

cost of \$2.5 million. Under the Decree, up to \$500,000 of the penalty can be mitigated through SEPs. The proposed Decree provides for cessation of underground injection by May 1999, interim reductions in the underground injection of contaminants, and extensive RCRA corrective action at nine hazardous waste disposal sites.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States v. Zeneca, Inc.*, D.J. Ref. 90-7-1-849.

The consent decree may be examined at the Office of the United States Attorney, 110 Ninth Avenue South, Nashville, TN 37203-3870, at U.S. EPA Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303, and at the Consent Decree Library, 1120 G Street, NW, 3rd Floor, Washington, DC 20005, (202) 624-0892. A copy of the consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW, 3rd Floor, Washington, DC 20005. In requesting a copy, please enclose a check in the amount of \$21.75 (25 cents per page reproduction cost) payable to the Consent Decree Library.

Joel Gross,

*Chief, Environmental Enforcement Section,
Environment and Natural Resources Division.*
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DEPARTMENT OF LABOR

**Pension and Welfare Benefits
Administration**

[Prohibited Transaction Exemption 98-41;
Exemption Application No. D-10372, et al.]

**Grant of Individual Exemptions;
Lehman Brothers Inc. (Lehman) and
Lehman Brothers Trust Company and
Affiliates (LBTC), 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, D.C. 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 (where 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.

**Lehman Brothers Inc. (Lehman) and
Lehman Brothers Trust Company and
Affiliates (LBTC), Located in New York,
New York**

[Prohibited Transaction Exemption 98-41;
Exemption Application No. D-10372]

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: (1) the lending of securities to Lehman or to any other U.S. registered broker-dealer

who is an affiliate of Lehman (collectively, Lehman Broker-Dealers) by employee benefit plans, including commingled investment funds holding plan assets (the Client Plans), with respect to which the Lehman Broker-Dealer is a party in interest, or for which LBTC or any other affiliate of Lehman, acts as directed trustee or custodian and/or securities lending agent (or sub-agent) for such Client Plan; and (2) the receipt of compensation by LBTC in connection with these transactions, provided that the following conditions are met:

1. Neither the Lehman Broker-Dealers nor LBTC has or exercises discretionary authority or control with respect to the investment of the assets of Client Plans involved in the transaction (other than with respect to the investment of cash collateral after the securities have been loaned and collateral received), or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets, including decisions concerning a Client Plan's acquisition or disposition of securities available for loan;

2. Before a Client Plan participates in a securities lending program and before any loan of securities to the Lehman Broker-Dealers is affected, a Client Plan fiduciary who is independent of LBTC and the Lehman Broker-Dealers must have:

(a) Authorized and approved a securities lending authorization agreement with LBTC (the Agency Agreement), where LBTC is acting as the direct securities lending agent;

(b) Authorized and approved the primary securities lending authorization agreement (the Primary Lending Agreement) with the primary lending agent, where LBTC is lending securities under a sub-agency arrangement with the primary lending agent;¹

(c) Approved the general terms of the securities loan agreement (the Basic Loan Agreement) between such Client Plan and the borrower, the Lehman Broker-Dealers, the specific terms of which are negotiated and entered into by LBTC;

3. A Client Plan may terminate the securities lending agency agreement at any time without penalty on five (5) business days notice, whereupon the Lehman Broker-Dealers shall deliver

¹ When LBTC acts as sub-agent, rather than the primary lending agent, the primary lending agent is receiving no section 406(b) of the Act relief herein. In such situations, the primary lending agent may be provided relief by Prohibited Transaction Class Exemption (PTE) 81-6 and PTE 82-63. PTE 81-6 was published at 46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987, and PTE 82-63 was published at 47 FR 14804, April 6, 1982.

securities identical to the borrowed securities (or the equivalent in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the plan within (a) the customary delivery period for such securities, (b) five (5) business days, or (c) the time negotiated for such delivery by the Client Plan and the Lehman Broker-Dealers, whichever is less;

4. LBTC (or another custodian on behalf of the Client Plan) will receive from the Lehman Broker-Dealers either by physical delivery, book entry in a securities depository, wire transfer or similar means collateral consisting of U.S. dollars, securities issued or guaranteed by the U.S. Government or its agencies or irrevocable U.S. bank letters of credit (issued by an entity other than the Lehman Broker-Dealers) or other collateral permitted under Prohibited Transaction Exemption (PTE) 81-6 (as amended from time to time or, alternatively, any additional or superceding class exemption that may be issued to cover securities lending by employee benefit plans) by the close of business on or before the day the loaned securities are delivered to the Lehman Broker-Dealers;

5. The market value of the collateral will initially equal at least 102 percent of the market value of the loaned securities. If the market value of the collateral on the close of trading on a business day falls below 100 percent of the market value of the borrowed securities at the close of business on that day, the Lehman Broker-Dealers will deliver additional collateral on the following day such that the market value of the collateral will again equal 102 percent. The Basic Loan Agreement will give the Client Plans a continuing security interest in, and a lien on, the collateral. LBTC will monitor the level of the collateral daily;

6. All the procedures regarding the securities lending activities will at a minimum conform to the applicable provisions of PTE 81-6 and PTE 82-63;

7. In the event the Lehman Broker-Dealer fails to return securities within a designated time, the Client Plan will have the right under the Basic Loan Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Lehman Broker-Dealer's obligation to return the Client Plan's securities, the Lehman Broker-Dealer will indemnify the Client Plan with respect to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default, together with

expenses incurred by the Client Plan plus applicable interest at a reasonable rate, including any attorneys fees incurred by the Client Plan for legal action arising out of default on the loans, or failure by the Lehman Broker-Dealer to properly indemnify the Client Plan;

8. The Client Plan will receive the equivalent of all distributions made to the holders of the borrowed securities during the term of the loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities, or other distributions;

9. Only Client Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to the Lehman Broker-Dealers; provided, however, that—

(a) In the case of two or more Client Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Client Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with the Lehman Broker-Dealers, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

(b) In the case of two or more Client Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Client Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Lehman Broker-Dealers, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations

including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(i) Has full investment responsibility with respect to plan assets invested therein; and

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above are formed for the sole purpose of making loans of securities.)

10. With respect to any calendar quarter, at least 50 percent or more of the outstanding dollar value of securities loans negotiated on behalf of Client Plans will be to unrelated borrowers.

11. The terms of each loan of securities by the Client Plans to the Lehman Broker-Dealer will be at least as favorable to such plans as those terms which would exist in a comparable arm's-length transaction between unrelated parties;

12. Each Client Plan will receive monthly reports on the transactions, so that an independent fiduciary of such plan may monitor the securities lending transactions with the Lehman Broker-Dealer;

13. Before entering into the Basic Loan Agreement and before a Client Plan lends any securities to the Lehman Broker-Dealer, an independent fiduciary of such Client Plan will receive sufficient information, concerning the financial condition of the Lehman Broker-Dealer, including the audited and unaudited financial statements of the Lehman Broker-Dealer;

14. The Lehman Broker-Dealer will provide to a Client Plan prompt notice at the time of each loan by such plan of any material adverse changes in the Lehman Broker-Dealer's financial condition, since the date of the most recently furnished financial statements;

15. With regard to the "exclusive borrowing" agreement (as described below), the Lehman Broker-Dealer will directly negotiate the agreement with a Client Plan fiduciary who is independent of the Lehman Broker-Dealers and LBTC, and such agreement may be terminated by either party to the agreement at any time;²

² The termination will be without penalty to the Client Plan, except for the return to the Lehman Broker-Dealers of a part of any flat fee paid by the

16. The Client 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. In the case of cash collateral, the Client Plan may pay a loan rebate or similar fee to the Lehman Broker-Dealer, if such fee is not greater than the fee the Client Plan would pay an unrelated party in an arm's length transaction;

17. In the event that a Lehman Broker-Dealer is also the securities lending agent for a Client Plan, LBTC shall act as securities lending sub-agent in connection with any loan of securities to the Lehman Broker-Dealer;

18. Prior to the Client Plan's approval of the lending of its securities to the Lehman Broker-Dealers, a copy of this exemption (and a copy of the notice of proposed exemption as published in the **Federal Register** on June 19, 1998 at 63 FR 33717) will be provided to the Client Plan; and

19. Lehman maintains or causes to be maintained within the United States for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (20) below to determine whether the conditions of this exemption have been met; except that a party in interest with respect to an employee benefit plan, other than Lehman or the Lehman Broker-Dealers, shall not be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) or (b) of the Code, if such records are not maintained, or are not available for examination as required by this section, and a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of Lehman or the Lehman Broker-Dealers, such records are lost or destroyed prior to the end of such six year period;

20. (i) Except as provided in subparagraph (ii) of this paragraph (20) and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (19) are unconditionally available at their customary location for examination during normal business hours by—

(a) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission,

(b) Any fiduciary of a Client Plan or any duly authorized representative of such fiduciary,

(c) Any contributing employer to any Client Plan, or any duly authorized employee or representative of such employer, and

(d) Any participant or beneficiary of any Client Plan, or any duly authorized representative of such participant or beneficiary.

(ii) None of the persons described in subparagraphs (b)–(d) of this paragraph (20) shall be authorized to examine trade secrets of Lehman or the Lehman Broker-Dealers, or commercial or financial information which is privileged or confidential.

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 June 19, 1998 at 63 FR 33717.

Written Comments

The Department received one written comment with respect to the Notice and no requests for a public hearing. The comment was filed by Lehman. The comment concerns footnote 2 of the Notice, which stated that:

The Department notes that this proposed exemption would provide relief from the restrictions of section 406(a) as well as section 406(b)(1) and (b)(2) of the Act, whereas PTE 81–6 provides relief only for securities lending transactions which would violate section 406(a) of the Act. Thus, any amendments that may be made by the Department to PTE 81–6 which would permit different types of assets to be used as collateral for a securities loan would not allow the use of such assets as collateral under this proposed exemption to the extent that the transactions covered by this exemption (if granted) would require relief from section 406(b) of the Act.

Lehman requests that this footnote be deleted from the final exemption.

Footnote 2 of the Notice was also included by the Department in the written comments contained in PTE 98–23 (63 FR 29435), an individual exemption for securities lending transactions by Bankers Trust Company and its affiliates (Bankers Trust) published in the **Federal Register** on May 29, 1998.

However, subsequent comments made to the Department by Bankers Trust also requested that the Department withdraw its comments on this matter with respect to PTE 98–23. The requests by Bankers Trust and Lehman were made with the intent of avoiding possible confusion and preserving the availability of relief under the Bankers Trust and Lehman individual exemptions when different types of assets are permitted to be used as collateral under an amended version of

PTE 81–6 or a superceding class exemption. In this regard, Lehman (and Bankers Trust) state that nothing in the record suggests that the type of collateral available under the individual exemptions should be different in any manner from the collateral requirements of PTE 81–6.

Upon consideration of these comments, the Department has modified the final exemption for Lehman by deleting Footnote 2, as it appeared in the Notice. In addition, the Department has indicated to Bankers Trust that it should consider the Department's comments on this issue withdrawn with respect to PTE 98–23.

Accordingly, the Department has determined to grant the proposed exemption as modified.

FOR FURTHER INFORMATION CONTACT: Ekaterina A. Uzlyan of the Department, telephone (202) 219–8883. (This is not a toll-free number.)

Van Ness Plastic Molding Co., Inc., Employees' Money Purchase Pension Plan (the Plan), Located in Belleville, NJ

[Prohibited Transaction Exemption 98–42; Exemption Application No. D–10483]

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 (1) the making to the Plan of a restoration payment (the Restoration Payment) with respect to certain defaulted third-party notes (Note 1, Note 2 and Note 3; collectively, the Notes) by the Van Ness Plastic Molding Co., Inc. (the Employer), a party in interest with respect to the Plan; and (2) the potential future receipt by the Employer of recapture payments (the Recapture Payments) made to the Plan pursuant to bankruptcy proceedings involving the issuer/assignor of the Notes.

This exemption is subject to the following conditions:

(a) Mr. William Van Ness, the Plan trustee, agrees to have excluded from his individual account in the Plan (the Account) any benefit attributable to the Restoration Payment, such that the total Restoration Payment is allocated to the Accounts of the other Plan participants and does not include any portion related to the interest of Mr. Van Ness's Account in the Notes.

(b) The Restoration Payment, which is calculated based upon the Account balances in the Plan of participants other than Mr. Van Ness, covers—

Lehman Broker-Dealers to the Client Plan, if the Client Plan has terminated its exclusive borrowing agreement with the Lehman Broker-Dealers.

(1) The aggregate unrecovered principal of the Notes plus accrued, but unpaid, interest on the Notes as of the dates of default, calculated through December 31, 1997;

(2) An additional amount representing interest on the unrecovered principal of Notes 2 and 3, originally scheduled for maturity in 1999, from January 1998 until the date the Restoration Payment is made; and

(3) Lost opportunity costs associated with Note 1, which was originally scheduled for maturity in 1997, from January 1998 until the date the Restoration Payment is made.

(c) Any Recapture Payments are restricted solely to the amounts, if any, recovered by the Plan with respect to the Notes in litigation or otherwise.

(d) The Restoration Payment is made to resolve potential claims for breach of fiduciary duty relating to the management of the Plan.

(e) The Employer receives a favorable ruling from the Internal Revenue Service that the Restoration Payment does not constitute a "contribution" or other payment that will disqualify the Plan.

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 June 29, 1998 at 63 FR 35281.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (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 exemptions 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 are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 24th day of August, 1998.

Ivan Strasfeld,

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

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DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 98-40;
Exemption Application No. D-10429]

Grant of Individual Exemption to Amend and Replace Prohibited Transaction Exemption (PTE) 96-14 Involving Morgan Stanley & Co. Incorporated (MS&Co) and Morgan Stanley Trust Company (MSTC), Located in New York, NY

AGENCY: Pension and Welfare Benefits Administration, U.S. Department of Labor.

ACTION: Grant of individual exemption to modify and replace PTE 96-14.

SUMMARY: This document contains a final exemption which amends and replaces PTE 96-14 (61 FR 10032, March 12, 1996). PTE 96-14, as clarified by a Notice of Technical Correction dated June 4, 1996 (61 FR 28243), permits the lending of securities to MS&Co and to any other U.S. registered broker-dealers affiliated with MSTC (the Affiliated Broker-Dealers; collectively, the MS Broker-Dealers) by employee benefit plans with respect to which the MS Broker-Dealer who is borrowing such securities is a party in interest or

for which MSTC acts as directed trustee or custodian and securities lending agent. In addition, PTE 96-14 permits MSTC to receive compensation in connection with securities lending transactions. These transactions are described in a notice of pendency (the Old Notice) that was published in the **Federal Register** on August 11, 1995 at 60 FR 41118.

The current exemption replaces PTE 96-14 but incorporates by reference the facts, representations and virtually all of the conditions that are contained in the Old Notice, the final exemption with respect thereto and the technical correction, except where modified.

EFFECTIVE DATE: This exemption is effective as of March 12, 1996 for transactions that are covered by PTE 96-14.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, telephone (202) 219-8881. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On January 26, 1998, the Department of Labor (the Department) published a notice of proposed exemption (the New Notice) in the **Federal Register** (63 FR 3767) that would amend and replace PTE 96-14. PTE 96-14 provides an exemption from certain prohibited transaction restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), as amended, by reason of section 4975(c)(1) of the Code. The proposed exemption was requested in an application filed on behalf of MS&Co and MSTC (collectively, the Applicants) pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures (the Procedures) set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 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. Accordingly, this replacement exemption is being issued solely by the Department.

The New Notice gave interested persons an opportunity to comment on the proposed exemption and to request a public hearing. The only written comment submitted to the Department during the comment period was provided by the Applicants.