

of the Accounts, which has been designated as October 1, 2003.

**EFFECTIVE DATE:** This proposed exemption, if granted, will be effective as of October 1, 2003, the Transition Effective Date.

The proposed exemption, if granted, will be subject to the express conditions that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transactions to be consummated pursuant to the exemption.

**FOR FURTHER INFORMATION CONTACT:** Brian J. Buyniski of the Department, telephone (202) 693-8545. (This is not a toll-free number.)

Signed at Washington, DC, this 24th day of September, 2003.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
Department of Labor.*

[FR Doc. 03-24594 Filed 9-26-03; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application No. D-11136, et al.]

#### Proposed Exemptions; The National Electrical Benefit Fund (the Plan)

**AGENCY:** Employee Benefits Security 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 requests 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.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffitt.betty@dol.gov", or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 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, 5 U.S.C. App. 1 (1996), 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.

#### The National Electrical Benefit Fund (the Plan) Located in Rockville, Maryland

[Application No. D-11136].

#### 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, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a) 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 (D) of the Code, shall not apply effective October 17, 2002 to Bank of America, N.A. (the Bank) providing a guaranty of repayment for the benefit of the bondholders in the form of an Irrevocable Direct Draw Letter of Credit No. 3051512 (Letter of Credit) and the Partnership's subsequent reimbursement to the Bank of amounts advanced by the Bank pursuant to the Letter of Credit in connection with the investment by the Plan in Colma Apartment Associates, L.P. (the Partnership), provided that the following conditions are met:

(a) The Plan's investment in the Partnership is on terms no less favorable to the Plan than those which the Plan could obtain in arm's length transactions with unrelated parties;

(b) The decisions on behalf of the Plan to invest in the Partnership and consent to the terms of the reimbursement agreement in favor of the Bank are made by fiduciaries, which are not included among, and are independent of and unaffiliated with, the Bank;

(c) The investment in the Partnership represents no more than .5% of the total assets of the Plan; and

(d) The general partners of the Partnership are independent of the Plan and of the Bank of America.

(e) The Plan shall have no obligation to fund its capital contribution unless and until (i) all conditions imposed by the construction lender regarding disbursement to the Partnership of \$25,950,000 of the tax-exempt bond construction financing proceeds have been satisfied by the Partnership; and (ii) the Department grants the proposed exemption; and

(f) The Plan's capital contribution will be used solely for the purpose of reimbursing Bank of America for the draw on the Letter of Credit.

**Effective Date of Exemption:** The effective date of this exemption is October 17, 2002.

### Summary of Facts and Representations

1. The Plan is a multiemployer defined benefit plan covering approximately 491,520 participants and beneficiaries. The fair market value of the total assets of the Plan was over \$9,700,000,000 as of December 31, 2001. The transaction that is the subject of this proposed exemption involves less than .08% of the fair market value of the total assets of the Plan.

2. The fiduciaries generally responsible for investment decisions in real estate matters on behalf of the Plan are the Trustees, John M. Grau and Jeremiah J. O'Connor (the Trustees). The Trustees were responsible for reviewing and authorizing the investment in the transaction, as detailed below. In addition, the Plan utilizes an independent outside fiduciary, CS Capital Management, Inc., to review and make recommendations regarding real estate transactions.

3. The Plan has become a limited partner in the Partnership which is leasing 2.18 acres of land (the Land) located in San Mateo County, California on which four (4) five-story apartment buildings with retail space and related improvements (the Improvements) are proposed to be built. (The Land and the Improvements are referred to collectively herein as the Project). The Project will have approximately 153 rental units, with 31 of these units (or 20%) being set aside for lower income residents. The Land is owned by San Mateo Transit District, a San Mateo County governmental agency, and is leased to the Partnership under a long term ground lease. The investment proposal involves the Partnership's continued lease of the Land and the construction of the Improvements. Because the Project will provide low income housing, the Partnership is eligible for a grant from San Mateo County and for favorable interest rates on construction and long-term financing. Some of the construction financing, which will be derived from the issuance of tax-exempt and taxable bonds, has been guaranteed, through credit enhancement and liquidity support, by a financial institution that is a party in interest to the Plan. It is the arrangement with respect to the redemption of the taxable bonds that is the subject of the proposed exemption.

4. The Partnership was formed by JSM Enterprises Inc., a commercial real estate developer based in San Jose, California (the Developer), pursuant to the laws of the State of Delaware for the sole purpose of leasing the Land and developing and operating the Project. At this time, the sole limited partner of the

Partnership is the Plan. There are two general partners of the Partnership, Colma BART Investors, L.P. (the Co-General Partner) and Affordable Housing Access, Inc. (the Managing General Partner). (The Co-General Partner and the Managing General Partner (the General Partners) are, together with the Plan, sometimes referred to collectively herein as the Partners).

5. The Project has a budget for construction of approximately \$36,373,000. Of these costs, \$25,950,000 (or 71.3% of the total project budget costs) will be funded in the form of tax-exempt bond construction financing (the Tax-Exempt Bond Financing) from the sale of tax-exempt, multi-family housing revenue, variable rate bonds (the Tax-Exempt Bonds) issued by the ABAG Finance Authority for Nonprofit Corporations (the Issuer), which is a State of California governmental entity (the proceeds of the Tax-Exempt Bond Financing would then be disbursed to the Partnership in the form of a construction loan which will convert into long-term financing). An additional \$589,000 of these costs (or 1.6% of the total project budget costs) will be funded from interest expected to be earned on the bond proceeds from the deposit of such proceeds into a guaranteed investment contract, and \$630,000 of these costs (or 1.7%) will be funded from income projected to be earned by the Project during the lease-up period. An additional \$310,000 (or .9% of the total project budget costs) will be funded by a grant from San Mateo County.

6. The remaining \$8,894,000 in project budget costs, \$1,779,000 (or 4.9% of the total project budget costs) will be funded by the Co-General Partners' capital contribution to the Partnership and \$7,115,000 (or 19.6% of the total project budget costs) will be funded by the Plan's capital contribution to the Partnership. The closing of the Co-General Partners' capital contribution occurred substantially simultaneously with the closing of the Tax-Exempt Bond Financing. As to the "timing" of the funding of the Plan's capital contribution, the parties have agreed that the Plan will not be obligated to make its capital contribution until both the Co-General Partners' capital contribution and the Tax-Exempt Bond Financing proceeds have been fully funded for project budget costs, which is expected to occur approximately fifteen (15) months from the date of the closing, or January 2004.

It is contemplated that additional construction financing will come from

the proceeds of taxable bonds in the amount of \$7,115,000 (*i.e.*, an amount identical to the amount of the Fund's capital contribution) which is issued by the Issuer (the Taxable Bonds) and loaned to the Partnership in the form of a construction loan.

7. In order to achieve a favorable rating for the Taxable Bonds, the Bank, a party in interest to the Plan, has provided a guaranty of repayment for the benefit of the bondholders in the form of a Letter of Credit, dated October 17, 2002. The Bank is a national banking association engaged in consumer banking, commercial banking and trust business and offers a wide range of banking services. The services provided by the Bank to the Plan are limited to those associated with a checking and depository account held by the Plan in connection with the distribution of benefit payments to the Plan's participants and beneficiaries. The Bank primarily provides services to the Plan by acting as the drawee with respect to checks issued by the Plan for certain benefit and other payments made by the Plan, by acting as the originating bank with respect to payments transmitted through the Automated Clearinghouse network, and by providing general depository account services with respect to these payments, such as full reconciliation of the Plan's account.

In addition, a few local branches of the Bank provide depository services for accounts established by local collection agents utilized by the Plan for the purpose of collecting contributions from local employers. In this regard, the Plan utilizes approximately 115 collection agents around the country, each of which is responsible for collecting contributions from covered employers who work in its jurisdiction and for depositing those contributions with a local bank into an account held in the Plan's name. On a regular basis, the Plan sweeps the accounts held by these banks of all the contributions that have been accumulated. A few local collection agents may use the Bank.

The Letter of Credit will be issued pursuant to a Reimbursement Agreement, dated as of October 1, 2002, by and between the Borrower and the Bank (the Reimbursement Agreement), which obligates the Partnership, among other things, to reimburse the Bank for funds advanced by the Bank under the Letter of Credit.

The proceeds of the Taxable Bonds have been deposited with Wells Fargo Bank (the Bond Trustee) pursuant to a Trust Indenture, dated as of October 1, 2002, by and between the Issuer and Wells Fargo Bank, National Association, as trustee (Indenture Agreement).

Assuming that this proposed exemption is granted, the Taxable Bond proceeds would be released by the Bond Trustee and used by the Partnership to help finance a portion of the costs of the construction of the Project. During the duration of the Letter of Credit, the Bond Trustee would make timely payments of draws against the Taxable Bonds. As a condition to the conversion of the Tax-Exempt Bond Financing to long-term financing upon the Project's achievement of certain leasing criteria, the Taxable Bonds (which will not convert into long-term financing) will be fully redeemed by Bank of America pursuant to the Letter of Credit, and the Plan would become obligated to fund its \$7,115,000 capital contribution to the Partnership. The Partnership would then use the Plan's capital contribution to reimburse Bank of America for the draw on the Letter of Credit. The Plan's capital contribution will be used by the Partnership for the exclusive purpose of reimbursing Bank of America for the draw on the Letter of Credit.

8. The Plan desires to participate in the Project as it is expected to earn an attractive investment and it fits well within the Plan's investment objectives. With respect to the issuance of the Taxable Bonds and the ultimate repayment of the bondholders with the Plan's capital contribution, the contemplated arrangement will allow the Partnership to take advantage of over \$7 million in construction financing at a very favorable interest rate. Such favorable financing would not be available but for the fact that the Project involves the construction of low income housing units.

If the proposed exemption is not granted, the Partnership will not be able to take advantage of the favorable interest rates available to it as an incentive for constructing low income housing. If this proposed exemption is denied, the proceeds of the Taxable Bonds will be returned by the Bond Trustee from the Indenture Account to the Issuer (together with interest) and neither the Partnership nor the Plan will have any further obligation with respect thereto. The Plan would then fund its \$7,115,000 to the Partnership for Project budget costs once the proceeds of the Tax-Exempt Bonds and the Co-General Partners' capital contribution were fully disbursed. This, of course, will result in an overall lower return to the Plan on its investment in the Partnership than if the arrangement with respect to the Taxable Bonds were allowed to proceed.

9. In summary, the applicant states that the transaction has satisfied the statutory criteria of section 408(a) of the Act because: (a) The Plan's investment

in the Partnership is on terms no less favorable to the Plan than those which the Plan could obtain in arm's length transactions with unrelated parties; (b) the decisions on behalf of the Plan to invest in the Partnership and consent to the terms of the Reimbursement Agreement in favor of the Bank are made by fiduciaries, which are not included among, and are independent of and unaffiliated with, the Bank; (c) the investment in the Partnership represents no more than 20% of the total assets of the Plan; (d) the general partners of the Partnership are independent of the Plan and of the Bank of America; (e) The Plan shall have no obligation to fund its capital contribution unless and until (i) all conditions imposed by the construction lender regarding disbursement to the Partnership of \$25,950,000 of the tax-exempt bond construction financing proceeds have been satisfied by the Partnership; and (ii) the Department grants the proposed exemption; and (f) The Plan's capital contribution will be used solely for the purpose of reimbursing Bank of America for the draw on the Letter of Credit.

*Effective Date:* This exemption, if granted, is effective as of October 17, 2002.

*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 Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Khalif I. Ford of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

**Bank of America, N.A., Located in Charlotte, North Carolina**

[Exemption Application No. D-11147].

*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).

Section I—Covered Transactions

If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reasons of section 4975(c)(1)(A) through (D) of the Code, shall not apply, as of January 1, 2003, to:

(A) the granting to Bank of America, N.A. (Bank), either as an agent (the

Agent) for a group of financial institutions (Lender(s)), or as a sole Lender, that will fund a so-called "credit facility" (Credit Facility) providing credit to certain investment funds (Fund(s)), by the Fund of a security interest in and lien on the capital commitments (Capital Commitments), reserve amounts, and capital contributions (Capital Contributions) of certain investors, including employee benefit plans (a Covered Plan, as defined in Section III (A)), investing in the Fund;

(B) any collateral assignment and pledge by the Fund to the Agent, or to the Bank as sole Lender, of its security interest in each Investor's equity interest, including a Covered Plan's equity interest, in the Fund;

(C) the granting by the Fund to the Agent, or to the Bank as sole Lender, of a security interest in a Borrower Collateral Account to which all Capital Contributions in the Fund will be deposited when paid (except in certain limited circumstances);<sup>1</sup>

(D) the granting by the Fund to the Agent, or to the Bank as sole Lender, of its right to make calls on Investors for Capital Contributions (Capital Call), which shall be in cash, under the operative Fund Agreements (as defined in Section III (C)), enforce the Capital Calls, collect the Capital Contributions, and apply them to any amount due under the Credit Facility;

(E) the execution by a Covered Plan of an agreement (Investor Consent) consenting to the Fund's assignment to the Agent, or to the Bank as sole Lender, of the Fund's right to make Capital Calls, which may contain: (i) An acknowledgment by the Covered Plan of the Fund's assignment to the Agent, or to the Bank as sole Lender, of the right to make Capital Calls upon the Covered Plan, enforce the Capital Calls, collect the Capital Contributions, and apply them to any amount due under the Credit Facility; (ii) a consent (as either part of the Fund Agreements or as a separate agreement) by the Covered Plan to make Capital Contributions to the Fund without counterclaim, setoff, or defense, for the purpose of repayment of the Credit Facility; (iii) a representation that the Covered Plan has no knowledge of claims, offsets or defenses that would adversely affect its obligation to fund Capital Contributions under the Fund Agreements; and (iv) an agreement that the Covered Plan will fund Capital

<sup>1</sup> In most cases, all Investors will make Capital Contributions into the Borrower Collateral Account. However, in some cases, investors that are not plans may be directed to make Capital Contributions to the Agent, for the benefit of the Lenders, after an event of default, in some other manner.

Contributions only into the Borrower Collateral Account; provided that with respect to all transactions described above, the conditions set forth below in Section II are met.

#### Section II—Conditions

(A) The transaction must be on terms that are no less favorable to the Covered Plans than those which the Covered Plans could obtain in arm's-length transactions with unrelated parties;

(B) The decision to invest in the Fund on behalf of each Covered Plan and to execute an Investor Consent in favor of the Bank (either as sole Lender or Agent), must be made by fiduciaries of the Covered Plan that are not included among, are independent of, and are unaffiliated with, the Lenders (including the Bank) and the Fund;

(C) At the time of the execution of an Investor Consent, a Covered Plan must have assets of not less than \$100 million. In the case of multiple plans maintained by the same employer, or by members of a controlled group of corporations (within the meaning of Code section 414(b)) or members of a group of trades or businesses under common control (within the meaning of Code section 414(c)) (hereafter, referred to as "members of a controlled group"), whose assets are invested on a commingled basis (*e.g.*, through a master trust), this \$100 million threshold will be applied to the aggregate assets of the commingled entity;

(D) Not more than five (5) percent of the assets of any Covered Plan, measured at the time of the execution of an Investor Consent, may be invested in the Fund. In the case of multiple plans maintained by the same employer, or by members of a controlled group, whose assets are invested on a commingled basis (*e.g.*, through a master trust), the five (5) percent limit will be applied to the aggregate assets of the commingled entity;

(E) Neither the Bank nor any Lender has discretionary authority or control with respect to a Covered Plan's investment in the Fund nor renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to such investment;

(F) Upon request, the Covered Plan fiduciaries must receive from the Bank a copy of this notice of proposed exemption and a copy of the final exemption, if granted. In addition, fiduciaries of Covered Plans will receive a copy of this proposed exemption, as published in the **Federal Register**, for Covered Transactions (as defined in Section III(D) below) that occur during the period from January 1, 2003 until

the date of the final exemption, if granted;

(G) The Bank must receive from the Covered Plan fiduciaries a written representation that the conditions set forth above in Section II (B), (C), and (D) are satisfied for such transaction with respect to the Covered Plan for which they are fiduciaries; and

(H) None of the Covered Transactions shall be part of an arrangement, agreement or understanding, designed to benefit a party in interest with respect to a Covered Plan.

#### Section III—Definitions

(A) The term "Covered Plan" means an investor in a Fund (as defined below) that is an employee benefit plan, as defined in section 3 (3) of the Act, that satisfies the conditions set forth herein in Section II;

(B) The term "Fund" means an investment opportunity or venture capital fund (organized as a corporation, limited partnership, limited liability company, or another business entity authorized by applicable law) in which one or more investors invest, including employee benefit plans or special purpose entities holding "plan assets" subject to the Act, as described herein, by making capital contributions in cash to such Fund, pursuant to specific capital commitments as established by the Fund Agreement(s) and other operative documents executed by the parties, for purposes of making certain real estate investments (including real estate-related investments, such as venture capital investments) or non-real estate investments;

(C) The terms "Fund Agreement" or "Fund Agreements" mean the written agreements under which a Fund (as defined above) will be formed (such as a limited partnership agreement, a limited liability company agreement or articles of incorporation, together with ancillary related agreements, such as subscription agreements) that will obligate each investor to make cash contributions of capital with respect to Capital Commitments, upon receipt of a call for Capital Contributions; and

(D) The terms "Covered Transaction" or "Covered Transactions" mean any combination of transactions described in Section I(A)–(D), in conjunction with the Investor Consent described in Section I(E).

*Effective Date:* This proposed exemption, if granted, will be effective as of January 1, 2003. Such retroactive effective date was requested by the Applicant so that the Bank would be able to close on one or more Credit Facilities during a time period after such date, without the need for

obtaining separate individual exemptions for such transactions, prior to the date that this exemption would be granted.

#### Summary of Facts and Representations

1. Administrative Necessity for Exemption. The Bank is a market leader in arranging and syndicating credit facilities that are secured by capital commitments in investment opportunity and venture capital funds (*i.e.*, a Fund). In the past, the Bank has applied for individual exemptions with respect to transactions that are similar to the transactions described herein.<sup>2</sup>

The Bank anticipates that it will continue to enter into such credit facility transactions. However, rather than continuing to submit individual exemption requests for transactions on a case by case basis, the Bank requests that it be granted a more general exemption which would permit the Bank to engage in a series of transactions without the need for recurring, administrative approvals.

2. Parties to Credit Facilities. The Bank represents that each transaction will consist at a minimum of: (i) One or more Funds; (ii) one or more investors (*i.e.*, the Investors) in the Fund that may be an employee benefit plan subject to the Act; and (iii) a Lender or group of Lenders. In each instance involving a group of Lenders, the Credit Facility will be arranged by the Bank, which will also be the Agent under the Credit Facility.

3. Funds. The borrower under the Credit Facility will be a Fund. A Fund may be a corporation, a limited partnership, a limited liability company, or another business entity authorized by applicable law.

The Fund's underlying assets will not consist of plan assets, and the Bank requests no determination with respect thereto.<sup>3</sup>

<sup>2</sup> For example, see Prohibited Transaction Exemption (PTE) 2001–21, 66 FR 34466 (June 28, 2001); PTE 2000–22, 65 FR 33376 (May 23, 2000); and PTE 2000–10, 65 FR 10826 (February 29, 2000).

<sup>3</sup> The Department notes that 29 CFR 2510.3–101, *et seq.* describes what constitutes assets of a plan with respect to a plan's investment in another entity for purposes of subtitle A, and Parts 1 and 4 of subtitle B, of Title I of the Act, and section 4975 of the Code. However, the Department expresses no opinion in this proposed exemption regarding whether the underlying assets of any Fund, as described herein, would be considered the assets of a plan under such regulations. In this regard, the Department notes that it is providing no relief for either internal transactions involving the operation of the Fund or for transactions involving the Fund and third parties other than the specific relief proposed herein. In addition, the Department encourages potential Plan investors and their independent fiduciaries to examine carefully all aspects of the Fund's organization, operation and

Each Fund will be organized and operated through the Fund's organizing and governing documents (*i.e.*, Fund Agreements, as defined in Section III(c) above) such as a partnership agreement, subscription agreements, and other agreements or documents that govern the rights and responsibilities of each party in the Fund. The Fund will generally target equity or debt real estate investments or non-real estate investments. The investments may include, but will not be limited to, the following:

- (i) operating company ventures, both public and private;
- (ii) the acquisition and development of office, retail, industrial, multi-family, single family, parking garage, corporate real estate assets, and other types of real estate assets;
- (iii) the acquisition of interests in real estate or the acquisition of interests in public or private real estate investment trusts and corporations, limited partnerships and limited liability companies whose primary assets will be commercial real estate; or
- (iv) the acquisition of publicly-traded or privately-traded debt or equity securities of issuers whose primary assets are real estate.

Although it is contemplated that the Funds will generally target real estate investments exclusively or in combination with non-real estate investments, some Funds may not target any real estate-related investments.<sup>4</sup>

4. Investors; Covered Plans. The investors in the Fund (Investor(s)) may generally include, but not be limited to, private or public corporations,

investment programs in order to determine whether the requirements of the Department's regulations will be met.

<sup>4</sup> The proposal of this exemption should not be interpreted as an endorsement by the Department of the transactions described herein. The Department notes that the fiduciary responsibility provisions of Part 4 of Title I of the Act will apply to a Covered Plan fiduciary's decision to invest in a Fund. Specifically, section 404(a)(1) of the Act requires, among other things, that a plan fiduciary act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of the plan. In this regard, the Department is not providing any opinion as to whether a particular investment strategy or arrangement would be considered prudent or in the best interests of a plan, as required by section 404 of the Act. The determination of the prudence of a particular investment must be made by a plan fiduciary after appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment involved, including the plan's potential exposure to losses and the role a particular investment plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties and responsibilities (see 29 CFR 2550.404a-1).

educational institutions, charitable trusts or foundations, tax-exempt trusts or other tax-exempt organizations, governmental employee benefit plans, insurance company general accounts, private individuals or trusts, and other private or public persons, entities, or associations. Such Investors will include "plans" subject to the provisions of the Act and the Code, including Covered Plans. The term "Covered Plan" means a "plan" that meets the requirements of section II(C) and (D). Any reference to a Covered Plan should be deemed, where appropriate, to include a reference to the Covered Plan's fiduciary, representative, agent or investment vehicle, such as a trust, through which the plan's assets are invested in the Fund. An Investor may invest directly in a Fund or indirectly, such as an investment through a special purpose vehicle, an intermediate limited partnership, an insurance company separate account, or otherwise. In some instances, these entities may contain "plan assets" subject to the Act as a result of investments made by Covered Plans. For purposes of this proposed exemption, a fiduciary of a Covered Plan is not included among, is independent of, and unaffiliated with, a Lender (including the Bank) or a Fund, as applicable, if: (i) The fiduciary is not, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such Lender or Fund,<sup>5</sup> (ii) the fiduciary is not an officer, director, employee or relative of, or partner in, such Lender or Fund; and (iii) the fiduciary is not a corporation or partnership in which a person affiliated with the Fund or a Lender, as appropriate, is an officer, director, partner, or employee.

5. Lenders; Agent. In each transaction, the Bank will arrange the Credit Facility. For each Credit Facility, there will be one or more Lenders. The Bank will either be the sole Lender for the Credit Facility or will serve as the administrative agent (*i.e.*, the Agent) under the Credit Facility, acting for the benefit of a group of Lenders that participate in the Credit Facility. In any event, one or more of the Lenders, including the Bank, may be a party in

<sup>5</sup> For purposes of determining whether a fiduciary is not included among, is independent of, and unaffiliated with, a Fund, the term "Fund" shall be deemed, as appropriate, to include the governing entity of the Fund or a member of the governing body of the Fund, as appropriate, *e.g.* a general partner of a partnership, a manager of a limited liability company, a member of a member-managed limited liability company, or a member of the board of directors of a corporation.

interest with respect to one or more of the Covered Plans invested in the Fund.

6. Credit Facility. The "Credit Facility" refers to an arrangement entered into by and among: (i) A Fund or Funds, as borrower(s); (ii) the Bank, as agent or the sole Lender; and/or (iii) the Lenders. Under this arrangement, the Fund may be provided credit through direct or indirect borrowings, letters of credit and similar forms of credit arrangements. Generally, the Fund Agreements will permit the Fund to incur indebtedness (typically, for a term of three to seven years) for the acquisition of investments and for working capital purposes. For purposes of the transactions described herein, such indebtedness will include the Credit Facility. The Credit Facility will allow the Fund to consummate investments quickly without having to finalize the debt/equity structure for an investment or arrange for interim or permanent financing prior to making an investment, and will have additional advantages to the Investors and the Fund.

The Fund will be able to use its credit under the Credit Facility by direct or indirect borrowings, by requesting that letters of credit be issued, by other similar forms of credit arrangements, or a combination of any of the foregoing. All Lenders will participate on a pro rata basis with respect to all loans, letters of credit, or other credit arrangements. All loans, letters of credit, and other credit arrangements will be issued to the Fund or an entity in which the Fund owns a direct or indirect interest (Qualified Borrower),<sup>6</sup> and not to any individual Investor. All payments of principal and interest made by the Fund or a Qualified Borrower will be allocated pro rata among all Lenders.

The Credit Facility will have a stated maturity date and, until such time, only interest will be payable on the facility. Generally, at the maturity date, the entire unpaid principal balance of, plus any accrued but unpaid interest on, the debt under the Credit Facility will be due and payable, unless the facility is extended. Whether or not an extension of the facility is requested, the manner of repayment of the debt will be generally a combination of Capital Calls on the Investors, proceeds from mortgage financings, and proceeds from liquidation of investments. The Fund will not typically make a lump-sum Capital Call on the day the debt is due.

<sup>6</sup> The Bank represents that Qualified Borrowers will be entities the indebtedness of which may be guaranteed by the Fund. When extensions of credit are made to a Qualified Borrower, the Fund will provide a guaranty agreement to the Lenders, under the terms of the Credit Facility.

Generally, no Fund will attempt to liquidate all of its properties to pay the Credit Facility without making any Capital Calls.

In most instances, the Credit Facility will be a recourse obligation of the Fund. The recourse obligation of a Covered Plan to the Fund will not exceed the Covered Plan's initial capital commitment. Repayment of the Credit Facility may be secured by, among other things, a security interest in and lien on the Capital Commitments, the right to make Capital Calls, the right to collect and enforce the same, and a collateral account in the name of the Fund, into which Capital Contributions are funded (*i.e.*, the Borrower Collateral Account), or any combination of the foregoing. In the event of a default under the Credit Facility, the Agent will have the right to make Capital Calls on the Investors to the extent of unfunded Capital Commitments and will apply Capital Contributions received from such Capital Calls to any amount due to any Lender under the Credit Facility.

7. Investor Consent. In connection with the Credit Facility, each of the Investors will be required to execute an agreement which may contain:

(i) An acknowledgment by the Investor of the Fund's assignment to the Bank, acting as Agent for the benefit of Lenders or as sole Lender, of the right to make Capital Calls upon the Investors, and to collect and enforce the same;

(ii) An agreement by the Investor to make Capital Contributions to the Fund without counterclaim, setoff, or defense, for the purpose of repayment of the Credit Facility;

(iii) A representation that the Investor has no knowledge of claims, offsets or defenses that would adversely affect its obligation to fund Capital Contributions under the Fund Agreement; and

(iv) An agreement that the Investor will fund Capital Contributions only into the Borrower Collateral Account.

Prior to obtaining Capital Commitments from the Investors, the Fund may negotiate with the Bank to provide the Credit Facility. With respect to the Fund and its activities, the only direct relationship between an Investor and the Bank or any Lender in connection with a Covered Transaction will be the execution of an Investor Consent. In this regard, the only provision in the Investor Consent which is not merely an acknowledgment of already-existing rights and obligations is the Investor's separate agreement that, in the event of default under the Credit Facility, the Investor will make its Capital Contribution to the Borrower Collateral Account in response to a

Capital Call for repayment of the Credit Facility without counterclaim, setoff, or defense. However, the Investor does retain its right to assert any such claim or defense in a separate action. Some Funds may not include such a waiver of defenses to the funding of Capital Contributions by the Investors within the Fund Agreements, in which case the Investor will provide the Agent, or the Bank entity as sole Lender, with a separate document that will simply contain an acknowledgment of such agreement. All other aspects of the transaction, including the negotiation of all terms of the Credit Facility, will be exclusively between the Agent (for the benefit of the Lenders) or the Bank (as a sole Lender) and the Fund.

8. Investor Consent Integral to Credit Facility. The Bank represents that the delivery by each Investor of an Investor Consent is integral to the Credit Facility, and the Credit Facility will be an integral part of the Fund's investment program. Prior to, or at the time of, the decision by the fiduciaries of a plan to invest in the Fund, such fiduciaries will be aware that the Fund will have the power to borrow money and enter into a loan agreement under which the Fund may pledge its assets, including the Capital Commitments of the Investors and the right to make Capital Calls (giving the secured party the right, under certain circumstances, to make Capital Calls directly). In addition, the Fund Agreements will provide, or each fiduciary of a plan that becomes a Covered Plan will be notified prior to its decision to invest in the Fund, that each Investor may be required to execute documents that are customary for the type of financing involved in the class of transactions described herein. These documents will include an Investor Consent, pursuant to which the Investor agrees to make Capital Contributions to the Fund without counterclaim, setoff, or defense, for the purpose of repayment of the Credit Facility. If a fiduciary of a plan that may become a Covered Plan considers these provisions overly-restrictive, it may decline to invest in the Fund. If the Investors refuse to execute the Investor Consent, the terms of the Credit Facility will be less favorable to the Fund. The result will be an increase in the cost of credit to a Fund. In addition, the Credit Facility may no longer be made available to the Fund by the Lender. Thus, the Credit Facility structure without Investor Consent could result in an increase in the cost of financing the operations of the Fund and reduce the Investors' overall rate of return on their investments.

9. Credit Facility and Investor Consent Do Not Alter Plans' Risks. The Bank represents that the Investor Consent does not alter the Covered Plans' risk of investment in the Fund. If the Credit Facility were not provided, the Investor's Capital Contributions would be required for the Fund to make investments. The Covered Plan's Capital Commitment to the Fund is an unconditional obligation to make Capital Contributions to the Fund upon receipt of a Capital Call. Absent any malfeasance on the part of the Fund that would give rise to a defense in favor of the Covered Plan, the Covered Plan will be required unconditionally to honor a Capital Call from the Fund. The Covered Plan's payment of Capital Contributions upon receipt of a Capital Call alters the Covered Plan's risk of the Fund's malfeasance. Any malfeasance occurring prior to the Capital Call will allow the Covered Plan to raise any defenses arising from the malfeasance and refuse to honor the Capital Call. The payment of Capital Contributions upon receipt of a Capital Call subjects the Covered Plan to greater risk. If the Covered Plan later had a claim based on mismanagement or fraud by the Fund, it could not limit its risk by withholding the Capital Contributions for such investment because they would have already been made in response to earlier Capital Calls. The Covered Plan's recourse would be to sue for damages, for recovery of Capital Contributions, or other remedies.

In lieu of making Capital Calls, the Fund will enter into a Credit Facility with the Bank to obtain financing for its investments and operations. With the liquidity from the Credit Facility, the Fund can defer or forego issuing Capital Calls. Absent the Investor Consent, this reduces the Covered Plan's risk of the Fund's wrongful actions. At the time it executes the Investor Consent, the Plan has committed its capital to the Fund. Although the Covered Plan agrees in the Investor Consent to pay its Capital Commitment in the event of a Capital Call by the Agent, without counterclaim, setoff, or defense, the only circumstances under which a Capital Call to repay the Credit Facility could be required is when advances were made thereunder to the Fund, to make investments which, absent the Credit Facility, would otherwise have been made with Capital Contributions of the Investors. Therefore, the Covered Plan would not otherwise have the opportunity to refuse to honor a Capital Call based on any counterclaim, setoff, or defense, but would have to pursue available remedies to recover against the

Fund. The Covered Plan retains the right to assert any such claim or defense in a separate action. The later repayment of the Credit Facility by making Capital Calls on the Investors permits the Fund to replace the Credit Facility with Capital Contributions. Thus, the Bank states that the Plan is exposed to the same risk whether or not the Fund enters into the Credit Facility.

10. Credit Facility Will Not Generally Affect Right of Plan to Withdraw From Fund. The Bank states that the Fund's provisions concerning assignment of Capital Commitments and covenants to honor Capital Calls unconditionally will generally not affect the ability of an Investor to withdraw from the Fund. Under the Fund Agreements, Investors generally will not be able to withdraw except in limited circumstances. Such circumstances would relate to changes that would cause adverse outcomes to the Investors under applicable law. Although the Credit Facility will typically require notice of any intent to withdraw, it will not prohibit withdrawals. The Credit Facility will be structured so that, in most cases, an allocable portion of the facility will be repaid at the time of any withdrawal or the Investor's interest will be transferred to an entity that meets certain financial or legal requirements.

Under the Fund Agreements, transfers of interests in the Fund by Investors are usually also restricted. Generally, Investors will have the right to transfer their interests only with the consent of the Fund, or only to entities that meet certain financial or legal requirements that will be specified in the Fund Agreements. The Credit Facility typically requires the Fund to agree that no transfer of an Investor's interest will be made without prior written consent of the Agent, except for transfers permitted by the Fund Agreements. This provision is put in place so that the Agent will know the identity of the transferee, and is typically coupled with a requirement that repayment of an allocable portion of the Credit Facility be made in connection with the effectiveness of any transfer.

11. Benefits of Credit Facility and Investor Consent. The Bank represents that, absent the requested exemption, the economic loss resulting to the Covered Plans and their participants and beneficiaries results from the more onerous and expensive financing terms and conditions that would be required, absent the Investor Consent, for those plans to invest in these types of investment ventures. The Bank states that the types of Funds involved in the covered transactions are an important element of a large diversified

investment portfolio of a qualified plan. The advantages of investments in real estate and other investments provided through such Funds are numerous, including long-term appreciation, hedges against inflation, and cash flow from operations. However, the Bank states that to minimize the risks involved in real estate investments, investment in a large diversified limited partnership or similar entity has many advantages over direct ownership of real estate properties and other securities, including limited liability with respect to such property. Most diversified real estate and other investment programs are carried out through partnerships or limited liability companies that are substantially similar to the Funds. The \$100 million minimum net asset value of a Covered Plan makes it likely the Covered Plans will be sponsored by large businesses and will have relationships with an extensive number of service providers, investment managers, and other entities that are related to financial institutions.

Although the Agent, for the benefit of the Lenders, will receive a pledge of the Capital Commitments of the Investors, the right to make Capital Calls, and the right to collect and enforce the same, in the event of default, the Agent would be required, without the Investor Consent, to foreclose on the collateral in order to effect a Capital Call for repayment of the Credit Facility. The Investor Consent permits the Agent to avoid the delay and expense of foreclosure proceedings, and to make a Capital Call immediately on the Investors for repayment. In addition, when the Fund Agreements themselves do not contain the agreement of the Investors to make Capital Commitments without counterclaim, setoff or defense, the Investor Consent contains such agreement, and permits Lenders to be repaid for amounts that were extended to the Fund prior to the time Capital Contributions are called, without the risk of repayment being challenged or delayed by claims the Investors may have against the Fund. The Bank states that this arrangement keeps the risk of the Fund's investment transactions between the Fund and the Investors.

Thus, if the Credit Facility were not provided, the Investor's Capital Contributions would be required for the Fund to make investments. In such instances, the Investor's capital would be used to make investments, and would be immediately at risk. If the Investor later had a claim based on mismanagement or fraud by the Fund, it could not limit its risk by withholding the Capital Contributions for such investment, since those contributions

would have already been made in response to earlier Capital Calls. The Investors' recourse would be to sue for damages, for recovery of Capital Contributions, or other remedies.

The Fund will draw on the Credit Facility in lieu of making Capital Calls to fund investments. The later repayment of the Credit Facility by making Capital Calls on the Investors permits the Fund to replace the Credit Facility with Capital Contributions. Therefore, the Bank represents that the agreement in the Investor Consent to repay the Lenders without counterclaim, setoff or defense keeps the risk of Fund mismanagement or fraud between the Fund and the Investors, where it would be were the Credit Facility not in place.

The Bank represents further that no more than five (5) percent of the assets of any Covered Plan, measured at the time of the execution of an Investor Consent, may be invested in the Fund. In the case of multiple plans maintained by the same employer, or by members of a controlled group, whose assets are invested on a commingled basis (*e.g.*, through a master trust), this five (5) percent limit will be applied to the aggregate assets of the commingled entity.

12. Lender Will Not Be a Fiduciary of the Plan With Respect to Investment in the Fund. The Bank represents that, with respect to each Credit Facility covered by this proposed exemption, no Lender which will participate, including the Bank, will be a fiduciary for any of the Covered Plans in connection with their investment in the Fund. The fiduciaries for Investors that may become Covered Plans will have to satisfy the conditions set forth in Section II(B), (C), and (D) above. In this regard, this proposed exemption requires that the applicable fiduciaries provide a representation to the Bank that includes a statement that the fiduciary responsible for making the investment decision on behalf of the Covered Plan to invest in the Fund will be independent of the Lenders and their affiliates. In addition, neither the Lenders nor any of their affiliates will have any influence, authority or control over such Investor's investment in the Fund. Such letter will demonstrate that the fiduciaries responsible for investment decisions are completely independent of any Lender. Moreover, the Bank states that the independent decision of the fiduciaries of those plans that may become Covered Plans to enter into the transaction, with full knowledge of the Credit Facility and the Investor Consent, will be protective of

the rights of participants and beneficiaries of Covered Plans.

The Bank represents that because the Lenders will be generally large, national and international financial institutions, it is likely that, in any given Credit Facility, one or more Lenders will have a relationship with a Covered Plan making it a party in interest with respect to the Plan. A Lender's status as a party in interest to a Covered Plan may cause a transaction proposed herein to be a prohibited transaction under the Act, even though all relationships between the Covered Plan and the Lender will be unrelated to the transaction and do not involve any conflict of interest or opportunity for improper benefit for the Lender. The Bank states that the affected Covered Plans' fiduciaries will be sophisticated investors represented by sophisticated investment advisors. Thus, all participants and beneficiaries of the affected Covered Plans will be adequately protected with respect to the transactions described herein. Finally, the Bank states that none of the Covered Transactions will be part of an overall arrangement, agreement or understanding designed to benefit a party in interest with respect to a Covered Plan.

13. Summary. In summary, the applicant represents that the proposed transactions will satisfy the statutory criteria of section 408(a) of the Act for the following reasons:

(i) Each transaction will be on terms that are no less favorable to the Covered Plans than those which the Covered Plans could obtain in arm's-length transactions with unrelated parties;

(ii) The decision to invest on behalf of each Covered Plan, and the decision to execute an agreement for consent to the Fund's assignment to the Bank of the Fund's right to make Capital Calls, will be made by fiduciaries of the Covered Plan that are independent of, and unaffiliated with, the Lenders and the Fund;

(iii) At the time of the execution of an Investor Consent, a Covered Plan must have assets of not less than \$100 million (other than situations involving multiple plans maintained by the same employer or by members of a controlled group, whose assets are invested on a commingled basis, where this \$100 million threshold can be met by aggregating assets of the commingled entity);

(iv) Not more than five (5) percent of the assets of any Covered Plan, measured at the time of the execution of an Investor Consent, will be invested in the Fund (other than in the case of multiple plans maintained by the same employer, or by members of a controlled

group, whose assets are invested on a commingled basis, wherein this five (5) percent limit will be applied to the aggregate assets of all such commingled entities);

(v) Neither the Bank nor any Lender has any fiduciary authority of control with respect to a Covered Plan's investment in a Fund nor renders investment advice within the meaning of 29 CFR 2510.3-21(c);

(vi) The Covered Plan fiduciaries will receive from the Bank, upon request, a copy of this notice of proposed exemption and a copy of the final exemption, if granted. In addition, fiduciaries of Covered Plans will receive a copy of this proposed exemption, as published in the **Federal Register**, for Covered Transactions that occur during the period from January 1, 2003 until the date of the final exemption, if granted; and

(vii) The Bank will receive from the Covered Plan Fiduciaries a written representation that the conditions set forth in Section II(B), (C), and (D) above are satisfied for each transaction with respect to the Covered Plan for which they are fiduciaries.

**Notice to Interested Persons:** The applicant states, with regard to the Covered Transactions (as defined in Section III (D), above) for which retroactive relief is requested, that fiduciaries of Covered Plans will receive a copy of this proposed exemption, as published in the **Federal Register**, for those Covered Transactions occurring during the period from January 1, 2003 until the date of the final exemption, if granted. In addition, with respect to Covered Transactions occurring in the future, for which prospective relief has been requested, the applicant represents that such fiduciaries will be notified by publication of this notice in the **Federal Register**.

The applicant represents that because potentially interested fiduciaries of employee benefit plans that may invest in a Fund in the future cannot all be identified, the only practical means of notifying such fiduciaries is by the publication of this notice in the **Federal Register**. However, the applicant states that Covered Plan fiduciaries will receive from the Bank a copy of this notice of proposed exemption, upon request, and a copy of the final exemption, if granted.

Comments relating to this notice of proposed exemption must be received by the Department not later than 45 days from the date of publication of this notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Janet L. Schmidt of the Department, at

telephone (202) 693-8540. (This is not a toll-free number.)

**Lodgian, Inc. 401(k) Plan and Trust Agreement (the Plan) Located in Atlanta, Georgia**

[Application No. D-11180]

*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, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) and 407(a) 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, effective December 3, 2002, to (1) the past acquisition and holding by the Plan of certain warrants (the Warrant(s)) issued by Lodgian, Inc. (Lodgian), a party in interest with respect to the Plan, which would permit the purchase of new common stock (New Lodgian Stock); (2) the cancellation payment (the Cancellation Payment) by Lodgian to the Plan in exchange for the Warrants (i) at the election of active participants (ii) at the election of the terminated vested participants whose vested interests exceed \$5,000, or (iii) in accordance with the procedures for the automatic cash out of the value of Warrants held in the accounts of terminated vested participants whose vested interests are \$5,000 or less, for an amount that represents the highest value of the Warrants determined by an independent, qualified, appraiser between December 31, 2002 and the date of the individual election; (3) the sale of the Warrants from Plan participants to Lodgian to cash out active and terminated vested participants; and (4) the potential exercise of the Warrants into the New Lodgian Stock, provided that the following conditions were met:

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

(b) The Plan had no ability to affect the Plan of Reorganization filed by Lodgian on December 20, 2001 under Chapter 11 of Title 11 of the United States Code (the Bankruptcy Code), or the First Amended Plan of Reorganization, subsequently filed under the Bankruptcy Code by Lodgian on November 1, 2002 (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 acquisition 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 participants whose vested interests exceed \$5,000;

(g) The Warrants have been and will continue to be valued annually on the 31st of December by an independent, qualified, appraiser;

(h) With Respect to those Plan participants who cash out the Warrants, the value of the Warrants will be determined by 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;

(i) An independent fiduciary will monitor the Cancellation Payments, and confirm the valuation of the Warrants;

(j) Lodgian is required to purchase the Warrants upon request by a Plan participant provided that on the day of the request the price of the New Lodgian Stock is less than the exercise price of the Warrants; and

(k) If the Warrant is listed on an established trading market Lodgian is not required to purchase the Warrant from the Plan.

*Effective Date:* This exemption, if granted, will be effective as of December 3, 2002.

*Summary of Facts and Representations*

1. Lodgian is a Delaware corporation maintaining its principal place of

business in Atlanta, Georgia. Lodgian is a hotel ownership and management company, and currently operates approximately 97 hotels in the hospitality industry, nearly all of which are located in the United States. On December 20, 2001, Lodgian and 82 of its subsidiaries filed for Chapter 11 Bankruptcy protection. Reasons for the filing included excessive debt and substantial weaknesses in the hotel industry following the events of September 11, 2001. The First Amended Plan of Reorganization (POR) was filed on November 1, 2002 and confirmed by the United States Bankruptcy Court for the Southern District of New York on November 5, 2002. The POR became effective November 25, 2002.

2. As of the date of this filing, Lodgian employs approximately 7,000 employees who are eligible to participate in the Plan upon satisfying the Plan's age and service eligibility requirements. The Plan is a tax qualified defined contribution retirement plan that provides for employee pre-tax contributions under section 401(k) of the Code, and employer matching contributions under Code section 401(m). The Plan was adopted effective as of July 1, 1984 by Servico, Inc. Subsequently, Servico, Inc. and Impac Hotel Group, LLC combined their respective businesses through a series of corporate mergers that resulted in Servico and Impac becoming wholly-owned subsidiaries of Lodgian, Inc. effective as of December 11, 1998. Effective January 1, 1999, Lodgian assumed sponsorship of the Plan and changed the Plan's name to the Lodgian, Inc. 401(k) Plan and Trust Agreement. As of December 31, 2002, the Plan had total assets of approximately \$6,363,693 and 1,580 participants, including active and former employees.

The Plan permits participants to direct the investment of their Plan accounts into a variety of investment funds, including, until December 6, 2001, investment in old Lodgian stock (Old Lodgian Stock). Lodgian's matching contributions to the Plan previously were made in the form of shares of Old Lodgian Stock following the end of each plan year. The last contribution in the form of Old Lodgian Stock was made for the 2000 plan year. Matching contributions were required to remain invested in Old Lodgian Stock until December 6, 2001 when participants were permitted to direct that all or a part of the matching contributions be invested in another investment fund offered under the Plan. If a participant's own contributions were invested in Old Lodgian Stock, such investments were always permitted to be liquidated and invested in another Plan investment fund.

3. Daniel E. Ellis, Senior Vice President and General Counsel of Lodgian, also serves as the trustee of the Plan. The administrator of the Plan is Lodgian, which administers the Plan through its Administrative Committee. Lodgian, as the Plan sponsor, selects the investment funds available for participant-directed investments.

4. When the Old Lodgian Stock was cancelled in connection with the effectiveness of the POR on November 25, 2002, shareholders, including the Plan, received one share of the New Lodgian Stock for each 137 shares of Old Logian Stock, along with the Warrants to purchase a share of New Lodgian Stock. The New Lodgian Stock and Warrants were deposited into the Plan's trust on December 3, 2002. For each 1,000 shares of Old Lodgian Stock, a shareholder received the following Warrants:

Type of warrant	Number of warrants	Warrant exercise price per share of New Lodgian Stock	Expiration date of warrant
Class A .....	8	\$18.29	11/25/07
Class B .....	27	25.44	11/25/09

Under the POR, the Plan received 9,096.0370 Class A Warrants and 28,108.2435 Class B Warrants. The Warrants are not traded on an exchange, and there are no plans for such trading. A total of approximately 7,000,000 shares of New Lodgian Stock are available for issuance to shareholders of which approximately 6,600,000 shares have been issued to date. The Plan held 7,509.169 shares of New Lodgian Stock

as of December 31, 2002, which was approximately 0.11% of the approximately 7,000,000 shares of New Lodgian Stock expected to be issued. The Plan's 7,509.169 shares of New Lodgian Common Stock represent approximately 0.39% of the fair market value of the total assets of the Plan on December 31, 2002. As of that date, New Lodgian Stock was held in the individual accounts of 836 participants.

Accordingly, as of December 31, 2002, 836 participants have an interest in the Warrant Funds. Currently 754 participants have an interest in the Warrant Funds. Currently, the cash value of Warrants distributed this far to terminated vested participants totals \$389.41, ranging in amount from \$.02 to \$31.52 per participant.

5. Shares of Old Lodgian Stock were traded on the New York Stock Exchange

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.<sup>7</sup> 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.<sup>8</sup>

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

<sup>7</sup> 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.

<sup>8</sup> 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.

participants whose vested interests exceed \$5,000;

(g) The Warrants have been and will continue to be valued annually on the 31st of December by an independent, qualified, appraiser;

(h) The value of the Warrants will be determined by 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; and

(i) An independent fiduciary will monitor the Cancellation Payments, and confirm the valuation of the Warrants;

(j) Lodgian is required to purchase the Warrants upon request by a Plan participant provided that on the day of the request the price of the New Lodgian Stock is greater than the exercise price of the Warrants; and

(k) If the Warrants are listed on an established trading market, Lodgian is not required to purchase the Warrants from the Plan.

*Notice to Interested Persons:* Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by Lodgian and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

*For Further Information Contact:*

Khalif Ford of the Department, telephone (202) 693-8563 (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 or 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 24th day of September, 2003.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Employee Benefits Security Administration,  
Department of Labor.*

[FR Doc. 03-24595 Filed 9-26-03; 8:45 am]

**BILLING CODE 4510-29-P**

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## MARINE MAMMAL COMMISSION

### Sunshine Act Notice

**TIME AND DATE:** The Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals will meet to discuss Commission administrative matters on Monday, 20 October, 2003, from 8:30 a.m. to 5 p.m. The Commission will meet in executive session on Tuesday, 21 October, 2003 from 8:30 a.m. to 12 p.m. Sessions of the Commission and the Committee's Annual Meeting related to marine mammal conservation will be held on Tuesday, 21 October, 2003, from 1 p.m. to 5:30 p.m., on Wednesday, 22 October, 2003, from 8:15 a.m. to 5:30 p.m., and on Thursday, 22 October, 2003, from 8:15 a.m. to 1 p.m.

**PLACE:** The Newport Harbor Hotel and Marina, 49 America's Cup Avenue, Newport, Rhode Island 02840; telephone (401) 847-9000; fax (401) 849-6380.

**STATUS:** The executive session will be closed to the public. At it, matters relating to international negotiations in process, personnel, and the budget of the Commission will be discussed. All other portions of the meeting will be

open to public observation. Public participation will be allowed as time permits and as determined to be desirable by the Chairman.

**MATTERS TO BE CONSIDERED:** The Commission and Committee will meet to discuss a broad range of marine mammal matters. While subject to change, major issues that the Commission plans to consider at the meeting are the status of large whales along the U.S. North Atlantic coast, including ongoing and planned research, the Atlantic Large Whale Take Reduction Plan, and ship collisions with North Atlantic right whales; the status of bottlenose dolphins along the U.S. East Coast; issues related to interactions between marine mammals and fisheries; a review of take reduction teams; issues related to strandings of marine mammals; issues related to marine mammal permits; and other matters. A more detailed agenda can be found on the Commission's Web site, <http://www.mmc.gov>.

**FOR FURTHER INFORMATION CONTACT:** David Cottingham, Executive Director, Marine Mammal Commission, 4340 East-West Highway, Room 905, Bethesda, MD 20814, (301) 504-0087.

Dated: September 25, 2003.

**David Cottingham,**

*Executive Director.*

[FR Doc. 03-24672 Filed 9-25-03; 10:09 am]

**BILLING CODE 6820-31-M**

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## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (03-116)]

### Notice of Prospective Patent License

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of prospective patent license.

**SUMMARY:** NASA hereby gives notice that Regenotech, Inc., of Sugar Land, TX, has applied for a partially exclusive license to practice the inventions described and claimed in U.S. Patent No. 6,485,963, "Growth Stimulation of Biological Cells and Tissue by Electromagnetic Fields and Uses Thereof; U.S. Patent No. 5,153,132, entitled "Three-Dimensional Co-Culture Process;" U.S. Patent No. 5,153,133, entitled "Method for Culturing Mammalian Cells in a Horizontally Rotated Bioreactor;" U.S. Patent No. 5,155,034, entitled "Three-Dimensional Cell to Tissue Assembly Process;" U.S. Patent No. 5,155,035, entitled "Method for Culturing Mammalian Cells in a