

accounts.<sup>16</sup> The AMG Notes Fund is invested in customer notes relating to farming equipment and machinery that is sold by AMG to customers, who are persons or entities unrelated to AMG, in the ordinary course of its business as a dealer in such equipment and machinery.<sup>17</sup> The applicant represents that customers often purchase such items from AMG by giving AMG a note (*i.e.*, a "customer note" as defined herein). The applicant also represents that for several years the Plan has offered the AMG Notes Fund as one of several investment options available to participants who are employed by AMG. The other investment options available under the Plan consist of stock and bond mutual funds, a money market fund, and a real estate fund.

4. According to the applicant, the current operation of the AMG Notes

<sup>16</sup> The applicant represents that the Plan is a 404(c) plan, pursuant to the applicable provisions of the Act. Section 404(c) of the Act provides that if a pension plan that provides for individual accounts permits a participant or beneficiary to exercise control over assets in his or her account and that participant or beneficiary in fact exercises control over assets in his or her account, then the participant or beneficiary shall not be deemed a fiduciary by reason of his or her exercise of control and no person who is otherwise a fiduciary shall be liable for any loss, or by reason of any breach, which results from such exercise of control.

The Department is providing no opinion in this proposed exemption as to whether the Plan would be considered an "ERISA section 404(c) plan" pursuant to section 404(c) of the Act and the regulations thereunder (*see* 29 CFR 2550.404c-1).

The Department notes further that if a participant or beneficiary of an ERISA section 404(c) plan exercises independent control over assets in his or her individual account, in the manner described in the regulations thereunder (*see* 29 CFR 2550.404c-1(c)), then no other person who is a fiduciary with respect to such plan shall be liable for any loss, or with respect to any breach of Part 4 of Title I of the Act, that is the direct and necessary result of that participant's or beneficiary's exercise of control. However, the regulations specify, in pertinent part, that this provision does not apply with respect to any instruction which, if implemented, would result in a direct or indirect sale, exchange, or lease of property between a plan sponsor or any affiliate of the sponsor and the plan except for the acquisition or disposition of any interest in a fund, subfund or portfolio managed by a plan sponsor or an affiliate of the sponsor, or the purchase and sale of any "qualifying employer security" (as defined in section 407(d)(5) of the Act) which meets the conditions of 408(e) of the Act and conditions specified further in such regulations (*see* 29 CFR 2550.404c-1(d)(2)(ii)(E)(4)).

<sup>17</sup> For purposes of the proposed exemption, the term "customer note" has the same meaning as set forth in Prohibited Transaction Exemption (PTE) 85-68, 50 FR 13293 (April 3, 1985). Section I of PTE 85-68 provides that a "customer note" is a two-party instrument, executed along with a security agreement for tangible personal property, which is accepted in connection with, and in the normal course of, an employer's primary business activity as a seller of such property. A two-party instrument is a promissory instrument used in connection with the extension of credit in which one party (the maker) promises to pay a second party (the payee) a sum of money.

Fund complies in all respects with the requirements of PTE 85-68.<sup>18</sup> The applicant represents that the AMG Notes Fund invests almost exclusively in customer notes purchased from AMG in accordance with PTE 85-68. In this regard, the applicant states that to the extent the amount directed into the AMG Notes Fund by the participants exceeds the amount of available customer notes, the Plan will invest the money in short-term interest bearing investments.

5. The applicant represents that the Independent Fiduciary for the Plan, Roy Miller (Mr. Miller), monitors the total amount invested in the AMG Notes Fund by each participant to ensure compliance with PTE 85-68. Mr. Miller is an experienced trust officer, having served for a number of years in pension and profit sharing trust management and administration with institutional trust departments of major banks, prior to being retained as a full-time trustee and independent fiduciary for the Plan pursuant to a federal court order and settlement involving transactions unrelated to the Plan's acquisition and holding of customer notes. Mr. Miller has served as the Plan's trustee and Independent Fiduciary, for purposes of acquiring and monitoring customer notes pursuant to PTE 85-68, since 1992.<sup>19</sup> The applicant states that Mr. Miller, as the Independent Fiduciary, continually monitors the customer notes held in the AMG Notes Fund to ensure that the notes are being repaid in accordance with PTE 85-68. The Independent Fiduciary performs a semi-annual review of all the customer notes including verification of the security for each note and compliance with the provisions of PTE 85-68. Additionally, the Independent Fiduciary must take appropriate action in order to safeguard Plan participants and beneficiaries in the event of a default of a customer note in the AMG Notes Fund. The applicant states that since the inception of the

<sup>18</sup> PTE 85-68 permits a plan to acquire customer notes accepted by an employer of employees covered by the plan in the ordinary course of the employer's primary business activity. Among the conditions contained therein is a requirement that a plan may not invest more than 50% of its assets in customer notes and not over 10% of its assets in the notes of a single customer. In addition, there are maximum terms ranging up to five years that are imposed on the notes, depending on the type of property being financed.

<sup>19</sup> With respect to Mr. Miller's current role as the Plan's Independent Fiduciary, the applicant represents that if it becomes necessary in the future to appoint a successor Independent Fiduciary to replace Mr. Miller (the Successor), the applicant will notify the Department at least sixty (60) days in advance of the appointment of the Successor. The applicant states that the Successor will have the responsibilities, experience and independence similar to that of Mr. Miller.

AMG Notes Fund in January 1993, there have been approximately 170 customer notes held by the Plan. None of these notes has incurred a default. However, the applicant states that two of the notes had become sufficiently delinquent so that AMG had to repurchase the notes from the Plan. With respect to these notes, AMG never had to make any payments on its guarantee to the Plan.

6. AMG and the Independent Fiduciary state that the AMG Notes Fund is a popular investment choice with AMG's employees that are participants in the Plan. As of December 31, 2001, approximately 29% of the Plan's total assets, or approximately \$1,800,000, was invested in the AMG Notes Fund. The applicant states that Plan participant demand for customer notes is significantly higher than AMG's current supply of good quality notes. If the proposed exemption is granted, AMG, as Plan sponsor, will establish a new consolidated customer notes fund (the Consolidated Notes Fund) that would be available to all adopting employers of the Plan and their corporate affiliates. The applicant represents that the Consolidated Notes Fund would be preferable to additional individual customer notes funds for the Plan. In this regard, the Consolidated Notes Fund would be less complicated to administer, would reduce the Plan's overall administrative expenses, and would allow better geographic diversification for the notes *vis a vis* the underlying investments (*i.e.*, notes of various customers in different local economic regions).<sup>20</sup> Thus, the Consolidated Notes Fund would enhance the security of the Plan participants' overall investments in customer notes.

7. The applicant represents that each transaction will be on terms that are at least as favorable to the Plan as an arm's-length transaction with an unrelated party.

Prior to the consummation of any transaction described herein, the transaction will be approved on behalf of the Plan by an Independent Fiduciary. Such fiduciary will be independent of any of the sponsoring or

<sup>20</sup> With respect to the appropriate Plan fiduciary's determination to offer a customer notes fund (*i.e.*, the Consolidated Notes Fund) as an investment choice for Plan participants, the Department notes that such decision would be subject to the fiduciary responsibility provisions of Part 4 of Title I of the Act including, among other things, section 404(a)(1). In addition, once a customer notes fund is selected as an investment option for the Plan's participants, the responsible fiduciary's duties would include prudently selecting the customer notes to be included in the Consolidated Notes Fund as well as taking appropriate actions to protect the Plan's interest in connection with delinquent customer notes.