

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

**ADDRESSEE:** Mary Ann Wyrsh, Director, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, Room S4231, 200 Constitution Avenue, N.W., Washington, D.C. 20210, telephone number (202) 219-7831 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Public Law 100-707 (Sections 410 and 423) provide for benefit assistance to "any individual unemployed as a result of a major disaster." SESA's, through agreements between the States and the Secretary of Labor, act as agents of the Secretary for the purpose of providing assistance to applicants in the various States who are unemployed as a result of a major disaster. The forms in Chapters III through VII of the Disaster Unemployment Assistance Handbook are used in connection with

the provision of this benefit assistance. (Previously cleared for use thru OMB by ETA under OMB No. 1205-0051.)

Form ETA 81 is an application form which is required to be completed by every applicant for Disaster Unemployment Assistance (DUA); DUA Form ETA 81A is a supplemental form to be completed by self-employed (or self employed prior to the disaster) applicants only; Form ETA 82 is used by the State agency in making a determination of each applicant's entitlement to DUA and to notify the applicant of the determination; Section A of Form ETA 83 is completed by the applicant each time (weekly or bi-weekly) he/she continues to request assistance to ensure continued entitlement, and Section B is completed by the State agency to notify the applicant of his/her current eligibility status; and Form ETA 84 is used by the State agency to notify overdrawn participants in the DUA program of the weeks and the cause of overpayment. These forms are prescribed by the Secretary under 20 CFR 625.8 and 625.9 and are all necessary to the operation of the program.

**II. Current Actions**

The forms (described above) are used by SESA's in operating the program and

are not reports per se. The continuation of this existing use of these forms by SESA's is essential to the operation of the DUA program. Because time is of the essence in making benefit payments due as a result of a major disaster, application data relating to the disaster are requested by State agencies through a number of appropriate forms. As previously indicated, if data were requested less frequently, determinations as to eligibility would be much more erratic, and the overall monitoring of the program as required by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, in order to insure adequate administration—yet expeditious administration—would be greatly impaired. Effective accounting of disaster unemployment assistance benefits and other emergency expenditures would also be hampered.

*Type of Review:* Extension.  
*Agency:* Employment and Training Administration.  
*Title:* Disaster Unemployment Assistance (DUA) Program Operating Forms.  
*OMB Number:* 1205-0051.  
*Agency Number(s):* ETA 81, ETA 81A, ETA 82, ETA 83, and ETA 84.  
*Affected Public:* Individuals/State Government.

Cite/reference	Total respondents	Frequency	Total responses	Average time per response (hours)	Burden in hours
ETA 81 .....	11,000	Annually .....	11,000	1/3	3,666
ETA 81A .....	3,800	Annually .....	3,800	1/4	950
ETA 82 .....	11,000	Annually .....	11,000	1/4	2,750
ETA 83 .....	11,000	Annually .....	66,000	1/4	16,500
ETA 84 .....	235	Annually .....	235	1/2	117
<b>Totals .....</b>	<b>11,000</b>	<b>.....</b>	<b>92,035</b>	<b>.....</b>	<b>23,983</b>

*Total Burden Cost (capital/startup):* \$0.00.

*Total Burden Cost (operating/maintaining):* \$148,922.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: May 15, 1996.  
 Mary Ann Wyrsh,  
 Director, Unemployment Insurance Service,  
 Employment and Training Administration.  
 [FR Doc. 96-13008 Filed 5-22-96; 8:45 am]

**BILLING CODE 4510-30-M**

**Pension and Welfare Benefits Administration**

[Application No. D-09990, et al.]

**Proposed Exemptions; Blue Cross and Blue Shield of Virginia**

**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 restriction 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 request 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. 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, N.W., Washington, D.C. 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 Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 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 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. 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.

Blue Cross and Blue Shield of Virginia (the Company), Located in Richmond, VA

[Application No. D-09990]

#### Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an

exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).<sup>1</sup>

#### Section I. Covered Transactions

If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to the proposed receipt of cash and/or common stock (the Stock) of Trigon Healthcare, Inc. (Trigon), the Company's sole owner, by any employee benefit plan policyholder of the Company (the Plan), other than an employee benefit plan sponsored by the Company or its affiliates, in exchange for such policyholder's membership interest in the Company, in accordance with the terms of a plan of reorganization (the Demutualization; the Demutualization Plan) adopted by the Company and implemented pursuant to the insurance laws of the State of Virginia.

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

#### Section II. General Conditions

(a) The Demutualization Plan is implemented in accordance with procedural and substantive safeguards that are imposed under Virginia law and is subject to the review and supervision by the Virginia State Corporation Commission (the Commission).

(b) The Commission reviews the terms of the options that are provided to certain policyholders of the Company (the Eligible Members), as part of such Commission's review of the Demutualization Plan, and the Commission only approves the Demutualization Plan following a determination that such Demutualization Plan is fair and equitable to all Eligible Members.

(c) Each Eligible Member has an opportunity to comment on the Demutualization Plan and decide whether to vote to approve such Demutualization Plan after full written disclosure is given such Eligible Member by the Company, of the terms of the Demutualization Plan.

(d) Any election by an Eligible Member to receive cash and/or Trigon Stock pursuant to the terms of the Demutualization Plan is made by one or more independent fiduciaries (the Independent Fiduciaries) of such Plan

and neither the Company nor any of its affiliates exercises any discretion or provides investment advice with respect to such election.

(e) After an Eligible Member entitled to receive stock is allocated at least 16 shares of Trigon Stock for each vote, additional consideration is allocated to an Eligible Member who owns a participating policy based on actuarial formulas that take into account each participating policy's contribution to the equity (the Equity Contribution) of the Company which formulas have been approved by the Commission.

(f) All Eligible Members participate in the transactions on the same basis within their class groupings as other Eligible Members that are not Plans.

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

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

#### Section III. Definitions

For purposes of this proposed exemption:

(a) The term "Company" means Blue Cross and Blue Shield of Virginia and any affiliate of the Company as defined in paragraph (b) of this Section III.

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

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Company. (For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.)

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

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

(c) The term "Effective Date" means the date on which the certificate of merger is issued by the Commission and the Demutualization occurs.

(d) The term "Eligible Member" means a member which will receive a distribution of Trigon Stock in the Demutualization. A "Member" is a policyholder which has a policy of insurance directly from the Company, which policy entitles the policyholder to vote. To be eligible for a distribution of Trigon Stock, the Member must have had a policy in effect on May 31, 1995, on the Effective Date, and at all times between those dates.

<sup>1</sup> For purposes of this exemption, reference to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(e) The term "Record Date" is the date on which the determination of an Eligible Member's status for voting on the Demutualization is made.

#### Summary of Facts and Representations

1. The Company is a mutual insurance corporation organized under the laws and regulations of the Commonwealth of Virginia. It is a member of the national organization, Blue Cross and Blue Shield Association (Blue Cross and Blue Shield). Blue Cross and Blue Shield, as part of its efforts to promote the Blue Cross and Blue Shield name, licenses to each member, the exclusive right to use the Blue Cross and Blue Shield service marks within restricted geographic areas. Except for a small part of Northern Virginia, Blue Cross and Blue Shield is the exclusive licensee of the Blue Cross and Blue Shield service marks in Virginia. The Company maintains its headquarters in Richmond, Virginia.

The Company is obligated to make basic health insurance available to all individuals in its service areas through a system of open enrollment. On December 31, 1994, the Company had total assets in excess of \$1 billion. The Company's main sources of income are the sale of health insurance policies to employee benefit plans, employers and individuals (the Members) and the generation of investment income. As of March 30, 1995, the Company had approximately 20,000 policies in force and 725,000 Members which were Plans covered by the Act.

As a mutual health care insurance company, the Company's policyholders have certain rights as Members. These rights, which are referred to as membership interests, include the right to vote on matters submitted to a vote of the Members.

2. The Company represents that it has been successful in offering health care insurance to its Members at affordable rates. However, it notes that there has been an increase in the level of competition. To maintain its position in the industry, the Company believes that it must expand and, in so doing, it will require an infusion of funds. As a mutual insurance company, the Company states that it is precluded from obtaining funds from the capital markets. Therefore, the Company proposes to convert from a mutual insurance company to a stock insurance company because it believes that demutualization is the most effective means of accessing the capital markets. The Company also believes that access to the capital markets will enhance its ability to grow, remain competitive and

provide essential insurance to its Members.

In addition, the Company represents that its Members would derive benefits from the Demutualization. One of these benefits is that Members would receive cash and/or shares of Trigon Stock which would be publicly-traded. The Company represents that the Demutualization would not have any effect on the rights of the Members as insureds. In this regard, all policies in effect before the Demutualization would remain in force after the Demutualization.

Accordingly, on June 20, 1995, the Board of Directors of the Company formally decided to proceed with the Demutualization by authorizing the filing of the Demutualization Plan with the Virginia State Corporation Commission. The actual filing of the Demutualization Plan with the Commission occurred on June 27, 1995. The actual procedures that will be followed in implementing the Demutualization Plan are described below.

3. Under Virginia law, insurance companies are primarily regulated by the Bureau of Insurance (the BOI) which is part of the Commission. The Commission is charged with the duty to ensure that licensed insurance companies comply with the requirements of law under its jurisdiction. The Commission will conduct an extensive review and analysis of the Demutualization Plan and make required findings under Virginia law before the Demutualization can be accomplished. In this regard, the Demutualization must comply with four provisions in the Virginia statutes which relate to—

(a) *The Conversion from a Mutual Insurance Company to a Stock Company.* According to Va. Stat. § 38.2-1005.1, a mutual insurance company may convert to a stock insurer under a plan of conversion approved by the Commission. In addition, the Commission shall approve the plan of conversion if it determines that the following conditions are met:

(1) The terms and conditions of the plan are fair and equitable to the policyholders of the issuer; (2) the plan is approved by more than two-thirds of the votes cast at a meeting of the members of the insurer at which a quorum is present; (3) the entire stock ownership interests or other consideration is distributed to policyholders, except as expressly otherwise provided; (4) for a mutual insurer that converted from a health services plan in existence prior to December 31, 1987, the Virginia State Treasurer is allocated stock or cash equal to the surplus on December 31, 1987 plus ten million dollars (Virginia may also be entitled to stock

or cash as a policyholder. This condition will apply to Trigon.); and (5) immediately after the conversion, the insurer will have the required amounts of fully paid capital stock and surplus.

(b) *A Change in Control as Part of the Demutualization.* Contemporaneous with the Demutualization, there will be an acquisition of control of the Company through the creation of a holding company. Va. Stat. § 38.2-1323A provides that—

No person shall acquire or attempt to acquire, through merger or otherwise, control of any domestic insurer, or any person controlling a domestic insurer, unless the person has previously filed with the Commission and has sent to the insurer an application for approval of acquisition of control of the insurer, and the Commission has issued an order approving the application.

The Commission's standard of review for an acquisition of control of an insurance company is set forth in Va. Stat. § 38.2-1326. These provisions require the Commission to review the following issues and deny the application if the Commission makes any of the following findings: (1) after the change of control, the insurer would not satisfy the requirements for the issuance of a license; (2) the acquisition of control would lessen competition substantially or tend to create a monopoly in insurance in Virginia; (3) the financial condition of the acquiring person might jeopardize the financial stability of the insurer, or prejudice the interest of the policyholders; (4) any plans or proposals of the acquiring party to make any material change in the company's business or corporate structure or management, are unfair and unreasonable to policyholders of the insurer and are not in the public interest; (5) the competence, experience and integrity of those persons who would control the operation of the insurer are such that it would not be in the interest of policyholders of the insurer and of the public to permit the acquisition of control; or (6) after the change of control, the insurer's surplus to policyholders would not be reasonable in relation to its outstanding liabilities and adequate to its financial needs.

(c) *The Treatment of the Demutualization as a Material Transaction.* The Commission must approve the Demutualization as a "material transaction" as defined in the Va. Stat. § 38.2-1322. The Commission, in reviewing any material transaction, will consider whether the material transaction complies with the standards set forth below and whether it may adversely affect the interest of

policyholders. (Va. Stat. § 38.2-1331C). These standards are that: (1) the terms of the transaction are fair and reasonable to the companies; (2) charges of fees for services performed will be reasonable; (3) expenses incurred and payments received will be allocated to the insurer in conformity with customary insurance accounting practices consistently applied; (4) the books, accounts and records of each party shall disclose clearly and accurately the precise nature and details of the transactions; and (5) the insurer's surplus to policyholders following any dividends or distributions to shareholder affiliates shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

4. Although the Company has finalized the Demutualization Plan, it still must be approved by the Commission and the Company's Members. The Commission will conduct a public hearing on the Demutualization Plan. Interested Members and other parties will be given an opportunity to present their views about the Demutualization Plan. The Commission will then make a finding as to the approval or disapproval of the Demutualization Plan. At present, the dates for the hearing and the special Member meeting have not been established.

5. For purposes of approving the Demutualization Plan, a Member who is the owner of the policy is entitled to vote. In general, the owner of an individual insurance policy is the person specified in the policy or contract as the owner or contract holder. The owner of a group policy of insurance is the person or persons specified in the group policy as the holder (usually the employer who has entered into the group policy to provide for health care insurance for its employees).

Members will vote on the Demutualization Plan at a special meeting. On matters submitted to a vote of the Members, the number of votes that a Member has depends on the type of policy. Each Member who has an individual group policy of insurance is entitled to as many votes as there are employees or other persons primarily insured under the policy. To be approved, the Demutualization Plan must receive two-thirds of the votes that are cast at the meeting in person or by proxy.

Notice of the special meeting to vote on the Demutualization Plan will be provided to Members with health insurance policies in force on the Record Date. In addition to receiving advance notice of the special meeting,

Members will receive a comprehensive informational packet about the Demutualization. The contents of the informational packet will be reviewed by the BOI.

6. In conjunction with receiving required approvals from the Members and the Commission, the Company contemplates that several corporate transactions have or will occur. In this regard, the Company has formed Trigon as a Virginia stock corporation and a wholly owned subsidiary of the Company. In addition, the Company has formed Trigon Merger Sub, Inc. (TMSI) as a wholly owned subsidiary of Trigon. The final step in the Demutualization process is for the Commission to issue a certificate of merger to effectuate the corporate merger needed to complete the conversion. The date on which the Commission issues the certificate of merger will be the Effective Date.

7. On the Effective Date, the following events will occur simultaneously under the Demutualization Plan:

(a) *Merger of TMSI into the Company.* TMSI will merge into the Company and the Company will be the survivor. As a result, the Company will become a wholly owned subsidiary of Trigon.

(b) *Change of the Company's Name.* The Company will then change its name to "Trigon Insurance Company" and become a Virginia stock corporation when its Restated Articles of Incorporation and New Bylaws are adopted by operation of the Demutualization Plan.

(c) *Cancellation of Membership Interests in the Company.* In accordance with the Demutualization Plan, all membership interests which Members had in the Company will be cancelled and converted into common stock of Trigon and/or cash for all Eligible Members. In addition, all issued and outstanding shares of capital stock which the Company owned in Trigon will be cancelled.

The Demutualization Plan provides that all elections by Eligible Members which are Plans to receive cash and/or shares of Trigon Stock will be made by Independent Fiduciaries. Neither the Company nor any of its affiliates will exercise any discretion nor provide investment advice with respect to such elections by the Independent Fiduciaries. In addition, no Eligible Members will be required to pay any brokerage fees or commissions in connection with the receipt of Trigon Stock.<sup>2</sup>

<sup>2</sup>The Company represents that an insurance policy that provides benefits under an employee benefit plan typically designates the employer that sponsors the plan, or a trustee acting on behalf of

(d) *The Initial Public Offering (the IPO).* The Company will conduct an IPO of the shares of Trigon Stock. The Demutualization Plan provides that the maximum size of the IPO will be such that 49 percent of the Trigon Stock outstanding after the IPO will have been issued in the IPO.<sup>3</sup>

8. The Company has hired the international accounting firm of KPMG Peat Marwick to prepare the actuarial calculations for the Demutualization Plan. The purpose of the actuarial calculations is to provide a reasonable and fair allocation of the Trigon Stock to the Eligible Members. The Company has been working with its actuaries to formulate the allocation methodology for the Demutualization Plan. The Members and the Commission will have to approve the final allocation among the Members.

The allocation of the Trigon Stock will be based on two components—voting rights (Voting Rights) and the Equity Contribution by the policies. Under the proposed Demutualization Plan, 15 percent of the Trigon Stock will be allocated based on the Voting Rights of the Members.<sup>4</sup> This portion of the Trigon Stock will be allocated based on the proportion of each Eligible Member's vote or votes compared to the total votes. It is anticipated that there will be 743,300 votes. Based on an allocation of 9,600,000 shares for Voting Rights, it is currently anticipated that

the plan, as the policyholder. With respect to insurance policies that designate the employer or trustee as policyholder, the Company asserts that, as required under the Demutualization Plan, the Company will make distributions to the employer or trustee with one exception. Where a group policy has been issued to the Company providing coverage for its own employees under a welfare benefit plan, the company will ensure that the distribution is made to an independent fiduciary acting on behalf of the Company's plan or will be distributed directly to participants.

In general, it is the Department's view that, if an insurance policy is purchased with assets of an employee benefit plan, and if there exist any participants covered under the plan (as defined at 29 CFR 2510.3-3) at the time when the Company incurs the obligation to distribute Trigon Stock, then such consideration would constitute an asset of the plan. Under these circumstances, the appropriate plan fiduciaries must take all necessary steps to safeguard the assets of the plan in order to avoid engaging in a violation of the fiduciary responsibility provisions of the Act.

<sup>3</sup>The Company projects that there will be a total of 64 million shares of Trigon Stock available for distribution to Eligible Members as part of the Demutualization. However, the Company notes that exact number of shares offered may be subject to further adjustment.

<sup>4</sup>The right to vote on the proposal to approve the Demutualization Plan is based on a voting Member's status on the Record Date for the special meeting. Voting Members are those Members holding an individual or group policy issued by the Company which is in force on the Record Date. To date, the Record Date has not been established.

each Eligible Member will receive 16 shares for each vote.

The remaining 85 percent of the Trigon Stock will be allocated based on the Equity Contribution of the policies. In this regard, the Demutualization Plan assigns each policy to a strategic business unit (SBU) (e.g., Major Accounts, Regional Business, etc.) and a major product line (MPL) under that SBU (e.g., Partially Self-Insured, Experience Rated, etc.). The Demutualization Plan divides the Eligible Members into 4 SBUs and 11 MPLs that could receive an allocation of Trigon Stock. In this regard, all Eligible Members will be treated the same within their class groupings.

9. The Company has provided a hypothetical example to illustrate the manner in which shares of Trigon Stock would be calculated for an Eligible Member. The Company notes that the example does not take into consideration such factors as the actual experience of an Eligible Member, the MPL or the total experience of the Company. The example is presented as follows:

Assume that an Eligible Member's group policy was in force from 1985 until 1995. Thus, the first step in the allocation methodology is to compute the Voting Rights allocation. The second step in the allocation methodology is to determine the Equity Contribution allocation.

*Voting Rights Allocation.* Assume that the policy has a total of 30 votes as of the Record Date. At a rate of 16 shares per vote, the Voting Rights allocation would be 480 shares of Trigon Stock.

$30 \text{ votes} \times 16 \text{ shares of Trigon Stock} = 480 \text{ shares of Trigon Stock}$

*Equity Contribution Allocation.* The following table represents the number of covered lives and the Equity Contribution Factor (the ECF)<sup>5</sup> derived for the Eligible Member's MPL for each year.

Period	Covered lives	ECF	Equity contribution	
Pre-1989 .....	22	×	\$50	\$1,100
1989 .....	22	×	60	1,320
1990 .....	30	×	60	1,800
1991 .....	28	×	40	1,120
1992 .....	35	×	70	2,450
1993 .....	35	×	60	2,100
1994 .....	40	×	80	3,200
Future .....	40	×	60	2,400
<b>Total Equity Contribution .....</b>				<b>\$15,490</b>

<sup>5</sup>The ECF is determined by dividing the Equity Contribution of the MPL by the total number of covered lives. For example, assume that in 1989, an MPL had an Equity Contribution of \$10 million and 50,000 covered lives. The 1989 ECF for that MPL would be \$200 (i.e., \$10 million divided by 50,000).

Assume that the total Equity Contribution for all Eligible Members is 500,000,000 and the total number of shares of Trigon Stock to be allocated for Equity Contributions is 50,000,000. The Eligible Member's allocation of Equity Contribution Shares would be 1,549 and is calculated as follows:

$\$15,490 / \$500,000,000 \times 50,000,000 \text{ shares} = 1,549 \text{ Equity Contribution Shares.}$

The total number of shares of Trigon Stock that will be received by the Eligible Member is the sum of the Voting Rights Shares and the Equity Contribution Shares.

$480 + 1549 = 2,029 \text{ Total Shares Received.}$

10. It is represented that the Company is a party in interest with respect to many Plans affected by the Demutualization because the Company provides a variety of services to Plans, some of which may constitute fiduciary services. In this regard, it is represented that a substantial portion of the policies in certain of the Company's SBUs are part of employee welfare benefit plans or employee pension benefit plans. Therefore, the Company requests an administrative exemption from the Department that would cover the receipt of cash and/or Trigon Stock by Eligible Members with respect to their membership interest in the Company as it existed in the form of a mutual insurance company.

11. As stated above, the form of distribution that will be made by the Company to Eligible Members is currently intended to be cash and/or shares of Trigon Stock in exchange for such Members' membership interests in the Company. The cash or stock will be paid to Eligible Members as soon as possible after the Effective Date. The form of payment and all other procedures with respect to the Demutualization will be the same for Plans as for other Members. The Company currently estimates that approximately 70 percent of the Trigon Stock will be distributed to Plans which participate with other Eligible Members in many of the SBUs.<sup>6</sup>

<sup>6</sup>The applicant represents that there is no alternative available if an Eligible Member decides not to participate in the Demutualization since it is governed by Virginia law. However, as discussed in Representation 7, there are several opportunities for an Eligible Member to receive cash instead of shares of Trigon Stock under the Demutualization Plan.

In addition, as noted in Representation 13, at the end of each Lockup Period, shares of Trigon Stock will be automatically distributed to Eligible Members. If the Eligible Member cannot be located, the stock will be returned to the Trigon transfer agent and held for the benefit of the Eligible Member. Assuming however the Eligible Member refuses to accept the Trigon Stock when it is distributed at the end of the Lockup Period, the applicant represents that it will continue to be held in the Eligible Member's name, possibly until the shares become abandoned property under Virginia escheat laws.

Although the Demutualization Plan provides that all Eligible Members may elect to receive their consideration in cash rather than in Trigon Stock, it is possible that certain Eligible Members will receive both forms of consideration. Certain Eligible Members, referred to as "Mandatory Cash Members," will receive cash in lieu of Trigon Stock once the value of such stock can be established.<sup>7</sup> Trigon Stock allocated to this class of Eligible Members is termed "Mandatory Cash Shares."

Other Eligible Members may also be provided with cash instead of Trigon Stock or, with a combination of both. Eligible Members in this category who elect to receive cash are called "Preferred Cash Members"<sup>8</sup> and the Trigon Stock otherwise allocable to them is termed "Preferred Cash Shares." To the extent that cash is less than the full consideration payable to the Eligible Member, shares of Trigon Stock will also be issued to such Eligible Member as the remaining consideration.

The amount of cash which a Mandatory Cash Member or a Preferred Cash Member will receive in lieu of Trigon Stock will equal the number of shares of Trigon Stock multiplied by the initial stock price (the ISP). The ISP means the proceeds per share of Trigon Stock obtained by Trigon from the sale of Trigon Stock to the public in the IPO minus all underwriting discounts, costs and expenses incurred in connection with the IPO, divided by the number of shares of Trigon Stock sold in the IPO.

On or immediately preceding the Effective Date, Trigon will determine the amount of cash available to pay all Eligible Members who are required or permitted to receive cash. If the amount of cash is insufficient to pay all of the Mandatory Cash Members and all of the Preferred Cash Members, then the cash available will be allocated in the following manner: First, the cash will be used to pay all Mandatory Cash Members. Second, any remaining cash

<sup>7</sup>The criteria for being a Mandatory Cash Member are the same for all Eligible Members. The classification of a Mandatory Cash Member is (a) an Eligible Member whom the Company knows is subject to a lien or bankruptcy proceeding or whose consideration for the shares will be subject to a lien or bankruptcy proceeding; (b) an Eligible Member with a mailing address outside the District of Columbia or any State of the United States of America; or (c) an Eligible Member with a mailing address within a state in which there are fewer than 10 Eligible Members and the total stock allocated to such Eligible Members is less than 2,000 shares, if the Company determines that the issuance of shares to these Eligible Members would result in unreasonable delay or excessive hardship or delay.

<sup>8</sup>A Preferred Cash Member is simply an Eligible Member, other than a Mandatory Cash Member, who has affirmatively elected, on a form that has been furnished and returned to the Company, to receive cash in lieu of Trigon Stock.

will be used to pay all Preferred Cash Members who are Odd Lot Holders.<sup>9</sup> If the cash is insufficient to pay all Odd Lot Holders in full, the cash available will be divided among the Odd Lot Holders *pro rata* based on the total number of shares allocated to each Odd Lot Holder. Third, any remaining cash will be used to pay all Preferred Cash Members who are not Odd Lot Holders. If the cash remaining is insufficient, the cash available will be divided among the Preferred Cash Members *pro rata* based on the total number of shares allocated to each non- Odd Lot Member. Then, the remaining amount that is not paid in cash will be distributed in the form of Trigon Stock.

12. After Demutualization, the Company will become a wholly owned subsidiary of Trigon. Persons holding policies of insurance issued by the Company will cease to be Members of the Company and will become stockholders of Trigon. As stated above, this change will not affect the rights and privileges of the Members in their insurance contracts. All policies in effect before the Demutualization will continue in force after the Demutualization. All Members will continue to receive health care insurance through Trigon.

Trigon will seek a listing for Trigon Stock on a major national stock exchange. The majority of the stockholders of Trigon will consist of Eligible Members who received shares of stock in Trigon in the Demutualization.

13. To protect the interest of all Eligible Members and to ensure the orderly trading and value of Trigon Stock after the IPO, the Demutualization Plan includes limitations on the sales of such stock issued to Eligible Members in the form of a Lockup. All shares of Trigon Stock that are issued to Eligible Members will be subject to the Lockup during two Lockup Periods. During each Lockup Period, Trigon Stock issued to an Eligible Member will be registered in uncertificated form on the books of Trigon as beneficially owned by the Eligible Member. A Trigon transfer agent will have computerized records that will show the amount of Trigon Stock, if any, that is available for each Eligible Member. Although the Eligible Member will not have physical custody of the Trigon Stock certificate, at all times during the Lockup Period, the Eligible Member will have the right to vote the shares and be entitled to receive all dividends or any other

distributions relating to the Trigon Stock issued to such Eligible Member.

As soon as practicable after the expiration of each Lockup Period, a certificate for Trigon Stock will be issued to Eligible Members or their permitted transferors. Eligible Members who are Odd Lot Holders may request a certificate from Trigon's transfer agent.

The first Lockup Period will end on the six month anniversary date of the Effective Date. Upon the termination of the first Lockup Period, one-half of the Trigon Stock will be freely-tradeable by Eligible Members and may be disposed of on a stock exchange at the public market price or in any manner that the Eligible Member wishes, subject to applicable securities laws.<sup>10</sup> The second Lockup Period will terminate on the twelve month anniversary of the Effective Date. At that time, the remaining one-half of Trigon Stock issued to Eligible Members will again be freely-tradeable.<sup>11</sup>

14. Prior to the ending of the first Lockup Period, Trigon will establish a commission-free sales and round-up program for small holders of Trigon Stock (the Small Holders Program). The purpose of the Small Holders Program is to allow certain Eligible Members either to sell all of their shares of Trigon Stock or to purchase sufficient shares of Trigon Stock that will enable such Eligible Members to round-up their holdings to 100 shares of Trigon Stock. The Small Holders Program will continue for 90 days unless otherwise extended.

Trigon will determine the maximum number of shares (not to exceed 99) that will entitle an Eligible Member to participate in the Small Holders Program. All purchases and sales under the Small Holders Program will be at prevailing market prices and free of brokerage commissions or other administrative or similar expenses.

<sup>10</sup>It should be noted that there is no provision in the Demutualization Plan requiring Trigon to purchase any of the shares of Trigon Stock from an Eligible Member at the end of a Lockup Period.

<sup>11</sup>In general, Trigon will not recognize most sales, pledges or other transfers by any Eligible Member of any rights or interest in the Trigon Stock or other distributions subject to the Lockup. Because of special circumstances, however, the Demutualization Plan will permit certain limited transfers. One of these special circumstances will allow an Eligible Member to transfer Trigon Stock to a trust created under a Plan. After the transfer to the trust, the Trigon Stock would continue to be subject to the same Lockup restrictions as described above.

Notwithstanding the foregoing, the Department notes, however, that the applicant has not requested, nor is the Department providing, exemptive relief with respect to the transfer of Trigon Stock by an Eligible Member to a Plan to the extent that the transaction violates the provisions of section 406 of the Act.

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

(a) The Demutualization Plan will be implemented in accordance with procedural and substantive safeguards that are imposed under Virginia law and will be subject to the review and supervision by the Commission.

(b) The Commission will review the terms of the options that are provided to Eligible Members of the Company as part of such Commission's review of the Demutualization Plan, and will approve the Demutualization Plan following a determination that such Demutualization Plan is fair and equitable to all Eligible Members.

(c) Each Eligible Member will have an opportunity to comment orally or in writing on the Demutualization Plan and decide whether to vote to approve in writing such Demutualization Plan after full written disclosure is given such policyholder by the Company, of the terms of the Demutualization Plan.

(d) Any election by an Eligible Member which is a Plan to receive shares of Trigon Stock pursuant to the terms of the Demutualization Plan will be made by one or more Independent Fiduciaries of such Plan and neither the Company nor any of its affiliates will exercise any discretion or provides investment advice with respect to such election.

(e) After each Eligible Member is allocated at least 16 shares of Trigon Stock, additional consideration allocated to Eligible Members who own participating policies will be based on actuarial formulas that take into account each participating policy's contribution to the surplus of the Company which formulas have been approved by the Director.

(f) All Plans that are Eligible Members will participate in the transactions on the same basis within their class groupings as other Eligible Members that are not Plans.

(g) No Eligible Member will pay any brokerage commissions or fees in connection with such Eligible Member's receipt of Trigon Stock or in connection with the implementation of the commission-free sales program.

(h) All of the Company's policyholder obligations will remain in force and will not be affected by the Demutualization Plan.

#### Notice to Interested Persons

The Company will provide notice of the proposed exemption to all Eligible Members which are Plans within 35 days of the publication of the notice of pendency in the Federal Register. Such

<sup>9</sup>An Odd Lot Holder is an Eligible Member who will receive more than 0 and less than 100 shares of Trigon Stock.

notice will be provided to interested persons by first class mail and will include a copy of the notice of proposed exemption as published in the Federal Register as well as a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on the proposed exemption. Comments with respect to the notice of proposed exemption are due within 65 days after the date of publication of this exemption in the Federal Register.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Smith Barney, Located in New York, New York

[Application No. D-10126]

#### 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 section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the lending of securities, under certain "exclusive borrowing" arrangements, to Smith Barney, and to any affiliate of Smith Barney who is a U.S. registered broker-dealer or a government securities broker or dealer (Affiliates; collectively Smith Barney), by employee benefit plans (Plans) with respect to which Smith Barney is a party in interest, provided that the following conditions are satisfied:

(a) For each Plan, neither Smith Barney nor its Affiliates has discretionary authority or control over the Plan's investment in the securities available for loan, nor do they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(b) Smith Barney directly negotiates an exclusive borrowing agreement (Borrowing Agreement) with a Plan fiduciary which is independent of Smith Barney;

(c) In exchange for granting Smith Barney the exclusive right to borrow certain securities, the Plan either (i) Receives a reasonable fee, which is specified in the Borrowing Agreement for each category of securities available for loan and is a flat fee, a set percentage rate, or a percentage rate established by reference to an objective formula, or (ii)

has the opportunity to derive compensation through the investment of cash collateral posted by Smith Barney;

(d) Any change in the rate that Smith Barney pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary, except that consent is presumed where the rate changes pursuant to an objective formula specified in the Borrowing Agreement and the independent fiduciary is notified at least 24 hours in advance of such change and does not object in writing thereto, prior to the effective time of such change;

(e) On or before the day the loaned securities are delivered, the Plan receives from Smith Barney (by physical delivery, book entry in a securities depository, wire transfer, or similar means) collateral consisting of cash, securities issued or guaranteed by the U.S. Government or its agencies, irrevocable bank letters of credit issued by persons other than Smith Barney or its Affiliates, or other collateral permitted under PTCE 81-6, as it may be amended or superseded;<sup>12</sup>

(f) The market value of the collateral initially equals at least 102 percent of the market value of the loaned securities and, if the market value of the collateral at any time falls below 100 percent, Smith Barney delivers additional collateral on the following day to bring the level of the collateral back to 102 percent;

(g) Before entering into a Borrowing Agreement, Smith Barney furnishes to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement;

(h) The Borrowing Agreement contains a representation by Smith Barney that as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished financial statements;

(i) The Plan receives the equivalent of all distributions made during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits,

<sup>12</sup> PTCE 81-6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) provides an exemption under certain conditions from section 406(a)(1) (A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to certain broker-dealers or banks which are parties in interest.

and rights to purchase additional securities, that the Plan would have received (net of tax withholdings)<sup>13</sup> had it remained the record owner of the securities;

(j) The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty, whereupon Smith Barney returns any borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within five business days of written notice of termination;

(k) In the event that Smith Barney fails to return the borrowed securities, Smith Barney indemnifies the Plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date the loan is declared in default, together with expenses not covered by the collateral plus applicable interest at a reasonable rate;

(l) All procedures regarding the securities lending activities, at a minimum, conform to the applicable provisions of PTCE 81-6, as it may be amended or superseded;

(m) Only Plans, which together with related Plans,<sup>14</sup> having assets with an aggregate market value in excess of \$50 million may lend securities to Smith Barney under an exclusive borrowing arrangement; and

(n) Prior to any Plan's approval of the lending of its securities to Smith Barney, a copy of this exemption, if granted, (and the notice of pendency) are provided to the Plan, and Smith Barney informs the independent fiduciary that Smith Barney is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.<sup>15</sup>

**EFFECTIVE DATE:** The proposed exemption, if granted, will be effective as of September 25, 1995.

<sup>13</sup> The Department notes the applicant's representation that dividends and other distributions on foreign securities payable to a lending Plan are subject to foreign tax withholdings and that Smith Barney will always put the Plan back in at least as good a position as it would have been in had it not loaned the securities.

<sup>14</sup> The Department notes the applicant's representation that the term "related Plans" refers to plans within the jurisdiction of Title I of the Act that are maintained by an entity or its affiliates, as "affiliate" is defined in section 407(d)(7) of the Act.

<sup>15</sup> The Department notes the applicant's representation that, under the proposed exclusive borrowing arrangements, Smith Barney will not perform the functions of a securities lending agent, nor will Smith Barney perform any services ancillary to securities lending, such as monitoring the level of collateral and the value of the loaned securities.

### Summary of Facts and Representations

1. Smith Barney is an investment services firm which is a member of the New York Stock Exchange and other principal securities exchanges in the United States and a member of the National Association of Securities Dealers. Smith Barney is one of the largest investment services firms in the United States, with \$44 billion in assets and \$3 billion in stockholders' equity.

2. Smith Barney, acting as principal, actively engages in the borrowing and lending of securities. Smith Barney utilizes borrowed securities either to satisfy its own trading requirements or to re-lend to other broker-dealers and entities which need a particular security for a certain period of time. As described in the Federal Reserve Board's Regulation T, borrowed securities are often used in short sales or in the event of a failure to receive securities that a broker-dealer is required to deliver.

3. An institutional investor, such as a pension fund, lends securities in its portfolio to a broker-dealer or bank in order to earn a fee while continuing to enjoy the benefits of owning the securities, (e.g., from the receipt of any interest, dividends, or other distributions due on those securities and from any appreciation in the value of the securities). The lender generally requires that the securities loan be fully collateralized, and the collateral usually is in the form of cash or high quality liquid securities, such as U.S. Government or Federal Agency obligations or irrevocable bank letters of credit. When cash is the collateral, the lender invests the cash and rebates a previously agreed upon amount to the borrower. The "fee" received by the lender as compensation for the loan of its securities then consists of the excess, if any, of the earnings on the collateral over the amount of the rebate. When the collateral consists of obligations other than cash, the borrower pays a fee directly to the lender.

4. Smith Barney requests an exemption for the lending of securities, under certain exclusive borrowing arrangements, by Plans with respect to which Smith Barney is a party in interest, for example, by virtue of its providing fiduciary, custodial, or other services to such Plans. For each Plan, neither Smith Barney nor its Affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan, nor will they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.<sup>16</sup> However,

because Smith Barney, by exercising its contractual rights under the proposed exclusive borrowing arrangements, will have discretion with respect to whether there is a loan of particular Plan securities to Smith Barney, the lending of securities to Smith Barney may be outside the scope of relief provided by PTCE 81-6.

5. For each Plan, Smith Barney will directly negotiate a Borrowing Agreement with a Plan fiduciary which is independent of Smith Barney. Under the Borrowing Agreement, Smith Barney will have exclusive access for a specified period of time to borrow certain securities of the Plan pursuant to certain conditions. The Borrowing Agreement will specify all material terms of the agreement, including the basis for compensation to the Plan under each category of securities available for loan. The Borrowing Agreement will also contain a requirement that Smith Barney pay all transfer fees and transfer taxes relating to the securities loans.

6. By the close of business on or before the day the loaned securities are delivered, the Plan will receive from Smith Barney (by physical delivery, book entry in a securities depository, wire transfer, or similar means) collateral consisting of cash, securities issued or guaranteed by the U.S. Government or its agencies, irrevocable bank letters of credit issued by persons other than Smith Barney or its Affiliates, or other collateral permitted under PTCE 81-6, as it may be amended or superseded. The market value of the collateral on the preceding day will be at least 102 percent of the market value of the loaned securities. The independent fiduciary will monitor the level of the collateral daily and, if its market value falls below 100 percent, Smith Barney will deliver additional collateral by the close of business on the following day to bring the level of the collateral back to 102 percent. If the market value of the collateral exceeds 104 percent, Smith Barney may require the Plan to return sufficient collateral to reduce the market value of the collateral to 102 percent.

7. Before entering into a Borrowing Agreement, Smith Barney will furnish to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should

enter into or renew the Borrowing Agreement. Further, the Borrowing Agreement will contain a representation by Smith Barney that as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished financial statements.

8. In exchange for granting Smith Barney the exclusive right to borrow certain securities, the Plan will either (i) receive a reasonable fee which is a flat fee, a set percentage rate, or a percentage rate established by reference to an objective formula, or (ii) have the opportunity to derive compensation through the investment of cash collateral posted by Smith Barney. Smith Barney proposes that different fee structures apply to different securities or groups of securities, depending upon various factors affecting their lending value, such as the time of year, the country of origin, and supply and demand. The fees with respect to any prospective or outstanding securities loan may be set or reset periodically pursuant to an objective formula agreed upon by Smith Barney and the independent fiduciary of the Plan at the time the parties enter into the Borrowing Agreement. Such formula may not be changed without the prior written consent of the independent fiduciary. If the rate that Smith Barney pays to the Plan for borrowing securities changes under a formula, Smith Barney will notify the independent fiduciary at least 24 hours in advance of such change, which may be implemented only if the independent fiduciary does not object in writing thereto, prior to the effective time of such change. No change may be made to rates not established pursuant to a formula, unless Smith Barney notifies the independent fiduciary at least 24 hours in advance of any change and obtains the prior written consent of the independent fiduciary.

Under this fee arrangement, earnings generated by non-cash collateral will be returned to Smith Barney. The Plan will be entitled to the equivalent of all distributions made to holders of the borrowed securities during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities that the plan would have received (net of tax withholdings in the case of foreign securities), had it remained the record owner of the securities.

9. The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty. Upon termination of

<sup>16</sup> Condition 1 of PTCE 81-6 requires, in part, that neither the borrower nor an affiliate of the borrower

may have discretionary authority or control over the investment of the plan assets involved in the transaction.

any securities loan, Smith Barney will return the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within five business days of written notice of termination. If Smith Barney fails to return the securities or the equivalent thereof within the designated time, the Plan will have certain rights under the Borrowing Agreement to realize upon the collateral. If the collateral is insufficient to satisfy Smith Barney's obligation to return the Plan's securities, Smith Barney will indemnify the Plan with respect to the difference between the replacement cost of the securities and the market value of the collateral on the date a loan is declared to be in default, together with expenses incurred by the Plan plus applicable interest at a reasonable rate.

10. All the procedures under the Borrowing Agreement will, at a minimum, conform to the applicable provisions of PTCE 81-6, as it may be amended or superseded. In addition, in order to insure that the independent fiduciary representing a Plan has the experience, sophistication, and resources necessary to adequately review the Borrowing Agreement and the fee arrangements thereunder, only Plans which, together with related Plans, having assets with an aggregate market value in excess of \$50 million may lend securities under an exclusive borrowing arrangement to Smith Barney.

The applicant represents that the opportunity for the Plans to enter into exclusive borrowing arrangements with Smith Barney under the flexible fee structures described herein is in the interests of the Plans because the Plans will then be able to choose among an expanded number of competing exclusive borrowers, as well as maximizing the volume of securities lent and the return on such securities.

11. In summary, the applicant represents that the described transactions satisfy the statutory criteria of section 408(a) of the Act because: (a) Smith Barney will directly negotiate a Borrowing Agreement with an independent fiduciary of each Plan; (b) the Plans will be permitted to lend to Smith Barney, a major securities borrower who will be added to an expanded list of competing exclusive borrowers, enabling the Plans to earn additional income from the loaned securities on a secured basis, while continuing to enjoy the benefits of owning the securities; (c) in exchange for granting Smith Barney the exclusive right to borrow certain securities, the

Plan will either (i) Receive a reasonable fee, which is specified in the Borrowing Agreement for each category of securities available for loan and is a flat fee, a set percentage rate, or a percentage rate established by reference to an objective formula, or (ii) have the opportunity to derive compensation through the investment of cash collateral posted by Smith Barney; (d) any change in the rate that Smith Barney pays to the Plan with respect to any securities loan will require the prior written consent of the independent fiduciary, except that consent will be presumed where the rate changes pursuant to an objective formula specified in the Borrowing Agreement and the independent fiduciary is notified at least 24 hours in advance of such change and does not object in writing thereto, prior to the effective time of such change; (e) Smith Barney will provide sufficient information concerning its financial condition to a Plan before a Plan lends any securities to Smith Barney; (f) the collateral posted with respect to each loan of securities to Smith Barney initially will be at least 102 percent of the market value of the loaned securities and will be monitored daily by the independent fiduciary; (g) the Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty, whereupon Smith Barney will return any borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within five business days of written notice of termination; (h) neither Smith Barney nor its Affiliates will have discretionary authority or control over the Plan's investment in the securities available for loan; (i) the Plan size requirement will insure that the Plans will have the resources necessary to adequately review and negotiate all aspects of the exclusive borrowing arrangements; and (j) all the procedures will, at a minimum, conform to the applicable provisions of PTCE 81-6, as it may be amended or superseded.

#### Notice to Interested Persons

Notice of the proposed exemption will be given to the independent fiduciary of any Plan which is interested in lending securities to Smith Barney. Such notice will be delivered by hand or first-class mail. Comments are due within 45 days of publication of this notice in the Federal Register.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karin Weng of the Department,

telephone (202) 219-8881. (This is not a toll-free number.)

VVP America, Inc. Incentive Savings Plan (the Plan), Located in Memphis, Tennessee

[Application No. D-10141]

#### 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 C.F.R. Part 2570, Subpart B (55 F.R. 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 sales by the Plan to VVP America, Inc. (the Employer), the sponsor of the Plan, of universal life insurance policies (the Policies) issued by the Confederation Life Insurance Company (CLI); provided that the following conditions are satisfied:

(A) All terms and conditions of the transactions are at least as favorable to the Plan as those which the Plan could obtain in arm's-length transactions with unrelated parties;

(B) The Plan receives cash purchase prices for the Policies of no less than the greater of (1) the fair market value of each Policy as of the sale date, or (2) each Policy's cash surrender value (as described below) as of the sale date; and

(C) The Plan does not incur any expenses or suffer any loss with respect to the transactions.

#### Summary of Facts and Representations

1. The Plan is a defined contribution 401(k) plan with 1,637 participants and total assets of \$26,210,617 as of June 30, 1995. The Plan is sponsored by the Employer, VVP America, Inc., which is a Delaware corporation engaged in the distribution and sale of various glass products. The trustee of the Plan is Dean Witter Trust Company (the Trustee), located in Jersey City, New Jersey.

2. The Plan provides for individual participant accounts (the Accounts) and participant-directed investment of the Accounts. The Accounts are invested pursuant to participant directions among investment options selected and made available by the Trustee (the Options). In addition to the Plan assets invested in the Options, 67 Accounts are invested in universal life insurance policies issued by Confederation Life Insurance Company (CLI), a Canadian corporation doing business in the

United States through branches in Michigan and Georgia. The Employer represents that a universal life policy is a flexible-premium individual life insurance contract maintainable for the insured's entire life, the premiums of which fund two components: (a) a protection component, providing a death benefit defined under the policy, and (b) an investment component, which earns interest on the premiums invested and which is debited with withdrawals and administration charges.

The Plan assets include the CLI universal life policies as the result of the Employer's 1992 acquisition of the Binswanger Glass Company (Binswanger). The Employer adopted Binswanger's 401(k) plan (the Predecessor Plan), which the Employer restated and renamed as the Plan. The Predecessor Plan had included among its investment options a universal life insurance option whereby participants could direct the purchase of individual universal life policies issued by CLI. Outstanding CLI policies purchased on behalf of Predecessor Plan participants became assets of the Plan when the Predecessor Plan was adopted by the Employer and renamed as the Plan. Plan participants are no longer able to direct the investment of their Accounts in universal life policies because the Options available to the Accounts in the Plan do not include a universal life insurance option. Of the approximately 250 CLI policies originally acquired by the Predecessor Plan, only 67 policies continue to be held by the Plan (the Policies), due to retirements and terminations of affected participants. The Employer represents that as of June 30, 1995, the Policies had a combined cash surrender value of \$227,336.<sup>17</sup>

3. The Employer represents that on August 11, 1994, the Canadian insurance regulatory authorities placed CLI in receivership, and on August 12, 1994, the insurance authorities of Michigan instituted legal rehabilitation proceedings (the Proceedings) against CLI. During the Proceedings, CLI is prohibited from payment of certain contractual obligations under life insurance policies outstanding. The Employer states that although the Proceedings do not affect CLI's ability to pay death benefits under the Policies,

the Proceedings prohibit access to the cash surrender values of the Policies, and the Trustee is unable to cash in any of the Policies to fund the payment of termination benefits to affected participants who separate from service with the Employer while the Proceedings continue (Separated Participants). The Employer represents that the Policies of Separated Participants remain in force and continue to be held in their respective Accounts even though the cash surrender values of the Policies remain inaccessible, and that neither the Trustee nor the Separated Participants may gain access to the cash values of the Policies. The Employer represents that because the Accounts of the Separated Participants no longer receive employer/employee contributions, premiums are no longer paid on those Policies, and administrative charges are being debited against those Policies' cash surrender values. The Employer represents that among active Plan participants whose Accounts are invested in Policies, premiums continue to be paid on the Policies in the Accounts of those active participants who have so directed. The Employer states that six active participants have elected to discontinue having contributions allocated to the payment of premiums on Policies in their Accounts, and these Policies will continue to experience decline in cash values as administrative charges are debited against those values.

5. The Employer represents that it is unable to determine when or to what extent the Trustee will be able to have access to the Policies' cash surrender values to pay termination benefits of Separated Participants. Accordingly, until such time as access to the cash surrender values of the Policies is restored pursuant to the Proceedings, the Employer desires the ability to purchase Policies from the Accounts of Plan participants who have separated from service since the Proceedings commenced and those participants who separate from service in the future. To enable these purchase transactions, the Employer is requesting an exemption, as proposed herein.

6. The Employer proposes only to purchase Policies from the Accounts of separating Plan participants who specifically desire the cash liquidation of their Policies, and any participant who prefers to retain the Policy in his Account would be able to do so.<sup>18</sup> For

each Policy which the Employer purchases from the Account of a Separated Participant, the Employer will pay such Account cash for the Policy in the amount of the cash surrender value of the Policy as of the date of the purchase, according to the most recent statement of such value provided by CLI. The Trustee has obtained an opinion as to the fair market values of the Policies from the accounting firm of Coopers & Lybrand, L.L.P. In an opinion letter dated August 4, 1995, Judy A. Faucett, F.S.A., a principal with Coopers & Lybrand, stated that the cash surrender values of the Policies represents a premium purchase price for the Policies since the Plan currently is not able to surrender the Policies to CLI to realize the Policies' cash values. The Employer will bear any expenses which may be incurred with respect to the proposed transactions. The Employer represents that the proposed transactions are necessary to enable the affected participants to receive the full accrued benefits in their Accounts by eliminating future decreases in cash surrender values of the Policies of Separated Participants. The Employer also maintains that the proposed transactions will enable the affected participants to avoid any risk associated with the continued holding of the Policies, due to the uncertainties surrounding the Proceedings.

7. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (a) The Accounts of affected participants will receive cash for the Policies in the amount of the Policies' cash surrender value as of the sale date; (b) The transaction will enable the Accounts of affected participants to avoid risk of loss associated with continued holding of the Policies, and to avoid future decreases in cash surrender value of the Policies; (c) A principal of Coopers & Lybrand has determined that the proposed purchase price for the Policies represents a premium for the Policies; and (d) The Plan will not incur any expenses with respect to the transactions.

**FOR FURTHER INFORMATION CONTACT:** Ronald Willett of the Department, telephone (202)219-8881. (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

<sup>17</sup> The Department notes that the decisions to offer and maintain Account investments in the Policies are governed by the fiduciary responsibility requirements of Part 4, Subtitle B, Title I of the Act. In this regard, the Department herein is not proposing relief for any violations of Part 4 which may have arisen or may arise as a result of offering or maintaining the Account investments in the Policies.

<sup>18</sup> For example, a terminated Plan participant whose Account holds one of the Policies may have become uninsurable since the original acquisition of the Policy and may choose to continue holding the Policy rather than acquiring its cash surrender value.

a fiduciary or other party in interest of 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 20th day of May 1996.

Ivan Strasfeld,

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

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**[Prohibited Transaction Exemption 96-38;  
Exemption Application No. D-09410, et al.]**

**Grant of Individual Exemptions;  
RREEF USA Fund**

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

**ACTION:** Grant of Individual Exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of

Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

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

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

**Statutory Findings**

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

(a) The exemptions are administratively feasible;

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

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

RREEF USA Fund—I (The Trust),  
Located in San Francisco, California

[Prohibited Transaction Exemption 96-38;  
Exemption Application No. D-09410]

**Exemption**

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 receipt by RREEF America L.L.C., the investment manager of the Trust (the Manager), of a certain performance compensation fee (the Performance Fee) in connection with the liquidation of the Trust, provided that the following conditions are satisfied:

(a) The terms and the payment of the Performance Fee shall be approved in writing, through approval of an amendment to the Group Trust Agreement, by independent fiduciaries of the plans that participate in the Trust (the Participating Plans);

(b) The terms of the Performance Fee shall be at least as favorable to the Participating Plans as those obtainable in an arm's-length transaction between unrelated parties;

(c) The total fees paid to the Manager by the Participating Plans that have invested in the Trust, shall constitute no more than reasonable compensation;

(d) The Performance Fee will be payable only when all of the assets of the Trust have been completely liquidated;

(e) The Performance Fee received by the Manager will be based on distributions, adjusted for inflation and present value, and will be calculated using two real hurdle rates of return. The Performance Fee will equal 10% after the Participating Plans have earned a 5% real return on the initial value of their investment and 20% after the Participating Plans have earned an 8% real return on the initial value of their investment;

(f) In the event of the Manager's resignation or termination as the investment manager to the Trust, the Investment Management Agreement would also terminate<sup>1</sup> and the Manager will not receive a Performance Fee;

(g) The Manager or its affiliates shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (2) of this Section (g) to determine whether the conditions of this exemption have been met, except that:

(1) (a) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Manager or its affiliates, the records are lost or destroyed prior to the end of the six year period; and (b) no party in interest, other than the Manager, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code if the records are not

<sup>1</sup> Unless termination was in bad faith wherein the Manager may seek legal recourse.