

acquisition expense to the Buying Account(s).

9. In order to maintain consistency with the language in the rest of the Notice, the applicant requests that certain changes should have been made to the language of the SFR, as set forth in the Notice. Specifically, in paragraph 14, at 68 FR 64648, column 3, line 34, the reference to "proposed transactions," should have referred instead to "subject transactions."

The Department concurs. Accordingly, the language in the SFR in paragraph 14 of the Notice, at 68 FR 64648, column 3, line 34, should have read as follows:

In this regard, participation in the subject transactions by ERISA-Covered Plans is limited to plans having total assets in excess of \$100 million.

After giving full consideration to the entire record, including the written comments from the applicant, the Department has decided to grant the exemption, as described, amended, clarified, and concurred in above. In this regard, the comment letter submitted by the applicant to the Department 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 made available for public inspection in the Public Documents Room of the Pension Welfare Benefits Administration, Room N-1513, U. S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

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 November 14, 2003, at 68 FR 64643.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

Painters District Council No. 4 Apprenticeship, Upgrading & Retraining Trust Fund (the Plan) Located in Cheektowaga, New York [Prohibited Transaction Exemption No. 2004-06; [Application No. L-11190] Exemption

The restrictions of section 406(a) of the Act shall not apply to a lease (the Lease) of certain space (the Leased Premises) in a building (the Building) owned by the Plan to Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP (the Applicant), a party in interest with respect to the Plan. This exemption is conditioned upon the adherence to the material facts and representations

described herein and upon the satisfaction of the following requirements:

(a) All terms and conditions of the Lease are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(b) The decision by the Plan to enter into the Lease will be made by the trustees of the Plan (the Trustees); and

(c) The fair market rental amount for the Lease will be determined by an independent, qualified appraiser as of the date of the commencement of the Lease; and

(d) After commencement of the Lease, an additional fair market rental appraisal of the Leased Premises will be performed by an independent, qualified appraiser every thirty months with the rental rate being adjusted accordingly.

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 December 17, 2003 at 68 FR 70310.

FOR FURTHER INFORMATION CONTACT: Khalif Ford of the Department, telephone (202) 693-8540 (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 19th day of March, 2004.

Ivan Strasfeld,

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

[FR Doc. 04-6583 Filed 3-23-04; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D-11132, et al.]

Proposed Exemptions; Landerholm, Memovich, Lansverk & Whitesides, P.S. 401(k) Profit Sharing Plan (the Plan)

AGENCY: Employee Benefits Security Administration, Labor

ACTION: Notice of Proposed Exemptions.

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

Written Comments and Hearing Requests

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

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. _____, stated in each Notice of Proposed

Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffitt.betty@dol.gov", or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

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

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

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

[Application No. D-11132]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in

accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).¹

Section I. Covered Transactions

If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply, 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, if the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the (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 proposed 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.

¹ For purposes of this proposed exemption, references to specific provisions of title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

(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 (the Selection Criteria). In this regard, at the time of the transaction:

(1) The loan to value ratio must be 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 proposed 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 Plans or duly authorized employee or representative of such participant or beneficiary.

EFFECTIVE DATE: If granted, this proposed exemption will be 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 future acquisitions, sales or exchanges of additional Contracts by the Plan.

Summary of Facts and Representations

1. The Plan is a defined contribution plan sponsored by Landerholm, Memovich, Lansverk & Whitesides, P.S. (Landerholm), a professional services corporation located in Vancouver, Washington. The Plan includes both 401(k) and profit sharing contributions.² Participant accounts are invested, at the participants' discretion, in one of 13 mutual funds available or in the Fund, a real estate fund holding mortgages, deeds of trust and real estate contracts.

² The Applicants represent that although the Trustees have not sought to designate the Plan an ERISA section "404 (c) plan," they state that the level of investment discretion participants can exercise under the Plan is consistent with section 404 (c) of the Act and the regulations promulgated thereunder. The Applicants explain that in the future, they intend to be fully compliant with section 404 (c) of the Act. Hence, every participant will have identical discretionary authority over his account and they may invest in any combination of the 13 mutual funds offered under the Plan or the Fund. The Applicants further explain that no charges or penalties will accrue as a result of any exercise by a participant of direction rights.

The present Trustees of the Plan are Irwin C. Landerholm, T. Randall Grove, and Philip Janney, all of whom are current Landerholm shareholders. In addition to the current Trustees, the former Plan Trustees also requesting exemptive relief are Gregory J. Dennis, William C. Dudley, and Thomas B. Erickson.³

2. The Trustees determined that establishing the Fund would provide Plan participants with lower risk, better stability and superior investment returns. Through maintenance of a pool of third party Contracts in the Fund, the Plan Trustees determined that the risks of other investment options could be balanced and the risk of loss in any single Contract would be moderated. All of the Contracts are "whole" Contracts that are held in the name of the Fund. The Contracts do not represent loans from direct, federally-insured lenders, and as a result, they normally trade at a discount to the current federally-insured lending rates. A participant electing to have a portion of his or her account invested in the Fund is essentially investing in an open-end fund. In other words, from a participant's perspective, the Fund includes both an undivided interest in all Contracts held by the Fund at the time an investment is made, as well as in each new Contract purchased as new participant funds become available and Contracts are retired or paid off.

3. For the Plan year 2002, the Plan's Form 5500 reported 71 currently active, retired, or separated participants and/or beneficiaries entitled to receive benefits. The Plan's total assets were reported at \$6,265,141 as of July 25, 2003.

4. AE, which is located in Vancouver, Washington, is a company that is primarily engaged in the purchase and resale of real estate contracts, such as the subject Contracts described herein.⁴

³ For purposes of this proposed exemption, the current and former Trustees are collectively referred to herein as the Trustees. Also, Landerholm and the Trustees are collectively referred to herein as the Applicants.

⁴ Prohibited Transaction Class Exemption (PTCE) 1982-87 (47 FR 21331, May 8, 1982) defines the term "established mortgage lender" as an organized business enterprise which has as one of its principal purposes in the normal course of business the origination of loans secured by real estate mortgages or deeds of trust and which has satisfied the qualification requirements of one of the following categories: (1) Approval by the Secretary of the Department of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act; (2) approval by the Federal National Mortgage Association (FNMA) or the Federal Home Loan Mortgage Corporation (FHLMC) as a qualified Seller/Service; or (3) a State agency or independent State authority empowered by State law to raise capital to provide financing for residential dwelling units.

AE acquires contracts at a discount and sells them at less than the federally-insured lending rate on the secondary market. AE also services contracts sold, if retained by the purchasers. In 1982, AE was retained by the Trustees to present prospective Contracts that might be appropriate for the Fund. 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.

The Trustees reviewed the proposed AE Contracts using various selection criteria they had developed to evaluate the Contract's investment worthiness. In this regard (a) the loan to value ratio had to be 75% or less; (b) the "Total Return" on the Contract had to be at least 1.00% above the prevailing 30 year home mortgage rate; (c) the purchaser of the property had to provide a clean payment history and a personal credit report of at least 12 months' duration; (d) the property had to be in good condition with no defects discovered upon inspection; (e) a clean title report was required; and (f) a first position lien had to be obtained on the property. If the Contract was to be purchased by the Plan, it was required to pass all of the Selection Criteria. Since AE has no discretionary authority over the Plan's assets, the decision to invest in the Contracts rested solely with the Trustees. Moreover, the terms reflected arm's length dealings between the parties.

5. In developing the Selection Criteria, the Applicants state that the overall purpose was to ensure that selected Contracts met the Fund's investment strategy. To evaluate whether each factor had been met, Landerholm utilized the expertise of its real estate and investment and lending practice groups.⁵ Once the screening

In addition, PTCE 1982-87 defines the term "recognized mortgage loan" as any mortgage loan on a "residential dwelling unit" which, at the time of its origination, was eligible, through an established program, for purchase by the FNMA, the Government National Mortgage Association or the FHLMC.

The Applicants represent that, in their opinion, AE is not an "established mortgage lender" nor would any of the Contracts be characterized as "recognized mortgage loans" within the meaning of PTCE 1982-87 because AE does not have the requisite authority from state or federal regulatory agencies, as described in PTCE 1982-87, and the Contracts purchased and resold by AE do not originate from an established program, as described in PTCE 1982-87.

⁵ The Applicants state that the Landerholm firm has a large and active real estate practice representing brokerage firms, developers, investors, lenders, and businesses in all matters pertaining to

Continued

process was completed and the Trustees agreed that certain Contracts were in the best interest of the Plan's investment strategy, the Plan purchased the Contracts on behalf of the Fund. Initially, Landerholm attempted to service the Contracts in-house, but it determined that it was more costly and cumbersome than to outsource the task. During this period, Landerholm bore the costs associated with servicing the Contracts. Subsequently, Landerholm decided that AE should be retained to service the Contracts and it would have no discretionary control over any of the Fund's assets with respect to default decisions and other determinations. AE began charging a service fee of \$4 to \$8 per month per Contract and an initial set-up fee of \$50 per Contract.⁶

During the period between April 11, 1994, through October 19, 2001, the Plan acquired 26 Contracts on behalf of the Fund from AE. The maturity dates range from July 1, 2002, through September 27, 2020, according to an October 2001 spread sheet submitted by the Applicants. The Contracts consisted of a mortgage and several real estate contracts and deeds of trust. The Applicants state that as of December 31, 2002, which is the most recent date that financial information is available, the Fund had 21 participating individual accounts.

6. At the time the Contracts were purchased, the Plan paid AE fair market value for the Contracts. The purchase price was determined by adjusting the offered Contract's rate to that of the prevailing market rate. In this regard, the Trustees obtained the prevailing market rate by measuring each prospective Contract's yield (*i.e.*, the interest rate plus a discount) against the then current lending rates of independent local lending institutions (typically, First Independent Bank and U.S. Bank) all within the vicinity of Vancouver, Washington. In addition to ensuring that the rate of return was current through the time of purchase, the Trustees required each Contract to exceed the average yield of mortgage rates by no less than 1% in order that the Plan could capture a higher return.

the acquisition, development, financing, sale and leasing of real estate. Thus, the Applicants believe Landerholm possesses skill sufficient to determine the appropriate fair market value of the Contracts it acquires, sells or exchanges.

⁶ Although the Applicants represent that the fees paid to AE for servicing the Contracts are reasonable compensation for services necessary for the operation of the Plan in accordance with section 408(b)(2) of the Act, the Department expresses no opinion herein on whether such compensation paid to AE in connection with its provision of services to the Plan satisfies the terms and conditions of section 408(b)(2) of the Act and the regulations promulgated thereunder.

The Applicants represent that this method for determining fair market value simulates rate adjustments that take place in the bond market that either result in a sale premium or a discount at the time of purchase. Moreover, the Applicants state that the 1% above prevailing average mortgage yields provided a further investment safeguard for the Fund. Finally, the Plan paid no fees or commissions to AE in connection with the Contract purchases.

7. Since the creation of the Fund, the Applicants represent that 51 Contracts have been retired, 26 Contracts are under current management, 2 have been foreclosed upon, and 3 have defaulted. The foreclosed Contracts resulted in the sale of the underlying real properties by the Plan to unrelated third party purchasers. Of the defaulted Contracts, 1 has been cured and 2 are in the process of being cured.⁷

Furthermore, no Contract has involved a borrower who is a party in interest with respect to the Plan. Within the past five years, the Applicants represent that the Fund has outperformed the mutual funds and has insulated the Plan from some of the market volatility to which traditional securities investments are susceptible. The Fund's annual return has ranged from 4.10% to 9.73%, whereas the mutual fund return has ranged from (-11.71%) to 24.94%.

According to the Applicants, at no time during the Fund's inception did the Trustees or Landerholm realize that having AE as Contract seller and service provider raised the issue of a possible prohibited transaction. The Applicants state that the Plan would have continued to acquire Contracts from AE had it not been for the Department's Seattle Regional Office (SRO) investigation into employee benefit plans holding mortgage notes.

8. On December 1, 2002, Landerholm entered into a tolling agreement (the Tolling Agreement) with the SRO as a result of the SRO's investigation of the Contracts held by the Plan. Pursuant to the Tolling Agreement, the SRO recommended that the Applicants seek exemptive relief from the Department

⁷ The Applicants state that curing refers to the process of removing whatever default exists in a Contract to make it current. For instance, if a Contract is 3 months in arrears, it will be cured if the borrower makes a payment to bring the loan current.

As of February 10, 2004, the Applicants represent that three Contracts were in default status. All three properties were eventually sold, with the proceeds going to the Plan to pay in full the Contract balances outstanding. Two of the Contract balances were paid in full on December 12, 2003. The property on the third Contract was sold and funds to pay the balance in full are forthcoming.

with respect to the Plan's acquisition and holding of the Contracts.⁸

Accordingly, the Applicants request an administrative exemption from the Department in connection with the Plan's past acquisition of the Contracts from AE. In addition, the Applicants request prospective exemptive relief with respect to the Plan's future acquisition of additional Contracts from AE, the Plan's holding of such future Contracts, the sale of the Contracts to AE by the Plan, and the exchange by the Plan of such Contracts with AE for other Contracts and/or cash. If granted, the proposed exemption will be effective as of January 1, 1998, with respect to the Plan's past acquisitions and holding of the Contracts. The exemption will be prospective with respect to additional purchases of Contracts by the Plan from AE, the holding of such Contracts by the Plan and the Sale or exchange of the Contracts.

9. For prospective acquisitions of additional Contracts by the Plan from AE, the Trustees will follow the following guidelines:

- The terms of the transactions between the Plan and AE involving the Contracts must not be less favorable to the Plan than those terms generally available in an arm's length transaction between unrelated parties.
- The transactions are not a part of an agreement, arrangement or understanding designed to benefit AE.
- 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%.
- The aggregate fees paid to AE for its activities as loan servicing agent for the Plan, have, and at all times, represent reasonable compensation for services necessary for the operation of the Plan in accordance with section 408(b)(2) of the Act.
- No investment management, advisory, underwriting fees or sales commissions must be paid by the Plan to AE or any of its affiliates with regard to the Plan's purchase of additional Contracts.

• All Contracts acquired by the Plan must satisfy the Trustees' Selection Criteria. In this regard, (1) the loan to value ratio must be 75% or less; (2) the "Total Return" on the Contract must be

⁸ Due to the Act's statute of limitations, the Department does not propose to extend retroactive relief for any of the purchases that took place between 1982 through 1997. Therefore, the retroactive exemption will apply to purchases of Contracts occurring after January 1, 1998.

at least 1.00% above the prevailing 30 year home mortgage rate; (3) the purchaser of the property must provide a clean payment history and a personal credit report of at least 12 months' duration; (4) the property must be in good condition with no defects discovered upon inspection; (5) a clean title report must be required; and (6) a first position lien must be obtained on the property.

- The Trustees maintain for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable (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 Plans or duly authorized employee or representative of such participant or beneficiary to determine whether the conditions of this proposed exemption have been met.

In addition, the Trustees will retain an Independent Consultant to perform an annual review of the Plan's current Selection Criteria to ensure that the selection process produces a yield to the Plan consistent with comparable market returns for first mortgage investments by independent, direct federally-insured lenders in Landerholm's market area. Such Independent Consultant will be a certified public accountant having substantial experience in real estate financing. The Independent Consultant will perform its annual review prior to the purchase of any further Contracts by the Plan. The Independent Consultant will have the authority to modify or replace the Plan's Selection Criteria to the extent the Independent Consultant believes such modification or replacement is necessary for the Plan's Selection Criteria to comply with Selection Criteria customarily employed in the purchase of Contracts within the Plan's market area. The Independent Consultant will also review the Plan's valuation methodology for the Contracts to ensure that the Plan's methodology will permit the purchase of Contracts only where the Plan's security interest is not subordinate to any other indebtedness, and where the credit worthiness of the borrower and the loan to value ratio of the underlying real estate held as security are appropriate for qualified retirement plan investments. This review of Plan methodology by the Independent

Consultant will take place prior to the beginning of each Plan Year during which the Plan will purchase additional Contracts from AE.

10. The Applicants represent that at some point, it may become advisable to sell one or more of the Contracts, held by the Fund, to AE. Under such circumstances, the Applicants explain that a sale would favor the Plan by permitting the purchase of a more favorable Contract or providing the Fund with additional liquidity in order to make distributions or transfers between funds, as participants may elect. Therefore, the Applicants represent that any prospective sales of Contracts by the Plan to AE would include the same safeguards applicable to the prospective acquisitions by the Plan, as set forth in Representation 9 of the proposal. In addition, the Applicants state that such a sale by the Plan to AE would only be for cash.

11. The Applicants represent that since AE is one of the larger marketers of Contracts in the Southwestern Washington area, engaging in an exchange of existing Contracts with AE would be beneficial to the Plan. Such an exchange, the Applicants state, would occur where the Trustees have considered the Plan's liquidity needs and determined that it would be in the best interests of the Plan to dispose of a large Contract in exchange for a combination of cash and smaller Contracts from AE. The Applicants propose that an exchange transaction will be subject to all of the safeguards already required for prospective acquisitions, as described in Representation 9.

12. In addition, for each prospective sale or exchange transaction, the fair market value of a Contract will be determined by the Trustees using an objective appraisal methodology. Further, such transactions will be subject to the Selection Criteria described above, which will be reviewed and approved annually by the Independent Consultant, to ensure that the Plan receives neither less than fair market value or pays more than fair market value for a Contract sold or exchanged.

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

- (a) Any acquisition, sale or exchange will be approved in advance by the Plan's Trustees, who are independent of AE and the borrowers. Furthermore, the terms of each transaction between the Plan and AE involving the Contracts have not been and will not be less

favorable to the Plan than those terms generally available in an arm's length transaction.

- (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 has not exceeded and will not exceed its fair market value, and the yield on all Contracts have exceeded and will exceed the average yield of comparable mortgage contract loans.

- (d) The aggregate fees paid to AE for its activities as loan servicing agent for the Plan have represented and will represent, at all times, reasonable compensation for services necessary for the operation of the Plan in accordance with section 408(b)(2) of the Act.

- (e) No investment management, advisory, underwriting fees or sales commissions have been paid or will be paid by the Plan to AE in connection with the purchase, sale or exchange of a Contract.

- (f) All Contracts acquired by the Plan have satisfied or will satisfy the Trustees' Selection Criteria.

- (g) For prospective purchases or exchanges of Contracts by or between the Plan and AE, (1) the Trustees will engage an Independent Consultant.

- (h) The Trustees have maintained and will maintain, at their customary location for examination during normal business hours, the records necessary to enable certain persons to determine whether the conditions of the exemption have been met.

Notice to Interested Persons

Notice of proposed exemption will be provided to all interested persons by first class mail within 10 days of publication of the notice of pendency in the **Federal Register**. Such notice shall include a copy of the notice of pendency, as published in the **Federal Register**, and supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on the proposed exemption. Comments are due within 40 days of the date of publication of the proposed exemption in the **Federal Register**.

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

DuPont Capital Asset Management Corporation (DCMC); Located in Wilmington, DE

[Application Nos. D-11157—D-11159]

Proposed Exemption

Based on the facts and representations set forth in the application, the Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1996).⁹

Section I. Covered Transactions

If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the 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 SIP), the DuPont Specialty Grains Savings Plan (the DSG Savings Plan), and the Thrift Plan for Employees of Sentinel Transportation Company (the Sentinel Thrift Plan; 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. duPont 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 proposed 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 proposed 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 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. If a price is unavailable through such sources, the Master Trust's investment managers solicit bids from at least three independent dealers who stand ready to trade at such bids. All commercial pricing sources and dealers are pre-approved by the such 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 methodology and the application of such methodology in valuing such Debt Securities.

(g) DCMC provides, within 30 days after the completion of the proposed 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

⁹ For purposes of this proposed exemption, references to specific provisions of the title I of Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(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 proposed 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 proposed 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 proposed 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 proposed 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 (the 1933 Act); (ii) securities issued by entities in countries which (a) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the 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 (the Fund), or if applicable, by the Independent Fiduciary, which will confirm and approve all such valuations.

Summary of Facts and Representations

1. DCMC, a wholly owned subsidiary of DuPont, is a registered investment adviser under the Investment Advisers Act of 1940. DCMC is intended to qualify as an "in house asset manager" or "INHAM"¹⁰ with respect to the DuPont Plans. DCMC acts as investment manager with respect to the Fund, which is offered as an investment option under each of the DuPont Plans. The assets of the Fund are held in the Master Trust. DCMC is responsible for managing the Fund, including certain underlying Debt Securities that, together with certain bank and insurance contracts, constitute a portion of the synthetic guaranteed investment contracts held by the Fund. However, DCMC directly manages approximately 20% of the Debt Securities, valued in excess of \$3.5 billion, and it has appointed four outside investment managers to manage the remainder of the debt securities. DCMC receives no fees for its services to the DuPont Plans, but it does charge back to the DuPont Plans, a *pro rata* share of direct costs related to its management activities.

2. The DuPont Plans are tax-qualified, defined contribution plans described in section 401(a) of the Code. Each of the DuPont Plans offers a "cash or deferred arrangement," matching contributions, and may also offer discretionary employer contributions. Each of the DuPont Plans offers a selection of investment options to participants in a manner intended to satisfy the requirements of an ERISA "section 404(c) plan."¹¹ Several of the investment options offered to ERISA section 404(c) plans are common among the DuPont Plans, including the Fund. The common funds are pooled under the Master Trust while investment options that are unique to a DuPont Plan are held under a separate trust. The separate trusts and the Master Trust are exempt from taxation under the provisions of section 501(a) of the Code. As of January 31, 2004, the DuPont Plans covered approximately 68,000 participants and beneficiaries.¹² The fair

market value of the DuPont Plans' assets as of January 31, 2004 exceeded \$9.5 billion.

The Named Fiduciary of each DuPont Plan is responsible for the selection of investment options for such Plan and for the selection of investment advisers and managers.¹³ Each DuPont Plan permits the Named Fiduciary to appoint investment managers and to delegate to an investment manager the authority to appoint additional investment managers. The Named Fiduciary of each DuPont Plan has delegated investment fiduciary authority with respect to investment in the Fund to the Vice President DuPont Capital Management (DCM),¹⁴ who, in turn, has entered into an investment management agreement with DCMC to manage assets of the Fund and to appoint additional investment managers to manage assets of the Fund.

3. The Fund constitutes one of several investment options made available to participants in the DuPont Plans, and as of September 30, 2002, it represented more than 60% of total combined assets of such plans. The Fund is a "stable value fund" with an investment objective of providing a stable rate of return that exceeds the rate of return on money market funds with comparable risk. The Fund is also managed to accommodate daily participant-related liquidity needs as provided by the DuPont Plans. As such, the Fund is structured into two tiers (a) a "liquidity tier," which holds cash and other marketable securities consisting of one or two short-term synthetic guaranteed investment contracts (synthetic GICs), which are backed by mutual or commingled bond funds, maturing guaranteed investment contracts (GICs), maturing separate account GICs, and or maturing synthetic GICs; and (b) a "total return tier" consisting entirely of synthetic GICs, which are managed on a total return basis with no established maturity date (known as "evergreen synthetic GICs").¹⁵ The liquidity tier

31, 2004, the DSG Savings Plan covered approximately 91 participants and it had total assets of approximately \$8.6 million. Generally, there is no overlap of participants.

¹³ The Named Fiduciary for SIP is the Vice President of DuPont Capital Management; Named Fiduciary authority for the Sentinel Thrift Plan is divided between Sentinel Transportation, L.L.C. and an Employee Benefit Plans Board; and the Named Fiduciary for the DSG Savings Plan is Optimum Quality Grains, Inc.

¹⁴ DCM is a division of DuPont, while DCMC is a wholly owned subsidiary of DuPont.

¹⁵ Unlike traditional GICs which contain a contractual promise to pay a specified rate of interest over the life of the contract, a synthetic GIC consists of a discreet portfolio of debt securities and a "wrap" contract associated with the portfolio that guarantees a rate of return with respect to the

and the total return tier each comprise approximately 50% of the Fund's assets. The overall rate of return on the Fund represents a combination of the rates of return of each of the tiers.

4. The proposed Group Trust, which will be utilized for the total return tier of the Fund, will be a group trust described in Rev. Rul. 81-100. The Group Trustee, which has been selected by DCMC, will be State Street Bank & Trust (SSB), a subsidiary of State Street Corporation.¹⁶ SSB will act as a directed trustee with respect to the Group Trust.¹⁷

5. Besides the DuPont Plans, the Investment Plan for Salaried Employees of CONSOL Energy, Inc. (the CONSOL Energy Plan) a defined contribution plan sponsored by CONSOL Energy, Inc. (CONSOL Energy), an employer who is not affiliated with DuPont but for which DCMC has been appointed as an investment manager, may participate in the establishment of the Group Trust. CONSOL Energy was previously a wholly owned business of DuPont. In connection with the divestiture of CONSOL Energy, assets were transferred to a stable value fund established under the CONSOL Energy Plan. As of September 30, 2003, the CONSOL Energy Plan had total assets of \$917,209,067.07 and 5,560 participants. The Independent Fiduciary of the CONSOL Energy Plan appointed DCMC as an investment manager of the Plan's stable value fund and of the underlying Debt Securities in such fund. As with the Fund, DCMC has appointed four

portfolio over a crediting period. Wrap contracts are typically issued by banks and insurance companies. Synthetic GICs became an important component of stable value funds after the collapse of a few large GIC issuers in the early 1990's. Since the investing plan retains the portfolio of debt securities underlying the synthetic GIC, the potential loss to the plan is limited to the value of the wrap contracts.

¹⁶ DCMC is not affiliated with any banks or insurance companies used as wrap providers for the Fund. State Street Global Advisors (SSGA), a division of SSC, and DCMC are 50-50 joint venture partners in Wilton Asset Management, a marketer of closed-end private equity funds. SSB has not issued wrap contracts to the DuPont Plans and it is not anticipated that SSB will issue wrap contracts to Plans that invest in the Group Trust. Furthermore, SSB will not have any role in the selection of the wrap issuers or investment managers.

¹⁷ As Group Trustee, SSB will be entitled to receive the following fees relating to the Group Trust: asset-based fees, transaction fees, pooled accounting fees, performance reporting fees, securities lending fees, short-term investment fees, and reimbursement for audit, courier, communication and other applicable miscellaneous expenses. According to DCMC, these fees are statutorily exempt under section 408(b)(2) of the Act and the regulations promulgated thereunder. However, the Department expresses no opinion herein on whether such fees satisfy the requirements of section 408(b)(2) of the Act.

¹⁰ See Prohibited Transaction Class Exemption (PTCE) 96-23 (61 FR 15975, April 10, 1996) (the INHAM Exemption).

¹¹ See 29 CFR 2550.404c-1.

¹² As of January 31, 2004, the SIP covered approximately 66,866 participants and it had total assets in excess of \$9.5 billion. As of January 31, 2004, the Sentinel Thrift Plan covered approximately 485 participants and it had total assets of approximately \$22.1 million. As of January

investment managers to assist in the management of the Debt Securities in the CONSOL Energy Plan's stable value fund.

DCMC has not secured any commitments from the CONSOL Energy Plan to participate in the Group Trust. However, it anticipates such Plan's investment. If the CONSOL Energy Plan does choose to participate in the Group Trust, DCMC does not believe there would be a violation of section 406(a)(1)(D) of the Act because the decision to invest in the Group Trust will be made by a fiduciary for the CONSOL Energy Plan who is independent of DuPont and its subsidiaries. DCMC states that the fact that it will realize a benefit incidental to the transaction does not cause the transaction to violate section 406(a)(1)(D) of the Act. Therefore, this exemption will apply only to the DuPont Plans currently investing in the Master Trust.

In addition, to the DuPont Plans and potentially, the CONSOL Energy Plan, tax-qualified plans of other unrelated employers will be allowed to participate in the Group Trust at a future date. However, DCMC will have no prior management responsibilities with respect to such plans.

6. Thus, the remaining parties to the proposed transaction will be the investment managers DCMC will appoint as fiduciaries to assist it in the management of Group Trust assets. DCMC will retain the discretion to appoint or remove any or all of such managers. In this regard, DCMC may appoint four unrelated managers who will manage approximately 20% each of the Debt Securities held in the Group Trust or retain the existing managers.

7. DCMC will propose to the Independent Fiduciary for the DuPont Plans, the establishment of the Group Trust to hold the Debt Securities which DCMC currently manages for the Fund. Specifically, the Independent Fiduciary, before authorizing the transfer of assets by the DuPont Plans from the Master Trust to the Group Trust, will determine that (a) the terms of the 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 (b) the transaction is in the best interest of the DuPont Plans, their participants and beneficiaries.

In addition, the Independent Fiduciary will receive written disclosures that will include, but will not be limited to, the following information: (a) A private offering memorandum describing the

transaction;¹⁸ (b) a table listing management fees, as negotiated under the applicable investment management agreements, and projected costs; (c) 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; (d) a statement of the reasons why DCMC may consider such investment to be appropriate for the DuPont Plans; (e) a statement of 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 (f) copies of the proposed and final exemption.

As stated above, DCMC will establish the Group Trust as a trust intended to qualify as tax-exempt under Rev. Rul. 81-100. DCMC will then, upon approval of the Independent Fiduciary, transfer the Debt Securities under DCMC's management into five separate funds or subtrusts established under the Group Trust for each investment manager of Debt Securities.¹⁹ In exchange for the Debt Securities transferred to the Group Trust, the DuPont Plans will receive units in the Group Trust of equal value to the Debt Securities transferred to the Group Trust in a one-time transaction. The Debt Securities will have readily ascertainable market values.²⁰ The value of the units will be determined by dividing the total fair market value of the transferred Debt Securities on the day of transfer by the number of Group Trust units issued to the DuPont Plans. No sales commissions, fees or other costs will be paid by the DuPont Plans in connection with the in kind transfer transaction.

8. The wrap contracts held by the Master Trust will not be transferred to the Group Trust. Instead, DCMC will

secure commitments from the banks and insurance companies which issued the wrap contracts to substitute the Group Trust units under the wrap contracts for the Debt Securities that are transferred to the Group Trust. DCMC will cover any additional costs associated with the wrap contract commitments. Under the terms of the agreement, the book value of the evergreen synthetic GICs as a whole after the substitution of Group Trust units will not be less than the book value of the evergreen synthetic GICs prior to the transfer of Debt Securities to the Group Trust.²¹

9. Accordingly, DCMC requests an administrative exemption from the Department in order to allow it to engage in the in kind transfer transaction. It is represented that the exchange of Debt Securities held by the Master Trust through the Fund for Group Trust units constitutes a prohibited transaction described in section 406(a) of the Act due to the "sale or exchange" of plan assets for Group Trust units. It is also represented that DCMC is a fiduciary of the DuPont Plans and will cause such plans to transfer Debt Securities to the Group Trust in exchange for Group Trust units. Further, DCMC will continue to manage the assets as investment manager of the Group Trust after the in kind transfer. Because DCMC is directing an exchange in which it is on both sides of the transaction, DCMC does not believe the INHAM Exemption applies to the contemplated transaction.

In addition, it is represented that the establishment of the Group Trust with Fund assets may result in a violation of section 406(b) of the Act because of the potential for increased management fees payable to DCMC in the future by unrelated plans willing to invest in the Group Trust. Although the applicant believes that the establishment of the Group Trust with assets of the DuPont Plans will likely result in a net decrease in fees and costs to the Plans over time, DCMC states that the expected future increase in asset values as assets accumulate and as unrelated plans contribute assets to the Group Trust may result in larger fees collected by DCMC

¹⁸ The private offering memorandum will contain substantially the same information that would be included in a prospectus for a registered security. Moreover, the DuPont Plans will have an opportunity to request whatever additional information they may need for purposes of evaluating the offering.

¹⁹ For the DuPont Plans, all of the Debt Securities held in the total return tier of the Fund will be transferred to the Group Trust.

²⁰ It is possible that an investment manager for the Fund may have purchased Debt Securities through a private placement offering. Such securities may either be "144A private placements," which trade similarly to public securities or others that are not as readily tradable. The latter category of private placement is intended to be held to maturity or traded on a limited basis. The value of such securities will be determined by an unrelated Fund investment manager or if applicable, by the Independent Fiduciary on the transfer date based on credit quality, length to maturity and current interest rates. Based on values on September 30, 2002, less than 3.2% of the Group Trust is expected to be invested in such Debt Securities.

²¹ According to AICPA Statement of Position 94-4, "book value" is defined as the measurement of value of stable value investments, including synthetic GICs. Generally, book value consists of the amount paid for the underlying portfolio of debt securities, plus the interest credited with respect to the portfolio under the terms of the wrap contract. The wrap contract specifies the types of securities including units of funds that can be wrapped. Since the wrap will apply to units after the transfer to the Group Trust, the applicant states that the wrap contract likely will require minor modification to continue book value treatment with respect to the units at the same levels that applied to the Debt Securities before the transfer to the Group Trust.

than DCMC would have collected if the Group Trust had not been established.

10. DCMC is also requesting that the exemption encompass DCMC's methodology for valuing Group Trust units utilized in PTCE 97-41 (62 FR 42830, August 8, 1997), but adapted to a non-bank context. In this regard, PTCE 97-41 provides a methodology for converting interests in bank-sponsored collective investment funds to mutual funds for which the bank acts as an investment adviser. Specifically, DCMC proposes valuing the exchanged Debt Securities on the transfer date in exchange for Group Trust units in a manner consistent with PTCE 97-41.²²

Thus, fair market value will be determined by the average of the highest current independent bid and the lowest current independent offer as of the close of business as provided to the investment managers by three independent third-party commercial pricing sources. If a price is unavailable through such sources, the investment managers will solicit bids from at least three independent dealers who stand ready to trade at such bids. All commercial pricing sources and dealers will be pre-approved by the investment managers. The fair market value of any private placement Debt Securities that are not readily tradable will be provided

²² In this regard, the "current market price" for specific types of Debt Securities will be determined as follows:

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

(b) If the security is not a reported security, and the principal market for such security is an exchange, then the last sale on such exchange on the Group Trust valuation date; or if there are no reported transactions on such exchange that day, the average of the highest current independent bid and lowest current independent offer on such exchange as of the close of business on the Group Trust valuation date.

(c) If the security is not a reported security and is quoted in the NASDAQ system, then the average of the highest current independent bid and lowest current independent offer reported on NASDAQ as of the close of business on the Group Trust valuation date.

(d) For all other securities, the average of the highest current independent bid and lowest current independent offer as of the close of business on the Group Trust valuation date, determined on the basis of reasonable inquiry. (For securities in this category, DCMC represents that it will obtain quotations from at least three sources which were either broker-dealers or pricing services independent of and unrelated to DCMC and, where more than one valid quotation was available, used the average of the quotations to value the securities, in conformance with interpretations by the SEC and practice under Rule 17a-7.)

by DCMC to the Independent Fiduciary for review and approval of the methodology and the application of such methodology in valuing such Debt Securities.²³

In addition, as noted in Representation 8, DCMC will not make any transfer of Debt Securities to the Group Trust without the advance agreement of the wrap issuers to wrap the Group Trust units at a book value that is not less than the book value reported to the Fund by the wrap issuers prior to the transfer.²⁴ Also, DCMC will pay for any increase.

11. Thus, with respect to the in kind transfer transaction, Group Trust units will be valued by the Group Trustee based on the aggregate asset value of the Debt Securities held by the Group Trust as of the transfer date as determined in accordance with Rule 17a-7, divided by the number of units issued. The unit value, market value of exchanged securities and the number of units issued will be provided to the Independent Fiduciary of the DuPont Plans within 30 days of the transfer to the Group Trust.

In this regard, the confirmation statement will contain the following information:

(a) The identity of each Debt Security that DCMC deemed suitable for transfer from the Master Trust to the Group Trust; (b) the current market price of each Debt Security for purposes of the transfer as determined on the date of the in kind transfer; (c) the identity of each Debt Security that does not fall into at least one of the following categories: a reported security; a security principally traded on an exchange; or a security quoted on the NASDAQ System; (d) the identity of each pricing service or market maker which was consulted in determining the fair market value of the Debt Securities, and 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 transaction and the number of Group Trust units held by the Master Trust for the DuPont Plans immediately after the in kind transfer transaction (the related per unit value and the aggregate value).

12. Once the Group Trust is established, DCMC expects that plans of

²³ As stated previously, as of September 30, 2002, such securities comprise less than 3.2% of the expected value of the Group Trust.

²⁴ The "wrap" value will be the difference between the fair (or market) value of the underlying Debt Securities and the book (or contract) value of each synthetic GIC. According to DCMC, AICPA Statement of Position SOP 94-4 values stable value investment contract, at contract value. DCMC further states that all of the contracts contained in the Fund satisfy the requirement of SOP 94-4.

unrelated employers will invest therein. It is anticipated that most of the investing plans will do so to fund all or a portion of their stable value funds. However, some plans may invest solely to hold a diversified portfolio of debt securities without associating the Group Trust units with a wrap contract. Because the valuation of Group Trust units is not dependent on the existence of a wrap contract, the number of issued units will be determined on the day of the transfer of any Debt Securities by dividing the fair market value of the transferred Debt Securities by the unit value of the applicable funds in the Group Trust. If cash is transferred, the number of units issued will be the cash amount divided by unit value, as determined by the Group Trustee.

13. If the Group Trust is established as proposed, DCMC will not charge an investment management fee to the DuPont Plans, but it will continue to charge to the DuPont Plans a proportionate share of direct costs incurred by the subtrust under the Group Trust managed by DCMC.²⁵ In addition, DCMC or an affiliate will charge the DuPont Plans direct costs for investment management of the Group Trust, only after full disclosure of the Group Trust's fee arrangement to the Independent Fiduciary. The overall fee structure will be similar, if not less costly, to the DuPont Plans than the fee structure currently in effect.

It is anticipated that DCMC's (or an affiliate's) total reimbursed expenses attributable to the assets of the DuPont Plans in the Group Trust will not exceed (and maybe less) than the amount of such reimbursed expenses before the transfer of DuPont Plan's assets in the Master Trust to the Group Trust. The cost savings, are expected to result from the ability of DCMC to consolidate investment management decisions and resources over a larger portfolio as opposed to separate and smaller portfolios maintained under separate trusts. In addition, DCMC expects investment management fees, as a percentage of assets, will decline as the asset base increases in size.

14. In order to address the potential conflict caused by the establishment of the Group Trust with Fund assets, the DuPont Plans will retain an independent fiduciary to review the proposed establishment of the Group Trust. DuPont or DCMC will pay the Independent Fiduciary a flat fee in advance of its review of the proposed

²⁵ Such costs will be allocated equally among subtrust units owned by the DuPont Plans.

transaction.²⁶ The fee is payable regardless of whether the proposed transaction is consummated. Prior to approving the transaction, the Independent Fiduciary will receive an offering memorandum for the proposed transaction and will be given access to Fund reports and transaction data in order to determine whether the proposed transaction is in the best interests of the participants of the DuPont Plans. Should the Independent Fiduciary approve the transaction and direct the exchange of Debt Securities for Group Trust units, the Independent Fiduciary will receive confirmation from DCMC of the transfer of Debt Securities from the Master Trust to the Group Trust. The Independent Fiduciary will also have the opportunity to confirm that the transfer was executed as described in the offering memorandum and to confirm and approve the proper valuations for the Debt Securities, including the private placements. The Independent Fiduciary, before authorizing the transfer of the DuPont Plans assets to the Group Trust, must determine that the terms of the transfer are fair to the participants in the DuPont Plans and comparable to and no less favorable than terms obtainable at arm's length between unaffiliated parties and that the transfer is in the best interest of the DuPont Plans and their participants and beneficiaries.

15. DCMC represents that U.S. Trust Company, N.A. (U.S. Trust) has confirmed its independence from DCMC and is qualified to serve as the Independent Fiduciary for the DuPont Plans with respect to the proposed in kind transfer transaction. U.S. Trust, in turn, represents that it understands and will accept the duties, responsibilities and liabilities in acting as a fiduciary under the Act for the Plan. U.S. Trust represents that as the Independent Fiduciary, it will be responsible for (a) analyzing, from an investment perspective, the fairness and reasonableness of the methodology used with respect to the in kind transfer transaction; and (b) giving its opinion as to the fairness and reasonableness of such methodology, as compared with a redemption for cash and subsequent reinvestment of such cash, based on such analysis. This determination and opinion are set forth in a written report

dated December 17, 2003 (the Report). Specifically, in the Report, U.S. Trust concludes that—

(a) The in kind transfer transaction will likely avoid certain transaction costs otherwise incurred in a cash redemption;

(b) The Debt Securities associated with the proposed transaction will be calculated based on the Master Trust's respective statements of assets and liabilities, valued in accordance with the pricing procedures established by the Master Trust's Board of Trustees. In this regard, U.S. Trust has reviewed a sample spreadsheet developed by DCMC to calculate the exact number of Debt Securities to be transferred, and believes the information provided to be conceptually and mathematically correct;

(c) All Debt Securities held by the Master Trust will be "qualifying" securities;

(d) The proposed transaction will be in compliance with the Plan's investment guidelines;

(e) The methodology used to conduct the in kind transfer transaction will be comparable to, and no less favorable than, similar in kind transfer transactions reached at arm's length between unaffiliated parties.

U.S. Trust represents that, if this proposed exemption is granted and the in kind transfer transaction is thereafter undertaken, it will be responsible for updating its findings and opinions to confirm whether such findings and opinions are applicable as of the anticipated date of such transaction. In this regard, U.S. Trust states that it will review the in kind transfer transaction and confirm in writing whether such transaction has been effectuated consistent with the required criteria and procedures set forth in the Report. In carrying out this duty, U.S. Trust represents that, if the proposed exemption is granted and the in kind transfer transaction occurs, it will conduct a post-exemption review, which will include (a) reviewing each DuPont Plan's current investment policy guidelines; (b) reviewing each DuPont Plan's investment portfolio and the Master Trust's assets as of the most recent common date for which such data is available; and (c) ascertaining whether the policies, procedures and controls established for effectuating the transfer remains unchanged. Moreover, U.S. Trust represents that it will conduct a post-transfer review to provide an additional safeguard to the Plan. In this regard, U.S. Trust will evaluate and test whether the in kind transfer transaction has been effectuated consistent with the required criteria and

procedures and confirm this in writing. Consistent with this requirement, U.S. Trust represents that if the exemption is granted and the in kind transfer transaction occurs, it will update the findings and opinions as set forth in the Report so as to confirm whether they still apply as of the expected date of the transfer. U.S. Trust will provide its opinion that the methodologies for the proposed transaction is fair to the DuPont Plans and reasonable in all material respects. In addition, U.S. Trust will state that the proposed transaction is in the interest of the participants and beneficiaries of the DuPont Plans since the anticipated costs savings are likely to be material. Further, U.S. Trust will conclude that if the exemption is granted, and all other essential facts and circumstances of the in kind transfer transaction remains materially unchanged at the time DCMC seeks to effectuate the transaction, it will issue a favorable recommendation regarding the commencement of such effectuation.

16. The costs of applying for the exemption, establishing the Group Trust and preparing disclosure documents for review by the Independent Fiduciary will be borne by DuPont or DCMC and not by the DuPont Plans. Furthermore, DCMC will maintain for a period of six years in a manner that is accessible for audit and examinations, records necessary to enable certain persons, such as representatives from the Department, the Service, the Independent Fiduciary, or any participant or beneficiaries of the DuPont Plans to determine whether the conditions of the exemption have been met.

The exchange of Debt Securities by the Master Trust for units in the Group Trust will not result in any commissions being paid to DCMC or any of the investment managers appointed by the DuPont Plans. For the exchange of Debt Securities for Group Trust units, the Group Trustee will calculate the unit value based on the market value of the Debt Securities transferred so that the value of the units issued to the Fund is equal to the fair market value of the Debt Securities transferred. Statements indicating the fair market value at which the Debt Securities are exchanged, the number of units issued in connection with such exchange, and the calculation of unit value will be provided to the Independent Fiduciary.

17. In summary, it is represented that the proposed transaction will satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) The in kind transfer transaction will be a one-time transaction, and for

²⁶ The fee may be a flat fee or hourly fee. If a flat fee, it will be paid in advance of the Independent Fiduciary's review. If an hourly fee, the fee will be estimated and substantially paid in advance to the Independent Fiduciary as a retainer. The purpose of the advance payment is to remove any appearance that the independent Fiduciary's fee is contingent on its recommendation to the DuPont Plans.

the DuPont Plans, the transferred assets will 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 Fund, which comprises part of the Master Trust prior to the transfer.

(b) The DuPont Plans will pay no sales commissions, or other similar fees in connection with the in kind transfer transaction. Furthermore, no additional management fees will be charged to the DuPont Plans by DCMC in the Group Trust.

(c) The assets transferred to the Group Trust pursuant to the in kind transfer transaction will consist of Debt Securities which are deemed to be "transferable securities."

(d) Each DuPont Plan will receive a proportionate share of the transferable securities which will equal in value to the number of units in the Group Trust such plan will receive, as determined in a single valuation performed in the same manner in accordance with valuation procedures prescribed by Rule 17a-7 of the 1940 Act.

(e) Prior to the in kind transfer transaction, DCMC will provide to the Independent Fiduciary a full and detailed written disclosure of information regarding the transaction and, on the basis of the foregoing information, such Independent Fiduciary will provide written authorization for the transaction.

(f) The Independent Fiduciary will determine 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.

(g) Not later than 30 days after the completion of an in kind transfer transaction, DCMC will provide to the Independent Fiduciary for the DuPont Plans, a written confirmation regarding such transaction.

(h) Subsequent to the in kind transfer transaction, the Independent Fiduciary will perform a post-transaction review which will include, among other things, a random sampling of the pricing information supplied by the Group Trustee.

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

(j) The Debt Securities that are transferred from the Master Trust to the Group Trust will be valued using the same methodology currently used by the

Master Trust to value such securities. Similarly, the Group Trust will use the same valuation methodology.

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

(l) DCMC will not execute the in kind transfer transaction unless the wrap contracts issuers 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.

Notice to Interested Persons

DCMC represents that it will distribute, by either first class mail or by e-mail to DuPont Plan participants who have affirmatively elected to access their account statements electronically, a copy of the notice of proposed exemption (the Notice) within thirty (30) days of the date of such Notice is published in the **Federal Register**. The Notice will also be sent to the Named Fiduciaries and the Independent Fiduciary for the DuPont Plans. The Notice will include a copy of the proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which informs all interested persons of their right to comment on and/or request a hearing with respect to the proposed exemption. Comments and requests for a public hearing are due within sixty (60) days following the publication of the proposed exemption in the **Federal Register**.

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

The UNITE National Retirement Fund; Located in New York, New York

[Exemption Application No. D-11185]

Proposed Exemption

I. Covered Transactions

The Department is considering granting an exemption under the authority of section 408 of the Act and section 4975 of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B, 55 FR 32836, 32847 (August 10, 1990).²⁷ If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from

the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed purchase by the Union of Needletrades, Industrial and Textile Employees (UNITE) and certain regional entities affiliated with and chartered by UNITE (the UNITE Affiliates) from the UNITE National Retirement Fund (the Pension Fund) of shares of perpetual cumulative convertible preferred stock (the Preferred Stock) representing fifteen percent (15%) of the outstanding equity interests in the ALICO Services Corporation (ASC), a wholly-owned entity of the Pension Fund; provided the conditions set forth in section II, below, are satisfied.

II. Conditions

Prior to entering into the transactions, (a) an independent, qualified fiduciary, (the Independent Fiduciary), as defined in section III(a), below, determines, on behalf of the Pension Fund, whether the Preferred Stock should be sold to UNITE and to the UNITE Affiliates; (b) the Independent Fiduciary approves of the terms underlying the Preferred Stock to be issued by ASC; (c) the Independent Fiduciary negotiates and approves of the terms of the sales of the Preferred Stock to UNITE and to the UNITE Affiliates; (d) the Independent Fiduciary monitors the terms of the transactions and ensures that ASC, UNITE, and the UNITE Affiliates comply with the approved terms of the sales of the Preferred Stock; (e) the Independent Fiduciary determines that the terms of the sales of the Preferred Stock are no less favorable to ASC than terms that would be offered to an unrelated third party under similar circumstances; (f) the Independent Fiduciary determines that the purchase price for the Preferred Stock paid by UNITE and by the UNITE Affiliates is no less than the fair market value of such Preferred Stock, as of the date each of the transactions is entered; (g) the Independent Fiduciary determines the fair market value of the Preferred Stock, as of the date each of the transactions is entered; (h) in determining the fair market value of the Preferred Stock, the Independent Fiduciary obtains an appraisal from an independent qualified appraiser selected by the Independent Fiduciary and ensures that the appraisal and the Independent Fiduciary's analysis of the appraisal are consistent with sound principles of valuation and the elements described in paragraph 8, in the Summary of Facts and Representations in this proposed exemption; and (i) the Pension Fund incurs no fees, commissions, or other charges or

²⁷ For purposes of this exemption, references to specific provisions of title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

expenses as a result of its participation in the transactions other than the fees incurred in requesting this exemption and the fee payable to the Independent Fiduciary.

III. Definitions

For purposes of this exemption:

(a) the term, "Independent Fiduciary," means an individual or firm which is independent of and unrelated to ASC, UNITE, the UNITE Affiliates, and any other party to the subject transactions (the Parties), and which has acknowledged and agreed that it is a fiduciary appointed to act on behalf of the Pension Fund for all purposes related to the subject transactions. For purposes of this exemption:

(1) A fiduciary will not be deemed to be independent of and unrelated to the Parties, if:

(i) such fiduciary directly or indirectly controls, is controlled by or is under common control with such Parties;

(ii) such fiduciary directly or indirectly receives any compensation or other consideration from such Parties in connection with the transactions described in this proposed exemption; except that an Independent Fiduciary may receive compensation for acting as an Independent Fiduciary in connection with the transactions contemplated herein, if the amount or payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decisions with regard to the subject transactions;

(2) No individual or firm shall serve as an Independent Fiduciary during any year in which annual gross revenues received from business with the Parties for that year exceeds five (5) percent of such individual's or firm's annual gross revenues from all sources for the prior tax year; and

(3) The individual or firm selected as an Independent Fiduciary must be qualified to serve as fiduciary and to carry out the duties responsibilities, as set forth herein.

Summary of Facts and Representations

1. The Pension Fund is a multiemployer pension plan jointly trustee by individuals selected by UNITE and individuals selected by various employers who contribute to the plan (the Trustees). Certain Trustees of the Pension Fund are also officers of UNITE and directors of ASC. The Pension Fund provides pension benefits to workers covered by collective bargaining agreements in the cotton garment and other related unionized segments of the garment, textile,

laundry, and allied industries. The Pension Fund is an "employee pension benefit plan," as defined under section 3(2) of the Act. As of December 31, 2001, there were approximately 95,995 participants and beneficiaries in the Pension Fund. As of December 31, 2001, the approximate aggregate fair market value of the total assets of the Pension Fund was \$577,684,500. Effective December 1, 2003, the name of the Pension Fund was changed from the UNITE National Cotton Retirement Fund to the Unite National Retirement Fund as a result of a merger with the ILGWU National Retirement Fund. It is represented that the merged fund has approximately \$1.5 billion in assets.

2. ASC is a holding company organized under the laws of New York that is wholly-owned by the Pension Fund. The Trustees of the Pension Fund appoint the ASC Board of Directors (the Board). ASC wholly owns each of the following four (4) subsidiaries: (a) Amalgamated Life Insurance Company (ALICO); (b) Alicare Inc. (Alicare); (c) Alicare Medical Management, Inc. (AMM); and (d) UNITE Fund Administrators, Inc. (UFA) (collectively, the ASC Subsidiaries).

ALICO provides life, disability, and medigap insurance primarily to unions and union-sponsored trust funds. It also provides fully retrospectively rated group life insurance to various jointly administered funds.

Alicare is a full-service third-party fund administrator focusing on the market for such service among Taft-Hartley plans. Alicare also offers computer services, insurance brokerage and printing services. Alicare's services are delivered through its four (4) divisions: (a) Alicare, (b) Alicomp, (c) Aligraphics and (d) Amalgamated Agency.

AMM provides medical cost management services, including utilization management, comprehensive claims cost containment, and a 24 Hour Nurse HelpLine to provide health information and education to patients.

UFA, a not-for-profit tax-exempt enterprise, provides third-party administration for the Pension Fund and several other funds sponsored by UNITE and entities affiliated with UNITE (collectively, the Patron Funds).²⁸ The specific services provided

²⁸ The Patron Funds for which UFA currently provides services include, but are not limited to: the Pension Fund; UNITE National Cotton Health Fund; Amalgamated Insurance Fund-Insurance Fund; Amalgamated Insurance Fund-Retirement Fund; Laundry & Dry Cleaning Workers Health Fund, UNITE; Laundry & Dry Cleaning Workers Pension Fund, UNITE; Amalgamated Washable Sportswear and Allied Industries Insurance Fund;

by UFA include claims processing, distribution and preparation of plan documents, collections of contributions by employers and participants, record retention and reporting to government authorities.²⁹

3. UNITE was formed in 1995 by the merger of two unions, the International Ladies Garment Workers Union (ILGWU) and the Amalgamated Clothing and Textile Workers Union (ACTWU). Under the merger agreement, UNITE is deemed a consolidation and continuation of ILGWU and ACTWU and their respective affiliates. Further, UNITE has several affiliated organizations, the UNITE Affiliates, which are chartered by UNITE. UNITE members work in the apparel and textile industries, industrial laundries, distribution and retail, auto parts and auto supply, and other industries in the United States and Canada.

4. The Pension Fund has requested an individual exemption in order that ASC may issue and sell shares of stock to UNITE and to certain UNITE Affiliates. As set forth in more detail below, it is represented that the proposed transactions will provide the Pension Fund: (i) With the ability to increase the value of its ownership interests in ASC by providing ASC with access to additional working capital, (ii) with the

Amalgamated Washable Clothing Sportswear and Allied Industries Retirement Fund; Amalgamated Retail Fund; Barney's Retail Employees Union Health Fund; ILGWU Death Benefit Fund; and UNITE Staff Retirement Plan, ACTWU Unit.

²⁹ The applicant has not requested, and the Department is not providing any relief, herein, for transactions involving the provision of services by UFA to the any of the Patron Funds, including the Pension Fund, nor is the Department providing relief for the decision by the fiduciaries of the such funds to retain UFA to provide such services. In the opinion of the applicant, prohibited transactions would not be an issue for the Pension Fund where: (1) the interested Pension Fund Trustees recuse themselves from any decision regarding the retention of UFA, *see*, Advisory Opinion 99-09A (AO 99-09A) issued on May 21, 1999, in a letter to Patricia A. Shlonsky, and (2) the services are provided to the Pension Fund by UFA in accordance with Section 408(b)(2) of the Act.

AO 99-09A states that a fiduciary may avoid engaging in an act described in section 406(b)(1) and 406(b)(2) by removing himself or herself from all consideration by the plan of whether or not to engage in such a transaction, and by not otherwise exercising, with respect to the transaction, any of the authority, control or responsibility which makes him or her a fiduciary, absent any arrangement, agreement or understanding with respect to who will ultimately provide the services in question.

Section 408(b)(2) of the Act provides a statutory exemption for "contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." The Department is offering no view, herein, as to the applicant's reliance on AO 99-09A and/or the statutory exemption, as set forth in section 408(b)(2) of the Act and 29 CFR 2550.408(b)(2) of the Department's regulations.

potential for increased profitability, and (iii) with the potential for new business opportunities.

At present, ASC has one class of outstanding equity in the form of common stock (the Common Stock), the entirety of which is held by the Pension Fund. There are currently 10,000 shares of ASC Common Stock outstanding. In connection with the proposed transactions, ASC proposes issuing a new class of shares, the Preferred Stock, to be purchased by UNITE and by the UNITE Affiliates for cash.³⁰ It is anticipated that UNITE will purchase shares of the Preferred Stock equal to approximately five percent (5%) of the outstanding equity of ASC, and that the UNITE Affiliates will purchase shares of Preferred Stock representing approximately ten percent (10%) of the outstanding equity of ASC.

5. The terms underlying the Preferred Stock will be determined by the issuer, ASC. However, the Independent Fiduciary has the discretion to accept or reject the terms of the Preferred Stock.

A fixed dividend rate of five percent (5%), declared annually, has been established for the Preferred Stock. It is represented that Preferred Stock dividends will only be paid when (1) there is surplus capital and (2) the Board declares a dividend. If there is not a surplus, the dividend cannot be paid under applicable corporate law. Further, the Board can exercise its discretion not to pay a dividend when there is a capital surplus. If dividends are not paid in a particular year, they accumulate. No dividends may be paid on the Common Stock until all accrued and unpaid dividends on the Preferred Stock are paid.

It is represented that the Board does not have the discretion to alter the five percent (5%) dividend rate, but such rate is subject to customary anti-dilution adjustments. For example, if the number of issued and outstanding shares of Preferred Stock is increased by a stock split from 100 to 200, the dividend rate paid with respect to each share would decrease to 2.5%.

ASC can redeem the Preferred Stock, on a *pro rata* basis at anytime it may

lawfully do so.³¹ In such event, and when the holder has not elected to convert the Preferred Stock into the Common Stock of ASC (if applicable) the holder of the Preferred Stock will receive an amount equal to the price paid for the Preferred Stock, plus any accrued but unpaid dividends. Written notice of such redemption shall be provided to the holders of Preferred Stock at least fifteen (15) days but no more than thirty (30) days prior to the date of redemption. At that date, all rights associated with the Preferred Stock, except the right to receive the redemption price shall cease. In the event of liquidation, the holders of Preferred Stock will be entitled to receive, on a *pro rata* basis, prior to the holders of the ASC Common Stock, an amount equal to the price paid for the Preferred Stock, plus any accrued but unpaid dividends.

The Preferred Stock will have no voting rights, except as required by section 804 of the New York Business Corporation Laws. Section 804 of the New York Business Corporation Laws provides that preferred shares of stock have voting power when a proposed charter amendment would: (a) Exclude or limit the shareholder's right to vote on any matter, except as such right may be limited by voting rights given to new shares then being authorized of any existing or new class or series; (b) reduce the par value of the shares (if they have par value); (c) change the shares of the class into a different number of shares; (d) change the class or series of the shares; (e) fix, change, or abolish the designation of the preferred, or any of the relative rights, preferences and limitation of any of the shares of the preferred, whether issued or unissued, including any provisions in respect to undeclared dividends, whether or not cumulative or accrued, or the redemption of any shares, or any sinking fund for the redemption or purchase of any shares, or any preemptive right to acquire shares or other securities; (f) provide that the shares may be converted into shares of any other class or into shares of any other series of the same class, or alter the terms or conditions upon which the shareholders' shares are convertible or change the shares issuable upon conversion of the shareholders' shares, if such action would adversely affect

such shareholders, or (g) subordinate the rights of the preferred shares by authorizing shares having preferences that would be in any respect superior to the shareholders' rights.

The term of the Preferred Stock will be perpetual. After five (5) years, the Preferred Stock will be convertible at any time at the option of each holder, into shares of the ASC Common Stock on a one to one basis. This ratio may only be adjusted for customary anti-dilution purposes. The Board cannot otherwise adjust the conversion ratio. Further, each of the shares of Preferred Stock shall be automatically converted into ASC Common Stock upon the first sale under the Securities Act of 1933 of at least twenty-five percent (25%) of the total voting power of ASC. In the event of a conversion, the conversion price will be adjusted for certain dilutive issuances, splits, and combinations.³²

If at any time following initial public offering, ASC proposes to register shares of the Common Stock with the Securities and Exchange Commission, the holders of the Preferred Stock will be allowed to include in such registration the shares of Common Stock into which their Preferred Stock are convertible (*i.e.*, the holders have "piggy-back" registration rights). In addition, the Preferred Stock (and the shares of Common Stock issued upon conversion of the Preferred Stock) will be subject to "drag along" and "tag along" rights. In this regard, if the Pension Fund sells its shares in ASC to an unrelated third party, the Pension Fund will be able to force UNITE and the UNITE Affiliates to also sell their Preferred Stock (and the shares of Common Stock issued upon conversion of the Preferred Stock) to the third party buyer, while UNITE and the UNITE Affiliates will be able to force the third party buyer to buy their Preferred Stock (and the shares of Common Stock issued upon conversion of the Preferred Stock), as part of the transaction.

UNITE will also have a right of first refusal in the event any of the UNITE Affiliates wishes to dispose of its Preferred Stock (and the shares of Common Stock issued upon conversion of the Preferred Stock). If UNITE fails to purchase such shares, then ASC and/or the Pension Fund shall have a right of first refusal to purchase the shares in question. Furthermore, if UNITE wishes to sell its Preferred Stock (and the shares of Common Stock issued upon conversion of the Preferred Stock), ASC

³⁰ It is represented that the decision was made to issue the Preferred Stock, rather than sell 15% of the Common Stock, because UNITE and the UNITE Affiliates generally invest in fixed income or fixed income-type investments that provide a set rate of return. UNITE and the UNITE Affiliates seek a fixed rate of return in order to generate cash from investments on an annual basis to ensure that union-related activities are adequately funded. As structured, the Preferred Stock will enable UNITE and the UNITE Affiliates to obtain an equity interest in ASC while simultaneously providing an income stream similar to that offered by a fixed income investment.

³¹ The applicant has not requested, and the Department is not providing, herein, relief for the redemption or call by ASC of the Preferred Stock or the shares of Common Stock issued upon conversion of the Preferred Stock from UNITE or the UNITE Affiliates. See, discussion of potential future prohibited transactions in paragraph 12, herein.

³² The applicant has not requested, and the Department is not providing relief, herein, with respect to the conversion of the Preferred Stock into Common Stock. See, discussion of potential future prohibited transactions in paragraph 12, herein.

and/or the Pension Fund will have a right of first refusal with respect to such shares.³³

6. Absent an exemption, the proposed transactions would constitute sales of property between a plan and parties in interest, and transfers of assets from a plan to parties in interest in violation of section 406(a)(1)(A) and section 406(a)(1)(D) of the Act. Accordingly, the Pension Fund is seeking relief with respect to section 406(a)(1)(A) and 406(a)(1)(D) of the Act. Further, to the extent that UNITE and the UNITE Affiliates are disqualified persons, the proposed transactions would also violate sections 4975(c)(1)(A) and 4975(c)(1)(D) of the Code, for which relief is also requested.

The proposed transactions may also raise issues under section 406(b)(1) of the Act and section 4975(c)(1)(E) of the Code which provide that "a fiduciary with respect to a plan shall not (1) deal with the assets of the plan in his own interest or for his own account." Further, the proposed transactions may also raise issues under section 406(b)(2) of the Act, because certain Trustees of the Pension Fund are also officers of UNITE affiliated with UNITE and/or the UNITE Affiliates (the Overlapping Trustees) and directors of ASC. In this regard, the Overlapping Trustees could be viewed as acting on behalf of UNITE and the UNITE Affiliates, adverse parties to the Pension Fund, in connection with the proposed transactions. Because of the potential concerns that may be raised, the Pension Fund has also requested relief with respect to sections 406(b)(1) and 406(b)(2) of the Act and section 4975(c)(1)(E) of the Code.

7. For purposes of determining the fair market value of the Preferred Stock, ASC sought the opinion of Willamette Management Associates (WMA), an independent, qualified appraiser. WMA is experienced in that it has prepared valuations relating to ASC for approximately six (6) years. As described more fully in paragraph 8, below, it is represented that the Independent Fiduciary will review the valuation prepared by WMA in determining the per share price of the Preferred Stock, as well as any other appropriate documents, for the purpose of evaluating the proposed sales of the

Preferred Stock to UNITE and to the UNITE Affiliates. The Independent Fiduciary is authorized to obtain another valuation if it believes that it would be in the interest of the Pension Fund.

WMA is independent in that the average percentage of WMA's annual income derived from work for the Pension Fund over the past six (6) year period is less than one percent (1%). Further, the Pension Fund and ASC represent that professional fees of WMA are not contingent upon the opinion expressed in the valuation report, and WMA represents that other than the services provided attendant to the valuation of ASC, neither it nor any of its employees has a present or intended financial interest in ASC.

In anticipation of the issuance of the Preferred Stock and the entry into the subject transactions, WMA prepared a valuation report, dated July 29, 2003, which offered WMA's preliminary opinion of the fair market value of ASC's equity, as of May 31, 2003. Specifically, WMA was asked to submit, as of a certain date, an opinion of: (1) The fair market value of an ownership interest in the Preferred Stock that is convertible into a one percent (1%) ownership interest in the outstanding Common Stock of ASC on a fully-diluted basis; and (2) the fair market value of an ownership interest in the Preferred Stock that is convertible into a fifteen percent (15%) ownership interest in the outstanding Common Stock of ASC on a fully-diluted basis. It is represented that WMA was asked to provide the fair market value of one percent (1%) of ASC's equity in case ASC elected to issue more or less than fifteen percent (15%) ownership interest in ASC's outstanding common shares (e.g. sell Preferred Stock convertible into a sixteen percent (16%) ownership interest in ASC's outstanding common shares). In a letter dated February 10, 2004, the applicant represented that it has been determined that ASC will sell Preferred Stock convertible into a fifteen percent (15%) interest in ASC's outstanding common shares.

After giving consideration to the historical and prospective operating characteristics of ASC, as well as the after-tax expected cash flows and earnings attributable to ASC, the current and forecasted capital structure of ASC, the risk/return relationship reflected for comparative companies having securities traded in the public market, the capital market and related industry macroeconomic evidence available, and other relevant factors, it is the opinion of WMA that the range of value for the

equity of ASC is between \$33 million and \$38.4 million, as of May 31, 2003.

Based on values for ASC's equity with a low of \$33 million and a high of \$38.4 million, it is the opinion of WMA that 118 shares of the Preferred Stock, which is convertible into a one percent (1%) ownership interest in the outstanding Common Stock of ASC on a fully-diluted basis, would be valued at a low of approximately \$536,000 and a high of approximately \$624,000, respectively, as of May 31, 2003. Based on values for ASC's equity with a low of \$33 million and a high of \$38.4 million, it is the opinion of WMA that 1,765 shares of the Preferred Stock, which upon conversion, would be convertible into 1,765 shares of Common Stock, or fifteen percent (15%) of the total shares of ASC outstanding on a fully-diluted basis, would be valued in the aggregate, respectively, at a low of approximately \$8,040,000 (\$4,557 per share) and a high of approximately \$9,360,000 (\$5,303 per share), as of May 31, 2003. It is represented that the number of shares of Preferred Stock that are issued as part of the transaction will have no impact on the per share value of the Common Stock or the Preferred Stock for purposes of this transaction. It is represented that this is due to the fact that the number of shares will increase at the same rate as the value of the Preferred Stock. It is further represented that WMA's valuation of a one percent (1%) and a fifteen percent (15%) ownership interest in the outstanding Common Stock of ASC on a fully-diluted basis is based on WMA's understanding: (1) That there are currently 10,000 shares of Common Stock of ASC outstanding; (2) that ASC plans to issue 1,765 shares of Preferred Stock; and (3) that the terms of the Preferred Stock included a mandatory dividend of five percent (5%) into perpetuity.

It is represented that the final appraisal conducted by WMA in connection with the sale of the Preferred Stock will set a fixed price for the Preferred Stock. It is represented as possible that the price set by WMA could fall outside the range of values, discussed in the paragraphs above. However, in no event will the Pension Fund receive less than fair market value for the Preferred Stock.

8. It is represented that the determination of whether to sell the Preferred Stock, and the oversight and negotiations with respect to the terms of the sales of the Preferred Stock shall be the sole responsibility of Fiduciary Counselors, Inc. (formerly, Aon Fiduciary Counselors, Inc.) (hereinafter, Fiduciary Counselors), which has been

³³ The applicant has not requested, and the Department is not providing, herein, relief for the purchase by the Pension Fund and/or ASC, pursuant to a right of first refusal, of the Preferred Stock or the shares of Common Stock issued upon conversion of the Preferred Stock from UNITE or the UNITE Affiliates. The applicant may submit an application for exemption prior to engaging in such transaction.

retained by the Pension Fund to act as the Independent Fiduciary on its behalf. Specifically, in its capacity as Independent Fiduciary for the Pension Fund, Fiduciary Counselors shall: (1) Determine, on behalf of the Pension Fund, whether the Preferred Stock should be sold by ASC to UNITE and to the UNITE Affiliates; (2) approve of the terms underlying the Preferred Stock to be issued by ASC; (3) negotiate and approve the terms of the sales of such Preferred Stock to UNITE and to the UNITE Affiliates; (4) determine that the terms of the sales of Preferred Stock are no less favorable to ASC than would be offered to an unrelated third party under similar circumstances; and (5) determine that the purchase price for the Preferred Stock paid by UNITE and by the UNITE Affiliates is no less than the fair market value of such Preferred Stock on the date of the purchases.

In addition, in a letter agreement between the Pension Fund and Fiduciary Counselors, dated August 7, 2003, Fiduciary Counselors acknowledged that the services of a qualified independent appraiser must be utilized to determine the purchase price for the Preferred Stock. Fiduciary Counselors further acknowledged that the selection and continuing retention of the appraiser and the acceptance of the appraiser's valuation of the Preferred Stock are fiduciary decisions governed by the provisions of part 4 of title I of the Act. Fiduciary Counselors represents that it understands that in discharging its obligations under Section 404(a) of the Act, it must take steps calculated to obtain the most accurate valuation of the Preferred Stock available. Fiduciary Counselors recognizes that the obligation to act prudently requires, at a minimum that it conduct a thorough and analytical critique of the Preferred Stock valuation and that in conducting such verification, it must evaluate a number of factors relating to the accuracy and methodology of the valuation and the expertise of the independent qualified appraiser. In addition it is represented that Fiduciary Counselors may cause the Pension Fund to replace the appraiser if necessary.

It is represented that Nell Hennessy, Esq. (Ms. Hennessy), President of Fiduciary Counselors, shall be the lead individual from Fiduciary Counselors in the execution of the duties of the Independent Fiduciary set forth above. Further, under the terms of its agreement with the Pension Fund, Fiduciary Counselors is responsible for maintaining records with respect to the performance of its duties for a period of six (6) years from the date on which the

proposed transactions close, or the date on which Fiduciary Counselors determines that ASC should not issue and sell the Preferred Stock, or the date on which UNITE and the UNITE Affiliates determine not to purchase the Preferred Stock from ASC.

Fiduciary Counselors has acknowledged and agreed that it is a fiduciary, under section 3(21) of the Act, with respect to any actions taken, pursuant to its agreement with the Pension Fund to serve as Independent Fiduciary. Further, Fiduciary Counselors has represented that it is independent of and unrelated to the parties to the proposed transactions.

9. It is represented that the proposed transactions are protective of the Pension Fund and of its participants and beneficiaries in that Fiduciary Counselors has been retained to serve as the Independent Fiduciary. Among other things, Fiduciary Counselors, as set forth above, will review and evaluate the terms of the Preferred Stock and the subject transactions. Fiduciary Counselors will also review and evaluate the independent appraisal of the fair market value of the Preferred Stock prepared by WMA, as well as any other relevant documents. Further, Fiduciary Counselors will make a determination as to whether the proposed sales satisfy the fiduciary requirements of prudence and loyalty.

In a letter to the Department, dated August 14, 2003, Ms. Hennessy set forth the preliminary conclusions of Fiduciary Counselors regarding the proposed transactions. Specifically, Fiduciary Counselors: (1) Determined, based on the terms of the transactions, including the tentative range for the fair market value of the Preferred Stock, that such stock should be sold to UNITE and to the UNITE Affiliates; (2) determined that the transactions, as structured would be in the interest of and would benefit the Pension Fund's participants and beneficiaries; (3) approved the proposed terms underlying the Preferred Stock, as set forth in the draft term sheet; (4) determined that such terms are consistent with what is "market" with respect to such securities; (5) reviewed the valuation provided by WMA; (6) determined that the transactions as structured are protective of the participants and beneficiaries of the Pension Fund; and (7) determined, on a preliminary basis, that ASC will receive no less than fair market value for the Preferred Stock. Ms. Hennessy further represented that Fiduciary Counselors is currently in the process of negotiating the terms of the sales with the representatives of UNITE and of the UNITE Affiliates, and will ensure that

the terms of the sales are no less favorable to ASC than would be offered to an unrelated third party under similar circumstances. It is also represented that Fiduciary Counselors will ensure that at closing, the subject transactions will be conducted in compliance with the negotiated terms, including that ASC receives no less than the fair market value of the Preferred Stock and that the transactions remain prudent, in the interest of, and protective of the participants and beneficiaries of the Pension Fund. In connection with the foregoing, Ms. Hennessy represented that Fiduciary Counselors will provide a detailed report to the Department upon the closing of the transactions.

10. It is represented that the proposed transactions are feasible in that the sales of the Preferred Stock to UNITE and to the UNITE Affiliates will be one time occurrences for cash with no ongoing oversight requirements.

11. It is represented that the proposed transactions are in the interests of the Pension Fund, because the transactions will provide ASC with an infusion of capital from an outside source which could be used to invest in the continued growth of ASC and the development of new product lines and markets with the goal of further increasing the value of ASC. The proposed transactions will permit ASC to raise capital while ensuring that the Pension Fund retains control of ASC.

Furthermore, it is anticipated that the proposed transactions will increase the profitability of ASC. It is represented that the fact that UNITE and the UNITE Affiliates will own the Preferred Stock of ASC will enhance the standing of ASC with its existing trade union customers, leading to additional business opportunities with such clients. Furthermore, it is represented that the fact that UNITE and the UNITE Affiliates own the Preferred Stock of ASC could serve as an effective marketing tool for obtaining business from other trade unions or trade union sponsored groups that have not previously purchased products from ASC or that do not currently utilize the services provided by ASC.

12. The Department notes that it is providing no relief for any potential down-the-road prohibited transactions that may arise after the sale of the Preferred Stock, including any that may arise in connection with (a) decisions by the Trustees of the Pension Fund to vote the Common Stock of ASC in a manner which could advantage the Preferred Stockholders, and (b) any decisions made by or actions undertaken by the ASC Board with respect to the Preferred Stock.

With respect to decisions by the Trustees of the Pension Fund to vote the Common Stock of ASC when the vote concerns the Preferred Stock held by UNITE and the UNITE Affiliates, the applicant has agreed that Trustees affiliated with UNITE and/or the UNITE Affiliates would recuse themselves from any decision to vote the Common Stock of ASC when participation by such Trustees would give rise to conflicts of interest. The applicant does not believe that such recusal is prohibited under the Taft-Hartley Act or the Labor Management Relations Act. In this regard, the applicant represents that the Taft-Hartley Act merely requires equal representation of employees and employers in connection with the receipt of payments by a trust fund. The purpose of restricting employers from making payments to benefit funds was to avoid union control and abuse—not employer control.

Potential conflicts may also arise with respect to any decision by the directors of ASC to redeem the Preferred Stock and any decision to pay dividends with respect to such stock.

In the opinion of the applicant, the redemption or call of the Preferred Stock or the conversion of the Preferred Stock, among other transactions, would not be prohibited, because the transaction would take place between UNITE and/or the UNITE Affiliates, and ASC, rather than with the Pension Fund. In this regard, the applicant maintains that once the Preferred Stock has been sold to UNITE and to the UNITE Affiliates, ASC no longer constitutes a plan asset look-through vehicle with respect to the Pension Fund under the Department's regulations at 29 CFR 2510.3-101(h) (the Plan Asset Regulation).³⁴ Accordingly, the applicant maintains that Trustees who are members of the ASC Board would be acting as directors of an operating company and not as fiduciaries under the Act controlling assets of the Pension Fund when making decisions regarding the Preferred Stock. The applicant further maintains that members of the ASC Board would be subject to the mandates of the New York state corporate laws, including those applicable to related party transactions, in the exercise of their duties as directors of ASC.

As the Department noted in its regulations at 29 CFR 2509.75-2:

if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if the plan may, by itself, require the corporation or partnership to engage in such transaction.

In any event, the Department is providing no relief herein, other than with respect to the sale of the Preferred Stock to UNITE and the UNITE Affiliates.

The applicant understands the concerns of the Department and has represented that conflicted directors of ASC will recuse themselves from participating in any decision or action involving the Preferred Stock. Thus, for example the ASC Directors affiliated with UNITE and/or the UNITE Affiliates would recuse themselves from any decision to issue dividends with respect to the Preferred Stock and any decision to redeem the Preferred Stock.

13. In summary, the applicant represents that the proposed transactions satisfy the statutory criteria of section 408(a) of the Act and section 4975 of the Code because: (a) Fiduciary Counselors will determine, on behalf of the Pension Fund, whether the Preferred Stock should be sold to UNITE and to the UNITE Affiliates; (b) Fiduciary Counselors will approve of the terms underlying the Preferred Stock to be issued by ASC; (c) Fiduciary Counselors will negotiate and approve the terms of the sales of the Preferred Stock to UNITE and to the UNITE Affiliates; (d) Fiduciary Counselors will monitor the terms of the transactions and ensure that ASC, UNITE, and the UNITE Affiliates comply with the approved terms; (e) Fiduciary Counselors will determine that the terms of the sales of Preferred Stock are no less favorable to ASC than would be offered to an unrelated third party under similar circumstances; (f) Fiduciary Counselors will determine that the purchase price for the Preferred Stock paid by UNITE and by the UNITE Affiliates is no less than the fair market value of such Preferred Stock, as of the date the transactions are entered; (g) Fiduciary Counselors will determine the fair market value of the Preferred Stock, as of the date each of the transactions is entered; (h) in determining the fair market value of the Preferred Stock, Fiduciary Counselors will obtain an appraisal from an independent qualified appraiser selected by it and ensure that the appraisal and Fiduciary Counselors's analysis of the appraisal are consistent with sound principles of valuation and the elements described in paragraph 8, in the Summary of Facts and Representations in this proposed

exemption; and (i) the Pension Fund will incur no fees, commissions, or other charges or expenses as a result of its participation in the transactions, other than the fee payable to Fiduciary Counselors.

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested exemption include all of the active participants and beneficiaries of the Pension Fund, the retirees receiving benefits from the Pension Fund, vested deferred participants and beneficiaries of the Pension Fund, the Trustees of the Pension Fund, all contributing employers to the Pension Fund, the members of the Board of ASC and the ASC Subsidiaries, UNITE, the UNITE Affiliates, and all locals, joint boards, and regional offices of UNITE who represent members who are participants in the Pension Fund. It is represented that these various classes of interested persons will be notified as follows.

All of the active participants and beneficiaries of the Pension Fund, the retirees receiving benefits from the Pension Fund, the Trustees of the Pension Fund, UNITE, and the members of the Board of ASC and the ASC Subsidiaries will be provided with a copy of the notice of pendency of this proposed exemption (the Notice), plus a copy of the supplemental statement (the Supplemental Statement), as required, pursuant to 29 CFR 2570.43(b)(2), which will advise such interested persons of their right to comment and to request a hearing. The Notice and the Supplemental Statement will be delivered by first class mail within fifteen (15) days of the publication of the Notice in the **Federal Register**.

In addition, a copy of the Notice and the Supplemental Statement will be provided, within fifteen (15) calendar days of the date of publication of the Notice in the **Federal Register**, to all locals, joint boards, and regional offices of UNITE who represent members who are participants in the Pension Fund and to contributing employers that employ members who are participants in the Pension Fund. The Pension Fund represents that immediately upon receipt of a copy of the Notice and Supplemental Statement such locals, joint boards, regional offices of UNITE, and contributing employers will post such Notice and the Supplemental Statement at those locations which are customarily used for notices regarding employee benefits matters and/or will post such Notice and Supplemental Statement at the union hall.

It is represented that for the purpose of sending the Notice and Supplemental

³⁴ The Plan Asset Regulation provides that where a plan "owns all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity."

Statement by mail, current addresses maintained by the Pension Fund will be used.

All written comments and requests for a hearing must be received by the Department no later than forty-five (45) days from the date of the publication of the Notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Angelena C. Le Blanc of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

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

[Application No. D-11202]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1996).³⁵ If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the 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 proposed 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 (TDTC), an unrelated party, at the time of the Transaction.

EFFECTIVE DATE: If granted, this proposed exemption will be effective as of November 17, 2003.

Summary of Facts and Representations

1. Pan-American is a mutual life insurance company based in New Orleans, Louisiana and is subject to the supervision and examination of the Louisiana Commissioner of Insurance. Pan-American is licensed in 40 states and the District of Columbia, Puerto Rico and the Virgin Islands. The insurer has affiliates in Panama, Guatemala and Colombia, and branch offices in Ecuador, El Salvador and Honduras. As of December 31, 2002, Pan-American had total assets under management of approximately \$2.3 billion. As of that date, Pan-American managed about \$900 million in retirement plan assets for approximately 1,200 employee benefit plans, covering about 50,000 plan participants. The insurer's most recent A.M. Best rating is "A -" (Excellent).

2. Among the insurance products and services it offers, Pan-American and certain of its affiliates provide funding, asset management and other services for employee benefit plans, some of which are subject to the provisions of title I of the Act. In particular, Pan-American maintains pooled separate accounts in which Title I pension, profit sharing, and other plans invest. The assets of a separate account are established and maintained by Pan-American separate and apart from its general account. The income and realized gains or losses from the assets in the separate account are credited or charged against the account without regard to the other investment gains or losses of Pan-American. Under the terms of the Pan-American contracts, either an independent Plan fiduciary or a participant can direct the investment of contract values among the investment options offered by Pan-American, in separate accounts or subaccounts. Pan-American manages all

or a portion of the assets of such separate accounts.

3. Among the separate accounts managed by Pan-American was Separate Account V, otherwise referred to herein as "the Account." The Account was established by Pan-American on or about November 24, 1992, and it was available only to defined contribution retirement plans, many of which are subject to Title I of the Act. The purpose of the Account was to provide a stable value fund option as an investment alternative in a pooled vehicle for Title I Plans. The unit value of the Account was set at \$10.00 when the first investment was made by a Plan in August 1995. The unit value was adjusted each Valuation Date (*i.e.*, each business day on which the Home Office of Pan-American was open to transact business and on which the New York Stock Exchange was open for unrestricted trading) to reflect the value of the assets of the Account, less any charges due Pan-American. The gross unit value of the Account on October 31, 2003 was \$14.4934. The net unit value for the Account varied according to differences in the charge structures for different group annuity contracts attributed to Plans participating in the Account.

A Plan's participation in the Account was governed by the Separate Account V Rider appended to the contracts issued by Pan-American to a participating Plan. The Account was not registered under the Investment Company Act of 1940. For purposes of the Act, the assets of the Account were treated as "plan assets" within the meaning of 29 CFR 2510.3-101(h)(1)(iii).

Approximately, 417 small to mid-sized client Plans of Pan-American invested in the Account.³⁶ As of October 31, 2003, the Plans had approximately \$75,517,418 invested in the Account and the Fund described herein. No Plan sponsored by Pan-American ever invested in the Account.

Accordingly, Pan-American was a party in interest with respect to such Plans, and a fiduciary with respect to the Account. Pan-American represents that neither it nor its affiliates had any discretionary authority over the decision to invest a Plan's assets in the Account. Instead, a Plan fiduciary or participant independent of Pan-American and its affiliates was

³⁵ For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

³⁶ The smallest Plan invested in the Account had an interest valued at \$29 and one participant while the largest Plan invested in the Account had an interest valued at over \$3 million and 1,243 participants. For 2001, 2002 and 2003, the net cash flow into the Account was \$17,785,258, \$32,727,395 and \$5,039,484, respectively.

responsible for such investment decisions.

4. The Account began investing in the Fund in August 1995. The Fund is a collective investment fund invested primarily in guaranteed investment contracts (GICs) and other similar instruments intended to achieve high current income and stability of principal. The Fund is designed for employee benefit plans, and for financial institutions acting as trustee, investment manager, custodian, or agent for one or more employee benefit plans as a convenient means of participating in a professionally managed, diversified portfolio consisting primarily of GICs and other stable value instruments.

Specifically, the Fund invests primarily in a diversified portfolio of GICs issued by insurance companies, bank investment contracts (BICs), corporate investment contracts, synthetic GICs (the wrap issuers of whom are not Pan-American), separate account GICs, floating rate GICs, repurchase agreements, and cash and cash equivalents, including money market instruments and certificates of deposit.

The trustee and portfolio manager of the Fund is TDTC, which has appointed Standish Mellon Asset Management Company LLC (Standish Mellon) as an investment advisor (prior to June 1, 2003, was doing business as Certus Asset Advisors). Both TDTC and Standish Mellon LLC are not affiliated with and are independent of Pan-American, which has no involvement in the operation or administration of the Fund. As of December 31, 2002, the Fund had total assets of \$588,015,081.

5. Units in the Fund are valued each business day at fair value, as determined in good faith by TDTC. At the Fund's inception, and all the times thereafter, the Fund has maintained a unit value of \$1.00. In other words, Fund units can never be worth more than \$1.00. Income distributed from the Fund is applied to the purchase of additional Fund units. Thus, an investor is entitled to receive a return on the investment plus the \$1.00 per unit value.³⁷ Units in the

Fund are offered by TDTC for purchase or redemption on a continuous basis, except that TDTC reserves the right to defer redemptions for a period of time, generally not to exceed twelve months, as necessary for a fair and orderly liquidation of Fund assets. There is no secondary market for units in the Fund.

6. Pan-American determined to discontinue the sale of its group annuity contracts and to transfer its existing business to another carrier in a reinsurance transaction because it could not reach the critical asset level needed to attain profitability in the retirement plan market. In particular, with respect to the group annuity contracts previously issued by Pan-American and remaining in force (the Contracts), Pan-American entered into agreements to transfer such business to Securian Retirement Services (Securian), a business unit of Minnesota Life Insurance Company (Minnesota Life). The Contracts included all of the group annuity contracts with amounts allocated to the Account.

Minnesota Life provides financial security for individuals and businesses in the form of insurance, retirement plans and investments. The company serves over seven million people with nearly \$350 billion of life insurance in force and \$22 billion in assets under management. Minnesota Life's combined work force of 4,400 employees and representatives is located at its St. Paul headquarters and agencies and offices across the country.

Minnesota Life is highly rated by the major independent rating agencies (e.g., A++ (Superior) by A.M. Best) that analyze the financial soundness and claims-paying ability of insurance companies. The Securian business unit of Minnesota Life currently manages assets of more than \$5.7 billion for more than 2,700 plans and over 180,000 participants nationwide. Securian consistently receives superior service ratings in independent surveys of plan sponsors and was one of the first retirement plan providers to offer transactional services on line.

7. The insurance commissioners of Louisiana and Minnesota approved the reinsurance transaction (the Reinsurance Transaction) on October 17, 2003, and October 28, 2003, respectively. Pan-American closed both the subject Transaction and the Reinsurance Transaction on November 17, 2003. On that date, Securian took responsibility for the administration and operation of the Contracts. Subsequently, subject to the consent of

money market funds issued by banks, provided the Account with a guarantee of principal.

the insurance commissioners in other jurisdictions, Securian agreed to co-insure the risks under the Contracts and, if the Plan owning the Contracts consented, to issue its own group annuity contracts in substitution for the Contracts.

In connection with the Reinsurance Transaction, Securian advised that it would not offer the Fund as an investment option for the Contracts nor a comparable stable value product.³⁸ Therefore, in accordance with industry practice, the Contracts provided, in pertinent part, that "[i]f in the judgment of the Insurance Company it [became] necessary or desirable to terminate Separate Account V by reason of any federal or state statute, any judicial decision or any rule or regulation of any governmental authority, or because it [was] no longer commercially feasible, the Insurance Company [could] liquidate the assets credited to the contractholder in Separate Account V and transfer them at the contractholder's election, to the Deposit Fund or other separate accounts maintained under the Group Annuity Contract or to any alternative funding agency."

In order to make all Plan monies immediately available for investment or reinvestment in the investment options to be offered by Securian, Pan-American requested that TDTC effect a redemption of the Account's interest in the Fund effective November 13, 2003, the original contemplated date of the Transaction. TDTC advised that it would not be able to fully redeem all of the Account's interests as of November 13, 2003, but, as allowed by the instruments governing the Fund, committed to redeeming \$8,000,000 of the Account's interests in the Fund each month beginning November 2003, until such time as all interests are redeemed.

8. Pan-American believed that it was appropriate and in the best interest of the Plans and their participants and beneficiaries for the monies invested in the Account to be made available for Plan fiduciaries and participants for reinvestment in other options. Because there was no secondary market for units in the Fund, to the best of Pan-American's information and belief, there was no available unrelated purchaser for the Fund units held by the Account.

9. Therefore, on November 17, 2003, Pan-American purchased in the ordinary course of business, for its own account, the Fund units held by the Account, at a per unit value of \$1.00, as

³⁷ The Plans investing in the Fund through the Account received a return on investment in the form of an increase or decrease in the number of units held. Pan-American did not issue any synthetic, stabilizing or other wrappers with respect to the Fund. The Fund was designed to provide the Account with stability of principal and high-current income through the assets it purchased, and the Fund did not separately provide a guarantee of principal, nor did Pan-American provide a guarantee of principal or earnings by issuing any wrappers with respect to the Fund. Although neither the value of the Fund's portfolio nor an investment in the Fund is insured or guaranteed, certain investments within the Fund, such as

³⁸ It is represented that Securian would offer all of the Plans invested in the Account and Fund a fixed income investment option that is supported and guaranteed by Minnesota Life's general account.

determined by TDTC on November 14, 2003.³⁹ Pan-American acquired 55,010,750.23 units from the Account for cash.⁴⁰ (The redemption proceeds for the Fund units that are received over the following six to twelve months will be paid by TDTC to Pan-American.) Thus, the purchase price for the Transaction was at the full unit value on November 14, 2003, without any discount or other reduction for the deferral of the redemption of those Fund units.

Both the subject Transaction and the entire Reinsurance Transaction were completed on November 17, 2003. The Plans received their *pro rata* portion of cash based upon their ownership percentage in the Fund at the close of business on November 14, 2003. No commissions or other fees were paid by the Account in connection with the Transaction.⁴¹

In addition, the value of the interests of Plans and participants and beneficiaries in the Account on November 14, 2003, was exactly the same as it would have been had the Transaction not occurred. The cash in the Account resulting from the Transaction was immediately available to the Plans and their participants for reinvestment in the options then offered under the Contracts. Following the reinvestment of these monies at the direction of the Plans and their

participants, the Account was terminated.

Accordingly, Pan-American requests an administrative exemption from the Department with respect to the Transaction. If granted, the exemption will be effective as of November 17, 2003.

10. U.S. Trust Company, National Association (U.S. Trust) agreed to act on behalf of the Plans investing in the Account as the Independent Fiduciary with respect to the Transaction. The Independent Fiduciary is a national banking association formed under the laws of the United States and authorized to exercise all fiduciary powers that may be exercised by state banks and trust companies under the laws of the State of Connecticut. The Independent Fiduciary, which is a wholly owned subsidiary of The Charles Schwab Corporation, has served as an independent fiduciary for employee benefit plans in connection with exemption requests from Department over the past fifteen years. The Independent Fiduciary has certified that it meets the following requirements:

- The Independent Fiduciary is not directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with Pan-American, Minnesota Life, Securian, TDTC, or Standish Mellon.
- The Independent Fiduciary is not an officer, director, employee of, or partner in Pan-American, Minnesota Life, Securian, TDTC, or Standish Mellon.
- The Independent Fiduciary is not a corporation or partnership in which Pan-American, Minnesota Life, Securian, TDTC, or Standish Mellon has an ownership interest or is a partner.
- The Independent Fiduciary does not have an ownership interest in Pan-American, Minnesota Life, Securian, TDTC, or Standish Mellon or any of their affiliates (except for possibly *de minimis* holdings in Minnesota Life).
- The Independent Fiduciary was not a fiduciary with respect to the Account prior to its appointment as an independent fiduciary.
- The Independent Fiduciary has acknowledged in writing acceptance of fiduciary responsibility and has agreed not to participate in any decision with respect to any transaction in which it has an interest that might affect its best judgment as a fiduciary.
- The Independent Fiduciary has not received, for any fiscal year, from Pan-American, Minnesota Life, Securian,

TDTC, or Standish Mellon or their affiliates (including amounts received for services provided by the Independent Fiduciary associated with the Transaction) gross income for that fiscal year that exceeds one percent of the Independent Fiduciary's annual gross income from all sources for such fiscal year.

- Lastly, neither the Independent Fiduciary nor any partnership or corporation of the Independent Fiduciary is an officer, director, or 10 percent or more partner or shareholder, will acquire any property from, sell any property to, or borrow funds from Pan-American, Minnesota Life, Securian, TDTC, or Standish Mellon during the period that the Independent Fiduciary serves as independent fiduciary of the Plans, and continuing for a period of six months after the Independent Fiduciary ceases to be an independent fiduciary of the Plans, or negotiate any such transaction during the period that the Independent Fiduciary serves as an independent fiduciary of the Plans.

11. Thus, the Independent Fiduciary is independent of and has no affiliation with Pan-American, Minnesota Life, Securian, TDTC, or Standish Mellon, and the fees paid to the Independent Fiduciary in connection with the Transaction will constitute less than one percent of its revenue for 2003. Furthermore, the Independent Fiduciary has acknowledged and accepted the duties, responsibilities of an Independent Fiduciary.

Prior to the closing of the Transaction, the Independent Fiduciary (a) Conducted a due diligence review of the Transaction; (b) determined whether the Transaction was in the interest and protective of the Plans and their participants and beneficiaries; (c) issued a written preliminary report to the Department; and (d) a final report to the Department within 30 days of the closing of the Transaction.

In making its determinations, the Independent Fiduciary was required to (a) Review the terms of the Transaction; (b) review the written procedures by which TDTC calculates the net asset value of the Fund; (c) conduct discussions, as necessary to make the determinations described above, with appropriate personnel of Pan-American, Standish Mellon, and/or TDTC; and (d) if the Transaction was effectuated, confirm in writing whether the Transaction was effectuated consistently with the required terms set forth in the exemption application, based on written representations that the Independent

³⁹ Based on its review of information provided by Pan-American and TDTC, the Independent Fiduciary concluded that the purchase of the Fund units by Pan-American was effectuated in a manner consistent with the required criteria and procedures set forth in its preliminary report and that the fair market value of the Plan's interest in the Account as of November 14, 2003, as determined by TDTC, was accurate and consistent with the Fund's valuation methodology.

⁴⁰ As noted in Representation 3, the Account had total assets in excess of \$75 million as of October 31, 2003 invested in the Fund. However, the Account sold approximately \$55 million in Fund units to Pan-American. The applicant explains that prior to the date of the Transaction and the Reinsurance Transaction, TDTC redeemed approximately 20,000,000 Fund units held by the Account at the request of certain Plan fiduciaries electing not to participate in the Reinsurance Transaction, thereby reducing the Account size.

⁴¹ The applicant represents that the economic burdens and benefits of the Fund units in the future will accrue to the detriment or benefit of Pan-American rather than to the Plans. Because the Fund units were purchased at fair market value, the purchase price reflected the market's assessment of the opportunity for future gains in the value of the Fund, balanced against the risk of future loss in value. The purchase price was the fair market value of the units determined in the ordinary course of business by TDTC for that date. The purchase price, which was credited to the Account, and to the Plans, compensated the Plans for the transfer of the future risks and rewards of Fund ownership. As a result, the applicant does not believe that the Transaction, and in particular, the form and timing of the payment by Pan-American to the Plans for the Fund units, provided financial benefit to Pan-American for which the Plans were not being compensated.

Fiduciary would request from Pan-American and TDTC and a test of a sample of material aspects of the Transaction, deemed in the Independent Fiduciary's judgment to be representative.

In connection with its analysis of the Transaction, the Independent Fiduciary states that it reviewed and considered various documents, including, but not limited to, the Separate Account V Rider, the Optional Investment Contract, the Fund's product description brochure, the December 31, 2002 Annual Report of the Fund, and the exemption request. However, the Independent Fiduciary states that it did not make any independent investigation to verify the accuracy of such information, data, analyses and representations. Instead, the Independent Fiduciary represents that it relied upon information provided by Pan-American, which Pan-American deemed to be accurate.

In anticipation of the Transaction, the Independent Fiduciary notes that as of August 31, 2003, the Fund was valued at \$643.2 million by TDTC, as based on a daily valuation of the Fund, and that the value of each unit was \$1.00 per unit. The Independent Fiduciary states that investments in GICs and other similar investments were valued at their contract values, and would provide for benefit responsive withdrawals at contract value and daily dividends to Fund unitholders that would be automatically reinvested on a monthly basis. In reviewing the Account's July Fund statement, the Independent Fiduciary demonstrated the methodology implemented by TDTC in calculating the net asset value of the Account's interest in the Fund as follows:

Number of units Beginning of July	\$77,442,676.88
Value of units	1.00
Account's Equity Beginning of July	77,442,676.88
Value of units acquired through Contributions (at \$1.00 per unit)	4,238,607.63
Value of units acquired through Reinvestment of dividends (at \$1.00 per unit)	260,589.89
Value of units withdrawn (at \$1.00 per unit)	(2,720,669.48)
Account's Equity End of July	79,221,204.92

The Independent Fiduciary opined that the Transaction would be in the interest and protective of the Plans and their participants and beneficiaries because:

- Securian had determined not to continue the Fund as an investment

alternative following the Transaction. Therefore, the Independent Fiduciary believed it imperative that the Account's interest in the Fund be redeemed.

- TDTC had the discretion to defer redemptions over an extended period of time and had chosen to do so.
- There was no secondary market for the Fund units and, to the best of Pan-American's knowledge, there was no available unrelated purchaser for the Fund units held by the Account.
- The fair market value of the Account's units in the Funds as of November 14, 2003, would be determined by TDTC in the same manner that the units were historically valued by TDTC.
- Pan-American would purchase the Account's units at the determined value for cash which would allow the Plans to reinvest the full amount of the proceeds immediately rather than extending the receipt of redemption proceeds over 6–12 months.
- The Plans would pay no fees or commissions associated with the Transaction.

Furthermore, the Independent Fiduciary believed the terms of the Transaction were no less favorable to the Account than the terms obtainable in an arm's length transaction with an unrelated party at the time of such Transaction.

Subsequent to the closing of the Transaction, the Independent Fiduciary performed a post-transaction review which included, among other things, a determination of whether the fair market value of the Plans' interests in the Account, as determined by TDTC, was accurate and consistent with TDTC's valuation methodology of the Fund. Based upon the results of such review, the Independent Fiduciary concluded that the purchase of Fund units by Pan-American was effectuated in a manner consistent with the required criteria and procedures set forth in its preliminary report, and that the value paid by Pan-American for the Plan's interests in the Account was accurate and consistent with the Fund's valuation methodology.

12. In summary, it is represented that the Transaction satisfied the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) Prior to the Transaction, the Independent Fiduciary, acting on behalf of the Plans, 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 TDTC, 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 TDTC, at the time of the Transaction.

Notice to Interested Persons

Pan-American represents that it will distribute, by first class mail, a copy of the notice of proposed exemption (the Notice) within five (5) days of the date of such Notice is published in the **Federal Register** to the independent fiduciaries of the Plans affected by the Transaction. The Notice will include a copy of the proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which informs all interested persons of their right to comment on and/or request a hearing with respect to the proposed exemption. Comments and requests for a public hearing are due within 35 days following the publication of the proposed exemption in the **Federal Register**.

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

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and

beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 19th day of March, 2004.

Ivan Strasfeld,

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

[FR Doc. 04-6584 Filed 3-23-04; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-52,912]

Boise Cascade Corporation, Yakima, WA; Notice of Revised Determination on Reconsideration Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

By letter dated December 3, 2003, the Western Council of Industrial Workers, Local 2739, requested administrative reconsideration regarding the Department's Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance (ATAA), applicable to

softwood dimensional lumber workers of the subject firm. The Notice of Affirmative Determination Regarding Application for Reconsideration was signed in February 10, 2004 and published in the **Federal Register** on February 25, 2004 (69 FR 8698).

The initial denial was based on the findings of no sales declines and minimal production declines during the period of employment declines at the subject company, no shift of production abroad, no subject company imports and that there was a shift of production to a domestic facility. The workers produce plywood and softwood dimensional lumber and are separately identifiable by product line.

In the request for reconsideration, the petitioner alleged that employment declines occurred at the subject facility and increased import of softwood dimensional lumber.

An examination of new information and further review of existing information supplied by the company during the initial investigation reveals that the subject company did experience sales, production and employment declines during the relevant time period.

The Department conducted a survey of the subject company's major declining customers for the time periods 2001, 2002, and January-August 2003 regarding imports of softwood dimensional lumber. The sample survey represents a meaningful portion of total subject company sales. The survey revealed decreased subject company purchases and increased customer reliance on imported softwood dimensional lumber during the relevant time period.

The investigation also revealed that at least five percent of the workforce at the subject firm is at least fifty years of age and that the workers possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

Conclusion

After careful consideration of the new facts obtained on reconsideration, it is concluded that increased imports of softwood dimensional lumber, contributed importantly to the decline in production and to the total or partial separation of workers at Boise Cascade Corporation, Yakima, Washington. In accordance with the provisions of the Act, I make the following revised determination:

Workers of Boise Cascade Corporation, Yakima, Washington, engaged in activity related to the production of softwood dimensional lumber, who became totally or partially separated from employment on or

after September 4, 2002 through two years from the date of this certification, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under section 246 of the Trade Act of 1974.

Signed in Washington, DC this 8th day of March 2004.

Elliott S. Kushner

*Certifying Officer, Division of Trade
Adjustment Assistance.*

[FR Doc. 04-6548 Filed 3-23-04; 8:45 am]

BILLING CODE 4510-30-P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-52,128, TA-W-52,128A, and TA-W-52,128B]

Control Engineering Company, Pellston, MI; Control Engineering Company, Harbor Springs, MI; Control Engineering Company, Boyne City, MI; Notice of Negative Determination on Reconsideration

On December 8, 2003, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of the subject firm. The notice was published in the **Federal Register** on December 29, 2003 (68 FR 74972).

The Department initially denied TAA to workers of Control Engineering Company, Pellston, Harbor Springs, and Boyne City, Michigan because the "contributed importantly" group eligibility requirement of section 222(3) of the Trade Act of 1974, as amended, was not met. The "contributed importantly" test is generally demonstrated through a survey of customers of the workers' firm. The survey revealed that none of the respondents increased their purchases of imported automated material handling systems/AVG and sheet metal enclosures. The company did not import automated material handling systems/AVG and sheet metal enclosures in the relevant period, nor did they shift production to a foreign source.

In the request for reconsideration, the petitioners alleged that the basis for certification at an affiliated facility (Jervis B. Webb Company, New Hudson, Michigan, TA-W-41,440) was also a contributing factor in layoffs at the subject firm facilities in this investigation. In the case of workers at the New Hudson facility, workers were certified on the basis of a shift of