either by an actual election or by a failure to return the election form in a timely manner) to receive cash. It is further represented that the Plan's receipt of the share exchange consideration resulted from shareholder approval of the Exchange Agreement and it did not result from a unilateral exercise of discretion by any Plan fiduciary.

9. However, prior to the share exchange, each individual participant who had invested in Florida Progress Stock through the Plan received a notice, dated September 28, 2000. The special notice explained that on the effective date of the share exchange, any Florida Progress Stock held on behalf of the participant in the Plan would be exchanged, in accordance with the election of the participant¹⁸ for the right to receive one CVO and either (a) cash, (b) shares of CP&L Energy Stock, or (c) a combination of cash and CP&L Energy Stock. The notice to participants further explained that for each share of Florida Progress Stock held on the effective date of the exchange, the participant would receive one CVO.

After receipt of the September 28, 2000 notice and prior to the effective date of the exchange, Plan participants had the opportunity, to transfer funds held on their behalf in the Florida Progress Stock Fund to other investment funds under the Plan if the participant did not wish to receive the CVOs and the CP&L Energy Stock. Because no other investment funds hold shares of Florida Progress Stock, no CVOs could be received by such funds.

10. Accordingly, an administrative exemption is requested on behalf of the

¹⁸ In accordance with the terms of the Exchange Agreement, all Florida Progress shareholder elections regarding whether the shareholder wished to receive cash, CP&L Energy Stock or a combination thereof in exchange for Florida Progress Stock was subject to allocation and proration to achieve an overall mix of 65 percent cash and 35 percent CP&L Energy Stock. Such proration would not have any impact on the receipt of CVOs by Florida Progress shareholders on the date of the exchange.

Plan¹⁹ and the Investment Committee for the Plan (together, the Applicants) with respect to (a) the receipt by the Plan of the CVOs as a result of its ownership of Florida Progress Stock; (b) the continued holding of the CVOs by the Plan; and

(c) the potential resale of the CVOs to Progress Energy. The Applicants are not requesting exemptive relief for the receipt of the CP&L Energy Stock by the Plan because, at the time of the share exchange, CP&L Energy and its affiliates were not parties in interest with respect to the Plan.²⁰ Therefore, exemptive relief is requested effective November 30, 2000.

The Applicants also represent that it is unclear whether the statutory exemption contained in section 408(e) of the Act, which permits plans to acquire and sell qualifying employer securities,²¹ would apply to the Plan's receipt of the CVOs.²² Although a CVO would likely qualify as a "security," as such term is defined in section 2(1) of the Securities Exchange Act of 1933 (the 1933 Act) and section 3(20) of the Act, the Applicants represent that it is not clear whether such securities would fall

¹⁹ For purposes of this exemption, the term "Plan" is meant to include The Savings Plan for Employees of Florida Progress Corporation and any successors to the current Plan that may be established by Progress Energy or an entity within Progress Energy's controlled group, into which the Plan is merged or which receives a transfer of accounts (including CVOs) from the Plan. Progress Energy and Florida Progress are contemplating the transfer of some accounts from the plan to another qualified plan maintained by Progress Energy. To simplify administrative and employee communication issues, both Progress Energy and Florida Progress would like the ability to transfer CVOs to the new plan.

²⁰ The Applicants note, however, that after the share exchange, CP&L Energy and its successor, Progress Energy, would be considered parties in interest with respect to the Plan and that the CP&L Energy Stock received by the Plan, which is currently referred to as "Progress Energy, Inc. common stock," would constitute a "qualifying employer security" within the meaning of section 407(d)(5) of the Act, as stock.

²¹ In relevant part, section 408(e) of the Act provides that sections 406 and 407 of the Act shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5) if such acquisition is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 407(e)(1)), (2) if no commission is charged with respect thereto, and (3) if—(A) the plan is an eligible individual account plan (as defined in section 407(d)(3)), or (B) in the case of an acquisition by a plan which is not an eligible individual account plan, the acquisition is not prohibited under section 407(a) of the Act.

²² Section 3(20) of the Act states that the term "security" has the same meaning as such term has under section 2(1) of the (the 1933 Act) [15 U.S.C. 77b(1)]. The term "security" is defined in the Securities Act as "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, * * * or, in general, any interest or instrument commonly known as a 'security'."

within the definition of "qualifying employer securities," as defined in section 407(d)(5) of the Act.²³

According to the Applicants, the CVOs do not constitute "shares of stock, or a bond, debenture, note, certificate or other evidence of indebtedness" but represent a right to receive certain contingent payments based upon the net after-tax cash flow to CP&L Energy (and later to Progress Energy) generated by the EARTHCO Plants. Therefore, the Applicants do not believe the CVOs can be characterized as a "qualifying employer security." Thus, the Applicants believe that the acquisition and holding of the CVOs by the Plan would violate sections 406 and 407 of the Act.

11. Following the exchange and receipt of the CVOs by the Plan, participants have been given the opportunity to direct the Trustee to sell the CVOs held on their behalf, at any time. In this regard, an independent fiduciary, U.S. Trust, has been appointed by the Trustees to oversee the Plan's holding or sale of any CVOs for which the Plan does not receive any investment direction from the participants. The CVOs are being held by the Trustee in a separate unitized fund (the CVO Fund) for which U.S. Trust will determine liquidity needs based on information provided by Florida Progress and to effect such liquidity when it reasonably deems it prudent.

The CVO Fund will be valued and traded on a periodic basis by U.S. Trust. If a CVO is to be sold at a time when there is no liquid market, as determined by U.S. Trust, Progress Energy has agreed to purchase CVOs to be sold by the Plan. Under such circumstances, U.S. Trust will retain an independent appraiser to determine the fair market value of the CVOs in order to ensure

that the Plan receives adequate consideration for any CVOs sold. It is possible that, in the future, Progress Energy may purchase directly CVOs being sold by the Plan, whether at the direction of a Plan participant or U.S. Trust. If a participant receives a cash distribution in the future related to the holding of the CVO, the cash received will be invested in a separate money market fund. The Plan will not be required to pay any fees or commissions in connection with any sales of the CVOs to Progress Energy.

12. Because the Plan received the CVOs automatically as a result of the share exchange between Florida Progress and CP&L Energy, it is represented that the Plan could have avoided acquiring or holding the CVOs if it sold all of its shares of Florida Progress Stock prior to the share exchange, in the absence of participant direction. Alternatively, the Plan could have sold its right to receive the CVOs prior to the effective date of the share exchange. However, Salomon Smith Barney advised Florida Progress, in an opinion letter dated July 5, 2000 to the company's Board of Directors, that due to the low trading volume in the "when, as and if issued" market, a mass sale of the CVOs by the Plan would likely depress the value of the CVOs, thereby adversely affecting the interests of the Plan participants.

13. As stated above, U.S. Trust is serving on behalf of the Plan as the independent fiduciary with respect to the holding or sale of any CVOs for which the Plan does not receive participant direction. U.S. Trust is the principal subsidiary of U.S. Trust Corporation, which was founded in 1853 and is subject to regulation as a trust company by the State of New York. U.S. Trust is a member of the Federal Reserve System and the Federal Deposit Insurance Corporation. As of December 31, 1999, U.S. Trust had approximately \$5 billion in assets and over \$75 billion in assets under management. Of those assets under management, a significant portion consisted of the assets of ERISA-covered Plans. U.S. Trust has served as an independent fiduciary for a number of Plans that have acquired or held employer securities and it has managed over \$20 billion in employer securities held by such Plans. In managing such investments, U.S. Trust has exercised discretionary authority over many transactions involving the acquisition, retention and disposition of employer securities. More specifically, U.S. Trust has served as an independent fiduciary, performing similar duties to those contemplated herein on at least ten previous occasions.

U.S. Trust represents that it is independent of Florida Progress and its affiliates. In this regard, U.S. Trust asserts that it has no business, ownership or control relationship, nor is it otherwise affiliated with Florida Progress. Further, U.S. Trust represents that it derives less than one percent of its annual income from Florida Progress.

U.S. Trust states that it has agreed to act, and is currently acting as independent fiduciary for the Plan with respect to the CVOs. U.S. Trust represents that it is monitoring the value of the CVOs and will dispose of them (unless they are disposed of sooner pursuant to directions of the participants) in the event a determination is made that it is in the interest of Plan participants to do so in accordance with the prudence standards of section 404 of the Act.

In the event U.S. Trust determines to sell the remaining CVOs in the Plan on behalf of the participants, or if at any time it determines there is a lack of liquidity in the market that would adversely affect the interests of Plan participants, U.S. Trust has arranged for Progress Energy to purchase the CVOs from the Plan. In connection with this type of sales transaction, U.S. Trust explains that it will engage the services of an independent appraiser to determine the fair market value or the range of fair market values for the CVOs. As the independent fiduciary, U.S. Trust states that it will make the final decision on an sale of the CVOs to Progress Energy, based upon the independent appraisal.

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

(a) The Exchange Agreement provided for the acquisition by CP&L Energy of the outstanding shares of Florida Progress in accordance with the share exchange. Consequently, the CVOs were issued pursuant to the terms of the Exchange Agreement and the CVO Agreement.

(b) The Exchange Agreement was negotiated on an arm's length basis by and among Florida Progress, CP&L Energy and CP&L, and approved by the shareholders of these entities.

(c) Salomon Smith Barney, an independent investment adviser, opined to Florida Progress that the consideration to be received by Florida Progress shareholders in exchange for their shares of Florida Progress Stock was "fair," from a financial point of view.

(d) Under the terms of the Plan, participants had the authority to transfer

²³ As noted in part previously, a "qualifying employer security" means an employer security which is either "stock," a "marketable obligation," or an "interest in a publicly-traded partnership," under section 407(d)(5) of the Act. Section 407(e) of the Act defines the term "marketable obligation" to mean a bond, debenture, note, certificate, or other evidence of indebtedness, if such obligation is acquired: (A) On the market, either (i) at the prevailing price of a national securities exchange, or (ii) if the obligation is not traded on a national securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer; (B) from an underwriter, at a price (i) not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or (C) directly from the issuer, at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issue by persons independent of the issuer.

their investments out of the Florida Progress Stock Fund prior to their receipt of the CVOs.

(e) For purposes of the share exchange, and with respect to any future dispositions of the CVOs, the Plan was treated and will be treated in the same manner as any other shareholder of Florida Progress Stock.

(f) Progress Energy will purchase the CVOs being sold by the Plan either at the direction of a Plan participant or by U.S. Trust, the independent fiduciary, if no participant direction is given.

(g) If U.S. Trust determines that a sale of the CVOs is appropriate, it will retain an independent appraiser to calculate the price at which the CVOs should be sold to Progress Energy.

(h) Plan participants will continue to have authority to sell any CVOs that are held in their participant accounts in the CVO Fund.

Notice to Interested Persons

Florida Progress will provide notice of the proposed exemption to all participants and beneficiaries in the Plan by either personal delivery or first class mail within 20 days of the date of publication of the notice of proposed exemption in the **Federal Register**. Florida Progress will provide notice to active participants in the Plan, who hold CVOs in their Plan accounts, by posting copies of the proposed exemption on bulletin boards normally used for employee notices of this nature. For terminated or retired employees, holding CVOs in their Plan accounts, Florida Progress will give notice to such interested persons by first class mail. The notice will include a copy of the proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which will inform interested persons of their right to comment on and/or to request a hearing with respect to the proposed exemption. Comments regarding the proposed exemption are due within 50 days of the date of publication of the notice of pendency in the **Federal Register**.

For Further Information Contact: Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Columbia Savings Plan (the Plan) Located in Wilmington, DE

[Application No. D-10977]

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). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) and section 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective November 1, 2000, to (1) the receipt, by the Plan, of Stock Appreciation Income Linked Securities (SAILS), in exchange for common stock in Columbia Energy Group (Columbia Energy), the Plan sponsor; (2) the extension of credit by the Plan to NiSource, Inc. (NiSource), a party in interest, in connection with the receipt of the zero coupon bond (the Debenture) portion of the SAILS; (3) the continued holding of the SAILS by the Plan; and (4) the potential sale of the SAILS by the Plan to Nisource.

This proposed exemption is subject to the following conditions:

(a) The Plan automatically received the SAILS in exchange for its shares of Columbia Energy common stock, in accordance with the terms of an agreement and plan of merger (the Merger Agreement), and it paid no fees or commissions in connection with its receipt of the SAILS and other merger consideration.

(b) All Columbia Energy shareholders, including Plan participants, received SAILS in the same manner, so that the Plan participants and beneficiaries were not in a less advantageous position than other Columbia Energy shareholders.

(c) The Plan's receipt of the SAILS resulted from shareholder approval and did not relate to any unilateral exercise of discretion by a Plan fiduciary.

(d) Morgan Stanley (Morgan Stanley) and Salomon Smith Barney, Inc. (Salomon Smith Barney) advised Columbia Energy that the consideration consisting of NiSource common stock, SAILS and cash for Columbia Energy common stock was "fair," from a financial point of view.

(e) Duff & Phelps, Inc. (Duff & Phelps) provided Fidelity Investments, Inc., the Plan trustee (the Trustee), and the Plan's Savings Plan Committee with independent financial advice concerning the valuation of the SAILS.

(f) The Plan did not pay any fees or commissions in connection with the acquisition and holding of the SAILS, nor will it pay any fees or commissions if any SAILS are sold to NiSource.

(g) An independent fiduciary, United States Trust Company, N.A. (U.S. Trust)—

(1) Has overseen, and continues to oversee, the Plan's holding and disposition of the SAILS;

(2) Determines whether it is appropriate for the Plan to dispose of the SAILS (either on the open market or through a direct sale to NiSource) and instructs the Trustee regarding such disposition;

(3) Determines, in the event of a sale of any SAILS to NiSource, the fair market value of such SAILS either (i) based on their closing price on the New York Stock Exchange (the NYSE) on the date of the transaction, or (ii) retains an independent appraiser if the SAILS are not carried on the NYSE or, in the event it concludes that the closing price on the NYSE is not representative of the fair market value of the SAILS as of the transaction date; and

(4) Anticipates disposing of all SAILS held by the Plan by the end of calendar year 2001.

(h) The Plan does not pay any fees or commissions in the event any SAILS are sold to NiSource.

Effective Date: If granted, this proposed exemption will be effective as of November 1, 2000.

Summary of Facts and Representations

1. Columbia Energy is a public utility holding company whose operating subsidiaries are engaged in natural gas transmission, distribution, exploration and production of natural gas and oil, other energy services, and the telecommunications business. Columbia Energy owns approximately 16,250 miles of interstate pipelines extending from offshore in the Gulf of Mexico to Lake Erie, New York and the Eastern seaboard. Columbia Energy's distribution subsidiaries provide natural gas to commercial and residential customers in Ohio, Pennsylvania, Virginia, Kentucky and Maryland.

Columbia Energy also explores for, develops, gathers and produces natural gas and oil in Appalachia and Canada. Further, Columbia Energy sells propane products at wholesale and retail prices to customers in 31 states and the District of Columbia. The company owns and operates petroleum assets in five states and owns an unregulated electric generation plant whose primary focus is the development, ownership and operation of clean, natural gas-fueled power projects.

Columbia Energy's principal executive offices are currently located in Wilmington, Delaware. As of October 31, 2000, Columbia Energy had 79,512,137 shares of common stock that were issued and outstanding. Such stock was publicly-held and listed on the NYSE.

2. NiSource is an energy and public utility holding company maintaining its principal executive offices in Merrillville, Indiana. NiSource's operating subsidiaries engage in most phases of the natural gas business, the electric utility business and other energy-related and utility-related services, primarily in northern Indiana and New England. NiSource also owns businesses that install, repair and maintain underground pipelines and invests in real estate and venture capital projects. Further, NiSource develops unregulated power projects and markets products and services, such as propane, energy efficiency design and energy advisory services, in various states.

3. The Plan is a defined contribution plan with 9,051 participants as of October 31, 2000. Prior to November 1, 2000 (the Transaction Date), the Plan held shares of common stock of Columbia Energy. As of October 31, 2000, the aggregate fair market value of the total assets of the Plan was \$686,077,606, of which \$262,236,210 was invested in a unitized company stock fund holding 3,626,555 shares of Columbia Energy common stock, or approximately 5 percent of the then outstanding shares of Columbia Energy.

Fidelity Investments serves as the independent Trustee of the Plan. In addition, a five member Savings Plan Committee, presently consisting of officers and employees of NiSource, serves as the Plan administrator and has investment discretion over the Plan's assets.

4. On February 27, 2000, Columbia Energy entered into an agreement and plan of merger (which was subsequently amended and restated as of March 31, 2000 and is referred to herein as the "Merger Agreement") with NiSource and certain of its subsidiaries. The Merger Agreement provided for the acquisition by NiSource of Columbia Energy.²⁴ Under the terms of the Merger Agreement, Columbia Energy shareholders had the right to elect to receive for their Columbia Energy shares either—

(a) *Cash and SAILS*²⁵ Consideration consisting of \$70 per share for each share of Columbia Energy common stock held by the shareholder and SAILS, having a face value of \$2.60 per unit; or

(b) *Stock Consideration* consisting of a specified number of NiSource common shares equal to \$74 divided by the average closing price of NiSource common shares for the 30 trading days ending two trading days before the completion of the merger, but never more than 4.44848 shares. If Columbia Energy shareholders made stock elections for more than an aggregate of 30 percent of the outstanding Columbia Energy shares, only a portion of the Columbia Energy common stock covered by the stock elections could be converted into the stock consideration. Thus, to the extent Columbia Energy shareholder elections exceeded the 30 percent maximum, the elections would be subject to proration and the Columbia Energy shareholders would be entitled to receive cash and SAILS, in addition to shares of NiSource common stock.

Regardless of the form of consideration elected by Columbia Energy shareholders, a penalty would apply to NiSource if the merger was not completed by February 27, 2001. Under such circumstances, the merger consideration would also include additional cash equal to interest at 7 percent per annum on the specified amount of \$72.29²⁶ for the period beginning on February 27, 2001 and ending on the day before the completion of the merger, minus all cash dividends paid on Columbia Energy common stock having a record date after February 27, 2001.

5. Each SAILS is a unit consisting of two components—(a) a zero coupon debt security (i.e., the Debenture), and (b) a forward equity (or share purchase) contract. The entire principal amount of the Debenture portion of the SAILS will mature and become due and payable, together with accrued and unpaid interest, on November 1, 2006, the sixth anniversary of the Transaction Date. The share purchase contract represents the SAILS holder's obligation to purchase, for \$2.60 in cash, a number of newly-issued shares of NiSource common stock (for each SAILS unit held) on November 1, 2004, the fourth anniversary of the Transaction Date

(unless the purchase contract expires prior to that date). The Debenture is pledged to secure that obligation. Such purchases will occur at the following settlement rates:

- If the Applicable Market Value²⁷ is equal to or greater than \$23.10, then each purchase contract will be settled for 0.1126 shares of NiSource common stock.
- If the Applicable Market Value is less than \$23.10 but greater than \$16.50, then each purchase contract will be settled for a number of NiSource common stock determined by dividing the stated amount of \$2.60 by the Applicable Market Value (carried to four decimal places).
- If the Applicable Market Value is less than \$16.50, then each purchase contract will be settled for 0.1576 shares of NiSource common stock.

Until a holder of SAILS acquires shares of NiSource common stock upon settlement of the SAILS units, the holder will have no rights with respect to the NiSource shares. SAILS holders are also not permitted to settle the share purchase contract prior to November 1, 2004, except where there is a change in control of NiSource. As noted above, the number of shares to be received at settlement is dependent upon the Applicable Market Value and is subject to antidilution adjustments.

Unless a SAILS holder chooses to make a cash payment of \$2.60 to settle the purchase contract portion of the SAILS, the Debenture that is pledged as collateral will be remarketed, i.e., sold to the public on the third business day before November 1, 2004, and the proceeds will be used to pay the amount the holder otherwise would owe under the purchase contract. If the holder elects to pay cash to settle the purchase contract, the Debenture will not be remarketed and the holder will continue to own it after November 1, 2004, free of any pledge related to the SAILS.

If the effort to remarket the SAILS is successful, the proceeds received from the sale will be delivered to NiSource as payment under the purchase contract. If the remarketing agent cannot remarket the Debentures, NiSource will exercise its rights as a secured party and take possession of the Debentures. Under either circumstance, the holder's obligation to purchase will be fully satisfied since the holder will not be required to expend additional money in order to receive shares of NiSource common stock.

²⁴ Specifically, the merger involved the creation of a new holding company (New NiSource) and also included two separate, but concurrent mergers. One wholly owned subsidiary of New NiSource merged into NiSource and another wholly owned subsidiary merged into Columbia Energy. NiSource and Columbia Energy were the surviving corporations in both mergers and became wholly owned by New NiSource. New NiSource then changed its name to "NiSource, Inc." and it serves as the holding company for Columbia Energy and its subsidiaries as well as the subsidiaries of NiSource.

²⁵ SAILS and "Stock Appreciation Income Linked Securities" are service marks of Credit Suisse First Boston Corporation.

²⁶ It is represented that \$72.29 was a negotiated amount based upon the advice of investment bankers. Because the merger was consummated on November 1, 2000, the penalty was never imposed.

²⁷ The "Applicable Market Value" refers to the average of the closing prices of NiSource common stock on each of the 30 consecutive trading days ending on the third trading day preceding November 1, 2004, the purchase contract settlement date.

The SAILS were initially traded on the over-the-counter market. However, on November 2, 2000, they commenced being traded on the NYSE under the ticker symbol "NSE," on a "when-issued" basis.

6. The terms of the Merger Agreement were negotiated on an arm's length basis between Columbia Energy and NiSource. Two independent investment banking firms, Morgan Stanley and Salomon Smith Barney, rendered opinions to Columbia Energy to the effect that the consideration, consisting of NiSource shares, SAILS and cash, for the Columbia Energy shares was "fair," from a financial point of view.²⁸ In making separate determinations, Salomon Smith Barney and Morgan Stanley, among other things, (a) reviewed publicly-available financial statements and other information about Columbia Energy and NiSource; (b) met with Columbia Energy and NiSource executive staff and others to discuss matters relating to the past and current operations of Columbia Energy and NiSource, the financial conditions of these entities, and the prospects of these companies; (c) reviewed information concerning the trading activity for NiSource common stock; (d) reviewed the Merger Agreement and related documents; and (e) performed other analyses and considered such other factors as they deemed appropriate.

In rendering their opinions, both Salomon Smith Barney and Morgan Stanley assumed and relied, without independent verification, upon the accuracy of the information provided. In this regard, the advisers did not make independent valuations or appraisals of the assets or liabilities of Columbia Energy, or for that matter, of NiSource.

Both Morgan Stanley and Salomon Smith Barney noted that their opinions did not address the prices at which NiSource common stock or the SAILS would trade following the merger. Moreover, neither firm expressed an opinion or recommendation as to how shareholders of Columbia Energy should vote at the shareholder's meeting held in connection with the merger or the transactions contemplated thereby. Based on the foregoing, Salomon Smith Barney and Morgan Stanley concluded that the merger consideration was "fair," from a financial point of view, to the holders of Columbia Energy common stock.

In addition to the opinions offered to Columbia Energy by Morgan Stanley

and Salomon Smith Barney, Duff & Phelps was retained jointly by the Trustee and the Savings Plan Committee to provide independent financial advice concerning the valuation of the SAILS. In part, Duff & Phelps opined that both "* * * the cash election and the stock election [would] provide no less than adequate consideration as defined under section 3(18) of ERISA."

7. The Merger Agreement was approved by the shareholders of both companies in early June 2000. On October 30, 2000, the Columbia Energy shareholder election period expired and the right to make an election was passed through to Plan participants, who were entitled to provide instruction to the Trustee concerning which form of merger consideration each participant wished to receive. On November 1, 2000, the Transaction Date, the contemplated merger was consummated following regulatory approval.

Because of the issue concerning whether each SAILS unit constituted a qualifying employer security which the Plan could hold, the Plan's independent Trustee determined that, in accordance with applicable law, it was required to override all Plan participant elections to receive cash and SAILS and to elect, in the alternative, to receive NiSource common stock in exchange for all Columbia Energy common stock held by the Plan.²⁹ The Trustee reportedly made this decision in an effort to avoid receiving SAILS on behalf of the Plan.

8. Columbia Energy shareholders holding approximately 61.3 million shares of Columbia Energy common stock, which represented approximately 77.3 percent of the outstanding Columbia Energy shares, elected to receive NiSource stock. Because this percentage (i.e., 77.3 percent) exceeded the 30 percent limitation contained in the Merger Agreement, the stock elections were prorated and only 38.944476 percent of the Columbia Energy common stock for which valid stock elections were made could ultimately be exchanged for NiSource common stock, at an exchange ratio of 3.04414 NiSource shares for each Columbia Energy share exchanged. The balance of the Columbia Energy common stock covered by the stock elections, as well as all Columbia Energy common stock for which no election was made, were exchanged, on a per share basis, for \$70 in cash and \$2.60, representing the face amount of each SAILS unit.

Notwithstanding the Plan's election to receive shares of NiSource common stock, because the total amount of shareholder elections to receive NiSource common stock exceeded 30 percent of the outstanding shares of Columbia Energy common stock, on November 9, 2000, the Plan received, as a result of the proration, 2,214,213 SAILS units (valued at \$5,756,953.80 or \$2.60 per unit face value)³⁰, \$154,994,851 in cash, and 4,299,366 shares of NiSource common stock (valued at \$24 per share or \$102,183,784). The Plan was treated in the same manner as any other shareholder of Columbia Energy common stock who had made a valid stock election. Moreover, the Plan did not pay any fees or commissions in connection with its receipt of the merger consideration.

Currently, the SAILS are being held on behalf of the Plan in a separate fund which is not subject to participant-directed investment.

9. Thus, based upon the foregoing description of the Plan's involvement in the merger, the Trustee and the Savings Plan Committee (together, the Applicants) request an administrative exemption from the Department with respect to (a) the receipt, by the Plan, of the SAILS as a result of the Plan's ownership of Columbia Energy common stock; (b) the extension of credit by the Plan to NiSource in connection with the Plan's receipt of the Debenture portion of the SAILS; (c) the continued holding of the SAILS by the Plan; and (d) the Plan's potential resale of the SAILS to NiSource. The Applicants are not requesting exemptive relief with respect to the Plan's acquisition and holding of NiSource common stock. The Applicants note that NiSource and its affiliates became parties in interest with respect to the Plan on the Transaction Date. Therefore, they state that the NiSource common stock would constitute a "qualifying employer security" within the meaning of section 407(d)(5) of the Act, as "stock," a "marketable obligation," or an "interest in a publicly-traded partnership." The Applicants further explain that the acquisition and holding of the NiSource common stock by the Plan would be statutorily exempt under section 408(e) of the Act.³¹

³⁰ The SAILS represented approximately .8 of one percent or .008 of the Plan's total assets.

³¹ However, the Department expresses no opinion herein on whether such stock is a qualifying employer security or the acquisition and holding of NiSource common stock by the Plan satisfies the terms and conditions of section 408(e) of the Act.

Continued

²⁸ Similarly, Credit Suisse First Boston Corporation advised NiSource that the merger consideration was fair to NiSource, from a financial point of view.

²⁹ The Department expresses no opinion in this proposed exemption on whether the Trustee's decision to receive NiSource common stock on behalf of the Plan was consistent with the provisions of Part 4 of Title I of the Act.

However, the Applicants represent that it is unclear whether the statutory exemption contained in section 408(e) of the Act would apply to the Plan's receipt and holding of the SAILS. Although each SAILS would likely qualify as a "security," as such term is defined in section 2(1) of the Securities Exchange Act of 1933 (the 1933 Act) and section 3(20) of the Act, the Applicants explain that it is unclear whether the SAILS would fall within the definition of "qualifying employer securities," as defined in section 407(d)(5) of the Act.³²

10. According to the Applicants, although the Debenture portion of the SAILS appears to meet the definition of a "marketable obligation" contained in section 407(d)(5) of the Act, that portion of the SAILS consisting of a forward equity or share purchase contract does not constitute either "stock" or a "marketable obligation" under section 407(d)(5) of the Act. Therefore, the Applicants state that the SAILS do not appear to meet the definition of a qualifying employer security and they conclude that the statutory exemption contained under section 408(e) of the Act would not be applicable to the Plan's receipt, holding and sale of both the equity and debt portions of the SAILS, including any extension of credit relating to the Debenture portion of the SAILS.

In relevant part, section 408(e) of the Act provides that sections 406 and 407 of the Act shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5)(1) if such acquisition is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 407(e)(1)), (2) if no commission is charged with respect thereto, and (3) if—(A) the plan is an eligible individual account plan (as defined in section 407(d)(3), or (B) in the case of an acquisition by a plan which is not an eligible individual account plan, the acquisition is not prohibited under section 407(a) of the Act.

³² As noted previously, a "qualifying employer security" means an employer security which is either "stock," a "marketable obligation," or an "interest in a publicly-traded partnership," under section 407(d)(5) of the Act. Section 407(e) of the Act defines the term "marketable obligation" to mean a bond, debenture, note, certificate, or other evidence of indebtedness, if such obligation is acquired: (A) On the market, either (i) at the prevailing price of a national securities exchange, or (ii) if the obligation is not traded on a national securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer; (B) from an underwriter, at a price (i) not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and (ii) at which a substantial portion of the same issue is acquired by persons independent of the issuer; or (C) directly from the issuer, at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issue by persons independent of the issuer.

If granted, the proposed exemption will be effective as of November 1, 2000.

11. As noted above, U.S. Trust has been retained to serve on behalf of the Plan as the independent fiduciary with respect to (a) reviewing and monitoring the subject transactions; (b) determining, on behalf of the Plan, the appropriate retention and disposition strategy for the SAILS, by taking into consideration the liquidity requirements of the Plan and any restrictions imposed by the Department pursuant to the request for the prohibited transaction exemption; and (c) based on the outcome of the exemption request, instructing the Trustee as to the disposition of the SAILS. U.S. Trust is the principal subsidiary of U.S. Trust Corporation, which was founded in 1853 and is subject to regulation as a trust company by the State of New York. U.S. Trust is a member of the Federal Reserve System, the Federal Deposit Insurance Corporation, and an entity having approximately \$5 billion in assets as of December 31, 1999. In addition, U.S. Trust Corporation is a wholly owned subsidiary of the Charles Schwab Corporation and currently has over \$73 billion in assets under management, a significant percentage of which consists of ERISA retirement plan assets. U.S. Trust has served as an independent fiduciary for numerous employee benefit plans that acquire or hold employer securities and has managed, at various times, over \$18 billion in employer securities held by various plans. In managing these investments, U.S. Trust has exercised discretionary authority over transactions involving the acquisition, retention and disposition of employer securities.

U.S. Trust represents that it is independent of Columbia Energy and its affiliates. In this regard, U.S. Trust asserts that it has no business, ownership or control relationship, nor is it otherwise affiliated with Columbia Energy. U.S. Trust represents that its only relationship with Columbia Energy relates to its engagement as the independent fiduciary for the Plan. U.S. Trust further asserts that it derives less than one percent of its annual income from Columbia Energy.

Subject to the terms of an engagement letter dated November 7, 2000 by and between it and Columbia Energy, U.S. Trust states that it has agreed to act, and is currently acting as independent fiduciary for the Plan with respect to the holding and the disposition of the SAILS. In its capacity as independent fiduciary, U.S. Trust represents that it has monitored the daily trading value of the SAILS on the NYSE, has been directing the Trustee to sell SAILS on a

daily basis since the time of its engagement, and has instructed the Trustee to dispose of all remaining SAILS held by the Plan by the end of calendar year 2001. Generally, such sales will take place on the open market. However, SAILS will be sold to NiSource only if U.S. Trust determines that there is no viable market and that it would be in the best interest of the Plan for a sale to be effected to NiSource.

For purposes of valuation, the fair market value of the SAILS is based upon their market price as listed on the NYSE at the time of the transaction. Should U.S. Trust determine that a disposition of the remaining SAILS to NiSource would be in the best interest of the Plan, it will determine the fair market value of the SAILS based upon their closing price on the NYSE as of the transaction date. However, if U.S. Trust concludes that the closing price is not representative of the fair market value of the SAILS, the sales price will be determined by a qualified, independent appraiser.³³ (U.S. Trust will also secure a valuation from an independent appraiser if the SAILS are delisted on the NYSE.) A sale to NiSource will be for cash and will not involve the payment of any fees or commissions by the Plan. Any cash received upon disposition of all of the SAILS held by the Plan will be allocated to Plan participant accounts and the special fund currently holding the SAILS on the Plan's behalf will be dissolved.

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

(a) The Plan automatically received SAILS in exchange for its shares of Columbia Energy common stock in accordance with the terms of the Merger Agreement and it paid no commissions or fees in connection with its receipt of the SAILS and other merger consideration.

(b) The Merger Agreement was negotiated on an arm's length basis by Columbia Energy and NiSource, and subsequently approved by the shareholders of these entities.

(c) Morgan Stanley and Salomon Smith Barney, an independent

³³ It is represented that U.S. Trust will not be exclusively guided by the price of the SAILS as quoted on the NYSE. The exception to U.S. Trust's reliance on the NYSE for determining the price of the SAILS will be if the securities become so thinly-traded as to no longer constitute a "generally-recognized market" within the meaning of section 3(18) of the Act, thereby requiring an independent valuation. As trading has developed with respect to the SAILS, U.S. Trust believes this circumstance will be extremely remote.

investment advisers, opined to Columbia Energy that the consideration consisting of NiSource common stock, SAILS and cash for Columbia Energy common stock was "fair," from a financial point of view.

(d) Duff & Phelps provided independent financial advice to the Trustee and the Savings Plan Committee concerning the valuation of the SAILS.

(e) For purposes of the merger, and with respect to any future dispositions of the SAILS, the Plan was treated and will be treated in the same manner as any other shareholder of Columbia Energy common stock that made a valid election.

(f) As independent fiduciary, U.S. Trust (i) has overseen and will continue to oversee, the Plan's holding and disposition of the SAILS; (ii) will determine whether it is appropriate for the Plan to dispose of the SAILS (either on the open market or through a direct sale of any remaining SAILS to NiSource) and will instruct the Trustee regarding such disposition; (iii) will determine, in the event of a sale of any SAILS to NiSource, the fair market value of such SAILS either based on their closing market price on the NYSE on the date of the transaction, or, it will retain an independent appraiser if the SAILS are delisted on the NYSE or if it concludes that the closing price on the NYSE as of the transaction date is not representative of the fair market value of the SAILS; and (iv) will require the disposal of all SAILS held by the Plan by the end of calendar year 2001.

(g) The Plan will not pay any fees or commissions in the event any SAILS are sold to NiSource.

Notice to Interested Persons

Columbia Energy will provide notice of the proposed exemption to all participants and beneficiaries in the Plan by first class mail within 20 days of the date of publication of the notice of proposed exemption in the **Federal Register**. The notice will include a copy of the proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which will inform interested persons of their right to comment on and/or to request a hearing with respect to the proposed exemption. Comments regarding the proposed exemption are due within 50 days of the date of publication of the notice of pendency in the **Federal Register**.

For Further Information Contact: Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Miller International, Inc. Profit Sharing Plan (the Plan) Located in Denver, Colorado

[Application No. D-10980]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed sale of a certain three-acre parcel of vacant land (the Property) by the Plan to Miller International, Inc. (Miller), the sponsor of the Plan and a party in interest with respect to the Plan; provided that the following conditions are satisfied:

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

(b) The Plan receives the current fair market value for Property, as established by an independent qualified appraiser at the time of the sale; and

(c) the Plan pays no commissions or other expenses associated with the sale.

Summary of Facts and Representations

1. The Plan is a qualified profit-sharing plan. As of February, 2001, the Plan had 39 participants and beneficiaries. As of December 31, 2000, the Plan had \$2,781,338 in total assets. Miller International, Inc. (Miller) is the sponsor of the Plan. The Plan's trustees are Seymour Simmons, Jr., Marvin Levy and Ronald G. Schmitz. Miller is a subchapter "C" State of Colorado corporation which is in the business of manufacturing and distributing clothing.

2. In August, 1971, the Plan purchased the Property from Coogan and Walters, a Colorado Partnership, which was an unrelated third party. The cost of the Property was \$15,800 in cash, which represented approximately 1.37% of the Plan's assets at that time. The Property is adjacent to another property owned by Miller.³⁴ It is represented that the Trustees made the decision to purchase the Property as an investment for the Plan. As of December 31, 2000, the Property represented

approximately 8.6% of the total value of the Plan's assets.

3. The applicant represents that since it was originally acquired by the Plan, the Property has not been used or leased by anyone, including the parties in interest described herein. Since it was originally acquired by the Plan in 1971, the Property has not been an income-producing asset. The applicant represents that the only expense incurred by the Plan with respect to the Property was in 1994, when \$3,950 was paid to install a storm sewer drain. The property tax on the Property has been paid by Miller on an annual basis.

4. The Property, located at the northwest corner of Umatilla Street and West 85th Avenue, Federal Heights, Colorado, was appraised on May 15, 2001 (the Appraisal). The Appraisal was prepared by A. Mark Dyson, MAI, CCIM (Mr. Dyson) and by Steven A. Tromly, MAI (Mr. Tromly, collectively; the Appraisers), who are independent state certified appraisers. The Appraisers are with DYCO Real Estate Inc., located at 15710 West Colfax Avenue, Suite 204, in Golden, Colorado. The Appraisers relied solely on the sales comparison approach in valuing the Property. The Appraisers determined that the fair market value of the Property was \$290,000, as of May 10, 2001. In addition, since the Property is adjacent to other property owned by Miller, the Appraisers considered whether the adjacency factor would merit a premium above fair market value in any sale of the Property to Miller. However, the Appraisers determined that no adjustments to the value of the Property are necessary for the adjacent property ownership by Miller.

5. The applicant now proposes that Miller purchase the Property from the Plan in a one-time cash transaction. The applicant represents that the proposed transaction would be in the best interest and protective of the Plan because, among other things, the Plan would pay no commissions or other expenses associated with the sale. In addition, Miller will pay the Plan the current fair market value of the Property, as established by an independent qualified real estate appraiser at the time of the sale. In this regard, the Appraisers will update the Appraisal at the time of the transaction to ensure that the Plan receives the then current fair market value for the Property. Finally, the applicant states that the proposed sale of the Property to Miller will increase the liquidity of the Plan's current investment portfolio by allowing the Plan to sell an illiquid, non-income producing asset. The sale will enable the Trustees to further diversify the

³⁴ The Department is not providing any opinion in this proposed exemption as to whether the acquisition and holding of the Property by the Plan violated any of the provisions of Part 4 of Title I of the Act.

assets of the Plan by reinvesting the sale proceeds in other assets.

6. In summary, the applicant represents that the proposed transaction will satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The sale will be a one-time cash transaction;

(b) The Plan will receive the current fair market value for the Property, as established by an independent, qualified real estate appraiser at the time of the sale;

(c) The Plan will pay no commissions or other expenses associated with the sale; and

(d) The sale will enable the Plan to sell an illiquid, non-income producing asset and further diversify the Plan's current portfolio by reinvesting the sale proceeds in other assets.

Further Information Contact:

Ekaterina A. Uzlyan of the Department at (202) 219-8883. (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 23rd day of July 2001.

Ivan Strasfeld,

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

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MEDICARE PAYMENT ADVISORY COMMISSION

Commission Meeting

AGENCY: Medicare Payment Advisory Commission.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given of the Medicare Payment Advisory Commission (MedPAC) public meeting on Thursday, September 13, 2001, and Friday, September 14, 2001, at the Ronald Reagan Building, International Trade Center, 1300 Pennsylvania Avenue, NW., Washington, DC. The meeting will begin at 10 a.m. on September 1, and at 9 a.m. on September 14.

Congress directed MedPAC in the Balanced Budget Refinement Act of 1999 (BBRA) to evaluate the level of burden placed on providers through federal regulations and make recommendations to reduce the regulatory complexity of the Medicare program. On Thursday, September 13, MedPAC will discuss the regulatory complexity of the Medicare program. During this meeting, invited witnesses will address how changes in law and regulation may improve the program, including improvement of the rules regarding quality of care requirements, billing, compliance, fraud and abuse, and beneficiary protections. Witnesses will also be asked to provide recommendations on how the Congress and the Secretary of Health and Human Services can reduce regulatory burden and complexity for Medicare beneficiaries, providers, and health plans. Further information on the full agenda for the two day meeting and list of participating witnesses will be posted

on the MedPAC website at www.medpac.gov prior to the meeting. We will publish another federal register notice in August.

To inform the Commission, MedPAC invites the public to provide written comments on regulatory burden related to Medicare. Respondents are asked to address the following questions:

1. Do current regulations help Medicare fulfill its responsibility to be a prudent purchaser of health care services and to promote access to quality care for its beneficiaries? What approaches do other payers use that could be useful for Medicare?

2. How do Medicare's regulatory requirements (and the resources you need to comply with them) compare with those of other payers?

3. How has the regulatory complexity of the Medicare program changed in recent years? How have these changes affected the delivery of care, including clinical innovation?

4. Have increased fraud and abuse investigative actions affected your service to Medicare beneficiaries? How can Medicare deter improper billing in a non-punitive environment?

5. What is the frequency and nature of your interactions with administrative personnel from the Centers for Medicare and Medicaid Services (CMS), formerly known as the Health Care Financing Administration (HCFA), its fiscal intermediaries and carriers as well as other Medicare contractors? How do these interactions compare with other insurers?

6. What aspects of Medicare do you find most/least burdensome?

7. What specific steps would you recommend to decrease regulatory complexity and burden in Medicare? How could those steps be implemented?

People or organizations wishing to submit a written statement for the printed record of the hearing should submit no more than five (5) one-sided, single-spaced pages of their statement, along with an IBM compatible 3.5-inch diskette in WordPerfect or MS Word format with their name, address, and hearing date noted on the label, by close of business, Friday, August 17, 2001, to Murray N. Ross, Ph.D., Executive Director, Medicare Payment Advisory Commission, 1730 K Street, NW., Suite 800, Washington, DC 20006. No attachments will be accepted.

Murray N. Ross,

Executive Director.

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