

## Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 94-87; Exemption Application No. D-9770, et al.]

### Grant of Individual Exemptions; The Lubrizol Corporation Employees' Stock Purchase and Savings Plan et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

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

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

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978 transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

### Statutory Findings

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

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

### The Lubrizol Corporation Employees' Stock Purchase and Savings Plan (the Plan)

Located in Wickliffe, Ohio

[Prohibited Transaction Exemption 94-87; Exemption Application No. D-9770]

### Exemption

The restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the cash sale by the Plan to the Lubrizol Corporation, the Plan sponsor and a party in interest with respect to the Plan, of the Plan's interest (the Interest) in certain securities (the Securities) issued by Columbia Gas Systems, Inc., provided: (a) no commissions or other expenses are paid by the Plan in connection with the sale; (b) the Plan will receive the greater of \$227,158.01 or the fair market value of the Plan's Interest in the Securities at the time of the sale as determined by Bankers Trust Company (BTC), the Plan's independent fiduciary; and (c) BTC has determined that the transaction is appropriate for the plan and in the best interest of the Plan and its participants and beneficiaries.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 1, 1994 at 59 FR 54637.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number).

### Wells Fargo Bank, N.A. (Wells Fargo) and Wells Fargo Institutional Trust Company, N.A. (WFITC)

Located in San Francisco, California

[Prohibited Transaction Exemption 94-88; Application Nos. D-9718 and D-9719]

### Exemption

The restrictions of sections 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 shall not apply to the lending of securities that are assets of an employee benefit plan for which Wells Fargo, WFITC or an affiliated company (the Applicants) are fiduciaries,

provided that the following conditions are met:

(A) The securities are loaned to a broker-dealer which is registered under the Securities Exchange Act of 1934 (the 1934 Act) or exempted from registration under section 15(a)(1) of the 1934 Act as a dealer in exempted Government Securities (as defined in section 3(a)(12) of the 1934 Act) or to a bank (A Borrower);

(B) Neither the Borrower nor an affiliate of the Borrower has discretionary authority or control with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(C) The lending plan receives from the Borrower (either by physical delivery or by book entry in a securities depository) by the close of the lending fiduciary's business on the day in which the securities lent are delivered to the Borrower, collateral (the Collateral) consisting of cash, securities issued or guaranteed by the United States Government or its agencies or instrumentalities, or irrevocable bank letters of credit issued by a person other than the Borrower or an affiliate thereof, or any combination thereof, having, as of the close of business on the preceding day, a market value or, in the case of letters of credit a stated amount, equal to not less than 100% of the then market value of the securities lent;

(D) Prior to the loan of any securities, the Borrower furnishes the Applicants with the most recent available audited statements of the Borrower's financial condition and a representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition since the date of the most recent financial statements furnished to the plan, that has not been disclosed to the Applicants. Such representation may be made by the Borrower's agreeing that each such loan shall constitute a representation by the Borrower that there has been no such material adverse change;

(E) The loan is made pursuant to a written loan agreement, the terms of which are at least as favorable to the lending plan as an arm's length transaction with an unrelated party would be. Such agreement may be in the form of a master agreement covering a series of securities lending transactions;

(F) (1) The lending plan (a) receives a reasonable fee that is related to the value of the borrowed securities and the duration of the loan, or (b) has the opportunity to derive compensation through the investment of cash collateral. Where the plan has that

opportunity, the plan may pay a loan rebate or similar fee to the Borrower, if such fee is not greater than the plan would pay in a comparable transaction with an unrelated party;

(2) The plan receives the equivalent of all distributions made on or with respect to the loaned securities during the term of the loan;

(G) If the market value of the Collateral at the close of trading on a business day is less than 100% of the market value of the borrowed securities at the close of trading on that day, the Borrower shall deliver, by the close of business on the following business day, an additional amount of Collateral (as described in paragraph C) the market value of which, together with the market value of all previously delivered Collateral, equals at least 100% 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% of the market value of the borrowed securities, as long as the market value of the remaining Collateral equals at least 100% of the market value of the borrowed securities;

(H) The loan may be terminated by the lending plan at any time. In the event of termination, the Borrower shall deliver Replacement Securities, as defined below, to the lending plan within 5 business days of notice of termination of the loan. The value of the securities that the Borrower is obligated to deliver upon termination of a loan of Agency Securities will be no less than the value of the loaned Agency Securities at the termination of the loan. For purposes of this exemption, the term "Replacement Securities" means securities that: (a) are issued and/or guaranteed by the same agency as the loaned securities, (b) have the same coupon as the loaned securities, (c) have a principal amount at least equal to but no more than 2% greater than the then current principal amount of the loaned securities, (d) are of the same program or class as the loaned securities, and (e) either (i) have an aggregate weighted average maturity within a 12-month variance of the then current aggregate weighted average maturity of the loaned securities, but in no case will the variance be more than 10% of such aggregate weighted average maturity of the loaned securities, or (ii) meet some other comparable objective standard containing a range of variance that is no greater than that described in (i) above and that assures that the aging of the loaned securities is properly taken into account.

If the Borrower fails to return the Replacement Securities, the lending fiduciary may apply the Collateral to purchase other Replacement Securities, to cover any other obligations of the Borrower under the agreement, or to pay other expenses associated with the sale and/or purchase. In addition, the Borrower is obligated to pay the amount of any remaining obligations and expenses not covered by the Collateral plus interest at a reasonable rate.

Notwithstanding the foregoing, the Borrower may, in the event the Borrower 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 such replacement is approved by the lending fiduciary.

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 who 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 Borrower's failure to comply with the conditions of the exemption.

For purposes of this exemption the term "affiliate" of another person shall include: (a) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person; (b) Any officer, director, or partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and (c) Any corporation or partnership of which such other person is an officer, director partner. For purposes of this definition, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

**EFFECTIVE DATE:** This exemption is effective May 27, 1994.

**WRITTEN COMMENTS:** In the Notice of Proposed Exemption (the Notice), the Department invited all interested persons to submit written comments on the proposed exemption within 45 days from the date of publication of the Notice in the **Federal Register**. All written comments were to have been received by the Department by December 16, 1994. The Department received one written comment. The comment was submitted on behalf of the Applicants. The issues addressed in the comment and the Department's responses are summarized as follows:

1. The Applicants request the following modifications be made in order to make the exemption consistent with the terms and conditions of PTE 81-6:

(a) Condition (D) of the proposed exemption would require the Borrower to furnish the Applicants with the most recent available audited statements of the Borrower's financial condition and a representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition since the date of those statements. The Applicants request that the following language be added at the end of condition (D):

Such representation may be made by the Borrower's agreeing that each such loan shall constitute a representation by the Borrower that there has been no such material adverse change.

The Department has no objection to the proposed modification, and accordingly, has amended the language of condition (D).

(b) Condition (G) of the proposed exemption would require the Collateral received by the lending plan to be equal to at least 102% of the market value of the loaned securities. The Applicants request that this condition be modified to require that the Collateral be equal to 100% of the market value of the loaned securities. According to the Applicants, requiring collateral equal to 102% of the market value of the loaned securities will discourage the lending of securities, thereby defeating the purpose of the exemption, which is to permit lending as a safe and valuable way of increasing the earnings of a portfolio. The Applicants note that the Department originally set the minimum level of collateral at 102% when PTE 81-6 was proposed but was subsequently convinced by commentators that a collateral value of 100% would provide adequate protection to plans. The Department is persuaded by the Applicants' comment that a collateral value of 100% will provide sufficient protection for the participants and beneficiaries of the Plans. Accordingly, the Department has made the requested modification. The Department notes, however that nothing contained in the exemption prohibits a lending plan for negotiating a higher collateral value if it is appropriate under the circumstances. The Applicants also request that the following language be added to the end of condition (G):

Notwithstanding the foregoing, part of the Collateral may be returned to the Borrower if the market value of the Collateral exceeds 100% of the market value of the borrowed securities, as long as the market value of the

remaining collateral equals at least 100% of the market value of the borrowed securities.

With the respect to the proposed languages concerning the return of a portion of the collateral under certain circumstances, the Department has no objection to the proposed additional language, and accordingly, has inserted this language at the end of condition (G).

(c) Condition (H) of the proposed exemption contains an explanation of the procedure involved in terminating the loan of securities. The Applicant requests that the first 3 sentences of condition (H) be replaced with the following:

The loan may be terminated by the lending plan at any time, whereupon the Borrower shall deliver Replacement Securities to the lending plan within 5 business days of notice of termination of the loan.

Although the Department does not object to the deletion of the reference to the trustee of the fund, the Department wants to make clear that the value of the securities that the Borrower is obligated to deliver upon termination of a loan of Agency Securities must be no less than the value of the loaned Agency Securities at the termination of the loan, as represented by the Applicants in correspondence dated September 26, 1994. The Department believes that this condition is integral to the proposed exemption and in the best interests of the participants and beneficiaries of the Plans. Consequently, in response to the Applicants' comments, the Department has modified the first 2 sentences of condition (H), and replaced the third sentence with the following:

The value of the securities that the Borrower is obligated to deliver upon termination of a loan of Agency Securities will be no less than the value of the loaned Agency Securities at the termination of the loan.

(d) The Applicants also request that the first sentence of the second paragraph of condition (H) be replaced with the following sentence:

If the Borrower fails to return Replacement Securities, the Collateral may be applied to purchase other Replacement Securities, to cover any other obligations of the Borrower under the agreement, or to pay other expenses associated with the sale and/or purchase.

The Department has no objection to the proposed modification, and accordingly, has made this substitution.

(e) In addition, the Applicants have requested that the following language be added immediately preceding the last paragraph of condition (H):

Notwithstanding the foregoing, the Borrower may, in the event the Borrower 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 such replacement is approved by the lending fiduciary.

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 who 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 Borrower's failure to comply with the conditions of the exemption.

The Department has no objection to the proposed additional language, and accordingly, has made the requested modification.

2. The Applicants have requested that the phrase "issued and/or guaranteed" replace the term "issued" wherever that term is used, in order to clarify that the Agency Securities may be either issued and/or guaranteed by an agency. In accordance with the Applicants' request, the Department has made the appropriate modifications to the exemption.

3. The Applicants wish to clarify that their assertion that over 95% of the Agency Securities traded in the market are effected using a generic trading method is merely an estimate and is not intended as a representation of fact.

4. The Applicants also wish to clarify that the Applicants' obligation to monitor the market value of the loaned securities on a daily basis extends to business days only.

5. The Department notes that the parenthetical "plus interest" in condition (e) of paragraph number 5 in the proposed exemption was included in the notice inadvertently.

The changes described above are hereby incorporated into the exemption as granted. Accordingly, after giving full consideration to the record, the Department has determined to grant the exemption, as described herein. In this regard, the Applicants' comments have been included as part of the public record for the exemption application. The complete application file is made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, room N-5638, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on November 1, 1994 at 59 FR 54635.

**FOR FURTHER INFORMATION CONTACT:** Virginia J. Miller of the Department,

telephone (202) 219-8971. (This is not a toll-free number.)

### **Vaquero Farms, Inc. Profit Sharing Plan and Agri-Bis, Inc. Profit Sharing Plan (the Plans)**

Located in Stockton, California  
[Prohibited Transaction Exemption 94-89;  
Application Nos. D-9711 and D-9712]

#### **Exemption**

The restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the past cash sale (the Sale) by the plans of certain promissory notes (the Notes) to Vaquero Farms, Inc. (the Applicant) and Agri-Bis, Inc., a related company, provided that the following conditions were met at the time of the sale: (1) The sales price of the Notes was not less than their aggregate fair market value on the date of the Sale; (2) the Sale was a one-time transaction for cash; (3) the Plans did not pay any fees or commissions in connection with the Sale; and (4) the Plans' independent fiduciary determined that the transaction was appropriate for and in the best interests of the Plans and their participants and beneficiaries.

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 September 30, 1994 at 59 FR 50013.

**EFFECTIVE DATE:** This exemption is effective as of May 31, 1994, the date of the Sale.

**FOR FURTHER INFORMATION CONTACT:** Virginia J. Miller of the Department, telephone (202) 219-8971. (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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

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

Signed at Washington, DC, this 29th day of December, 1994.

**Ivan Strasfeld,**

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

[FR Doc. 95-110 Filed 1-3-95; 8:45 am]

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[Application No. D-9727, et al.]

### **Proposed Exemptions; Hospital Supplies, Inc. Pension Plan, et al.**

**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 restriction of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

### **Written Comments and Hearing Requests**

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and request 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.

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 request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 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 (43 FR 47713, October 17, 1978) 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.

### **Hospital Supplies, Inc. Pension Plan (the Plan) Located in Radnor, Pennsylvania; Proposed Exemption**

[Application No. D-9727]

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the

Code and in accordance with the procedures set forth in 29 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990.) If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed cash sale of two adjacent parcels of real property (the Properties) by the Plan to Armond J. Civera, Jr. (Mr. Civera)<sup>1</sup>, a disqualified person with respect to the Plan, provided that the following conditions are satisfied:

(a) the proposed sale will be a one-time cash transaction;

(b) the Plan will receive for each Property the current fair market value established at the time of the sale by an independent qualified appraiser;

(c) the Plan will pay no expenses associated with the sale.

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

1. The Plan is a defined benefit pension plan with one participant, Mr. Civera, who is also the trustee of the Plan and the owner of the Plan sponsor. Mr. Civera is a sole participant of the Plan. As of December 31, 1993, the Plan's assets were \$594,061.63.<sup>2</sup> The Plan sponsor is a Pennsylvania corporation which provides consulting services to the medical industry and to the print technology industry (the Employer).

2. In October 1989, the Plan acquired a 100 percent interest in a single family residence built on a 1.17 acres of land, which is located at 1128 King of Prussia Road, Tredyffrin Township, Pennsylvania (Property 1). The total purchase price of Property 1, including related closing costs, was \$170,000. In March 1993, the Plan also allocated approximately \$60,000 for certain structural improvements for Property 1. This construction work was done by companies that have no relationship to the Plan and the Employer. It is represented that Property 1 was purchased from Roseanne Koczicki, who has no relationship to the Plan and the Employer. In March 1993, the Plan acquired a 100 percent interest in a 1.026 acre parcel of vacant land (Property 2), which is adjacent to Property 1. The total purchase price of Property 2, including related closing

<sup>1</sup> Because Mr. Civera is the only participant in the Plan and the Employer is wholly owned by Mr. Civera there is no jurisdiction with respect to the Plan under Title I of the Act pursuant to CFR 2510.3-3(b) and (c). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

<sup>2</sup> In this regard, the Plan's financial statement lists the aggregate value of the Properties as \$485,000.