

or sale within the United States after importation of certain insect traps that infringe the claims of ABC's U.S. Patents Nos. 6,286,249 (the '249 patent) and 6,145,243 (the '243 patent). The notice of investigation identified one respondent, Blue Rhino Corp. ("BRC") of Winston-Salem, North Carolina. On December 8, 2003, the complaint and notice of investigation were amended to add four additional respondents: Blue Rhino Consumer Products, LLC ("BRCP") and Blue Rhino Global Sourcing, LLC ("BRGS"), both of Winston-Salem, N.C.; Guangdong Dong Fang Imp. & Exp. Corp. ("Guangdong") of Shenzhen, China; and Lentek International, Inc. ("Lentek") of Kissimmee, Florida.

On March 29, 2004, pursuant to Commission rule 210.21(c)(1)(ii), respondents BRC, BRCP, BRGS, and Guangdong filed a motion for partial termination of the investigation and entry of a consent order. The motion requested termination of the investigation with respect to these respondents' older model accused insect traps, *i.e.*, the SV-1000 model insect traps. On April 7, 2004, the respondents filed a revised proposed consent order and consent order stipulation, which included changes agreed to by complainant. On April 2, 2004, the Commission investigative attorney filed a response supporting the motion.

On April 9, 2004, the ALJ issued an ID (Order No. 23) granting the motion. No petitions for review of the ID were filed.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.

Issued: April 28, 2004.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04-10016 Filed 5-3-04; 8:45 am]

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## INTERNATIONAL TRADE COMMISSION

[USITC SE-04-011]

### Sunshine Act Meeting

**AGENCY:** United States International Trade Commission.

**TIME AND DATE:** May 14, 2004 at 11 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205-2000.

**STATUS:** Open to the public.

### MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: None.
2. Minutes.
3. Ratification List.
4. Inv. No. 731-TA-1034 (Final) (Certain Color Television Receivers from China)—briefing and vote. (The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before May 26, 2004.)
5. *Outstanding action jackets:* None. In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: April 29, 2004.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 04-10157 Filed 4-30-04; 9:17 am]

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. D-11008, et al.]

### Proposed Exemptions; Comerica Bank and Its Affiliates (Collectively, Comerica)

**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 EBSA 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.

**Comerica Bank and Its Affiliates  
(Collectively, Comerica) Located in  
Detroit, Michigan**

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

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

**Section I—Proposed Exemption for the  
Acquisition, Holding and Disposition of  
Comerica Incorporated Stock**

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(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)(D) and (E) of the Code, shall not apply to the acquisition, holding and disposition of Comerica Incorporated Stock by Index and Model-Driven Funds managed by Comerica, provided that the following conditions and the general conditions in Section II are met:

(a) The acquisition or disposition of Comerica Incorporated Stock is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based, and does not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring the Comerica Incorporated Stock which is intended to benefit Comerica or any party in which Comerica may have an interest.

(b) Whenever Comerica Incorporated Stock is initially added to an index on which an Index or Model-Driven Fund is based, or initially added to the portfolio of an Index or Model-Driven Fund, all acquisitions of Comerica Incorporated Stock necessary to bring the Fund's holdings of such Stock either to its capitalization-weighting or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or to its correct weighting as determined by the model which has been used to transform the index (a "Buy-up" defined in Section III(e)), occur in the manner described in either (1) or (2) below:

(1) If,

(A) The aggregate required purchase of Comerica Incorporated Stock is less than one (1) percent of the total trading volume in Comerica Incorporated Stock during the previous ten (10) trading days, and

(B) The required purchase can be completed within ten (10) trading days with each day's purchase limited to no more than ten (10) percent of the aggregate required purchase,

Then all purchases would be made by placing market-on-close orders either with a broker-dealer independent of Comerica which is registered under the '34 Act or through an automated trading system operated by a broker-dealer independent of Comerica which is registered under the '34 Act and which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of the broker-dealer; or

(2) If the conditions under (1) cannot be met, then:

(A) Purchases are from, or through, only one broker or dealer on a single trading day;

(B) Based on the best available information, purchases are not the opening transaction for the trading day;

(C) Purchases are not effected in the last half hour before the scheduled close of the trading day;

(D) Purchases are at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from non-affiliated brokers;

(E) Aggregate daily purchases do not exceed 15 percent of the average daily trading volume for the security, as determined by the greater of (i) the trading volume for the security occurring on the applicable exchange and automated trading system on the date of the transaction, or (ii) an aggregate average daily trading volume for the security occurring on the applicable exchange and automated trading system for the previous five (5) business days, both based on the best information reasonably available at the time of the transaction;

(F) All purchases and sales of Comerica Incorporated Stock occur either (i) on a recognized securities exchange (as defined in Section III(k) below), (ii) through an automated trading system (as defined in Section III(j) below) operated by a broker-dealer independent of Comerica that is either registered under the '34 Act, and thereby subject to regulation by the SEC, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system (as defined in Section III(j) below) that is operated by a recognized securities exchange (as defined in Section III(k) below), pursuant to the applicable securities laws, and provides a mechanism for customer orders to be

matched on an anonymous basis without the participation of a broker-dealer; and

(G) If the necessary number of shares of Comerica Incorporated Stock cannot be acquired within 10 business days from the date of the event which causes the particular Fund to require Comerica Incorporated Stock, Comerica appoints a fiduciary which is independent of Comerica to design acquisition procedures and monitor Comerica's compliance with such procedures.

(c) Subsequent to a Buy-up necessary to bring a Fund's holdings of Comerica Incorporated Stock to its specified weighting in the index or model pursuant to the restrictions described in paragraph (b) above, all aggregate daily purchases of Comerica Incorporated Stock by the Funds do not exceed on any particular day the greater of:

(1) 15 percent of the average daily trading volume for the Comerica Incorporated Stock occurring on the applicable exchange and automated trading system (as defined below) for the previous five (5) business days, or

(2) 15 percent of the trading volume for Comerica Incorporated Stock occurring on the applicable exchange and automated trading system (as defined below) on the date of the transaction, as determined by the best available information for the trades that occurred on such date.

(d) All transactions in Comerica Incorporated Stock not otherwise described in paragraph (b) above are either: (i) entered into on a principal basis in a direct, arms-length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of Comerica and is registered under the '34 Act, and thereby subject to regulation by the SEC, (ii) effected on an automated trading system (as defined in Section III(j) below) operated by a broker-dealer independent of Comerica that is subject to regulation by the SEC, or an automated trading system operated by a recognized securities exchange (as defined in Section III(k) below) which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized securities exchange (as defined in Section III(k) below) so long as the broker is acting on an agency basis.

(e) No transactions by a Fund involve purchases from, or sales to, Comerica (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the

Fund with such party in interest would otherwise be subject to an exemption).

(f) No more than five (5) percent of the total amount of Comerica Incorporated Stock that is issued and outstanding at any time is held in the aggregate by Index and Model-Driven Funds managed by Comerica.

(g) Comerica Incorporated Stock constitutes no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

(h) A plan fiduciary independent of Comerica authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds Comerica Incorporated Stock, pursuant to the procedures described herein, other than in the case of a plan sponsored by Comerica for the benefit of its employees (a Comerica Plan).

(i) A fiduciary independent of Comerica directs the voting of the Comerica Incorporated Stock held by an Index or Model-Driven Fund on any matter in which shareholders of Comerica Incorporated Stock are required or permitted to vote.

(j) No more than ten (10) percent of the assets of any Fund that acquires and holds Comerica Incorporated Stock is comprised of assets of any Comerica Plan(s) for which Comerica exercises investment discretion.

#### Section II—General Conditions

(a) Comerica maintains or causes to be maintained for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (b) of this Section 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 Comerica, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest other than Comerica 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) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) of this Section are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service,

(B) Any fiduciary of a plan participating in an Index or Model-Driven Fund who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan participating in an Index or Model-Driven Fund or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an Index or Model-Driven Fund, or a representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this paragraph (b) shall be authorized to examine trade secrets of Comerica or commercial or financial information which is considered confidential.

#### Section III—Definitions

(a) The term "Index Fund" means any investment fund, account or portfolio sponsored, maintained, trusteeed, or managed by Comerica, in which one or more investors invest, and—

(1) Which is designed to track the rate of return, risk profile and other characteristics of an independently maintained securities Index, as described in Section III(c) below, by either (i) replicating the same combination of securities which compose such Index or (ii) sampling the securities which compose such Index based on objective criteria and data;

(2) For which Comerica does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That contains "plan assets" subject to the Act, pursuant to the Department's regulations (see 29 CFR 2510.3–101, Definition of "plan assets"—plan investments); and,

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund which is intended to benefit Comerica or any party in which Comerica may have an interest.

(b) The term "Model-Driven Fund" means any investment fund, account or portfolio sponsored, maintained, trusteeed, or managed by Comerica, in which one or more investors invest, and—

(1) Which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third party data, not within the control of Comerica, to transform an independently maintained Index, as described in Section III(c) below;

(2) Which contains "plan assets" subject to the Act, pursuant to the Department's regulations (see 29 CFR 2510.3–101, Definition of "plan assets"—plan investments); and

(3) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria which is intended to benefit Comerica or any party in which Comerica may have an interest.

(c) The term "Index" means a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) The organization creating and maintaining the index is—

(A) Engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients,

(B) A publisher of financial news or information, or

(C) A public stock exchange or association of securities dealers; and,

(2) The index is created and maintained by an organization independent of Comerica; and,

(3) The index is a generally accepted standardized index of securities which is not specifically tailored for the use of Comerica.

(d) The term "opening date" means the date on which investments in or withdrawals from an Index or Model-Driven Fund may be made.

(e) The term "Buy-up" means an acquisition of Comerica Incorporated Stock by an Index or Model-Driven Fund in connection with the initial addition of such Stock to an independently maintained index upon which the Fund is based or the initial investment of a Fund in such Stock.

(f) The term "Comerica" refers to Comerica Bank and its Affiliates, as defined below in paragraph (g).

(g) The term "Affiliate" means, with respect to Comerica Bank, an entity which, directly or indirectly, through one or more intermediaries, is controlled by Comerica Incorporated.

(h) An "affiliate" of Comerica Incorporated 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 or relative of such person, or partner of any such person; and

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

(i) The term "control" means the power to exercise a controlling

influence over the management or policies of a person other than an individual.

(j) The term "automated trading system" means an electronic trading system that functions in a manner intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers, such as an "alternative trading system" within the meaning of the SEC's Reg. ATS [17 CFR Part 242.300], as such definition may be amended from time to time, or an "automated quotation system" as described in Section 3(a)(51)(A)(ii) of the '34 Act [15 USC 78c(a)(51)(A)(ii)].

(k) The term "recognized securities exchange" means a U.S. securities exchange that is registered as a "national securities exchange" under Section 6 of the '34 Act (15 U.S.C. 78f), or a designated offshore securities market, as defined in Regulation S of the SEC [17 CFR Part 230.902(b)], as such definition may be amended from time to time, which performs with respect to securities the functions commonly performed by a stock exchange within the meaning of definitions under the applicable securities laws (e.g., 17 CFR Part 240.3b-16).

#### Summary of Facts and Representations

1. Comerica Bank is a banking corporation chartered under the laws of Michigan. It is a wholly-owned subsidiary of Comerica Incorporated, which is a bank holding company regulated by and registered under the Bank Holding Company Act of 1956 as amended. Comerica Bank & Trust, National Association, is a federally chartered banking association. It is also a wholly-owned subsidiary of Comerica Incorporated. Comerica Bank has been granted trust powers by the Michigan Division of Financial Institutions which regulates Comerica Bank pursuant to Michigan law. As to fiduciary matters, the Michigan Division of Financial Institutions requires Michigan chartered banks to comply with the regulations promulgated by the United States Comptroller of the Currency. Comerica Bank is also regulated by the Federal Reserve Board. Comerica Bank & Trust, National Association has been granted trust powers by the Comptroller of the Currency under section 92a of the National Bank Act. World Asset Management (WAM) is an investment advisor registered under the Investment Advisers Act of 1940. WAM is a Delaware limited liability company of which the controlling partners are Comerica Bank affiliates. The "Applicants" for the exemption proposed herein are Comerica Bank,

Comerica Bank & Trust, National Association, WAM, and those other affiliates of Comerica Bank that act or may act in the future as fiduciaries to ERISA-covered plans.

2. The Applicants represent that they act as a trustee, a custodian of assets or an investment manager for various employee pension and welfare benefit plans which are subject to regulation under ERISA. In their fiduciary capacities, the Applicants have complete discretionary powers with respect to some plans, and as to other plans, they invest assets as directed by independent investment fiduciaries, the plan sponsors or individual plan participants.

3. Effective September 1, 1999, WAM became an investment manager for a group of employee benefit pension plans for which Comerica Bank previously acted as trustee. Under Comerica Bank's trusteeship, the plans' assets were invested in a Model-Driven Fund (i.e., the WAM Model-Driven Fund) which depended upon certain indices which included Comerica Incorporated Stock. The plans' sponsor, acting in an independent fiduciary capacity, periodically directed Comerica Bank to acquire and dispose of Comerica Incorporated Stock as dictated by the computer model upon which the Model-Driven Fund was based.<sup>1</sup> WAM was appointed as an investment manager for the purpose of continuing to operate the Model-Driven Fund.

4. The Applicants organize and maintain collective investment funds for the pooled investment of assets of ERISA-regulated plans over which Comerica Bank has fiduciary powers. The collective funds are managed pursuant to specific investment objectives set forth in the declaration of trust for each fund. As prescribed by regulations of the Comptroller of the Currency, Comerica retains the fiduciary responsibility for the investment of the assets of their collective investment funds. The Applicants represent that by diversifying investments within collective funds, the investment risk to individual customer accounts is reduced while enabling the collective funds to pursue investment objectives which might otherwise be possible or prudent only for larger accounts. While Comerica retains the fiduciary

<sup>1</sup> The Applicants are not requesting a retroactive exemption for the past acquisition, holding and disposition of any Comerica Incorporated Stock by the WAM Model-Driven Fund. In this regard, the Department is not providing any opinion in this proposed exemption as to whether such transactions were in violation of any of the fiduciary provisions contained in Part 4 of Title I of the Act.

responsibility for investing the assets of its collective investment funds, all of the funds invested according to indices (i.e., Index and Model-Driven Funds) are currently managed on a day-to-day basis under contracts between Comerica and WAM.

5. Before investing the assets of an ERISA-covered employee benefit plan in its collective funds, Comerica represents that it complies with the requirements for the exemption of such transactions from the prohibitions of section 406(a) and (b) of the Act as provided in section 408(b)(8) of the Act.<sup>2</sup> *Inter alia*, Comerica represents that it requires either that the controlling employee benefit plan document permits the plan's assets to be invested in the particular collective investment funds or secures the written permission of an independent investment fiduciary to such plan for the collective fund investment.

6. The Applicants request that the Index and Model-Driven Funds be permitted to invest in Comerica Incorporated Stock if such Stock is included among the securities listed in the index utilized by the Fund. The Applicants represent that Comerica Incorporated Stock is currently included in the S&P 500 Index, the Wilshire 5000 Total Return Index, the Russell 3000 Index, and the Russell 1000 Index. Comerica has identified at least eight Index Funds it sponsors which would, if the exemption proposed herein is granted, acquire and hold Comerica Incorporated Stock. Those Index Funds are the Comerica 500 Index Fund (An Employee Benefit Stock Fund), Comerica Large Cap Value Index Fund (An Employee Benefit Fund), Comerica Large Cap Index Fund (A Tax Exempt Organizations Fund), Comerica 500 Index Fund (PEP) (An Employee Benefit Stock Fund), Trowel Trades S&P 500 Index Fund, Comerica Managed Asset Allocation Fund (An Employee Benefit Fund), and the Comerica Managed Asset Allocation Fund (A Tax Exempt Organizations Fund). At present, Comerica has excluded Comerica Incorporated Stock from the portfolios of those Index Funds holding "plan assets" subject to ERISA, even though such stock is included in the independently maintained indices upon which such Funds are based. The exclusion of Comerica Incorporated Stock prevents Comerica's Index Funds from accurately tracking the investment return published by the independent

<sup>2</sup> In this proposed exemption, the Department expresses no opinion as to whether any activities of Comerica regarding its collective funds have satisfied the conditions of section 408(b)(8) of the Act.

organizations which maintain the indices.

7. The Applicants state that the exemption proposed herein is necessary to allow Funds holding "plan assets" to purchase and hold Comerica Incorporated Stock in order to replicate the capitalization-weighted or other specified composition of Comerica Incorporated Stock in an independently maintained third party index used by an Index Fund or to achieve the desired transformation of an index used to create a portfolio for a Model-Driven Fund.

In addition, the Applicants represent that there will be instances, once this proposed exemption is granted, when Comerica Incorporated Stock will be added to an index on which a Fund is based or will be added to the portfolio of a Fund which seeks to track an index that includes such stock. These instances will be referred to herein as a "Buy-up." In such instances, acquisitions of Comerica Incorporated Stock will be necessary to bring the Fund's holdings of such stock either to its capitalization-weighted or other specified composition in the index, as determined by the independent organization maintaining such index, or to achieve the desired weighting for such stock as determined by the computer model which has been used to transform the index. If the Index or Model-Driven Fund holds "plan assets," the Applicants represent that all acquisitions of Comerica Incorporated Stock will comply with the Buy-up conditions of this proposed exemption. These conditions are described in either (1) or (2) below, as applicable:

(1) If,

(A) The aggregate required purchase of Comerica Incorporated Stock is less than one (1) percent of the total trading volume in Comerica Incorporated Stock during the previous ten trading days, and

(B) The required purchase can be completed within ten (10) trading days with each day's purchase limited to no more than ten (10) percent of the aggregate required purchase,

Then all purchases would be made by placing market-on-close orders either with a broker-dealer independent of Comerica which is registered under the Securities Act of 1934 or through an automated trading system operated by a broker-dealer independent of Comerica which is registered under the Securities Act of 1934 and which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of the broker-dealer; or

(2) If the conditions in (1) above cannot be met, then:

(A) Purchases are from, or through, only one broker or dealer on a single trading day;

(B) Based on the best available information, purchases are not the opening transaction for the trading day;

(C) Purchases are not effected in the last half hour before the scheduled close of the trading day;

(D) Purchases are at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from non-affiliated brokers;

(E) Aggregate daily purchases do not exceed 15 percent of the average daily trading volume for the security, as determined by the greater of either (i) the trading volume for the security occurring on the applicable exchange and automated trading system on the date of the transaction, or (ii) an aggregate average daily trading volume for the security occurring on the applicable exchange and automated trading system for the previous five (5) business days, both based on the best information reasonably available at the time of the transaction;

(F) All purchases and sales of Comerica Incorporated Stock occur either (i) on a recognized securities exchange as defined in Section III(k) above, (ii) through an automated trading system (as defined in Section III(j) above) operated by a broker-dealer independent of Comerica that is registered under the '34 Act, and thereby subject to regulation by the SEC, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system (as defined in Section III(j) above) that is operated by a recognized securities exchange (as defined in Section III(k) above) pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(G) If the necessary number of shares of Comerica Incorporated Stock cannot be acquired within 10 business days from the date of the event which causes the particular Fund to require Comerica Incorporated Stock, Comerica appoints a fiduciary which is independent of Comerica to design acquisition procedures and monitor Comerica's compliance with such procedures.

The Applicants represent that if an independent fiduciary were required to be appointed under "(2)(G)" above, the independent fiduciary and its principals will be completely independent from Comerica and its Affiliates and will be experienced in developing and operating investment strategies for individual and collective investment vehicles that track third-party indices. Furthermore, the independent fiduciary will not act as the broker for any purchases or sales of Comerica Incorporated Stock and will not receive any commissions as a result of the initial acquisition program.

The independent fiduciary will have as its primary goal the development of trading procedures that minimize the market impact of purchases made pursuant to the initial acquisition program by the Funds. The Applicants would expect that, under the trading procedures established by the independent fiduciary, the trading activities will be conducted in a low-profile, mechanical, non-discretionary manner and would involve a number of small purchases over the course of each day, randomly timed. The Applicants further expect that such a program will allow them to acquire the necessary shares of Comerica Incorporated Stock for the Funds with minimum impact on the market and in a manner that will be in the best interests of any employee benefit plans that participate in such Funds.

The independent fiduciary will also be required to monitor the Applicants' compliance with the trading program and procedures developed for the initial acquisition of Comerica Incorporated Stock. During the course of any initial acquisition program, the independent fiduciary will be required to review the activities weekly to determine compliance with the trading procedures and notify Comerica or WAM, as the case may be, should any non-compliance be detected. Should the trading procedures need modifications due to unforeseen events or consequences, the independent fiduciary will be required to consult with Comerica or WAM, as the case may be, and must approve in advance any alteration of the trading procedures.

8. The Applicants state that subsequent to acquisitions necessary to bring a Fund's holdings of Comerica Incorporated Stock to its specified weighting in the index or model pursuant to the restrictions described above, all aggregate daily purchases or sales of Comerica Incorporated Stock by the Funds will not exceed on any particular day the greater of: (i) 15% of the trading volume for Comerica Incorporated Stock on the exchange on which the stock is primarily traded and automated trading systems on the day of the transaction; or (ii) 15% of an aggregate average daily trading volume for the Comerica Incorporated Stock occurring on the exchange on which the stock is primarily traded and automated trading systems for the previous five business days, based upon the best information reasonably available at the time of the transaction.

The Applicants state that all transactions in Comerica Incorporated Stock subsequent to acquisitions necessary to bring a Fund's holdings of

Comerica Incorporated Stock to its specified weighting in the index or model will be conducted in one of the following three manners: (i) On a principal basis in a direct, arms-length transaction with a broker-dealer in the ordinary course of its business, which broker-dealer is not affiliated with Comerica and which is registered under the '34 Act; (ii) effected on an automated trading system (as that term is defined in Section III(j) above) operated either by a broker-dealer not affiliated with Comerica and which is regulated by the SEC or by a recognized securities exchange and which matches customer orders on an anonymous basis; or (iii) effected through a recognized securities exchange with the broker acting on an agency basis.

The Applicants represent that no transactions in Comerica Incorporated Stock will involve purchases from or sales to Comerica or any affiliate (including officers, directors and employees of Comerica Bank or its affiliates, as defined in Section III(g) above), or any party in interest with respect to a plan which has discretion to invest plan assets into an Index or Model-Driven Fund.

9. The Applicants represent further that no more than five (5) percent of the total amount of Comerica Incorporated Stock issued and outstanding at any time will be held in the aggregate by the Index and Model-Driven Funds. For all acquisitions and holdings of Comerica Incorporated Stock by such Funds, the Applicants represent that they will ensure that Comerica Incorporated Stock does not constitute more than five (5) percent of the value of any independent third-party index on which the investments of an Index or Model-Driven Fund are based. In this regard, the weight currently assigned to Comerica Incorporated Stock in the S&P 500 Index is only approximately 0.0703% and 0.137% of the value subcategory. The Applicants have not identified any indices in which Comerica Incorporated Stock exceeds 5% of the index.

10. The Applicants state that a fiduciary independent of Comerica Bank and its affiliates will direct the voting of the Comerica Incorporated Stock held by an Index or Model-Driven Fund on any matter in which shareholders of Comerica Incorporated are required or permitted to vote. In all instances, the independent fiduciary chosen to vote Comerica Incorporated Stock for the Funds will be a consulting firm specializing in corporate governance issues and proxy voting on behalf of institutional investors with large equity portfolios. The fiduciary will develop

and follow standard guidelines and procedures for the voting of proxies by institutional fiduciaries. Comerica will provide the independent fiduciary with all necessary information regarding the Funds that hold Comerica Incorporated Stock, the amount of Comerica Incorporated Stock held by the Funds on the record date for shareholder meetings of Comerica Incorporated, and all proxy and consent materials with respect to Comerica Incorporated Stock. The independent fiduciary will maintain records with respect to its activities as an independent fiduciary on behalf of the Funds, including the number of shares of Comerica Incorporated Stock voted, the manner in which they were voted, and the rationale for the vote if the vote was not consistent with the independent fiduciary's procedures and current voting guidelines in effect at the time of the vote. The independent fiduciary will be required to acknowledge that it will be acting as a fiduciary with respect to the plans which invest in the Funds which own Comerica Incorporated Stock, when voting such stock. The Applicants will engage Institutional Shareholder Services to act as the independent fiduciary to vote the Comerica Incorporated Stock.

11. Comerica represents that it may exercise some discretion in allocating and reallocating a plan's assets among various collective investment funds, including Funds which may hold Comerica Incorporated Stock. These allocations are based on a plan's investment objectives, risk profile and market conditions. Comerica represents that in such cases a plan fiduciary independent of Comerica and its affiliates will authorize the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds Comerica Incorporated Stock, other than in the case of a Comerica Plan. Comerica makes the following representations with respect to the purchase, directly or indirectly, of Comerica Incorporated Stock by such plans:

(a) Comerica represents that any prohibited transactions which might occur as a result of the discretionary allocation and reallocation of plan assets among collective investment funds will be exempt from the prohibitions of section 406 of the Act by reason of section 408(b)(8).

(b) Before Comerica Incorporated Stock is first purchased by a Fund, the appropriate independent fiduciary for each plan which is currently invested or could be invested in such Fund will be furnished an explanation and a simple form to return to Comerica for the

purpose of indicating either approval or disapproval of investments in the Index or Model-Driven Fund including Comerica Incorporated Stock, together with a postage-paid return envelope. If the form is not returned to Comerica, Comerica may obtain a verbal response by telephone. If a verbal response is obtained by telephone, Comerica will confirm the fiduciary's decision in writing with five (5) business days. In the event no response is obtained from a plan fiduciary, the assets of the plan will not be invested in any Index Fund which invests in Comerica Incorporated Stock and any plan assets currently invested in such Fund at that time would be withdrawn.

(c) Each new management agreement with such a plan will contain language specifically approving or disapproving the investment in any Fund which holds or might hold Comerica Incorporated Stock. The fiduciary for each such plan will be informed that the existing management agreement could be modified in the same way. However, if the fiduciary does not specifically approve language in the agreement allowing the investment of plan assets in Funds which hold or might hold Comerica Incorporated Stock, then no such investment will be made by Comerica.

(d) Each such plan will be informed on a quarterly basis of any investment in, or withdrawal from, any Fund holding Comerica Incorporated Stock. The plan would be granted the election to override Comerica's discretionary decision to invest in, or withdraw from, such Funds. If the plan overrides Comerica's decision to invest in, or withdraw from, the Funds, then Comerica will carry out the plan's election as soon as possible after being notified of such election.

12. Comerica represents that the Comerica Incorporated Retirement Plan (the Comerica Retirement Plan) is trustee by Comerica Bank. It has assets currently invested in three Comerica collective funds, the Comerica 500 Index Fund, the Comerica 500 Index Fund (PEP), and the Comerica Large Cap Value Index Fund. If the requested exemption is granted, these funds will be permitted to purchase Comerica Incorporated Stock, and as a consequence the Comerica Retirement Plan will invest in Comerica Incorporated Stock.<sup>3</sup>

<sup>3</sup>The Applicants are not requesting any relief from sections 406 and 407(a) of the Act in connection with the acquisition and the holding of Comerica Incorporated Stock by any employee benefit plans established and maintained by Comerica for its own employees which invest in the

13. In summary, the Applicants represent that such transactions will meet the criteria of section 408(a) of the Act for the following reasons:

(a) Each Index or Model-Driven Fund involved will be based on an Index, as defined in Section III(c) above;

(b) The acquisition, holding and disposition of Comerica Incorporated Stock will be for the sole purpose of maintaining strict quantitative conformity with the relevant Index upon which the Index or Model-Driven Fund is based, and will not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring the Comerica Incorporated Stock which is intended to benefit Comerica or any party in which Comerica may have an interest;

(c) Whenever Comerica Incorporated Stock is initially added to an index on which a Fund is based, or initially added to the portfolio of a Fund (*i.e.*, a "Buy-up"), all acquisitions of Comerica Incorporated Stock necessary to bring the Fund's holdings of such stock either to its capitalization weighted or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or to its correct weighting as determined by the computer model which has been used to transform the index, will be restricted by conditions which are designed to prevent possible market price manipulations;

(d) Subsequent to acquisitions necessary to bring a Fund's holdings of Comerica Incorporated Stock to its specified weighting in the index or model, pursuant to the restrictions noted in paragraph (c) above, all aggregate daily purchases of Comerica Incorporated Stock by the Funds will not exceed, on any particular day, the greater of: 15% of the average daily trading volume for such stock occurring on the applicable exchange or automated trading system for the previous five trading days, or 15% of the trading volume for such stock on the date of the transaction, as determined by the best available information for the trades that occurred on such date;

(e) All transactions in Comerica Incorporated Stock, other than acquisitions of such stock in a Buy-up described in paragraph (c) above, will be either: (i) Entered into on a principal basis with a broker-dealer, in the

ordinary course of its business, where such broker-dealer is independent of Comerica and is registered under the '34 Act, and thereby subject to regulation by the SEC, (ii) effected on an automated trading system operating by a broker-dealer subject to regulation by the SEC, or by a recognized securities exchange which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized securities exchange (as defined herein) so long as the broker is acting on an agency basis;

(f) No transactions by a Fund will involve purchases from or sales to Comerica (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund;

(g) No more than five (5) percent of the total amount of Comerica Incorporated Stock, that is issued and outstanding at any time, will be held in the aggregate by Index and Model-Driven Funds managed by Comerica or its Affiliates;

(h) Comerica Incorporated Stock will constitute no more than five (5) percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based;

(i) A plan fiduciary independent of Comerica will authorize the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds Comerica Incorporated Stock pursuant to the procedures described herein, including those which relate to portfolio management services provided to certain plans;

(j) A fiduciary independent of Comerica will direct the voting of the Comerica Incorporated Stock held by an Index or Model-Driven Fund on any matter in which shareholders of Comerica Incorporated Stock are required or permitted to vote; and

(k) No more than ten (10) percent of the assets of any Fund that acquires and holds Comerica Incorporated Stock will be comprised of assets of any Comerica Plan(s) for which Comerica exercises investment discretion.

**Notice to Interested Persons:** Notice of the proposed exemption will be mailed by first class mail to all interested persons, including the appropriate fiduciaries for employee benefits plans currently invested in the Funds. The notice will contain a copy of the proposed exemption as published in the **Federal Register** and an explanation of the rights of interested parties to comment on or request a hearing regarding the proposed exemption. All

notices should be sent to interested persons within 15 days of the publication of his proposed exemption in the **Federal Register**. Any written comments and/or requests for a hearing must be received by the Department from interested persons with 45 days of the publication of this proposed exemption in the **Federal Register**.

In addition, Comerica shall provide a copy of the proposed exemption and, if granted, a copy of the final exemption upon request to all ERISA-covered plans that invest in Index or Model-Driven Fund that will include Comerica Incorporated Stock in its portfolio after the date the final exemption is published in the **Federal Register**.

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

**Les Olson Company, Inc. Profit Sharing Plan (the Plan) Located in Salt Lake City, Utah**

[Application Nos. D-11225]

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of 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: (i) The proposed series of loans (the Loans), originated within a 5-year period, by the Plan to REVCO Leasing Company, LLC (Revco), a party in interest with respect to the Plan; and (ii) a guarantee of the Loans (the Guarantee) by Les Olson Company, Inc. (the Employer), a party in interest with respect to the Plan, provided that the following conditions are met:

(a) The total amount of the outstanding Loans under this proposed exemption and PTE 2000-03 do not, in the aggregate, exceed 20 percent (20%) of the Plan's total assets at any time during the transactions;

(b) Each Loan entered into by the Plan is made pursuant to the terms and conditions of a loan agreement (the Loan Agreement) executed by the parties and signed on behalf of the Plan by the Plan's duly-appointed independent, qualified fiduciary (the I/F);

(c) All terms and conditions of the Loans are at least as favorable to the Plan as those the Plan could obtain in

Applicants' Index Funds. In this regard, such transactions may be covered by the statutory exemption under section 408(e) of the Act, if the conditions of that exemption are met. However, the Department is not providing an opinion in this proposed exemption as to whether the conditions of section 408(e) of the Act are met.

an arms-length transaction with an unrelated third party;

(d) Each Loan is: (i) For a maximum term of five (5) years pursuant to terms and conditions of the Loan Agreement; (ii) fully amortized and payable in equal monthly installments of principal and interest; (iii) used exclusively by Revco to purchase office equipment (the Equipment) from the Employer, which Revco will lease to the Employer's customers (in the ordinary course of its business); and (iv) secured by duly perfected security interests in the new and used Equipment, and by certain leases of Equipment (Equipment Leases) where such Equipment Leases are assigned and pledged as collateral for the Loans, which is at all times equal to 200% of the outstanding principal balance of such Loan;

(e) New Equipment is valued for collateralization purposes at 80 percent (80%) of the invoice price paid by Revco to purchase such Equipment less taxes and transportation expenses. Used Equipment and any Equipment Lease pledged as collateral for the Loans is valued by an independent, qualified appraiser;

(f) Prior to the approval of each Loan, the I/F determines, on behalf of the Plan, that each Loan is prudent and in the best interests of the Plan, and protective of the Plan and its participants and beneficiaries;

(g) The I/F conducts a review of all terms and conditions of the exemption,

if granted, and the Loans, including: (i) The applicable interest rate; (ii) the sufficiency of the collateral pledged for each Loan; (iii) the financial condition of the Employer, in connection with the Guarantee, on at least a quarterly basis; and (iv) compliance with the 20% limitation for the Plan's maximum total Loan amount prior to approving each disbursement under the Loan Agreement; and

(h) The I/F takes whatever action is necessary to protect the Plan's interests, throughout the duration of the exemption, with respect to any Loan entered into under the exemption, if granted.

*Temporary Nature of Exemption, If Granted*

The exemption, if granted, will be temporary and will expire five (5) years from the date of publication in the **Federal Register** of the final grant of this proposed exemption. Subsequent to the expiration of the exemption, if granted, the Plan may hold any Loans originated during this 5-year period until the Loans are repaid or otherwise terminated.

*Summary of Facts and Representations*

1. The Plan was established in 1979. As of December 31, 2002, the Plan had approximately 120 participants and beneficiaries and total assets of \$8,602,918. The Plan is trustee by Thomas P. Olson, James R. Olson and L. Ray Olson (the Olsons), who are owners

and officers of the Employer. The Olsons also own approximately 45% of the outstanding interests in Revco.

2. The Employer is a closely-held corporation organized under the laws of the State of Utah. The Employer is engaged in the sale, leasing and maintenance of copiers, fax machines and digital and analog dictation equipment. The shareholders of the Employer are all members of the Olson family.

The Employer has facilities in the major metropolitan areas of Utah, which are Salt Lake City, Ogden, Provo and St. George. The Employer is in the business of purchasing office equipment and leasing such equipment to its customers. The Employer generally has not used outside financing in its operations and has supported itself from the revenues it generates.

In the year 2000, the Department granted a prohibited transaction exemption (see PTE 2000-03, at 65 FR 4854, February 1, 2000) for a series of loans (the Olson Loans), originated within a five-year period, by the Plan as well as the Les Olson Company, Inc. Money Purchase Plan (the M/P Plan; <sup>4</sup> collectively, the Plans) to the Employer.

The applicant represents that three (3) Olson Loans were made pursuant to the terms and conditions of PTE 2000-03. The dates and amounts of the Olson Loans, as well as their separate balances as of September 30, 2003, were as follows:

Dates & loan amounts originated under PTE 2000-03	Loan balances on 9/30/03
1/31/2000 \$500,000 .....	\$156,471.28.
3/23/2001 \$500,000 .....	193,362.40.
12/15/2002 \$500,000 .....	426,981.91.
Total loans under PTE 2000-03 \$1,500,000 .....	Total outstanding debt \$776,815.59.

The applicant states that the terms and conditions of PTE 2000-03 have been met.

3. Revco was established by the owners of the Employer to facilitate the leasing aspect of its office equipment business. Revco purchases various types of office equipment (*i.e.*, the Equipment) from the Employer and leases such Equipment (*i.e.*, the Equipment Leases) to the Employer's customers. Currently, Revco finances its acquisitions of the Equipment with internally generated funds and a line of credit established with Zions First National Bank, located in Salt Lake City, Utah (the Bank). As of September 30, 2003, Revco's line of credit with the Bank was \$661,587. At that time, Revco had 1,514 active leases

totaling approximately \$19,918,000. As of December 31, 2002, the value of the Equipment Leases was approximately \$16,406,000. Revco conducts no business other than the purchase and lease of Equipment for the Employer.

4. The applicant proposes that the Plan make a series of Loans to Revco over a period of 5 years. The proceeds from the Loans will be used by Revco to purchase new Equipment from the Employer.

Each Loan will be collateralized by a promissory note and security agreement, duly perfected and properly recorded under applicable state law, which will provide that the Plan has a first lien on the Equipment. In addition, the Loan may be collateralized by Equipment

Leases, if necessary to adequately secure such Loans. At all times, the fair market value of the property used as collateral for the Loans will be at least equal to 200% of the outstanding balance of such Loans. For this purpose, new Equipment will be valued at 80% of the invoice price, less taxes and transportation expenses. In addition, used Equipment and Equipment Leases that are pledged as collateral for the Loans will be valued in each case by an independent, qualified appraiser. The Loans will be guaranteed by the Employer.

5. Mr. Jack S. Emery (Mr. Emery) will serve as the independent, qualified appraiser for the Equipment used to secure Loan transactions described herein.

<sup>4</sup> The applicant represents that the M/P Plan was merged with the Plan, as of December 31, 2000.

The applicant states that Mr. Emery is a qualified appraiser of office equipment who has over 20 years of experience in the business of leasing office equipment. In this regard, Mr. Emery was one of the founders of the Matrix Funding Corporation (Matrix). Matrix was a major office equipment leasing business from 1978 until 1998. In 1998, Matrix was sold and consolidated with 12 other leasing companies to form Unicapital, an office equipment leasing company.

Mr. Emery will appraise all of the Equipment used as collateral for the Loans on an annual basis. Mr. Emery states that he has valued numerous pieces of office equipment that are similar to, or the same as, the Equipment that will be used as collateral for the Loans. Mr. Emery represents that he is familiar with the useful life of this type of equipment, the rate at which it depreciates, and the market factors that may affect its value. In conducting appraisals of the Equipment, Mr. Emery will take into consideration all the relevant factors relating to the valuation of the Equipment and the market-place for such Equipment. In the event Equipment Leases are used as collateral for the Loans, Mr. Emery represents that he has the requisite expertise to value such Equipment Leases using commercially accepted methodologies.

Mr. Emery states that the Loans are cross-collateralized under the Loan Agreement. Under cross-collateralization, each Loan will have sufficient, separate collateral to maintain the required loan-to-value ratio. In the event of a default, the Plan will use any and all of the Equipment or Equipment Leases used as collateral to satisfy the outstanding debt. Mr. Emery states that a default under any Loan will be viewed as a default under all outstanding loans. Thus, the cross-collateralization feature for the Loans will provide the Plan with adequate security in the event of default.

Mr. Emery will verify that appropriate steps are taken to perfect the Plan's security interest in each piece of Equipment used as collateral. Mr. Emery represents that in order to perfect a security interest in the Equipment or Equipment Leases, an appropriate financing statement will be filed with the UCC Division of the Department of Commerce for the State of Utah.

6. The Employer will also guarantee each of the Loans (*i.e.*, the Guarantee). The Guarantee shall be governed and construed in accordance with the laws of the State of Utah. In this regard, Mr. Emery will monitor the condition of Loans on an ongoing basis. Mr. Emery will review, at least quarterly, the

financial condition of the Employer and Revco. Mr. Emery states that the Guarantee will provide a ready source of repayment for the Plan on each of the Loans, in the event Revco defaults on its obligations. Mr. Emery represents that Revco has a significant portfolio of Equipment Leases that will enable it to repay the Loans. In addition, under the Guarantee, the Employer will be primarily liable for repayment of the Loans, and will pay any indebtedness on demand. The Employer, as the guarantor, will pay all collection costs, including reasonable attorneys fees and legal expenses, incurred by the Plan, as the lender, in enforcing the Guarantee. The Guarantee will remain in effect until all Loans have been repaid.

7. The maximum length of any Loan will be five (5) years, under the terms and conditions of the Loan Agreement. The interest rate on the Loans will be equal to the prime rate as of the date of closing, as quoted under "Money Rates" in the Wall Street Journal (WSJ Prime) plus two percentage points, and will be adjusted quarterly. Additionally, the interest rate of any Loan will be set at a higher rate if such higher rate represents the prevailing market rate for similar loans, as determined by Mr. Emery as the Plan's independent fiduciary, as discussed further below. In no event will any Loan bear an interest rate lower than the WSJ Prime plus two percentage points. Each Loan will be paid in equal monthly installments of principal and interest, with outstanding principal amortized over the remainder of the Loan Agreement's five (5) year term.

The outstanding balance of the Loans will never exceed 20% of the fair market value of the Plan's total assets.

8. Mr. Emery will serve as the independent fiduciary for the Plan (*i.e.*, the I/F) with respect to the Loans, pursuant to the terms and conditions of a written independent fiduciary agreement (the I/F Agreement).

Mr. Emery represents that he is qualified to act as an independent, qualified fiduciary with respect to the Loans, and that he understands his duties and responsibilities under the Act. In this regard, Mr. Emery states that he is currently serving as the I/F for the Plan for the Olson Loans made pursuant to PTE 2000-03. However, if this exemption is granted, Mr. Emery will also serve as the I/F for the Loans between Revco and the Plan. Mr. Emery maintains that his responsibilities under PTE 2000-03 and this exemption, if granted, are complementary. The security for the Loans involve the same type of equipment and essentially the same borrower as the Olson Loans. In

addition, the Olson Loans and the Loans to Revco will have separate Loan Agreements that are substantially the same.

Mr. Emery states that while Revco is a separate legal entity, it has no employees and acts to facilitate the equipment leasing operations of the Employer. If this proposed exemption is granted, there will be no new Olson Loans under PTE 2000-03. All Loans that are in existence under both exemptions (*i.e.*, both Olson Loans and the Loans to Revco) will be aggregated for purposes of the maximum loan amount requirement under this proposed exemption. When the Olson Loans made under PTE 2000-03 are paid off by the Employer, Mr. Emery's duties as the I/F for the Plan with respect to the Olson Loans will cease. However, Mr. Emery will continue to exercise and carry out his duties as the I/F for the Loans to Revco.

Mr. Emery represents that each new Loan will be evaluated independently. Mr. Emery states that the Loans will be sufficiently collateralized in accordance with the Loan documentation and the terms and conditions of the proposed exemption. Furthermore, each Loan will be separately accounted for and separately collateralized in accordance with the Loan Agreements. Under the security agreement, all collateral for any of the Loans must be used to satisfy any deficiency on the Loans in the event of default. Mr. Emery maintains that the sufficiency of the collateral will be assured and the Plan will be given the maximum protection for all the Loans, if there is a default under the terms of any Loan.

Mr. Emery represents that the Employer will be primarily liable under the Loan Agreements for both the Olson Loans and the Loans to Revco. Mr. Emery states that, in his capacity as the I/F, his responsibility will be to protect the Plan and its participants and beneficiaries. In default, Mr. Emery will assure repayment of all Loans (*i.e.*, both the Olson Loans and the Loans to Revco). If there is a deficiency under any Loan, Mr. Emery will maximize the recovery of value from all collateral sources, no matter which Loan is in default.

Mr. Emery states that the two Loan Agreements are essentially identical. A default under one Loan will be a default under both Loan Agreements. Each of the Loans will be cross-collateralized. In the event that the Employer or Revco are unable to pay off the Loans, Mr. Emery will assure that the Plan is in a position to maximize the value of the collateral.

Mr. Emery states that he has been, and will continue to be, advised by a

qualified ERISA attorney regarding his duties and responsibilities as the I/F for the Plan. The income received by Mr. Emery from the Plan for functioning as the I/F will not exceed 1% of his gross annual income. In addition, Mr. Emery represents that he has no pre-existing relationship with the Employer or with any of the shareholders of the Employer.

9. Mr. Emery, as the I/F, represents that he will determine the appropriateness and suitability of each Loan for the Plan prior to the consummation of the Loan transaction. Mr. Emery will review the value of the Equipment and the Equipment Leases pledged to secure the Loans and confirm the sufficiency of the value of the collateral for each Loan.

Mr. Emery will ensure that the Loans are appropriate investments for the Plan. As the I/F, Mr. Emery will determine that the Loans are in the best interests of the Plan's participants and beneficiaries, and protective of their interests. Mr. Emery states that the terms of the Loans will be at least as favorable to the Plan as the terms that would be obtainable by the Plan in an arm's-length transaction with an unrelated party. Mr. Emery states that he will enforce the terms of each Loan including, but not limited to, making demand for timely payments from Revco or the Employer, bringing suit or other appropriate action against Revco or the Employer in the event of default, and monitoring the performance of each Loan and taking whatever actions are necessary to protect the interests of the Plan.

10. Mr. Emery, as the I/F, reserves the right under the I/F Agreement to hire independent advisors, as necessary to perform his duties. For example, Mr. Emery states that in the event of a foreclosure on the Equipment used as collateral, it may be necessary, for him to obtain legal advice from an independent, qualified legal counsel on the mechanics of such foreclosure.

11. With respect to the terms and conditions of the Loans, Wells Fargo Bank in Salt Lake City, Utah (Wells Fargo), has stated, in a letter dated March 2, 2004, that it would enter into similar loan transactions with Revco, under the same terms and conditions (including, among other things, the Guarantee of Revco's credit by the Employer). Wells Fargo has examined the terms of the Loans and concluded that such terms are at least as favorable to the Plan as those terms which the Plan could obtain in an arm's-length transaction with an unrelated party.

12. The Applicant represents that in the event the I/F needs to be replaced, the Department will be notified at least

sixty (60) days prior to the appointment of a successor I/F (the Successor I/F). The Successor I/F will have the same duties and responsibilities as Mr. Emery has under the I/F Agreement, and will have experience and expertise that is substantially similar to that of Mr. Emery.

13. In summary, the applicant represents that the transactions will meet the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

(a) The interest rates paid to the Plan on the Loans will be at least as favorable to the Plan as the current market rate of interest that would be paid for similar loans;

(b) The Plan's interests with respect to the Loans will be represented by Mr. Emery, as the I/F. Mr. Emery will monitor the Loans, as well as the terms and conditions of the exemption (if granted), and will take all appropriate actions necessary to safeguard the interests of the Plan and its participants and beneficiaries;

(c) Mr. Emery will determine that each Loan is in the best interests of the Plan's participants and beneficiaries at the time of the transaction;

(d) Mr. Emery will review and approve each Loan prior to making any disbursements of Loan amounts to Revco;

(e) The Loans will be secured at all times by the Equipment or Equipment Leases, which will be valued at an amount for each Loan that is not less than 200% of the outstanding principal balance of the Loan;

(f) The Loans will be guaranteed by the Employer, a creditworthy entity, whose financial condition will be reviewed on a quarterly basis by the I/F; and

(g) The aggregate outstanding balance of the Loans will not exceed 20% of the total value of the Plan's assets.

**FOR FURTHER INFORMATION CONTACT:**

Ekaterina A. Uzlyan of the Department at (202) 693-8540 (This is not a toll-free number).

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

[Application No. L-11217 through L-11219]

*Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) and (b) of the Act shall not apply to the

reinsurance of risks and the receipt of premiums therefrom by SCA Reinsurance Limited (SCA Re), through its USVI Branch, in connection with insurance contracts sold by Aetna, Inc. (Aetna), or any successor insurance company to Aetna which is unrelated to SCA, to provide long-term disability, accidental death and dismemberment, and basic and supplemental life insurance benefits to participants in programs maintained by SCA North America, Inc. (SCA North America) to provide such benefits to its employees (the Plans)<sup>5</sup>, provided the following conditions are met:

(a) SCA Re—

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

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

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

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

(B) Has undergone a financial examination (within the meaning of the law of its domiciliary State, the U.S. Virgin Islands)<sup>6</sup> by the Insurance Commissioner of the State within 5 years prior to the end of the year preceding the year in which the reinsurance transaction occurred; and

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

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

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

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

(e) In subsequent years, the formula used to calculate premiums by Aetna or

<sup>5</sup> Each plan will be considered an "employee welfare plan" as defined in section 3(1) of the Act.

<sup>6</sup> The U.S. Virgin Islands are considered a "State," as defined in section 3(10) of the Act.

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

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

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

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

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

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

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

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

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

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

exemption granted by the Department) for that fiscal year exceeds 5 percent of that organization or individual's annual gross income from all sources for such fiscal year.

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

#### *Preamble*

On August 7, 1979, the Department published a class exemption (Prohibited Transaction Exemption 79-41 (PTE 79-41), 44 FR 46365) that permits insurance companies that have substantial stock or partnership affiliations with employers establishing or maintaining employee benefit plans to make direct sales of life insurance, health insurance or annuity contracts which fund such plans if certain conditions are satisfied. In PTE 79-41, the Department stated its views that if a plan purchases an insurance contract from a company that is unrelated to the employer pursuant to an arrangement or understanding, written or oral, under which it is expected that the unrelated company will subsequently reinsure all or part of the risk related to such insurance with an insurance company which is a party in interest with respect to the plan, the purchase of the insurance contract would be a prohibited transaction under the Act.

The Department further stated that as of the date of publication of PTE 79-41, it had received several applications for exemption under which a plan or its employer would contract with an unrelated company for insurance, and the unrelated company would, pursuant to an arrangement or understanding, reinsure part or all of the risk with (and cede all or part of the premiums to) an insurance company affiliated with the employer maintaining the plan. The Department felt that it would not be appropriate to cover the various types of reinsurance transactions for which it had received applications within the scope of the class exemption, but would instead consider such applications on the merits of each individual case.

#### *Summary of Facts and Representations*

1. The applicants for this exemption are SCA, its subsidiary, SCA Re, and SCA Reinsurance Limited, USVI Branch. SCA is a multinational company based in Sweden that produces and sells absorbent hygiene products, packaging solutions and publication papers. In 2001, SCA established a United States business unit, SCA North America, comprised of various divisions in the United States and Canada.

2. SCA Re is a captive reinsurance corporation wholly-owned by SCA and organized in Ireland to assist in managing SCA's European risks. SCA Re was incorporated in Ireland on January 11, 1991. Ireland's Department of Enterprise, Trade and Employment (DETE) authorizes a reinsurer to conduct reinsurance business after the reinsurer notifies DETE of company details (such as shareholder or parent company identities, adequate capitalization, reasonableness of proposed reinsurance policies, and substance of its residence and management in Ireland), and the qualifications of each director and the general manager. DETE also requires reinsurance companies to have certain minimum paid-up share capital. SCA Re is in compliance with these requirements, and DETE has authorized SCA Re to conduct reinsurance business pursuant to these requirements.

In 2003, SCA Re established SCA Reinsurance Limited, USVI Branch (the SCA Re/USVI Branch) as a captive insurance organization licensed in the United States Virgin Islands (USVI), a State (as defined in ERISA section 3(10) of the Act), to insure SCA benefit plan risks. The SCA Re/USVI Branch was licensed by USVI to conduct insurance operations in the USVI effective November 24, 2003. The laws of USVI require that an actuarial review of reserves be conducted annually by an independent firm of actuaries and reported to USVI's Department of Banking and Insurance. Towers Perrin, an independent, qualified international actuarial and benefits consulting firm, has been retained to provide actuarial services to SCA Re/USVI Branch. The SCA Re/USVI Branch's accounting functions, records retention and other management and administrative services are expected to be performed by Marsh Management Services Limited, a company licensed as an insurance manager by USVI.

3. During 2001, SCA Re reinsured risks of SCA, accepted from fronting insurance companies, for property damage, business interruption,

employee benefits, and credit lines of business. At year-end 2002, total capital and surplus of SCA Re was 179,842,000 Swedish Kronor (approximately \$20.5 million) and gross written premiums were 145,055,000 Swedish Kronor (approximately \$16.5 million). The independent certified public accounting firm of PriceWaterhouse Coopers, LLP (PWC), which prepared SCA Re's most recent audited financial statement, will examine SCA Re's reserves on an annual basis in connection with the employee benefits business to be reinsured by SCA Re through the SCA Re/USVI Branch to ensure that appropriate reserve levels are maintained.

4. Among other benefit plans, SCA maintains the following:

(i) SCA North America Incontinence Care and Corporate Life Insurance and Long-Term Disability Plan (the Inco and Corporate Plan);

(ii) SCA North America Packaging Life Insurance and Long-Term Disability Plan (the Tuscarora Plan); and

(iii) SCA Tissue North America Life Insurance and Long-Term Disability Plan (the Tissue Plan).

The Plans provide varying levels of accidental death and dismemberment insurance, life insurance, and long-term disability insurance to three groups of SCA's employees.

The Inco and Corporate Plan provides employer-paid basic life insurance, accidental death and dismemberment, and long-term disability benefits to approximately 260 employees, for approximately \$150,000 in employer-paid premiums. The Inco and Corporate Plan also provides optional spouse and child life insurance coverage to approximately 140 employees for approximately \$78,000 in employee-paid premiums.

The Tuscarora Plan provides employer-paid basic life insurance, accidental death and dismemberment to approximately 1890 employees for approximately \$250,000 in employer-paid premiums. Approximately 475 employees are also provided employer-paid long-term disability benefits for approximately \$120,000 in premiums. The Tuscarora Plan also offers optional supplemental coverage to approximately 100 employees for approximately \$20,000 in employee-paid premiums.

The Tissue Plan provides employer-paid basic life insurance to approximately 2560 employees, and employer-paid long-term disability insurance to approximately 800 employees, for approximately \$490,000 in total premiums. Employees covered by the Tissue Plan are also able to elect additional, employee-paid supplemental life insurance, accidental death and

dismemberment insurance, and dependent supplemental life insurance. Approximately 980 employees have elected such coverages, for approximately \$511,500 in employee-paid premiums.

The transaction resulting in the reinsurance of benefit plan risks by SCA Re/USVI Branch has a number of advantages for the Plans. Specifically, SCA will make substantial improvements to affected Plans. With respect to the Plans providing life insurance benefits (which are employer-paid, except for optional supplemental life insurance and coverage for dependents, which are employee-paid), SCA will increase employee life insurance, spouse and child life insurance, and basic accidental death and dismemberment benefits. Under the employer-paid basic life and accidental death and dismemberment insurance programs, maximum benefits have been increased and the formula for calculating the amount of employer-paid insurance has been revised to increase benefits for all of SCA's employees. With respect to disability benefits, the benefit enhancements include an increase in both monthly maximum disability benefits and the optional buy-up amount.

5. SCA plans to insure SCA North America's accidental death and dismemberment insurance, life insurance, and long-term disability benefit plan risks with Aetna, which will reinsure the risk through the SCA Re/USVI Branch. Aetna's overall financial strength is rated A by A.M. Best. Aetna is headquartered in Hartford, Connecticut.

Aetna will insure the Plans with the enhanced new benefits. Aetna will enter into a reinsurance agreement for 100% of SCA's benefit plan risk with SCA Re/USVI Branch. That is, Aetna would continue to directly insure the Plans' benefit risks, but SCA Re/USVI Branch would ultimately provide reinsurance coverage for the full amount of that risk. However, Aetna's reinsurance agreement will be "indemnity only"—that is, Aetna will not be relieved of its liability to the affected SCA Plans if any of its reinsurers are unable or unwilling to cover liability arising from the reinsurance arrangements.

In connection with the proposed transaction, SCA will pay no more than adequate consideration for the Plans' insurance contracts with Aetna or any successor insurer. The formula that Aetna and any successor insurer will use to calculate its premiums will be similar to the formulae used by other insurers providing similar insurance coverages under similar insurance

programs. Moreover, the premium charge resulting from application of the formula will be reasonable and comparable to the premium charged by the insurer and its competitors with the same rating or better, providing the same coverage under comparable programs of insurance. Finally, the Plans will not pay any commissions in connection with the reinsurance transactions described herein.

6. In connection with this exemption request, SCA Re has engaged the services of U.S. Trust Company, National Association (U.S. Trust), as the Independent Fiduciary for the Plans. U.S. Trust is a wholly-owned subsidiary of The Charles Schwab Corporation that provides various financial and special fiduciary services to clients, including employee benefit plans. Norman P. Goldberg (Mr. Goldberg), Managing Director, has signed the Independent Fiduciary's representations on behalf of U.S. Trust. U.S. Trust's consultants are frequently retained to provide specialized fiduciary decision-making services on behalf of employee benefit plans in connection with investment management, employer stock and ESOP transactions, pass-through voting and tender offer decision-making, and various plan transactions requiring exemptive relief, including captive insurance transactions.

7. For purposes of demonstrating independence, U.S. Trust has represented that:

(a) U.S. Trust is not an Affiliate of SCA, SCA Re, or USVI Branch;

(b) U.S. Trust is not an officer, director, employee of, or partners in SCA, SCA Re, or USVI Branch;

(c) U.S. Trust is not a corporation or partnership in which SCA, SCA Re, or USVI Branch has an ownership interest or is a partner;

(d) U.S. Trust does not have an ownership interest, other than a possible *de minimis* number of shares, in SCA, SCA Re, USVI Branch, or any of their Affiliates;

(e) U.S. Trust was not a fiduciary to the Plans prior to its appointment in connection with the transactions described herein;

(f) Mr. Goldberg has acknowledged in writing, on behalf of U.S. Trust, his acceptance of fiduciary obligations, and has agreed not to participate in any decision with respect to any transaction in which U.S. Trust would have an interest that might affect his best judgment as a fiduciary, in acting on behalf of U.S. Trust, or the interests of U.S. Trust, as a corporate entity;

(g) The gross income received by U.S. Trust from SCA, SCA Re, SCA Re/USVI Branch and their Affiliates (including

amounts received for services as the Independent Fiduciary for the Plans under any prohibited transaction exemption granted by the Department), does not exceed 5 percent of U.S. Trust's annual gross income from all sources for any fiscal year; and

(h) U.S. Trust, and any partnership or corporation of which U.S. Trust is an officer, director, or ten (10) percent or more partner or shareholder, will not acquire any property from, sell any property to, or borrow funds from SCA or SCA Re/USVI Branch while it is the Independent Fiduciary for the Plans and for a period of six months thereafter.

8. U.S. Trust represents that: (i) SCA Re/USVI Branch is licensed to do business in the USVI; and (ii) SCA Re has been conducting business since 1991 insuring and reinsuring property, casualty and employee benefit business. SCA Re's reserves for the past two (2) years have been reviewed by PWC, which is a firm independent of SCA Re and SCA. U.S. Trust has reviewed the report on the reserves and is satisfied that there are no issues to be resolved. In addition, U.S. Trust represents that future reserves will be reviewed by a qualified actuary approved by the USVI. U.S. Trust has confirmed that SCA Re has undergone an examination by PWC, an independent certified public accountant, for its last completed taxable year.

9. U.S. Trust has concluded that, as a result of the reinsurance agreement described in representation 5, above, the Plans' risks will be 100% covered by Aetna, a carrier rated A or better by A.M. Best, even if SCA Re/USVI Branch is unable or unwilling to cover the Plans' liabilities it is assuming as a result of the reinsurance agreement. U.S. Trust represents that it has reviewed the terms of the proposed reinsurance agreement between Aetna and SCA Re/USVI Branch. U.S. Trust states that the agreement provides for the risk retained by SCA Re/USVI Branch to revert back to Aetna at no further cost to the Plans should SCA Re/USVI Branch be unable or unwilling to pay the benefits.

10. U.S. Trust has represented that it reviewed the Plans' benefits before the reinsurance transaction and the benefits implemented in anticipation of the reinsurance transaction. U.S. Trust has concluded that there is an immediate benefit to the Plans' participants from the reinsurance transaction. All participants in the Plans will receive increased benefits and options. Specifically, under the long-term disability programs, the proposed benefit changes improve disability benefits and add buy-up options, in some cases, allowing employees to

purchase additional benefits. Under the employer-paid basic life and accidental death and dismemberment insurance programs, maximum benefits have been increased and the formula for calculating the amount of employer-paid insurance has been revised to increase benefits for all of SCA's employees. With respect to voluntary life insurance, rates have been reduced for most employees and additional options have been added to some programs, such as spouse and child life insurance. Where programs already offered voluntary spouse and child life insurance, the maximum benefit amounts have been increased. As a result, U.S. Trust concluded that the enhancements represent an immediate benefit to the Plans' participants from the reinsurance transaction.

11. U.S. Trust makes the following representations concerning the determination of the initial premium to the Plans under the proposed arrangement. The Plans contacted Aetna and were quoted a rate based on Aetna's evaluation of the risk. SCA received quotes from five different companies to provide insurance coverage for the programs. From these five companies, SCA selected Aetna, which was somewhat higher than some of its competitors with respect to its life insurance premiums, but most competitive with respect to its disability premiums, making Aetna's entire package the best choice for SCA Re. The premium paid to SCA Re/USVI Branch is based on a reinsurance agreement where SCA Re/USVI Branch receives a portion of the premium charged equal to the proportion of the risk that SCA Re/USVI Branch covers. This is a typical reinsurance arrangement for life and long-term disability products. U.S. Trust represents that, based upon its review, the premiums charged by Aetna are calculated according to a formula that is reasonable. In addition, U.S. Trust states that the premiums are similar to premiums charged by other insurers with the same or better rating providing similar life and long-term disability insurance under comparable programs. The applicants represent that the Independent Fiduciary (*i.e.*, either U.S. Trust or another qualified fiduciary acting as a successor, as noted below) will confirm on an annual basis that each Plan is paying a rate comparable to that which would be charged by a comparably-rated insurer for a program of the approximate size of the Plans with comparable claims experience. However, by letter dated February 13, 2004, U.S. Trust states that no opinion can be given at this time about whether

the reinsurance arrangement will be in compliance with these requirements in subsequent years.

12. U.S. Trust will represent the interests of the Plans as the Independent Fiduciary at all times.<sup>7</sup> U.S. Trust will monitor compliance by the parties with the terms and conditions of the proposed reinsurance transaction, and will take whatever actions are necessary and appropriate to safeguard the interests of the Plans and their participants and beneficiaries.

13. The applicants represent that the proposed reinsurance transaction will meet the following conditions of PTE 79-41 covering direct insurance transactions:

(a) SCA Re is a party in interest with respect to the Plans (within the meaning of section 3(14)(G) of the Act) by reason of a stock affiliation with SCA, which maintains the Plans.

(b) SCA Re is licensed to conduct reinsurance transactions by the USVI, through its branch, SCA Re/USVI Branch. The law under which USVI Branch is licensed requires that an actuarial review of reserves be conducted annually by an independent firm of actuaries and reported to the appropriate regulatory authority;

(c) SCA Re has undergone an examination by the independent certified public accounting firm of PWC for its last completed taxable year;

(d) SCA Re, through its branch, SCA Re/USVI Branch, has received a Certificate of Authority from its domiciliary state, USVI, which has not been revoked or suspended;

(e) The Plans will pay no more than adequate consideration for the insurance. In addition, in the initial year of the proposed reinsurance transaction, there will be an immediate and objectively determined benefit to the Plans' participants and beneficiaries in the form of increased benefits; and

(f) No commissions will be paid by the Plans with respect to the reinsurance arrangement with SCA Re, as described herein.

In addition, the Plans' interests will be represented by a qualified, independent fiduciary (*i.e.*, U.S. Trust or its Successor), who has initially determined that the proposed reinsurance transactions will be in the best interests, and protective, of the

<sup>7</sup> In this regard, the applicants make a representation regarding a successor Independent Fiduciary. Specifically, if it becomes necessary in the future to appoint a successor Independent Fiduciary (the Successor) to replace U.S. Trust, the applicants will notify the Department sixty (60) days in advance of the appointment of the Successor. Any Successor will have the same, or substantially similar, responsibilities, experience and independence as U.S. Trust.

Plans and their participants and beneficiaries. The Independent Fiduciary will also confirm on an annual basis that the Plans are paying a rate comparable to that which would be charged by a comparably-rated insurer for a program of the approximate size of the Plans with comparable claims experience.

14. In summary, the applicants represent that the proposed reinsurance transactions will meet the criteria of section 408(a) of the Act because: (a) The Plans' participants and beneficiaries are afforded insurance protection by Aetna, a carrier rated A or better by A.M. Best, at competitive market rates arrived at through arm's-length negotiations; (b) SCA Re, which will enter into the reinsurance agreements with Aetna, is a sound, viable insurance company that has been in business since the 1850s (though it incorporated into its present form in December 2000); (c) the protections described in representation 13, above, provided to the Plans and their participants and beneficiaries under the proposed reinsurance transactions are based on those required for direct insurance by a "captive" insurer, under the conditions of PTE 79-41 (notwithstanding certain other requirements related to, among other things, the amount of gross premiums or annuity considerations received from customers who are not related to, or affiliated with, the insurer);<sup>8</sup> (d) U.S. Trust, as the Plans' Independent Fiduciary, has reviewed the proposed reinsurance transaction and has determined that the transaction is appropriate for, and in the best interests

<sup>8</sup>The proposal of this exemption should not be interpreted as an endorsement by the Department of the transactions described herein. The Department notes that the fiduciary responsibility provisions of Part 4 of Title I of the Act apply to the fiduciary's decision to engage in the reinsurance arrangement.

Specifically, section 404(a)(1) of the Act requires, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of the plan. In this regard, the Department is not providing any opinion as to whether a particular insurance or investment product, strategy or arrangement would be considered prudent or in the best interests of a plan, as required by section 404 of the Act. The determination of the prudence of a particular product or arrangement must be made by a plan fiduciary after appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should now be relevant to the particular product or arrangement involved, including the plan's potential exposure to losses and the role a particular insurance or investment product plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties and responsibilities (see 29 CFR 250.404a-1).

of, the Plans and that there will be an immediate benefit to the Plans' participants as a result thereof by reason of an improvement in benefits under the terms of the Plans; and (e) U.S. Trust will monitor compliance by the parties with the terms and conditions of the proposed reinsurance transaction, and will take whatever action is necessary and appropriate to safeguard the interests of the Plans and of their participants and beneficiaries.

#### Notice to Interested Persons

SCA will provide notice of the proposed exemption to all of its affected benefit Plan participants by posting copies of the proposed exemption (as published in the **Federal Register** on the date of publication) and a copy of the Supplemental Statement, as required pursuant to 29 CFR 2570.43(b)(2), which will advise interested persons of their right to comment and/or request a hearing. SCA will post this information on bulletin boards in prominent areas at those SCA work sites at which more than ten participants of the Plans work. All other SCA work sites will distribute the information by hand delivery to the Plan participants. Copies of the proposed exemption will also be available to Plan participants, upon request, at SCA work sites where the information is posted.

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

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions 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 29th day of April, 2004.

**Ivan Strasfeld,**

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

[FR Doc. 04-10111 Filed 5-3-04; 8:45 am]

BILLING CODE 4510-29-P

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-54,485]

### Burlington Industries, Hurt, VA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 12, 2004, in response to a petition filed by a company official on behalf of workers at Burlington Industries, Hurt, Virginia.

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

Signed in Washington, DC this 5th day of April, 2004.

**Richard Church,**

*Certifying Officer, Division of Trade  
Adjustment Assistance.*

[FR Doc. E4-1010 Filed 5-3-04; 8:45 am]

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