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ARIZONA CORPORATION COMMISSION

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EXECUTIVE SECRETARY

SECURITIES DIVISION  
1300 West Washington  
Third Floor  
TELEPHONE: (602) 542-4242  
FAX: (602) 542-3583

March 6, 1995

Stanley D. Mabbitt, Esq.  
Bryan Cave  
Twenty-First Floor  
2800 North Central Avenue  
Phoenix, AZ 85004-1019

RE: Lehman Brothers  
A.R.S. § 44-1843(A)(2)

Dear Mr. Mabbitt:

On the basis of the facts set forth in your letters of December 2, 1994, January 30, 1995, and March 3, 1995, and in reliance upon your opinion as counsel, the Securities Division will not recommend enforcement action for violation of the Securities Act of Arizona (the "Act") should the transaction take place as set forth in your letters. The Division concurs with your opinion that the certificates of deposit are exempt from registration pursuant to A.R.S. § 44-1843(A)(2).

As this position is premised upon the facts set forth in your letters, it should not be relied on for any other set of facts or by any other person. Please also note that this position applies only to the registration requirements of the Act; the anti-fraud provisions of the Act continue to be applicable.

We have attached a photocopy of your letters. By doing this we are able to avoid having to recite or summarize the facts set forth therein.

Very truly yours,

DEE RIDDELL HARRIS  
Director of Securities

DRH:lb  
Attachment

# BRYAN CAVE

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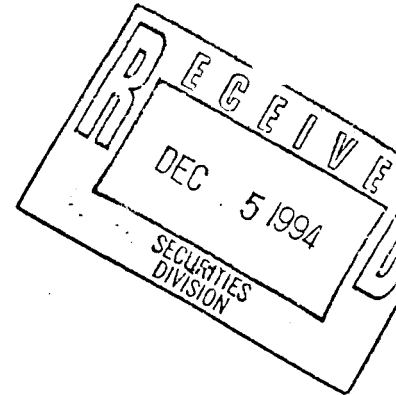
FACSIMILE: (314) 259-2020

IRVINE, CALIF.  
SANTA MONICA, CA  
OVERLAND PARK,  
LONDON, ENG.  
RIYADH, SAUDI  
FRANKFURT AM MAIN

December 2, 1994

## VIA FEDERAL EXPRESS

Mr. D. Riddel Harris  
Corporation Commission  
Securities Division  
1300 West Washington, Third Floor  
Phoenix, AZ 85007



Dear Mr. Harris:

We hereby request that you concur with our opinion that the certificates of deposit ("CDs") described below are not within the definition of a "security" under the Securities Act of Arizona (the "Act"), or, alternatively, that CDs issued by banks and savings associations insured by the Federal Deposit Insurance Corporation (the "FDIC"), including state banks and state savings associations organized and supervised outside Arizona, are exempt from registration pursuant to Section 44-1843(1) of the Act.

### Facts

One of our broker-dealer clients ("Broker-Dealer") wishes to enter into arrangements with federal and state savings associations and national and state banks, the deposits of which are insured by the FDIC (collectively the "Depository Institutions"), to sell to the public CDs issued by the Depository Institutions. The Depository Institutions may not be qualified to do business in Arizona, but the Broker-Dealer will be a registered broker-dealer in the State.

The Broker-Dealer also intends to enter into an agreement with certain other broker-dealers pursuant to which the other broker-dealers will offer for sale the CDs of the Depository Institutions. Any of such other broker-dealers who shall offer CDs for sale in the State of Arizona shall also be registered broker-dealers in Arizona.

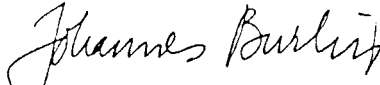
### FDIC Insurance of the CDs

The deposits of the Depository Institutions, including the CDs, are insured by the FDIC pursuant to the Federal Deposit Insurance Act (the "FDI Act"). Under the FDI Act, insurance of deposits is provided through the Savings Association Insurance Fund for insured savings associations and through the Bank Insurance Fund for insured banks. Upon

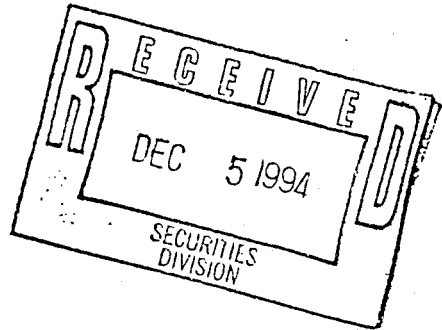
BRYAN CAVE

We would very much appreciate your timely confirmation of the above analysis. Should you have any questions, or wish further discussion of the matters presented herein, please contact the undersigned at (314) 259-2810.

Very truly yours,



Johannes P. Burlin



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JOHANNES P. BURLIN

(314) 259-2810

January 30, 1995

## VIA FEDERAL EXPRESS

Leslie R. Block, Esq.  
Arizona Securities Division  
Corporation Commission  
1300 West Washington, Third Floor  
Phoenix, Arizona 85007

Re: Lehman Brothers Inc. Supplemental Request for Interpretive Opinion

Dear Ms. Block:

The purpose of this letter is to supplement our letter of December 2, 1994, a copy of which is attached hereto, requesting interpretive advice under Section 44-1843(1) of the Securities Act of Arizona (the "Act"). Pursuant to our telephone conversations, we hereby request that you concur with the opinion that the certificates of deposit ("CDs"), described herein and in our December 2, 1994 letter are exempt from registration pursuant to Section 44-1843(A)(2) of the Act.

### Facts

In addition to the facts set forth in our December 2, 1994 request, please be advised that the name of the broker-dealer intending to offer the CDs is Lehman Brothers Inc. ("Lehman"). Lehman owns several subsidiaries which are engaged in the broker-dealer business, and it is possible that such subsidiaries will be the broker-dealer that actually offers and sells the CDs in Arizona. Furthermore, if Lehman does not have a presence in Arizona or if other circumstances make the offering or sale of the CDs by Lehman or a subsidiary impractical, it may contract with a local or regional broker to offer the securities.

### CDs An Exempt Security Under Section 44-1843(A)(2)

Section 44-1843(A)(2) exempts from registration securities "issued by a national bank or a bank or credit or loan association organized pursuant to an act of Congress and supervised by the United States or an agency thereof, or issued by a state bank or savings institution the business of which is supervised and regulated by an agency of this state or of the United States."

## BRYAN CAVE

Leslie R. Block, Esq.

January 30, 1995

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The issuers of the CDs will be either federal or state savings associations or national or state banks. All of the issuers will be members of the Federal Deposit Insurance Corporation ("FDIC"), their deposits will be insured pursuant to the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1834b ("FDI Act"), and they will, therefore, be "insured depository institutions" as defined by Section 3 of the FDI Act, 12 U.S.C. § 1813(c). As insured depository institutions, each of the issuers, irrespective of their individual form of charter or organization, is subject to extensive regulation at the federal level. We have set forth below several examples of such Federal regulation.

As amended by the Federal Deposit Insurance Corporation Improvement Act of 1991, P.L.102-242, 105 Stat. 2236 (1991) ("FDICIA"), the FDI Act requires that all insured depository institutions be subject to "full-scope, on-site" examination by the appropriate Federal banking agency once during each 12-month period. 12 U.S.C. § 1820(d). With respect to state-chartered institutions, the federal banking agencies may accept state examinations in alternate years. *Id.* In addition, all insured depository institutions must submit an annual report on financial condition and management to the FDIC and the appropriate state or federal supervisory agency. 12 U.S.C. § 1831m(a).

FDICIA also created new categories of capitalization for insured depository institutions (*i.e.*, well-capitalized, adequately capitalized, undercapitalized, significantly undercapitalized and critically undercapitalized), 12 U.S.C. § 1831o(b), and the appropriate Federal banking agencies are charged with the specifying the capital standards applicable to each of the foregoing categories. Numerous restrictions and requirements apply to insured depository institutions as a result of their level of capitalization. For example, subject to certain exceptions, any insured depository institution is prohibited from making capital distributions if, after making such distribution, the depository institution would be undercapitalized. And, no insured depository institution may pay a management fee to a person having control of the institution if, as a result of such payment, the institution would be undercapitalized. 12 U.S.C. § 1831o(d). *See* 12 U.S.C. §§ 1831o(e) (provisions applicable to undercapitalized institutions), 1831o(f) (provisions applicable to significantly undercapitalized institutions), 1831o(g) (provisions applicable to critically undercapitalized institutions).

With respect to brokered deposits and deposit solicitations generally, the FDI Act limits the acceptance of brokered deposits to well-capitalized insured depository institutions and adequately capitalized institutions that have obtained the approval of the FDIC. 12 U.S.C. §§ 1831f(a), 1831f(c). Moreover, an undercapitalized insured depository institution is prohibited from soliciting deposits by offering rates that are significantly higher

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Leslie R. Block, Esq.  
January 30, 1995  
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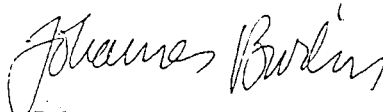
than the prevailing rate for similar deposits in the institution's normal market area. 12 U.S.C. § 1831f(h).

Section 24 of the FDI Act, as added by FDICIA, prohibits insured state banks from engaging as principal, directly or indirectly through a subsidiary, in any activity that is not permissible for a national bank, unless the bank meets its capital requirements and the FDIC determines that the activity will not pose a significant risk to the deposit insurance fund. 12 U.S.C. § 1831a(a). In addition, insured state banks are prohibited from acquiring or retaining any equity investment that is not permissible for a national bank. 12 U.S.C. § 1831a(f).

It seems clear that, regardless of whether the issuer is state or federally chartered, each is an "insured depository institution" under the FDI Act and is, therefore, supervised and regulated by an agency of the United States. We respectfully request that you concur with our opinion that the CDs are exempt under Section 44-1843(A)(2).

Please call me at the above number if you have any questions or comments regarding the aforementioned or if there is anything else I can do to facilitate your review of this matter. Thank you.

Very truly yours,

  
Johannes P. Burlin

cc. Stanley D. Mabbitt

# BRYAN CAVE

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STANLEY D. MABBITT

March 3, 1995

Leslie R. Block, Esq.  
Arizona Securities Division  
Corporation Commission  
1300 West Washington, Third Floor  
Phoenix, Arizona 85007

Re: Lehman Brothers Inc. Supplemental Request for Interpretive Opinion

Dear Ms. Block:

This letter supplements our letter of December 2, 1994, requesting interpretive advice under Section 44-1843(l) of the Securities Act of Arizona (the "Act") and our supplemental letter dated January 30, 1995.

In addition to the facts set forth in our December 2, 1994 request and our supplemental letter, you have requested that we provide you with the following information:

1. Each of the certificates of deposit ("CDs") offered by Lehman Brothers Inc. ("Lehman") will be in the principal amount of \$1,000.00.
2. Prior to the closing date ("Closing Date"), Lehman will enter into an agreement with the Issuer pursuant to which Lehman will commit to the purchase of a specific aggregate amount of the CDs on the Closing Date. On the Closing Date, whether Lehman or any other broker-dealer who is a participant in the sale of the CDs ("Participant") has pre-sold any of the CDs, Lehman will purchase the aggregate amount of CDs it has agreed to purchase.
3. Neither Lehman nor the Participants will sell CDs that would result in the aggregate principal amount of such CDs, plus the maximum accrued interest thereon, exceeding the maximum amount of deposit insurance payable under applicable federal law or regulation to each purchaser who is the beneficial owner ("Beneficial Owner") of the CDs. For example, in the case of CDs maturing in one year and bearing 5% simple interest payable only at maturity, a maximum of \$95,000 principal amount may be sold to a Beneficial Owner.

BRYAN CAVE

Leslie R. Block, Esq.  
March 3, 1995  
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Additional CDs may be sold to a purchaser that purchases the CDs as nominee, authorized representative, custodian or agent of its customers, including without limitation, trusts, pension and retirement plans and accounts, fiduciaries, custodians, agents, trustees and nominees and as to which CDs two or more Beneficial Owners may claim additional insurance under applicable federal law or regulation.

It is not possible for Lehman or the Participants to institute specific procedures to insure that a purchaser does not purchase CDs that, when aggregated with other deposit accounts owned by the purchaser at the same institution, would exceed applicable federal deposit insurance limitations. Such other deposits may be acquired by the purchaser either directly from the Issuer or through other broker-dealers. In either case, neither Lehman nor the Participants would have access to information regarding the existence of such other deposits.

The Disclosure Statement distributed to each purchaser, will contain the following language:

"BY YOUR PURCHASE OF A CD YOU ARE DEEMED TO REPRESENT TO EACH OF THE ISSUER AND THE FIRM THAT YOUR BENEFICIAL INTEREST (OR IF YOU ARE AN AGENT, NOMINEE, CUSTODIAN OR OTHER PERSON WHO IS PURCHASING A CD FOR ITS BENEFICIAL OWNERS, THAT EACH BENEFICIAL OWNER'S BENEFICIAL INTEREST) IN OTHER DEPOSITS IN THE ISSUER , WHEN AGGREGATED WITH THE BENEFICIAL INTEREST IN THE CD SO PURCHASED, TO THE EXTENT THAT AGGREGATION IS REQUIRED IN DETERMINING INSURANCE OF ACCOUNTS UNDER FEDERAL DEPOSIT INSURANCE REGULATIONS, DOES NOT EXCEED \$100,000."

4. The FDIC considers the following factors relevant in determining whether an instrument is an insured deposit: (1) the depository institution will receive and hold an unpaid balance of money or its equivalent in the usual course of business; (2) the depository institution will utilize the funds received in the normal course of its banking business (e.g. to make loans or investments); (3) the depository institution will give credit for the funds received to an account evidenced by a certificate of deposit; (4) the parties intend to create a deposit liability; (5) the depository institution intends to treat the certificate of deposit like any other deposit liability, including booking it as a deposit for accounting purposes, paying deposit insurance assessments on it and maintaining the necessary reserves. *See* Interpretive Letter 94-31, FDIC-94-31 WL (May 12, 1994).



## BRYAN CAVE

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Neither the existence of the interest rate swap transaction entered into contemporaneously by the Issuer, described below, nor the fact the CDs are redeemable by the Issuer affect the foregoing criteria. Accordingly, neither the Swap nor the redemption feature should affect the characterization of the CDs and insurable deposit accounts. See OCC Interpretive Letter, 1988 WL 282282 (O.C.C.) (August 8, 1988) (bank's engaging in swap transaction to hedge interest rate risk on deposits did not affect characterization of funds received as deposits; among other things, the obligation for payment of principal and interest was unconditional and no way contingent upon bank's hedging strategies or performance of the hedge); 1986 FDIC Interp. Ltr. LEXIS 40; Fed. Banking L. Rep. (CCH) ¶ 81,049 (December 24, 1986) (accounts addressed in OCC Interpretive Letter found to be insured deposits).

In addition, the federal deposit insurance applicable to the CDs should be unaffected by the fact that Lehman enters into a firm commitment to purchase the CDs on the Closing Date, and may, as a result, purchase the CDs on the Closing Date for resale to its customers or other Participants at a later date. See Interpretive Letter 94-18, FDIC-94-18 WL (April 1, 1994).

4. The CDs will be redeemable by the Issuer on any interest payment date following an initial redemption date (each, a "Redemption Date"). The Issuer will simultaneously enter into a swap transaction ("Swap") with a swap counterparty ("Counterparty") who may be an affiliate of Lehman. The Swap is for the benefit of the Issuer and the Counterparty and not for the benefit of any purchaser of CDs. On any Redemption Date, the Swap may be terminated at the option of the Counterparty. The Issuer's obligations to pay the principal of, and accrued interest on, the CDs, are not conditioned upon the Swap, and there is no contractual obligation to redeem the CDs in the event the Swap is terminated, although it is anticipated that the Issuer will redeem the CDs in that event.

5. The purchasers of the CDs will not be charged a direct commission in connection with the purchase of the CDs in original issuances. No fee or discount will be paid by the Issuer with respect to the issuance of the CDs. Lehman will pay the Participants such fee or discount with respect to the CDs as may be agreed by Lehman and the Participants from time to time. As indicated above, the Issuer will enter into the Swap in connection with the original issuance of the CDs. Lehman or an affiliate of Lehman will receive income in connection with the Swap.

6. Purchasers of CDs will receive a disclosure statement describing the CDs in connection with purchases in the initial offering and in secondary market transactions.

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Leslie R. Block, Esq.  
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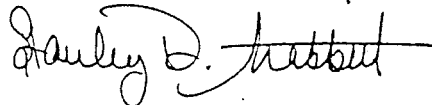
7. We have not requested a no-action letter from the staff of the Securities and Exchange Commission regarding the contemplated transactions.

8. Lehman and the Participants intend to provide a Secondary Market for the CDs, but they are not contractually required to do so.

9. All of the issuers who sell CDs under the program will be FDIC-insured institutions. (Please see our letter to you dated January 30, 1995, a copy of which is enclosed) regarding the degree of federal regulation of all federally-insured depository institutions).

If we can provide additional information, please do not hesitate to call.

Sincerely,



STANLEY D. MABBITT  
For the Firm

SDM:sjs  
Enclosures