

(2) The obligor becomes insolvent, commits an act of bankruptcy, makes an assignment for the benefit of creditors or a liquidating agent, offers a composition or extension to creditors or makes a bulk sale;

(3) Any proceeding, suit or action at law, in equity, or under any of the provisions of Title 11 of the United States Bankruptcy Code [11 U.S.C. 101 *et seq.*] or amendments thereto for reorganization, composition, extension, arrangements, receivership, liquidation or dissolution is begun by or against the obligor;

(4) A receiver of any property of the obligor is appointed under any jurisdiction at law or in equity; or

(5) The obligor fails to take proper care of or abandons the property being financed by the note.

(f) The Plan receives adequate security for the note. For purposes of this proposed exemption, the term "adequate security" means that the note is secured by a perfected security interest in the property purchased by the obligor on the note so that if the security is foreclosed upon, or otherwise disposed of, in default of repayment of the loan, the value and liquidity of the security is such that it may reasonably be anticipated that loss of principal or interest will not result. In no event shall "adequate security" mean an interest in intangible personal property, such as, but not limited to, accounts, contract rights, documents, instruments, chattel paper, and general intangibles.

(g) Insurance against loss or damage to the collateral from fire or other hazards will be procured and maintained by the obligor until the note is repaid or repurchased by the employer or affiliate from which the Plan originally acquired the note, and the proceeds from such insurance will be assigned to the Plan.

(h) Repayment must be provided for in the following manner:

(1) Where the note is secured by heavy equipment, the term of the note shall in no event exceed 60 months. For purposes of this proposed exemption, heavy equipment shall include machinery sold by equipment distributors such as, but not limited to, earth moving, material handling, pipe laying, power generation, and construction machinery manufactured according to standard specifications, but shall not include such equipment which has been specifically designed and manufactured to a user's specifications and which cannot reasonably be resold in the ordinary course of the equipment distributor's business;

(2) Where the note is secured by passenger automobiles and light-duty highway motor vehicles, the term of the

note shall in no event exceed 48 months. For purposes of this proposed exemption, passenger automobiles and light-duty highway motor vehicles are defined as vehicles which have a gross weight of 10,000 pounds or less, are propelled by means of their own motor and are a type used for highway transportation; and

(3) Where the note is secured by tangible personal property, other than heavy equipment or motor vehicles described in paragraph (h)(1) and (2) of this section, the term of the note shall in no event exceed 36 months.

(i) All records, information and data required to be maintained which relate to Plan investments in customer notes covered by this proposed exemption shall be unconditionally available at the customary location for examination during normal business hours by:

(1) The Department of Labor,

(2) The Internal Revenue Service,

(3) Plan participants and beneficiaries, or

(4) Any duly authorized employee or representative of a person described in subparagraph (1) through (3) above.

Section III. Definitions

For purposes of this proposed exemption, the following definitions shall apply:

(a) The terms, "affiliate" or "affiliates," mean, with respect to an employer of employees covered by the Plan, any corporation that is, at the time the Plan acquires a customer note, a member of a controlled group of corporations (as defined in section 407(d)(7) of the Act and section 1563(a) of the Code), along with AMG and any other adopting employer.

(b) The term "customer note," means a two-party instrument, executed along with a security agreement for tangible personal property, which is accepted and held in connection with, and in the normal course of, an employer's (or affiliates's) primary business activity as a seller of such property. A two-party instrument is a promissory instrument used in connection with an extension of credit in which one party (the maker) promises to pay a second party (the payee) a sum of money.

(c) The term "Independent Fiduciary" means a person or entity which is qualified to serve in that capacity (*i.e.*, knowledgeable as to the duties and responsibilities as a fiduciary under the Act and knowledgeable as to the subject transaction) and which is independent of the party in interest engaging in the transaction and its affiliates.

(d) The terms "employer" or "adopting employer" mean those entities which currently sponsor, or in

the future will sponsor, the Plan and who have, or will have, employees that are participants in the Plan, and are considered an "employer" as that term is defined in section 3(5) of the Act.

Summary of Facts and Representations

1. AMG is an Arizona corporation that deals in and services farming equipment and machinery. AMG sponsors the Arizona Machinery Group Employee's Profit Sharing Retirement Plan (*i.e.*, the Plan), which is a multiple employer plan with several adopting companies. Although all the adopting employers are related, only two employers (AMG and Arizona Machinery, L.L.C.) are members of a "controlled group" of companies pursuant to the applicable provisions of the Code.¹⁴

2. The Plan is a defined contribution profit sharing plan that was established in 1969. The trustee of the Plan, Mr. Roy Miller (the Trustee), is an Independent Fiduciary who will also be responsible for overseeing the proposed consolidated customer notes fund. The Plan provides pension benefits to approximately 161 active participants and 41 terminated vested participants. For the year ending December 31, 2001, net assets for the Plan totaled approximately \$6,265,256. Effective as of January 1, 1993, the Plan established the AMCO Customer Notes Fund, which later became the AMG Customer Notes Fund (the AMG Notes Fund).¹⁵ Currently, the AMG Notes Fund invests exclusively in customer notes purchased from AMG. As of December 31, 2001, the Plan had approximately twenty-nine percent (29%) of the fair market value of its total assets invested in the AMG Notes Fund.

3. The Plan provides for individual participant accounts and permits participants (or beneficiaries, where applicable) to exercise investment control over the assets in their

¹⁴ As of the date of this proposed exemption, five related companies have adopted the Plan. The applicant states that the requisite level of common ownership does not exist among the remaining adopting employers for them to constitute a "controlled group", as that term is defined under section 1563(a) of the Code. In this regard, the Department notes that section 407(d)(7) of the Act states that a corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in 1563(a) of the Code, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe.

¹⁵ Effective April 1, 2002, Arizona Machinery Company, Inc. changed its name to "Arizona Machinery Group, Inc.," and the name of the Plan was recently amended to reflect the new name of the Plan sponsor, and to reflect the new Plan name.