

holding company within the meaning of the Act.

Upon consummation of the proposed transaction: (1) each issued and outstanding share of PSCo common stock, together with the appurtenant rights (other than treasury and certain other shares which will be cancelled, fractional shares and shares held by holders who dissent in compliance with Colorado law) will be converted into the right to receive one share of NCE common stock, par value \$1.00 per share ("PSCo Conversion Ratio"); (2) each issued and outstanding share of SPS common stock, together with the appurtenant rights, (other than treasury and certain other shares which will be canceled, fractional shares and shares held by holders who dissent in compliance with New Mexico law) will be converted into the right to receive 0.95 of one share of NCE common stock ("SPS Conversion Ratio"); (3) each share of PSCo Merger Corp. common stock issued and outstanding prior to the transaction will be converted into the right to receive one share of common stock of PSCo as the surviving corporation; (4) each share of SPS Merger Corp. common stock issued and outstanding prior to the transaction will be converted into the right to receive one share of common stock of SPS as the surviving corporation and (5) all shares of capital stock of NCE issued and outstanding immediately prior to the transaction will be canceled. The shares of preferred stock of PSCo and SPS outstanding at the time of the consummation of the Transaction will remain preferred stock of PSCo and SPS, respectively. NCE states that the transaction is expected to be tax-free to PSCo and SPS shareholders (except as to dissenters' rights and fractional shares). Based on the capitalization of PSCo and SPS on December 1, 1995, the shareholders of PSCo and SPS would own securities representing approximately 62.0% and 38.0%, respectively, of the outstanding voting power of NCE. NCE states that the proposed merger qualifies for treatment as a pooling of interests.

Following the merger, PSCo, SPS and Cheyenne will become direct public utility subsidiaries of NCE and the nonutility subsidiaries of PSCo and SPS will become either direct or indirect nonutility subsidiaries of NCE. The Merger Agreement provides that NCE's principal corporate office will be in Denver, Colorado, with significant operating offices in Ararillo, Texas. NCE's board of directors will consist of a total of 14 directors, 8 of whom will be designated by PSCo and 6 of whom will be designated by SPS.

NCE proposes that the Commission authorize two system service companies; NC Services and UE. NC Services will be a direct subsidiary of NCE and will be incorporated in Delaware. NC Services will provide companies in the NCE system with a variety of administrative, management and support services. It is anticipated that NC Services will be staffed by a transfer of personnel from PSCo, SPS and their subsidiaries. In contrast, UE will be a subsidiary of an intermediate holding company, NC Hold (discussed below), which will hold the system's nonutility interests. UE will provide a variety of engineering, design, construction, management and other miscellaneous services to NCE system companies.

NCE states that the accounting and cost allocation methods of both NC Services and UE will comply with the Commission's standards for service companies in registered holding-company systems and that NC Services' and UE's billing system will use the Commission's "Uniform System of Accounts for Mutual Service Companies and Subsidiary Service Companies."¹⁵ Except as permitted by the Act or the Commission, and except as summarized below, all services provided by NC Services and UE to affiliated companies will be "at-cost" pursuant to rules 90 and 91.

NCE requests an exemption from the at-cost provisions of rules 90 and 91 in connection with the provision of services to affiliated QFs, IPPs, EWGs and FUCOs by the following companies: (1) NC Services, (2) UE, (3) KRM, (4) Utility Services, (5) UE Carolina, (6) Quixx, (7) QPS, and (8) e prime. In addition, NCE requests an exemption from rules 90 and 91 in connection with the provision of services by e prime to Young Gas Storage Co., Ltd. Finally, to facilitate e prime's marketing of certain products and services to nonaffiliates, NCE requests that PSCo be exempted from rules 90 and 91 for the sale of certain products and services to e prime.

NCE further requests authority to form a new subsidiary, NC Hold Co., which will be incorporated in Delaware, to hold certain of the NCE system's nonutility interests. At the consummation of the Transaction, all outstanding shares of NC Hold common stock will be held by NCE. NC Hold will acquire the common stock of certain of PSCo's nonutility subsidiaries via a capital contribution from NCE and will purchase the common stock of SPS's nonutility subsidiaries by issuing debt to SPS.

¹⁵ 17 CFR Part 256 (1995).

The debt issued by NC Hold will have a twenty-year maturity and bear interest at a fixed rate, with interest payments to be made semi-annually. The interest rate will be determined at the time of issuance based on the then prevailing rate which would be charged by an unaffiliated third party. The principal will be repaid in twenty equal annual installments. NC Hold will have the option to prepay the entire obligation, including accrued and unpaid interest, at any time without any prepayment premium.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,
Secretary.

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BILLING CODE 8010-01-M

[Investment Company Act Release No. 21851; 812-9924]

U.S. Trust Corporation, et al.; Notice of Application

March 22, 1996.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for an Order under the Investment Company Act of 1940 (the "Act").

APPLICANTS: U.S. Trust Corporation, United States Trust Company of New York ("U.S. Trust"), the Excelsior Institutional Trust ("Excelsior Trust"), the Excelsior Funds, Inc. ("Excelsior Funds, Inc. ("Excelsior Funds")),¹ and any registered open-end management investment company that may be advised by U.S. Trust or any entity controlling, controlled by, or under common control with U.S. Trust (together, with Excelsior Trust and Excelsior Funds, the "Funds"), the United States Trust Company of New York Pooled Pension and Profit Sharing Trust ("CIF"), and other collective investment funds that may be sponsored by U.S. Trust which U.S. Trust in the future may decide to convert into registered open-end investment companies in the manner described below, and in which, at that time, pension plans established and maintained for the benefit of employees of U.S. Trust and its subsidiaries have invested assets.

RELEVANT ACT SECTIONS: Order requested under sections 6(c) and 17(b) of the Act exempting applicants from section 17(a)

¹ The Excelsior Funds formerly were known as the UST Master Funds, Inc. The name was changed, effective January 2, 1996, primarily for marketing purposes.

of the Act and pursuant to section 17(d) of the Act and rule 17d-1 thereunder.

SUMMARY OF APPLICATION: The requested order would permit the CIF to transfer securities to certain portfolios of the Funds in exchange for portfolio shares.

FILING DATES: The application was filed on December 29, 1995. Applicant's counsel has stated in a letter dated March 18, 1996 that an amendment, the substance of which is incorporated herein, will be filed during the notice period.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on April 16, 1996 and should be accompanied by proof of service on applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants: c/o U.S. Trust Corporation, 114 West 47th Street, New York, New York 10043.

FOR FURTHER INFORMATION CONTACT: David W. Grim, Staff Attorney, at (202) 942-0571, or Alison E. Baur, Branch Chief, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. U.S. Trust is a state-chartered bank and trust company and wholly-owned subsidiary of U.S. Trust Corporation. U.S. Trust serves as trustee, investment manager, and custodian for numerous pension plan clients. The assets of some of those pension plans are invested in the CIF, which was established by U.S. Trust as an investment vehicle for employee retirement plans qualified under section 401 of the Internal Revenue Code or similar governmental plans. The CIF includes assets of pension plans for the benefit of employees of entities unaffiliated with U.S. Trust ("Other Plans") as well as assets of pension plans for the benefit of employees of U.S. Trust and its affiliates

("Affiliated Plans") (Other Plans and Affiliated Plans collectively referred to as "Plans"). Each of the Affiliated Plans has a five percent or greater beneficial interest in the CIF. The assets of the CIF are invested in one or more investment funds ("CIF Portfolios") with varying investment objectives.

2. The Excelsior Trust is a Delaware business trust registered under the Act as an open-end management investment company. The Excelsior Trust currently consists of 10 portfolios. The Excelsior Trust is establishing two new portfolios, the Excelsior Trust Institutional Optimum Growth Fund and the Excelsior Trust Institutional Equity Value Fund, which will be the only portfolios of the Excelsior Trust to which Affiliated Plan assets in the CIF will be transferred. Excelsior Funds is a Maryland corporation registered under the Act as an open-end management investment company. Excelsior Funds is currently divided into 20 portfolios. The following portfolios are the only portfolios of Excelsior Funds to which Affiliated Plan assets in the CIF will be transferred: Excelsior Funds Equity Fund, Excelsior Funds International Fund, Excelsior Funds Short-Term Government Securities Fund, Excelsior Funds Managed Income Fund, Excelsior Funds Early Life Cycle Fund, and Excelsior Funds Money Fund (together with the Excelsior Trust Institutional Optimum Growth Fund and the Excelsior Trust Institutional Equity Value Fund, the "Portfolios"). U.S. Trust serves as investment adviser to the Portfolios.

3. U.S. Trust is terminating the CIF and proposes to transfer the Affiliated Plans' assets of the CIF in-kind to the Portfolios. Under this proposal, each Portfolio will accept a transfer of securities from a corresponding CIF Portfolio with substantially similar investment objectives, in exchange for Portfolio shares. The conversion may occur in stages, with certain transfers occurring before others.

4. The assets of the CIF representing Other Plans may be converted into Funds in accordance with a series of no-action letters in which the SEC staff has permitted similar conversions of collective trust funds into mutual funds.² The Affiliated Plans are unable to rely on the no-action letters, however, because each Affiliated plan has a five percent or greater beneficial interest in

CIF.³ As a result, applicants are seeking exemptive relief for the transfer of CIF assets into the Funds on behalf of the Affiliated Plans.

5. Affiliated Plan assets of the CIF will be transferred as follows: the Short-Term Fixed Income CIF Portfolio into the Excelsior Funds Money Fund, the Fixed Income CIF Portfolio into the Excelsior Funds Managed Income Fund, the U.S. Government Short/Intermediate Term CIF Portfolio into the Excelsior Funds Short-Term Government Securities Fund, the International CIF Portfolio into the Excelsior Funds International Fund, the Equity CIF Portfolio into the Excelsior Funds Equity Fund, the Early Life Cycle CIF Portfolio into the Excelsior Funds Early Life Cycle Fund, the Optimum Growth CIF Portfolio into the Excelsior Trust Institutional Optimum Growth Fund, and the Equity Value CIF Portfolio into the Excelsior Trust Institutional Equity Value Fund.

6. Applicants will institute the following procedures to ensure the protection of Plan participants in the proposed transactions. Each Affiliated Plan will have an employee benefit review committee (the "Committee") that serves as fiduciary for the Plan. Also, each Affiliated Plan and Other Plan will have a fiduciary, independent of U.S. Trust and its affiliates, that will supervise the investment of that Plan's assets. This independent fiduciary generally will be the Plan's named fiduciary, trustee or sponsoring employee (in the case of the Other Plans), and will be subject, as will the Committee, to fiduciary responsibilities under the Employee Retirement Income Security Act of 1974 ("ERISA"). Under section 404(a) of ERISA, such fiduciaries must ensure that the investment of the Affiliated Plans' assets is prudent and operates exclusively for the benefit of participating employees of U.S. Trust and/or its affiliates and of their beneficiaries.

7. Before transferring the Affiliated Plans' CIF assets to the Portfolios, U.S. Trust will seek and obtain the approval of the Committee and each Affiliated Plan's independent fiduciary. U.S. Trust will provide the Committee and the independent fiduciaries with a current prospectus for the relevant Portfolios and a written statement giving full disclosure of the fees to be received by U.S. Trust and/or its affiliates and the

² See, e.g., The DFA Investment Trust Company (pub. avail. Oct. 17, 1995); Federated Investors (pub. avail. Apr. 21, 1994); and Lincoln National Investment Management Company (pub. avail. Apr. 25, 1976).

³ See The DFA Investment Trust Company (pub. avail. Mar. 21, 1996) (clarifying the staff's position that a less than five percent beneficial interest in a collective trust fund conversion by an affiliated person of a fund, or an affiliated person of such affiliated person, is not, in and of itself, a disqualifying affiliation for purposes of rule 17a-7).

terms of the proposed transactions. The disclosure will explain why U.S. Trust believes that the investment of assets of the Affiliated Plans in the Portfolios is appropriate.

8. On the basis of such information, the Committee and the independent fiduciary will decide whether to authorize U.S. Trust to invest the relevant Affiliated Plan's assets in the Fund and to receive fees from the Fund. U.S. Trust does not charge Plan level fees to Affiliated Plans and, therefore, will not collect fees at both the Plan level and the Fund level for managing the same assets. However, the fees charged to the Affiliated Plans may increase as a result of the greater costs of Fund administration as compared to the administration of the CIF. Because U.S. Trust does charge Plan level fees to the Other Plans, it will credit all Fund level fees back to those Plans.

9. Because of the need to obtain approval from various fiduciaries, and the need to obtain effectiveness of the registration statement describing the two new equity Portfolios of the Excelsior Trust, the proposed transactions may occur in more than one stage. Only those Plans that have received the required approval from the Committee and the independent fiduciary will participate at any stage. As of the date of each transfer, U.S. Trust, on behalf of the CIF Portfolios, will deliver to the corresponding Portfolio securities equal in value to the interest of each participating Plan, in exchange for Fund shares with total net asset value equal to the market value of the transferred assets as of the date of the transfer. All securities transferred to a Portfolio in any stage will be securities capable of being priced pursuant to rule 17a-7(b) (1) through (4) under the Act, and will be consistent with the investment objectives and fundamental policies of the corresponding Portfolio. The Fund shares received by the CIF Portfolios then will be distributed, *pro rata*, to all Plans whose interests were converted as of that date.

10. U.S. Trust is terminating the CIF and transferring its assets into the Funds because it believes investment of those assets in mutual fund will better serve the interests of its employee retirement benefit plan clients. Investment of Plan assets in mutual funds will allow the sponsors of and participants in the Plans to monitor more easily the performance of their investments on a daily basis, as information concerning the investment performance of the Portfolios generally will be available in daily newspapers. Additionally, the mutual fund vehicle will provide other advantages, such as daily pricing, and

will afford U.S. Trust a better opportunity to market its investment management services. Assuming those marketing efforts result in greater assets under management, this investment also will allow for greater diversification. Also, Plan participants will have the benefit of the heightened disclosure applicable to mutual funds under the federal securities laws.

Applicants' Legal Analysis

1. Section 17(a) of the Act, in relevant part, prohibits an affiliated person of a registered investment company, or an affiliated person of such person, acting as principal, from selling to or purchasing from such investment company any security or other property. Section 2(a)(3) of the Act, in relevant part, defines "affiliated person" to include: (a) any person directly or indirectly owning, controlling, or holding with the power to vote, 5% or more of the outstanding voting securities of such other person; (b) any person directly or indirectly controlling, controlled by, or under common control with, such other person; and (c) if such other person is an investment company, any investment adviser thereof.

2. Section 6(c) provides that the SEC may exempt any person or transaction from any provision of the Act or any rule thereunder to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Section 17(b) provides that the SEC shall exempt a proposed transaction from section 17(a) if evidence establishes that: (a) the terms of the proposed transaction are reasonable and fair and do not involve overreaching; (b) the proposed transaction is consistent with the policies of the registered investment company involved; and (c) the proposed transaction is consistent with the general provisions of the Act.

4. Section 17(d) prohibits an affiliated person of a registered investment company, or an affiliated person of such person, acting as principal, from effecting any transaction in which such investment company is a joint, or joint and several, participant with such person in contravention of SEC rules and regulations. Rule 17d-1 under the Act provides that no joint transaction covered by the rule may be consummated unless the SEC issues an order upon application. In passing upon such applications, the SEC considers whether participation by a registered investment company is consistent with the provisions, policies, and purposes of the Act, and is not on a basis less

advantageous than that of other participants.

5. Because the CIF may be viewed as acting as principal in the proposed transactions and because the CIF and the Funds may be viewed as being under the common control of U.S. Trust within the meaning of section 2(a)(3)(C) of the Act, the proposed transactions may be subject to the prohibitions contained in section 17(a). For the same reasons, the proposed transactions might be deemed to be a joint enterprise or other joint arrangement prohibited by section 17(d) and rule 17d-1.

6. Applicants request an order under sections 6(c) and 17(b) granting an exemption from section 17(a), and pursuant to section 17(d) and rule 17d-1. Applicants submit that the terms of the proposed transactions, as set forth above, satisfy the standards for an exemption set forth in sections 6(c) and 17(b) and rule 17d-1.

7. Applicants believe that the proposed transactions will be on terms that are reasonable and fair, and do not involve overreaching on the part of any person. The proposed transactions will comply with rule 17a-7 (b)-(f) under the Act, and also will comply with the policy behind the conditions set forth in rule 17a-8. Applicants assert that the fact that the proposed transactions are designed as in-kind transfers does not negatively affect their fairness. Indeed, if the proposed transactions were effected in cash, the Plans would have to sell their securities, thereby incurring brokerage commissions or the adverse effects of mark-downs. Similarly, following the Plans' investment in the Fund, the Fund would purchase similar securities in the market, causing a second round of brokerage commissions and the adverse effects of mark-ups. In addition, because time could elapse between the sale of Plan securities and the repurchase of similar securities, no assurance could be given that the Funds would be able to purchase those securities at the price for which Plan securities had been sold. In contrast, the proposed transactions would not expose the Plans' assets to transaction costs or timing risk.

8. Applicants contend that the requested exemptive relief also would be consistent with the purposes intended by the policies and provisions of the Act. Applicants believe that the proposed transactions do not give rise to the abuses that sections 17 (a) and (d) and rule 17d-1 were designed to prevent. A primary purpose underlying sections 17 (a) and (d) and rule 17d-1 is to prevent a person with a pecuniary interest in a transaction from using his or her position with a registered

investment company to benefit himself or herself to the detriment of the company's shareholders. After the proposed transactions, each Affiliated Plan will be a shareholder in a Portfolio with substantially similar investment objectives to the CIF Portfolio from which their assets were transferred. In this sense, the proposed transactions can be viewed as a change in the form in which assets are held, rather than as a disposition giving rise to section 17 concerns. Moreover, any transfer will be subject to extensive review and evaluation by independent fiduciaries whose actions are governed by ERISA and by the disinterested members of the board of directors (trustees) of the Funds. For these reasons, the participation will not be on a basis different from or less advantageous than that of other participants for purposes of rule 17d-1.

9. Applicants submit that the proposed transactions meet the section 6(c) standards for relief as necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Shares of the Funds issued as part of the proposed transactions will be issued at prices equal to their net asset values. In addition, the assets of the Affiliated Plans will be valued pursuant to objective standards and are the type that the Portfolios otherwise would purchase through market transactions. Furthermore, the proposed transactions are subject to independent fiduciary approval. Therefore, the transfers will afford no opportunity for affiliated persons of the Funds to effect a transaction detrimental to the Affiliated Plans or to the other shareholders of the Funds.

Applicants' Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions:

1. The purchase transactions will comply with the provisions of rules 17a-7(b)-(f).

2. The purchase transactions will not occur unless and until: (a) the boards of directors (trustees) of the Funds (including a majority of their disinterested members) and the Committee and the Affiliated Plans' independent fiduciaries find that the proposed transactions are in the best interest of the Funds and the Affiliated Plans, respectively; and (b) the boards of directors (trustees) of the Funds (including a majority of their disinterested members) find that the interests of the existing shareholders of the Funds will not be diluted as a result

of the proposed transactions. These determinations and the basis on which they are made will be recorded fully in the records of the Funds and the Plans, respectively.

3. In order to comply with the policies underlying rule 17a-8, any conversion will have to be approved by the board of directors (trustees) of the Funds and any Affiliated Plan's independent fiduciaries who would be required to find that the interests of beneficial owners would not be diluted.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

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[Release No. 34-37009; File No. S7-8-96]

Study and Report on Protections for Senior Citizens and Qualified Retirement Plans

AGENCY: Securities and Exchange Commission.

ACTION: Request for comments.

SUMMARY: The Private Securities Litigation Reform Act of 1995 directs the Securities and Exchange Commission (the "Commission") to determine whether investors that are senior citizens or qualified retirement plans require greater protection against securities fraud than is currently provided under the federal securities laws; and whether investors that are senior citizens or qualified retirement plans have been adversely impacted by abusive or unnecessary securities fraud litigation, and whether the current provisions of the federal securities laws are sufficient to protect them from such litigation. The Commission is soliciting comment on these questions and on the more general question of the role of senior citizens and qualified retirement plans in our securities markets.

DATES: Comments must be received no later than April 30, 1996.

ADDRESSES: Persons wishing to respond should file three copies of their written comments with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments may also be submitted electronically at the following E-mail address: rule-commentssec.gov. All written comments should refer to File No. S7-8-96; this file number should be included on the subject line if E-mail is used. The comments will be available for public inspection and copying in the

Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comments will be posted on the Commission's Internet web site (<http://www.sec.gov>).

FOR FURTHER INFORMATION CONTACT: John W. Avery, Office of the General Counsel, at (202) 942-0816; or Ann M. Gerg, Office of the General Counsel, at (202) 942-0857.

SUPPLEMENTARY INFORMATION:

I. Introduction

On December 22, 1995, Congress overrode the President's veto and enacted the Private Securities Litigation Reform Act of 1995 (the "Act"). Section 106 of the Act requires the Commission to:

(1) Determine whether investors that are senior citizens or qualified retirement plans require greater protection against securities fraud than is provided in the Act and the amendments made by the Act; and

(2) Determine whether investors that are senior citizens or qualified retirement plans have been adversely impacted by abusive or unnecessary securities fraud litigation, and whether the provisions in the Act or amendments made by the Act are sufficient to protect their investments from such litigation.

If the Commission determines that greater protections are necessary, it must submit a report to the Congress by June 19, 1996.

For purposes of section 106 of the Act, the term "senior citizen" means an individual who is 62 years of age or older, and the term "qualified retirement plan" has the same meaning as in section 4974(c) of the Internal Revenue Code of 1986.

II. Background

Senior citizens and qualified retirement plans are substantial participants in our financial markets and play a vital role in capital formation. As the population ages, the importance of seniors and qualified retirement plans to our markets will increase. Many employers are moving away from traditional pension plans in which the plan participants have little, if any, investment discretion, to defined contribution plans in which the participants have significant investment discretion. Thus, seniors and qualified retirements plans may be more vulnerable to securities fraud and to the effects of abusive securities fraud litigation.

The Commission believes that it would be valuable to examine generally