U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

September 30, 1997

97-24A
ERISA SEC. 408(b)(5)

Mr. Paul D. Brink
Dorinco Reinsurance Company
1320 Waldo Avenue, Suite 200
Midland, Michigan 48642

Dear Mr. Brink:

This is in response to your request for an advisory opinion under the Employee Retirement Income Security Act of 1974 (ERISA) concerning the application of section 408(b)(5) of ERISA. In particular, you request an opinion that an arrangement pursuant to which Dorinco Reinsurance Company (Dorinco), an indirectly wholly owned subsidiary of Dow Chemical Company (Dow), and Metropolitan Life Insurance Company (Metropolitan) jointly insure certain employee benefit plans covering employees of Dow and its affiliates is exempt from ERISA's prohibited transaction provisions by reason of section 408(b)(5).

You represent that Dow and SEBA, a nonprofit Michigan corporation comprised of salaried employees of Dow and certain Dow subsidiaries, offer group term and supplemental life insurance to employees of Dow and its subsidiaries (collectively, the Plans). The total annual premiums on the life insurance offered by Dow and SEBA on the Plans in 1995 was $14,700,000.

Dow owns 100 percent of Dorinco through Liana Limited (Liana), a holding company. Dorinco is incorporated in and authorized to do business in Michigan. Dow intends to utilize Dorinco to write a portion of the coverage for the Plans. Dorinco is one of the 25 largest reinsurers in the United States. Liana also owns Dorintal, an insurance company incorporated in Bermuda and licensed to do business in Michigan.

Dow and SEBA intend to enter into an integrated insurance arrangement with Metropolitan to provide coverage for the insurance provided pursuant to the Plans. Under this arrangement, Metropolitan will directly write the coverage for the Plans and Dorinco will assume up to 50% of the risk. Under the insurance arrangement between Metropolitan and Dorinco (the insurance arrangement), Metropolitan and Dorinco will each be liable to pay the stated percentage, e.g., 50%, of each death benefit claim in respect of a Plan participant. When a claim for benefits is approved, Dorinco will transfer its percentage of each death benefit claim to Metropolitan. Metropolitan will then pay the full amount of the claim. If Metropolitan is financially unable to pay its portion of the claim, Dorinco will be obligated to pay the full amount of the claim directly. Similarly, if Dorinco is financially unable to pay its designated percentage of a particular claim, Metropolitan will be obligated to pay the entire amount of the claim. You represent that the existence of the insurance arrangement will be disclosed in the summary plan descriptions distributed to participants pursuant to sections 102 and 104(b) of ERISA. Furthermore, the contract between Dorinco and Metropolitan, as well as the contracts between the Plans and Metropolitan, will include language providing that, in the event of Metropolitan's insolvency, Dorinco will be liable to the Plans' participants and beneficiaries. The participants and beneficiaries will thus be third party beneficiaries of the Dorinco-Metropolitan contract. As a result, Metropolitan and Dorinco will have identical financial and legal obligations. Neither Metropolitan nor Dorinco will charge the Plans any administrative fees, commissions or other consideration as result of the participation of Dorinco.

Dorinco currently reinsures Dow's voluntary group accident program (VGA), a welfare benefit plan which includes death benefits. Dorinco received a prohibited transaction exemption (Prohibited Transaction Exemption 85-108, 50 FR 24601, June 11, 1985) for this transaction. You estimate that in 1997 Dorinco will receive total premiums and annuity considerations of approximately $1.2 million pursuant to this transaction. Dorinco also reinsures certain plans maintained outside of the United States that cover Dow employees substantially all of whom are non-resident aliens (the off-shore plans). For 1997, the total life and health insurance premiums and annuity considerations written by Dorinco for these plans is estimated to be $4.2 million.

You estimate that, for 1997, Dorinco's total premiums and annuity considerations written for all lines of insurance will be approximately $160 million. You further estimate that Dorinco will write approximately $2 million of the life insurance premiums for the Plans in 1997. Accordingly, you estimate that the total premiums received by Dorinco in 1997 for life insurance, health insurance or annuities for all Dow plans (and their sponsoring employers), including the off-shore plans, with respect to which Dorinco is a party in interest will be $7.4 million. This represents approximately 4.6% of the estimated total premiums and annuity considerations written for all lines of insurance by Dorinco in 1997. You further represent that the total premiums received by Dorinco in future years for life insurance, health insurance or annuities for all Dow plans (and their sponsoring employers), including the off-shore plans, with respect to which Dorinco is a party in interest will not exceed 5% of the total premiums and annuity considerations written for all lines of insurance in that year by Dorinco.

You also represent that in future years, Dorintal may write some of the life insurance for the off-shore plans and/or the Plans. If Dorintal does write some of these insurance premiums, you represent that the total premiums received by Dorinco and Dorintal in such years for life insurance, health insurance or annuities for all Dow plans (and their sponsoring employers), including the off-shore plans, with respect to which Dorinco and Dorintal are parties in interest will not exceed 5% of the total premiums and annuity considerations written for all lines of insurance in that year by Dorinco and Dorintal.

You request an advisory opinion that the insurance arrangement will be exempt from the prohibited transaction restrictions of ERISA section 406 by reason of the exemption contained in ERISA section 408(b)(5). You also request an opinion that, in years in which Dorintal also writes a portion of the life insurance premiums for plans sponsored by Dow or its affiliates, the percentage formula contained in section 408(b)(5) will be applied in the aggregate to the insurance premium and annuity consideration receipts of Dorinco and Dorintal.

Under Reorganization Plan No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations regarding section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor and the Secretary of the Treasury is bound by interpretations of the Secretary of Labor pursuant to such authority. Therefore, references in this letter to specific sections of ERISA should be read to refer also to the corresponding sections of the Code.

Section 406(a)(1)(A) and (D) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if the fiduciary knows or should know that the transaction, among other things, constitutes a direct or indirect sale of any property between the plan and a party in interest with respect to the plan, or transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 406(b)(1) provides that a fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account.

Section 3(14)(C), (E) and (G) of ERISA defines a party in interest with respect to a plan to include, among other things, an employer any of whose employees are covered by the plan, a corporation which owns, directly or indirectly, 50% or more of the total value of all shares of stock in a corporation which is an employer any of whose employees are covered by the plan, and a corporation in which 50% or more of the total value of all shares of stock is owned by a corporation described in section 3(14)(C) or (E).

Section 408(b) provides in part that the prohibitions of section 406 shall not apply to:

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurer is –

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> (B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan,..., but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

You ask us to assume, for the purposes of this opinion, that the Plans will pay no more than adequate consideration for the life insurance coverage provided by Metropolitan and Dorinco. In this context, we note that you represent that neither Metropolitan nor Dorinco will charge the Plans any additional consideration for the coverage written by Dorinco, nor will any commissions be paid.

Based on your representations, it is the view of the Department that the insurance arrangement as described will satisfy the conditions of section 408(b)(5). Dorinco is qualified to do business in the State of Michigan, and is wholly-owned by Dow through Liana Limited. The life and health insurance premiums and annuity considerations written by Dorinco for the Plans, the VGA plan and the off-shore plans will not exceed 5% of the total premiums written for all lines of insurance by Dorinco. Finally, under the insurance arrangement, Dorinco and Metropolitan each are potentially liable to the Plan participants for the full amount of any particular benefit claim. The participants will be able to enforce their rights against Dorinco as well as against Metropolitan. Under Michigan law, Dorinco will be considered to be directly insuring the lives of Plan participants. Under these circumstances, it is the opinion of the Department that the arrangement constitutes a "contract for life insurance with an insurer qualified to do business in a State."

With respect to whether the percentage formula contained in section 408(b)(5)(B) will be applied separately to the premium and annuity consideration receipts of Dorinco and Dorintal if Dorintal writes a portion of the life or health insurance premiums or annuity considerations for plans sponsored by Dow or its affiliates, the Department generally does not opine on hypothetical fact patterns. However, we note that the Joint Explanatory Statement of the Committee of Conference, H. Rep. 93-1280, 93rd Cong. 2nd Sess. (1974) at 314, describes the percentage test contained in section 408(b)(5)(B) as follows:

> This (statutory exemption) applies if the **total** premiums and annuity considerations written by **all such** wholly-owned insurers for life insurance, health insurance, and annuity premiums purchased by all employers which are parties-in-interest and their plans are not more than 5 percent of the total premiums and annuity considerations written for all lines of insurance by **these insurers**. (Emphasis added)

The Department has also addressed this issue in Advisory Opinion 82-4 (January 26, 1982), in which three indirectly wholly-owned subsidiaries of Transamerica Corporation (Transamerica) were involved in the sale of insurance to various plans sponsored by Transamerica and its subsidiaries. In that opinion, the Department stated that the percentage test contained in section 408(b)(5)(B) is to be applied by determining the total premiums and annuity considerations derived from contracts written by all insurers which qualify for, and otherwise meet the conditions of,

section 408(b)(5)(B) for life insurance, health insurance or annuities for all of the plans and their employers (excluding premiums and annuity considerations received by an insurer for sales to its own plan) and dividing this amount by the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (excluding premium or annuity considerations received by an insurer for sales to its own plan).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10, regarding the effect of advisory opinions.

Sincerely,

Bette J. Briggs
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations