

until trading was suspended on November 26, 2001. Due to Lodgian's filing of the voluntary bankruptcy petition on December 20, 2001, the Old Lodgian Stock was "delisted" from that exchange on December 31, 2001. Subsequent trading took place on the "over the counter" market, until November 25, 2002. The New Lodgian Stock was issued in exchange for Old Lodgian Stock, which was cancelled as part of the approved POR on November 25, 2002. Between November 25, 2002 and January 27, 2003, trades of shares of New Lodgian Stock were reported on the "pink sheets." Shares of New Lodgian Stock began trading on the American Stock Exchange on January 28, 2003 under the symbol "LGN." The opening price per share on that date was \$5.25. The trading prices have ranged from a high of \$5.50 per share on January 28, 2003 (the opening date on the American Stock Exchange) to a low of \$2.50 per share. The current trading price is in the range of \$3.19 per share.

Effective as of January 1, 2003, the Plan permits participants to defer up to 15% (increased from 10% in prior years) of their eligible compensation subject to other applicable limits in the Code. The Plan was amended and restated to comply with recent tax law changes in December 2002. The amendment and restatement included the creation of two separate funds, Warrant Fund A and Warrant Fund B, to hold the Warrants which are the subject of this exemption application. These two Warrant Funds are "frozen" as described in the Plan document, meaning that participants may not invest new amounts in the Warrant Funds or direct a transfer from the Warrant Funds to other Plan investment funds.⁷ A Participant whose Plan account included an investment in Old Lodgian Stock on December 3, 2002 (the date the New Lodgian Stock and Warrants were issued to the Plan) received a proportionate interest in the New Lodgian Stock Fund and the frozen Warrant Funds.

6. It is represented that the Warrants do not constitute qualifying employer securities for purposes of section 407(d)(5) of the Act. Lodgian represents that the Warrants held by the Plan would constitute an "employer security" within the meaning of 407(d)(1) of the Act but not a "qualifying employer security" under

section 407(d)(5) of the Act inasmuch as the Warrants do not fall within any of the covered categories.⁸

Therefore, Lodgian requests retroactive exemptive relief from the Department.

7. The decision as to whether to exchange the Warrants before their respective expiration dates for the Cancellation Payment from Lodgian will be made independently by each active participant. Further, terminated vested participants whose interests in the Plan exceed \$5,000 will also have the option to exchange the Warrants for the Cancellation Payment.

The applicant represents that the terminated vested participants whose vested interests are \$5,000 or less will automatically be cashed out pursuant to the Cancellation Payment and paid their vested interests as soon as administratively possible following their employment termination. In this case, the cash value of any Warrants held in their Plan accounts will be included in the distribution, using the highest value determined by an independent, qualified, appraiser between December 31, 2002 and the most recent valuation date prior to the date of the distribution.

Although the Warrants have been valued by an independent, qualified, appraiser in March, April and May of 2003, in the future, as long as Warrants remain in the Plan, the Warrants will be valued annually on the 31st of December. Pursuant to the Cancellation Payment, active participants and terminated participants who are not automatically cashed out because their vested interests exceed \$5,000 will have an ongoing right to elect to cash in their Warrants, and, in the case of terminated vested participants whose vested interests are less than \$5,000, these participants will receive cash for the surrendered Warrants based on the highest independent appraisal prior to the cash in. The cash value will be held in the active participant's Plan account for investment direction into another Plan investment option. In the case of the terminated vested participant, the cash value will be included in the distribution of his or her vested interest.

An independent fiduciary will monitor the Cancellation Payments and confirm the valuation of the Warrants.

8. Lodgian's obligation to purchase the Warrants is effective at a time when the New Lodgian Stock price is greater than the Warrant exercise price. When the Warrant exercise price is equal to or less than the fair market value of a share of the New Lodgian Stock, Lodgian will not be required to purchase the Warrant(s) from Plan participants. The Plan participant will be permitted to exercise the Warrant(s) and obtain the New Lodgian Stock by paying the exercise price. The exercise price will be paid from the proceeds of a sale of another Plan investment as directed by the Plan participant. Following the exercise of the Warrant, the participant can retain the New Lodgian Stock or direct a sale of some or all of the New Lodgian Stock shares, with the sales proceeds invested in another Plan investment fund selected by the Plan participant. The determination of whether or not Lodgian is obligated to purchase a Warrant would be made on the basis of the closing stock price of a share of the New Lodgian Stock on the day the Plan participant directs a sale of the Warrant.

If the Warrants are traded on an established market, the Plan participant would be allowed to direct the sale of the Warrants on the market, and Lodgian would not be required to purchase the Warrants. The Plan participant would receive cash proceeds from the sale of the Warrant, and this cash sale would represent a market transaction and would not involve Lodgian.

9. In summary, it is represented that the proposed transaction meets the statutory criteria of section 408(a) of the Act because:

(a) The acquisition and holding of the Warrants by the Plan occurred in connection with Lodgian's Bankruptcy;

(b) The Plan had no ability to affect the Plan of Reorganization filed by Lodgian on December 20, 2001 under the Bankruptcy Code, or the First Amended Plan of Reorganization;

(c) The Warrants were acquired automatically and without any action on the part of the Plan;

(d) The Warrants were acquired by the Plan with the same terms and conditions as non-Plan shareholders;

(e) The Plan did not pay any fees or commissions in connection with the receipt of the Warrants, nor did the Plan pay any fees or commissions in connection with the holding of the Warrants;

(f) Any decision to cancel the Warrants and accept a Cancellation Payment from Lodgian will be made by the Participant in the case of active participants and terminated vested

⁷ The Department notes that investment decisions regarding the Warrants are subject to section 404 of the Act. In this regard, section 404(a) of the Act requires, among other things, that a plan fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion.

⁸ Section 407(d)(1) of the Act defines an "employer security" as a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. Section 407(d)(5) of the Act defines a "qualifying employer security" as an employer security which is (a) stock; (b) a marketable obligation; or (c) an interest in certain publicly-traded partnerships, but only if such partnership is an existing partnership.