

## **NOTICE OF APPLICATION FOR AUTHORIZATION UNDER PROHIBITED TRANSACTION EXEMPTION 96-62**

In accordance with U.S. Department of Labor (“DOL”) procedures, you are hereby notified that United States Trust Company of New York (“US Trust”) has applied to the DOL for authorization of the in-kind redemption of investments in the Excelsior Funds by the U.S. Trust Corporation Employees’ Retirement Plan (the “Plan”). The purpose of the authorization is to exempt those transactions from certain of the prohibited transaction rules of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). The only change that would be made by these transactions is to the investments being made under the Plan – there is no change to or effect on Plan benefits.

The authorization would permit the Plan to redeem its investments in the Excelsior Funds – the proprietary fund family of the affiliates of U.S. Trust Corporation (“USTC”), the Plan sponsor – for securities rather than cash, to avoid potentially large transaction costs and exposure to market fluctuation. Because of the relationship between US Trust, a subsidiary of the Plan sponsor, and the Plan, such in-kind redemptions might otherwise be prohibited by ERISA.

### Overview

US Trust decided in 1996 that the Plan would benefit from the diversification that would result from investing assets in the Excelsior Funds. US Trust recently reconsidered its investment strategy, and decided to reallocate the Plan’s investments in a manner that would require redeeming the Plan’s shares in several of the Funds.

The redemptions from the Excelsior Funds may be accomplished in cash under an existing class exemption from the ERISA prohibited transaction rules. However, US Trust is seeking to make certain redemptions in kind to avoid potentially large transaction costs and exposure to market fluctuation pending reinvestment. To do so, it is requesting an authorization from DOL, which would be subject to the conditions described below and set forth in more detail in Exhibit A.

### Parties to the Proposed Redemption Transactions

#### US Trust

US Trust is a New York-chartered bank and trust company that is a member bank of the Federal Reserve System, with its principal offices in New York, New York. It is a wholly owned subsidiary of USTC, a registered bank holding company that in turn is a wholly owned subsidiary of The Charles Schwab Corporation. US Trust provides trust and banking services to individuals, corporations and institutions, both nationally and internationally.

#### The Plan

The Plan is a qualified defined benefit/cash balance pension plan maintained by USTC to provide retirement benefits to eligible employees of USTC and its affiliates. US Trust serves as Trustee of the Plan with authority and responsibility for the management and administration of the Plan’s trust fund.

## The Excelsior Funds

Each of the Excelsior Funds Trust and the Excelsior Funds, Inc. (collectively, "Excelsior Funds") is a family of open-end management investment companies registered with the Securities and Exchange Commission (the "SEC") under the Investment Company Act of 1940 (the "1940 Act"). Two wholly-owned subsidiaries of USTC serve as investment advisers to the Funds. Individual mutual funds in the Excelsior Funds family are referred to herein as "Portfolios."

### Plan Investments in the Excelsior Funds

Prior to 1996, a substantial portion of the assets of the Plan was invested in the collective investment funds of US Trust. In 1996, in connection with the termination of the US Trust collective investment funds and the transfer of their assets to the Excelsior Funds, the Plan acquired shares of the Excelsior Funds through an in-kind exchange of assets. Pursuant to the terms of a DOL exemption, Prohibited Transaction Exemption 97-17, a fiduciary independent of US Trust, acting on behalf of the Plan, authorized the in-kind transfers as being in the best interests of the Plan and its participants and beneficiaries.

US Trust recently retained an independent consulting firm to perform a portfolio structure and investment capabilities review for the Plan. In order to implement the recommended portfolio structure, US Trust intends to redeem the Plan's investments in certain of the Portfolios.

### In-Kind Redemption Transactions

In order to carry out the recommended changes from the current investments in the Excelsior Funds with minimal disruption and expense, US Trust has proposed that the Plan redeem its Portfolio investments in-kind rather than in cash. This step is appropriate because the successor accounts may invest in many of the same securities as the Portfolios from which they are redeeming the assets. In-kind redemptions, having no associated brokerage commissions or other fees or expenses other than customary transfer charges, would avoid potentially large transaction costs. They also would avoid exposure to market fluctuation pending reinvestment.

Under the requested authorization, the Plan would initially redeem its shares of the Blended Equity, Energy & Natural Resources, Small Cap, and Institutional Mid Cap Value Funds. It is possible that the Plan fiduciaries may determine at a later date that it is in the best interest of the Plan and its participants and beneficiaries to redeem in kind the Plan's interest in additional Portfolios. Consequently, in the event that the requested authorization is granted, the relief would apply to any such future in-kind redemptions as well, but only to the extent involving Portfolios in which the In-house Plan is currently invested, and which are in existence and offered by the Excelsior Funds as of the effective date of the authorization.

The proposed redemptions would involve ministerial transactions to be performed in accordance with pre-established objective procedures, in accordance with the requirements of the Securities Act of 1933, the 1940 Act and the rules and regulations thereunder. As a result, neither US Trust nor any affiliate would be able use its influence or control to cause the Plan to purchase particular securities from the Portfolios.

To the extent possible, the Plan will exchange its Portfolio shares for a proportionate share of the “Transferable Securities” – securities for which market quotations are readily available and that are otherwise freely transferable – held by each Portfolio. Securities that are not “Transferable Securities” would either be liquidated or retained by the Portfolio. If the security is liquidated, the In-house Plan would receive its pro rata share of the proceeds of the sale in cash. The value of odd lot securities, fractional shares and accruals on such securities also may be transferred in cash, as appropriate. Therefore, the proposed redemptions will be carried out, to the extent possible, on a pro rata basis as to the number and kind of securities transferred to the Plan.

For purposes of the in-kind 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”), in accordance with Rule 2a-4 under the 1940 Act and the then-existing procedures established by the board of trustees of the Funds, using sources independent of US Trust and US Trust affiliates. It is not anticipated that the Portfolios will hold any securities for which market quotations are not readily available at the time of an in-kind redemption. In the event a Portfolio does come to hold such a security – for example, if trading is halted or otherwise disrupted in that security – the Portfolio would determine the fair value of the security in accordance with its “fair value” procedures, and the In-house Plan would receive the cash equivalent of its pro rata share of the security’s value. The fair value procedures, which were adopted by the board of directors of the Excelsior Funds (including a majority of independent directors), require the investment adviser and other fund personnel to exercise reasonable diligence to obtain a market quote and, if they fail, to determine the price that they estimate the Portfolio could receive in cash within seven days if the security were sold. The procedures list a series of factors that the investment adviser is to consider when determining fair value, and require that the fair value determination be documented in a fair valuation report, which is reviewed and approved by a fair valuation sub-committee and overseen by the board. The Portfolio’s fair value procedures would be provided to, reviewed and approved by the Independent Fiduciary in advance of the Redemption. The Portfolio would retain documentation, in the form of the fair value reports prepared in accordance with the fair value procedures, showing how the procedures were applied and followed for each security valued in this manner.

Not later than 30 business days after completion of an in-kind redemption, the Excelsior Funds would confirm in writing the number of Portfolios shares redeemed and their value; the identity and value of each security transferred to the Plan, as well as each security’s price for purposes of the redemption; and the identity of each pricing service or market-maker consulted in determining the value of the securities.

To the extent any of the securities received by the Plan from an in-kind redemption are disposed within one year of the redemption by a manager that is an affiliate of US Trust, US Trust will reimburse the Plan for the brokerage fees and commissions and any other costs associated with the disposition of such securities.

Consulting Fiduciaries, Inc. (“CFI”), a registered investment adviser under the Investment Advisers Act of 1940, has been retained as the “Independent Fiduciary” for purposes of the requested authorization. CFI initially is responsible for reviewing the Plan’s investment policies and investment portfolio, and the assets of the Excelsior Funds, from the perspective of making an in-kind redemption; and analyzing from an investment perspective the fairness and

reasonableness of US Trust's methodology for determining the identity and value of the assets to be redeemed. It has issued a written report as to the fairness and reasonableness of the methodology for the proposed in-kind redemption compared to a cash redemption and a cash purchase. In its report, CFI has stated that:

- (a) The in-kind redemptions will avoid certain transactions costs that would otherwise be incurred in a cash redemption (estimated to be between \$250,000 to \$300,000 in trading costs alone);
- (b) The number of Portfolio shares and amount of cash associated with the proposed redemptions will be calculated based on the Portfolios' respective statements of assets and liabilities, valued in accordance with the Portfolios' pricing procedures and applicable securities regulations;
- (c) All securities held by the Portfolios, other than the non-Transferable Securities, are securities that qualify to be transferred in kind under the authorization;
- (d) The proposed transactions would be in compliance with the Plan's investment guidelines; and
- (e) The methodology used to conduct the in-kind redemptions would be comparable to, and no less favorable than, a similar in-kind redemption reached at arms' length between unaffiliated parties.

If the requested authorization is granted, CFI 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 in-kind redemptions. Based on its review, CFI would determine whether the redemptions are in the best interest of the Plan's participants and beneficiaries. CFI will inform US Trust of the conclusion reached, and the redemptions will not proceed unless CFI issues a favorable opinion.

CFI also will conduct a post-transfer review in which it will evaluate and test whether the transfer was carried out consistent with the required criteria and procedures, by testing a limited sampling of certain aspects of the redemption transactions, and confirm this in writing.

#### Tentative Authorization of Proposed Transaction

This authorization was requested under a procedure, Prohibited Transaction Exemption ("PTE") 96-62, requiring that DOL have granted at least two prior exemptions that are substantially similar to the proposed transaction. The Federal Register citations to these exemptions are:

Prohibited Transaction Exemption 2002-20 (Union Bank of California), 67 Fed. Reg. 14986 (Mar. 28, 2002), proposed at 67 Fed. Reg. 354 (Jan. 3, 2002)

Prohibited Transaction Exemption 2003-01 (The Northern Trust Company and Affiliates), 68 Fed. Reg. 6194 (Feb. 6, 2003), proposed at 67 Fed. Reg. 69561 (Nov. 18, 2002)

The proposal has met the requirements for tentative authorization under PTE 96-62. Unless DOL otherwise notifies US Trust, the authorization would be effective December 4, 2004. US Trust would begin entering into transactions under the terms of the authorization upon its effective date.

Right to Comment on Tentative Authorization

You have the right to comment to DOL on the tentative authorization. If you decide to do so, you should submit your comments to the following address:

Employee Benefits Security Administration  
Office of Exemption Determinations  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Room N-5649  
Washington, DC 20210

Be sure to reference the submission number, which is E-00378. Comments must be received by DOL no later than November 29th.

The proposed transaction would not raise or lower any benefit you may be entitled to receive under the plan. If you have questions on your retirement benefits, you may call (212) 852-2816.

Comments may be faxed or emailed to the Department. The fax number is (202) 219-0204, and the e-mail address is [moffitt.betty@dol.gov](mailto:moffitt.betty@dol.gov).

## EXHIBIT A

### DRAFT OF REQUESTED AUTHORIZATION

#### 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 to certain in-kind redemptions (the Redemptions) by the U.S. Trust Corporation Employees' Retirement Plan, and any other employee benefit plan sponsored by U.S. Trust Corporation (US Trust) or an affiliate of US Trust (In-house Plan(s)), of shares (the Shares) of proprietary mutual funds of the Excelsior Funds for which US Trust or an affiliate thereof (the Advisor) provides investment advisory and other services (the Fund(s)), which are currently in existence and in which the In-house Plan(s) currently invests, provided that the following conditions are satisfied:

(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 US Trust and affiliates of US Trust (US Trust Affiliates));

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

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

(D) US Trust, the Advisor, 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, US Trust 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 US Trust, 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 US Trust of written or electronic notice regarding such termination (unless circumstances beyond the control of US Trust delay termination for no more than one additional business day);

(G) Before approving a Redemption, based on the disclosures provided by the Fund(s) to the Independent Fiduciary and discussions with appropriate operational personnel of the In-house Plan, 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, US Trust or the relevant Fund provides to the Independent Fiduciary a written confirmation regarding such Redemption containing:

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

(ii) the identity (and related aggregate dollar value) of each security provided to the In-house Plan pursuant to the Redemption, including each security valued in accordance with Rule 2a-4 under the 1940 Act and the then-existing procedures established by the board of trustees of the Fund (using sources independent of US Trust and US Trust Affiliates) for obtaining current prices from independent market-makers,

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

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

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

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

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

(L) US Trust 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)(1)(i)-(v) below to determine whether the conditions of this exemption have been met, except that

(i) if the records necessary to enable the persons described in paragraph (M)(1)(i)-(v) below to determine whether the conditions of this exemption have been met are lost,

or destroyed, due to circumstances beyond the control of US Trust, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(ii) no party in interest with respect to the In-house Plan other than US Trust 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,

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

(iv) any employer whose employees are covered by the In-house Plan, and

(v) any employee organization whose members are covered by such In-house Plan;

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

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

## Section II—Definitions

For purposes of this proposed exemption,

(A) The term “affiliate” means:

(1) Any person (including a corporation or partnership) 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 US Trust 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 US Trust if:

(i) Such fiduciary directly or indirectly controls, is controlled by or is under common control with US Trust;

(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 US Trust 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 5 percent (5%) of such fiduciary’s gross income, for federal income tax purposes, in its prior tax year will be paid by US Trust and its affiliates in the fiduciary’s current tax year.

(E) The term “Transferable Securities” shall mean securities

(1) for which market quotations are readily available as determined pursuant to procedures established by the Funds under Rule 2a-4 of the 1940 Act; and

(2) which are not:

(i) Securities which, if publicly offered or sold, would require registration under the Securities Act of 1933;

(ii) securities issued by entities in countries which (a) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the Funds, or (b) permit transfers of ownership of securities to be effected only by transactions conducted on a local stock exchange;

(iii) certain portfolio positions (such as forward foreign currency contracts, futures and options contracts, swap transactions, certificates of deposit and repurchase agreements) that, although they may be liquid and marketable, involve the assumption of contractual obligations, require special trading facilities or can only be traded with the counter-party to the transaction to effect a change in beneficial ownership;

(iv) cash equivalents (such as certificates of deposit, commercial paper and repurchase agreements);

(v) other assets which are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable); and

(vi) securities subject to "stop transfer" instructions or similar contractual restrictions on transfer.

(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.