

**DEPARTMENT OF LABOR****Pension and Welfare Benefits Administration****[Application No. D-11061, et al.]****Proposed Exemptions; John Hancock Life Insurance Company****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 requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration (PWBA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to PWBA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: [moffittb@pwba.dol.gov](mailto:moffittb@pwba.dol.gov), or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

**Notice to Interested Persons**

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

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

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

**John Hancock Life Insurance Company, Located in Boston, MA****[Application No. D-11061]****Proposed Exemption**

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

**Section I: Transactions**

If the exemption is granted, the restrictions of sections 406(a)(1)(A) and 406(a)(1)(D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(A) and 4975(c)(1)(D) of the Code shall not apply to:<sup>1</sup>

(a) The purchase of a timber asset (Timber Asset(s)), as defined in section III(f), below, from International Paper Company or any affiliate, as defined in

section III(a), below, (collectively, International Paper) by a certain insurance company separate account (ForesTree IP), as defined in section III(d), below, maintained and managed by Hancock, as defined in section III(e), below, for the investment of the assets of one or more employee pension benefit plans sponsored by International Paper (the IP Plan or IP Plans); provided that the following conditions are satisfied:

(1) The price paid by ForesTree IP for the Timber Asset is determined by an independent, qualified appraiser, as defined in section III(h), below, as of the date of the transaction,

(2) The fair market value of the Timber Asset sold to ForesTree IP must be documented by an appraisal report in writing issued, as of the date of the transaction, by the independent, qualified appraiser;

(3) The price paid by ForesTree IP for the Timber Asset does not exceed the fair market value of such asset at the time of the purchase; and

(4) The general conditions set forth in section II, below, are satisfied.

(b) The sale of a timber product (Timber Product(s)), as defined in section III(g), below, to International Paper by ForesTree IP; provided that the following conditions are satisfied:

(1) Prior to soliciting bids for the sale of a Timber Product, Hancock establishes a minimum bid (the Minimum Bid) based on its assessment of the fair market value of the Timber Product offered for sale;

(2) Hancock (or its designee) solicits from each party on the buyers list (the Buyer's List), as defined in section III(c), below, for the relevant geographic area in which the Timber Product is located, a written bid for the purchase of the Timber Product offered for sale;

(3) The highest price bid for the Timber Product offered for sale must meet or exceed the Minimum Bid established by Hancock and must not be less than the fair market value of such Timber Product at the time the contract for sale is legally binding on the parties involved;

(4) Where International Paper is the highest price bidder for the Timber Product offered for sale, the transaction may not go forward, unless Hancock has received bids on such Timber Product from at least two (2) other bidders, in addition to International Paper, provided that each such bidder satisfies the definition of a *bona fide* bidder, as set forth in section III (i), below; and provided further that neither Hancock's general account nor any other account managed by Hancock is either of the two other bidders; and

<sup>1</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to the corresponding provisions of the Code.

(5) The general conditions set forth in section II, below, are satisfied.

#### *Section II: General Conditions*

(a) Any IP Plan that invests in ForesTree IP has total assets in excess of \$100 million;

(b) Hancock acts as a discretionary investment manager for ForesTree IP;

(c) Hancock negotiates on behalf of ForesTree IP the terms and conditions of any purchase of a Timber Asset by ForesTree IP from International Paper and the terms and conditions of any sale of a Timber Product by ForesTree IP to International Paper;

(d) Prior to ForesTree IP entering into any purchase of a Timber Asset or any sale of a Timber Product, Hancock determines on behalf of such account that each such transaction is feasible, in the interest of the account based on the investment policy and objectives of the account, and protective of the participants in the account;

(e) The terms and conditions of each transaction involving the sale of a Timber Asset by International Paper to ForesTree IP or the purchase of a Timber Product by International from ForesTree IP are at least as favorable to ForesTree IP as the terms obtainable by ForesTree IP in a similar transaction negotiated at arm's length with an unrelated third party;

(f) The transactions subject to this exemption are not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(g) Each transaction subject to this exemption is exclusively a cash transaction;

(h) ForesTree IP does not purchase Timber Assets from or sell Timber Products to Hancock's general account or any other account managed by Hancock;

(i) The investment of plan assets by any IP Plan in ForesTree IP does not exceed 20 percent (20%) of the total assets of such plan;

(j) The total amount of contributions received by Hancock from International Paper on behalf of the IP Plans and allocated to ForesTree IP must not in the aggregate exceed \$100 million; and

(k) Hancock maintains, or causes to be maintained, within the United States for a period of six (6) years from the date of each transaction which is subject to this exemption, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described, below in paragraph (1)(1), to determine whether the conditions of the 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 Hancock, the records are lost or destroyed prior to the end of the six (6) year period; and

(2) No party in interest other than Hancock 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 below by paragraph (1)(1).

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

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

(ii) Any fiduciary of an IP Plan or any duly authorized representative of such fiduciary;

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

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

(2) None of the persons described above in subparagraphs (1)(1)(ii)–(iv) are authorized to examine the trade secrets of Hancock or its affiliates or commercial or financial information which is privileged or confidential.

#### *Section III: Definitions*

(a) The term, "affiliate" or "affiliates," 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 officer, director, employee, relative of, or partner in any such person; and

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

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

(c) The term, "Buyer's List," means a comprehensive and current list of the names of the active forest products companies and prospective buyers of Timber Products in the geographic area in which such Timber Products are located, which is compiled and maintained by Hancock for each such

geographic area for the purpose of selling Timber Products in such area on behalf of any of the timber accounts managed by Hancock, provided that, with respect to the Buyer's List utilized by ForesTree IP:

(1) International Paper's name may not be added to the Buyer's List for a geographic area solely for the purpose of a sale by ForesTree IP of Timber Products in such area; and

(2) The name of a prospective buyer of Timber Products in a geographic area may not be removed by Hancock from the Buyer's List for such geographic area, unless such buyer:

(A) Has failed to perform satisfactorily in a previous transaction;

(B) Is no longer in business;

(C) Requests, orally or in writing, to be removed from such list; or

(D) Has failed to respond for a period of two (2) years to previous solicitations by ForesTree IP to bid on Timber Products offered for sale in the geographic area;

(d) The term, "ForesTree IP," refers to the non-pooled insurance company separate account maintained and managed by Hancock for the investment of assets of one or more of the IP Plans, as well as to any partnership, limited liability company, or corporation in which ForesTree IP invests. The term, "ForesTree IP," does not include the other ForesTree Separate Accounts managed by Hancock.

(e) The term, "Hancock," means John Hancock Financial Services (Financial Services); John Hancock Life Insurance Company (JHLIC); John Hancock Variable Life Insurance Company (Variable Life); Hancock Natural Resources Group (Resources Group); John Hancock Timber Resource Corporation (Timber Resource); or other affiliates of JHLIC, as defined in section III(a), above.

(f) The term, "Timber Asset(s)," means a fee simple in timberland (and appurtenant rights)<sup>2</sup>, or a timber lease, or a timber deed, provided that, with respect to any timber lease, or timber deed:

(1) The underlying fee simple is owned by a person other than International Paper, Hancock, or any other account managed by Hancock at the time of the sale; and

(2) The entire deed or lease held by International Paper is purchased by ForesTree IP.

<sup>2</sup> It is represented that certain property rights, including mineral rights, easements, and recreational leases, are appurtenant to a fee simple and are bought and sold, and appraised along with the fee simple.

(g) The term, "Timber Product(s)," means standing timber or timber in the form of logs.

(h) The term, "independent, qualified appraiser," means an individual or firm which is qualified to serve in the capacity as an appraiser; is independent of the parties in interest engaging in the transaction and their affiliates; and satisfies the following conditions:

(1) Other than serving as the independent, qualified appraiser for a transaction which is subject to this exemption, the individual or firm has no current employment relationship with Hancock or with International Paper;

(2) No individual or firm may serve as an independent, qualified appraiser during any year in which the gross receipts such individual or firm received from business with Hancock and from business with International Paper for that year exceeds 5 percent (5%) of such individual's or firm's gross receipts from all sources for the prior year;

(3) If an individual is selected to serve as the independent, qualified appraiser, then such individual must:

(A) Have a forestry degree; and

(B) Have a minimum of five (5) years of experience as a timberland appraiser; or

(C) Otherwise demonstrate proficiency in timberland appraisal work which is equivalent to the level of expertise demonstrated by the requirements, as set forth in section III(h)(3)(A) and (B), above;

(4) If a firm is selected to serve as the independent, qualified appraiser, then such firm must have:

(A) A minimum of five (5) years of experience as a timberland appraiser; or

(B) Otherwise demonstrate proficiency in timberland appraisal work; and

(5) The individual or the firm that serves as the independent, qualified appraiser for transactions covered by this exemption must have the ability to access appropriate timberland sales comparison data.

(i) The term, "*bona fide* bidder," means a bidder on a Timber Product offered for sale by ForesTree IP, only if

(1) The bidder has made an offer to purchase the Timber Product, in accordance with the terms of the bid solicitation;

(2) The bidder's name appears on the Buyer's List at the time of bid solicitation and at the time of the bid;

(3) Hancock neither knows or should know of any impediment to the bidder's consummation of the purchase of the Timber Product offered for sale upon which the bidder has bid; and

(4) Hancock has no reason to believe that the bid was not made in good faith by the bidder with the present intent of procuring the Timber Product offered for sale by ForesTree IP.

#### Summary of Facts and Representations

1. The Retirement Plan of the International Paper Company, (the IP Retirement Plan), located in Memphis, Tennessee is affected by this proposed exemption. The IP Retirement Plan is an employee pension benefit plan covered by the Act. As of January 10, 2002, the estimated number of participants and beneficiaries in the IP Retirement Plan was: (a) 61,100 actives; (b) 35,600 retired or separated individuals; and (c) 30,600 terminated vested individuals.

International Paper and certain of its affiliates sponsor and maintain the IP Retirement Plan for their employees. As employers any of whose employees are covered by the IP Retirement Plan, International Paper and certain of its affiliates are parties in interest with respect to such plan, pursuant to section 3(14)(C) of the Act.

The fair market value of the total assets of the IP Retirement Plan was approximately \$6,884,329,000, as of June 30, 2001. The assets of the IP Retirement Plan are held in the International Paper Company Trust Agreement to Fund Pension Plans (the IP Trust). It is represented that the IP Trust may also, from time to time, hold the assets of other plans sponsored and maintained by International Paper and its affiliates for their employees. The trustee of the IP Trust is State Street Bank and Trust Company (State Street).

2. The application for this proposed exemption was submitted on behalf of JHLIC, Financial Services, Variable Life, Resources Group, and Timber Resource. JHLIC is a wholly-owned subsidiary of Financial Services. Variable Life is a wholly-owned subsidiary of JHLIC. Resources Group and Timber Resource are wholly-owned indirect subsidiaries of JHLIC.<sup>3</sup>

Through Resources Group, John Hancock manages timberland for its customers and for its own general account. In this regard, as of June 30, 2001, Resources Group managed over 2.4 million acres of timberland in the United States valued at approximately \$2.2 billion, and managed nearly .5 million acres of Australian timberland valued at approximately \$362 million.

<sup>3</sup> Throughout the Summary of Facts and Representations for this proposed exemption, JHLIC and Variable Life are referred to collectively as "John Hancock," and the term, "Hancock," is defined, as set forth in section III(e) of this proposed exemption.

3. John Hancock offers annuity contracts and funding agreements to customers (Contract Holders), including employee pension benefit plans subject to the Act. Such Contract Holders may invest directly or indirectly in timberland through pooled and non-pooled separate accounts available under John Hancock group annuity contracts and funding agreements. It is represented that these contracts and agreements provide that, in accordance with the Contract Holders' direction, the premium or contribution received from such Contract Holder will be allocated internally on the books of John Hancock to segregated asset accounts or "separate accounts." The separate account investments are held in John Hancock's name, but the value of the contract or agreement to the Contract Holder fluctuates with the value of the investments allocated to the separate account. The direct expenses of managing the investments and John Hancock's fees are charged against the value of the separate account.

4. John Hancock manages a number of separate accounts, both pooled and non-pooled, that invest in timber. These separate accounts are generally known as the ForesTree Separate Accounts. It is represented that these ForesTree Separate Accounts may invest in Timber Assets, including a fee simple (with appurtenant rights), as well as timber leases, and timber deeds. It is represented that a timber lease is a contract between a landowner (the lessor) and another party (the lessee) under which the lessee is granted the right to use the land for the production of lumber for a specified period of time. Timber leases typically specify how the land is to be managed and the condition to which the land is to be returned upon expiration of the lease. A timber deed is a contract under which the landowner grants to a third party the right (but not the obligation) to harvest existing timber.

It is represented that over one million acres of Timber Assets are allocated to the ForesTree Separate Accounts. As of June 30, 2001, these Timber Assets had a value of over \$1 billion.

As part of its timberland management, John Hancock or an affiliate also periodically sells Timber Products in the form of standing timber or logs from its ForesTree Separate Accounts to companies in the forest products industry. John Hancock, through its affiliates, has the discretion to determine when and how much of the Timber Products in the ForesTree Separate Accounts to sell, based on the market conditions for each type of timber and the geographic location.

John Hancock is the sole legal owner of the assets in each of the ForesTree Separate Accounts. Under the applicable contract or agreement, John Hancock or an affiliate has the right to control, manage, and administer the ForesTree Separate Accounts, including the sole discretion to select and dispose of investments in such accounts in accordance with the investment policy for such accounts.

John Hancock's management responsibilities under the ForesTree Separate Accounts are performed by Resources Group, a wholly-owned indirect subsidiary of John Hancock which was established in 1995. Subject to review and approval by John Hancock's internal investment committees, Resources Group is responsible for all decisions regarding the acquisition and disposition of timberland properties held in the ForesTree Separate Accounts. In addition, Resources Group is responsible for the ongoing management of John Hancock's timberland properties, including site preparation and planting, road building and construction, leasing to tenants, maintenance, acquisition of insurance, and payment of taxes. It is represented that on-site work is performed either by independent forest managers under contract to Resources Group or by employees of Timber Resource. In this regard, Resources Group currently contracts with three regional forest management firms. Such firms include Olympic Resource Management (in the western United States and Canada), Resource Management Services (in the southern United States), and Wagner Forest Management (in the northern United States). In addition to these regional forest management firms, Cahaba Forest Management, Inc., a wholly-owned subsidiary of Resources Group established in February of 2000, provides property management services and manages International Paper's Redstone investment in Alabama.

5. ForesTree IP is a non-pooled separate account established on January 1, 2000. ForesTree IP is maintained pursuant to a Group Annuity Contract (No. 14756 GAC), entered into on January 31, 2000, between John Hancock and the IP Trust. ForesTree IP is one of the ForesTree Separate Accounts managed by John Hancock that are invested in Timber Assets. ForesTree IP is the only one of the ForesTree Separate Accounts to which the relief provided by this proposed exemption is applicable. It is represented that, as of December 31, 2001, the real, dollar-weighted internal rate of return since the inception of

ForesTree IP was 6.5 percent (6.5%) (after John Hancock's fees).<sup>4</sup> ForesTree IP was established with an intended allocation of \$25 million to be invested in Timber Assets. In February 2000, \$10 million of the allocation was invested in Timber Assets in Alabama. John Hancock expects that the remaining \$15 million will be allocated before the end of the year 2002. In addition, it is represented that there is the potential for additional funding in the range of \$10 million to \$30 million.

Following an expected allocation of \$25 million to ForesTree IP, it is represented that the percentage of the fair market value of the total assets of the IP Retirement Plan (approximately \$6.9 billion, as of June 30, 2001) involved in the proposed transactions will be .36 percent (.36%). It is represented that approximately .27 percent (.27%) of the fair market value of the assets of the IP Retirement Plan are invested in timber related assets outside of ForesTree IP.

As a result of the investment in ForesTree IP by the IP Retirement Plan, the assets of such account are deemed to be assets of the IP Retirement Plan, pursuant to the Department's regulations, as set forth in 29 CFR § 2510.3-101(h)(1)(iii).

Assets invested in ForesTree IP are managed by John Hancock and Resource Group in accordance with the investment policy established for the account. The investment objective of ForesTree IP is to establish and maintain a diversified portfolio of individual or shared equity interests in timberland investments. Timberland investments consist primarily of interests in timber producing real estate, and in contracts relating to real estate for the production and harvesting of Timber Products. Timberland investments may be located either inside the United States, or, with the consent of the Contract Holder, the IP Retirement Plan, outside the United States.<sup>5</sup>

<sup>4</sup> The applicants have not requested an exemption for the receipt of incentive management fees or other fees in connection with John Hancock or its affiliates serving as investment manager for ForesTree IP under the terms of the group annuity contract (No. 14756 GAC) between John Hancock and the IP Trust. The Department herein offers no opinion as to whether the fee structure, as set forth in such group annuity contract, raises issues under the prohibited transaction provisions of section 406 of the Act, nor is the Department providing relief, herein, for the receipt by John Hancock or any of its affiliates of incentive management fees or other fees in connection with the assets held by ForesTree IP.

<sup>5</sup> The applicants represent that John Hancock satisfies the indicia of ownership requirements, as set forth in section 404(b) of the Act. In this regard, it is represented that where John Hancock invests

Pursuant to the investment policy of ForesTree IP, Timber Assets are purchased or sold opportunistically to generate returns to meet performance objectives of the account. ForesTree IP may invest directly in a Timber Asset, or it may invest in entities that own Timber Assets, directly or indirectly. These entities include corporations, partnerships, 501(c)(25) organizations, and their international equivalents (Holding Entities). Although ForesTree IP does not currently invest through such Holding Entities, if it were to do so, it is represented that Resources Group would likely be appointed the investment manager of such entity, or that Resources Group (or an employee) would be appointed as an officer of the entity that holds the Timber Assets.

It is represented that the assets of any of the Holding Entities through which ForesTree IP may invest in Timber Assets could constitute plan assets, pursuant to the Department's regulations, as set forth at 29 CFR § 2510.3-101(a)(2). It is further represented that as investment managers for ForesTree IP, John Hancock, and Resources Group are fiduciaries of the IP Retirement Plan, pursuant to section 3(14)(A) of the Act. Resources Group is also a fiduciary with respect to the IP Retirement Plan, pursuant to section 3(14)(A) of the Act, as discretionary manager of the timberland held by any pass-through entity.

6. John Hancock desires to purchase Timber Assets from International Paper on behalf of ForesTree IP. In this regard, John Hancock anticipates that \$1 million to \$2 million worth of Timber Assets will be marketed by International Paper for sale over the next two (2) years, as a result of the May 2000 merger of International Paper and Champion International. As the sale of Timber Assets from International Paper to ForesTree IP would constitute a violation of section 406(a)(1)(A) and (D) of the Act, John Hancock and its affiliates request an administrative exemption; provided certain general and specific conditions are satisfied at the time each transaction is entered.

It is further represented that section 406(a)(1)(A) and (D) of the Act would be violated by any sale of Timber Products from ForesTree IP to International Paper. Accordingly, John Hancock also

in foreign timber, it does so through an entity qualified as a "real estate operating company," pursuant to 29 CFR § 2510.3-101(e) of the Department's plan assets regulation. Further, it is represented that the indicia of ownership of such entity is held in the United States. The Department, herein, expresses no opinion as to whether the applicants have satisfied the indicia of ownership requirements, as set forth in section 404(b) of the Act.

requests an administrative exemption that would permit it or Resources Group periodically to sell Timber Products from ForesTree IP, to International Paper; provided certain general and specific conditions are satisfied at the time each transaction is entered.

7. In the opinion of John Hancock, the proposed transactions are in the interest of the IP Retirement Plan and any IP Plan subsequently sponsored by International Paper which participates through the IP Trust in ForesTree IP. In this regard, if permitted to purchase Timber Assets held by International Paper, ForesTree IP will have access to the broadest range of potential timber investments, in a market in which such investments are limited.

It is represented that an exemption permitting the sale of Timber Products from ForesTree IP to International Paper is in the interest of the IP Plan and its participants and beneficiaries, because it will enhance John Hancock's ability to maximize the return of such account. In this regard, the exemption will create a more competitive market in which to sell Timber Products harvested from the Timber Assets held on behalf of such account. John Hancock notes that the number of purchasers of Timber Products has declined in the last few years due to the consolidation of the forest products industry. In the opinion of John Hancock, in order to ensure that ForesTree IP is obtaining the highest value for its Timber Products, it should be able to market such products to all available purchasers, including International Paper. It is represented that, if International Paper is precluded from bidding on Timber Products sold by ForesTree IP, the account may not obtain the highest price for its timber to the detriment of the IP Retirement Plan.

8. It is represented that the proposed exemption contains sufficient safeguards to protect the participants and beneficiaries of the IP Retirement Plan. In this regard, before purchasing a Timber Asset from International Paper, John Hancock, as the investment manager of ForesTree IP, will independently determine that the purchase of such asset is in the interest of the account and consistent with the policies and objectives of such account. Moreover, John Hancock will obtain an appraisal from an independent, qualified appraiser of the value of the Timber Asset prior to purchase to ensure that ForesTree IP pays no more than the fair market value of such asset. The fair market value of the Timber Asset sold to ForesTree IP must be documented by an appraisal report in writing issued, as of the date of the transaction, by the independent,

qualified appraiser, and such report must be retained for a period of six (6) years from the date of the transaction.

Because of the ongoing nature of the requested exemption, it is represented that the applicants cannot now identify the appraisers who will perform the required appraisals. However, the Department notes that any appraiser selected to value the Timber Asset to be purchased by ForesTree IP from International Paper, pursuant to the terms of this exemption, must satisfy the requirements for independence and qualification, as set forth in section III(h) of this exemption.

Before selling a Timber Product, John Hancock will independently determine that the sale is in the interest of ForesTree IP. Further, it is represented that the price received by ForesTree IP for Timber Products offered for sale will be established through a competitive bidding process among the prospective buyers in the relevant geographic area in which the Timber Products are located.

It is represented that John Hancock's regional forest managers compile and maintain Buyer's Lists of the names of active forest products companies and timber buyers in each geographic region in which Timber Products are located for the purpose of selling such Timber Products for any timber account. The relevant geographic area is generally a 100-mile radius from the harvest area, because the cost to truck logs beyond this distance is typically uneconomical. However, there is no fixed requirement for such radius. It is represented that John Hancock's regional forest managers take into account the distance of a potential buyer from the location of the properties under management and determine what is the appropriate target area.

It is further represented that Buyer's Lists typically contain between 50 and 100 potential buyers. However, the number may vary from list to list depending upon the depth of the timber markets and the number of wood processing facilities in the relevant geographic area. It is in the interest of John Hancock, and all of its client accounts, to maintain the most comprehensive Buyer's Lists for all transactions. In this regard, prospective buyers are identified via word of mouth through day to day dealing with logging contractors and timber buyers by John Hancock's regional forest managers. In addition, prospective buyers may be added to a particular Buyer's List upon the request, either oral or written, of such buyers. It is represented that John Hancock's regional forest managers will add a potential buyer to the Buyer's List, so long as a manager has no knowledge

of unsatisfactory past performance by such buyer. The applicants have informed the Department that John Hancock's general account and the names of other accounts managed by John Hancock may appear on any of the Buyer's Lists. In this regard, the Department notes that section II(h) of this exemption precludes relief for the purchase by ForesTree IP of Timber Assets from or sale by ForesTree IP of Timber Products to Hancock's general account or any other account managed by Hancock.

With respect to the Buyer's List utilized by ForesTree IP, John Hancock's forest manager in the region where such Timber Products are located will solicit bids from all of the buyers in that geographic area whose names are on the Buyer's List then currently in effect. It is represented that John Hancock will not modify the Buyer's List for a geographical area to add International Paper's name to such list solely for the purpose of engaging in a sale by ForesTree IP of Timber Products in such area to International Paper. Further, with respect to the Buyer's List utilized by ForesTree IP, John Hancock's regional forest managers will not remove a buyer from the Buyer's List for a geographic area, unless the buyer has failed to perform satisfactorily in a previous transaction; is no longer in business; requests, orally or in writing, to be removed from such list; or has failed to respond for a period of two (2) years to previous solicitations by ForesTree IP to bid on Timber Products offered for sale in the geographic area.

Prior to sending out a solicitation for bids on Timber Products, John Hancock will establish a Minimum Bid based on its assessment of the fair market value of the Timber Products being sold. It is represented that John Hancock manages Timber Assets through individuals in its regional offices (the Hancock Forester(s)). The Hancock Foresters contract for management of Timber Assets in specific regions with affiliates or with third party forest managers (the Contract Forest Managers). Each of the Contract Forest Managers are represented by a timberland manager (the Timberland Managers). Individual field foresters (the Field Forester(s)) report to the Timberland Managers.

It is represented that Field Foresters are responsible for day-to-day management of ForesTree IP. Such Field Foresters determine when, consistent with annual budgets established by the Hancock Foresters, to sell specific Timber Products. Each time a Timber Product is sold using the bid solicitation process, a Field Forester determines the current fair market value of such

product. It is further represented that the Minimum Bid is equal to the current fair market value of such product.

It is represented that to determine the fair market value (and consequently, the Minimum Bid) for a solicitation, a Field Forester reviews: (1) Information about recent sales of Timber Products in the area, gleaned from conversations with mill owners and other timber buyers on a regular basis, (2) information on sales of standing timber and so-called "gatewood" (harvested timber delivered directly to the gate of a mill), and (3) routine disclosures of actual recent winning and low bids received for Timber Products.

Once a Field Forester determines the fair market value for the Timber Product to be sold, the price is compared to the "per unit annual budgeted price" for the applicable Timber Product. It is represented that every year a budget for each Timber Asset is adopted. Among other things, the budget includes a projection of the average sales price for specific types of Timber Products to be sold during the year. If the Minimum Bid proposed by a Field Forester for a Timber Product is more than 10 percent (10%) below the budgeted price, a Hancock Forester must review the solicitation. It is the responsibility such Hancock Forester to then determine whether the price difference is justified by changes in circumstances, and whether or not to approve the proposed Minimum Bid. Rather than approve the proposed Minimum Bid, a Hancock Forester may insist that the sale of the Timber Product be delayed.

The applicants indicate that it is not customary at John Hancock or in the timber industry in which it operates to disclose the Minimum Bid in advance for a timber sale in a competitive bid situation. Minimum Bids are not disclosed because that disclosure could adversely affect the price received by the seller. The Minimum Bid is published with final bid results.

It is represented that the highest bid must meet or exceed the Minimum Bid and must be at least as favorable to ForesTree IP as the fair market value of the Timber Product being sold at the time that the contract for sale is legally binding on the parties involved. Where International Paper is the highest bidder for a Timber Product being sold by ForesTree IP, it is represented that the sale will not go forward, unless Hancock has received bids on such Timber Product from at least two (2) other bidders, in addition to International Paper, provided that each such bidder satisfies the definition of a bona fide bidder, as set forth in section III (i), below; and that neither Hancock's

general account nor any other account managed by Hancock is either of the two other bidders.

9. It is represented that the proposed transactions are administratively feasible, because each transaction involving the IP Retirement Plan can be readily identified and audited. Furthermore, the exemption will not require continued monitoring or other involvement on behalf of the Department or the Internal Revenue Service. Furthermore, John Hancock or an affiliate is responsible for maintaining or causing to be maintained certain records for a period of six (6) years from the date of any transaction covered by this exemption which will enable certain persons to determine whether the conditions of the exemption have been met.

10. In summary, the applicants represent that the proposed transactions meet the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The price paid by ForesTree IP for the Timber Assets will be determined, as of the date of each transaction, by an independent, qualified appraiser; and will be documented in writing by an appraisal report;

(b) The price paid by ForesTree IP for the Timber Assets will not exceed the fair market value of such assets at the time of the purchase;

(c) Prior to soliciting bids for the sale of a Timber Product, John Hancock will establish a Minimum Bid based on its assessment of the fair market value of the Timber Product offered for sale;

(d) John Hancock (or its designee) will solicit from each party on the Buyer's List utilized by ForesTree IP for the relevant geographic area in which the Timber Product is located, a written bid for the purchase of the Timber Product offered for sale;

(e) The highest price bid for the Timber Product offered for sale must meet or exceed the Minimum Bid established by John Hancock and must not be less than the fair market value of such Timber Product at the time the contract for sale is legally binding on the parties involved;

(f) Where International Paper's is the highest price bidder for the Timber Product offered for sale, the transaction may not go forward, unless bids have been received on such Timber Product from at least two (2) other bidders, in addition to International Paper, provided that each such bidder satisfies the definition of a bona fide bidder, as set forth in section III (i), below; and provided further that neither Hancock's general account nor any other account

managed by Hancock is either of the two other bidders;

(g) any plan that invests in ForesTree IP will have total assets in excess of \$100 million;

(h) John Hancock or an affiliate will act as discretionary investment manager for ForesTree IP;

(i) John Hancock or an affiliate will negotiate on behalf of ForesTree IP the terms and conditions of the purchase of Timber Assets or the sale of Timber Products by ForesTree IP;

(j) prior to entering into the purchase of Timber Assets or the sale of Timber Products by ForesTree IP, John Hancock or an affiliate will determine on behalf of such account that each such transaction is feasible, in the interest of the account based on the investment policy and objectives of such account, and protective of the participants in such account;

(k) The terms and conditions of each transaction involving the purchase of Timber Assets or the sale of Timber Products by ForesTree IP are at least as favorable to such account as those obtainable in an arm's length transaction with an unrelated party;

(l) The transactions which are the subject of this exemption are not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(m) ForesTree IP will not purchase Timber Assets from or sell Timber Products to Hancock's general account or any other account managed by Hancock;

(n) The investment of plan assets by any IP Plan in ForesTree IP will not exceed 20 percent (20%) of the total assets of such plan;

(o) The total amount invested by International Paper on behalf of the IP Plans and allocated to ForesTree IP will not in the aggregate exceed \$100 million; and

(p) John Hancock or its affiliates shall maintain or cause to be maintained certain records for a period of six (6) years from the date of any transaction covered by this exemption.

#### Notice to Interested Persons

It is represented that those persons who may be interested in the publication in the **Federal Register** of the Notice of Proposed Exemption (the Notice) include International Paper, State Street Bank, and the active participants in the IP Retirement Plan.

John Hancock proposes to provide notification of the publication of the Notice to these interested persons through different methods. In this regard, John Hancock will provide notification to International Paper and

State Street by first class mail or by overnight delivery within fifteen (15) calendar days of the date of publication of the Notice in the **Federal Register**. Such mailing will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the supplemental statement (the Supplemental Statement), as required, pursuant to 29 CFR § 2570.43(b)(2), which will advise such interested persons of their right, to comment on the proposed exemption.

With regard to notification to the active participants in the IP Retirement Plan, John Hancock proposes: (1) To ask International Paper to distribute the required notification pursuant to its usual and customary procedures for dissemination of information to employees; and (2) to direct that notification be posted within twenty-one (21) calendar days of the date of publication of the Notice in the **Federal Register**. Such postings will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR § 2570.43(b)(2), which will advise interested persons of their right to comment. International Paper has agreed to post the required notification on bulletin boards in prominent areas at those International Paper work sites at which more than ten (10) participants of the IP Retirement Plan work. Further, it is represented that International Paper will also provide written confirmation to the Department that it posted the required notification at the various work sites on a specified date.

The Department must receive all written comments and requests for a hearing no later than thirty (30) days from the *later of*: (1) The date when posting of a copy of the Notice and a copy of the Supplemental Statement was completed at all those International Paper work sites at which more than ten (10) participants in the IP Retirement Plan work; or (2) the date a copy of the Notice and a copy of the Supplemental Statement was received in the mail or by overnight delivery by State Street.

#### **FURTHER INFORMATION CONTACT:**

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

#### **G.D. Castillo, M.D., Ltd, Profit Sharing Plan (the Plan), Located in Savoy, IL**

[Application No. D-11107]

#### **Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act

and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the proposed exemption is granted, the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective August 23, 1999, to the sale of two parcels of unimproved real property (the Properties) by the Plan to Doctor G.D. Castillo (the Sales), a party in interest with respect to such Plan, provided that the following conditions are met:<sup>6</sup>

(a) The terms and conditions of the Sales were at least as favorable to the Plan as those obtainable in similar arm's-length transactions involving unrelated parties;

(b) Each Sale was a one-time transaction for cash;

(c) The amount of cash received by the Plan for each Property was not less than the fair market value of such Property as of the date of the Sales as determined by a qualified, independent appraiser; and

(d) The Plan did not pay any fees or commissions in connection with the Sales.

**EFFECTIVE DATE:** August 23, 1999.

#### **Summary of Facts and Representations**

1. Doctor G.D. Castillo (Dr. Castillo), a physician specializing in plastic surgery, is the sole owner of G.D. Castillo, M.D., Ltd., a medical office located in Savoy, Illinois. G.D. Castillo, M.D., Ltd. is the sponsor of the Plan, a profit sharing plan having three participants and approximately \$2,667,475 in assets as of December 31, 1999. On the date of the Sales, the assets of the Plan were invested primarily in the Properties, stock, and other non-cash assets.

2. The assets of the Plan are invested according to the sole discretion of Dr. Castillo. In 1995 and 1996, Dr. Castillo directed the Plan to acquire the Properties from unrelated third parties (the Acquisitions). The first of the Properties is located at 1804A Woodfield Drive, Savoy, Illinois (the First Property) and is described as a commercial lot comprising approximately 17,178 square feet. Dr. Castillo directed the Plan to acquire this property for \$72,000 in 1995. The second of the Properties is located at Lot

50, J.L. Smith Lane, Monee, Illinois (the Second Property) and is described as an air park subdivision lot comprising approximately 43,200 square feet. Dr. Castillo directed the Plan to acquire this property for \$39,845 in 1996.

3. Subsequent to the Acquisitions, Dr. Castillo decided that the Properties were no longer appropriate investments for the Plan. In this regard, by 1999, Dr. Castillo determined that the Properties, while incurring certain costs to the Plan, were not appreciating as expected.<sup>7</sup> As a result, Dr. Castillo directed the Plan to sell the Properties on the open market.

4. Concurrent with the offering of the Properties on the open market, Dr. Castillo identified a new investment opportunity for the Plan. In this regard, Dr. Castillo sought to acquire a certain improved real property located in Golden, Colorado (the New Property) on behalf of the Plan. Given that the Plan lacked sufficient liquid assets to acquire the New Property, Dr. Castillo initiated the Sales. In this regard, on August 23, 1999, the Plan sold the First Property and the Second Property to Dr. Castillo for \$70,000 and \$42,000, respectively. Dr. Castillo represents that both transactions were for cash and that the Plan was not charged any costs or fees arising in connection with the Sales.<sup>8</sup> Thereafter, an accountant reviewed the Sales when preparing an Internal Revenue Service Form 5500 on behalf of the Plan with respect to the 1999 Plan year. Upon being notified that the Sales constituted a prohibited transaction, Dr. Castillo voluntarily filed this application for an exemption on January 15, 2001.

5. Dr. Castillo states that the amount of cash the Plan received for the Properties pursuant to the Sales equaled the fair market value of the Properties as of the date of the Sales. In this regard, Dr. Castillo states that the Properties were appraised by Mr. Carl Hill (Mr. Hill), a real estate appraiser with over 22 years of specialized experience in valuing commercial properties. In appraising these Properties, Mr. Hill used the sales comparison approach and determined that the fair market value of the First Property was \$70,000 as of March 15, 1999 and the fair market value of the Second Property was \$42,000 as of March 15, 1999.

<sup>7</sup> The applicant represents that at the time of the Sales, these costs (i.e., taxes, association dues, and maintenance) totaled \$1,297.

<sup>8</sup> Using the cash received from the Sales, the applicant states that the Plan acquired the New Property on August 27, 1999 from an unrelated third party for approximately \$690,000. Dr. Castillo states further that he has been unsuccessful in his attempts to resell the Properties on the open market.

<sup>6</sup> The application for this proposed exemption, which was filed on January 19, 2001, was initially assigned the number D-10967 before being reassigned the above-referenced application number on July 22, 2002.



6. Dr. Castillo states that the participation by the Plan in the Sales benefited the participants and beneficiaries of the Plan. In this regard, Dr. Castillo states that the cash received by the Plan from the Sales enabled the Plan to acquire the New Property. In so doing, the Plan acquired an asset that Dr. Castillo anticipates will provide a suitable rate of return to the Plan.

7. Dr. Castillo represents that the Sales were protective of the participants and beneficiaries of the Plan since the terms of the Sales were no less favorable to the Plan than the terms available between unrelated parties. In this regard, the Plan received the current fair market value of the Properties without incurring any of the costs or fees associated therein. In addition, Dr. Castillo states that the Sale was in the best interests of the Plan since it enabled the Plan to sell a non-appreciating asset that had limited marketability. Finally, Dr. Castillo states that the proposed exemption is administratively feasible in that the Sales involved one-time transactions for cash.

8. In summary, Dr. Castillo represents that the Sales satisfy the criteria of section 408(a) of the Act since:

(a) The terms and conditions of the Sales were at least as favorable to the Plan as those obtainable in similar arm's-length transactions involving unrelated parties;

(b) Each Sale was a one-time transaction for cash;

(c) The amount of cash received by the Plan for each Property equaled the fair market value of such Property as of the date of the Sales as determined by a qualified, independent appraiser; and

(d) The Plan did not pay any fees or commissions in connection with the Sales.

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

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

[Application Nos. D-11111, 11112, 11113]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a) 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>9</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 \$1,975,320 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 proposed exemption, if granted, will be 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).

**Summary of Facts and Representations**

1. The applicant is DuPont Capital Management Corporation (DCMC), a wholly owned subsidiary of E.I. duPont de Nemours and company (DuPont), and organized as a Delaware corporation with its principal office in Wilmington, Delaware. As of December 31, 2001, DCMC had total assets under its management with an aggregate market value of approximately \$19.3 billion. DCMC is an investment advisor, registered under the Investment Advisers Act of 1940, for the assets of the DuPont Pension Trust Fund (the Trust), which holds the assets of the Plans. DCMC has managed the assets of the Trust since July 1997. The aggregate

<sup>9</sup> Because the Plans are funded through the same trust and each has an undivided interest in the assets of such trust, this application will treat the purchase of the Bonds (as defined herein) by the Plans as a single transaction and information concerning such purchase will be discussed on an aggregate basis.

fair market value of the Trust's assets is in excess of \$13 billion.

2. DuPont is the plan sponsor of the DuPont Pension and Retirement Plan. The applicant estimates that there are currently 156,677 participants and beneficiaries in the DuPont Pension and Retirement Plan. Pioneer Hi-Bred International Inc. and Protein Technologies International, each of which is a subsidiary of DuPont, are the plan sponsors of the Pioneer Hi-Bred International Inc. Retirement Plan and the Protein Technologies International Retirement Plan, respectively. The applicant represents that there are currently 5,000 participants and beneficiaries in the Pioneer Hi-Bred International, Inc. Retirement Plan, and 734 participants and beneficiaries in the Protein Technologies International Retirement Plan.

3. The applicant represents that DCMC provides investment management services to various employee benefit plans, including plans sponsored by DuPont and its subsidiaries (i.e., Pioneer Hi-Bred International, Inc. and Protein Technologies International) and affiliates (collectively, the DuPont Group), with respect to a spectrum of investments consisting primarily of domestic and international equities, fixed-income securities, and various alternative investments (including real estate, venture capital, and commodity futures). DCMC utilizes value-based investment strategies with the objective of achieving maximum return consistent with levels of risk suitable to each Plan.

4. DuPont and Dow participate in a 50/50 joint venture known as DuPont Dow Elastomers LLC (DDE), as a result of which Dow is a party in interest with respect to the Plans. In this regard, Dow is a party in interest with respect to the Plans under section 3(14)(I) of the Act because it is a 10% or more joint venturer of DDE. DDE is a party in interest with respect to the DuPont Pension and Retirement Plan under section 3(14)(G) of the Act, as an entity 50% owned by DuPont (which is a party in interest with respect to such Plan under section 3(14)(C) of the Act). DDE is a party in interest with respect to the Pioneer Hi-Bred International, Inc. Retirement Plan and the Protein Technologies International Retirement Plan under section 3(14)(G) of the Act, as an entity 50% owned by DuPont which is a party in interest with respect to such Plans under section 3(14)(E) of the Act. The annual sales of DDE represent less than 2% of DuPont's total annual sales.

5. According to the applicant, as a result of the inadvertent failure to



identify Dow as a party in interest with respect to the Plans.<sup>10</sup> DCMC purchased on October 25, 2000, on behalf of the Plans, certain corporate debt securities issued by Dow (*i.e.*, the Bonds). The decision to purchase the Bonds was made by employees of DCMC who specialize in purchases of corporate debt securities. The principal amount of the Bonds purchased by the Plans was \$2,000,000. The Bonds were purchased in a principal transaction by the Plans from UBS Warburg, an entity unrelated to the Plans. The Bonds were sold in a subsequent principal transaction by the Plans to Lehman Brothers, an entity unrelated to the Plans. The Bonds were purchased on October 25, 2000 for \$1,975,320 (including accrued but unpaid interest) and were sold on July 10, 2001 for \$2,101,900 (including accrued but unpaid interest).

6. It is represented that Dow issued a total of \$1 billion of the Bonds. Accordingly, the Plans purchased 0.2% of the total Bond issue. The coupon rate on the Bonds was 7 $\frac{3}{8}$ % per annum. The Bonds had a credit rating of A/A1 by Standard and Poor's Rating Services and Moody's Investor Service, Inc., respectively, at the time of the Plans' purchase. The applicant represents that the expected duration of the Bonds was approximately 11.9 years. The Bonds were debentures with interest payable semi-annually and principal payable at maturity. The Bonds represented a de minimus percentage of each Plan's total assets. In the aggregate the Bonds represented less than .02% of the Trust's total assets at the time of the acquisition.

7. The applicant states that the transaction was in the interests of the Plans' participants and beneficiaries since the acquisition and sale of the Bonds resulted in a profit totaling \$126,580. Moreover, the applicant represents that the purchase of the Bonds was equitable to the Plans since

the Plans paid no more than the current fair market value for the Bonds at the time of the acquisition. In this regard, it is represented that in providing the acquisition price of the Bonds to DCMC, the DCMC trader responsible for the purchase of the Bonds utilized pricing mechanisms commonly employed in the over-the-counter fixed income markets. Specifically, the purchase price was determined in consideration of competitive offers from multiple dealers.<sup>11</sup>

The applicant represents that upon identifying the extension of credit as a prohibited transaction, DCMC acted promptly to deal with the problem by filing for a retroactive exemption with the Department. In addition, the applicant has established new internal compliance procedures for considering any new purchases of debt instruments for client pension plans in order to avoid future prohibited transactions under the Act. According to the applicant, special lists must now be maintained for each Plan of all joint ventures of DuPont or a subsidiary where DuPont owns (directly or indirectly) at least 50% of the joint venture and another joint venturer owns at least 10% of the joint venture. Pursuant to compliance procedures, the applicant's bond trading personnel must check these lists prior to any new purchases of such bonds for the Plans. The lists must be updated monthly.

8. In summary, the applicant represents that the proposed exemption will satisfy the criteria of section 408(a) of the Act because:

- (a) The purchase of the Bonds by the Plans was a one-time cash transaction;
- (b) The Plans purchased the Bonds at their current fair market value from an unrelated party, based on prices determined by a reputable, independent third party market source;
- (c) The purchase of the Bonds was not part of an arrangement, agreement, or understanding designed to benefit Dow or any other party in interest with respect to the Plans;

(d) The purchase and sale of the Bonds resulted in the Plan's receipt of a profit totaling \$126,580; and

(e) The applicant has established new internal compliance procedures to avoid future prohibited transactions under the Act for acquisition of bonds by the Plans.

**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**

[Application Nos. D-11114, 11115, 11116, 11117, 11118]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a) 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, the Protein Technologies International Retirement Plan and the DuPont Savings and Investment Plan (collectively, the Plans)<sup>12</sup> 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 proposed exemption, if granted, will be effective for the period from

<sup>10</sup> In this proposed exemption, the Department is providing no opinion as to whether the Plans' acquisition and holding of the Bonds violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act other than section 406(a). In this regard, the applicant has not requested, nor is the Department providing, any relief from section 406(b) of the Act in connection with the subject transactions. The Department notes that section 406(b) of the Act provides, in pertinent part, that a fiduciary of a plan shall not deal with the assets of the plan in his own interest or for his own account, nor act on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. In addition, section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan.

<sup>11</sup> Pricing sources for the acquisition of the Bonds were electronic sources on trader desks. Information concerning dealer quotes is updated via computer monitors available to each of the primary security dealers. These sources include, but are not limited to, Bloomberg, Telerate, Reuters, Salomon Yield Book and Lehman Brothers PC Product in addition to daily flow and pricing indications received directly from 10-15 broker/dealers.

<sup>12</sup> Because the Plans are funded through the same trust and each has an undivided interest in the assets of such trust, this application will treat the purchase of the Bonds (as defined herein) by the Plans as a single transaction and information concerning such purchase will be discussed on an aggregate basis.

September 5, 2001 (the date of the acquisition of the Bonds by the Plans) until October 17, 2001 (the date the Bonds were sold).

### Summary of Facts and Representations

1. The applicant is DuPont Capital Management Corporation (DCMC), a wholly owned subsidiary of E.I. duPont de Nemours and Company (DuPont), and organized as a Delaware corporation with its principal office in Wilmington, Delaware. As of December 31, 2001, DCMC had total assets under its management with an aggregate market value of approximately \$19.3 billion. DCMC is an investment advisor, registered under the Investment Advisers Act of 1940, for the assets of the DuPont Pension Trust Fund (the Trust), which holds the assets of the Plans. DCMC has managed the assets of the Trust since July 1997. The aggregate fair market value of the Trust's assets is in excess of \$13 billion.

2. DuPont is the plan sponsor of the DuPont Pension and Retirement Plan and the DuPont Savings and Investment Plan. The applicant estimates that there are currently 156,677 participants and beneficiaries in the DuPont Pension and Retirement Plan and 84,562 in the DuPont Savings and Investment Plan. Pioneer Hi-Bred International Inc. and Protein Technologies International, each of which is a subsidiary of DuPont, are the plan sponsors of the Pioneer Hi-Bred International Inc. Retirement Plan and the Protein Technologies International Retirement Plan, respectively. The applicant represents that there are currently 5,000 participants and beneficiaries in the Pioneer Hi-Bred International, Inc. Retirement Plan, and 734 participants and beneficiaries in the Protein Technologies International Retirement Plan.

3. The applicant represents that DCMC provides investment management services to various employee benefit plans, including plans sponsored by DuPont and its subsidiaries (*i.e.*, Pioneer Hi-Bred International, Inc. and Protein Technologies International) and affiliates (collectively, the DuPont Group), with respect to a spectrum of investments consisting primarily of domestic and international equities, fixed-income securities, and various alternative investments (including real estate, venture capital, and commodity futures). DCMC utilizes value-based investment strategies with the objective of achieving maximum return consistent with levels of risk suitable to each Plan.

4. DuPont and ConAgra participate in a 50/50 joint venture known as Ecological Chemical Products

(Ecochem), as a result of which ConAgra is a party in interest with respect to the Plans. In this regard, ConAgra is a party in interest with respect to the Plans under section 3(14)(I) of the Act because it is a 10% or more joint venturer of Ecochem. Ecochem is a party in interest with respect to the DuPont Pension and Retirement Plan and the DuPont Savings and Investment Plan under section 3(14)(G) of the Act, as an entity 50% owned by DuPont (which is a party in interest with respect to such Plan under section 3(14)(C) of the Act). Ecochem is a party in interest with respect to each of DuPont Dow Elastomers Pension and Retirement Plan, the Pioneer Hi-Bred International, Inc. Retirement Plan and the Protein Technologies International Retirement Plan under section 3(14)(G) of the Act, as an entity 50% owned by DuPont which is a party in interest with respect to such Plans under section 3(14)(E) of the Act. According to the applicant, the value of DuPont's interest in Ecochem represents less than 1% of DuPont's total net value.

5. According to the applicant, as a result of the inadvertent failure to identify ConAgra as a party in interest with respect to the Plans,<sup>13</sup> DCMC purchased on September 5, 2001, on behalf of the Plans, certain corporate debt securities issued by ConAgra (*i.e.*, the Bonds). The decision to purchase the Bonds was made by employees of DCMC who specialize in purchases of corporate debt securities. The principal amount of the Bonds purchased by the Plans was \$4,051,000. The Bonds were purchased in a principal transaction by the Plans from Merrill Lynch, an entity unrelated to the Plans, as part of a new issuance of the Bonds by the issuer, ConAgra. The Bonds were sold in a subsequent principal transaction by the Plans to UBS Warburg, an entity unrelated to the Plans. The Bonds were purchased by the Plans on September 5, 2001 for \$4,048,893 (including accrued

but unpaid interest) and were sold on October 17, 2001 for \$4,234,531 by the Plans (including accrued but unpaid interest).

6. It is represented that ConAgra issued a total of \$1 billion of the Bonds. Accordingly, the Pension Plans and Savings Plan purchased 0.41% of the total Bond issue. The coupon rate on the Bonds was 6.75% per annum. The Bonds had a credit rating of BBB+/Baa1 by Standard and Poor's Rating Services and Moody's Investor Service, Inc., respectively, at the time of the Plans' purchase. No change in such rating occurred while the Bonds were held by the Plans. The applicant represents that the expected duration of the Bonds was approximately 6.7 years. The Bonds paid interest semi-annually, with the total principal amount payable at maturity. The Bonds also had certain special features that allowed them to be called (*i.e.*, redeemed) by the issuer, at certain times. The Bonds represented a de minimus percentage of each Plan's total assets. In the aggregate the Bonds represented less than 1% of the Trust's total assets at the time of the acquisition.

7. The applicant states that the transaction was in the interests of the Plans' participants and beneficiaries since the acquisition and sale of the Bonds resulted in a profit totaling \$185,638. Moreover, the applicant represents that the purchase of the Bonds was equitable to the Plans since the Plans paid no more than the current fair market value for the Bonds at the time of the acquisition. In this regard, the Bonds were purchased by the Plans at the same price that was paid by all other investors at the time of issuance by ConAgra. Thus, the DCMC trader responsible for the purchase of the Bonds relied on the pricing mechanisms that were used by Merrill Lynch and the other underwriters in determining the price of the Bonds at the time of issuance. DCMC represents that the pricing mechanisms for the Bonds were those commonly employed in the over-the-counter fixed-income markets.

The applicant represents that upon identifying the extension of credit as a prohibited transaction, DCMC acted promptly to deal with the problem by filing for a retroactive exemption with the Department. In addition, the applicant has established new internal compliance procedures for considering any new purchases of debt instruments for client pension plans in order to avoid future prohibited transactions under the Act. According to the applicant, special lists must now be maintained for each Plan of all joint ventures of DuPont or a subsidiary

<sup>13</sup> In this proposed exemption, the Department is providing no opinion as to whether the Plans' acquisition and holding of the Bonds violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act other than section 406(a). In this regard, the applicant has not requested, nor is the Department providing, any relief from section 406(b) of the Act in connection with the subject transactions. The Department notes that section 406(b) of the Act provides, in pertinent part, that a fiduciary of a plan shall not deal with the assets of the plan in his own interest or for his own account, nor act on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. In addition, section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan.

where DuPont owns (directly or indirectly) at least 50% of the joint venture and another joint venturer owns at least 10% of the joint venture. Pursuant to compliance procedures, the applicants bond trading personnel must check these lists prior to any new purchases of such bonds for the Plans. The lists must be updated monthly.

8. In summary, the applicant represents that the proposed exemption will satisfy the criteria of section 408(a) of the Act because:

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

(b) The Plans' purchased the Bonds at their current fair market value from an unrelated party, based on prices determined by a reputable, independent third party market sources;

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

(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.

**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**

[Application Nos. D-11119, 11120]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a) 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) 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 proposed exemption, if granted, will be 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).

**Summary of Facts and Representations**

1. The applicant is DuPont Capital Management Corporation (DCMC), a wholly owned subsidiary of E.I. duPont de Nemours and Company (DuPont), and organized as a Delaware corporation with its principal office in Wilmington, Delaware. As of December 31, 2001, DCMC had total assets under its management with an aggregate market value of approximately \$19.3 billion. DCMC is an investment advisor, registered under the Investment Advisers Act of 1940, for the assets of the DuPont Pension Trust Fund (the Trust), which holds the assets of the Plans. DCMC has managed the assets of the Trust since July 1997. The aggregate fair market value of the Trust's assets is in excess of \$13 billion.

2. CONSOL Energy Inc., is the plan sponsor of the CONSOL Inc. Employee Retirement Plan and the CONSOL Inc. Investment Plan for Salaried Employees. The applicant represents that there are currently 7,049 participants and beneficiaries in the CONSOL Inc. Employee Retirement Plan, and 7,509 participants and beneficiaries in the CONSOL Inc. Investment Plan for Salaried Employees.

3. The applicant represents that DCMC provides investment management services to various employee benefit plans, including plans sponsored by DuPont and its subsidiaries [(i.e., Pioneer Hi-Bred International, Inc. and Protein Technologies International) and affiliates (collectively, the DuPont Group)], with respect to a spectrum of investments consisting primarily of

domestic and international equities, fixed-income securities, and various alternative investments (including real estate, venture capital, and commodity futures). DCMC utilizes value-based investment strategies with the objective of achieving maximum return consistent with levels of risk suitable to each Plan.

CONSOL, Inc. (CONSOL) was a member of the DuPont Group prior to November 5, 1998. At that time, the Trust held assets of the Plans. On November 5, 1998, DuPont divested substantially all of its holdings in CONSOL. Thus, DCMC is no longer an affiliate of the employer maintaining the Plans. However, DCMC continues to manage the assets of the Plans.<sup>14</sup>

4. CONSOL Energy Inc. and Conoco participate in two 50/50 joint ventures known as the Cardinal States Gathering Partnership and the Pocahontas Gas Partnership as a result of which Conoco is a party in interest with respect to the Plans. In this regard, each of the joint ventures is a party in interest with respect to the Plans under section 3(14)(G) of the Act, as an entity 50% owned by CONSOL (which is a party in interest with respect to such Plan under section 3(14)(C) of the Act). Conoco is a party in interest with respect to the Plans under section 3(14)(I) because it is a 10% or more joint venturer of each of the joint ventures. According to the applicant, Conoco is a Fortune 500 company and CONSOL had sales in excess of \$2 billion for the year 2000. Additionally, the value of CONSOL's aggregate interest in the joint ventures represents less than 1% of CONSOL's total net value.

5. According to the applicant, as a result of the inadvertent failure to identify Conoco as a party in interest with respect to the Plans,<sup>15</sup> DCMC

<sup>14</sup> See Prohibited Transaction (PTE) 2001-05, 66 FR 7789 (January 25, 2001), which provides relief for transactions between parties in interest and certain former DuPont related employee benefit plans whose assets are managed by DCMC. In this regard, PTE 2001-05 was not effective at the time of the subject transactions to which this proposed exemption relates.

<sup>15</sup> In this proposed exemption, the Department is providing no opinion as to whether the Plans' acquisition and holding of the Bonds violated any of the fiduciary responsibility provisions of Part 4 of Title I of the Act other than section 406(a). In this regard, the applicant has not requested, nor is the Department providing, any relief from section 406(b) of the Act in connection with the subject transactions. The Department notes that section 406(b) of the Act provides, in pertinent part, that a fiduciary of a plan shall not deal with the assets of the plan in his own interest or for his own account, nor act on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. In addition, section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the

purchased on December 29, 1999, on behalf of the Plans, certain corporate debt securities issued by Conoco (*i.e.*, the Bonds). The decision to purchase the Bonds was made by employees of DCMC who specialize in purchases of corporate debt securities. The principal amount of the Bonds purchased by the Plans was \$820,000. The Bonds were purchased in a principal transaction by the Plans from Prudential Bache, an entity unrelated to the Plans. The Bonds were sold in a subsequent principal transaction by the Plans to ABN AMRO, an entity unrelated to the Plans. The Bonds were purchased by the Plans on December 29, 1999 for \$754,783 (including accrued but unpaid interest) and were sold on August 16, 2001 for \$816,641 by the Plans (including accrued but unpaid interest).

6. It is represented that Conoco issued a total of \$1.9 billion of the Bonds. Accordingly, the Plans purchased 0.043% of the total Bond issue. The coupon rate on the Bonds was 6.95% per annum. The Bonds had a credit rating of BBB+/Baa1 by Standard and Poor's Rating Services and Moody's Investor Service, Inc., respectively, at the time of the Plans' purchase. No change in such rating occurred while the Bonds were held by the Plans. The applicant represents that the expected duration of the Bonds was approximately 11.5 years. The Bonds paid interest semi-annually, with the total principal amount payable at maturity. The Bonds also had certain special features that allowed them to be called (*i.e.*, redeemed) by the issuer, at certain times. The Bonds represented a de minimus percentage of each Plan's total assets. In the aggregate, the Bonds represented less than 1% of the Trust's total assets at the time of the acquisition.

7. The applicant states that the transaction was in the interests of the Plans' participants and beneficiaries since the acquisition and sale of the Bonds resulted in a profit totaling \$61,858. Moreover, the applicant represents that the purchase of the Bonds was equitable to the Plans since the Plans paid no more than the current fair market value for the Bonds at the time of the acquisition. In this regard, it is represented that in providing the acquisition price of the Bonds to DCMC, the DCMC trader responsible for the purchase of the Bonds utilized pricing mechanisms commonly employed in the over-the-counter fixed-income markets. Specifically, the purchase price was

determined in consideration of competitive offers from multiple dealers.<sup>16</sup>

The applicant represents that upon identifying the extension of credit as a prohibited transaction, DCMC acted promptly to deal with the problem by filing for a retroactive exemption from the Department. In addition, the applicant has established new internal compliance procedures for considering any new purchases of debt instruments for client pension plans in order to avoid future prohibited transactions under the Act.<sup>17</sup> According to the applicant, special lists must now be maintained for each Plan of all joint ventures where CONSOL owns (directly or indirectly) at least 50% of the joint venture and another joint venturer owns at least 10% of the joint venture.

Pursuant to compliance procedures, the applicant's bond trading personnel must check these lists prior to any new purchases of such bonds for the Plans. The lists must be updated monthly.

8. In summary, the applicant represents that the proposed exemption will satisfy the criteria of section 408(a) of the Act because:

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

(b) The Plans' purchased the Bonds at their current fair market value from an unrelated party, based on prices determined by reputable, independent third party market sources;

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

(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.

#### FOR FURTHER INFORMATION CONTACT:

Brian Buyniski of the Department at (202) 693-8545. (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

<sup>16</sup> Pricing sources for the acquisition of the Bonds were electronic sources on trader desks.

Information concerning dealer quotes is updated via computer monitors available to each of the primary security dealers. These sources include, but are not limited to, Bloomberg, Telerate, Reuters, Salomon Yield Book and Lehman Brothers PC Product in addition to daily flow and pricing indications received directly from 10-15 broker/dealers.

<sup>17</sup> The Department is providing no opinion in this proposed exemption as to whether such prohibited transactions, if entered into by the Plans, would be covered by PTE 2001-05.

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

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

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

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

Signed at Washington, DC, this 16th day of January, 2003.

**Ivan Strasfeld,**

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

[FR Doc. 03-1354 Filed 1-21-03; 8:45 am]

**BILLING CODE 4510-29-P**

## NATIONAL INDIAN GAMING COMMISSION

### Fee Rates

**AGENCY:** National Indian Gaming Commission.

**ACTION:** Notice.

exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan.