

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- 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 submission of responses.

#### Overview of This Information Collection:

- (1) *Type of Information Collection:* Extension of a currently approved collection.
- (2) *Title of the Form/Collection:* Grant Management System Online Application
- (3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. The Office of the Chief Information Officer, Office of Justice Programs, United States Department of Justice is sponsoring the collection.
- (4) *Affected public who will be as or required to respond, as well as a brief abstract:* Primary: State, Local, or Tribal Government; Other: Individuals or households, Business or other for-profit, Not-for-profit institutions, Farms, and Federal Government. The information is collected via the SF-424 as a means to determine the validity of a request for funding. The Grant Management System collects this information as respondents apply for funding from various solicitations posted by program offices in the agency.
- (5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* The estimated number of respondents are 4,000. The average number of respondents is based on the awards made each year, and the number of applications received, approved, and reviewed per fiscal year. The estimated amount of time that a respondent spends completing the forms is approximately 4 hours.
- (6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated total estimated

annual hour burden associated with this collection is 16,000 hours.

If additional information is required contact: Brenda E. Dyer, Clearance Officer, Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: June 30, 2004.

**Brenda E. Dyer,**

*Clearance Officer, Department of Justice.*  
[FR Doc. 04-15392 Filed 7-6-04; 8:45 am]

**BILLING CODE 4410-18-P**

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#### DEPARTMENT OF LABOR

##### Employee Benefits Security Administration

[Exemption Application Nos. D-11008 through D-11012]

##### Withdrawal of Notice of Proposed Exemption Involving Comerica Bank and Its Affiliates (Collectively, Comerica); Located in Detroit, MI

In the **Federal Register** dated May 4, 2004 (69 FR 24671), the Department of Labor (the Department) published a notice of proposed exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 and from certain taxes imposed by the Internal Revenue Code of 1986. The notice of proposed exemption, for which relief had been requested, concerned the acquisition, holding and disposition of Comerica Incorporated Stock by Index and Model-Driven Funds managed by Comerica.

By letter dated June 7, 2004, Comerica Bank informed the Department that it wished to withdraw the notice of proposed exemption.

Accordingly the notice of proposed exemption is hereby withdrawn.

Signed at Washington, DC, this 1st day of July, 2004.

**Ivan L. Strasfeld,**

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

[FR Doc. 04-15363 Filed 7-6-04; 8:45 am]

**BILLING CODE 4510-29-M**

#### DEPARTMENT OF LABOR

##### Employee Benefits Security Administration

[Prohibited Transaction Exemption 2004-08; Exemption Application No. D-11079 et al.]

##### Grant of Individual Exemptions; Kinder Morgan, Inc.

**AGENCY:** Employee Benefits Security 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).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

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

##### Statutory Findings

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

- (a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

#### **Kinder Morgan, Inc.**

[Prohibited Transaction Exemption 2004-08; Exemption Application Number D-11079]

#### *Exemption*

##### Section I. Transactions Involving Contributions In-Kind

The restrictions of sections 406(a)(1)(E), 407(a)(2), 406(b)(1), and 406(b)(2) of the Act shall not apply to:

(1) The acquisition of publicly traded Employer Stock by the Trusts through the voluntary in-kind contribution (the Contribution) of such Stock by the Employer for the purpose of pre-funding welfare benefits provided by the Plans; and (2) the holding by the Trusts of Employer Stock acquired pursuant to a Contribution, provided that:

(a) Each Contribution is authorized pursuant to, and made in conformity with, all relevant provisions of each affected Plan;

(b) The Plans and/or Trusts do not pay any amount or type of consideration whether in cash or other property (including the diminution of any Employer obligation to fund a Plan) for Employer Stock contributed in-kind by the Employer;

(c) Each Contribution is voluntary and unrelated to any Employer obligation to fund a Plan;

(d) The Plans do not cede any right to receive a cash contribution from the Employer as a result of any Contribution made to any Plan;

(e) The Plans and/or Trusts do not pay any fees or commissions in connection with any Contribution; and

(f) Each condition set forth below in Section II is satisfied.

##### Section II. Conditions

The exemption is conditioned upon the adherence by the Employer to the material facts and representations described herein and in the notice of proposed exemption, and upon the satisfaction of the following requirements:

(a) Only Employer Stock that constitutes "qualifying employer securities" (QES), as such term is set forth in section 407(d)(5) of the Act, will be transferred by the Employer to a Trust pursuant to a Contribution;<sup>1</sup>

<sup>1</sup> Section 407(d)(5) of the Act provides that the term "qualifying employer security" means an employer security that is stock or a marketable obligation (as defined in subsection (e)). After

(b) Employer Stock transferred by the Employer on behalf of a Plan will thereafter be held by the Trust (or Trusts) for the purpose of funding welfare benefits for the participants and beneficiaries of such Plan;

(c) Employer Stock contributed to, or otherwise acquired by, a Trust will be held in a separate account (an Account) under such Trust;

(d) The appropriate fair market value of any Employer Stock contributed by the Employer to a Trust will be established by an Independent Fiduciary, as such term is defined in section III(c) of this exemption;

(e) The Independent Fiduciary will represent the interests of the Plans for all purposes related to each Contribution for the duration of the Trust's holding of such Employer Stock, and will authorize the trustee of each Trust to accept Employer Stock pursuant to a Contribution only after such Independent Fiduciary determines, at the time of the transaction, that such transaction is feasible, in the interest of the affected Plans, and protective of the participants and beneficiaries of such Plans;

(f) The Independent Fiduciary will: (1) Verify that the price of Employer Stock contributed by the Employer is appropriate and, thereafter, monitor the Employer Stock and have sole responsibility for the ongoing management of the Accounts; and (2) take whatever action is necessary to protect the rights of the Plans funded by the Trusts, including, but not limited to, the making of all decisions regarding the acceptance and acquisition of Employer Stock contributed by the Employer, the retention and any disposition of such Stock, and the exercise of any voting rights associated with such Stock;

(g) With certain exceptions described in paragraphs (h) and (i) below, the total amount of: (1) Employer Stock; (2) qualifying employer real property (QERP), as defined by section 407(d)(4) of the Act; and (3) QES other than the Employer Stock (collectively, the Limited Assets) held by each Plan shall not comprise more than twenty-five percent (25%) of the fair market value of the assets held by such Plan as

December 17, 1987, in the case of a plan other than an individual account plan, stock is considered a "qualifying employer security" only if such stock satisfies the requirements of subsection 407(f)(1) of the Act. Section 407(f)(1) of the Act provides that stock satisfies such requirement if, immediately following the acquisition of such stock—(A) no more than 25 percent of the aggregate amount of stock of the same class issued and outstanding at the time of acquisition is held by the plan, and (B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer.

determined on the date of each such transaction;

(h) For purposes of calculating the percentage limitation described in paragraph (g) of this section, and to the extent the conditions of Prohibited Transaction Exemption (PTE) 91-38 have been met,<sup>2</sup> Employer Stock will not constitute a "Limited Asset" to the extent that such Employer Stock:

(1) Is held by an unrelated common or collective trust fund maintained by an independent bank in which any of the Plans through the Trusts may invest; and

(2) Has a total fair market value that does not exceed five percent (5%) of the fair market value of each such common or collective trust fund;

(i) Notwithstanding the requirement set forth in paragraph (g) above, the amount of Limited Assets held by a Plan may only exceed 25% of the total assets held by such Plan where:

(1) The Limited Assets appreciate in value at a rate that is greater than the rate attributable to the Plan's non-Limited Assets, and such difference in rates causes the value of the Limited Assets to exceed 25% of the Plan's total asset value; or

(2) The non-Limited Assets have declined in value at a rate that is greater than the rate attributable to the Plan's Limited Assets, and such difference in rates causes the value of the Limited Assets to exceed 25% of the Plan's total asset value; and

(j) At no time will any of the assets of the Trusts revert to the use or benefit of the Employer.

##### Section III. Definitions

(a) The term "Employer" means Kinder Morgan, Inc., any successor to Kinder Morgan, Inc., and/or any affiliates of Kinder Morgan, Inc.;

(b) The term "Employer Stock" means shares of publicly traded common stock of the Employer and includes any replacement publicly traded shares of such stock;

(c) The term "Independent Fiduciary" means W.H. Reaves & Company Investment Management only to the extent that W.H. Reaves & Company Investment Management: (1) Is an investment manager; (2) is independent of and unrelated to the Employer; and (3) acts solely on behalf of the Plans with respect to each Contribution. For purposes of this exemption, W.H. Reaves & Company Investment

<sup>2</sup> PTE 91-38 (56 FR 31966 (July 12, 1991)) requires, among other things, that the interests of a plan in an unrelated common or collective trust fund may not exceed ten percent (10%) of the total of all assets in such common or collective trust fund.

Management will not be deemed to be independent of and unrelated to the Employer if (i) W.H. Reaves & Company Investment Management directly or indirectly controls, is controlled by or is under common control with the Employer; or (ii) the Employer pays W.H. Reaves & Company Investment Management an amount of income during the fiduciary's current tax year that exceeds one percent (1%) of such fiduciary's gross income (for federal income tax purposes) over its prior tax year;

(d) The term "Plan" means an employee welfare benefit plan maintained by the Employer; and

(e) The term "Trust" means a trust which is qualified under Section 501(c)(9) of the Code, and established for the purpose of funding life, sickness, accident, and other welfare benefits for the participants and beneficiaries of the Plans.

#### Written Comments

Subsequent to the publication of the notice of proposed exemption (the Notice), Kinder Morgan, Inc. (hereinafter, either Kinder Morgan or the Applicant) notified the Department that it selected W.H. Reaves & Company Investment Management to act as the Independent Fiduciary.

The Department received two written comments in response to the Notice. The first written comment inquired: (1) Does the contribution of stock by Kinder Morgan limit Kinder Morgan's liability to fund the Plan; (2) What purpose does the proposed exemption serve; (3) Are the transactions described in the proposed exemption just a "scheme;" (4) Has the Securities and Exchange Commission (the SEC) reviewed the proposed transactions; and (5) Does Kinder Morgan have to contribute more shares if the value of the previously contributed shares significantly decreases?

The Applicant responded to (1) above as follows: Kinder Morgan is not required to pre-fund the Plans except for required contributions made as part of certain rate agreements with the Federal Energy Regulatory Commission.<sup>3</sup> Kinder Morgan is required to make contributions to the Plans only as benefit payments become due. The contribution of Employer Stock

increases the assets in the Plan. This increases Kinder Morgan's ability to make benefit payments in the future. These contributions do not limit Kinder Morgan's liability to fund the Plan.

The Applicant responded to (2) above as follows: Kinder Morgan desires to pre-fund the Plans in order to provide both current and future eligible participants (and their beneficiaries) with greater assurance that funds will be available in future years to make benefit payments. This desire to pre-fund (rather than utilizing a "pay-as-you-go" approach) should be perceived very positively by eligible participants. Pre-funding eliminates the risk associated with having company general asset funds available in future years to make benefit payments.

With respect to (3) above, Kinder Morgan represents that there is no "scheme" involved with its prohibited transaction exemption request. According to the Applicant, contributions of Employer Stock will enable the Plans to more securely fund benefit payments in the future. In response to (4) above, Kinder Morgan states that the requested exemption does not affect the SEC's jurisdiction. With respect to (5) above, Kinder Morgan represents that the purpose of the prohibited transaction exemption request is to increase the amount of assets that would otherwise be contributed to the Plans by pre-funding the Plans with additional contributions of Employer Stock; but since any contributions of Employer Stock into the Plans are voluntary Kinder Morgan contributions, no additional contributions are required if previously contributed Employer Stock shares decrease in value.

The other written comment expressed general concern regarding the transactions described in the proposed exemption. In response to this comment, Kinder Morgan states that the contributions of Employer Stock described in the proposed exemption are voluntary. Once made, all Employer Stock contributed in-kind will be subject to the control of an Independent Fiduciary who will represent the interests of the Plans for all purposes with respect to the Employer Stock for the duration of the Trusts' holding of any of such Employer Stock as Plan assets. Kinder Morgan represents that no assets of any of the Trusts may be used except for the exclusive purpose of providing life, sickness, accident, and other benefits covered under the Code to Kinder Morgan employees, retirees, and their dependents and beneficiaries and for reasonable expenses.

In addition, the Applicant represents that the Independent Fiduciary is reputable and qualified as an investment manager. The Applicant states that: (1) The Independent Fiduciary is and will remain independent of, and unrelated to, Kinder Morgan; and (2) the Independent Fiduciary's income from Kinder Morgan will not represent a significant percentage (*i.e.*, not more than one percent) of its total income. The Applicant further represents that the requested transactions are structured so that: (1) The Plans will not give up any rights to cash or other property in connection with the acceptance of the Employer Stock contributions; (2) no consideration will be paid for Employer Stock contributed in-kind; (3) no obligation to pre-fund welfare benefits will be satisfied by the contribution of Employer Stock; (4) the Independent Fiduciary will be authorized to sell the Employer Stock at any time; (5) the Plans will pay no commissions in connection with the acquisition of the Employer Stock; (6) acceptance of the Employer Stock will be consistent with the guidelines and asset allocation policies applicable to the Trusts; and (7) the Employer Stock will be subject to no restrictions on marketability and fully transferable.

Accordingly, after full consideration and review of the entire record, including the written comments, the Department has determined to grant the exemption, as modified herein. The comments submitted by the commentators to the Department and the Applicant's response thereto has been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice published on June 24, 2003 (68 FR 37534).

**FOR FURTHER INFORMATION CONTACT:** Christopher Motta of the Department, telephone (202) 693-8544. (This is not a toll-free number.)

<sup>3</sup> As stated in the proposed exemption, Kinder Morgan is currently subject to two rate agreements (the Rate Agreements) that require the Employer to make annual cash contributions of specified amounts to a Trust for an indefinite period of time. The Applicant states that all of the contributions made by Kinder Morgan to satisfy the funding requirements under the Rate Agreements will be accounted for separately.

**Landerholm, Memovich, Lansverk & Whitesides, P.S. 401(k) Profit Sharing Plan (the Plan) Located in Vancouver, WA**

[Prohibited Transaction Exemption 2004-09; Exemption Application No. D-11132]

*Exemption*

Section I. Covered Transactions

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code<sup>4</sup> shall not apply, effective January 1, 1998, to the past acquisition by the Plan, through its real estate contract fund (the Fund), of real estate mortgage contracts (the Contracts) from American Equities, Inc. (AE), a party in interest with respect to the Plan.

In addition, 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 (1) future acquisition by the Plan, through the Fund, of additional Contracts from AE; (2) the sale by the Plan of any of the Contracts to AE; and (3) the exchange by the Plan of certain Contracts with AE for other AE contracts and/or cash.

Section II. General Conditions

This exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following general conditions:

(a) Any acquisition, sale or exchange is approved in advance by the Plan's Trustees (the Trustees), who are independent of AE and the borrowers. Furthermore, the terms of each transaction between the Plan and AE involving the Contracts is not less favorable to the Plan than those terms generally available in an arm's length transaction between unrelated parties.

(b) The transactions are not a part of an agreement, arrangement or understanding designed to benefit AE.

(c) For purposes of an acquisition, sale or exchange, the cost of a Contract does not exceed its fair market value, as determined by the Plan's Trustees, using an objective appraisal methodology, and the yield on all Contracts purchased, sold or exchanged exceeds the average yield of comparable mortgage contract loans by not less than 1%.

(d) The aggregate fees paid to AE for its activities as loan servicing agent for

the Plan at all times do not exceed "reasonable compensation" within the meaning of section 408(b)(2) of the Act.

(e) No investment management, advisory, underwriting fees or sales commissions are paid by the Plan to AE or any of its affiliates with regard to the Plan's purchase, sale or exchange of a Contract.

(f) All Contracts acquired by the Plan satisfy the Trustees' selection criteria. In this regard, at the time of the transaction:

(1) The loan to value ratio is 75% or less;

(2) The "Total Return" on the Contract is at least 1.00% above the prevailing 30 year home mortgage rate;

(3) The purchaser of the property provides a clean payment history and a personal credit report of at least 12 months' duration;

(4) The property is in good condition with no defects discovered upon inspection;

(5) A clean title report is required; and

(6) A first position lien is obtained on the property.

(g) For prospective purchases or exchanges of Contracts by or between the Plan and AE,

(1) The Trustees engage an independent and unrelated consultant (the Independent Consultant), trained and experienced in real estate financing, to perform a written annual review of the Plan's Contract selection process to assure that—

(i) The selection process produces a yield to the Plan consistent with comparable market returns for first mortgage investments by direct federally insured lenders in the Trustees' market area;

(ii) The selection process permits only the purchase of Contracts which are not subordinated to other indebtedness; and

(iii) The selection process incorporates standards for loan to value ratio and borrower credit worthiness appropriate for qualified retirement plan investments; and

(2) No Contracts are purchased or exchanged in any year until the Independent Consultant's review has been issued, and the Independent Consultant has the authority to require that the Plan modify or replace the Selection Criteria utilized by the Plan as a condition to issuance of its review.

(h) The Trustees maintain for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons, as described in (i) to determine whether the conditions of this

exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due

to circumstances beyond the control of the Trustees, the records are lost or destroyed prior to the end of the six year period; and

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

(i) Except as provided in (i)(1)–(2) and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (h) above shall be unconditionally available at their customary location for examination during normal business hours by—

(1) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission;

(2) Any fiduciary of the Plan who has authority to acquire or dispose of any assets of the Plan, or any duly authorized employee or representative of such fiduciary; and

(3) Any participant or beneficiary of the Plan or duly authorized employee or representative of such participant or beneficiary.

**EFFECTIVE DATE:** This exemption is effective as of January 1, 1998 with respect to the Plan's past acquisition of the Contracts and effective as of the date of publication of the final exemption in the **Federal Register** for further acquisitions, sales or exchanges of additional Contracts by the Plan.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on March 24, 2004 at 69 FR 13884.

Written Comments

During the comment period, the Department received two written comments. The first comment letter was submitted by a former employee of Landerholm, Memovich, Lansverk & Whitesides (Landerholm), the Plan sponsor. The second comment letter was submitted by Landerholm. Discussed below are the comments, including the responses made by Landerholm to the first commenter and the Department's responses to Landerholm's comment.

Former Employee's Comments

1. *Arm's Length Transaction.* The former employee's first comment concerned whether "the Fund [would]

<sup>4</sup> For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to corresponding provisions of the Code.

maintain an arm's length Plan." Landerholm notes that although the Plan has always functioned on an arm's length basis with respect to transactions with AE, all discretion to purchase either administrative services or Contracts from AE has resided with the Trustees, who are wholly independent of AE. Landerholm also points out that the exemption would add an Independent Consultant to review the decision-making parameters employed by the Trustees in selecting investment Contracts. In Landerholm's view, the addition of the Independent Consultant would not compromise the arm's length nature of the transactions.

In addition, Landerholm wishes to remind the commenter that the changes resulting from the exemption relate only to the Fund, which is an investment option offered to participants under the Plan. Should the commenter have concerns about the arm's length nature of transactions involving the Fund, Landerholm suggests that the commenter could pursue other investment alternatives offered under the Plan.

2. *AE's Ownership Interests.* The commenter's second comment concerned the ownership status of AE and whether any Landerholm attorneys own interests in AE. Landerholm states that AE is a wholly independent company owned by Mr. Ross Niles and Ms. Maureen Wile. Landerholm also explains that none of its attorneys, nor their relatives or related entities, have any ownership interest in AE.

3. *Impact of Contract Default on Plan.* The commenter's third comment concerned the impact of a Contract failure upon her retirement benefits. Landerholm explains that there would be no adverse effect on the commenter's retirement benefits since the commenter has not invested any of her account balance in the Fund. On a more generic basis, Landerholm notes that any investments in mortgages, deeds of trust or other real estate financing instruments may involve some degree of risk of default for delayed performance by the borrower. However, Landerholm states that the Trustees have worked diligently to minimize this risk by the application of stringent underwriting standards to evaluate the borrower, the Contracts being purchased, and the incidences of default. In addition, Landerholm asserts that the Plan has intentionally diversified its investment in the Fund among a large number of Contracts to minimize the risk that default on any one Contract would seriously harm the Fund or its cash flow. Landerholm explains that historically, Contracts have either been

refinanced or foreclosed upon. Although these processes may temporarily delay cash flow on a particular Contract, Landerholm indicates that the diversification of Contracts and their maturities is intended to minimize or eliminate the impact on Plan distributions to participants. Finally, Landerholm believes that after implementing the exemptive safeguards, the Plan's processes for selecting, holding and monitoring the Contracts provides a high degree of protection for those participants choosing to invest in the Fund.

#### Landerholm's Comments

1. *Current Plan Trustees.* On page 13885 of the proposed exemption, the fourth sentence of Representation 1 states "The present Trustees of the Plan are Irwin C. Landerholm, T. Randall Grove, and Philip Janney, all of whom are current Landerholm shareholders." Landerholm wishes to note that Mr. Landerholm is retired and is no longer a shareholder. Landerholm suggests rewording the sentence to read as follows: "The present Trustees of the Plan are Irwin C. Landerholm, T. Randall Grove, and Philip Janney. Mr. Grove and Mr. Janney are current Landerholm shareholders, and Mr. Landerholm is a former Landerholm shareholder. The Department notes this clarification to the proposed exemption."

2. *Fund's Ownership Interest in the Contracts.* On page 13885 of the proposal, the third sentence of Representation 2 states "All of the Contracts are "whole" Contracts that are held in the name of the Fund." Landerholm wishes to clarify that all Contracts, whether "whole" Contracts or partial interests in Contracts are held in the name of the Fund, are secured by a first mortgage, deed of trust, or equivalent first security, and provide the Plan with the right to proceed with foreclosure in the event of a default by the borrower. In this regard, Landerholm states that there are two types of co-ownerships involved in the Contracts. For instance, the Plan may hold either a stream of a fixed number of payments (the Stream) or an undivided interest in a Contract. Where a Stream is involved, Landerholm explains that the Plan receives the first of (x) number of Contract payments. Any remaining payments will be made to the seller of the Plan, *i.e.*, AE. Currently, Landerholm indicates the Plan holds thirteen Contracts which break down as follows: 6 entire Contracts, 1 undivided interest in a Contract, 4 entire Streams, and 2 undivided interests in a Stream.

Landerholm further explains that in all of the co-ownership situations, the Plan's interest in the Contracts is secured by a first real estate mortgage or deed of trust. Upon default by the borrower on the underlying Contract, Landerholm indicates that the Contract documents provide the Plan (together with any undivided co-owner) the right to foreclose on the underlying property. If the Plan's interest is in a Stream, the Plan must give thirty (30) days notice to AE, as seller and holder of any residue interest after the Stream. Up until there is a foreclosure of the property, Landerholm states that AE can pay the Plan an amount equal to the entire Stream (including accrued interest), together with all costs and expenses incurred by the Plan, and thereby protect its residuary interest. If such a payoff occurs, Landerholm represents that the Plan is made whole. However, if AE does not pay off the entire Stream, then the Plan will complete the foreclosure process, sell the underlying property and retain the entire net foreclosure proceeds as a Plan asset. Thus, in the case of an undivided interest, Landerholm states that the Plan (acting in concert with the joint owner) has the same right it would if the Plan were the sole owner of the Contract with first security position. In the case of a Stream, other than AE's ability to pay off the Plan to protect AE's residuary interest, Landerholm explains that the Plan has the same first lien position and foreclosure rights that it would have if it were the whole Contract holder with first security position.

Landerholm further notes that as a technical matter, all of the Streams involve AE, a party in interest, since AE retains a residuary interest after all of the payments of the Stream have been made. Other than AE's residuary interest, Landerholm points out that only two active Contracts have a party in interest, Mr. Irwin Landerholm, a co-trustee of the Plan, as a co-owner. Landerholm explains that at the time the Plan purchased its interests in these Contracts, the Fund lacked sufficient free cash to purchase full Contracts. Therefore, Mr. Landerholm agreed to purchase a fifty percent undivided interest in one undivided Contract and one undivided Stream to facilitate the Plan's investment of the cash it did have available in the other fifty percent interest.

Landerholm further states that Mr. Landerholm's 50% co-ownership interest in the Contracts is identical to the Plan's 50% interest. In this respect, Landerholm indicates that Mr. Landerholm does not receive payment or distribution preferences. Until the

time the Contracts are paid, or Mr. Landerholm sells or otherwise transfers his interest to a third party, all payments under the Contracts are allocated equally between the Plan and Mr. Landerholm. Landerholm further represents that in the event of a Contract foreclosure the Plan and Mr. Landerholm have a joint first security interest, and either party can instigate the foreclosure proceeding. In this regard, Landerholm notes that Mr. Landerholm would not receive distribution or payment preferences of any kind.

Landerholm further represents that with respect to Mr. Landerholm's current fiduciary status, whether as Trustee, Real Estate Committee member, or otherwise, Mr. Landerholm will recuse himself from any and all decision making by the relevant fiduciary body with respect to matters involving any payment default and/or foreclosure on either of the Contracts in which Mr. Landerholm is co-owner. In addition, Landerholm notes that one of the Contracts in which Mr. Landerholm is co-owner will be fully paid off in a matter of a few months.

Landerholm explains that both it and Mr. Landerholm desire to complete Mr. Landerholm's retirement from his remaining Plan functions (principally as a Trustee and Real Estate Committee member) shortly after this exemption is granted. Upon that severance, Landerholm states that Mr. Landerholm will no longer be a fiduciary, and thus, he will have no discretionary authority over any Plan decision, including whether to proceed with a Contract foreclosure. The Department acknowledges the foregoing clarification to the proposal.<sup>5</sup>

3. *Federally-Insured Mortgage Lenders.* On page 13885 of the proposed exemption, the fourth sentence of Representation 2 states "The loans do not represent loans from direct, federally-insured lenders, and as a result, they normally trade at a discount

<sup>5</sup> The Department notes that Mr. Landerholm will recuse himself from all decisions regarding payment default and/or foreclosure on either of the Contracts in which he is a co-owner with the Plan. Although this issue may become moot due to Mr. Landerholm's contemplated retirement and resignation as Trustee and Real Estate Committee member, the Department wishes to point out that where a plan fiduciary removes himself from all consideration by the plan of whether or not to engage in a transaction, and by not otherwise exercising, with respect to the transaction, any of the authority, control or responsibility which makes such person a fiduciary, and absent any arrangement, agreement or understanding with respect to who will render the decision concerning the propriety of the transaction, the fiduciary may avoid engaging in an act described in section 406(b)(1) and (b)(2) of the Act. (See ERISA Advisory Opinion 97-72A, October 10, 1979.)

to the current federally-insured lending rates." Landerholm explains that while it agrees with this statement, it would like to emphasize that the Contracts must provide a premium return over current rates due to the fact that they are not federally insured. Landerholm proposes that the sentence be reworded to read "The loans do not represent loans from direct, federally-insured lenders, and as a result, the Contracts must normally provide a return which is superior to the current federally-insured lending rates." The Department notes this clarification to the proposed exemption.

4. *Contract Purchase Price.* On page 13885 of the proposed exemption, the second sentence of Representation 4 reads "AE acquires Contracts at a discount and sells them at less than the federally-insured lending rate on the secondary market." Landerholm proposes the sentence be reworded to read "AE sells the Contracts at a discount to reflect the fact that the return must be at a premium to the federally-insured lending rate." The Department acknowledges this clarification to the proposal.

5. *Prospective Contract Disclosure to Plan.* On page 13885 of the proposed exemption, the fifth sentence of Representation 4 reads "Each package prepared by AE included relevant documentation and performance history, as well as an independent appraisal by a knowledgeable realtor in the property's locale, of the underlying real estate securing the loans." Landerholm states that under Washington law special licensure is required to provide an "appraisal" and a realtor is not normally licensed to provide "appraisals". As a result, Landerholm proposes the sentence be reworded to read "Each package prepared by AE included relevant documentation and performance history, as well as an independent market evaluation by a knowledgeable realtor in the property's locale, of the underlying real estate securing the loans." The Department notes the foregoing clarification to the proposal.

6. *Contract Yield.* On page 13886 of the proposed exemption, the third bullet point of Representation 9 reads "The cost of a Contract must not exceed its fair market value, as determined by the Trustees using an objective appraisal methodology, and the yield on all Contracts purchased must exceed the average yield of comparable mortgage contract loans by no less than 1%." Landerholm notes that the Trustees focus on each Contract and the determination of yield at the time of acquisition. Therefore, Landerholm

proposes the bullet language be modified to read " \* \* \* and the yield on each Contract, determined at the time of acquisition, must exceed the average yield of comparable mortgage contract loans at that time by no less than 1%." The Department notes this clarification to the proposal.

Accordingly, after giving full consideration to the entire record, including the two comment letters, the Department has determined to grant the exemption. For further information regarding the comments and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-11132) the Department is maintaining in this case. The complete application file, as well as the comments and all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Ms. Silvia M. Quezada of the Department, telephone (202) 693-8553. (This is not a toll-free number.)

#### **DuPont Capital Management Corporation (DCMC)**

[Prohibited Transaction Exemption 2004-10; Exemption Application Nos. D-11157-D-11159]

#### *Exemption*

##### Section I. Covered Transactions

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 in kind transfer of certain debt securities (the Debt Securities) that are held in the DuPont and Related Companies Defined Contribution Plan Master Trust (the Master Trust), in which the assets of the E.I. du Pont de Nemours and Company Savings and Investment Plan (the DuPont Savings and Investment Plan), the DuPont Specialty Grains Savings Plan, and the Thrift Plan for Employees of Sentinel Transportation Company (collectively, the DuPont Plans) invest, in exchange for units in a newly-established group trust (the Group Trust), where DCMC, a wholly owned subsidiary of E.I. du Pont de Nemours and Company (DuPont), one of the sponsors of the DuPont Plans, acts as both a fiduciary for the Master Trust and the Group Trust.

## Section II. Specific Conditions

This exemption is subject to the following conditions:

(a) A fiduciary (the Independent Fiduciary), who is acting on behalf of the DuPont Plans, who is independent of and unrelated to DuPont and its subsidiaries, as defined in paragraph (e) of Section IV below, has the opportunity to review the in kind transfer of the Debt Securities that are held in the Master Trust, to the Group Trust, in exchange for units in the Group Trust, and receives, in advance of the investment by the Master Trust in the Group Trust, full written disclosures concerning the Group Trust, which include, but are not limited to the following:

- (1) A private offering memorandum describing the transaction;
- (2) A table listing management fees, as negotiated under the applicable investment management agreements, and projected costs;
- (3) A chart showing the effect of such fees and costs on an investment in the Group Trust for different amounts of Debt Securities managed in the Group Trust;
- (4) A statement of the reasons why DCMC may consider such investment to be appropriate for the DuPont Plans;
- (5) A statement on whether there are any limitations applicable to DCMC with respect to which assets of a DuPont Plan may be invested in the Group Trust and the nature of such limitations; and
- (6) Copies of the proposed and final exemption.

(b) On the basis of the foregoing information, the Independent Fiduciary authorizes, in writing, the in kind transfer of the Debt Securities that are held on behalf of the DuPont Plans in the Master Trust to a series of subtrusts under the Group Trust, in exchange for units in the Group Trust. Such authorization is to be consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act. Specifically, the Independent Fiduciary, before authorizing the transfer of assets by the DuPont Plans from the Master Trust to the Group Trust, determines that:

- (1) The terms of the in kind transfer transaction, are fair to the participants in the DuPont Plans, and are comparable to, and no less favorable than, terms obtainable at arm's length between unaffiliated parties; and
  - (2) The in kind transfer transaction is in the best interest of the DuPont Plans and their participants and beneficiaries.
- (c) No sales commissions, fees or other costs are paid by the DuPont Plans in connection with the in kind transfer transaction. Furthermore, no additional

management fees are charged to the DuPont Plans by DCMC in the Group Trust.

(d) The in kind transfer transaction is a one-time transaction for the DuPont Plans, the transferred assets constitute a *pro rata* portion of all of the assets of the DuPont Plans that are held in the total return tier portion of the DuPont Stable Value Fund (the Fund) within the Master Trust prior to the transfer.

(e) The per unit value of the units representing interests in the subtrusts created under the Group Trust that are issued to each DuPont Plan have an aggregate value that is equal to the value of the Debt Securities transferred to the Group Trust on the date of the transfer, as determined in a single valuation performed in the same manner and at the close of business on the same day in accordance with Securities Exchange Commission Rule 17a-7 under the Investment Company Act of 1940 (the 1940 Act), as amended (Rule 17a-7), (using sources independent of DCMC), and the procedures established by the Master Trust to Rule 17a-7.

(f) Fair market value of the Debt Securities for which a current market price can be obtained is determined by reference to the last sale price for transactions reported in the consolidated transaction reporting system (the Consolidated System), a recognized securities exchange, or the National Association of Securities Dealers Automated Quotation System (the NASDAQ System). If there are no reported transactions or if the Debt Securities are not quoted in the NASDAQ System, fair market value is determined based on the evaluated mean price provided by a pricing service that is independent of DCMC, or, in the absence of an evaluated mean price from an independent pricing service, based on the average of the highest current independent bid and lowest current independent offer, as of the close of business on the day of the transaction determined on the basis of reasonable inquiry from at least two market makers as shall be provided to the trustee and custodian of the stable value fund of the Master Trust. All commercial pricing sources and dealers are pre-approved by the Master Trust's investment managers. The fair market value of any illiquid Debt Securities is provided to the Independent Fiduciary by DCMC for review and approval of the objective methodology and the application of such methodology in valuing such Debt Securities.

(g) DCMC provides, within 30 days after the completion of the transaction, a confirmation statement to the

Independent Fiduciary containing the following information:

(1) The identity of each Debt Security that DCMC deemed suitable for transfer from the Master Trust to the Group Trust;

(2) The current market price of each Debt Security for purposes of the transfer, as determined on the date of such in kind transfer;

(3) The identity of each Debt Security that does not fall into at least one of the following categories: (i) a reported security; (ii) a security principally traded on an exchange; or (iii) a security quoted on the NASDAQ System;

(4) The identity of each pricing service or market maker consulted in determining the fair market value of the Debt Securities, and

(5) The aggregate dollar value of the Debt Securities that were held on behalf of the DuPont Plans in the Master Trust immediately before the in kind transfer, and the number of Group Trust units held by the Master Trust for the DuPont Plans immediately after the transfer (the related per unit value and the aggregate value).

(h) After the transfer of Debt Securities from the Master Trust to the Group Trust, the Independent Fiduciary performs a review verifying the pricing information supplied by the investment managers and the Group Trustee.

(i) The Debt Securities that are transferred from the Master Trust to the Group Trust are valued using the same methodology currently used by the Master Trust to value such securities. Similarly, the Group Trust uses the same valuation methodology.

(j) DCMC does not execute the in kind transfer transaction unless the Independent Fiduciary for the DuPont Plans consents to such in kind transfer in writing.

(k) DCMC does not execute the in kind transfer transaction unless the wrap contracts issued by certain unrelated banks and insurance companies to the Master Trust agree in advance to maintain the then-current book value for accounting purposes with respect to the assets transferred to the Group Trust. In addition, DCMC absorbs all costs associated with the commitments.

(l) Each of the DuPont Plan's dealings with the Master Trust, the Group Trust and DCMC is on a basis that is no less favorable to such Plan than dealings between the Group Trust and other holders of Group Trust units.

## Section III. General Conditions

This exemption is subject to the following general conditions:

(a) DCMC maintains for a period of six years the records necessary to enable the persons described below in paragraph (b) of this Section III to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of DCMC, the records are lost or destroyed prior to the end of the six year period, and (2) no party in interest other than DCMC shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b) below.

(b)(1) Except as provided in paragraph (b)(2) of this Section III, and notwithstanding any provisions of sections 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) The Independent Fiduciary described in paragraph (e) of Section IV; or

(iii) Any participant or beneficiary of the DuPont Plans or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraph (b)(1)(ii) and (iii) of this Section III shall be authorized to examine trade secrets of DCMC, or commercial or financial information which is privileged or confidential.

#### Section IV. Definitions

For the purposes of this exemption,

(a) The term "DCMC" means DuPont Capital Management Corporation and any affiliate of DCMC, as defined below in Section IV(b).

(b) An "affiliate" of a person includes:

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

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

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

(d) The term "relative" means a "relative," as that term is defined in

section 3(15) of the Act, (or a "member of the family," as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(e) The term "Independent Fiduciary" means a fiduciary who is: (1) Independent of and unrelated to DCMC and its affiliates, and (2) appointed to act on behalf of the Plan for all purposes related to, but not limited to, (A) the in kind transfer of the Debt Securities by the Master Trust to the Group Trust, (B) the Group Trust, in turn, transferring units equal in value to the assets of the Master Trust held in certain stable value funds. For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to DCMC if: (1) Such fiduciary directly or indirectly controls, is controlled by or is under common control with DCMC; (2) 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 for acting as an Independent Fiduciary from DCMC in connection with the transaction contemplated herein if the amount of payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decision; and (3) the annual gross revenue received by such fiduciary from DCMC and its affiliates during any year of its engagement, exceeds 5 percent (5%) of the Independent Fiduciary's annual gross revenue from all sources for its prior tax year.

(f) The term "transferable securities" means securities (1) for which market quotations are readily available (as determined under Rule 17a-7 of the 1940 Act) and (2) which are not: (i) Securities which, if distributed, would require registration under the Securities Exchange 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 Mutual 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) which are not readily distributable; (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. Notwithstanding the above, the term "transferable securities" also includes securities that are considered private placements intended for large institutional investors, pursuant to Rule 144A under the 1933 Act, which are valued by the unrelated investments managers for the DuPont Stable Value Fund, or if applicable, by the Independent Fiduciary, which will confirm and approve all such valuations.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on March 24, 2004 at 69 FR 13888.

#### Written Comments

During the comment period, the Department received two written comments and no requests for public hearing. The first comment letter was submitted by a DuPont Plan participant, who is a retired employee. The second comment letter, which was submitted by DCMC, is intended to clarify the proposal. Discussed below are both comments, including responses made by DCMC and the Department.

#### Retired Employee's Comments

1. *DCMC's Seeking Financial Relief.* The former employee's first comment concerns whether DCMC is looking for some type of financial relief. However, as discussed at some length in the exemption application, and as confirmed by the Independent Fiduciary, DCMC states that it is in no way seeking "financial relief." Rather, DCMC states that it receives no compensation (other than the reimbursement of direct expenses) for managing assets attributable to the DuPont Plans, and it anticipates that the Group Trust structure will ultimately result in lower costs for all Participating Plans.

2. *Recent Mutual Fund Scandals.* The commenter's second comment concerns his general opposition to DCMC's exemption request due to recent mutual fund activities and events occurring within the DuPont Savings and Investment Plan which he believes were not in the best interests of the Plan's participants. DCMC explains that the commenter never specifies the activities



to which he is referring, and therefore DCMC is unable to respond to the commenter's concerns in a constructive manner. DCMC indicates that it is well aware of its fiduciary responsibilities. However DCMC explains it is not aware of any recent "events" that might not be considered to be in the best interests of participants in the DuPont Plans.

3. *Divestment Activities.* The commenter's third comment expresses concern over "activities in divestment-associated businesses [sic] units (*i.e.*, Invista to Koch Industries) that are not identified in the notice." DCMC believes that the commenter's concerns on divestment issues relate solely to DuPont corporate matters and do not relate to plan administration or to the proposed exemption.

#### DCMC's Comments

1. *Correction of Name of DCMC.* On page 13888 of the proposed exemption, DCMC requests that the Department make a correction to its listed name. DCMC states that its proper name is "DuPont Capital Management Corporation."

Accordingly, in response to this comment, the Department has revised DCMC's listed name to reflect the correct name for this entity.

2. *Valuation of Debt Securities Held in the Master Trust.* On page 13888 of the proposal, Section II(f) specifies how valuations are to be determined for Debt Securities for which a current market price can be obtained, as well as for Debt Securities for where no current market price is available. Section II(f) requires, in relevant part, that the fair market value of Debt Securities for which a current market price is unavailable be determined by taking the average of the highest current independent bid and lowest current independent ask prices as of the close of business as provided to the Master Trust's investment managers and the trustee of the Group Trust by three independent third party commercial pricing sources.

DCMC represents that it has been informed by the custodian for the DuPont Stable Value Fund of the Master Trust that current industry practice for valuing such securities involves reliance on values provided by independent pricing services. DCMC states that the pricing service used by the custodian develops prices using proprietary vendor models in conjunction with quoted values received from in house trading desks where available. In this connection, DCMC notes that the Department has acknowledged reliance on a pricing service as appropriate and consistent with standard industry

practice in Prohibited Transaction Exemption (PTE) 2002-21, an individual exemption issued to the Pacific Investment Management Company (67 FR 14988, March 28, 2002 and 67 FR 36037, May 22, 2002). Accordingly, DCMC requests that the Department modify the second sentence of Section II(f) of the proposal to read as follows:

\* \* \* If there are no reported transactions or if the Debt Securities are not quoted in the NASDAQ System, fair market value is determined based on the evaluated mean price provided by a pricing service that is independent of DCMC, or, in the absence of an evaluated mean price from an independent pricing service, based on the average of the highest current independent bid and lowest current independent offer, as of the close of business on the day of the transaction determined on the basis of reasonable inquiry from at least two market makers as shall be provided to the trustee and custodian of the stable value fund of the Master Trust \* \* \*

In response to this comment, the Department has revised Section II(f) of the final exemption.<sup>6</sup>

3. *Former DuPont Affiliate Plans.* On page 13890 of the proposed exemption, Representation 5 identifies a defined contribution plan whose sponsoring employer was formerly affiliated with DuPont. DCMC requests that the proposed exemption be modified to refer to the sponsor as the "Former DuPont Affiliate" but not by its actual name. Furthermore, DCMC requests that the Department refer to the sponsor's respective plan as the "Former DuPont Affiliate Plan."

In response to this comment, the Department acknowledges these clarifications to the proposal.

4. *State Street Bank and Trust (SSB) as an Issuer of Wrap Contracts.* On page 13890 of the proposed exemption, Footnote 16 states, in part, that SSB, the directed trustee of the Group Trust, has not issued wrap contracts to the DuPont Plans nor is it anticipated that SSB will be issuing wrap contracts to Plans that invest in the Group Trust. However, DCMC wishes to clarify that in the past, SSB has issued wrap contracts to the DuPont Plans that may invest in the Group Trust and may continue to do so in the future. DCMC believes that as a directed trustee of the Group Trust, SSB would have no investment discretion over Plan assets. Since SSB would not use any of the authority, control or responsibility that makes it a fiduciary

to cause a DuPont Plan to purchase wrap contracts from SSB, therefore, DCMC believes such a purchase would not violate section 406(b) of the Act. However, DCMC explains that SSB would be a party in interest to the Plans participating in the Group Trust, including the DuPont Plans, by reason of its provision of services to such Group Trust. Therefore, DCMC explains that any purchase of a wrap contract by SSB on behalf of these participating Plans would need to comply with the requirements of one or more prohibited transaction exemptions, for example, class PTE 84-14 (49 FR 9494, March 13, 1984) and/or class PTE 96-23 (61 FR 15975, April 10, 1996).

In response to this comment, the Department notes this clarification to the proposal.

5. *Reference to "Board of Trustees."* On page 13893 of the proposed exemption, Representation 15 describes the qualifications, duties and written determinations made by U.S. Trust Company, N.A. (U.S. Trust), the Independent Fiduciary for the DuPont Plans with respect to the proposed in kind transfer transaction. Paragraph (b) of Representation 15, which pertains to conclusions reached by U.S. Trust in a December 17, 2003 written report, indicates that the Debt Securities associated with the proposed transaction will be valued in accordance with pricing procedures "established by the Master Trust's Board of Trustees." DCMC explains that this reference should be to the "custodian of the Stable Value Fund of the Master Trust."

In response to this comment, the Department notes this clarification to the proposal.

6. *Cost Savings.* On page 13893 of the proposed exemption, the second paragraph of Representation 15 refers to how U.S. Trust will conclude that the proposed exemption transaction is in the interest of the participants and beneficiaries of the DuPont Plans since the anticipated costs savings are likely to be material. DCMC states that there is no need to modify this description of U.S. Trust's conclusion. However, DCMC would like to emphasize that the anticipated cost savings are expected to be realized over a period of time rather than immediately.

In response to this comment, the Department acknowledges this clarification to the proposed exemption.

Accordingly, after giving full consideration to the entire record, including the comment letters, the Department has determined to grant the exemption. For further information regarding the comments and other matters discussed herein, interested

<sup>6</sup> The Department notes that, consistent with the fiduciary responsibility provisions of section 404 of the Act, it is ultimately the responsibility of the fiduciaries for the DuPont Plans to determine whether the Debt Securities are appropriately valued.

persons are encouraged to obtain copies of the exemption application file (Exemption Application Nos. D-11157 through D-11159) the Department is maintaining in this case. The complete application file, as well as the comments and all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Mr. Arjumand A. Ansari of the Department at (202) 693-8566. (This is not a toll-free number.)

**Pan-American Life Insurance Corporation (Pan-American) Located in New Orleans, LA**

[Prohibited Transaction Exemption 2004-11; Exemption Application No. D-11202]

*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 cash sale, on November 17, 2003, by certain defined contribution plans (the Plans), which invest in Separate Account V (the Account), a pooled separate account, whose assets are invested in units of the Dreyfus-Certus Stable Value Fund (the Fund), of Fund units, to Pan-American, the Account's investment manager and a fiduciary with respect to such Account.

This exemption is subject to the following conditions:

(a) Prior to the transaction (the Transaction), a fiduciary (the Independent Fiduciary), acting on behalf of the Plans, who was independent of and unrelated to Pan-American and its subsidiaries, determined that the subject Transaction (1) was fair to the participants in the Plans investing in the Account; (2) was comparable to, and no less favorable than, terms obtainable at arm's length between unaffiliated parties; and (3) was in the best interest of the Plans investing in the Account and their participants and beneficiaries.

(b) The Independent Fiduciary monitored the Transaction on behalf of the Plans investing in the Account.

(c) Subsequent to the closing of the Transaction, the Independent Fiduciary performed a post-Transaction review, which included, among other things, a determination that the fair market value of the Plan's interests in the Account as

of November 14, 2003, as determined by the Fund trustee, was accurate and consistent with the Fund's valuation method.

(d) No sales commissions, fees or other costs were paid by the Plans in connection with the Transaction.

(e) The sale was a one-time transaction for cash.

(f) The fair market value of the units was determined in good faith by The Dreyfus Trust Company, an unrelated party, at the time of the Transaction.

**EFFECTIVE DATE:** This exemption is effective as of November 17, 2003.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on March 24, 2004 at 69 FR 13900.

**FOR FURTHER INFORMATION CONTACT:** Mr. Arjumand A. Ansari of the Department at (202) 693-8566. (This is not a toll-free number.)

**Svenska Cellulosa Aktiebolaget SCA (publ) (SCA) Located in Stockholm, Sweden**

[Prohibited Transaction Exemption 2004-12; Exemption Application Nos. L-11217 through L-11219]

*Exemption*

The restrictions of section 406(a) and (b) of the Act shall not apply to the reinsurance of risks and the receipt of premiums therefrom by SCA Reinsurance Limited (SCA Re), through its USVI Branch, in connection with insurance contracts sold by Aetna, Inc. (Aetna), or any successor insurance company to Aetna which is unrelated to SCA, to provide long-term disability, accidental death and dismemberment, and basic and supplemental life insurance benefits to participants in programs maintained by SCA North America, Inc. (SCA North America) to provide such benefits to its employees (the Plans),<sup>7</sup> provided the following conditions are met:

(a) SCA Re—

(1) Is a party in interest with respect to the Plans by reason of a stock or partnership affiliation with SCA that is described in section 3(14)(E) or (G) of the Act;

(2) Is licensed to sell insurance or conduct reinsurance operations in at least one State as defined in section 3(10) of the Act;

(3) Has obtained a Certificate of Authority from the Insurance Commissioner of its domiciliary state that has not been revoked or suspended;

(4)(A) Has undergone an examination by an independent certified public accountant for its last completed taxable year immediately prior to the taxable year of the reinsurance transaction; or

(B) Has undergone a financial examination (within the meaning of the law of its domiciliary State, the U.S. Virgin Islands)<sup>8</sup> by the Insurance Commissioner of the State within 5 years prior to the end of the year preceding the year in which the reinsurance transaction occurred; and

(5) Is licensed to conduct reinsurance transactions by a State whose law requires that an actuarial review of reserves be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority; and

(b) The Plans pay no more than adequate consideration for the insurance contracts;

(c) No commissions are paid by the Plans with respect to the direct sale of such contracts or the reinsurance thereof;

(d) In the initial year of any contract involving SCA Re, there will be an immediate and objectively determined benefit to the Plans' participants and beneficiaries in the form of increased benefits;

(e) In subsequent years, the formula used to calculate premiums by Aetna or any successor insurer will be similar to formulae used by other insurers providing comparable coverage under similar programs. Furthermore, the premium charge calculated in accordance with the formula will be reasonable and will be comparable to the premium charged by the insurer and its competitors with the same or a better rating providing the same coverage under comparable programs;

(f) The Plans only contract with insurers with a rating of A or better from A.M. Best Company. The reinsurance arrangement between the insurers and SCA Re will be indemnity insurance only, *i.e.*, the insurer will not be relieved of liability to the Plans should SCA Re be unable or unwilling to cover any liability arising from the reinsurance arrangement;

(g) SCA Re retains an independent fiduciary (the Independent Fiduciary), at SCA North America's expense, to analyze the transactions and render an opinion that the requirements of sections (a) through (f) have been complied with. For purposes of this exemption, the Independent Fiduciary is a person who:

<sup>7</sup>Each Plan will be considered an "employee welfare benefit plan" as defined in section 3(1) of the Act.

<sup>8</sup>The U.S. Virgin Islands are considered a "State," as defined in section 3(10) of the Act.

(1) Is not directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with SCA, SCA North America or SCA Re (this relationship hereinafter referred to as an "Affiliate");

(2) Is not an officer, director, employee of, or partner in, SCA, SCA North America or SCA Re (or any Affiliate of either);

(3) Is not a corporation or partnership in which SCA, SCA North America or SCA Re has an ownership interest or is a partner;

(4) Does not have an ownership interest in SCA or SCA Re, or any of either's Affiliates;

(5) Is not a fiduciary with respect to the Plans prior to the appointment; and

(6) Has acknowledged in writing acceptance of fiduciary responsibility and has agreed not to participate in any decision with respect to any transaction in which the Independent Fiduciary has an interest that might affect its best judgment as a fiduciary.

For purposes of this definition of an "Independent Fiduciary," no organization or individual may serve as an Independent Fiduciary for any fiscal year if the gross income received by such organization or individual (or partnership or corporation of which such individual is an officer, director, or 10 percent or more partner or shareholder) from SCA, SCA Re, or their Affiliates (including amounts received for services as Independent Fiduciary under any prohibited transaction exemption granted by the Department) for that fiscal year exceeds 5 percent of that organization or individual's annual gross income from all sources for such fiscal year.

In addition, no organization or individual who is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder, may acquire any property from, sell any property to, or borrow funds from SCA, SCA Re, or their Affiliates during the period that such organization or individual serves as Independent Fiduciary, and continuing for a period of six months after such organization or individual ceases to be an Independent Fiduciary, or negotiates any such transaction during the period that such organization or individual serves as Independent Fiduciary.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on May 4, 2004 at 69 FR 24679.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department, telephone (202) 693-8546. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions 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) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 1st day of July, 2004.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*

[FR Doc. 04-15362 Filed 7-6-04; 8:45 am]

**BILLING CODE 4510-29-P**

#### DEPARTMENT OF LABOR

##### Employment and Training Administration

[TA-W-54,884]

##### **American Airlines, Las Vegas Reservations Office, Las Vegas, NV; Notice of Termination of Investigation**

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on May 11,

2004 in response to a worker petition filed by on behalf of workers at American Airlines, Las Vegas Reservations Office, Las Vegas, Nevada.

All workers were separated from the subject firm more than one year before the date of the petition. Section 223(b) of the Act specifies that no certification may apply to any worker whose last separation occurred more than one year before the date of the petition. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 17th day of June, 2004.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 04-15319 Filed 7-6-04; 8:45 am]

**BILLING CODE 4510-30-P**

#### DEPARTMENT OF LABOR

##### Employment and Training Administration

[TA-W-55,034]

##### **Android Industries, Lordstown LLC, Vienna, Ohio; Notice of Termination of Investigation**

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 14, 2003, in response to a petition filed on by a company official on behalf of workers of Android Industries, Lordstown LLC, Vienna, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 18th day of June, 2004.

**Richard Church,**

*Certifying Officer, Division of Trade Adjustment Assistance.*

[FR Doc. 04-15316 Filed 7-6-04; 8:45 am]

**BILLING CODE 4510-30-P**

#### DEPARTMENT OF LABOR

##### Employment and Training Administration

[TA-W-54,692]

##### **The Bank of New York, New York, NY; Dismissal of Application for Reconsideration**

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at the Bank of New York, New York, New