

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 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 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 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 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 or 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 affiliate'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.

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 (the Notice) published on May 5, 2003 at 68 FR 23778.

*Written Comments:* The Department received one written comment with respect to the Notice which was submitted by the applicant (AMG). The applicant states that in Subsection (a) of Section III (Definitions) of the Notice, the terms "affiliate" or "affiliates" were defined, with respect to an employer of employees covered by the Plan, as:

any corporation that is, at the time the Plan acquires a customer note, a member of a controlled group of corporations (as defined in 407(d)(7) of the Act and section 1563(a) of the Code), along with AMG and any other adopting employer. [emphasis added]

In this regard, the applicant represents that only two employers that have adopted the Plan are part of a controlled group. The remaining companies, while related, do not have the requisite level of common ownership to constitute a controlled group, as described in the definition noted above. Thus, in order to include other adopting employers of the Plan that are not currently within a controlled group along with AMG, the applicant requests that the word "and" be changed to "or" in the last phrase of

the definition of the terms "affiliate" or "affiliates" in Section III(a) of the exemption.

The Department acknowledges the applicant's comment and has revised the definition of "affiliate" in Section III(a) of the exemption to reflect the applicant's request.

No other comments, nor any requests for a hearing, were received by the Department. Accordingly, the Department has determined to grant the exemption, as modified.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brian J. Buyniski of the Department, telephone (202) 693-8545. (This is not a toll-free number.)

**Lehman Brothers Holding Inc. (LBHI) and Lehman Brothers Inc. (LBI), et al. (collectively, the Applicants) Located in New York, NY**

[Prohibited Transaction Exemption 2003-22; Exemption Application No. D-11164]

### Exemption

#### Section I. Covered Transactions

The restrictions of section 406 of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) of the Code,<sup>1</sup> shall not apply, effective April 16, 2003, to the purchase of any securities by LBHI and LBI and their affiliate (collectively the Asset Manager), on behalf of employee benefit plans (Client Plans), including Client Plans investing in a pooled fund (the Pooled Fund), for which the Asset Manager acts as a fiduciary, from any person other than the Asset Manager or an affiliate thereof, during the existence of an underwriting or selling syndicate with respect to such securities, where LBI and its affiliates (collectively, the Affiliated Broker-Dealer) are a manager or member of such syndicate, provided that the following conditions are satisfied:

(a) The securities to be purchased are—

- (1) Either:
  - (i) Part of an issue registered under the Securities Act of 1933 (the 1933 Act) (15 U.S.C. 77a *et seq.*) or, if exempt from such registration requirement, are (A) issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States, (B) issued by a bank, (C) exempt from such registration requirement pursuant to a

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