

Number" and Title referenced in this announcement.

Submit an original and five copies. The original should have the applicant's signature in blue ink. A cover letter must identify the responsible audit agency for the applicant's financial accounts.

The narrative portion of this cooperative agreement application should include, at a minimum.

1. A brief paragraph that indicates the applicant's understanding of the purpose of this cooperative agreement;

2. One or more paragraphs to detail the applicants understanding of Impact Evaluation;

3. A brief paragraph that summarizes the project goals and objectives;

4. A clear description of the methodology that will be used to complete the project and achieve its goals;

5. A clearly developed and detailed Project Plan which demonstrates how the various goals and objectives of the project will be achieved through its various activities so as to produce the required results;

6. A chart of measurable project milestones and time lines for the completion of each milestone;

7. A description of the staffing plan for the project, including the role of each project staff, the time commitment for each, the relationship among the staff (who reports to whom), and a signed statement from individual staff that they will be available to work on this project;

8. A description of the qualifications of the applicant organization and documentation of each project staff's knowledge, skills and abilities to carry out their assigned project responsibilities;

9. A budget that details all costs for the project, shows consideration for all contingencies for this project, and notes a commitment to work within the budget proposed (budget should be divided into object class categories as shown on application Standard Form 424A). A budget narrative must be included which explains how all costs were determined.

The project must be completed within one year of its award date.

**Authority:** Public Law 93-415.

**Funds Available:** The award will be limited to a maximum of \$150,000.00 (direct and indirect costs). Funds may be used only for the activities that are linked to the desired outcome of the project. No funds are transferred to state or local governments. Additional funding will be requested in subsequent years. Future award decisions will be based upon satisfactory performance of

the awarded and upon the availability of funding.

This project will be a collaborative venture with the NIC Prisons Divisions.

**Eligibility of Applicants:** An eligible applicant in any state or general unit of local government, private agency, educational institution, or organization, individual or team with expertise in the described areas.

**Review considerations:** Applications received under this announcement will be subject to a 3 to 5 person NIC Peer Review Process. One of the reviewers will be from Bureau of Prisons staff. No companies, project staff or consultants who are working on any of the projects within the Institutional Culture Initiative as identified in the RFP, may participate in the evaluation which will be proposed in response to this RFP. The purpose for this restriction is to assure that the evaluation team is totally separate from any of the projects which will be evaluated.

**Numbers of Awards:** 1.

**NIC Application Number:** 03P23. This number should appear as a reference line in the cover letter, in box 11 of Standard Form 424, and outside of the envelope in which the application is sent.

**Catalog of Federal Domestic Assistance Number:** 16.602.

**Executive Order 12372:** This project is not subject to the provisions of Executive Order 12372.

This announcement is expected to be awarded by August 27, 2003.

**Morris L. Thigpen,**

*Director, National Institute of Corrections.*

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**BILLING CODE 4410-36-M**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### Prohibited Transaction Exemption 2003-15; [Exemption Application No. D-11111, 11112, and 11113] *et al.* Grant of Individual Exemptions; Dupont Capital Management Corporation, (DCMC)

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Grant of Individual Exemptions.

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

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

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

### Statutory Findings

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

(a) The exemption is administratively feasible;

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

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

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

[Prohibited Transaction Exemption 2003-15; Exemption Application Nos. D-11111, 11112, and 11113]

### Exemption

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the past extension of credit from the DuPont Pension and

Retirement Plan, the Pioneer Hi-Bred International, Inc. Retirement Plan, and the Protein Technologies International Retirement Plan (collectively, the Plans)<sup>1</sup> to the Dow Chemical Company (Dow), a party in interest with respect to the Plans, as a result of the holding by the Plans of certain corporate debt securities (the Bonds) issued by Dow, for the period from October 25, 2000 until July 10, 2001; provided the following conditions were satisfied:

(a) The purchase of the Bonds by the Plans was a one-time transaction for cash;

(b) The Plans paid no more than the current fair market value for the Bonds at the time of the transaction, as determined by a reputable, independent, third party market source;

(c) The Bonds were sold on July 10, 2001 for \$2,101,900 at a profit of \$126,580 for the Plans;

(d) The purchase of the Bonds was not part of an agreement, arrangement or understanding designed to benefit Dow or any other party in interest with respect to the Plans; and

(e) The transaction represented less than .02% of each Plan's total assets.

#### Effective Date of Exemption

The exemption is effective for the period from October 25, 2000 (the date of the acquisition of the Bonds by the Plans) until July 10, 2001 (the date the Bonds were sold).

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on January 22, 2003, at 68 FR 3047.

**Written Comments:** The applicant (*i.e.*, DCMC) submitted a written comment with respect to the notice of proposed exemption (the Proposal). The comment is summarized below.

The applicant noted that in the operative language section of the Proposal, paragraph (c), it was erroneously indicated that the Bonds were sold for \$1,975,320 (rather than for \$2,101,900, as correctly stated in Item 5 of the Summary of Facts and Representations in the Proposal). Therefore, the Department has modified the language in paragraph (c) of the exemption to state that the Bonds were sold for \$2,101,900.

The Department also received over one hundred telephone calls from interested persons concerning the

Proposal. In addition, the Department received seven written inquiries from interested persons. All of the telephone calls and written inquiries requested additional information regarding the transactions and their possible affect on benefits payable to the appropriate Plan participants. The Department responded to each inquiry by telephone and attempted to address the concerns that were raised. None of the additional comments made to the Department offered any suggestions for changes to the Proposal.

No other comments were received by the Department. Accordingly, the Department has determined to grant the exemption, as clarified above.

#### FOR FURTHER INFORMATION CONTACT:

Brian Buyniski of the Department at (202) 693-8545. (This is not a toll-free number).

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

[Prohibited Transaction Exemption 2003-16; Exemption Application Nos. D-11114, 11115, 11116, 11117, 11118]

#### Exemption

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the past extension of credit from the DuPont Pension and Retirement Plan, the DuPont Dow Elastomers Pension and Retirement Plan, the Pioneer Hi-Bred International, Inc. Retirement Plan, the Protein Technologies International Retirement Plan, and the DuPont Savings and Investment Plan (collectively, the Plans) to ConAgra Foods, Inc. (ConAgra), a party in interest with respect to the Plans, as a result of the holding by the Plans of certain corporate debt securities (the Bonds) issued by ConAgra, for the period from September 5, 2001 until October 17, 2001; provided the following conditions were satisfied:

(a) The purchase of the Bonds by the Plans was a one-time transaction for cash;

(b) The Plans paid no more than the current fair market value for the Bonds at the time of the transaction, as determined by reputable, independent, third party market sources;

(c) The Bonds were sold on October 17, 2001 for \$4,234,531 at a profit of \$185,638 for the Plans;

(d) The purchase of the Bonds was not part of an agreement, arrangement or understanding designed to benefit ConAgra or any other party in interest with respect to the Plans; and

(e) The transaction represented less than 1% of each Plan's total assets.

#### Effective Date of Exemption

The exemption is effective for the period from September 5, 2001 (the date of the acquisition of the Bonds by the Plans) until October 17, 2001 (the date the Bonds were sold).

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on January 22, 2003, at 68 FR 3048.

**Written Comments:** The applicant (*i.e.*, DCMC) submitted written comments with respect to the notice of the proposed exemption (the Proposal). The comments are summarized below.

The applicant states that the DuPont Dow Elastomers Pension and Retirement Plan was not included in the list of "Plans" in the Proposal.

Based on this comment, the Department has revised the appropriate language in the Proposal to include the DuPont Dow Elastomers Pension and Retirement Plan.

In addition, the applicant states that the information concerning the plan sponsor of, and number of participants covered under, the DuPont Dow Elastomers Pension and Retirement Plan was not included in Item 2 of the Summary of Facts and Representations contained in the Proposal (the Summary).

The applicant also noted that footnote 12 in the Proposal indicates that "the Plans are funded through the same trust" and should have indicated that the Dupont Savings and Investment Plan is funded through a separate trust. The Department acknowledges the applicant's clarifications to the information contained in the Summary.

The Department received seven written inquiries and over one hundred telephone calls concerning the Proposal from interested persons. All of the telephone calls and written inquiries requested additional information regarding the transactions and their possible affect on benefits payable to the appropriate Plan participants. The Department responded to each inquiry by telephone and attempted to address the concerns that were raised. None of the additional comments made to the Department offered specific suggestions for changes to the Proposal.

No other comments were received by the Department. Accordingly, the Department has determined to grant the exemption, as modified herein.

**FOR FURTHER INFORMATION CONTACT:** Brian Buyniski of the Department at

<sup>1</sup> Because the Plans are funded through the same trust and each has an undivided interest in the assets of such trust, this exemption treats the purchase of the Bonds by the Plans as a single transaction and information concerning such purchase is referred to on an aggregate basis.

(202) 693-8545. (This is not a toll-free number).

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

[Prohibited Transaction Exemption 2003-17; Exemption Application Nos. D-11119 and 11120]

*Exemption*

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the past extension of credit from the CONSOL Inc. Employee Retirement Plan and the CONSOL Inc. Investment Plan for Salaried Plans (collectively, the Plans)<sup>2</sup> to Conoco Inc. (Conoco), a party in interest with respect to the Plans, as a result of the holding by the Plans of certain corporate debt securities (the Bonds) issued by Conoco, for the period from December 29, 1999 through August 16, 2001; provided the following conditions were satisfied:

(a) The purchase of the Bonds by the Plans was a one-time transaction for cash;

(b) The Plans paid no more than the current fair market value for the Bonds at the time of the transaction, as determined by reputable, independent, third party market sources;

(c) The Bonds were sold on August 16, 2001 for \$816,641 at a profit of \$61,858 for the Plans;

(d) The purchase of the Bonds was not part of an agreement, arrangement or understanding designed to benefit Conoco or any other party in interest with respect to the Plans; and

(e) The transaction represented less than 1% of each Plan's total assets.

*Effective Date of Exemption*

The exemption is effective for the period from December 29, 1999 (the date of the acquisition of the Bonds by the Plans) until August 16, 2001 (the date the Bonds were sold).

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on January 22, 2003, at 68 FR 3050.

*Written Comments:* The applicant (i.e., DCMC) submitted written

comments with respect to the notice of the proposed exemption (the Proposal). The comments are summarized below.

First, the applicant states that in Item 1 of the Summary of Facts and Representations (the Summary), a reference was made to the DuPont Pension Trust Fund (the DuPont Trust). In this regard, the applicant notes that CONSOL, Inc., (CONSOL) was a member of a controlled group of corporations that were subsidiaries of the E.I. duPont de Nemours and Company (the DuPont Group) prior to November 1998. However, after such date, CONSOL was no longer a member of the DuPont Group. Therefore, the applicant wishes to clarify that the assets of the Plans are no longer held in the DuPont Trust. In addition, the applicant notes that DCMC's investment management services to employee benefit plans that are sponsored by corporations that are part of the DuPont Group is not relevant to CONSOL and the subject transactions described in the proposal.

Second, the applicant notes that footnote 14 in the Summary, reference is made to PTE 2001-05, 66 FR 7789 (January 25, 2001). The information therein states that PTE 2001-05 was not effective at the time of the subject transactions. The applicant represents that if PTE 2001-05 had been in effect at the time of the subject transactions the exemption would not have provided relief. In this regard, the applicant notes that PTE 2001-05 only provides relief for prohibited transactions where the counterparty's party in interest status results solely from being a service provider to the Plan. In the present case, the counterparty's status as a party in interest results from an ownership affiliation with an employer whose employees are covered by the Plan.

The Department acknowledges all of the applicant's comments and clarifications to the information contained in the Summary.

Finally, the Department also received seven written inquiries and over one hundred telephone calls from interested persons concerning the Proposal. All of the telephone calls and written inquiries requested additional information regarding the transactions and their possible affect on benefits payable to the appropriate Plan participants. The Department responded to each inquiry by telephone and attempted to address the concerns that were raised. None of the additional comments made to the Department offered any specific suggestions for changes to the Proposal.

No other comments were received by the Department. Accordingly, the

Department has determined to grant the exemption, as clarified herein.

**FOR FURTHER INFORMATION CONTACT:**

Brian Buyniski of the Department at (202) 693-8545. (This is not a toll-free number).

**Skandinaviska Enskilda Banken AB (SEB) Located in Stockholm, Sweden**

[Prohibited Transaction Exemption 2003-18; Exemption Application No. D-11133]

*Exemption*

*Section I. Covered Transactions*

The restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code,<sup>3</sup> shall not apply, effective October 23, 2002, to: (1) the lending of securities that are assets of a plan (the Plan) to SEB's head office in Stockholm (the Borrower or the Applicant) in accordance with the conditions set forth below (the foregoing being Part One of this exemption); and (2) the lending of securities, under certain exclusive borrowing arrangements, to the Borrower by Plans, including commingled investment funds holding assets of such Plans with respect to which SEB or any of its affiliates is a party in interest; and (3) the receipt of compensation by SEB or any of its affiliates in connection with these exclusive borrowing transactions (the foregoing being Part Two of this exemption).

This exemption is subject to the conditions contained below in Sections II, III, and IV.

*Section II. Conditions Applicable to Part One of the Exemption—Securities Lending Between Plans and the Borrower*

(a) Neither the Borrower nor any of its affiliates shall have discretionary authority or control with respect to the investment of Plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to such assets.

(b) Each Plan receives from the Borrower, either by physical delivery or by book entry in a securities depository located in the United States, by the close of business on the day on which the securities lent are delivered to the Borrower, collateral consisting of U.S. currency, securities issued or guaranteed by the United States

<sup>2</sup> Because the Plans are funded through the same trust and each has an undivided interest in the assets of such trust, this exemption treats the purchase of the Bonds by the Plans as a single transaction and information concerning such purchase is referred to on an aggregate basis.

<sup>3</sup> For the purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Government or its agencies or instrumentalities, or irrevocable United States bank letters of credit issued by persons other than the Borrower (or any of its affiliates), or any combination thereof, having, as of the close of business on the preceding business day, a market value (or, in the case of letters of credit, a stated amount) equal to not less than 100 percent of the then market value of the securities lent. The collateral referred to in this exemption, shall in all cases, be in U.S. dollars or dollar-denominated securities or United States bank letters of credit and must be held in the United States.

(c) Each loan is made pursuant to a written loan agreement (the Loan Agreement), which may be in the form of a master agreement covering a series of securities lending transactions, and which contains terms at least as favorable to the Plan as those the Plan could obtain in an arm's length transaction with an unrelated party.

(d) In return for lending securities, each Plan either (1) receives a reasonable fee which is related to the value of the borrowed securities and the duration of the loan, or (2) has the opportunity to derive compensation through the investment of cash collateral. In the latter case, the Plan may pay a loan rebate or similar fee to the Borrower, if such fee is not greater than the Plan would pay an unrelated party in a comparable arm's length transaction with an unrelated party.

(e) Each Plan receives at least the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities that the Plan would have received (net of tax withholdings)<sup>4</sup> had it remained the record owner of such securities.

(f) If the market value of the collateral on the close of trading on a business day falls below 100 percent of the market value of the borrowed securities at the close of trading on that day, the Borrower delivers additional collateral, by the close of business on the following business day to bring the level of the collateral back to at least 100 percent of the market value of all the borrowed securities as of such preceding day. Notwithstanding the foregoing, part of the collateral may be returned to the

Borrower if the market value of the collateral exceeds 100 percent of the market value of the borrowed securities, as long as the market value of the remaining collateral equals at least 100 percent of the market value of the borrowed securities.

(g) Prior to entering into a Loan Agreement, the Borrower furnishes to the independent fiduciary for the Plan who is making decisions on behalf of the Plan with respect to the lending of securities: (1) the most recently available audited and unaudited statements of its financial condition; (2) the most recent available unaudited statement of the Borrower's financial condition; and (3) a representation by the Borrower that, as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished financial statement that has not been disclosed to the Plan fiduciary.

Such representation may be made by the Borrowers' agreeing that each loan shall constitute a representation by the Borrower that there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

(h) Each Loan Agreement and any securities loan outstanding may be terminated by the applicable Plan at any time, whereupon the Borrower delivers securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within (1) the customary delivery period for such securities; (2) five business days; or (3) the time negotiated for such delivery by the Plan and the Borrower, whichever is lesser, or, alternatively such period as permitted by Prohibited Transaction Class Exemption (PTE) 81-6 (43 FR 7527, January 23, 1981), as it may be amended or superseded.<sup>5</sup>

(i) In the event that a loan is terminated and the Borrower fails to return the borrowed securities or the equivalent thereof within the time described in paragraph (h) above, then the Plan may purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the Borrower under the

Loan Agreement, and any expenses associated with any such sale and/or purchase. The Borrower indemnifies the Plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date the loan is declared in default, together with expenses not covered by the collateral plus applicable interest at a reasonable rate. Notwithstanding the foregoing, the Borrower, may, in the event it fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the then-current market value of the collateral, provided that such replacement is approved by the independent plan fiduciary.

(j) Each Plan maintains the situs of any Loan Agreement in accordance with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 CFR 2550.404(b)-1. However, the Borrower shall not be subject to the civil penalty, which may be assessed pursuant to section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the Plan fails to comply with the requirements of 29 CFR 2550.404(b)-1.

If the Borrower fails to comply with any condition of this exemption in the course of engaging in a securities lending transaction, the Plan fiduciary which caused the Plan to engage in such transaction shall not be deemed to have caused the Plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the failure on the part of the Borrower to comply with the conditions of the exemption.

(k) Prior to any Plan's approval of any transaction with the Borrower, the Plan is provided copies of the proposed and final exemptions covering the exemptive relief described herein.

### *SECTION III. Conditions Applicable to Part Two of the Exemption—Exclusive Borrowing Arrangements Between Plans and the Borrower*

(a) For each Plan, neither the Borrower nor any affiliate has or exercises discretionary authority or control over the Plan's investment in the securities available for loan, nor do they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

(b) The Borrower is a party in interest with respect to each Plan (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H), or (I) of the Act.

<sup>4</sup> The Department notes that the Applicants representation that dividends and other distributions on foreign securities payable to a lending Plan may be subject to foreign tax withholdings and that the Borrower will always put the Plan in at least as good a position as it would have been in had it not loaned the securities.

<sup>5</sup> PTE 81-6, as amended at 52 FR 18754, May 19, 1987, provides an exemption under conditions from section 406(a)(1)(A), through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to certain broker-dealers or banks which are parties in interest.

(c) The Borrower directly negotiates an exclusive borrowing agreement (the Borrowing Agreement) with a Plan fiduciary which is independent of the Borrower and its affiliates.

(d) The terms of each loan of securities by a Plan to the Borrower are at least as favorable to such Plan as those of a comparable arm's length transaction between unrelated parties, taking into account the exclusive arrangement.

(e) In exchange for granting the Borrower the exclusive right to borrow certain securities, each Plan will receive from the Borrower either (1) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement from time to time); (2) a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities; or (3) any combination of (1) and (2) (collectively, the Exclusive Fee). If the Borrower deposits cash collateral, all the earnings generated by such cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the applicable Plan that a percentage of the earnings on the collateral may be retained by the Plan or the Plan may agree to pay the Borrower a rebate fee and retain the earnings on the collateral (the Shared Earnings Compensation). If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree to pay the applicable Plan a lending fee (the Lending Fee, together with the Shared Earnings Compensation, the Transaction Lending Fee). The Transaction Lending Fee, if any, shall be either in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be different for different securities or different groups of securities subject to the Borrowing Agreement. Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and

such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

(f) The Borrower may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to each Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage or other percentage determined pursuant to an objective formula.

(g) By the close of business on or before the day the loaned securities are delivered to the Borrower, each Plan shall receive from the Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank other than SEB or any affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption 81-6, as amended or superseded. Such collateral will be deposited and maintained in an account which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of a Plan by an affiliate of the Borrower that is the trustee or custodian of such Plan.

(h) The market value (or in the case of a letter of credit, the stated amount) of the collateral initially equals at least 102 percent of the market value of the loaned securities on the close of business on the day preceding the day of the loan, and, if the market value of the collateral at any time falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of a Plan may agree upon) of the market value of the loaned securities, the Borrower delivers additional collateral on the following day to bring the level of the collateral back to at least 102 percent. The level of the collateral is monitored daily by each Plan or its designee, which may be SEB or any of its affiliates which provides custodial or directed trustee services in respect of the securities covered by the applicable Borrowing Agreement. Such Borrowing Agreement shall give the applicable Plan title to the collateral until such collateral is redelivered to SEB pursuant to the terms of the Borrowing Agreement.

(i) Before entering into any Borrowing Agreement, the Borrower furnishes to the applicable Plan the most recent

publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement.

(j) Each Borrowing Agreement contains a representation by the Borrower that as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

(k) Each Plan receives at least the equivalent of all distributions made during the applicable loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities, that the Plan would have received (net of tax withholdings)<sup>6</sup> had it remained the record owner of the securities.

(l) Each Borrowing Agreement and any outstanding securities loans with respect thereto may be terminated by either party at any time without penalty (except for, if a Plan has terminated its Borrowing Agreement, the return to the Borrower of a pro rata portion of the Exclusive Fee paid by the Borrower to the Plan), whereupon the Borrower returns any borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the applicable Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities.

(m) In the event that the Borrower fails to return securities in accordance with a Borrowing Agreement, the applicable Plan will have the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the U.S. with respect to the difference between the replacement cost of the securities and the market value of the collateral on the date the loan is declared in default, together with expenses incurred by the Plan plus applicable interest at a reasonable rate, including reasonable attorneys' fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly

<sup>6</sup> See Footnote 4, *infra*.

(2) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization, whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are “plan assets” under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrower, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

<sup>7</sup> The Department notes SEB's representation that, under the exclusive borrowing arrangements, neither the Borrower nor any of its affiliates will perform the essential functions of a securities lending agent, *i.e.*, SEB will not be the fiduciary who negotiates the terms of the Borrowing Agreement on behalf of the Plan, the fiduciary who identifies the appropriate borrowers of the securities or the fiduciary who decides to lend securities pursuant to either a general securities lending arrangement or an exclusive borrowing arrangement. However, SEB or its affiliates may monitor the level of collateral and the value of the loaned securities.

(c)(1) Except as provided in subparagraph (c)(2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (b) are unconditionally available at their customary location or

examination during normal business hours by—

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

(ii) Any fiduciary of a participating Plan or any duly authorized representative of such fiduciary;

(iii) Any contributing employer to any participating Plan or any duly authorized employee representative of such employer; and

(iv) Any participant or beneficiary of participating Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in paragraphs (c)(1)(ii)-(t)(1)(iv) of this paragraph (c)(1) are authorized to examine the trade secrets of SEB or its affiliates or commercial or financial information which is privileged or confidential.

#### Section V. Definitions

(a) 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. (For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, employee or relative (as defined in section 3(15) of the Act) of any such other person or any partner in any such person; and

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

(b) The term "borrower" includes SEB and any other affiliate of SEB that now or in the future, is a U.S. registered broker-dealer or a government securities broker or dealer or U.S. bank.

*Effective Date:* This exemption is effective as of October 23, 2002.

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 May 5, 2003 at 68 FR 23768.

#### Written Comments

The Department received one written comment with respect to the Notice. The comment letter, which was submitted on behalf of SEB by its outside legal counsel, is intended to modify the Summary of Facts and Representations (the Summary) of the Notice, as discussed below.

1. *Footnote 6.* On page 23770 of the Notice, SEB states that Footnote 6 of the

Summary contains a reference to a non-existent "Footnote 2." SEB explains that the correct reference should have been to another footnote, *i.e.*, "Footnote 4," which describes the tax implications of foreign securities lending on an investing Plan.

2. *Representation 18.* On page 23374 of the Notice, the first sentence of Representation 18 of the Summary states, in part, that "in the event a loan is terminated and the Borrower fails to return the borrowed securities, or the equivalent thereof, within the time described in Representation 18 above, the Plan may purchase securities identical to the borrowed securities \* \* \*." SEB notes that the reference should be to "Representation 17" rather than to "Representation 18."

3. *Representation 32.* On page 23777 of the Notice, in Representation 32 of the Summary, the last sentence of the fourth paragraph states, that "the Applicant concludes that a Plan can bring an enforcement action, under an expedited procedure, on a foreign money judgment in New York to attach the assets of SEB's New York branch located in New York." For purposes of clarification, SEB suggests that the word "often" be inserted before the phrase "under an expedited procedure." As a result, the sentence would now read as follows:

\* \* \* Thus, the Applicant concludes that the Plan can bring an enforcement action, often under an expedited procedure, on a foreign money judgment in New York to attach the assets of SEB's New York branch located in New York.

The Department concurs with SEB's comments and suggested changes, and it takes note of the foregoing revisions to the Notice. In addition, the Department has revised Footnote 4 of the operative language to reflect the correct footnote reference.

Accordingly, after giving full consideration to the entire record, including SEB's written comment, the Department has decided to grant the exemption, as modified herein.

For further information regarding the comment and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-11133) 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 Employee Benefits Security Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

*For Further Information Contact:* Ms. Blessed ChukSORJI of the Department, telephone (202) 693-8567. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

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

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

Signed at Washington, DC this 19th day of June, 2003.

**Ivan Strasfeld,**

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

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