

including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (for example, permitting electronic submissions of responses).

**DATES:** Written comments must be submitted on or before August 18, 1998.

**ADDRESSES:** Comments are to be submitted to the Docket Office, Docket ICR-98-15, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW, Washington, DC 20210, (202) 219-7894. Written comments limited to 10 pages or less may be transmitted by facsimile to (202) 219-5046.

**FOR FURTHER INFORMATION CONTACT:** Mr. Laurence Davey, Directorate of Construction, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3621, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 219-7207. A copy of the referenced information collection request is available for inspection and copying in the Docket Office and will be mailed to persons who request copies by telephoning Mr. Davey at (202) 219-7207 or Barbara Bielaski at (202) 219-8076. For electronic copies of the information collection request, contact OSHA's Web Page on Internet at <http://www.osha-slc.gov> (click on *Information Collection Requests*).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Occupational Safety and Health Administration (OSHA) currently has approval from the Office of Management and Budget (OMB) for the information collection requirement contained in 29 CFR 1926.550(a)(11). That approval will expire on September 30, 1998, unless OSHA applies for an extension of the OMB approval. This notice initiates the process for OSHA to request an extension of the current OMB approval. The provision requires employees to keep a record of oxygen and toxic gas tests made when internal combustion engines of construction cranes or derricks exhaust into enclosed workspaces.

**Current Action**

The notice requests an extension of the current OMB approval of the

paperwork requirements in 29 CFR 1926.550(a)(11).

*Type of Review:* Extension of existing approval.

*Agency:* Occupational Safety and Health Administration, U.S. Department of Labor.

*Title:* Construction Oxygen and Toxic Gas Test.

*OMB Number:* 1218-0054.

*Agency Number:* Docket No. ICR-98-15.

*Affected Public:* Business or other for-profit.

*Number of Respondents:* 50.

*Frequency:* Daily.

*Average Time Per Response:* 2 minutes.

*Total Burden Hours:* 100.

Comments submitted in response to this notice will be summarized and included in the request of Office of Management and Budget approval of the information collection (record) request; they will also become a matter of public record.

Signed this 15th day of June 1998.

**Charles N. Jeffress,**

*Assistant Secretary of Labor.*

[FR Doc. 98-16386 Filed 6-18-98; 8:45 am]

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**DEPARTMENT OF LABOR**

**Pension and Welfare Benefits Administration**

[Application No. D-10327, et al.]

**Proposed Exemptions; Lehman Brothers, Inc.**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions 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).

*Written comments and hearing requests:* All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request,

and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESS:** All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. *Attention:* Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

*Notice to interested persons:* Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, 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. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

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

[Application No. D-10327]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990.) If the exemption is granted, 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;<sup>1</sup>

(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 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)<sup>2</sup> 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

<sup>1</sup> 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.

<sup>2</sup> 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.

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;<sup>3</sup>

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 the exemption, if granted, (and this notice of pendency) 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

<sup>3</sup>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 Lehman Broker-Dealers to the Client Plan, if the Client Plan has terminated its exclusive borrowing agreement with the Lehman Broker-Dealers.

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.

#### Summary of Facts and Representations

1. Lehman, a Delaware corporation, is the principal operating subsidiary of Lehman Brothers Holdings Inc. (LB Holdings), also a Delaware corporation. Lehman is one of the largest full-line investment service firms in the United States, and is registered with and regulated by the Securities and Exchange Commission (SEC). Lehman is a member of the New York Stock Exchange and other principal securities exchanges in the United States, and is also a member of the National Association of Securities Dealers, Inc. As of November 30, 1995, Lehman had \$82.6 billion in assets.

2. Lehman and the Lehman Broker-Dealers acting as principals, borrow securities from institutions and either utilize such securities to satisfy their own needs, or re-lend these securities to borrowing brokerage firms and other

entities which need a particular security for certain periods of time. Borrowers often need securities to satisfy deliveries in cases of short sales, or where a broker fails to receive securities it is required to deliver. Lehman Broker-Dealers borrow and lend approximately \$50 billion of securities on an average daily basis, and are among the largest institutional securities borrowers and lenders in the United States. In making such loans, the Lehman Broker-Dealers carefully review the credit-worthiness of its counterparties.

3. LBTC is an affiliate of Lehman, and is a wholly owned subsidiary, organized and chartered by LB Holdings as a limited purpose trust company under the laws of the State of New York. LBTC has its principal executive offices in New York, New York. LBTC provides a variety of services to its clients, including custodial services and securities lending services as a direct securities lending agent. LBTC may also be retained from time to time by primary securities lending agents to provide securities lending services in a sub-agent capacity with respect to portfolio securities of clients of such primary securities lending agents. As a securities lending sub-agent, LBTC's role (i.e., negotiating the terms of the loans with borrowers pursuant to a client-approved form of a loan agreement, and monitoring receipt of, and marking-to-market, the required collateral) parallels those under the lending transactions for which LBTC acts as a primary lending agent on behalf of its clients.

4. An institutional investor, such as a pension fund, lends securities in its portfolio to a broker-dealer or a bank to earn a fee in addition to any interest, dividends, or other distributions paid on the loaned securities. The lender generally requires that the security loans be fully collateralized, and the collateral usually is cash or high quality liquid securities issued by the U.S. Government, or Federal Agency obligations or certain bank letters of credit. When the collateral is cash, the lender generally invests the cash and rebates a portion of the earnings on such collateral to the borrower. The fee received by the lender is the difference between the earnings on the collateral and the amount of the rebate that is paid to the borrower. When a securities loan is collateralized with U.S. Government or Federal Agency securities or with letters of credit issued by a bank, the fee is paid directly by the borrower to the lender.

Institutional investors often utilize the services of an agent in performing securities lending transactions. The

lending agent is paid a fee for its services which may be a percentage of the income earned by the investor from lending its securities. The applicants represent that the essential functions which define a securities lending agent are identifying appropriate borrowers of securities and negotiating loan terms to the borrowers. Certain services which are ancillary to securities lending include monitoring the level of collateral, the value of loaned securities, and in some instances, investing the collateral.

5. LBTC and Lehman request an exemption for the lending of securities owned by the Client Plans, with respect to which the Lehman Broker-Dealer is a party in interest, or for which LBTC will serve as directed trustee or custodian and/or securities lending agent (or sub-agent),<sup>4</sup> following disclosure to the Client Plans of LBTC's affiliation with the Lehman Broker-Dealer, under either of the two arrangements described as Plan A and Plan B, and for receipt of compensation by LBTC in connection with such transactions. Neither LBTC nor the Lehman Broker-Dealers will have discretionary authority or control over the Client Plans' decisions concerning the acquisition or disposition of securities available for lending. However, because LBTC under the Plan A arrangement and the Lehman Broker-Dealers under the Plan B arrangement (as discussed further below), will have discretion with respect to whether there is a loan of the Client Plan securities to the Lehman Broker-Dealers, the lending of securities to the Lehman Broker-Dealers under such arrangements may be outside the scope of relief provided by PTE 81-6 and PTE 82-63.<sup>5</sup>

<sup>4</sup>Future references to LBTC's performance of services as securities lending agent should be deemed to include its parallel performance as a securities lending sub-agent, and references to the Client Plans should be deemed to include those plans for which LBTC is acting as a sub-agent with respect to securities lending activities, unless otherwise specifically indicated or by the context of reference.

<sup>5</sup>PTE 81-6 (46 FR 7527, January 23, 1981, as amended at 52 FR 18754, May 19, 1987) provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to certain broker-dealers or banks which are parties in interest. However, condition 1 of PTE 81-6 requires, in part, that neither the borrower nor an affiliate of the borrower has discretionary authority or control with respect to the investment of the plan assets involved in the transaction.

PTE 82-63 (47 FR 14804, April 6, 1982) provides an exemption under specified conditions from section 406(b)(1) of the Act and section 4975(c)(1)(E) of the Code for the payment of compensation to a plan fiduciary for services rendered in connection with loans of plan assets

6. When a loan of securities by a Client Plan is collateralized with cash, LBTC, at the Client Plan's direction, will either transfer such cash collateral to the Client Plan or its designated agent for investment. Alternatively, LBTC may invest the cash in short-term securities or interest-bearing accounts. In either case, LBTC will rebate a portion of the earnings on the cash collateral to the Lehman Broker-Dealers on behalf of the Client Plan. The Lehman Broker-Dealers will pay a fee to the Client Plan based on the value of the loaned securities where the collateral consists of obligations other than cash. Under the Plan A arrangement and, in some instances, under the Plan B arrangement (see paragraph 24 for the types of lending services which may be provided to the Client Plans by LBTC under Plan B arrangement), the Client Plan will pay a fee to LBTC for providing lending services to the Client Plan, which will reduce the income earned by the Client Plan from lending its securities to the Lehman Broker-Dealers. The Client Plan and LBTC will agree in advance to this fee, which will represent a percentage of the income the Client Plan earns from its lending activities.

Several safeguards, described more fully below, are incorporated into the application to ensure the protection of the Client Plans' assets involved in these securities lending transactions. In addition, the applicants represent that both the Plan A and Plan B arrangements described herein incorporate the relevant conditions contained in PTE 81-6 and PTE 82-63.

7. Plan A. Where LBTC is the direct securities lending agent, a fiduciary of a Client Plan who is independent of LBTC and the Lehman Broker-Dealers will sign a securities lending agency agreement (the Agency Agreement) with LBTC before the Client Plan participates in the LBTC securities lending program. The Agency Agreement will, among other things, describe the operation of the lending program, prescribe the form of the securities loan agreement to be entered into on behalf of the Client Plan with the borrowers, identify the securities which are available to be lent, required collateral and daily marking-to-market, and provide the list of permissible borrowers, including the Lehman Broker-Dealers. The Agency Agreement will also set forth the basis and rate for LBTC's compensation from the Client Plan for the performance of securities lending services. The Client

that are securities. PTE 82-63 permits the payment of compensation to a plan fiduciary for the provision of securities lending services only if the loan of securities itself is not prohibited under section 406(a) of the Act.

Plan may terminate the Agency Agreement at any time, without penalty, on no more than five business days' notice.

8. The Agency Agreement will contain provisions regarding designation by the Client Plan of the Lehman Broker-Dealer as an approved borrower. Specifically, the Client Plan will acknowledge that the Lehman Broker-Dealer is an affiliate of LBTC. Pursuant to the Agency Agreement, LBTC will represent to the Client Plan that each loan made to the Lehman Broker-Dealer on behalf of the Client Plan will be at market rates, and in no event less favorable to the Client Plan than a loan of such securities, made at the same time and under the same circumstances, to an unaffiliated borrower.

9. When LBTC is lending securities under a sub-agency arrangement, the primary lending agent will enter into a securities lending agency agreement (the Primary Lending Agreement) with a fiduciary of the Client Plan, who is independent of such primary lending agent, LBTC and the Lehman Broker-Dealers, before the Client Plan participates in the securities lending program. Except as set forth in paragraph 10 below, the primary lending agent will be unaffiliated with LBTC and the Lehman Broker-Dealers. The Primary Lending Agreement will contain substantive provisions akin to those in the Agency Agreement described above, relating to the description of the operation of the lending program, use of an approved form of securities loan agreement, identification of securities which are available to be lent, required collateral and daily marking-to-market, and provision of a list of approved borrowers (which will include the Lehman Broker-Dealers). The Primary Lending Agreement will specifically authorize the primary lending agent to appoint sub-agents, including LBTC, to facilitate its performance of securities lending agency functions. Where LBTC is to act as a sub-agent, the Primary Lending Agreement will expressly disclose that LBTC is to so act. The Primary Lending Agreement will also set forth the basis and rate for the primary lending agent's compensation from the Client Plan for the performance of securities lending services, and will authorize the primary lending agent to pay a portion of its fee, as the primary lending agent determines in its sole discretion, to any sub-agent(s) it retains pursuant to the authority granted under such agreement. The Client Plan may terminate the Primary Lending Agreement at any time, without penalty,

on no more than five business days' notice.

Pursuant to its authority to appoint sub-agents, the primary lending agent will enter into a securities lending sub-agency agreement (the Sub-Agency Agreement) with LBTC under which the primary lending agent will retain and authorize LBTC, as sub-agent, to lend securities of the primary lending agent's clients, subject to the same terms and conditions as are specified in the Primary Lending Agreement. Thus, for example, the form of basic loan agreement (described in paragraph 12 below) will be the same as that approved by the Client Plan fiduciary in the Primary Lending Agreement, and the list of permissible borrowers under the Sub-Agency Agreement (which will include the Lehman Broker-Dealers) will be limited to those approved borrowers listed as such under the Primary Lending Agreement.

The Sub-Agency Agreement will contain provisions which are in substance comparable to those described in paragraphs 7 and 8 above, which would appear in the Agency Agreement in situations where LBTC is the primary lending agent. In this regard, LBTC will make the same representation in the Sub-Agency Agreement as described in paragraph 8 above with respect to arm's-length dealings with the Lehman Broker-Dealers. The Sub-Agency Agreement will also set forth the basis and rate for LBTC's compensation to be paid by the primary lending agent.

10. Lehman has been informed that some Client Plans will not be able to hire LBTC as direct securities lending agent, because under the provisions of that Plan any such agent for such Client Plans is required to be registered as a broker-dealer with the Securities and Exchange Commission (SEC). In these cases, the applicants propose that a Lehman Broker-Dealer, which is registered as a broker-dealer with the SEC, will act as a primary lending agent and LBTC will act as sub-agent. In other respects the sub-agency relationship will operate as set forth in paragraph (9) above.

11. In all cases, LBTC will maintain transactional and market records sufficient to assure compliance with its representation that all loans to the Lehman Broker-Dealers are effectively at arms-length terms. Such records will be provided to the Client Plan fiduciary, who is independent of LBTC and the Lehman Broker-Dealers, in the manner and format agreed to by the Client Plan fiduciary and LBTC, without charge to the Client Plan.

12. LBTC, under the Agency Agreement, as securities lending agent for the Client Plans, will negotiate a master securities borrowing agreement with a schedule of modifications attached thereto (the Basic Loan Agreement) with the Lehman Broker-Dealers on behalf of the Client Plans. An independent fiduciary of the Client Plan will approve the form of the Basic Loan Agreement before such fiduciary executes the Agency Agreement. The Basic Loan Agreement will specify, among other things, the right of the Client Plan to terminate a loan at any time and the Client Plan's rights in the event of any default by the Lehman Broker-Dealers. The Basic Loan Agreement will set forth the basis for compensation to the Client Plan for lending securities to the Lehman Broker-Dealers under each category of collateral. The Basic Loan Agreement will also contain a requirement that the Lehman Broker-Dealers must pay all transfer fees and transfer taxes related to the security loans.

13. Prior to making any loans under the Basic Loan Agreement, the Lehman Broker-Dealers will furnish its most recent available audited and unaudited financial statements to LBTC (assuming LBTC does not already possess such statements), which, in turn, will provide such statements to the Client Plan before the independent fiduciary of the Client Plan is asked to approve the terms of the Basic Loan Agreement. The terms of the Basic Loan Agreement will contain a requirement that the Lehman Broker-Dealer must give prompt notice at the time of the loan of any material adverse changes in its financial condition since the date of the most recently furnished financial statements. If any such changes have taken place, LBTC will request that the independent fiduciary of the Client Plan approve the loan in view of the changed financial condition.

14. As noted above, the agreement by LBTC to provide securities lending services, as agent, to a Client Plan will be embodied in the Agency Agreement. The Client Plan and LBTC will agree to an arrangement under which LBTC will be compensated for its services as the lending agent prior to the commencement of any lending activity. Similarly, with respect to arrangements under which LBTC is acting as securities lending sub-agent, the agreed upon fee arrangement of the primary lending agent will be set forth in the Primary Lending Agreement, and such agreement will specifically authorize the primary lending agent to pay a portion of such fee, as the primary lending agent determines in its sole

discretion, to any sub-agent, including LBTC, which is to provide securities lending services to the plan.<sup>6</sup>

15. Each time a Client Plan loans securities to the Lehman Broker-Dealers pursuant to the Basic Loan Agreement, the Lehman Broker-Dealers will execute a designation letter specifying the material terms of the loan, including the securities to be loaned, the required level of collateral, and the fee or rebate payable, and any special delivery instructions. The terms of each loan will be at least as favorable to the Client Plan as those of a comparable arm's-length transaction between unrelated parties.

16. LBTC will establish each day a written schedule of lending fees<sup>7</sup> and rebate rates<sup>8</sup> to assure uniformity of treatment among borrowing brokers and to limit the discretion LBTC would have in negotiating securities loans to the Lehman Broker-Dealers. Loans to the Lehman Broker-Dealers on any day will be made at rates on the daily schedule or at rates which may be more advantageous to the Client Plans. In no case will the loans be made to the Lehman Broker-Dealers at rates or lending fees less advantageous to the Client Plan than those on the schedule.

The rebate rates, which are established for cash collateral loans made by the Client Plans, will take into account the potential demand for the loaned securities, the applicable benchmark cost of funds indices [typically, the U.S. Federal Funds Rate established by the Federal Reserve System (Federal Funds), the overnight "REPO"<sup>9</sup> rate, or the like] and the

anticipated investment return on overnight investments which are permitted by the Client Plan Fiduciary. The lending fees, which are established with respect of loans made by the Client Plans collateralized by other than cash, will be set daily to reflect conditions as influenced by potential market demand.

LBTC will negotiate rebate rates for cash collateral payable to each borrower, including the Lehman Broker-Dealers, on behalf of a Client Plan. Where, for example, cash collateral derived from an overnight loan is intended to be invested in a generic repurchase agreement, any rebate fee determined with respect to an overnight repurchase agreement benchmark will be set below the applicable "ask" quotation therefor. Where cash collateral is derived from a loan with an expected maturity date (term loan) and is intended to be invested in instruments with similar maturities, the maximum rebate fee will be less than the investment return (assuming no investment default). With respect to any loan to the Lehman Broker-Dealers, LBTC will not knowingly negotiate a rebate rate with respect to such loan which over the anticipated term of the loan would produce a zero or negative return to the Client Plan (assuming no default on the investments related to the cash collateral from such loan where LBTC has investment discretion over the cash collateral). LBTC represents that the written rebate rate established daily for cash collateral under loans negotiated with the Lehman Broker-Dealers will not exceed the rebate rate which would be paid to a similarly situated unrelated borrower with respect to a comparable securities lending transaction. LBTC will disclose the method for determining the maximum daily rebate rate as described above to an independent fiduciary of the Client Plan for approval before lending any securities to the Lehman Broker-Dealers on behalf of the Client Plan.

17. For collateral other than cash, the applicable lending fee in respect of any outstanding loan will be reviewed daily by LBTC for competitiveness and adjusted, where necessary, to reflect market terms and conditions. With respect to any calendar quarter, at least 50 percent of the securities loans negotiated on behalf of the Client Plans will be to borrowers not affiliated with LBTC, and so the competitiveness of the

a temporary surplus of cash, agreeing to buy them back the next day. Such transactions are settled in immediately available Federal Funds, usually at a rate below the Federal Funds rate (the rate charged by the banks lending funds to each other). See *Barron's Dictionary of Finance and Investment Terms*, 2nd Edition (New York, 1987).

loan fee will be tested in the marketplace. Accordingly, the applicants state that loans to the Lehman Broker-Dealers should result in a competitive rate of income to the lending Client Plan. At all times, LBTC will effect loans in a prudent and diversified manner.

The method of determining the actual daily securities lending rates (fees and rebates), the minimum lending fees payable by the Lehman Broker-Dealers and the maximum rebate payable to the Lehman Broker-Dealers, will be specified in an exhibit attached to the Agency Agreement to be executed between the independent fiduciary of the Client Plan and LBTC in cases where LBTC is the direct securities lending agent. These methods of determination need not be formulaic, but may consist of a description of the process involved in determining rebate rates and lending fees.

18. If LBTC reduces the lending fee or increases the rebate rate on any outstanding loan to an affiliated borrower (except for any change resulting from a change in the value of any index with respect to which the fee or rebate is calculated), LBTC, by the close of business on the date of such adjustment, shall provide the independent fiduciary of the Client Plan with notice that it has adjusted such fee or rebate to such affiliated borrower, and that the Client Plan may terminate such loan at any time. LBTC shall provide the independent fiduciary with such information as the independent fiduciary may reasonably request regarding such adjustment.

19. While LBTC will normally lend securities to requesting borrowers on a first come, first served basis, as a means of assuring uniformity of treatment among borrowing brokers, in some cases it may not be possible to adhere to first come, first served allocation. This can occur in instances where (a) the credit limit established for such "first in line" borrower by LBTC and/or the Plan has already been satisfied; (b) the "first in line" borrower is not approved as a borrower by a particular Client Plan whose securities are sought to be borrowed; or (c) the "first in line" borrower cannot be ascertained, as an operational matter, because several borrowers spoke to different representatives of LBTC at or about the same time with respect to the same security. In situations (a) and (b), loans would normally be effected with the "second in line" borrower. In situation (c), securities would be allocated as equitably as practicable among all eligible requesting borrowers.

<sup>6</sup>The foregoing provisions describe arrangements comparable to conditions (c) and (d) of PTE 82-63 which require that the payment of compensation to a "lending fiduciary" is made under a written instrument and is subject to prior written authorization of an independent "authorizing fiduciary." In the event that a commingled investment fund will participate in the securities lending program, the special rule applicable to such funds concerning the authorization of the compensation arrangement set forth in paragraph (f) of PTE 82-63 will be satisfied.

<sup>7</sup>LBTC will adopt minimum daily lending fees for non-cash collateral payable by the Lehman Broker-Dealer to LBTC on behalf of the Client Plans. LBTC will submit the method for determining such minimum daily lending fees to an independent fiduciary of the Client Plan for approval before initially lending any securities to a Lehman Broker-Dealer on behalf of a Client Plan.

<sup>8</sup>LBTC will adopt maximum daily rebate rates with respect to securities loans collateralized with cash collateral. LBTC will submit the method for determining such maximum daily rebate rates to an independent fiduciary of a Client Plan for approval before initially lending any securities to the Lehman Broker-Dealer on behalf of such Client Plan.

<sup>9</sup>An overnight "REPO" is an overnight repurchase agreement which is an arrangement whereby securities dealers and banks finance their inventories of Treasury bills, notes, and bonds. The dealer or bank sells securities to an investor with

20. LBTC on behalf of the Client Plan will receive collateral from Lehman Broker-Dealers by physical delivery, book entry in a securities depository, wire transfer or similar means by the close of business on or before the day the loaned securities are delivered to the Lehman Broker-Dealers. The collateral will consist 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 a person other than the Lehman Broker-Dealers or any affiliates thereof) or such other types of collateral which might be permitted by the Department under PTE 81-6 or any successor.<sup>10</sup> The market value of the collateral on the close of business on the business day preceding the day the loaned securities are delivered to the Lehman Broker-Dealers will be at least 102 percent of the then market value of the loaned securities. The Basic Loan Agreement will give the Client Plan a continuing security interest in and a lien on the collateral. LBTC will monitor the level of the collateral daily. If the market value of the collateral falls below 100 percent, LBTC will require the Lehman Broker-Dealers to deliver by the close of business the next day sufficient additional collateral to bring the level back to at least 102 percent.

21. Subject to the terms and conditions of the Agency Agreement (or the Primary Lending Agreement), LBTC will invest and reinvest all or substantially all cash collateral in approved investments designated by the applicable Client Plan and identified on a schedule attached to the relevant agreement. All approved investments made by LBTC will be for the sole account and risk of the applicable Client Plan. These approved investments shall not include securities, instruments, transactions and investments issued by LBTC or any of its affiliates. From time to time, the Client Plan may instruct LBTC in writing not to make any approved investment with a certain counterparty, or through a particular financial institution or intermediary. Alternatively, the Client Plan may also retain the right to directly control the reinvestment of the cash collateral.

22. Each Client Plan participating in the lending program will be sent a monthly transaction report. The monthly report will provide a list of all security loans outstanding and closed for a specified period. The report will identify for each open loan position, the

securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or loan premium (as the case may be) at which the security is loaned, and the number of days the security has been on loan. At the request of the Client Plan, such a report will be provided on a weekly or daily basis, rather than a monthly basis. Also, upon request of the Client Plan, LBTC will also provide the Client Plan with daily confirmations of securities lending transactions.

In order to provide the means for monitoring lending activity, rates on loans to the Lehman Broker-Dealers compared with loans to other brokers, and the level of collateral on the loans, it is represented that the monthly report will show, on a daily basis, the market value of all outstanding security loans to the Lehman Broker-Dealers and to other borrowers. Further, the monthly report will state the daily fees where collateral other than cash is utilized and will specify the details used to establish the daily rebate payable to all brokers where cash is used as collateral. The monthly report also will state, on a daily basis, the rates at which securities are loaned to the Lehman Broker-Dealers compared with those at which securities are loaned to other brokers. This statement will give an independent Client Plan fiduciary information which can be compared to that contained in the daily rate schedule.

23. 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.)

24. Plan B. The Lehman Broker-Dealers will directly negotiate “exclusive borrowing” agreements with fiduciaries of Client Plans, including Client Plans for which LBTC serves as directed trustee or custodian, where such fiduciary is independent of the Lehman Broker-Dealers and LBTC. Under the exclusive borrowing agreement, the Lehman Broker-Dealer will have exclusive access for a specified period of time to borrow securities of the Client Plan pursuant to certain conditions. LBTC will not participate in the negotiation of the exclusive borrowing agreement. The involvement of LBTC, if any, will be limited to such activities as holding securities available for lending, handling the movement of borrowed securities and collateral, and investing or depositing any cash collateral and supplying the Client Plans with certain reports. The applicants represent that, under the exclusive borrowing agreement, neither the Lehman Broker-Dealer nor LBTC will perform for the Client Plans the functions which

<sup>10</sup> See Footnote 2 above regarding the scope of relief that may be provided by the Department in any successor class exemption and the type of assets that may be used as collateral for a securities loan.

constitute the essential functions of a securities lending agent.

25. Upon delivery of loaned securities to the Lehman Broker-Dealer, LBTC, or another custodian on behalf of the Client Plan, will receive from the Lehman Broker-Dealer the same day 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 a person other than a Lehman Broker-Dealer or any affiliate thereof) or other non-cash collateral permitted under PTE 81-6 or any successor. The market value of the collateral at the close of business on the business day preceding the day the loaned securities are delivered to the Lehman Broker-Dealer will be at least 102 percent of the then market value of the loaned securities. LBTC or such other custodian, will monitor the level of the collateral daily. If the market value of the collateral falls below 100 percent of that of the loaned securities, the Lehman Broker-Dealer will deliver sufficient additional collateral on the following day such that the market value of all collateral will equal at least 102 percent of the market value of the loaned securities. The Lehman Broker-Dealer or, in the case of some Client-Plans, LBTC, will provide a weekly report to the Client Plan showing, on a daily basis, the aggregate market value of all outstanding security loans to the Lehman Broker-Dealer, and the aggregate market value of the collateral.

26. Before entering into an exclusive borrowing agreement, the Lehman Broker-Dealer will furnish to the Client Plan, if it does not already possess such statements, the most recent publicly available audited and unaudited statements of its financial condition, as well as any other publicly available information which it believes is necessary for the Client Plan to determine whether to enter into or renew the agreement, and a copy of the final exemption, if granted, together with this proposed exemption. The agreement will contain a representation by the Lehman Broker-Dealer that, as of each time it borrows securities, there has been no material adverse changes in its financial condition. All the procedures under the agreement will, at a minimum, conform to the applicable provisions of PTE 81-6 and PTE 82-63.

27. In exchange for the exclusive right to borrow certain securities from the Client Plan, the Lehman Broker-Dealer will pay the Client Plan either a flat fee, or a minimum flat fee plus a percentage (negotiated at the time the exclusive

borrowing agreement is entered into) of the total balance outstanding of borrowed securities, or a percentage of the total balance outstanding without any flat fee. A percentage may be established by reference to an objective formula. The Lehman Broker-Dealer and the independent fiduciary of the Client Plan may agree that different fee arrangements will apply to different securities or different groups of securities. Any change in the rate paid to the Client Plan will require written consent of the Client Plan independent fiduciary. However, such Client Plan's consent will be presumed where the rate changes pursuant to an objective formula. In such instances, an independent fiduciary of the Client Plan must be notified at least 24 hours in advance of the rate change, and the independent fiduciary must not object in writing to such change, prior to the effective date of the change. Under this fee arrangement, all earnings generated by the cash collateral will be returned to the Lehman Broker-Dealer. The Client Plan will receive credit for all interest, dividends or other distributions on any borrowed securities. In addition, under some arrangements, the earnings on the collateral due to the Lehman Broker-Dealer, and the dividends, interest, and other distributions on the borrowed securities payable to the Client Plan may be offset against each other, so that only a net amount will be returned to the Lehman Broker-Dealer.

28. The exclusive borrowing agreement and/or any securities loan outstanding may be terminated by either party at any time. Upon termination of any securities loan, the Lehman Broker-Dealer will deliver any borrowed securities back to the Client Plan within five business days of written notice of termination. If the Lehman Broker-Dealer fails to return the loaned securities or the equivalent thereof, the Client Plan will have the right under the agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price and any other expenses of the Client Plan associated with the sale and/or purchase. Pursuant to the terms of the exclusive borrowing agreement, 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 the securities and the market value of the collateral on the date a loan is declared to be in default together with expenses

not covered by the collateral, plus applicable interest at a reasonable rate.

29. With regard to those Client Plans for which LBTC provides custodial, clearing and/or reporting functions relative to securities loans, LBTC and a Client Plan fiduciary independent of LBTC and the Lehman Broker-Dealers, will agree in advance and in writing to any fee that LBTC is to receive for such services. Such fees, if any, would be fixed fees (e.g., LBTC might negotiate to receive a fixed percentage of the value of the assets with respect to which it performs these services, or to receive a stated dollar amount) and any such fee would be in addition to any fee LBTC has negotiated to receive from any such Client Plan for standard custodial or other services unrelated to the securities lending activity. The arrangement for LBTC to provide such functions relative to securities loans to the Lehman Broker-Dealer will be terminable by the Client Plan within five business days of receipt of written notice without penalty to the Client Plan, except for the return to the Lehman Broker-Dealer of a part of any flat fee paid by the Lehman Broker-Dealer to the Client Plan, if the Client Plan has also terminated its exclusive borrowing agreement with the Lehman Broker-Dealer. Before entering into an agreement with the Client Plan to provide such functions relative to securities loans to the Lehman Broker-Dealer, LBTC will furnish to the Client Plan any publicly available information which it believes is necessary for the Client Plan to determine whether to enter into or renew the exclusive borrowing agreement.

30. In summary, the applicant represents that the subject transactions will satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

A. Plan A requires approval of the terms of the Basic Loan Agreement and the execution of the Agency Agreement (or the Primary Lending Agreement) by a Client Plan fiduciary independent of the Lehman Broker-Dealers and LBTC before a Client Plan lends any securities to the Lehman Broker-Dealers;

B. Under Plan B, the Lehman Broker-Dealers will directly negotiate exclusive borrowing agreement with the Client Plan;

C. The lending arrangements will permit the Client Plans to lend securities to the Lehman Broker-Dealers, which have a substantial market position as securities lenders, and will enable the Client Plans to earn additional income from the loaned securities while continuing to receive any dividends, interest payments and other distributions on those securities;

D. 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;

E. 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:

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

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

(iii) Approved the general terms of the securities loan agreement (i.e., 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;

F. A Client Plan may terminate any securities lending agency agreement at any time without penalty on five (5) business days' notice;

G. 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 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;

H. 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 falls below 100 percent, 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;

I. 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;

J. 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;

K. 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;

L. Only those Client Plans which have assets with an aggregate market value of at least \$50 million (except for certain Related Client Plans or Unrelated Client Plans whose assets are commingled in a group trust under the conditions discussed herein) will be permitted to lend securities to the Lehman Broker-Dealers;

M. 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;

N. 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 of a

comparable arm's-length transaction between unrelated parties;

O. Each Client Plan will receive monthly reports on the transactions, including but not limited to the information described in paragraph 22 above, so that an independent fiduciary of such plan may monitor the securities lending transactions with the Lehman Broker-Dealer;

P. 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;

Q. 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 LBTC's financial condition, since the date of the most recently furnished financial statements;

R. With regard to the "exclusive borrowing" agreement, 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;

S. 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;

T. 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; and

U. Prior to the Client Plan's approval of the lending of its securities to the Lehman Broker-Dealers, a copy of the final exemption, if granted, (and this notice of pendency) will be provided to the Client Plan.

*For Further Information Contact:* Ekaterina A. Uzlyan of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

**Individual Retirement Accounts (the IRAs) for Roark Young, Russell Rice, Mary J. Rice, Bruce Lamchick, Steven McKean and David McKean, and Burton Young (Collectively, the Participants) Located in Miami, Florida**

[Application No. D-10558-10561, 10565-10566, 10568]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, 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 the cash sales (the Sales) of certain stock (the Stock) by the IRAs<sup>11</sup> to the Applicants, disqualified persons with respect to the IRAs, provided that the following conditions were met:

(a) The terms and conditions of the Sales were at least as favorable to each IRA as those obtainable in an arm's length transaction with an unrelated party;

(b) The Sale of Stock by each IRA was a one-time transaction for cash;

(c) Each IRA received the fair market value of the Stock as established by a qualified, independent appraiser; and

(d) Each IRA was not required to pay any commissions, costs or other expenses in connection with each Sale.

*Effective Date:* These proposed exemptions, if granted, will be effective as of March 30, 1998.

**Summary of Facts and Representations**

1. The IRAs are individual retirement accounts, as described in Section 408(a) of the Code. Among the assets of each IRA were shares of closely-held stock in Turnberry Financial Services, Inc. (Turnberry), a unitary savings and loan holding company located in Aventura, Florida. The primary asset held by Turnberry is the Turnberry Bank (the Bank), also of Aventura, Florida.

The applicants describe the Participants, the IRAs, and their former holdings of the Stock as follows:

(a) The IRA of Roark Young, Chairman and CEO of Turnberry and the Bank, and majority shareholder in Turnberry, currently holds assets of approximately \$260,141 which, prior to the Sale, included 6,400 shares of the Stock. The IRA acquired most of the

Stock from the issuer, at various times and various prices, from the period between 1993 and 1995.

(b) The IRA of Russell Rice, President of Turnberry, Executive Vice President of the Bank, and Director of both, currently holds total assets of approximately \$22,000 which, prior to the Sale, included 700 shares of the Stock. The IRA acquired the Stock from other shareholders during 1997 at a price of \$25, the fair market value at the time of purchase.

(c) The IRA of Mary J. Rice, wife of Russell Rice, currently holds total assets of approximately \$9,600 which, prior to the Sale, included 300 shares of the Stock. The IRA acquired the Stock during 1997 at a price of \$25, the fair market value of the Stock at the time of purchase.

(d) The IRA of Burton Young, Director of the Bank, currently holds total assets of approximately \$1,563,039 which, prior to the Sale, included 4,567 shares of the Stock. The IRA acquired all of the Stock from the issuer in October of 1995.

(e) The IRA of David McKean currently holds total assets of approximately \$14,000 which, prior to the Sale, included 380 shares of the Stock. The IRA acquired most of the Stock from the issuer at various times and prices during the period from 1990 to 1997.

(f) The IRA of Steven McKean currently holds total assets of approximately \$20,000 which, prior to the Sale, included 715 shares of the Stock. The IRA acquired most of the Stock from the issuer at various times and various prices during the period of 1990 to 1997.

(g) The IRA of Bruce Lamchick currently holds total assets of approximately \$320,000, which, prior to the Sale, included 700 shares of the Stock. The IRA acquired the Stock from other shareholders in October 1995 for its fair market value.

2. The applicants request an exemption for the Sale of the Stock by each individual IRA to its respective Participant. Business and income tax considerations have recently caused Turnberry to elect to be taxed as a Subchapter S corporation pursuant to the Code, effective the close of business on March 31, 1998. However, section 1361 of the Code only permits eligible shareholders to hold stock in a Subchapter S corporation. Because the IRAs are not eligible shareholders for purposes of the Code, the applicants wished to purchase the Stock from their IRAs. The applicants represent that the acquisition of the Stock by each IRA was done for investment purposes and

that, in fact, each IRA made a profit on its original investment.<sup>12</sup> Furthermore, the applicants represent that the Stock held by the IRAs only represented a small portion of the 296,300 shares outstanding.

3. Mr. David A. Harris (Mr. Harris) and Mr. Douglas K. Southard (Mr. Southard), both accredited appraisers with Southard Financial, located in Memphis, Tennessee, appraised the Stock on July 14, 1997. Both Mr. Harris and Mr. Southard represent that they are full-time, qualified appraisers, as demonstrated by the fact that they both are currently Senior Members of the American Society of Appraisers. In addition, Mr. Harris and Mr. Southard represent that they and their firm are independent of the Participants. After analyzing the Stock, on a marketable minority interest basis which they believed appropriate for this transaction, Southard and Mr. Harris concluded that the fair market value of the Stock was \$30 per share.

In reaching their conclusion as to the value of the Stock, Mr. Harris and Mr. Southard took the weighted average of the asset-based approach, the income approach, the market approach using price/book value, and the market approach using prior transactions, and arrived at a per share value of \$29.98.

<sup>12</sup>The Department notes that the Internal Revenue Service has taken the position that a lack of diversification of investments may raise questions in regard to the exclusive benefit rule under section 401(a) of the Code. See, e.g. Rev. Rul. 73-532, 1973-2 C.B. 128. The Department further notes that section 408(a) of the Code, which describes the tax qualification provisions for IRAs, mandates that the trust be created for the exclusive benefit of an individual or his beneficiaries. However, the Department is expressing no opinion in this proposed exemption regarding whether violations of the Code have taken place with respect to the purchase and subsequent retention of the Stock by some of the Applicants.

Further, to the extent that Turnberry or the other sellers were not disqualified persons with respect to the IRAs under section 4975(e)(2), the purchase of the Stock would not have constituted a prohibited transaction under section 4975(c)(1)(A) of the Code. However, the purchase and holding of the Stock by the IRAs of officers and directors of Turnberry and/or the Bank raises questions under section 4975(c)(1)(D) and (E) depending on the degree (if any) of the IRA Participant's interest in the transaction. Section 4975(c)(1)(D) and (E) of the Code prohibits the use by or for the benefit of a disqualified person of the assets of a plan and prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. The IRA Participants, as officers and directors of Turnberry and/or the Bank, may have interests in the proposed transactions which may affect their best judgment as fiduciaries of their IRAs. In such circumstances, the transactions may violate 4975(c)(1)(D) and (E) of the Code. See Advisory Opinion 90-20A (June 15, 1990). Accordingly, to the extent there were violations of section 4975(c)(1)(D) and (E) of the Code with respect to the purchases and holdings of the Stock by the IRAs, the Department is extending no relief for these transactions herein.

<sup>11</sup> Because each IRA has only one Participant, there is no jurisdiction under 29 CFR § 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

After obtaining this number, they rounded the fair market value to reflect what they believe is the imprecision inherent in the various assumptions used in the fair market value determination.

4. The applicants represent that the transactions were feasible in that each was a one-time transaction for cash. Furthermore, the applicants state that the transactions were in the best interest of the IRAs because they provided each IRA with the opportunity to dispose of the Stock for cash at the fair market value, thus allowing for diversification and enhancing liquidity so as to facilitate future distributions. Finally, the applicants represent that the transactions were protective of the rights of the Participants and beneficiaries because each IRA received the fair market value of the Stock, as determined by a qualified, independent appraiser, and incurred no commissions, costs, or other expenses as a result of each Sale.

5. In summary, the applicants represent that the proposed transactions satisfy the statutory criteria of section 4975(c)(2) of the Code because: (a) the terms and conditions of the Sales were at least as favorable to each IRA as those obtainable in an arm's length transaction with an unrelated party; (b) the Sale of Stock by each IRA was a one-time transaction for cash; (c) each IRA received the fair market value of the Stock, as established by a qualified, independent appraiser; and (d) each IRA was not required to pay any commissions, costs or other expenses in connection with each Sale.

*Notice to Interested Persons:* Because the applicants are the only participants in the IRAS, it has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons. Comments and requests for a hearing are due thirty (30) days after publication of the Notice in the **Federal Register**.

*For Further Information Contact:* Mr. James Scott Frazier, telephone (202) 219-8881. (This is not a toll-free number).

**Service Employees International Union Local 252 Welfare Fund (the Fund) Located in Wynnewood, Pennsylvania**

[Application No. L-10595]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act in accordance with the procedures set forth in 29 C.F.R. Part 2570, Subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the restrictions of

sections 406(a), 406(b)(1) and (b)(2) of the Act shall not apply to the proposed sale (the Sale) of certain improved real property located in Wynnewood, Pennsylvania (the Property) to the Service Employees International Union Local 252 (Local 252), a party in interest with respect to the Fund, provided the parties adhere to the following conditions:

(a) The Sale is a one-time transaction for cash;

(b) The terms and conditions of the Sale are at least as favorable to the Fund as those obtainable in an arm's length transaction with an unrelated party;

(c) The Sales price is an amount which represents the greater of: (1) the total cost to the Fund of acquiring the Property; or (2) the fair market value of the Property on the date of Sale as determined by a qualified, independent appraiser;

(d) The Fund does not incur any expenses with respect to the Sale.

**Summary of Facts and Representations**

1. The Fund is a welfare plan providing medical, hospital, and disability benefits to approximately 900 health care workers currently affiliated with Local 252, a 4000 member labor organization based in Wynnewood, Pennsylvania. The Fund was created and is maintained pursuant to collective bargaining agreements between Local 252 and employers in and around the Philadelphia, Pennsylvania area. The Local 252 trustee for the Fund is Anthony L. Teti, and the employer trustee is Zelick Kaplan. As of April 30, 1997, the Fund held net assets of \$4,745,862.

2. Among the assets of the Fund is the Property, a parcel of improved real property located at 3 East Wynnewood Road in Wynnewood, Pennsylvania. Purchased for \$725,000 in July 1994 from an unrelated third party, the Property consists of 8,490 square feet of land improved with a 5,360 square foot, two-story plus basement office building (the Building). The first floor of the Building consists primarily of office space with the second floor containing additional office space and a meeting room. Currently, the Fund and Local 252 occupy the Building, the latter leasing the space for its principal office.<sup>13</sup>

<sup>13</sup>The Fund and Local 252 represent that the lease satisfies the requirements of Prohibited Transaction Class Exemption 76-1 (PTE 76-1, 41 FR 12740, March 26, 1976) and Prohibited Transaction Class Exemption 77-10 (PTE 77-10, 42 FR 33918, July 1, 1977), relating to, among other things, the leasing of office space by a multiemployer plan to a participating employee organization. The Department expresses no opinion

3. The Fund's need to sell the Property arises out of a recent restructuring imposed by the Service Employees International Union (the International). According to the applicant, the International has ordered the approximately 900 health care workers affiliated with Local 252 to transfer their membership to two other local organizations whose membership also consists of workers in the health care industry. Pursuant to the agreement between Local 252 and the International, the Fund will be terminated and the assets currently held therein transferred to the International's welfare fund. As a result of this transfer, the International plans to dispose of the Property. Because the Building currently serves as Local 252's principal office, and fearing that the Fund faces taking a substantial loss on the sale of the Property to an unrelated third party, Local 252 wishes to purchase the Property from the Fund.

4. Paul J. Leis (Mr. Leis), an accredited appraiser with Hayden Real Estate, Inc., located in Conshohocken, Pennsylvania, appraised the Property on January 21, 1998. Mr. Leis states that he is a qualified appraiser, as demonstrated by his status as a Member of the Appraisal Institute and a Certified Pennsylvania General Appraiser. In addition, Mr. Leis represents that both he and Hayden Real Estate, Inc. are independent of the International, Local 252, and the Trustees. After inspecting the Property, Mr. Leis determined a fee simple interest in the Property is worth \$550,000.

As noted above, the Fund originally paid \$725,000 for the Property. In light of the fact that this amount exceeds the fair market value determined pursuant to Mr. Leis's appraisal, Local 252 represents that it will pay \$725,000 to the Fund for the Property. Local 252 has determined that paying the Fund an amount equal to the Property's acquisition price would be in the best interest of the Fund and its participants and beneficiaries as it would enable the Fund to recoup its original investment.

5. The applicant represents that the proposed transaction would be feasible in that it would be a one-time transaction for cash. Furthermore, the applicant states that the transaction would be in the best interests of the Fund because the price offered by Local 252 exceeds that obtainable in a sale to an unrelated third party and because it will allow the Fund to recoup its original investment. Finally, the applicant asserts that the transaction

as to whether the lease satisfies the conditions of PTE 76-1 or PTE 77-10.

will be protective of the rights of the participants and beneficiaries because the Fund will receive a purchase price which is an amount representing the greater of: (1) the total cost to the Fund of acquiring the Property; or (2) the fair market value of the Property on the date of Sale as determined by a qualified, independent appraiser.

6. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (a) the Sale is a one-time transaction for cash; (b) the terms and conditions are at least as favorable to the Fund as those obtainable in an arm's length transaction with an unrelated party; (c) the Sales price is an amount which represents the greater of: (1) the total cost to the Fund of acquiring the Property; or (2) the fair market value of the Property on the date of Sale as determined by a qualified, independent appraiser; and (d) the Fund does not incur any expenses with respect to the Sale.

*Notice to Interested Persons:* Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due on or before \_\_\_\_\_.

*For Further Information Contact:* Mr. James Scott Frazier, 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 of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption 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) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional 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

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 16th day of June, 1998.

**Ivan Strasfeld,**

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

[FR Doc. 98-16335 Filed 6-18-98; 8:45 am]

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 98-28; Exemption Application No. D-10396, et al.]

#### Grant of Individual Exemptions; Massachusetts Mutual Life Insurance Company

**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.

#### Massachusetts Mutual Life Insurance Company (MM) Located in Springfield, Massachusetts [Prohibited Transaction Exemption 98-28; Exemption Application No. D-10396]

#### Exemption

*Section I—Exemption for Certain Transactions Involving the Management of Investments Shared by Two or More Accounts Maintained by MM*

The restrictions of certain sections of the Act and the sanctions resulting from the application of certain parts of section 4975 of the Code shall not apply to the following transactions if the conditions set forth in Section IV are met:

(a) *Transfers Between Accounts*

(1) The restrictions of section 406(b)(2) of the Act shall not apply to