

(g)(1) The term "Independent Fiduciary" means a fiduciary of a Client Plan who is unrelated to, and independent of, the Asset Manager and the Affiliated Broker-Dealer. For purposes of this exemption, a Client Plan fiduciary will be deemed to be unrelated to, and independent of, the Asset Manager and the Affiliated Broker-Dealer if such fiduciary represents that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for transactions described in Section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Asset Manager or the Affiliated Broker-Dealer and represents that such fiduciary shall advise the Asset Manager if those facts change.

(2) Notwithstanding anything to the contrary in this Section II(g), a fiduciary is not independent if:

(i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Asset Manager or the Affiliated Broker-Dealer;

(ii) Such fiduciary directly or indirectly receives any compensation or other consideration from the Asset Manager or the Affiliated Broker-Dealer for his or her own personal account in connection with any transaction described in this exemption;

(iii) Any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Asset Manager, responsible for the transactions described in Section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Client Plan sponsor or of the fiduciary responsible for the decision to authorize or terminate authorization for transactions described in Section I. However, if such individual is a director of the Client Plan sponsor or of the responsible fiduciary, and if he or she abstains from participation in (A) the choice of the Plan's investment manager/adviser and (B) the decision to authorize or terminate authorization for transactions described in Section I, then this Section II(g)(2)(iii) shall not apply.

(3) The term "officer" means a president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), or any other officer who performs a policy-making function for the entity.

(4) In the case of existing Client Plans in a Pooled Fund, at the time the Asset Manager provides such Client Plans with initial notice pursuant to this exemption, the Asset Manager will

notify the fiduciaries of such Client Plans that they must advise the Asset Manager, in writing, if they are not independent, within the meaning of this Section II(g).

(h) The term "security" shall have the same meaning as defined in section 2(36) of the Investment Company Act of 1940 (the 1940 Act), as amended (15 U.S.C. 80a-2(36)(1996)). For purposes of this exemption, mortgage-backed or other asset-backed securities rated by a Rating Organization will be treated as debt securities.

(i) The term "Eligible Rule 144A Offering" shall have the same meaning as defined in SEC Rule 10f-3(a)(4) (17 CFR 270.10f-3(a)(4)) under the 1940 Act.

(j) The term "qualified institutional buyer" or "QIB" shall have the same meaning as defined in SEC Rule 144A (SEC Rule 144A) (17 CFR 230.144A(a)(1)) under the Securities Act of 1933.

(k) The term "Rating Organizations" means Standard & Poor's Rating Services, Moody's Investors Service, Inc., Duff & Phelps Credit Rating Co., or Fitch IBCA, Inc., or their successors.

**EFFECTIVE DATE:** If granted, this proposed exemption will be effective as of April 16, 2003.

## Summary of Facts and Representations

### *The Applicants*

1. LBHI, a Delaware corporation, is one of the leading global investment banks. LBHI and its numerous subsidiaries serve institutional, corporate, retirement plan, government and high net worth individual clients and customers. The businesses of LBHI and its subsidiaries include asset management;<sup>8</sup> capital raising for clients through securities underwriting and direct placements; corporate finance and strategic advisory services; merchant banking; securities sales and trading; research; and the trading of foreign exchange, derivative products and certain commodities. Hereinafter, LBHI, together with its affiliates including LBI shall be referred to as the "Asset Manager" when discussing their activities relating to investment advisory and/or investment management services. LBHI and its affiliates currently have approximately \$21 billion in assets under management. LBI is a wholly owned direct subsidiary

<sup>8</sup> It should be noted that Lincoln Capital Fixed Income Management Company, LLC, a subsidiary of LBHI, acquired the fixed income management business of Lincoln Capital Asset Management Company (Lincoln) as of the close of business on January 31, 2003. Currently, the fixed income management business of Lincoln has approximately \$27.4 billion in assets under management.

of LBHI and is a U.S. registered broker-dealer.

2. It is represented that the Applicants and their various affiliates are all regulated by other federal government agencies such as the SEC, as well as state government agencies, and industry self-regulatory organizations (e.g., the New York Stock Exchange (NYSE) and the National Association of Securities Dealers).

### *Requested Exemption*

3. The Applicants request a prohibited transaction exemption that would permit the purchase of securities by the Asset Manager for its ERISA-covered Client Plans, including any Pooled Funds, from underwriting or selling syndicates in which the Affiliated Broker-Dealer participates as a manager or member. Such purchase would be made by the Asset Manager for the Client Plans from an underwriter or broker-dealer, other than the Affiliated Broker-Dealer, and such Affiliated Broker-Dealer would receive no selling concessions in connection with the securities sold to the Client Plans. If granted, the proposed exemption would be effective as the date the proposed exemption is published in the **Federal Register**.

4. The Applicants represent that if the Affiliated Broker-Dealer is a member of an underwriting or selling syndicate, the Asset Manager may purchase underwritten securities for Client Plans in accordance with Part III of Class PTE 75-1, (40 FR 50845, October 31, 1975). Part III of this class exemption provides limited relief from the Act's prohibited transaction provisions for plan fiduciaries that purchase securities from an underwriting or selling syndicate of which the fiduciary or an affiliate is a member. However, such relief is not available if the Affiliated Broker-Dealer manages the underwriting or selling syndicate.

5. In addition, regardless of whether a fiduciary or its affiliate is a manager or merely a member of an underwriting or selling syndicate, PTE 75-1 does not provide exemptive relief for the purchase of unregistered securities. This includes those securities that are purchased by an underwriter for resale to a "qualified institutional buyer" (i.e., a QIB) pursuant to the SEC's Rule 144A under the 1933 Act. Rule 144A is commonly utilized in connection with sales of securities issued by foreign corporations to U.S. investors that are QIBs. Notwithstanding the unregistered nature of such shares, syndicates selling Rule 144A Securities are the functional equivalent of those selling registered securities.