

# PUBLIC

RESPONSE OF THE OFFICE OF  
INVESTMENT COMPANY REGULATION  
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 93-4-ICR  
Shearson Lehman Brothers Inc.  
and Smith Barney, Harris Upham  
& Co. Incorporated

In your letter dated June 7, 1993, you state that on March 12, 1993, Shearson Lehman Brothers Inc. ("Shearson") entered an asset purchase agreement with Primerica Corporation and its subsidiary, Smith Barney, Harris Upham & Co. Incorporated ("Smith Barney"). The agreement provides for the sale to Smith Barney and its designated affiliates of substantially all of the assets of the Shearson Lehman Brothers Division and the SLB Asset Management Division of Shearson (the "Transaction").

You state that the registered investment companies sponsored by Shearson (the "Funds") have been granted orders exempting them from various provisions of the Investment Company Act of 1940. Certain of the orders that are essential to the continued operations of the Funds include as a named party Shearson (or one of its predecessors or affiliates) in its capacity as distributor or underwriter of the Funds. These orders (the "Exemptive Orders") contemplate the compliance by Shearson (or one of its predecessors or affiliates) with certain undertakings and conditions. 1/ After consummation of the Transaction, however, Smith Barney or one of its affiliates will serve as distributor or underwriter of the Funds.

You state that because the Transaction is structured as an asset purchase, Smith Barney will not be acquiring the entity to

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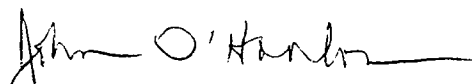
1/ The Exemptive Orders are: Shearson Lehman Brothers Appreciation Fund Inc., Investment Company Act Release Nos. 19176 (Dec. 22, 1992) (notice) and 19216 (Jan. 19, 1993) (order); Shearson Lehman Brothers Appreciation Fund Inc., Investment Company Act Release Nos. 18770 (June 11, 1992) (notice) and 18832 (Jul. 7, 1992) (order); Shearson Lehman Brothers Income Trust, Investment Company Act Release Nos. 18565 (Feb. 24, 1992) (notice) and 18623 (Mar. 23, 1992) (order); Shearson Lehman Brothers Inc., Investment Company Act Release Nos. 18145 (May 14, 1991) (notice) and 18191 (June 11, 1991) (order); Shearson Lehman Hutton Unit Trusts, Investment Company Act Release Nos. 16904 (Apr. 6, 1989) (notice) and 16940 (Apr. 27, 1989) (order); E.F. Hutton & Co., Investment Company Act Release Nos. 14182 (Oct. 5, 1984) (notice) and 14219 (Oct. 31, 1984) (order); E.F. Hutton & Co., Investment Company Act Release Nos. 13733 (Jan. 20, 1984) (notice) and 13787 (Feb. 24, 1984) (order); Shearson Daily Dividend Inc., Investment Company Act Release Nos. 13316 (June 10, 1983) (notice) and 13382 (July 13, 1983) (order); and Shearson Daily Dividend Inc., Investment Company Act Release Nos. 11671 (Mar. 6, 1981) (notice) and 11716 (Apr. 3, 1981) (order).

whom an Exemptive Order was issued. In addition, Smith Barney has not formally undertaken to meet the conditions that may have been imposed in the Exemptive Orders on that entity. Accordingly, the Exemptive Orders may not be available to the Funds and Smith Barney after consummation of the Transaction. The Funds and Smith Barney therefore have agreed and intend promptly to file applications (the "Renewal Applications") with the Commission in which they would request exemptive orders ("Renewal Orders") that would effectively continue the relief previously granted in the Exemptive Orders.

You request assurance that the Division of Investment Management will not recommend that the Commission take enforcement action if the Funds and Smith Barney rely on the Exemptive Orders pending receipt by the Funds of the Renewal Orders. Smith Barney specifically agrees that, pending receipt of the Renewal Orders, it will comply with the terms and conditions in the Exemptive Orders imposed on Shearson (or one of its predecessors or affiliates) as though such terms and conditions were imposed directly on Smith Barney. The Funds agree that they will rely on the Renewal Orders when they are granted, rather than continuing to rely on the Exemptive Orders.

Based on the facts and representations contained in your letter, we would not recommend that the Commission take enforcement action against the Funds or Smith Barney if, pending the issuance of the Renewal Orders, the Funds and Smith Barney rely on the Exemptive Orders. In particular, we base our position upon your representation that Smith Barney will comply with the terms and conditions imposed upon Shearson (or one of its predecessors or affiliates) as though such terms and conditions were imposed directly on Smith Barney. This assurance, however, is not a substitute for exemptive relief. Accordingly, this position shall be effective until the earlier of the issuance by the Commission of the Renewal Orders, or one year from the date of this letter.

This response expresses the Division's position on enforcement action only, and does not purport to express any legal conclusions on the questions presented. Facts or conditions different from those presented in your letter might require a different conclusion. Moreover, this letter provides no assurance that the Commission will issue the Renewal Orders, or that the staff will not comment upon or seek modification of any Renewal Application.

  
John V. O'Hanlon  
Staff Attorney  
June 8, 1993

WILLKIE FARR & GALLAGHER

New York  
Washington, DC  
London  
Paris

1940 Act/Sections  
2(a)(19), 2(a)(32), 2(a)(35),  
12(d)(1), 14(a), 17(b),  
17(d), 18(f), 18(g),  
18(i), 22(c), 22(d) and  
Rules 17d-1 and 22c-1

June 7, 1993

Jeremy N. Rubenstein, Esq.  
Assistant Director  
Office of Investment Company Regulation  
Division of Investment Management  
Securities and Exchange Commission  
Judiciary Plaza  
450 Fifth Street  
Washington, D.C. 20549-1004

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|---------------------|-------------|
| Act                 | ICA of 1940 |
| Section             | 15(b)       |
| Rule                |             |
| Public Availability | 6/8/93      |

Re: Shearson Lehman Brothers Inc. and  
Smith Barney, Harris Upham & Co. Incorporated

Dear Mr. Rubenstein:

On behalf of Shearson Lehman Brothers Inc. ("Shearson") and Smith Barney, Harris Upham & Co. Incorporated ("Smith Barney"), we request that the staff (the "Staff") of the Division of Investment Management of the Securities and Exchange Commission (the "Commission") advise us that it will not recommend that the Commission take any enforcement action under the Investment Company Act of 1940, as amended (the "1940 Act"), under the circumstances described below. In addition, the registered investment companies sponsored by Shearson (the "Funds") and Smith Barney intend to file applications with the Commission, which, if granted, would continue existing exemptive relief previously granted by the Commission.

*Background*

On March 12, 1993, Shearson entered into an asset purchase agreement (the "Asset Purchase Agreement") with Primerica Corporation ("Primerica") and its indirect, wholly owned subsidiary, Smith Barney, providing for the sale to Smith

|                         |                   |
|-------------------------|-------------------|
| One Citicorp Center     | Telex: RCA 233780 |
| 153 East 53rd Street    | RCA 238805        |
| New York, NY 10022-4669 | WU 12 7679        |
| 212 935 8000            | Fax: 212 752 2991 |

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Barney and its designated affiliates of substantially all of the assets of the Shearson Lehman Brothers Division of Shearson and the SLB Asset Management Division of Shearson (the "Transaction"). Upon the closing of the Transaction, Shearson will receive, subject to adjustment, \$850 million in cash, \$125 million in value of convertible preferred stock of Primerica, \$25 million in value of warrants to purchase Primerica common stock, a three-year participation in the revenues of the combined companies (with revenue participation payments to Shearson limited to \$50 million per year) and a five-year 10% participation in the net profits (in excess of \$250 million) of the combined companies.

The closing of the Transaction, scheduled for early July 1993, is subject to certain conditions, including the condition that the new investment advisory contracts with Smith Barney or an affiliate of Smith Barney shall have been approved by (a) the Boards of Directors or Trustees (the "Boards"), as the case may be, (i) of the registered investment management companies sponsored by Shearson that are money market funds (each a "Money Fund" and collectively, the "Money Funds") (subject to later shareholder approval) and (ii) of the registered investment management companies sponsored by Shearson other than the Money Funds (the "Non-Money Funds"), including, in each case a majority of the Board members who are not "interested persons" of the Money Funds or the Non-Money Funds as defined under the 1940 Act ("Independent Board Members"), and (b) shareholders of the Non-Money Funds which, as of February 28, 1993, represented at least 75% of all of the assets of such funds, upon terms virtually identical with the investment advisory contracts of each such fund currently in effect (other than changes in the identity of the parties and the commencement and termination dates of the contracts). In addition, the closing of the Transaction is subject to the condition that the Board, including a majority of Independent Board Members, of each of the Money Funds and Non-Money Funds shall have approved new underwriting, distribution or dealer contracts, if any, with Smith Barney pursuant to Section 15 of the 1940 Act and any other requirements applicable thereto contained in the 1940 Act. Shearson is currently in the process of soliciting proxies from shareholders of these funds for shareholder meetings scheduled to be held on various dates during June 1993.

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### *The Exemptive Orders*

Over time, the Funds have applied for, and been granted by the Commission, orders of exemption from various provisions of the 1940 Act. Certain of these exemptive orders (described in more detail below (the "Exemptive Orders")) have included as named parties not only the Funds but also Shearson (or one of its predecessors or affiliates) in its capacity as distributor or underwriter of the Funds and contemplate the performance by Shearson (or one of its predecessors or affiliates) of certain conditions. After consummation of the Transaction, it is contemplated that Smith Barney or one of its affiliates, rather than Shearson (or one of its predecessors or affiliates), will serve as distributor or underwriter of the Funds. Since the Transaction is structured as an asset purchase, Smith Barney will not be acquiring the entity to whom an Exemptive Order was issued, nor has Smith Barney formally undertaken specifically to meet the conditions that may have been imposed in the Exemptive Orders on that entity. Accordingly, the Staff has advised that the Exemptive Orders may not be available to the Funds and Smith Barney after consummation of the Transaction. The Funds and Smith Barney, therefore, have agreed and intend promptly to file applications (the "Renewal Applications") with the Commission in which they would request exemptive orders ("Renewal Orders") that would effectively continue the exemptive relief previously granted to the Funds by the Commission in the Exemptive Orders.

The following is a brief description of the Exemptive Orders for which it is contemplated that Renewal Applications would be filed:<sup>1</sup>

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<sup>1</sup> Our research indicates that since 1970 approximately 140 orders have been issued to Shearson (or one of its predecessors or affiliates). Of these orders, approximately 110 orders were issued (a) to specific Funds that will remain in existence after consummation of the Transaction; (b) in connection with deregistration under Section 8(f) of the 1940 Act; (c) in connection with disciplinary proceedings; and (d) with respect to specific transactions (e.g., relief under Section 17 of the 1940 Act for mergers of funds in the Shearson family). Approximately 30 orders name Shearson (or one of its predecessors) as a party and imposed ongoing obligations on that party. With the exception of the Exemptive Orders described in the accompanying text, however, these orders are no longer necessary as a result of subsequently issued exemptive orders, elimination of affiliations that necessitated

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1. Variable Pricing. Investment Company Act Release Nos. 19216 (January 19, 1993) (order) and 19176 (December 22, 1992) (notice); Investment Company Act Release Nos. 18832 (July 7, 1992) (order) and 18770 (June 11, 1992) (notice). Exemption from sections 2(a)(32), 2(a)(35), 18(f), 18(g), 18(i), 22(c) and 22(d) of the 1940 Act and Rule 22c-1 thereunder relating to implementation of multiple class distribution arrangements and establishment of contingent deferred sales charges.

2. Income Trust CDSC. Investment Company Act Release Nos. 18623 (March 23, 1992) (order) and 18565 (February 24, 1992) (notice). Exemption from sections 2(a)(32), 2(a)(35), 22(c) and 22(d) of the 1940 Act and Rule 22c-1 thereunder relating to establishment of a contingent deferred sales charges for Shearson Lehman Brothers Income Trust.

3. Interested Person Relief. Investment Company Act Release Nos. 13382 (July 13, 1983) (order) and 13316 (June 10, 1983) (notice) (Martin Brody); and Investment Company Act Release Nos. 11716 (April 3, 1981) (order) and 11671 (March 6, 1981) (notice) (Judge James Crisona). Exemption from section 2(a)(19) relating to relief for the named individual from being deemed an "interested person" with respect to certain Funds for which the person was a director.

4. Shearson Sponsored Unit Investment Trusts. Investment Company Act Release Nos. 18191 (June 11, 1991) (order) and 18145 (May 14, 1991) (notice). Exemptive relief pursuant to Section 11(a) permitting certain offers of exchange between the applicant Shearson sponsored unit investment trusts (the "UITs") and pursuant to Section 6(c) exempting Shearson and any other underwriters for the UITs from Section 14(a) to the extent it would require them to take and hold for their own accounts or privately place at least \$100,000 of units in each series of the UITs that do not hold exclusively "eligible trust securities" within the meaning of Rule 14a-3(b).

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relief or subsequent Commission rulemaking under the 1940 Act (i.e., Rule 11a-3 and Rule 2a-7).

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5. Shearson Unit Trusts. Investment Company Act Release Nos. 16940 (April 27, 1989) (order) and 16904 (April 6, 1989) (notice). Relief pursuant to: (i) section 6(c) exempting Shearson and the UITs from Section 12(d)(1) to permit the UITs to invest in portfolios consisting of zero-coupon obligations, from Section 14(a) to exempt the UITs from the requirement that an investment company must have a net worth of \$100,000 at the time of public offering of its securities, and from Section 22(d) to permit the waiver of deferred sales loads under certain circumstances; and (ii) Section 17(d) and Rule 17d-1 thereunder, approving certain affiliated transactions.

6. Hutton Telephone Trust. Investment Company Act Release Nos. 14219 (October 31, 1984) (order) and 14182 (October 5, 1984) (notice); Investment Company Act Release Nos. 13787 (February 24, 1984) (order) and 13733 (January 20, 1984) (notice). Relief pursuant to Sections 6(c) and 17(b) permitting Shearson, the sponsor of Hutton Telephone Trust (the "Trust"), acting as principal, to purchase, at a 1% discount, securities from the Trust which the Trust receives in accordance with its participation in a dividend reinvestment plan.

Reliance on the Exemptive Orders is essential for the continued operations of the Funds, and the Funds' counsel has discussed with the Staff the possibility of filing a no-action request which would permit the Funds and Smith Barney to rely on the Exemptive Orders during the interim period from the closing of the Transaction until the Renewal Orders have been granted.

#### *Analysis*

The Funds and Smith Barney propose that, pending receipt of the Renewal Orders, the Funds and Smith Barney would rely on the Exemptive Orders and would be subject to those orders' terms and conditions.<sup>2</sup> Smith Barney specifically

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<sup>2</sup> In addition, where the terms of the Exemptive Orders apply to registered investment companies organized in the future that are in the same "group of investment companies" (as defined in Rule 11a-3) as the Funds or to future series of a UIT ("Future Funds"), it is proposed that such Future Funds could rely on the Exemptive Orders, subject to those orders' terms and conditions, pending receipt of the Renewal Orders.

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agrees that, pending receipt of the Renewal Orders, it will comply with the terms and conditions in the Exemptive Orders imposed on Shearson (or one of its predecessors or affiliates) as though such terms and conditions were imposed directly on Smith Barney. The Funds agree that they would rely on the Renewal Orders when they are granted, rather than continuing to rely on the Exemptive Orders in accordance with any Staff no-action letter issued in response to this request. The Funds further agree that such Staff no-action position shall remain in effect only until the earlier of (i) the date on which the appropriate Renewal Order is issued or (ii) one year from the date of the Staff's letter setting forth its no-action position.

We believe that the Funds should be permitted to continue relying on the Exemptive Orders because the factors supporting the issuance of those orders are still applicable to the Funds even though the Funds will have a different distributor after the Transaction. Moreover, since, as described above, substantially all of Shearson's retail brokerage and asset management businesses are being transferred to Smith Barney for consideration valued at approximately \$1 billion for valid business reasons, we do not believe that a question can be raised that the Transaction was occasioned by a desire on the part of Smith Barney to acquire use of the Exemptive Orders.

The Staff previously has taken "no-action" positions in similar situations involving various parties who sought to continue to rely on exemptive orders despite changes in circumstances similar to those involved here.<sup>3</sup> In

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<sup>3</sup> See The PNC Fund (April 2, 1993) (pending receipt of amended order, investment company can rely on order granted to former distributor); Cigna Funds Group (July 13, 1992) (investment companies with a new sponsor can rely on exemptive order relating to deferred compensation for non-interested trustees even though the order was granted to their previous sponsor for investment companies sponsored by such sponsor); Merrill Lynch Federal Securities Trust (Sept. 26, 1991) (investment company can rely on exemptive order permitting dual distribution system without seeking to amend order even though order did not originally apply to investment company); First Boston Corporation (July 3, 1991) (newly created funding corporation can rely on order exempting a substantially equivalent, but separate, funding corporation from registration without seeking separate order); Fiduciary Capital Partners, L.P. (Jan. 24, 1990) (partnerships can rely on existing order without declaring independent general partners not to be "interested persons" without



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addition, most of these "no-action" positions were not limited to covering an interim period pending the receipt of a comparable order.

*Conclusion*

For the reasons stated above, and, subject to the condition that the Funds and Smith Barney will comply with the terms and conditions of the Exemptive Orders pending receipt of the Renewal Orders, we respectfully request that the Staff advise that it will not recommend that the Commission take enforcement action if the Funds and Smith Barney rely on the Exemptive Orders pending receipt by the Funds of the Renewal Orders.

We would greatly appreciate your assistance in expediting this request. Should you have any questions regarding this request, please contact the undersigned or Avi Katz of this office at (212) 935-8000.

Very truly yours,



Burton M. Leibert

cc: Elizabeth G. Osterman, Esq.  
John V. O'Hanlon, Esq.

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seeking amended or new order despite subsequent replacement of general partner; and Federated Investors, Inc. (Sept. 22, 1989) (reorganized entities can rely on order that only applied to predecessors).