

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration**

[Prohibited Transaction Exemption 2001-04; Exemption Application No. D-10538, et al.]

Grant of Individual Exemptions; SEI Investments Company (SEI Investments), SEI Investments Management Corporation (SIMC) and SEI Private Trust Company (STC)

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of Individual Exemptions.

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

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

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

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon

the entire record, the Department makes the following findings:

- (a) The exemptions are administratively feasible;
- (b) They are in the interests of the plans and their participants and beneficiaries; and
- (c) They are protective of the rights of the participants and beneficiaries of the plans.

SEI Investments Company (SEI Investments), SEI Investments Management Corporation (SIMC) and SEI Private Trust Company (STC), Located in Oaks, PA

[Prohibited Transaction Exemption 2001-04; Exemption Application No. D-10538]

Exemption

Section I. Exemption for the Purchase of Fund Shares With Assets Transferred in Kind From a Plan Account

The restrictions of section 406(a) and section 406(b) 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 (F) of the Code, shall not apply, effective June 19, 1996, to the purchase of shares of one or more open-end management investment companies (the Fund or Funds) registered under the Investment Company Act of 1940 (the ICA), to which SEI Investments, SIMC, STC, or any of their affiliates (collectively, SEI) serve as investment adviser and may provide other services, by an employee benefit plan (the Plan or Plans) whose assets are held by SEI as trustee, investment manager, or as a discretionary fiduciary, in exchange for securities held by the Plan in an account (the Account) with SEI (the Purchase Transaction), provided the following conditions are met:

(a) A fiduciary (the Second Fiduciary) who is acting on behalf of each affected Plan and who is independent of and unrelated to SEI, as defined in paragraph (g) of Section III below, receives advance written notice of the Purchase Transaction and full and written information concerning the Funds which includes the following:

- (1) A current prospectus for each Fund to which the Plan's assets may be transferred;
- (2) A statement describing the fees to be charged to, or paid by, the Plan and the Funds to SEI, including the nature and extent of any differential between the rates of the fees paid by the Fund and the rates of the fees otherwise payable by the Plan to SEI;
- (3) A statement of the reasons why SEI may consider the Purchase Transaction to be appropriate for the Plan;

(4) A statement of whether there are any limitations on SEI with respect to which Plan assets may be invested in the Funds;

(5) The identity of all securities that are deemed suitable by the Funds' sub-advisers for transfer to the Funds;

(6) The identity of all such securities that will be valued in accordance with the procedures set forth in Rule 17a-7(b)(4) under the ICA; and

(7) Upon such fiduciary's request, copies of the proposed and final exemptions pertaining to the exemptive relief provided herein for Purchase Transactions occurring after the date of the final exemption.

(b) On the basis of the foregoing information, the Second Fiduciary gives SEI prior written approval with respect to—

(1) Each Purchase Transaction, consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act;

(2) The transaction date proposed by SEI; and

(3) The receipt of confirmation statements, described below in paragraph (g)(1) and (g)(2), by facsimile or electronic mail.

(c) No sales commissions or other fees are paid by the Plans in connection with a Purchase Transaction.

(d) All transferred assets are securities for which market quotations are readily available, or cash.

(e) The transferred assets consist of assets transferred to the Plan's Account at the direction of the Second Fiduciary and constitute all of the assets held in the Account immediately prior to the transfer (other than Fund shares already held in the Account). With respect to any Plan assets transferred in-kind to an Account which are not suitable for acquisition by the Funds, such assets are liquidated as soon as reasonably practicable and the cash proceeds are invested directly in Fund shares.

(f) With respect to assets transferred in-kind, each Plan receives shares of a Fund which have a total net asset value that is equal to the value of the assets of the Plan exchanged for such shares, based on the current market value of such assets at the close of the business day on which such Purchase Transaction occurs, using independent sources in accordance with the procedures set forth in Rule 17a-7b (Rule 17a-7) under the ICA and the procedures established by the Funds pursuant to Rule 17a-7 for the valuation of such assets. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized

securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the last business day prior to the Purchase Transaction determined on the basis of reasonable inquiry from at least three sources that are broker-dealers or pricing services independent of SEI.

(g) SEI sends by regular mail or personal delivery or, if applicable, by facsimile or electronic mail to the Second Fiduciary of each Plan that engages in a Purchase Transaction, the following information:

(1) Not later than 30 business days after completion of each Purchase Transaction, a written confirmation which contains—

(A) The identity of each of the assets that was valued for purposes of the transaction in accordance with Rule 17a-7(b)(4) under the ICA;

(B) The current market price, as of the date of the Purchase Transaction, of each of the assets involved in the Purchase Transaction; and

(C) The identity of each pricing service or market maker consulted in determining the value of such assets.

(2) Not later than 90 days after completion of each Purchase Transaction, a written confirmation which contains—

(A) The aggregate dollar value of the assets held in the Account immediately before the Purchase Transaction; and

(B) The number of shares of the Funds that are held by the Account following the Purchase Transaction (and the related per share net asset value and the aggregate dollar value of the shares received).

(h) With respect to each of the Funds in which a Plan continues to hold shares acquired in connection with a Purchase Transaction, SEI provides the Second Fiduciary with—

(1) A copy of an updated prospectus of such Fund, at least annually; and

(2) Upon request of the Second Fiduciary, a report or statement (which may take the form of the most recent financial report, the current statement of additional information, or some other statement) containing a description of all fees paid by the Fund to SEI.

(i) As to each Plan, the combined total of all fees received by SEI for the provision of services to the Plan, and in connection with a Purchase Transaction, is not in excess of “reasonable compensation” within the meaning of section 408(b)(2) of the Act.

(j) All dealings in connection with the Purchase Transaction between the Plan and the Fund are on a basis no less favorable to the Plan than dealings

between the Fund and other shareholders.

(k) Between June 19, 1996 and the date this final exemption is granted, no Plan may enter into more than one Purchase Transaction with the Funds. However, subsequent to the granting of this exemption, a Second Fiduciary may engage in more than one Purchase Transaction provided that such Second Fiduciary allocates additional securities representing a different asset class to a Plan Account.

(l) SEI maintains for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons, as described in paragraph (m) of this Section I, to determine whether the conditions of this proposed exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of SEI, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest, other than SEI, 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 (m) of this Section I.

(m)(1) Except as provided in paragraph (m)(2) of this Section II and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (l) of Section I above are unconditionally available at their customary location for examination during normal business hours by—

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

(B) Any fiduciary of each of the Plans who has authority to acquire or dispose of shares of any of the Funds owned by such a Plan, or any duly authorized employee or representative of such fiduciary; and

(C) Any participant or beneficiary of the Plans or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraph (m)(1)(B) or (C) of this Section I shall be authorized to examine the trade secrets of SEI or commercial or financial information which is privileged or confidential.

Section II. Availability of PTE 77-4

Any purchase of Fund shares that complies with the conditions of Section

I of this exemption shall be treated as a “purchase or sale” of shares of an open-end investment company for purposes of PTE 77-4 and shall be deemed to have satisfied paragraphs (a), (d) and (e) of Section II of PTE 77-4 (42 FR 18732, April 3, 1977).¹

Section III. Definitions

For purposes of this exemption,

(a) The term “SEI” means SEI Investments Company, SEI Investments Management Corporation, SEI Private Trust Company and any affiliate of SEI, as defined in paragraph (b) of this Section III.

(b) An “affiliate” of a person includes:

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

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

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

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

(d) The term “Fund” or “Funds” means any open-end investment company or companies registered under the ICA for which SEI serves as investment adviser, and may also provide custodial or other services as approved by such Funds.

(e) The term “net asset value” means the amount for purposes of pricing all purchases and sales calculated by dividing the value of all securities, determined by a method as set forth in a Fund’s prospectus and statement of additional information, and other assets belonging to each of the portfolios in such Fund, less the liabilities charged to each portfolio, by the number of outstanding shares.

(f) The term “relative” means a “relative” as that term is defined in section 3(15) of the Act (or a “member

¹ In relevant part, PTE 77-4 permits the purchase and sale by an employee benefit plan of shares of a registered open-end investment company when a fiduciary with respect to such plan is also the investment adviser for the mutual fund. Section II(a) of PTE 77-4 requires that a plan does not pay a sales commission in connection with such purchase or sale. Section II(d) describes the disclosures that are to be received by an independent plan fiduciary. For example, the plan fiduciary must receive a current prospectus for the mutual fund as well as full and detailed written disclosure of the investment advisory and other fees that are charged to or paid by the plan and the investment company. Section II(e) requires that the independent plan fiduciary approve, in writing, purchases and sales of mutual fund shares on the basis of the disclosures given.

of the family” as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(g) The term “Second Fiduciary” means a fiduciary of a plan who is independent of and unrelated to SEI. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to SEI if—

(1) Such Second Fiduciary directly or indirectly controls, is controlled by, or is under common control with SEI;

(2) Such Second Fiduciary, or any officer, director, partner, employee, or relative of such Second Fiduciary is an officer, director, partner, or employee of SEI (or is a relative of such persons); or

(3) Such Second Fiduciary directly or indirectly receives any compensation or other consideration from SEI for his or her own personal account in connection with any transaction described in this proposed exemption.

If an officer, director, partner, or employee of SEI (or a relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (A) the choice of the Plan’s investment manager/adviser; (B) the approval of any purchase, continued holding or redemption by the Plan of shares of the Funds; and (C) the approval of any change of fees charged to or paid by the Plan, in connection with the transactions described above in Section I, then paragraph (g)(2) of this Section III, shall not apply.

EFFECTIVE DATE: This exemption is effective as of June 19, 1996, with the exception of Section I(a)(7), which is applicable for Purchase Transactions occurring after the date of the final exemption.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption, refer to the notice of proposed exemption (the Notice) published on October 11, 2000 at 65 FR 60456.

Written Comments

The Department received one written comment with respect to the Notice and no requests for a public hearing. The comment, which was submitted on behalf of SEI suggested certain clarifications or modifications to the operative language and the Summary of Facts and Representations (the Summary) of the Notice. Following are a discussion of SEI’s comments and the Department’s responses with respect thereto.

1. *STC.* On page 60459 of the Notice, Representation 3 of the Summary contains a description of STC, a wholly

owned subsidiary of SEI. SEI wishes to clarify that the name “SEI Trust Company” has been changed to “SEI Private Trust Company” and that STC serves as trustee of the Plans but not as an investment manager.

The Department has noted the foregoing revisions to Representation 3 of the Summary. In addition, on page 60457 of the Notice, in the caption identifying SEI and its affiliates, the Department has revised the name “SEI Trust Company” to read “SEI Private Trust Company.” The Department has also made a corresponding change to Section III(a) of the final exemption in the definition of the term “SEI.”

2. *The Funds—The Managed Trust.*

On page 60459 of the Notice, Representation 5(b) of the Summary identifies twelve Fund portfolios comprising the Managed Trust. SEI represents that, in addition to the listed portfolios, the Managed Trust also includes the “Tax-Managed Small Cap Fund” portfolio.

In response to this comment, the Department has noted the revision to Representation 5(b).

3. *The Asset Allocation Strategy.* On pages 60459 and 60460 of the Notice, Representation 7 of the Summary describes SEI’s asset allocation strategy (the Strategy). SEI states that the sixth and seventh paragraphs of Representation 7 refer to “no separate fee being charged for an asset allocation” and to the allocation “to only one asset allocation.” SEI points out that the term “asset allocation” should refer instead to the term “Strategy,” as previously denoted in Representation 7.

In response to this comment, the Department has noted this change to Representation 7.

4. *Footnote 8.* On page 60460 of the Notice, in Representation 8 of the Summary, Footnote 8 states, in relevant part, that “Although the requested exemption currently covers unaffiliated sub-advisers, SEI represents that it may wish to retain affiliated sub-advisers for the Funds in the future so that the benefits of the Purchase Transactions will not be diluted.” However, SEI wishes to clarify that since this representation was originally made to the Department, it has retained an affiliated sub-adviser which it has a 47 percent ownership interest.

In response to this comment, the Department has noted this clarification to Representation 8.

5. *Footnote 12.* On page 60461 of the Notice, in Representation 10 of the Summary, Footnote 12 describes the circumstances under which SIMC and SEI would become fiduciaries. SEI

represents that the language set forth in the footnote is ambiguous. Therefore, it suggests the following language (shown in italics) be substituted to clarify the precise nature of SIMC’s or SEI’s potential fiduciary status:

It is represented that SIMC does not become a discretionary investment management fiduciary until after the Second Fiduciary has specified which portion of the Plan’s assets (including which specific assets) will be allocated to the Account. It is also represented that SEI may become a non-discretionary investment advisory fiduciary with respect to a particular pool of assets (e.g., helping the Plan develop its Strategy) before those assets are “converted” into Fund shares.

In response to this comment, the Department has noted this revision to Footnote 12.

6. *Footnote 14.* On page 60461 of the Notice, in Representation 10 of the Summary, Footnote 14 states, in part, that SIMC had accepted two or three new Plan clients which elected to engage in the Purchase Transactions. SEI explains that since this representation was originally made to the Department, approximately 18 new Plan clients have also elected to engage in the Purchase Transactions. However, SEI states that in no event has there been more than one such Purchase Transaction per Plan.

SEI also represents that it has attempted to structure its client agreements to avoid undertaking fiduciary responsibility until after the completion of the Purchase Transactions. Therefore, it believes no exemptive relief is necessary. However, because of previously noted uncertainty on whether its services prior to the completion of a Purchase Transaction might involve the provision of investment advice, SEI maintains its request that the exemption be made retroactive to June 19, 1996 to cover all of the Purchase Transactions that have occurred since that time.

In response to this comment, the Department has noted the revision to Footnote 14 and the fact that there has been no change in the retroactivity date of the exemption.

7. *Footnote 18.* On page 60462 of the Notice, in Representation 14 of the Summary, Footnote 18 describes the performance fees that may be charged to SEI. The footnote states, in part, that “Both the weighting and the choice of indices are negotiated between the Plan and SEI.” However, SEI wishes to clarify that these performance fee factors are not actively negotiated with each client Plan. Rather, SEI points out that the use of a performance fee and its

terms are always open to negotiation at the request of the client Plan.

In response, the Department has noted this clarification to Footnote 18.

8. *Representation 14.* On page 60463 of the Notice, the sixth paragraph of Representation 14 of the Summary states, in part, that SEI's current practice is to credit back to the Plans fees for Secondary Services in the same manner as SEI credits back its Fund-level investment advisory fees. The paragraph also states that SEI reserves the right to retain such fees for Secondary Services in the future in accordance with the Department's advisory opinions involving PNC Financial Corp. (ERISA Advisory Opinion 93-12A, April 27, 1993) and the Frank Russell Company (ERISA Advisory Opinion 93-13A, April 27, 1993). However, SEI states that since the original representation was made to the Department, it has exercised its right to retain some fees for Secondary Services in accordance with the referenced advisory opinions.

In response to this comment, the Department has noted this clarification to Representation 14.

10. *Footnote 20.* On page 60463 of the Notice, in Representation 15 of the Summary, Footnote 20 sets forth the following notice provisions to be provided to a Plan's Second Fiduciary with respect to securities brokerage transactions that may be executed by SEI or its affiliates with respect to Fund portfolios.

In some cases, SEI executes brokerage transactions for the investment portfolios of certain of the Funds as a Secondary Service. To the extent that SEI does not presently execute securities brokerage transactions with respect to any Fund for which an investment advisory fee is paid to SEI, but proposes to do so in the future, for any Plan that invests in the Fund (other than an SEI-sponsored Plan investing in the Fund pursuant to PTE 77-3), SEI will, at least 30 days in advance of the implementation of such additional service, provide a written notice to the Plan's Second Fiduciary which explains the nature of such additional brokerage service and the amount of the fees. Further, with respect to any Fund for which SEI does or will provide such brokerage services, SEI will provide, at least annually to each such Plan, a written disclosure indicating (a) the total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid to SEI by such Fund; (b) the total, expressed in dollars, of brokerage commissions of each Fund's investment portfolio that are paid by such Fund to brokerage firms unrelated to SEI; (c) the average brokerage commissions per share, expressed as cents per share, paid to SEI by each portfolio of a Fund; and (d) the average brokerage commissions per share, expressed as cents per share, paid by each portfolio of a Fund to brokerage firms unrelated to SEI.

SEI maintains that this type of disclosure is overly burdensome and unnecessary. Once Plans have invested in the Funds, SEI represents that it is relying on PTE 77-4 to address the fee issue. In the event brokerage services are added as Secondary Services, SEI maintains that it will comply with the provisions of PTE 77-4 by providing, at least 30 days in advance of the implementation of such additional service, a written notice to the Plan's Second Fiduciary. Although the notice will explain the nature of the additional brokerage service and the amount of the fees, SEI explains that it does not wish to provide the annual notice as further described in the footnote.

In response to this comment, the Department does not object to SEI's decision not to provide a Second Fiduciary with an annual disclosure pertaining to brokerage services. Although SEI proposed this additional disclosure in its application in order to provide the Second Fiduciary with information to assist such fiduciary in monitoring Fund investments that are made by a client Plan, the Department notes that SEI is relying on the provisions of PTE 77-4 which contain separate disclosure requirements as they pertain to fees and that no relief is provided under this exemption for SEI's receipt of fees from the Funds.

Finally, the Department notes that SEI did not inform interested persons of the proposed exemption within the time frame specified in the proposed exemption. Therefore, the Department requested that SEI extend the comment period. Subsequently, SEI complied with the Department's request.

For further information regarding SEI's comment letter and other matters discussed therein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10538) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-5638, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

Accordingly, after giving full consideration to the entire record, including the SEI's comment, the Department has decided to grant the exemption subject to the modifications described above.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

DuPont Capital Management Corporation, Located in Wilmington, DE

[Prohibited Transaction Exemption 2001-05, Exemption Application Nos.: D-10744 through D-10746]

Exemption

I. Transactions

The restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D),² shall not apply to a transaction between a party in interest with respect to certain plans (the Former DuPont Related Plans), as defined in Section II(e), below, and an investment fund in which such plans have an interest (Investment Fund), as defined in Section II(k), below, provided that DuPont Capital Management Corporation (DCMC) has discretionary authority or control with respect to the plan assets involved in the transaction and the following conditions are satisfied:

(a) DCMC is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total assets, including in-house plan assets (In-house Plan Assets), as defined in Section II(g), below, under its management and control in excess of \$100 million and either:

- (1) shareholders' or partners' equity, as defined in Section II(j), below, in excess of \$750,000; or
- (2) payment of all its liabilities, including any liabilities that may arise by reason of a breach or violation of a duty described in sections 404 or 406 of the Act, is unconditionally guaranteed by a person with a relationship to DCMC, as described in Section II(a)(1), below, if DCMC and such affiliate have, as of the last day of their most recent fiscal year, shareholders' or partners' equity, in the aggregate, in excess of \$750,000;

(b) At the time of the transaction, as defined in Section II(m), below, the party in interest or its affiliate, as defined in Section II(a), below, does not have, and during the immediately preceding one (1) year has not exercised, the authority to—

- (1) Appoint or terminate DCMC as a manager of any of the Former DuPont Related Plans' assets, or
- (2) Negotiate the terms of the management agreement with DCMC (including renewals or modifications

² For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to the corresponding provisions of the Code.

thereof) on behalf of the Former DuPont Related Plans;

(c) The transaction is not described in—

(1) Prohibited Transaction Class Exemption 81–6 (PTCE 81–6)³ (relating to securities lending arrangements);

(2) Prohibited Transaction Class Exemption 83–1 (PTCE 83–1)⁴ (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Class Exemption 82–87 (PTCE 82–87)⁵ (relating to certain mortgage financing arrangements);

(d) The terms of the transaction are negotiated on behalf of the Investment Fund by, or under the authority and general direction of, DCMC, and either DCMC, or (so long as DCMC retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by DCMC, makes the decision on behalf of the Investment Fund to enter into the transaction;

(e) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of DCMC, the terms of the transaction are at least as favorable to the Investment Fund as the terms generally available in arm's length transactions between unrelated parties;

(f) Neither DCMC nor any affiliate thereof, as defined in Section II(b), below, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in DCMC is a person who, within the ten (10) years immediately preceding the transaction, has been either convicted or released from imprisonment, whichever is later, as a result of:

(1) any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization;

(2) any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(3) income tax evasion;

(4) any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or (5) any other crime described in section 411 of the Act.

For purposes of this Section I(f), a person shall be deemed to have been

“convicted” from the date of the judgment of the trial court, regardless of whether the judgment remains under appeal;

(g) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(h) The party in interest dealing with the Investment Fund:

(1) Is a party in interest with respect to the Former DuPont Related Plans (including a fiduciary) solely by reason of providing services to the Former DuPont Related Plans, or solely by reason of a relationship to a service provider described in section 3(14)(F),(G),(H), or (I) of the Act;

(2) Does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR § 2510.3–21(c)) with respect to those assets; and (3) Is neither DCMC nor a person related to DCMC, as defined in Section II(i), below;

(i) DCMC adopts written policies and procedures that are designed to assure compliance with the conditions of the exemption;

(j) An independent auditor, who has appropriate technical training or experience and proficiency with the fiduciary responsibility provisions of the Act and who so represents in writing, conducts an exemption audit, as defined in Section II(f), below, on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the Former DuPont Related Plans presenting its specific findings regarding the level of compliance with the policies and procedures adopted by DCMC in accordance with Section I(i), above, of this exemption; and (k)(1) DCMC or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the persons described in Section I(k)(2), below, to determine whether the conditions of this exemption have been met, except that (a) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of DCMC and/or its affiliates, the records are lost or destroyed prior to the end of the six (6) year period, and (b) no party in interest or disqualified person other than DCMC shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by Section I(k)(2), below, of this exemption.

(2) Except as provided in Section I(k)(3), below, of this exemption, and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in Section I(k)(1), above, of this exemption are unconditionally available for examination at their customary location during normal business hours by:

(A) any duly authorized employee or representative of the Department of Labor (the Department) or of the Internal Revenue Service;

(B) any fiduciary of any of the Former DuPont Related Plans investing in the Investment Fund or any duly authorized representative of such fiduciary;

(C) any contributing employer to any of the Former DuPont Related Plans investing in the Investment Fund or any duly authorized employee representative of such employer;

(D) any participant or beneficiary of any of the Former DuPont Related Plans investing in the Investment Fund, or any duly authorized representative of such participant or beneficiary; and, (E) any employee organization whose members are covered by such Former DuPont Related Plans;

(3) None of the persons described in Section I(k)(2)(B) through (E), above, of this exemption shall be authorized to examine trade secrets of DCMC or its affiliates or commercial or financial information which is privileged or confidential.

II. Definitions

(a) For purposes of Section I (a) and (b), above, of this exemption, an “affiliate” of a person means—

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

(2) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, 5 percent (5%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and (3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets. A named fiduciary, within the meaning of section 402(a)(2) of the Act, of a plan, and an employer any of whose employees are covered by the plan, will also be considered affiliates with respect to each other for purposes of Section I(b), if such employer or an affiliate of such

³ 46 FR 7527, January 23, 1981.

⁴ 48 FR 895, January 7, 1984.

⁵ 47 FR 21331, May 18, 1982.

employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(b) For purposes of Section I(f), above, of this exemption, an "affiliate" of a person means—

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

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent (5%) or more partner or owner, and

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent (10%) or more of the yearly wages of such person), or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management, or disposition of plan assets.

(c) For purposes of Section II(e) and (g), below, of this exemption an "affiliate" of DCMC includes a member of either:

(1) a controlled group of corporations, as defined in section 414(b) of the Code, of which DCMC is a member, or

(2) a group of trades or businesses under common control, as defined in section 414(c) of the Code, of which DCMC is a member; provided that "50 percent" shall be substituted for "80 percent" wherever "80 percent" appears in section 414(b) or 414(c) of the rules thereunder.

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

(e) "Former DuPont Related Plans" mean:

(1) CONSOL Inc. Employee Retirement Plan (the CONSOL Plan);

(2) the Pension Plan for Consolidation Coal Company Local 5400 Union Employees (the CONSOL Union Plan);

(3) the Investment Plan for Salaried Employees of CONSOL Inc. (the CONSOL DC Plan);

(4) the Thrift Plan for Employees of Conoco Inc. (the Conoco DC Plan);

(5) any plan the assets of which include or have included assets that were managed by DCMC, as an in-house asset manager (INHAM), pursuant to Prohibited Transaction Class Exemption

96-23 (PTCE 96-23)⁶ but as to which PTCE 96-23 is no longer available because such assets are no longer held under a plan maintained by an affiliate of DCMC (as defined in Section II(c), above, of this exemption); and

(6) any plan (the Add-On Plan) that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of DCMC (as defined in Section II(c), above, of this exemption); provided that: (A) the assets of the Add-On Plan are invested in a commingled fund (the Commingled Fund), as defined in Section II(n), below, of this exemption, with the assets of a plan or plans, described in Section II(e)(1)-(5), above, of this exemption; and (B) the assets of the Add-On Plan in the Commingled Fund do not comprise more than 25 percent (25%) of the value of the aggregate assets of such fund, as measured on the day immediately following the commingling of their assets (the 25% Test);

For purposes of the 25% Test, as set forth in Section II(e)(6), above:

(i) in the event that less than all of the assets of an Add-On Plan are invested in a Commingled Fund on the date of the initial transfer of such Add-On Plan's assets to such fund, and if such Add-On Plan subsequently transfers to such Commingled Fund some or all of the assets that remain in such plan, then for purposes of compliance with the 25% Test, the sum of the value of the initial and each additional transfer of assets of such Add-On Plan shall not exceed 25 percent (25%) of the value of the aggregate assets in such Commingled Fund, as measured on the day immediately following the addition of each subsequent transfer of such Add-On Plan's assets to such Commingled Fund;

(ii) where the assets of more than one Add-On Plan are invested in a Commingled Fund with the assets of plans described in Section II(e)(1)-(5), above, of the exemption, the 25% Test will be satisfied, if the aggregate amount of the assets of such Add-On Plans invested in such Commingled Fund do not represent more than 25 percent (25%) of the value of all of the assets of such Commingled Fund, as measured on the day immediately following each addition of Add-On Plan assets to such Commingled Fund;

(iii) if the 25% Test is satisfied at the time of the initial and any subsequent transfer of an Add-On Plan's assets to a Commingled Fund, as provided in Section II(e), above, this requirement shall continue to be satisfied notwithstanding that the assets of such

Add-On Plan in the Commingled Fund exceed 25 percent (25%) of the value of the aggregate assets of such fund solely as a result of: (AA) a distribution to a participant in a Former DuPont Related Plan; (BB) periodic employer or employee contributions made in accordance with the terms of the governing plan documents; (CC) the exercise of discretion by a Former DuPont Related Plan participant to re-allocate an existing account balance in a Commingled Fund managed by DCMC or to withdraw assets from a Commingled Fund; or (DD) an increase in the value of the assets of the Add-On Plan held in such Commingled Fund due to investment earnings or appreciation;

(iv) if, as a result of a decision by an employer or a sponsor of a plan described in Section II(e)(1)-(5) of the exemption to withdraw some or all of the assets of such plan from a Commingled Fund, the 25% Test is no longer satisfied with respect to any Add-On Plan in such Commingled Fund, then the exemption will immediately cease to apply to all of the Add-On Plans invested in such Commingled Fund; and

(v) where the assets of a Commingled Fund include assets of plans other than Former DuPont Related Plans, as defined in Section II(e), above, of this exemption, the 25% Test will be determined without regard to the assets of such other plans in such Commingled Fund.

(f) "Exemption audit" of any of the Former DuPont Related Plans must consist of the following:

(1) A review of the written policies and procedures adopted by DCMC, pursuant to Section I(i), above, of this exemption for consistency with each of the objective requirements of this exemption, as described in Section II(f)(5), below;

(2) A test of a representative sample of the subject transactions in order to make findings regarding whether DCMC is in compliance with:

(A) the written policies and procedures adopted by DCMC, pursuant to Section I(i), above, of this exemption; and

(B) the objective requirements of this exemption;

(3) A determination as to whether DCMC has satisfied the requirements of Section I(a), above, of this exemption;

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings; and

(5) For purposes of Section II(f) of this exemption, the written policies and procedures must describe the following

⁶ 61 FR 15975 (April 10, 1996)

objective requirements of the exemption and the steps adopted by DCMC to assure compliance with each of these requirements:

(A) the requirements of Section I(a), above, of this exemption regarding registration under the Investment Advisers Act of 1940, total assets under management, and shareholders' or partners' equity;

(B) the requirements of Part I and Section I(d) of this exemption regarding the discretionary authority or control of DCMC with respect to the assets of the Former DuPont Related Plans involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the Former DuPont Related Plans to enter into the transaction;

(C) the transaction is not entered into with any person who is excluded from relief under Section I(h)(1), above, of this exemption, or Section I(h)(2) to the extent such person has discretionary authority or control over the plan assets involved in the transaction, or Section I(h)(3); and

(D) the transaction is not described in any of the class exemptions listed in Section I(c), above, of this exemption.

(g) "In-house Plan Assets" means the assets of any plan maintained by an affiliate of DCMC, as defined in Section II(c), above, of this exemption and with respect to which DCMC exercises discretionary authority or control.

(h) The term, "party in interest," means a person described in section 3(14) of the Act and includes a "disqualified person," as defined in section 4975(e)(2) of the Code.

(i) DCMC is "related" to a party in interest for purposes of Section I(h)(3) of this exemption, if the party in interest (or a person controlling, or controlled by, the party in interest) owns a 5 percent (5%) or more interest in DCMC, or if DCMC (or a person controlling, or controlled by DCMC) owns a 5 percent (5%) or more interest in the party in interest.

For purposes of this definition:

(1) the term, "interest," means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation,

(B) The capital interest or the profits interest of the entity if the entity is a partnership; or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest.

(j) For purposes of Section I(a) of this exemption, the term, "shareholders" or partners' equity," means the equity shown in the most recent balance sheet prepared within the two (2) years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

(k) "Investment Fund" includes single customer and pooled separate accounts maintained by an insurance company, individual trust and common, collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of DCMC) is subject to the discretionary authority of DCMC.

(l) The term, "relative," means a relative as that term is defined in section 3(15) of the Act, or a brother, sister, or a spouse of a brother or sister.

(m) The "time" as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after the date when the grant of this exemption is published in the **Federal Register** or a renewal that requires the consent of DCMC occurs on or after such publication date and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this subsection shall be construed as exempting a transaction entered into by an Investment Fund which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of this exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption. In determining compliance with the conditions of the exemption at the time that the transaction was entered into for purposes of the preceding sentence, Section I(h) of this exemption will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

(n) "Commingled Fund" means a trust fund managed by DCMC containing assets of some or all of the plans,

described in Section II(e)(1)–(5), above, of this exemption, plans other than Former DuPont Related Plans, and, if applicable, any Add-On Plan, as to which the 25% Test, provided in Section II(e)(6), above, of this exemption has been satisfied; provided that: (1) where DCMC manages a single sub-fund or investment portfolio within such trust, the sub-fund or portfolio will be treated as a single Commingled Fund; and (2) where DCMC manages more than one sub-fund or investment portfolio within such trust, the aggregate value of the assets of such sub-funds or portfolios managed by DCMC within such trust will be treated as though such aggregate assets were invested in a single Commingled Fund.

Temporary Nature of Exemption

The Department has determined that the relief provided by this exemption is temporary in nature. The exemption is effective upon the date this exemption is published in the **Federal Register** and expires on the day which is six (6) years from the date of such publication. Accordingly, the relief provided by this exemption will not be available upon the expiration of such six-year period for any new or additional transactions, as described herein, after such date, but would continue to apply beyond the expiration of such six-year period for continuing transactions entered into within the six-year period; provided the conditions of the exemption continue to be satisfied. Should the applicant wish to extend, beyond the expiration of such six-year period, the relief provided by this exemption to new or additional transactions, the applicant may submit another application for exemption. In this regard, the Department expects that prior to filing another exemption application seeking relief for new or additional transactions, the applicant would be prepared to document compliance with the conditions of this exemption.

Written Comments

In the Notice of Proposed Exemption (the Notice), the Department invited all interested persons to submit written comments and requests for a hearing on the proposed exemption. As set forth in the Notice, interested persons consist of the investment committee or trustees of each of the Former DuPont Related Plans. The deadline for submission of such comments and requests for hearing was within forty-five (45) days of the date of the publication of the Notice in the **Federal Register** on August 17, 2000. All comments and requests for a hearing were due on October 2, 2000.

During the comment period, the Department received no requests for a hearing. However, the Department did receive several comment letters from DCMC, the applicant. In this regard, in a letter dated September 25, 2000, DCMC requested that the Department make certain substantive changes to the operant language of the exemption and correct various typographical errors found in the Notice. Subsequently, in a letter dated October 17, 2000, DCMC withdrew the comment submitted on September 25, 2000, and instead requested clarification concerning certain aspects of the exemption and sought confirmation from the Department that the final exemption would still apply in certain factual circumstances. Thereafter, in follow-up letters dated October 18, and October 23, 2000, DCMC suggested certain changes to the contents of its October 17 letter. DCMC's comments and suggested changes and the Department's responses, thereto, are summarized below.

(A) DCMC asserts that the exemption would apply to trust assets managed by DCMC (assuming all other requirements of the exemption are met) in the case of a trust that has more than one asset portfolio, with participating plans having pro-rata undivided interests in all of the trust's assets, if: (a) DCMC manages assets within one or more of such asset portfolios, and (b) the plans utilizing the trust are all plans described in Section II(e)(1)–(5) of the exemption or any Add-On Plan, described in Section II(e)(6) of the exemption, as to which the 25 percent (25%) test (the 25% Test) is satisfied by treating the trust as a single Commingled Fund.

In response to this comment, it is the Department's view that for purposes of calculating compliance with the 25% Test with respect to assets of any Add-On Plan to be added to such trust, a single portfolio within the trust managed by DCMC shall be treated as a single Commingled Fund, and where DCMC manages more than one portfolio within such trust, the aggregate value of the assets of such portfolios managed by DCMC within such trust shall be treated as though such aggregate assets were invested in a single Commingled Fund.

(B) DCMC asserts that the exemption would apply to trust assets managed by DCMC (assuming all other applicable requirements of the exemption are met) in the case of a single trust that has multiple separately valued investment sub-funds, with covered plan participants generally having the right to allocate the amounts held for them among the sub-funds in their discretion, if: (a) DCMC manages assets within one

or more of such sub-funds, and (b) the plans participating in the trust are all plans described in Section II(e)(1)–(5) of the exemption or any Add-On Plan as to which the 25% Test, provided in Section II(e)(6) of the exemption, is satisfied by treating the trust as a single Commingled Fund.

In response to this comment, it is the Department's position that, under the circumstances described above, the exemption will apply to the assets managed by DCMC within the trust, assuming all other requirements of the exemption are met. Further, it is the Department's view that for purposes of calculating compliance with the 25% Test with respect to assets of any Add-On Plan to be added to such trust under the circumstances described above, that each sub-fund within such trust managed by DCMC shall be treated as a single Commingled Fund and where DCMC manages more than one sub-fund within such trust, the aggregate value of the assets of such sub-funds managed by DCMC within such trust shall be treated as though such aggregate assets were invested in a single Commingled Fund.

With respect to the two comments above, for purposes of clarity, the Department has added a new definition at paragraph (n), as set forth below, to Section II of the exemption:

(n) "Commingled Fund" means a trust fund managed by DCMC containing assets of some or all of the assets of plans, described in Section II(e)(1)–(5), above, of this exemption, plans other than Former DuPont Related Plans, and, if applicable, any Add-On Plan, as to which the 25% Test, provided in Section II(e)(6), above, of this exemption has been satisfied; provided that: (1) where DCMC manages a single sub-fund or investment portfolio within such trust, the sub-fund or portfolio will be treated as a single Commingled Fund; and (2) where DCMC manages more than one sub-fund or investment portfolio within such trust, the aggregate value of the assets of such sub-funds or portfolios managed by DCMC within such trust will be treated as though such aggregate assets were invested in a single Commingled Fund.

Further, the Department has amended the language of Section II(e)(6) to include a reference to the definition of a Commingled Fund and a reference to the 25% Test, as indicated below by the underlined passages:

(6) any plan (the Add-On Plan) that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of DCMC (as defined in Section II(c), above, of this exemption); provided that: (A) the assets of the Add-On Plan are invested in a commingled fund (*the Commingled Fund*), as defined in Section II(n), below, of this exemption, with the assets of a plan or plans, described in Section II(e)(1)–(5), above, of

this exemption; and (B) the assets of the Add-On Plan in the Commingled Fund do not comprise more than 25 percent (25%) of the value of the aggregate assets of such fund, as measured on the day immediately following the commingling of their assets (*the 25% Test*).

(C) DCMC asserts that it is not necessary, in order for the exemption to apply with respect to assets of a Commingled Fund which are managed by DCMC, that the assets of plans described in Section II(e)(1)–(5) of the exemption and/or the assets of any Add-On Plan invested in such Commingled Fund represent all of the assets of such plans. In this regard, the applicant believes that the exemption will apply (if all other applicable requirements of the exemption are satisfied) where only a portion of the assets of a plan described in Section II(e)(1)–(5) of the exemption are invested in a Commingled Fund.

In response to this comment, the Department agrees with DCMC. In this regard, it is the Department's view that it is not necessary for all the assets of plans described in Section II(e) of the exemption to be invested in a Commingled Fund in order for the exemption to apply, assuming all applicable requirements of the exemption are satisfied. However, in the event that less than all of the assets of an Add-On Plan are invested in a Commingled Fund on the date of the initial transfer of such Add-On Plan's assets to such fund, it is the Department's view that subsequent transfers to such Commingled Fund of some or all of the assets that remain in such plan would trigger a re-calculation of the 25% Test. Accordingly, the Department has decided to amend Section II(e)(6) of the exemption to include a new sub-paragraph (i), as follows:

(i) in the event that less than all of the assets of an Add-On Plan are invested in a Commingled Fund on the date of the initial transfer of such Add-On Plan's assets to such fund, and if such Add-On Plan subsequently transfers to such Commingled Fund some or all of the assets that remain in such plan, then for purposes of compliance with the 25% Test, the sum of the value of the initial and each additional transfer of assets of such Add-On Plan shall not exceed 25 percent (25%) of the value of the aggregate assets in such Commingled Fund, as measured on the day immediately following the addition of each subsequent transfer of such Add-On Plan's assets to such Commingled Fund.

(D) DCMC maintains that where the assets of more than one Add-On Plan are invested in a Commingled Fund with the assets of plans described in Section II(e)(1)–(5) of the exemption, the 25% Test will be satisfied, if the

aggregate amount of the assets of such Add-On Plans invested in such Commingled Fund do not represent more than 25 percent (25%) of the value of all of the assets of such Commingled Fund, as measured on the day immediately following each addition of Add-On Plan assets to such Commingled Fund.

The Department concurs with DCMC's comment. Accordingly, the Department has decided for purposes of clarity to amend Section II(e)(6) of the exemption to include a new subparagraph (ii), as set forth below:

(ii) where the assets of more than one Add-On Plan are invested in a Commingled Fund with the assets of plans described in Section II(e)(1)–(5), above, of the exemption, the 25% Test will be satisfied, if the aggregate amount of the assets of such Add-On Plans invested in such Commingled Fund do not represent more than 25 percent (25%) of the value of all of the assets of such Commingled Fund, as measured on the day immediately following each addition of Add-On Plan assets to such Commingled Fund.

(E) DCMC has expressed concern over the application of the 25% Test in a type of arrangement normally used for 401(k) Plans. Specifically, DCMC describes a situation where a trust is established with a single trustee under a single trust agreement: (a) with provision for separate sub-funds representing different types of investment portfolios; and (b) plan participants generally having the right to allocate amounts contributed for them among the sub-funds as well as the right to transfer existing account balances among such sub-funds in such a trust. DCMC indicates that participants may make these choices at their discretion and often through telephonic contact with the trustee without the employer's personnel having any involvement in or knowledge of such transactions. DCMC maintains that where a number of plans are funded through such a trust, the proportionate interest of a particular plan will be different for the various sub-funds, because of differing investment choices made by participants in such plans using the trust. Because these investment choices can be made by participants on a daily basis, a particular plan's proportionate interest in a particular sub-fund can change over a short period of time.

Further, DCMC has expressed concern over the application of the 25% Test with regard to increases in the value of Add-On Plan assets in a Commingled Fund. In this regard, DCMC maintains that investment earnings on Add-On Plan assets held in such Commingled Fund should not be considered to

involve an addition of assets for purposes of compliance with the 25% Test. It is DCMC's position that, if the 25% Test is met at the time assets of an Add-On Plan are added to a Commingled Fund, the 25% Test will not thereafter fail to be satisfied merely because the assets of the Add-On Plan held in the Commingled Fund have appreciated to a greater extent than the assets of the other plans (described in Section II(e)(1)–(5) of the exemption) that are held in such Commingled Fund.

To address this issue, DCMC, as a follow-up to its comment letters of October 17 and October 18, 2000, requested that the Department consider the following language:

If during any calendar year DCMC manages assets within fewer than all of the sub-funds and the 25% test, is not satisfied for such year (on a weighted-average basis) taking into account only the sub-funds as to which DCMC has asset management responsibilities, the Exemption will not apply to such Commingled Fund during the next following calendar year.

The Department has decided not to accept DCMC's suggestion, as set forth above. However, the Department recognizes that with respect to Add-On Plan Assets in a Commingled Fund, it would be burdensome to require continual testing of the percentage of Add-On Plan assets to the total assets in a Commingled Fund, as a result of events that occur in the ordinary operation of a plan or as a result of increases in the value of an Add-On Plan's assets held in a Commingled Fund. Accordingly, the Department has decided to clarify the language of the exemption by adding the following new subparagraph (iii) to Section II(e)(6) of the exemption:

(iii) if the 25% Test is satisfied at the time of the initial and any subsequent transfer of an Add-On Plan's assets to a Commingled Fund, as provided in Section II(e), above, this requirement shall continue to be satisfied notwithstanding that the assets of such Add-On Plan in the Commingled Fund exceed 25 percent (25%) of the value of the aggregate assets of such fund solely as a result of: (AA) a distribution to a participant in a Former DuPont Related Plan; (BB) periodic employer or employee contributions made in accordance with the terms of the governing plan documents; (CC) the exercise of discretion by a Former DuPont Related Plan participant to re-allocate an existing account balance in a Commingled Fund managed by DCMC or to withdraw assets from a Commingled Fund; or (DD) an increase in the value of the assets of the Add-On Plan held in such Commingled Fund due to investment earnings or appreciation.

(F) DCMC acknowledges that where a Commingled Fund includes assets of Add-On Plans, the 25% Test is to be applied to such Commingled Fund on

the next day immediately following each addition of Add-On Plan assets to such Commingled Fund. However, DCMC maintains that, if the 25% Test is met at the time the assets of an Add-On Plan are transferred to a Commingled Fund, the 25% Test will not thereafter fail to be satisfied merely because the assets of plans (described in Section II(e)(1)–(5) of the exemption) that are held in such Commingled Fund are withdrawn from such fund. In this regard, DCMC believes that after such a withdrawal, if Add-On Plan assets are added to such Commingled Fund, the exemption would cease to apply, if the 25% Test were not then satisfied.

In response to this comment, it is the position of the Department that other than, as set forth, above, in Section II(e)(6)(iii) of this exemption, the 25% Test is to be satisfied each time assets of an Add-On Plan are transferred to or invested in a Commingled Fund. Failure to satisfy the 25% Test or any other condition of this exemption would cause the exemption immediately to become unavailable to Add-On Plans. The Department notes that, if as a result of a decision by an employer or a sponsor of a plan (described in Section II(e)(1)–(5) of the exemption), the assets of such plan are withdrawn from a Commingled Fund, and if as a result of such withdrawal the 25% Test is no longer satisfied with respect to any Add-On Plan in such Commingled Fund, then it is the position of the Department that the exemption would immediately cease to apply to all of the Add-On Plans invested in such Commingled Fund. Accordingly, the Department has decided to clarify the language of the exemption by adding the following new subparagraph (iv) to Section II(e)(6) of the exemption:

(iv) if, as a result of a decision by an employer or a sponsor of a plan described in Section II(e)(1)–(5) of the exemption to withdraw some or all of the assets of such plan from a Commingled Fund, the 25% Test is no longer satisfied with respect to any Add-On Plan in such Commingled Fund, then the exemption will immediately cease to apply to all of the Add-On Plans invested in such Commingled Fund.

(G) DCMC asserts that where the assets of a Commingled Fund include assets of plans, other than Former DuPont Related Plans, the inclusion of the assets of such other plans in such Commingled Fund will not prevent the application of the exemption to Former DuPont Related Plans, provided that the assets of such other plans will be disregarded in applying the 25% Test to any Add-On Plan whose assets are held in such Commingled Fund.

With respect to this comment, the Department concurs with DCMC. Accordingly, for purposes of clarity, the Department has decided to amend Section II(e)(6) of the exemption to include a new paragraph (v) as follows:

(v) where the assets of a Commingled Fund include assets of plans other than Former DuPont Related Plans, as defined in Section II(e), above, of this exemption, the 25% Test will be determined without regard to the assets of such other plans in such Commingled Fund.

After giving full consideration to the entire record, including the written comments from DCMC, the Department has decided to grant the exemption, as amended by the Department herein. The comment letters submitted to the Department have been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Pension Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on August 17, 2000, at 65 FR 50226.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (this is not a toll-free number).

General Motors Investment Management Corporation, Located in New York, NY

[Prohibited Transaction Exemption 2001-06, Exemption Application Nos.: D-10782 through D-10785]

Exemption

I. Transactions

The restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D),⁷ shall not apply, as of May 28, 1999, to a transaction between a party in interest with respect to certain plans (the Transition Plans), as defined in Section II(e), below, and an investment fund in which such plans have an interest (the Investment Fund), as defined in Section II(k), below, provided that General Motors Investment Management Corporation or its successor

(collectively, GMIMCO) has discretionary authority or control with respect to the plan assets involved in the transaction and the following conditions are satisfied:

(a) GMIMCO or its successor is an investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total assets, including in-house plan assets (the In-house Plan Assets), as defined in Section II(g), below, under its management and control in excess of \$100 million and shareholders' or partners' equity, as defined in Section II(j), below, in excess of \$750,000;

(b) At the time of the transaction, as defined in Section II(m), below, the party in interest or its affiliate, as defined in Section II(a), below, does not have, and during the immediately preceding one (1) year has not exercised, the authority to—

(1) Appoint or terminate GMIMCO as a manager of any of the Transition Plans' assets, or

(2) Negotiate the terms of the management agreement with GMIMCO (including renewals or modifications thereof) on behalf of the Transition Plans;

(c) The transaction is not described in—

(1) Prohibited Transaction Class Exemption 81-6 (PTCE 81-6)⁸ (relating to securities lending arrangements);

(2) Prohibited Transaction Class Exemption 83-1 (PTCE 83-1)⁹ (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Class Exemption 82-87 (PTCE 82-87)¹⁰ (relating to certain mortgage financing arrangements);

(d) The terms of the transaction are negotiated on behalf of the Investment Fund by, or under the authority and general direction of, GMIMCO, and either GMIMCO, or (so long as GMIMCO retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by GMIMCO, makes the decision on behalf of the Investment Fund to enter into the transaction;

(e) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of GMIMCO, the terms of the transaction are at least as favorable to the Investment Fund as the terms generally

available in arm's length transactions between unrelated parties;

(f) Neither GMIMCO nor any affiliate thereof, as defined in Section II(b), below, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in GMIMCO is a person who, within the ten (10) years immediately preceding the transaction, has been either convicted or released from imprisonment, whichever is later, as a result of:

(1) any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization;

(2) any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(3) income tax evasion;

(4) any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or

(5) any other crime described in section 411 of the Act.

For purposes of this Section I(f), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether the judgment remains under appeal;

(g) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(h) The party in interest dealing with the Investment Fund:

(1) Is a party in interest with respect to the Transition Plans (including a fiduciary) solely by reason of providing services to the Transition Plans, or solely by reason of a relationship to a service provider described in section 3(14)(F),(G),(H), or (I) of the Act;

(2) Does not have discretionary authority or control with respect to the investment of plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR § 2510.3-21(c)) with respect to those assets; and

(3) Is neither GMIMCO nor a person related to GMIMCO, as defined in Section II(i), below;

(i) GMIMCO adopts written policies and procedures that are designed to assure compliance with the conditions of the exemption;

(j) An independent auditor, who has appropriate technical training or experience and proficiency with the

⁷ For purposes of this exemption, references to specific provisions of Title I of the Act unless otherwise specified, refer to the corresponding provisions of the Code.

⁸ 46 FR 7527, January 23, 1981.

⁹ 48 FR 895, January 7, 1983.

¹⁰ 47 FR 21331, May 18, 1982.

fiduciary responsibility provisions of the Act and who so represents in writing, conducts an exemption audit, as defined in Section II(f), below, on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the Transition Plans presenting its specific findings regarding the level of compliance with the policies and procedures adopted by GMIMCO in accordance with Section I(i), above, of this exemption; and

(k)(1) GMIMCO or an affiliate maintains or causes to be maintained within the United States, for a period of six (6) years from the date of each transaction, the records necessary to enable the persons described in Section I(k)(2) to determine whether the conditions of this exemption have been met, except that (a) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of GMIMCO and/or its affiliates, the records are lost or destroyed prior to the end of the six (6) year period, and (b) no party in interest or disqualified person other than GMIMCO 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 Section I(k)(2), below, of this exemption.

(2) Except as provided in Section I(k)(3), below, of this exemption, and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in Section I(k)(1), above, of this exemption are unconditionally available for examination at their customary location during normal business hours by:

(A) any duly authorized employee or representative of the Department of Labor (the Department) or of the Internal Revenue Service;

(B) any fiduciary of any of the Transition Plans investing in the Investment Fund or any duly authorized representative of such fiduciary;

(C) any contributing employer to any of the Transition Plans investing in the Investment Fund or any duly authorized employee representative of such employer;

(D) any participant or beneficiary of any of the Transition Plans investing in the Investment Fund, or any duly authorized representative of such participant or beneficiary; and

(E) any employee organization whose members are covered by such Transition Plans;

(3) None of the persons described in Section I(k)(2)(B) through (E), above, of this exemption shall be authorized to

examine trade secrets of GMIMCO or its affiliates or commercial or financial information which is privileged or confidential.

II. Definitions

(a) For purposes of Section I(b) of this exemption, an "affiliate" of a person means—

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

(2) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, 5 percent (5%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets. A named fiduciary (within the meaning of section 402(a)(2) of the Act) of a plan, and an employer any of whose employees are covered by the plan, will also be considered affiliates with respect to each other for purposes of Section I(b) if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(b) For purposes of Section I(f), above, of this exemption, an "affiliate" of a person means—

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

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent (5%) or more partner or owner, and

(4) Any employee or officer of the person who —

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent (10%) or more of the yearly wages of such person), or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management, or disposition of plan assets.

(c) For purposes of Section II(e) and (g), below, of this exemption an "affiliate" of GMIMCO includes a member of either:

(1) a controlled group of corporations, as defined in section 414(b) of the Code, of which GMIMCO is a member, or

(2) a group of trades or businesses under common control, as defined in section 414(c) of the Code, of which GMIMCO is a member; provided that "50 percent" shall be substituted for "80 percent" wherever "80 percent" appears in section 414(b) or 414(c) of the rules thereunder.

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

(e) "Transition Plans" mean:

(1) the Delphi Retirement Program for Salaried Employees; Delphi Hourly-Rate Employees Pension Plan; Delphi Automotive Systems Corporation Personal Savings Plan, Delphi Automotive Systems Corporation Income Security Plan, Delphi Automotive Systems Corporation Savings-Stock Purchase Program, Packard-Hughes Interconnect Non-Bargaining Retirement Plan, Packard-Hughes Interconnect Bargaining Retirement Plan, Packard-Hughes Interconnect Foley-Alabama Facility Retirement Plan, and ASEC Manufacturing Retirement Program (collectively, the Delphi Plans);

(2) any plan the assets of which include or have included assets that were managed by GMIMCO, as an in-house asset manager (INHAM), pursuant to Prohibited Transaction Class Exemption 96-23 (PTCE 96-23);¹¹ but as to which PTCE 96-23 is no longer available because such assets are no longer held under a plan maintained by an affiliate of GMIMCO (as defined in Section II(c), above, of this exemption); and

(3) any plan (the Add-On Plan) that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of GMIMCO (as defined in Section II(c), above, of this exemption); provided that: (A) The assets of the Add-On Plan are invested in a commingled fund (the Commingled Fund), as defined in Section II(n), below, of this exemption, with the assets of a plan or plans, described in Section II(e)(1)-(2), above, of this exemption; and (B) the assets of the Add-On Plan in the Commingled Fund do not comprise more than 25 percent (25%) of the value of the aggregate assets of such fund, as measured on the day immediately following the commingling of their assets (the 25% Test);

¹¹ 61 FR 15975 (April 10, 1996).

For purposes of the 25% Test, as set forth in Section II(e)(3), above:

(i) in the event that less than all of the assets of an Add-On Plan are invested in a Commingled Fund on the date of the initial transfer of such Add-On Plan's assets to such fund, and if such Add-On Plan subsequently transfers to such Commingled Fund some or all of the assets that remain in such plan, then for purposes of compliance with the 25% Test, the sum of the value of the initial and each additional transfer of assets of such Add-On Plan shall not exceed 25 percent (25%) of the value of the aggregate assets in such Commingled Fund, as measured on the day immediately following the addition of each subsequent transfer of such Add-On Plan's assets to such Commingled Fund;

(ii) where the assets of more than one Add-On Plan are invested in a Commingled Fund with the assets of plans described in Section II(e)(1)–(2), above, of the exemption, the 25% Test will be satisfied, if the aggregate amount of the assets of such Add-On Plans invested in such Commingled Fund do not represent more than 25 percent (25%) of the value of all of the assets of such Commingled Fund, as measured on the day immediately following each addition of Add-On Plan assets to such Commingled Fund;

(iii) if the 25% Test is satisfied at the time of the initial and any subsequent transfer of an Add-On Plan's assets to a Commingled Fund, as provided in Section II(e), above, this requirement shall continue to be satisfied notwithstanding that the assets of such Add-On Plan in the Commingled Fund exceed 25 percent (25%) of the value of the aggregate assets of such fund solely as a result of: (AA) a distribution to a participant in a Transition Plan; (BB) periodic employer or employee contributions made in accordance with the terms of the governing plan documents; (CC) the exercise of discretion by a Transition Plan participant to re-allocate an existing account balance in a Commingled Fund managed by GMIMCO or to withdraw assets from a Commingled Fund; or (DD) an increase in the value of the assets of the Add-On Plan held in such Commingled Fund due to investment earnings or appreciation;

(iv) if, as a result of a decision by an employer or a sponsor of a plan described in Section II(e)(1)–(2) of the exemption to withdraw some or all of the assets of such plan from a Commingled Fund, the 25% Test is no longer satisfied with respect to any Add-On Plan in such Commingled Fund, then the exemption will immediately

cease to apply to all of the Add-On Plans invested in such Commingled Fund; and

(v) where the assets of a Commingled Fund include assets of plans other than Transition Plans, as defined in Section II(e), above, of this exemption, the 25% Test will be determined without regard to the assets of such other plans in such Commingled Fund.

(f) "Exemption audit" of any of the Transition Plans must consist of the following:

(1) A review of the written policies and procedures adopted by GMIMCO, pursuant to Section I(i), above, of this exemption, for consistency with each of the objective requirements of this exemption, as described in Section II(f)(5), below;

(2) A test of a representative sample of the subject transactions in order to make findings regarding whether GMIMCO is in compliance with:

(A) the written policies and procedures adopted by GMIMCO, pursuant to Section I(i), above, of this exemption; and

(B) the objective requirements of this exemption;

(3) A determination as to whether GMIMCO has satisfied the requirements of Section I(a), above, of this exemption;

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings; and

(5) For purposes of Section II(f) of this exemption, the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by GMIMCO to assure compliance with each of these requirements:

(A) the requirements of Section I(a), above, of this exemption regarding registration under the Investment Advisers Act of 1940, total assets under management, and shareholders' or partners' equity;

(B) the requirements of Part I and Section I(d) of this exemption regarding the discretionary authority or control of GMIMCO with respect to the assets of the Transition Plans involved in the transaction, in negotiating the terms of the transaction, and with regard to the decision on behalf of the Transition Plans to enter into the transaction;

(C) the transaction is not entered into with any person who is excluded from relief under Section I(h)(1), above, of this exemption, Section I(h)(2) to the extent such person has discretionary authority or control over the plan assets involved in the transaction, or Section I(h)(3); and

(D) the transaction is not described in any of the class exemptions listed in Section I(c), above, of this exemption.

(g) "In-house Plan Assets" means the assets of any plan maintained by an affiliate of GMIMCO, as defined in Section II(c), above, of this exemption and with respect to which GMIMCO exercises discretionary authority or control.

(h) The term, "party in interest," means a person described in section 3(14) of the Act and includes a "disqualified person," as defined in section 4975(e)(2) of the Code.

(i) GMIMCO is "related" to a party in interest for purposes of Section I(h)(3) of this exemption, if the party in interest (or a person controlling, or controlled by, the party in interest) owns a 5 percent (5%) or more interest in GMIMCO, or if GMIMCO (or a person controlling, or controlled by GMIMCO) owns a 5 percent (5%) or more interest in the party in interest.

For purposes of this definition:

(1) the term, "interest," means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation,

(B) The capital interest or the profits interest of the entity if the entity is a partnership; or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose of such interest.

(j) For purposes of Section I(a) of this exemption, the term, "shareholders' or partners' equity," means the equity shown in the most recent balance sheet prepared within the two (2) years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

(k) "Investment Fund" includes single customer and pooled separate account maintained by an insurance company, individual trust and common, collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of GMIMCO) is subject to the discretionary authority of GMIMCO.

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

section 3(15) of the Act, or a brother, sister, or a spouse of a brother or sister.

(m) The "time" as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after the date when the grant of this exemption is published in the **Federal Register** or a renewal that requires the consent of GMIMCO occurs on or after such publication date and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Nothing in this subsection shall be construed as exempting a transaction entered into by an Investment Fund which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of this exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption. In determining compliance with the conditions of the exemption at the time that the transaction was entered into for purposes of the preceding sentence, Section I(h) of this exemption will be deemed satisfied if the transaction was entered into between a plan and a person who was not then a party in interest.

(n) "Commingle Fund" means a trust fund managed by GMIMCO containing assets of some or all of the assets of plans, described in Section II(e)(1)-(2), above, of this exemption, plans other than Transition Plans, and, if applicable, any Add-On Plan, as to which the 25% Test, provided in Section II(e)(3), above, of this exemption has been satisfied; provided that: (1) where GMIMCO manages a single sub-fund or investment portfolio within such trust, the sub-fund or portfolio will be treated as a single Commingle Fund; and (2) where GMIMCO manages more than one sub-fund or investment portfolio within such trust, the aggregate value of the assets of such sub-funds or portfolios managed by GMIMCO within such trust will be treated as though such aggregate assets were invested in a single Commingle Fund.

Temporary Nature of Exemption

The Department has determined that the relief provided by this exemption is temporary in nature. The exemption is effective May 28, 1999, and expires on the day which is five (5) years from the

date of the publication of the final exemption in the **Federal Register**. Accordingly, the relief provided by this exemption will not be available upon the expiration of such five-year period for any new or additional transactions, as described herein, after such date, but would continue to apply beyond the expiration of such five-year period for continuing transactions entered into within the five-year period; provided the conditions of this exemption continue to be satisfied. Should the applicant wish to extend, beyond the expiration of such five-year period, the relief provided by this exemption to new or additional transactions, the applicant may submit another application for exemption. In this regard, the Department expects that prior to filing another exemption application seeking relief for new or additional transactions, the applicant would be prepared to demonstrate compliance with the conditions of this exemption.

Written Comments

In the Notice of Proposed Exemption (the Notice), the Department invited all interested persons to submit written comments and requests for a hearing on the proposed exemption. As set forth in the Notice, interested persons consist of the investment committee of each of the Delphi Plans. The deadline for submission of such comments was within forty-five (45) days of the date of the publication of the Notice in the **Federal Register** on August 17, 2000. All comments and requests for a hearing were due on October 2, 2000.

By letter dated September 1, 2000, the applicant confirmed that a copy of the Notice and a copy of the supplemental statement (the Supplemental Statement), described at 29 CFR § 2570.43.(b)(2) were delivered by first class mail via Federal Express on August 31, 2000, to the Executive Committee of the Board of Directors of Delphi Automotive Systems Corporation. As the committee responsible for appointing GMIMCO, as named fiduciary and investment manager for the Transition Plans, the Executive Committee of the Board of Directors of Delphi Automotive Systems Corporation is an interested person with respect to the Transition Plans.

Subsequently, the applicant represented that the ASEC Manufacturing Benefits Committee, and the Packard-Hughes Interconnect Administrative Committee, are also interested persons, as the committees responsible for appointing GMIMCO, as named fiduciary and investment manager, respectively for the ASEC

Manufacturing Retirement Program and the Packard-Hughes Interconnect Non-Bargaining Retirement Plan, the Packard-Hughes Interconnect Bargaining Retirement Plan, and the Packard-Hughes Interconnect Foley-Alabama Facility Retirement Plan. By letter dated September 14, 2000, the applicant confirmed that a copy of the Notice and a copy of the Supplemental Statement were delivered by first class mail via Federal Express on September 11, 2000, to the ASEC Manufacturing Benefits Committee, and the Packard-Hughes Interconnect Administrative Committee.

In light of the fact that the notification to ASEC Manufacturing Benefits Committee, and the Packard-Hughes Interconnect Administrative Committee was delayed until September 11, 2000, and in order to give all interested persons the benefit of the full thirty (30) day comment period the Department required, and the applicant agreed to, an extension of the deadline when comments and requests for hearing would be due on the proposed exemption. In a letter dated October 16, 2000, the applicant confirmed that ASEC Manufacturing Benefits Committee, and the Packard-Hughes Interconnect Administrative Committee were informed that all comments and requests for a hearing were due by October 11, 2000.

During the comment period, the Department received no requests for a hearing. However, the Department did receive a comment letter from GMIMCO relating to a Notice of Proposed Exemption published in the **Federal Register** on August 17, 2000, for DuPont Capital Management Corporation (DCMC).¹² Because, GMIMCO requested a similar exemption, the Department has determined to treat GMIMCO's submission, as though the comments were filed by GMIMCO with respect to its own Notice of Proposed Exemption¹³ which was published on the same date. Because the two proposals provide identical relief, the Department believes that, in the interest of clarity and consistency, both exemptions should operate in the same manner. In this regard, the Department has summarized below its position with respect to certain issues which may affect both exemptions. GMIMCO's comments and the Department's responses thereto, are also summarized below.

(A) Questions have arisen as to what constitutes a Commingle Fund for purposes of compliance with the 25%

¹² 65 FR 50226, August 17, 2000.

¹³ 65 FR 50232, August 17, 2000.

Test and how the exemption should apply where a trust has multiple separately valued sub-funds, with covered plan participants generally having the right to allocate the amounts held among the sub-funds at their discretion, or where a trust has one or more investment portfolios with participating plans having pro-rata undivided interests in all of the trust's assets, if: (a) GMIMCO manages assets within one or more of such sub-funds or portfolios, and (b) the plans utilizing the trust are plans described in Section II(e)(1)-(2) of the exemption or any Add-On Plan, described in Section II(e)(3), as to which the 25 percent (25%) test (the 25% Test), is satisfied.

It is the Department's view that for purposes of calculating compliance with the 25% Test with respect to the assets of any Add-On Plan to be added to such trust, a single sub-fund or portfolio within such trust managed by GMIMCO shall be treated as a single Commingled Fund, and where GMIMCO manages more than one sub-fund or portfolio within such trust, the aggregate value of the assets of such sub-funds or portfolios managed by GMIMCO within such trust shall be treated as though such aggregate assets were invested in a single Commingled Fund. Accordingly, for purposes of clarity, the Department has added a new definition at paragraph (n), as set forth below, to Section II of the exemption:

(n) "Commingled Fund" means a trust fund managed by GMIMCO containing assets of some or all of the assets of plans, described in Section II(e)(1)-(2), above, of this exemption, plans other than Transition Plans, and, if applicable, any Add-On Plan, as to which the 25% Test, provided in Section II(e)(3), above, of this exemption has been satisfied; provided that: (1) where GMIMCO manages a single sub-fund or investment portfolio within such trust, the sub-fund or portfolio will be treated as a single Commingled Fund; and (2) where GMIMCO manages more than one sub-fund or investment portfolio within such trust, the aggregate value of the assets of such sub-funds or portfolios managed by GMIMCO within such trust will be treated as though such aggregate assets were invested in a single Commingled Fund.

Further, the Department has amended the language of Section II(e)(3) of the exemption to include a reference to the definition of a Commingled Fund and a reference to the 25% Test, as indicated below, by the underlined passages:

(3) any plan (the Add-On Plan) that is sponsored or becomes sponsored by an entity that was, but has ceased to be, an affiliate of GMIMCO (as defined in Section II(c), above, of this exemption); provided that: (A) the assets of the Add-On Plan are invested in a commingled fund (*the Commingled Fund*), as

defined in Section II(n), below, of this exemption, with the assets of a plan or plans, described in Section II(e)(1)-(2), above; and (B) the assets of the Add-On Plan in the Commingled Fund do not comprise more than 25 percent (25%) of the value of the aggregate assets of such fund, as measured on the day immediately following the commingling of their assets (the 25% Test).

(B) Questions have arisen whether, in order for the exemption to apply with respect to assets of a Commingled Fund, it is necessary for the assets of plans described in Section II(e)(1)-(2) of the exemption and/or the assets of any Add-On Plan invested in such Commingled Fund to represent all of the asset of such plans.

It is the Department's view that it is not necessary for all the assets of plans described in Section II(e) of the exemption to be invested in a Commingled Fund in order for the exemption to apply, assuming all applicable requirements of the exemption are satisfied. However, in the event that less than all of the assets of an Add-On Plan are invested in a Commingled Fund on the date of the initial transfer of such Add-On Plan's assets to such fund, it is the Department's view that subsequent transfers to such Commingled Fund of some or all of the assets that remain in such plan would trigger a re-calculation of the 25% Test. Accordingly, the Department has decided to amend Section II(e)(3) of the exemption to include a new sub-paragraph (i), as follows:

(i) in the event that less than all of the assets of an Add-On Plan are invested in a Commingled Fund on the date of the initial transfer of such Add-On Plan's assets to such fund, and if such Add-On Plan subsequently transfers to such Commingled Fund some or all of the assets that remain in such plan, then for purposes of compliance with the 25% Test, the sum of the value of the initial and each additional transfer of assets of such Add-On Plan shall not exceed 25 percent (25%) of the value of the aggregate assets in such Commingled Fund, as measured on the day immediately following the addition of each subsequent transfer of such Add-On Plan's assets to such Commingled Fund;

(C) Questions have arisen as to the calculation of the 25% Test where the assets of more than one Add-On Plan are invested in a Commingled Fund with the assets of plans described in Section II(e)(1)-(2) of the exemption. In this regard, the Department has decided for purposes of clarity to amend Section II(e)(3) of the exemption to include a new sub-paragraph (ii), as set forth below:

(ii) where the assets of more than one Add-On Plan are invested in a Commingled Fund with the assets of plans described in Section

II(e)(1)-(2), above, of the exemption, the 25% Test will be satisfied, if the aggregate amount of the assets of such Add-On Plans invested in such Commingled Fund do not represent more than 25 percent (25%) of the value of all of the assets of such Commingled Fund, as measured on the day immediately following each addition of Add-On Plan assets to such Commingled Fund;

(D) GMIMCO believes that, for purposes of compliance with the 25% Test, it would be burdensome to require continual testing of the percentage of Add-On Plan assets to the total assets in a Commingled Fund. In GMIMCO's view, whether or not an Add-On Plan is covered by the exemption should be determined at the time such plan is brought into a Commingled Fund and not on a continuing basis. In this regard, GMIMCO believes that re-calculation of compliance with the 25% Test should be required in the event that all of the assets of an Add-On Plan are not initially invested in such Commingled Fund and to the extent that additional Add-On Plan assets are later added to or removed from the assets in such Commingled Fund for reasons other than: (i) normal contributions to or distributions from the plans in a Commingled Fund made under the terms of such plans, (ii) changes in specific investment selections within a Commingled Fund, or (iii) changes in the amount of plan assets in such Commingled Fund resulting from investment performance.

As indicated above, the Department concurs with GMIMCO that re-calculation of the 25% Test must occur where less than all of the assets of an Add-On Plan are initially invested in a Commingled Fund. Further, the Department recognizes that it would be administratively burdensome to require continuous recalculation of the 25% Test as a result of events that occur in the ordinary operation of a plan or as a result of increases in the value of an Add-On Plan's assets held in a Commingled Fund. Accordingly, the Department has decided to clarify the language of the exemption by adding the following new sub-paragraph (iii) to Section II(e)(3) of the exemption:

(iii) if the 25% Test is satisfied at the time of the initial and any subsequent transfer of an Add-On Plan's assets to a Commingled Fund, as provided in Section II(e), above, this requirement shall continue to be satisfied notwithstanding that the assets of such Add-On Plan in the Commingled Fund exceed 25 percent (25%) of the value of the aggregate assets of such fund solely as a result of: (AA) a distribution to a participant in a Transition Plan; (BB) periodic employer or employee contributions made in accordance with the terms of the governing plan documents; (CC) the exercise of discretion by a Transition

Plan participant to re-allocate an existing account balance in a Commingled Fund managed by GMIMCO or to withdraw assets from a Commingled Fund; or (DD) an increase in the value of the assets of the Add-On Plan held in such Commingled Fund due to investment earnings or appreciation;

(E) GMIMCO maintains that failure to satisfy the 25% Test should only cause the exemption to become unavailable for the Add-On Plans in a Commingled Fund but should not cause the exemption to be unavailable for the entire Commingled Fund.

In response to this comment, it is the position of the Department that other than, as set forth, above, in Section II(e)(3)(iii) of this exemption, the 25% Test is to be satisfied each time assets of an Add-On Plan are transferred to or invested in a Commingled Fund. Failure to satisfy the 25% Test or any other condition of this exemption would cause the exemption immediately to become unavailable for Add-On Plans. The Department notes that, if as a result of a decision by an employer or a sponsor of a plan (described in Section II(e)(1)–(2) of the exemption), the assets of such plan are withdrawn from a Commingled Fund, and if as a result of such withdrawal the 25% Test is no longer satisfied with respect to any Add-On Plan in the Commingled Fund, then it is the Department's position that the exemption will immediately cease to apply to all of the Add-On Plans invested in such Commingled Fund. Accordingly, the Department has decided to clarify the language of the exemption by adding the following new sub-paragraph (iv) to Section II(e)(3) of the exemption:

(iv) if, as a result of a decision by an employer or a sponsor of a plan described in Section II(e)(1)–(2) of the exemption to withdraw some or all of the assets of such plan from a Commingled Fund, the 25% Test is no longer satisfied with respect to any Add-On Plan in such Commingled Fund, then the exemption will immediately cease to apply to all of the Add-On Plans invested in such Commingled Fund;

(F) Questions have arisen whether the inclusion of the assets of plans, other than plans described in Section II(e) of this exemption, in a Commingled Fund would result in the exemption being unavailable for assets of plans described in Section II(e) of this exemption which are held in such Commingled Fund.

It is the Department's view that, under the circumstances described above, the inclusion of the assets of other plans in a Commingled Fund will not result in the exemption being unavailable for assets of Transition Plans, described in Section II(e) of this exemption, held in such Commingled Fund, provided that

the assets of such other plans are disregarded for purposes of applying the 25% Test to any Add-On Plan whose assets are held in such Commingled Fund. Accordingly, for purposes of clarification, the Department has decided to amend Section II(e)(3) of the exemption to include a new sub-paragraph (v) as follows:

(v) where the assets of a Commingled Fund include assets of plans other than Transition Plans, as defined in Section II(e), above, of this exemption, the 25% Test will be determined without regard to the assets of such other plans in such Commingled Fund.

After giving full consideration to the entire record, including the written comment from the applicant, the Department has decided to grant the exemption, as amended by the Department, herein. The comment letter submitted by the applicant has been included as part of the public record of the exemption application. The complete application file, including the supplemental submission received by the Department, is made available for public inspection in the Public Documents Room of the Pension Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on August 17, 2000, at 65 FR 50232.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (this is not a toll-free number).

General Information

The attention of interested persons is directed to the following:

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

of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, D.C., this 19th day of January, 2001.

Ivan Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-10856, et al.]

Proposed Exemptions; Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis Professional Association Section 401(k) Profit Sharing Plan (the Plan)

AGENCY: Pension and Welfare Benefits 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 request 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