DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11183, et al.]

Proposed Exemptions; Notice of Proposed Individual Exemption Involving the Plumbers & Pipefitters National Pension Fund (the Fund)

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 (ERISA or 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–5700, 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.

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11183]

Notice of Proposed Individual Exemption Involving the Plumbers & Pipefitters National Pension Fund (The Fund) Located in Alexandria, VA

Proposed Exemption

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (b)(2) 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 June 5, 2001, to the transactions described below involving the receipt by Diplomat Properties, Limited Partnership (DPLP or the Partnership) of certain services and products from the hotel management company, Westin Management Company East (after January 12, 2006, Westin Hotel Management, L.P.) (referred to collectively with its parent company, Starwood Hotels & Resorts Worldwide, Inc., as Starwood) and certain related entities (Related Companies), retained to operate the Partnership's principal asset, the Westin Diplomat Resort & Spa and the Diplomat Country Club and Spa (collectively, the Resort), provided that there is adherence to the material facts and representations contained in the Application and satisfaction of the applicable requirements described in Parts II and III below.

I. Exemption Transactions

(a) The provision of Centralized Services or Additional Services (collectively, the Proposed Services) to the Resort by Starwood or a Related Company;

(b) The purchase of goods from Starwood or a Related Company in connection with the provision of Centralized Services or Additional Services (Purchase of Goods); and

(c) The participation of the Resort in the Associate Room Discount Program (ARD Program).

II. General Conditions

(a) LaSalle, CHM or a successor independent QPAM for the Partnership, will represent the interests of the Partnership for all purposes with respect to the Proposed Services and the Purchase of Goods for the duration of the arrangement. The QPAM, on behalf of the Partnership, through negotiation and execution of the Operating Agreements and periodic monitoring of the Proposed Services and the Purchase of Goods, determines that:

(1) Starwood's provision of Centralized Services and Additional Services to the Resort is in the best interests and protective of the participants and beneficiaries of the Plumbers & Pipefitters National Pension Fund (the Fund).

(2) The terms under which the provision of Centralized Services and Additional Services are provided by Starwood to the Resort are at least as favorable to the Resort as those which the Partnership could obtain in arm's length transactions with unrelated parties in the relevant market;

(3) The overall cost of services and products charged by Starwood to the Resort on a centralized basis is consistent with the amounts charged by other potential branded operators; and

(4) The Centralized Services and Additional Services made available by Starwood and its affiliates are provided at prices and on terms at least as favorable to the Partnership as are available in the relevant market from

unrelated parties and reflect the same prices and terms as are offered by Starwood and its affiliates to other properties managed by Starwood and its affiliates in the ordinary course of business.

(b) Under the Operating Agreements, at all times that the Partnership is using Centralized Services and Additional Services, Starwood has acknowledged in writing:

(1) Starwood's fiduciary status under section 3(21)(A) of the Act, with respect to the Resort; and

(2) Starwood's indemnification of the Partnership with respect to any claims, demands, actions, penalties, suits and liabilities arising from Starwood's breach of fiduciary duty or violation of the Act.

(c) On an annual basis, the QPAM, on behalf of the Partnership, approves the participation of the Resort in Centralized Services and Additional Services as part of its approval of the Resort's Annual Operating Plan.

(d) During any year, subject to exceptions for certain Variable Expenses or Uncontrollable Expenses, Starwood does not, without the approval of the QPAM, incur any cost or expense or make any expenditure with respect to Centralized Services or Additional Services that would: (i) Cause the total expenditures for any line item in the Annual Operating Plan that includes payment of fees for Centralized Service or Additional Services to exceed the budgeted expense for that line item by more than 10%; (ii) cause total expenditures for any department of the Resort that pays fees for Centralized Service or Additional Services to exceed the budgeted expenses for that department by more than 5%; or (iii) cause the actual aggregate expenditures for operating expenses or capital expenditures to exceed the budget by more than 2%.

(e) All purchases of products and services by Starwood from (i) itself, (ii) any person or entity directly or indirectly controlling, or controlled by, or under common control with Starwood, or (iii) any entity in which Starwood or its affiliates have any ownership, investment or management interest or responsibility are first approved by the QPAM (as part of the approval of the Annual Operating Plan or otherwise), except in cases of purchases of not more than $50,000 per annum where the price paid or charged for each such purchase and the terms thereof are lower than those that could be obtained from unrelated third parties in the applicable location.

(f) The QPAM approves (as part of the approval of the Annual Operating Plan or otherwise) all contracts for Additional Services (and, to the extent applicable, Centralized Services) that provide for aggregate annual expenditure or revenue of more than $50,000 or have a term of more than one year.

(g) The fees charged to the Resort for Centralized Services can be increased only on a system-wide basis (*i.e.*, not just for the Resort).

(h) The fees for Centralized Services are not greater than the lowest of: (i) the fees initially agreed upon by the parties in the Operating Agreement; (ii) Starwood's prevailing fee for the services or products as generally charged by Starwood or its affiliates to other properties managed by it; (iii) Starwood's cost, with no profit or mark-up (although it may include overhead); or (iv) 5% of gross revenues (exclusive of certain occupancy-related charges, such as third-party reservations fees and frequent guest program charges) of the hotel or country club, as applicable.

(i) Starwood does not, with respect to any Centralized Service or Additional Service, solicit bids for the product or service in a manner that could result in a ''right of first refusal'' or other bidding advantage for the benefit of Starwood or its affiliates.

(j) The QPAM, on behalf of the Partnership, has the right to opt out of any Centralized Services and to elect not to receive any Additional Services.

(k) The QPAM, on behalf of the Partnership, retains the right to conduct audits of transactions entered into by Starwood with respect to Centralized Services and Additional Services, and, in the event that an audit uncovers a discrepancy related to any payment to Starwood or its affiliates, it must be corrected within ten days of notice being provided.

(l) As part of its monitoring responsibilities, the QPAM, on behalf of the Partnership, has the right to meet with representatives of Starwood no less frequently than monthly (and otherwise at the request of the Partnership) for the purposes of reviewing each Annual Operating Plan, preparing, reviewing and updating rolling three-month forecasts for the Resort, and analyzing Starwood's actual performance against the Annual Operating Plan and the performance of the Resort relative to an applicable competitive set of resorts.

(m) The QPAM, on behalf of the Partnership, retains the right to receive monthly interim and annual accounting reports that include a comparison of actual to budgeted expenses, and to have such reports audited by an independent accounting firm not more than once in any fiscal year.

III. ARD Program Conditions

(a)(1) Rooms are not made available to employees or associates of Starwood or a Related Company pursuant to the Associate Room Discount Program if the rooms could otherwise be sold to the public at a higher rate; and

(2) In each case, the discounted rates fully cover the variable cost to the Resort for the use of the room and the cost to the Resort of the food, beverage and amenities.

(b) Participation in the Associate Room Discount Program is offered by Starwood at all of its owned properties and properties that it manages.

(c) The QPAM, acting on behalf of the Partnership, monitors the Resort's participation in the Associate Room Discount Program and retains the right to opt out of the Associate Room Discount Program.

IV. Definitions

(a) The term ''Partnership'' means Diplomat Properties, Limited Partnership whose principle asset is the Resort. The Plumbers & Pipefitters National Pension Fund (the Fund) is the sole member of Diplomat Properties, LLC, the General Partner of the Partnership. The QPAM is a non-member manager of the General Partner.

(b) The term ''QPAM'' means LaSalle Investment Management, Inc. (LaSalle), Capital Hotel Management, LLC (CHM) or a successor qualified professional asset manager (as defined in section V(a) of Prohibited Transaction Class Exemption 84–14 at 49 FR 9494, March 13, 1984), as amended at 71 FR 5887 (February 3, 2006) or such other entity that is permitted by a U.S. Department of Labor individual exemption to function with powers similar to that of a qualified professional asset manager, that is exercising discretionary authority on behalf of the Fund with respect the activities of the Partnership and the Resort.

(c) The term ''affiliate'' means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner of any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(d) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(e) The term ''Related Company'' means wholly or partially owned affiliates of Starwood (including, without limitation, affiliates of Starwood that are parties in interest by virtue of section 3(14)(G), (H) or (I) of the Act or disqualified persons by virtue of sections 4975(e)(2)(G), (H), or (I) of the Code) or affiliates or other entities in which Starwood has an ownership or other contractual interest.

(f) The term ''Additional Services'' means any service or product other than Centralized Services: (1) Which is provided to the Resort by Starwood or a Related Company and is typically provided by Starwood or a Related Company on a property by property basis to properties operated by Starwood or an affiliate; and (2) for which Starwood or a Related Company receives a fee for providing such service or product that is based on the level of usage by the Resort.

(g) The term ''Annual Operating Plan'' means the annual written operating plan submitted by Starwood to the Partnership no later than 90 days before the commencement of each fiscal year, which plan shall include monthly estimates and cover the operating budget (including departmental revenue and expenses, taxes, insurance and reserves), the capital budget, the marketing plan, the advertising program, working capital requirements, litigation and any other matter reasonably deemed appropriate by the QPAM, on behalf of the Partnership.

(h) The term ''Associate Room Discount Program'' means the program maintained by Starwood with the approval of the QPAM pursuant to which discounted room rates and discounted food, beverage and other amenities at participating hotels are provided for Starwood associates or associates of participating Starwood franchise hotels worldwide and their immediate family.

(i) The term ''Centralized Services'' means any service or product, including (without limitation) certain advertising, marketing and promotional activities (including frequent guest programs), reservations and distribution systems and networks, training and similar items, provided that: (i) The service or product is provided to the Resort by Starwood or a Related Company and is typically provided by Starwood or a Related Company on a central, regional, chain or brand basis, rather than specifically at an individual property; and (ii) Starwood or a Related Company receives a fee for providing the service or product that is based on the level of usage by the Resort.

(j) The term ''Operating Agreements'' means, collectively, the parallel operating agreements, executed on June 5, 2001, between LaSalle and Starwood, as amended, to brand and operate the Resort's convention hotel as the ''Westin Diplomat Resort and Spa,'' and to brand and operate the country club as ''The Diplomat Country Club and Spa,'' as part of Starwood's Luxury Collection, and any successor operating agreements that may be in effect between the parties or successor parties from time to time.

(k) The term ''Variable Expense,'' as set forth in the Operating Agreements, means operating expenses covered by the then-current Annual Operating Plan that reasonably fluctuate as a direct result of business volumes, including food and beverage expenses, other merchandise expenses, operating supply expenses, and energy costs.

(l) The term ''Uncontrollable Expenses,'' as set forth in the Operating Agreements, means certain expenses the amount of which cannot be controlled by Starwood, which expenses include, without limitation, real estate taxes, utilities, insurance premiums, license and permit fees and charges provided in contracts entered into pursuant to the Operating Agreement, provided, that Starwood agrees to use commercially reasonable efforts to mitigate the expenses under such contracts; and the QPAM, on behalf of the Partnership, agrees that Starwood shall have the right to pay all Uncontrollable Expenses without reference to the amounts provided for in respect thereof in the approved Annual Operating Plan.

Summary of Facts and Representations

1. The Application for this proposed exemption is submitted by LaSalle Investment Management, Inc. (LaSalle), as qualified professional asset manager (QPAM) for, and on behalf of, the Plumbers & Pipefitters National Pension Fund (the Fund). By letter dated April 30, 2006 (LaSalle Letter), LaSalle informed the Department that as of April 30, 2006, LaSalle was replaced by Capital Hotel Management, LLC (CHM) as the QPAM for the Fund.[1] The Fund is a Taft-Hartley, multi-employer, defined benefit pension fund, as defined in section 3(37) of ERISA. The Fund is funded solely by employer contributions negotiated under collective bargaining agreements with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (the Union). The Fund is administered by the Board of Trustees of the Fund (the Board), which has six individual members, three of whom are appointed by employers who contribute to the Fund, and three of whom are appointed by the Union. By letter dated July 14, 2006 from CHM to the Department (CHM Letter), CHM stated that as of July 1, 2005, the Fund had 66,513 active participants, 17,697 terminated vested participants and 37,062 retirees and beneficiaries in pay status. As of July 1, 2006, the Fund had approximately $4.295 billion in total assets.

2. The Application states that on August 19, 1997, the Union entered into a contract to acquire the Resort and related property from an unaffiliated third party (a wholly owned subsidiary of Union Labor Life Insurance Company). In late September 1997, the Union caused the Partnership and its general partner, Diplomat Properties, Inc. (the General Partner), to be organized, with the Union as the initial sole limited partner of the Partnership and the sole owner of Diplomat Properties, Inc. The Partnership was assigned the right to acquire the Resort and arranged to borrow $40 million from a third-party lender to fund the acquisition of the Resort and such related property. On October 7, 1997, the Union assigned its interests in both the Partnership and its General Partner to the Fund, in exchange for the Fund's agreement to make a capital contribution to the Partnership of $40 million plus certain costs incurred by the Union in connection with the acquisition of the Resort and related property. On October 9, 1997, the Partnership acquired the Resort from the third party seller for a purchase price of approximately $40 million (plus reimbursement of certain expenses to the Union); it thereupon repaid the loan from the third party lender. As a result, the Fund became the indirect owner of the Resort. The LaSalle Letter noted that ''the Fund paid off the $40 million bank loan. That $40 million paid by the Fund was treated as a capital contribution by the Fund to the Partnership.''

The Fund applied for an exemption from the prohibited transaction provisions of ERISA and the Code, on October 3, 1997 for the acquisition of the Resort. On November 15, 1999, the Department granted PTE 99–46, at 64 FR 61944, which provided conditional relief for the Fund's acquisition of the Resort from the Union. Additional undertakings agreed to by the Fund, pursuant to an October 13, 1999 Term Sheet, were incorporated by reference into PTE 99–46. The Fund agreed to the appointment of Actuarial Sciences Associates (ASA) as the independent named fiduciary of the Fund's account that holds the interests in the Partnership, the General Partner and

[1] See below for information on the April 30, 2006 appointment of CHM as QPAM for the Fund.

other assets of the Fund invested in, or awaiting investment in, the Resort (the Diplomat Account). ASA's responsibilities were subsequently assumed, with the Department's approval, by its wholly owned subsidiary, ASA Fiduciary Counselors, Inc. (ASA Counselors). ASA Counselors resigned its appointment, effective as of November 3, 2000.

On September 12, 2000, the Board and Independent Fiduciary Services, Inc. (IFS) entered into an Independent Named Fiduciary Agreement (the IFS Agreement), the terms of which were reviewed and approved by the Department prior to its execution, pursuant to which IFS was appointed, effective as of November 3, 2000, as the successor independent named fiduciary of the Fund with respect to the Diplomat Account. A more complete description of the general background and history of the development of the Resort is set forth in the Department's grant of PTE 2001–39 at 66 FR 53439, October 22, 2001 (PTE 2001–39), providing relief to IFS which is similar to the relief provided under Prohibited Transaction Class Exemption 84–14 at 49 FR 9494, March 13, 1984 (PTE 84–14).

3. In September 2002, the Department filed a lawsuit entitled *Chao* v. *Maddaloni, et al.*, Case No. 02–61289, in the United States District Court for the Southern District of Florida, in which the Partnership and the Fund trustees were named as defendants. The relevant facts are set forth in the Complaint filed in such action by the Department alleging that the trustees failed to prudently manage and invest the Fund's assets through their involvement in the Resort project. The suit arose from the Fund's acquisition and development of the Resort project, beginning in 1997. The Secretary alleged that the trustees acted imprudently and without regard to the Fund participants' interests in entering into, and continuing the project, specifically by failing to obtain, prior to the expenditure of Fund assets, necessary analyses for the evaluation of the economic feasibility of the project, failing to determine the Fund's rate of return, or risk, on the investment, failing to evaluate the qualifications and experience of various contractors with whom they entrusted discretionary authority with respect to the disposition of Fund assets, and paying excessive and unreasonable fees and expenses to the contractors. In August 2004, the parties signed a final Consent Order resolving the claims contained in this action.[2] Prior to the Fund's retention of IFS, the Department notified the Partnership that it had begun an investigation of the use of the Fund's assets in the development of the Resort.[3]

4. The Applicant represents that, pursuant to IFS's authority as independent named fiduciary, and after an extensive due diligence process, which involved issuing a comprehensive request for proposal to numerous major real estate investment managers and personal interviews with several finalist candidates, IFS appointed LaSalle, effective December 14, 2000, pursuant to a comprehensive discretionary investment management agreement (the QPAM Agreement), to serve as the QPAM for the Diplomat Account, with broad discretionary powers to manage the Diplomat Account.

The Application notes that LaSalle, a member of the Jones Lang LaSalle group (JLL), is a leading global real estate investment manager with approximately $21.5 billion of public and direct real estate assets under management. LaSalle represents many of the world's largest and most sophisticated institutional investors, has expertise in the management of all major real property types (including hotels) and frequently acts as an ERISA fiduciary and QPAM for its clients. Various divisions of JLL have assisted (and will continue to assist) LaSalle in connection with the Resort, subject to LaSalle's supervisory authority. Since its appointment, LaSalle has become integrally involved in all aspects of the Diplomat Account, and has made all of the business, operational and fiduciary decisions for the Diplomat Account, pursuant to the QPAM Agreement (subject to the oversight or approval of IFS, as appropriate). The fees of IFS are paid by the Fund; the fees of LaSalle are paid by the Partnership.

In April 2003, Diplomat Properties, Inc. was converted to its present form, a limited liability company, and it is now known as Diplomat Properties, LLC (DPLLC). The Fund is the sole member of DPLLC, and both IFS and LaSalle are non-member managers of DPLLC. DPLLC remains the General Partner of the Partnership (DPLP).

5. The Resort, located in the cities of Hollywood and Hallandale Beach, Florida, was initially constructed in the late 1950s and consisted of several parcels. The original Diplomat Hotel operated as a premier hotel and country club catering to the middle-income convention trade, but has been closed since 1992. Since their appointment, IFS and LaSalle have overseen the continuing development and initial operation of the Resort, including the construction, development and opening of a destination resort with multiple operating components, including a 998-room ocean-front convention hotel with multiple food and beverage outlets and recreational facilities, a 217,000 square-foot convention center, two marinas, a country club (with 60 guest rooms, approximately 8,000 square feet of meeting space, and a clubhouse), a 30,000 square-foot spa, an 18-hole golf course and a tennis center.

6. The Application states that the process of selecting a third-party operator for the Resort formally commenced on or about April 1, 2000, at which time Hotel Investment Partners (HIP), a hotel consulting firm selected by ASA, sent a request for proposal to potential operators. Upon its retention in December 2000, LaSalle reviewed the documentation collected in connection with HIP's initial search for an operator. LaSalle determined that it should conduct further analyses and reach its own conclusions regarding the appropriate operator for the Resort because, among other things, it found, as had IFS, that the initial process was not sufficiently organized or documented. During the first few months of 2001, IFS and LaSalle spent a significant amount of time and effort conducting due diligence and a competitive bidding process for the selection of a world-class branded hotel operator for the Resort.

LaSalle performed a comprehensive review of the relevant issues, with the assistance of its affiliate, Jones Lang LaSalle Hotels (JLL Hotels) (a hotel advisory group staffed by lodging industry professionals experienced in hotel operations, hotel asset management and hotel transactions, including financing), and in coordination with IFS and its consultant, Strategic Hospitality Advisors (a hospitality consultant that regularly advises institutional clients on

[2] The Application states that LaSalle has been informed that the Fund is the successor to the former Sabine Area Pipefitters Local No. 195 Pension Trust Fund, which was involved in the correction of a 1988 prohibited transaction that had occurred before the former Local 195 Pension Fund merged into the Fund in 1990. IFS has further been informed that the correction of the prohibited transaction did not involve any assets of the Fund except to the extent that the Local 195 Joint Apprenticeship Committee was assessed first tier excise taxes under section 4975 of the Code for its use of assets of the former Local 195 Pension Fund.

[3] Although the Department has requested documents relating to various aspects of the Resort's development and operation, LaSalle states that it is unaware of any investigation or enforcement action that is targeted at the retention of Starwood or its provision of services and/or products to the Resort.

the investment characteristics of hotel and resort properties, including feasibility, acquisition, planning, design, construction, operation and disposition of hotels and resorts) (SHA). Based on such review, LaSalle concluded that the retention of a third-party operator for the Resort was an important component to securing any necessary financing and ensuring that the Fund's investment in the Project will be managed in a profitable and professional manner. LaSalle further concluded that the Partnership should consider retaining a major operating company that has a significant internal infrastructure and global marketing resources.

The Application notes that, in light of these conclusions, LaSalle then distributed a second, very detailed request for proposal to ten hotel operating companies, which companies then competed for the right to manage the Resort. The selected candidates included many of the larger international hotel operating companies, including several brands. After a detailed analysis of each candidate's written response to the request for proposal and a comprehensive analysis of the performance of the candidates' comparable properties, LaSalle concluded that, given the Resort's size, location and recent history, the selected operator should have a strong brand, including a marketing program, a group sales network and global distribution and reservations systems, in order to maximize revenues throughout the year in an area of the country (south Florida) primarily known as a seasonal destination.

This conclusion was based in part on the fact that, while there are large-scale independent resort hotels in south Florida that operate successfully without the benefit of an operator's brand, those resorts are located in the more primary, upscale destinations of Boca Raton, Palm Beach and Miami and, in most instances, are established hotels that have been operating for many years. In addition, outside the key destination markets, such as Orlando, New York, Los Angeles and Chicago, there are, according to JLL Hotels, only eight independent hotels with over 800 rooms. In fact, LaSalle observed that all recently opened hotels over 1,000 rooms have been affiliated with a branded ''chain.''

Through a rigorous interview process, coupled with a detailed analysis of each candidate's written response to the request for proposal and a comprehensive analysis of the performance of the candidates' comparable properties, the original field of ten was then narrowed to three major operators—Starwood, Marriott International and Hyatt. Further interviews and negotiations with each of these three operator candidates, including an on-site review of the Resort by each company and a review of their comments to a proposed operating agreement, resulted in the selection of Starwood and Marriott International as finalists for negotiation. Following meetings with each of these companies and their counsel to review their comments on the proposed operating agreement, LaSalle selected Starwood, through its operating subsidiary, Westin Management Company East (effective as of January 12, 2006, Westin Management Company East assigned its interest in the Operating Agreements (described below) to Westin Hotel Management, L.P., a wholly-owned subsidiary of Starwood Hotels & Resorts Worldwide, Inc.) (Westin), as the candidate of first choice.

Starwood is one of the world's preeminent international hotel owners and operators (with brands including St. Regis, W Hotels, Westin and Sheraton). Among other items considered by LaSalle in selecting Starwood was LaSalle's conclusion that the overall cost of services and products offered by Starwood on a centralized basis was consistent with the amounts charged by other potential operators.

7. The Application represents that following extensive negotiations with Starwood, on June 5, 2001, LaSalle, on behalf of the Partnership (Owner), and Starwood (Operator) signed parallel operating agreements (collectively, the Operating Agreements) to brand and operate the Resort's convention hotel and spa as the ''Westin Diplomat Resort and Spa'' and to brand and operate the country club as ''The Diplomat Country Club and Spa,'' as part of Starwood's Luxury Collection. In the Operating Agreements, Starwood specifically acknowledged, represented and warranted that it is a ''fiduciary,'' as defined in section 3(21)(A) of ERISA, with respect to the Resort and all assets of the Fund subject to the Operating Agreements, and that it is not subject to any of the disqualifications described in section 411 of ERISA.

The Applicant asserts that the 15-year term of each of the Operating Agreements evidences Starwood's significant, long-term business and financial commitment to the Resort. The Operating Agreements required Starwood to provide up to $4 million to pay for various pre-opening expenses. The Application states that Starwood also agreed to provide loans to the Resort (without recourse to the general assets of the Fund, other than the Diplomat Account) to fund, among other things and subject to certain conditions, up to $11.75 million in operating cash flow shortfalls at any given time and up to $50 million for debt service shortfalls at any given time.

8. The Application states that Starwood, like other national or international branded hotel operating companies, provides many of its services and products through itself or through wholly or partially owned affiliates (including, without limitation, the Starwood ERISA Affiliates [4] or other entities in which Starwood has an ownership interest (all such affiliates or other entities referred to herein as the Related Companies).[5] Many of these services and products, such as certain advertising, marketing and promotional activities (including frequent guest programs), reservations and distribution systems and networks, training and the like, are typically provided on a central, regional, ''chain'' or ''brand'' basis, rather than specifically at a property (such services and products referred to herein as Centralized Services). Other

[4] The parties in interest are Starwood Hotels & Resorts Worldwide, Inc., its wholly owned subsidiary, Westin Management Company East, and certain related entities that, because of their relationship with Starwood, are parties in interest by virtue of sections 3(14) (G), (H) or (I) of ERISA or disqualified persons by virtue of sections 4975(e)(2) (G), (H), or (I) of the Code (Starwood ERISA Affiliates).

[5] The Application notes that Starwood has disclosed to the Fund that its corporate and operating structure includes divisions or departments within Starwood or its operating subsidiary Westin Management Company East and a variety of affiliates that regularly deal with Starwood's network or ''chain'' of branded properties to provide both ''centralized'' services and products and regular, property-specific services and sources of supply. As operator of the components of the Resort, Starwood has presented an operating plan that will include obtaining certain products and/or services for the Resort (including the Centralized Services and Additional Services defined below) from Starwood, its affiliates and other Related Companies, subject to all the restrictions in the applicable Operating Agreement.

In the LaSalle Letter, LaSalle further explained that the Applicant is requesting an exemption in order to permit Starwood to contract on behalf of the Applicant with any entity in which Starwood has an interest which arguably might affect its independent judgment. Because of the many and diverse entities in which Starwood from time to time has an economic interest and which are included in its operating programs, it is not feasible to break down the various types of relationships or to speculate how large an economic interest would have to be to create a prohibited transaction. Therefore, in order to cover all parties in which Starwood has an interest that might arguably affect its judgment, Starwood includes all entities in which it has an investment, even if the investment is very minor, as ''Related Companies.'' The references to ''ERISA Affiliates'' and ''subsidiaries'' are descriptive only and not meaningful to the Applicant because they are included in the larger group of ''Related Companies'' for which relief is requested.

services or products (the Additional Services) are provided by Starwood or Related Companies on a property by property basis to properties operated by Starwood.[6] Starwood has informed LaSalle that, where that is the case, these Additional Services are offered to properties owned and operated by Starwood, as well as to properties operated, but not owned, by Starwood (such as the Resort); in each case on the same basis.

The Application provides the following list of entities in which Starwood owns a minor equity interest and with which the Resort may enter into arrangements for products or services: LastMinute.com—On-line provider of last-minute travel and entertainment packages.

Plansoft Corporation—On-line meeting planning company that provides meeting planning and technology and services including the listing of basic meeting information on Starwood hotels.

Brightware—Software licensor of e-mail automation and interactive one-to-one marketing solutions.

Worldres—On-line Internet reservation network service provider for hotels and other lodging establishments that allows end-users to check availability and make real-time reservations.

Big Vine—On-line business-to-business barter marketplace.

Site 59.com Inc.—On-line provider of last-minute travel and entertainment packages.

Classwave Wireless Inc.—Canadian company with a global strategy to transform the delivery of data to and from mobile devices.

StarCite Inc.—On-line meeting planning company that provides meeting planning and technology and services including the listing of basic meeting information on Starwood hotels.

Hotel Distribution Systems LLC—Joint venture to create a stable, low cost, high quality online distribution outlet for the services and products of its members currently consisting of Starwood, Hilton Hotels Corporation, Marriott International Hotels, Inc. Six Continents Hotels, Inc. and Pegasus Solutions, Inc.

The Application notes that although the foregoing identifies the types of arrangements that Starwood currently expects to enter into with itself and Related Companies with respect to the Resort, it is possible that, due to changing business needs, other arrangements with these or other Related Companies will be consummated subject to the terms of the Operating Agreements.

9. The Applicant states that the primary services and products provided by Starwood and its affiliates are classified as Centralized Services. In some cases, the products provided by Starwood and its affiliates (with respect to both Centralized Services and Additional Services) are incidental to the services it provides; in others they are not. Centralized Services, and the fee structure applicable thereto, were set forth in the Operating Agreements negotiated and executed by LaSalle for the Resort and were, therefore, approved by a QPAM. Changes to services and products or fees are presented to and approved, if applicable, by LaSalle in connection with the annual budget process (as described below). In addition, the amount of fees for Centralized Services is limited as described above to, among other limitations, the cost incurred by Starwood and its affiliates with no mark-up or profit. The Application provides a description of the Additional Services, Centralized Services and fees proposed in connection with the Operating Agreements.[7] The Partnership (through LaSalle) has the right to opt out of any Centralized Service.

The Applicant provides that Centralized Services for which fees are payable to Starwood and affiliates include the following major components:

Reservations Services, for which there are fees based on gross room revenue and per room charges, plus additional fees for specialized services.

Frequency Programs, which are the preferred guest programs and airline programs used to increase loyalty to the Starwood brands. Fees are a percentage of qualified charges[8] plus usage fees for training, program materials, program audits, bonus points and customer service.

Sales and Marketing Services, for which there is a fee based on gross revenues plus certain specified transaction based fees.

Human Resources, which provides administration of employee benefits and payroll for the Resort for a per capita and per check fee respectively.

Information Technology, which includes the Integrated Property System, which is the standard and mandated property management system for all Starwood hotels and resorts; the Starwood SAP Accounting System; Technology Management Services; Revenue Management Services, and Network Services. Oracle has been selected as Starwood's database for all future systems, including StarwoodONE, the Starwood company portal. In order to use StarwoodONE (and any of the following systems: Opera PMS, Starwood Customer Relationship Marketing System, Topline Prophet, and Rate Shopper), the Resort must participate in the Starwood Enterprise Oracle License Program, either through a purchase of the right to use the licenses or payment of an annual user fee.

The Application notes that, in addition, it will become mandatory over the next few years for all Starwood hotels to offer high-speed Internet services in accordance with Starwood's Broadband Standards. Broadband refers to the technology infrastructure that delivers large amounts of data, voice and video over a network. There are two components to the Broadband Standards—the Guest Portal Standards and the Broadband Technology Standards. The Starwood Broadband

[6] Starwood subsidiaries that may be involved in the provision of the Centralized Services and Additional Services to the Resort include the following: Galaxy Hotel Systems LLC; Westel Insurance Company; Westin Payroll Company; Westin Management Company East; Global Connextions, Inc.; and Starwood Reservations Corporation. LaSalle notes that, as used in the Application, the term ''subsidiary'' refers to entities that are majority owned by Starwood; however, this distinction is not meaningful because the Application covers transactions with all Related Companies, which is a broader term that encompasses minority subsidiaries.

[7] The Fund notes that due to the ever changing nature of the hospitality business, it is anticipated that services and products (whether Centralized Services or Additional Services) may be added, discontinued or modified from time to time in the future, subject to the limitations and LaSalle's rights to approve any such changes as described in the Operating Agreements.

[8] In the LaSalle Letter, LaSalle explained that ''qualified charges'' are charges on the guest's room account based on the U.S. dollars or equivalent spent on eligible room rate, food and beverage, direct dialed telephone, laundry/valet, and in-room movies only. Qualified charges also include food and beverage charges of US$10 or more in participating Starwood dining outlets, even if the guest is not a registered guest. Other charges such as parking, business center, retail stores, greens fees, etc., as well as taxes, gratuities, service charges and other applicable charges, such as energy charges, resort fees, etc, are not qualified charges. Banquet or meeting room charges billed back to a member's room are not qualified charges. Amounts earned or accrued for charges master-billed or paid by wholesale rates including WFNR, and all other rates from pre-paid channels, such as but not limited to, priceline.com, expedia.com, hotels.com, hrn.com, hotwire.com, lastminute.com, site59.com, etc. tour or tour operator or other vouchers or for certain other discounted rates including, without limit, airline vouchers or for certain other discounted rates are also not qualified charges. Charges from tour operator rates; wholesaler rates; stays longer than 30 days, Free Night Awards, TAED rates; room rates billed to master account, crew room rates, and employee rates are not qualified charges.

Guest Portal is the customer access point to the Internet and is a mandatory Westin standard requiring the payment of fees to Starwood based on estimates by Starwood of its costs and expenses. The costs and expenses are tracked by Starwood and the fees are adjusted up or down as appropriate. The Broadband Technology Standard can be met by the property by using the Starwood Broadband Solution or another solution that meets required standards.

Internal Audit Services, with fees based on the size of the hotel.

Six Sigma, which applies training and other tools to improve business processes in order to increase revenue and decrease costs.

Reimbursable Expenses. The Application states that, on an as needed basis, properties pay directly or reimburse Starwood and its affiliates, for specified charges and fees, which may include, without limitation, rooms programs and services, food and beverage programs and services, travel expenses of supervisors, website design and consulting, training courses, brand audits, central accounting, treasury services, property directories and other brand collateral, and payments made to third parties for items such as surveys, employee handbooks and similar publications, property photography, internet booking services, printing and distribution of manuals and similar publications, and the costs incurred by Resort personnel in attending management seminars and conferences organized by the corporate divisions of Starwood and its affiliates.

The Application represents that, in some cases, Centralized Services are provided in exchange for a fee that cannot be affected by Starwood's exercise of discretion. For example, the fee for certain Centralized Services is based on the number of rooms at the Resort. However, there are other Centralized Services with respect to which Starwood or a Related Company receives a fee for providing the service or product that is based on the level of usage by the Resort where Starwood can, through the exercise of its discretion as operator of the Resort, affect the level of usage by the Resort of the product or service. For example, one Centralized Service involves SPG Bonus Points, pursuant to which Starwood, through the General Manager of a particular hotel, can attempt to increase business during slow periods by running a promotion that increases the frequent guest award for stays at that hotel. The cost of the promotion, which is 1.25 cents for each bonus point awarded, is paid to a fund maintained by Starwood and used to pay the cost of the program, which includes the overhead cost.

Another example of this situation involves training courses provided by Starwood on a centralized basis. For example, Starwood offers at the regional level an ''ABCs of Housekeeping'' training course. A fee, based on the cost of the program (including overhead), is paid to Starwood and is based on the number of persons who attend. Since this course is mandatory for all housekeeping staff, Starwood can theoretically affect the level of its fee for this program by hiring more housekeeping staff. There are other training courses, such as arrival training, that are not mandatory for all of the staff of a department. This gives Starwood, through the hotel's General Manager, the discretion as to which hotel employees receive arrival training and, therefore, the level of fees it receives.

10. The Applicant represents that in addition to the Centralized Services involving Starwood and Related Companies, the Resort may also acquire Additional Services (*i.e.*, arrangements for products or services) with entities in which Starwood has made an investment, but which are not controlled by Starwood. These Additional Services are being provided by entities connected to Starwood. One example of the Additional Services is insurance. LaSalle has decided to obtain general liability, automotive liability, employment practices liability insurance, automobile physical damage and umbrella/excess liability coverage through the Starwood Risk Management Program. Starwood provides this coverage to its owned hotels and makes it available to managed hotels on an optional basis for all or only selected coverage. (There is an exception for workers' compensation insurance, which must be provided through Starwood because Starwood is the employer of the employees who operate the Resort.) The Resort will receive first dollar protection (with no deductibles) with respect to this coverage with the exception of automobile physical damage coverage, which has a small deductible, and employment practices liability insurance, which has a $100,000 deductible for the Resort vs. a $250,000 deductible for the policy purchased by Starwood. To fund this coverage, Starwood purchases high deductible insurance and funds projected losses and related administrative costs through its subsidiary Westel Insurance Company, with premiums to Westel allocated to participating hotels on a cost recovery basis. The potential underwriting surplus is retained or the potential deficit is absorbed by Westel. LaSalle believes that the cost of insurance purchased in this manner is more attractive to the Partnership than if it purchased comparable insurance through an unrelated party.

11. The Application notes that another program Starwood typically implements at hotels it manages is the Associate Room Discount Program (ARD Program) that provides discounted room rates and discounted food, beverage and other amenities (to be determined in advance with LaSalle's approval) at participating hotels, including the Resort, for Starwood associates (including employees of Starwood and their immediate families) or associates of participating Starwood franchise hotels worldwide and their immediate families. Starwood associates are all regular full time and part time employees who have been employed by Starwood entities or participating Starwood franchise hotel employers for more than 90 days. The ARD Program is offered to all of the properties that Starwood owns, manages or has an interest in. All hotels owned or managed by Starwood participate in the Associate Room Discount Program. Most hotels franchised by Starwood also participate in the Program.

The Applicant states that under the ARD Program, the Resort's management would have control over the number of rooms rented at the discounted rate on any given night based on occupancy levels at the Resort (and where this would not cause higher rate business to be displaced). The discounted rates under this program fully cover the variable cost to the hotel for the use of the room and the cost to the hotel of the food, beverage and amenities. In return for its participation in this program and its offering discounted rates, the Resort enjoys a substantial benefit in that employees of the Resort are entitled to discount rates at other hotels participating in the program. The Application asserts that this allows the Resort to provide its employees with a valuable employee benefit that is low in cost relative to the value it provides (particularly because it is available only when rooms could not otherwise be sold at a higher rate). In addition, since this arrangement is typically offered by Starwood and all other international branded operators, refraining from offering this benefit to its employees would place the Resort in a distinct hiring disadvantage vis-à-vis other competing hotels. Further, to the extent that an individual taking advantage of the ARD Program spends money on food, beverage and incidentals, he or she will bring additional revenues to the Resort.

The LaSalle Letter noted that there is not a specific document executed by the Partnership describing the ARD Program that LaSalle, on behalf of the Partnership, has agreed to or signed. However, LaSalle provided to the Department a March 17, 2004 Starwood Corporate/Divisional HR Policies and Procedures document on ''Hot Rates,'' Starwood's Associate Room Discount policy. LaSalle, on behalf of the Partnership, and Starwood entered into the Operating Agreements. In these agreements, Starwood has the authority to determine employment practices, (including wages, hiring, discipline, and discharge), and similarly has the authority to participate in ''Centralized Services,'' or those programs that Starwood performs as Operator at all other hotels managed by Operator. Although LaSalle did not specifically negotiate the terms of the ARD Program, it approved of the participation in the ARD Program as part of a more global approval of the terms on which Starwood was retained. LaSalle elected not to opt out of the ARD Program because it concluded that the program was standard industry practice and that the Resort would enjoy a substantial benefit from the program. In addition, from time to time, LaSalle conducts operational audits, the most recent of which was March 31, 2005, to ensure that Starwood is complying with its procedures.[9] Although the scope of these operational audits varies from audit to audit, a review of Starwood's compliance with the ARD Program has been the subject of some prior audits.

In the LaSalle Letter, LaSalle stated that it would be overly burdensome to cross-reference the very long list of Fund participants, Trustees and contributing employers against the very long list of participants in the ARD Program. However, LaSalle confirms that no participant, Trustee or contributing employer of the Fund could be a participant in the Associate Room Discount Program by virtue of that status. Rather, such an individual would only be a participant in the Program if he or she were an employee of a Starwood entity or a participating franchise hotel (in accordance with the eligibility criteria described above).

12. Section 5.01 of the Operating Agreements requires that: With respect to its decisions concerning the operation of the [Resort], the Operator shall at all times act in good faith and in the best interests of the Owner, using all commercially reasonable efforts to maximize the profits from operation of the [Resort] for [the Partnership], subject to the terms and conditions of this Agreement.

The Applicant represents that consistent with this requirement, Starwood has indicated that as a major owner of hotels, its primary objective in establishing Centralized Services and Additional Services is to deliver value to all hotel properties it represents. LaSalle believes that it is through the aggregation of these properties, the implementation of demonstrated practices and its hospitality industry expertise that Starwood is able to provide services and products that will result in improved operating performance beyond that which can be provided by an operator of a single hotel or smaller group of hotels. LaSalle believes that (a) by centralizing this sourcing function, Starwood is also able to capture economies of scale designed to reduce the cost of the procurement function in the Resort and (b) participation in these programs by the Resort should result in increased efficiencies and lower operating costs.

In this regard, LaSalle states that there is objective industry data indicating that chain hotels are better performers than independent hotels in terms of both average daily rate and occupancy. While there is data comparing chain and independent hotels on an overall performance basis, there are no specific benchmarks that allow for a comparison of specific services. Accordingly, at the time it retained Starwood on behalf of the Partnership, LaSalle considered the generally accepted principle in the hospitality industry that such services can be aggregated and delivered more effectively and efficiently on behalf of a chain of hotels rather than individual hotels. In so doing, it relied on various sources of industry data bearing upon this issue. By way of example, LaSalle provided to the Department an example of one data compilation, prepared by Smith Travel Research, on which LaSalle relied when it decided to retain a chain hotel that provides Centralized Services, rather than an independent hotel that does not. In addition, LaSalle notes that there are several services provided by a chain such as Starwood that could not be easily replicated by an individual property, such as a frequent traveler program, reservation center, and similar services. No benchmark would exist that compares the services of chain and independent hotels in that regard because the independent hotels do not provide the service at all.

LaSalle has concluded that the Centralized Services and Additional Services are likely to result in improved operating performance that is both monetary and non-monetary. Starwood has represented to LaSalle that utilizing these services and products will result in cost savings through aggregation of Starwood's purchasing and organizational power, and, as more fully described below, the Operating Agreements include specific provisions to assure that the Resort will benefit from such arrangements. LaSalle also shares Starwood's belief that value will be achieved through enhancements in quality and service resulting from the economies of scale and joint participation in such arrangements with Starwood's branded hotels. In attempting to select the right supplier for the hotels it operates, Starwood considers a variety of other factors, such as financial, operational (including availability of supplies), health and safety issues, and LaSalle ultimately expects that Starwood's services and purchasing program will maximize the value of the properties.

13. The Application states that as of January 2003, Starwood's portfolio consisted of over 750 properties owned, managed or franchised by Starwood in 80 countries. By aggregating certain service and other activities described above, Starwood believes that it obtains a substantial net cost savings for owners (including itself) of properties it manages. Nevertheless, recognizing the Partnership's unique status as an ERISA plan asset, the Applicant asserts that Starwood has agreed to significant conditions and that the Operating Agreements include stringent limitations on Starwood's ability to enter into transactions and arrangements concerning the Resort. The Application provides the following examples.[10]

(a) Limitations on Transactions and Arrangements

In order to ensure that Starwood treats the Resort at least as well as the other properties it manages (and to make it more likely that the Resort will be operated in accordance with customary industry standards), the Operating Agreements provide that the general operating policies applied to the Resort must (in all material respects) be at prices and on terms and conditions no less favorable to the Resort (in terms of

[9] See 13.(c) below for more information on the latest operational audit conducted by LaSalle.

[10] The Partnership and Starwood have entered into two Operating Agreements, one covering the country club and spa and one covering the hotel and convention center. The Application notes that although it references specific terms and conditions related to the Resort in general, these terms and conditions are included in each of the two Operating Agreements.

increasing gross revenues and decreasing gross operating expenses) than the general operating policies applied by Starwood and/or its affiliates to the other properties managed by Starwood and/or its affiliates. Additionally, Starwood is required by the Operating Agreements to act in the best interests of the Partnership and to use all commercially reasonable efforts to maximize its profits from the Resort.

There are limitations on Starwood's ability to enter into contracts. Specifically, any contracts, leases, licenses and concession agreements (other than collective bargaining agreements or terminable group sales contracts) providing for an aggregate annual expenditure or revenue that exceeds $50,000 for the Resort, or with a term in excess of one year for contracts,

(i) require the Partnership's prior approval (through LaSalle), whether as part of the Annual Operating Plan or otherwise; and

(ii) must be subject to the competitive bidding procedures included in the Operating Agreement. Similarly, any single purchase providing for the purchase of products and services that requires an expenditure that exceeds $50,000 requires the Partnership's prior approval (through LaSalle), whether as part of the annual operating plan or otherwise. Capital expenditures in excess of $25,000 (as adjusted for increases of CPI), or in excess of $100,000 (as adjusted for increases of CPI) in the aggregate in any fiscal year, also require Partnership approval.

There are specific limitations on the fees that may be charged for Centralized Services, which may not be greater than the lowest of: (i) Fees initially agreed upon by the parties in the Operating Agreements (which are the same as those currently offered to other, similar properties that Starwood manages), (ii) Starwood's prevailing fee for such services as offered from time to time, (iii) Starwood's cost, with no profit or mark-up, or (iv) 5% of gross revenues (exclusive of certain occupancy-related charges, such as third-party reservations fees and frequent guest program charges) of the hotel or country club, as applicable.

Centralized Services and Additional Services provided by Starwood affiliates must be provided at prices and on terms and conditions no less favorable to the Resort than the fees and terms and conditions charged or included generally by Starwood (and its affiliates) to other properties Starwood manages. The fees charged to the Resort for Centralized Services can only be modified on a system-wide basis (*i.e.*, not just for the Resort).

The fee for reservations services, which includes participation in Starwood's proprietary reservations network system, is determined according to actual usage of the services and system on a basis no less favorable than that of any other property that is furnished such services and system. The Application notes that, to the extent that usage is determined by individuals unrelated to Starwood or Related Companies, it is likely that the use of this system will not constitute a prohibited transaction in the first instance.

Under section 5.07 of the Operating Agreements, unless the Partnership's prior consent is obtained (as part of the approval of the Annual Operating Plan or otherwise), any transaction for the purchase of products or services from Starwood, its affiliates [11] or any entity in which Starwood or any of its affiliates has any ownership, investment or management interest or responsibility must (i) be on prices and terms better than the prices and terms that could be obtained from third parties for delivery or performance in Hollywood, Florida (for the hotel and convention center) or Hallandale Beach, Florida (for the country club and spa) and (ii) not exceed $50,000. To ensure that this provision is not undermined by suspect bidding practices, the Operating Agreements also provide that Starwood may not solicit bids in a manner that could result in a right of first refusal, or any other bidding advantage, for Starwood or any of its affiliates, as defined in the Operating Agreement.

The Partnership (through LaSalle) has the right to opt out of any Centralized Services and may choose not to participate in the Associate Room Discount Program. As the Additional Services are provided on a case-by-case basis and are subject to the limitations described above, the Partnership may elect not to receive any Additional Services.

(b) Partnership Involvement in the Budgeting Process

The Operating Agreements include detailed and elaborate budgeting and reporting requirements that limit significantly Starwood's discretion with respect to all transactions and purchases, particularly those with or from Starwood and/or its affiliates. Starwood must submit to the Partnership (no later than 90 days before the commencement of each fiscal year) an Annual Operating Plan for the Resort. The Partnership (through LaSalle) has specific line-item approval of the Annual Operating Plan, which includes monthly estimates and covers the operating budget (including departmental revenue and expenses, taxes, insurance and reserves), the capital budget, the marketing plan, the advertising program, working capital requirements, litigation and any other matter reasonably deemed appropriate by the Partnership.

Starwood is required to work within the approved Annual Operating Plan, with very strict parameters for permitted variation. During any year, Starwood may not, without the Partnership's prior approval (through LaSalle), and subject to certain variable or ''uncontrollable'' expenses (which are defined in the Operating Agreements and include such items as real estate taxes and the like), (i) incur any cost or expense that would cause total expenditures for any line item to exceed the budgeted expense for that line item by more than 10%, (ii) incur any cost or expense that would cause total expenditures for any department to exceed the budgeted expenses for that department by more than 5%, or (iii) incur any cost or expense that would cause total operating or capital expenditures to exceed the budget by more than 2%. Other than for emergency reasons, Starwood may not exceed the budgeted amount for capital expenditures.

(c) Reporting and Disclosure Obligations

The Applicant asserts that the Operating Agreements allow the Partnership and LaSalle to monitor Starwood's compliance with the budget and all major expenditures and transactions. The Partnership, through LaSalle, controls all bank accounts, and has signatories on the operating accounts that Starwood will use to manage the Resort. Upon the occurrence of an Event of Default (as described below), the Partnership may freeze these accounts and prevent Starwood from making any additional payments.

The Operating Agreements also provide that representatives of Starwood and the Partnership (through LaSalle) must meet no less frequently than monthly, for the purposes of (i) reviewing each annual operating plan; (ii) analyzing Starwood's actual performance against the annual operating plan; (iii) reviewing and updating rolling revenue disbursements and three-month forecasts for the Resort; and (iv) analyzing Starwood's actual

[11] Section 1.01 of the Operating Agreement defines an ''Affiliate'' of Starwood as ''any [other] person or entity directly or indirectly controlling, or controlled by, or under common control with [Starwood].''

performance against the performance of an applicable competitive set of resorts.

Under Article 11 of the Operating Agreements, LaSalle, on behalf of the Partnership, has the right to conduct audits with respect to the Resort. The Partnership receives interim (delivered within 20 days after the end of each fiscal month) and annual (audited, and delivered within 90 days after the end of each fiscal year) accounting reports, which include a comparison of actual to budgeted expenses. The Partnership, through LaSalle, has the right to have these reports audited by an independent accounting firm. If any discrepancy is discovered with respect to payments to Starwood or any of its affiliates, including in the payment of fees for Centralized Services or reimbursement of expenses, the Operating Agreements provide for adjustment within 10 days following notice thereof. In addition, if the audit discloses weaknesses or the need for changes in internal control systems pertaining to safeguarding the Partnership's assets, Starwood is required to make the necessary changes.

By letter dated July 13, 2006 from LaSalle to the Department, La Salle provided that the last operational audit was completed on March 31, 2005 and was conducted by a third party, Gallogly, Fernandez & Riley, LLP, a prominent local accounting firm. A written report was provided to LaSalle and found no breaches of the Operating Agreements. The scope of the audit was to review areas such as the calculation and payment of management fees, allocation of salaries and wages, return of vendor rebates, use of complimentary rooms and other similar areas which are prone to miscalculations, inaccuracies or abuse. Additionally, LaSalle represented that they are not aware of any areas in which Starwood has exceeded its authority under the Operating Agreements and that LaSalle has not asked Starwood to discontinue providing any of the Centralized Services that Starwood provides under the Operating Agreements. LaSalle noted that it did instruct Starwood not to participate in the Starwood program for Worker's Compensation and elected to obtain coverage through a third-party.

(d) Recourse for Breach

As described above, the Partnership, acting through LaSalle, exercises a significant level of oversight through the budgeting, reporting, monitoring and audit process, which will facilitate LaSalle's ability to detect and rectify any violation of the restrictions discussed above. If Starwood breaches its obligations under the Agreement, there are readily exercisable avenues of recourse for the Partnership.

For example, upon the occurrence of an ''Event of Default,'' (which includes breaches of material covenants, undertakings, obligations or conditions (which are not cured within 30 days), the Partnership may terminate the Operating Agreements (or the relevant one) and pursue any other remedies available to it in law and in equity, other than those specifically excluded in the applicable Operating Agreement. Furthermore, as the funding of the operations of the Resort is primarily done through the Partnership's agency and reserve accounts, upon the occurrence of an Event of Default, the Partnership may freeze these accounts and prevent Starwood from making any additional payments.

Additionally, the nature of the relationship between Starwood and the Partnership is one of fiduciary and agency. Accordingly, if, for any reason, the Partnership determines that Starwood is putting its assets at risk, the Partnership could protect itself by terminating the agency and demanding possession of the Resort.[12]

The Partnership is also entitled to indemnification with respect to any claims, demands, actions, penalties, suits and liabilities arising from Starwood's breach of fiduciary duty, violation of ERISA or breach of or default on the Operating Agreements.

14. LaSalle, after consulting with JLL Hotels (its hotel advisory firm) and following substantial review, determined that:

(a) The provision of Centralized Services and the Additional Services is a critical component of management by a major third-party branded operator in order to allow the managed property to realize the benefits of retention of such an operator;

(b) Given their existing infrastructure and agreements, neither Starwood nor any major competitive national or international third-party operator could, as a practical contractual matter, provide these types of services and products on an effective basis without these sorts of arrangements;

(c) The effect of aggregation in a multi-property system (e.g., enhanced by the buying power of over 750 hotels) and the affiliate relationships inherent in these arrangements are both reasonable and customary and, in light of the effect on costs and revenues, beneficial to the Partnership, as owner of the Resort;

(d) The Partnership will be able to monitor these arrangements in an effective manner through the significant and ongoing controls available to it under the Operating Agreements (to be exercised by LaSalle); to the extent it determines that it is advisable to do so, it can opt out and/or discontinue some or all of these arrangements;

(e) As noted above, in connection with the operator selection process, LaSalle reviewed in detail the Centralized Services offered by Starwood and concluded that the overall cost of services and products offered by Starwood on a centralized basis was consistent with the amounts charged by other potential international branded operators; and

(f) Delivery of services and products such as the Centralized Services and Additional Services and participation in programs such as the Associate Room Discount Program is customary in the hotel industry, and comparable operators, such as Hilton, Marriott International and Hyatt, have similar policies and processes.

Based on these determinations, LaSalle concluded that it would be appropriate to submit an application to the Department for the reasons set forth below.

15. As noted above, the transactions undertaken by Starwood are subject to the authority and general direction of LaSalle. Pursuant to the IFS Agreement, IFS is the independent named fiduciary with respect to the Diplomat Account. IFS retained LaSalle to serve as investment manager and QPAM with respect to the Resort pursuant to the QPAM Agreement, which provides that IFS retains significant oversight responsibilities with respect to LaSalle's performance hereunder. Starwood, as property manager for the Resort, is acting under the authority and general direction of LaSalle pursuant to the Operating Agreements. As discussed above, the Operating Agreements contain both significant limitations on the ability of Starwood to exercise discretion and significant oversight of Starwood by LaSalle.

(a) Centralized Services and Additional Services

(1) Self-Dealing Transactions

Because of the additional fees that could be earned by Starwood or a Related Company as a result of management decisions by Starwood,

[12] The Application provides that such an action could subject the Partnership to damages if, for example, the termination were a breach of contract. However, there is an extra layer of protection afforded the Partnership because it would have the right to remove Starwood from the Resort during the pendency of any dispute, assuring the Partnership that if such a dispute were to arise, it could conduct the litigation after Starwood left the property.

Starwood could be viewed as having an interest that might affect its judgment in violation of section 406(b) of ERISA. Accordingly, Starwood seeks relief to the extent that either (i) the Related Company is a Starwood ERISA Affiliate or (ii) Starwood has an interest in the Related Company that could arguably affect its judgment in operating the assets of the Partnership.

(2) Party-In-Interest Transactions Involving Non-Incidental Goods

Starwood's corporate and operating structure as well as its contractual obligations result in arrangements pursuant to which Starwood (or Starwood ERISA Affiliates) would be providing services and/or selling products to the Partnership. Any furnishing of services or products to the Fund by, or transfer of Fund assets to, Starwood or Starwood ERISA Affiliates could constitute a prohibited transaction in violation of ERISA and the Code, absent the applicability of a specific exemption.[13]

Notwithstanding the foregoing, the Application asserts that most such transactions will not constitute prohibited transactions (and relief is not sought with respect thereto) because specific exemptions will apply in most cases. To the extent that Centralized Services and Additional Services consist of services (as opposed to goods that are not incidental to such services), section 408(b)(2) of ERISA would exempt these services from the prohibited transaction rules because the services are ''reasonable arrangements'' under which Starwood (or an entity related to Starwood) provides ''services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor[e].'' The Department notes, however, that section 408(b)(2) of the Act provides no relief from violations of section 406(b) of ERISA that may arise in connection with any provision of services.

The Application states that section 408(b)(2) of ERISA does not provide an exemption with respect to goods that are not incidental to the furnishing of necessary services described in the preceding paragraph. PTE 84–14 would generally provide relief for transactions where a QPAM, e.g., LaSalle, or a property manager acting under its authority and general direction, approves a particular transaction. However, the Application notes that PTE 84–14 generally does not provide relief from violations of section 406(b) of ERISA. Accordingly, to the extent that the property manager has limited discretionary authority to affect the amount of non-incidental goods purchased by the Partnership, the Application states that this could constitute a prohibited transaction that is not exempted by either PTE 84–14 or section 408(b)(2) of ERISA. Relief is, therefore, being sought for such transactions.

(b) Associate Room Discount Program

As a participant in the Associate Room Discount Program, the Resort provides Starwood associates, including its employees and employees of certain Starwood ERISA Affiliates, or associates of participating Starwood franchise hotels with discounted room rates and discounted food, beverage and other amenities, subject to various limitations.

Under section 3(14) of ERISA, the term ''party in interest'' includes employees of Starwood, an entity providing services to the Fund, and certain Starwood ERISA Affiliates, as well as certain other individuals (such as family members of parties in interest). In addition, by offering these discounts to its associates, Starwood could be viewed as dealing with the assets of the Fund in its own interest or acting on behalf of the associates, who could be viewed as parties with interests adverse to those of the Fund. Accordingly, the provision of discounts to employees of Starwood or Starwood ERISA Affiliates and their families could constitute a prohibited transaction in violation of ERISA, absent the applicability of a specific exemption.[14]

16. LaSalle believes that Starwood's ability to provide (by itself or via Related Companies) the Centralized Services and Additional Services provides significant operational and economic benefits to the Partnership and, therefore, the Fund. LaSalle has concluded that the provision of these sorts of services is a critical component of management by a major third-party branded operator. After careful consideration and full analysis during the operator selection process (as described above), LaSalle concluded that the retention of a major international branded hotel operator was in the best interests of the Partnership because it would, among other things, increase the gross revenues and/or decrease certain expenses generated by the Resort, as well as permit the Partnership to obtain any necessary financing on more desirable terms than may otherwise be available to the Partnership. Services, such as the Starwood proprietary group sales and global reservations system, should provide the Resort with greater occupancy and revenues than could be obtained without engaging such a brand and operator.

LaSalle asserts that the conflicts of interest that arise due to the fact that these services are provided by Starwood or a Related Company can be mitigated, if not eliminated, by (i) restrictions in the Operating Agreements relating to the amount and nature of charges for such services and products and the requirement that such arrangements be beneficial to the Partnership, such as those discussed above; (ii) the ability of the Partnership to review the effect of these transactions through its review of its financial information; and (iii) the Partnership's ability to opt out or discontinue some or all of these services or products.

While the Partnership is entitled not to participate in certain Centralized Services or Additional Services and obtain the products and services on its own, overall these arrangements provide precisely the types of advantages that the Partnership (and LaSalle) intended to obtain by engaging a major international branded hotel operator to manage the Resort. For its part, Starwood has contractual arrangements in place with some Related Companies and other entities that require that Starwood utilize these entities in providing products and/or services, or that require a specific manner of obtaining services or products through these entities for its own properties.

Based on information obtained during the process of selecting a brand and an operator for the Resort, as well as the experience of JLL Hotels, LaSalle believes these sorts of arrangements are customary in (and endemic to) the hotel

[13] The Application notes that the provision of Additional Services is often by Related Companies in which Starwood owns less than 10% of the total outstanding equity. LaSalle believes that in cases in which Additional Services are provided by Related Companies that are not Starwood ERISA Affiliates, the provision of Additional Services would not constitute a prohibited transaction under section 406(a) of ERISA because these entities in which Starwood has made an investment are not parties in interest or disqualified persons. Accordingly, relief is not sought in that circumstance. The Department expresses no views as to whether selection of these entities by Starwood would raise any issues under section 406(b) of ERISA.

[14] The Application notes that Part IV of PTE 84–14 (regarding Transactions Involving Places of Public Accommodation) would not provide an exemption for the Associate Room Discount Program because the rooms, food, beverage and other amenities are not furnished on a comparable basis to the general public. However, the rooms are not made available under the Associate Room Discount Program if they could otherwise be sold to the public at a higher rate. In addition, in each case, the discounted rates fully cover the variable cost to the hotel for the use of the room and the cost to the hotel of the food, beverage and amenities.

industry, and that each of the other candidates for operator—including the other finalist candidates (*i.e.*, Hyatt and Marriott) have the same or similar arrangements. Therefore, it is extremely unlikely that the Partnership would be able to continue to retain a major hotel operator that would not have similar arrangements.[15] LaSalle believes that, if the Partnership were forced to opt out of these arrangements, it would lose important benefits of being part of a major national branded operation (which, in LaSalle's considered view, would likely substantially reduce the profitability of the Resort and its value as an investment of the Fund).

In addition, as discussed above, the Operating Agreements provide significant limitations on Starwood's use of affiliated entities. If products or services are provided to or performed by Starwood affiliates, as defined in the Operating Agreements, they must be (unless approved by the Partnership, through LaSalle), in the aggregate, on terms and prices lower (or at least as favorable) than those that could be obtained from unaffiliated parties in the relevant market. The fee for a significant number of these services or products (whether performed by affiliates or non-affiliates) may not exceed ''the cost incurred by [Starwood or its affiliates] * * * with no profit or mark-up.'' Specific approval by LaSalle is required for agreements or purchases that are in excess of $50,000, or with a term in excess of one year for agreements, whether they are made with affiliates or with unrelated third parties.

With respect to the Associate Room Discount Program, the Applicant notes that the Resort's participation enables the Resort to offer its employees discount rates at other hotels participating in the program. Although this provides employees with a valuable benefit that attracts high-level candidates, it is relatively low in cost to provide (particularly because it is available only when rooms would otherwise remain vacant and would not generate revenue). In addition, since this arrangement is typically offered by Starwood and all other international branded operators, refraining from offering this benefit to its employees would place the Resort in a distinct hiring disadvantage vis-a-vis other competing hotels.

The Application states that the percentage of the Fund's assets involved in the provision of any service or the sale of any products by Starwood or a Related Company or with respect to the Associate Room Discount Program is not currently determinable. However, as discussed in greater detail above, the Operating Agreements include various protections against the use of significant assets in these transactions without the Partnership's approval. These include, by way of example, budgeting requirements, prohibitions on incurring costs significantly in excess of budget, specific limitations on the costs of Centralized Services, and requirements for Partnership approval of significant expenses and contractual undertakings.

Accordingly, through written, enforceable assurances from Starwood in its agreements with the Partnership, LaSalle believes it has adequately provided for the Partnership's ability to profit from these arrangements and to control any abuse of authority or potential breach of duties by Starwood; but relief is sought in light of the concern that such transactions would otherwise be viewed as prohibited transactions.

17. The Applicant asserts that the Partnership, the Fund and the Fund's participants and beneficiaries would suffer hardship and substantial economic loss if this Application were denied because the prohibited transaction rules of ERISA and the Code would not permit Starwood (or Related Companies) to provide certain Centralized Services and Additional Services and to participate in the Associate Discount Room Program. If this Application were to be denied, the Partnership may have to opt out of all of these arrangements and obtain the products and/or services on its own, likely on less favorable terms, or LaSalle will need to be intimately involved in managing, negotiating and approving each and every transaction involving the purchase of products and/or services, which would be very costly and highly impractical and negate much of the benefit to be derived from the Operating Agreements with Starwood and from engaging a major international branded hotel operating company. The Applicant states that the arrangements for Centralized Services and Additional Services, as described above, provide precisely the types of advantages that the Partnership (and LaSalle) intended to obtain by engaging a major international branded hotel operator to manage the Resort, such as increased operating revenues and economies of scale designed to reduce procurement costs. Additionally, LaSalle (and its and IFS's hotel advisors) has concluded that, given the size and location of the Resort, the utilization of the Centralized Services and Additional Services (such as a strong marketing program, groups sales network and reservation system) is absolutely essential to achieve acceptable occupancy rates, and to ensure that the Fund's investment is managed in a profitable and professional manner. Thus, the Fund would suffer significant economic loss and substantial hardship if, as a result of its inability to enter into transactions that are otherwise standard in the hotel industry, it was unable to retain (or optimally utilize the resources of) a major branded operating company with significant internal infrastructure and marketing resources. LaSalle is also of the opinion that maintaining an international branded operator enhances the ability of the Fund to obtain financing for the Resort, should this be needed in the future.

18. The Application requests that the exemption be made applicable as of June 5, 2001, the execution date of the Operating Agreements. The circumstances surrounding the transactions are that the Fund and LaSalle believe that these products and/or services are essential for effective management of the Resort and in the interest of the Fund and its participants. If it had not engaged in these transactions, the Fund would not have been able to realize the critical benefits of retaining a third-party operator.

19. The Applicant represents that an exemption would be administratively feasible for the Fund because it would allow Starwood to operate the Resort in accordance with its industry accepted, standard procedures. In contrast, if the exemption were not granted, at the present time, the Partnership would incur significant administrative and operating costs in purchasing and obtaining the services and/or products (that would otherwise be provided by Starwood or its affiliates) by itself, or, possibly, reviewing its rights with respect to terminating the Operating Agreements (and possibly searching for a smaller, less qualified operator). The Fund believes that an exemption would be administratively feasible for the Department because it does not add any additional material burden to the Department's already significant ongoing oversight of the Diplomat Account.

[15] The Application notes that even if the Partnership were able to negotiate a different agreement with an alternative branded operator, it would incur the significant expense of negotiating another complicated operating agreement with the newly selected operator, whom both IFS and LaSalle believe would not be more qualified than Starwood to operate the Resort. Additionally, the Operating Agreements provide terms and conditions that are extremely favorable to the Partnership. There is a significant risk that an Operating Agreement with another entity would contain significantly less favorable terms and conditions.

The Applicant asserts that the proposed exemption would be protective of the rights of participants and beneficiaries of the Fund because the Operating Agreements contain (a) substantial limitations on Starwood's ability to provide services or sell products directly or through its affiliates and Related Companies;[16] (b) provisions for significant involvement by the Partnership (generally, through LaSalle) in the budgetary process; (c) provisions for significant after the fact reporting and disclosure to the Partnership on these types of transactions; and (d) provisions for correction in the event that an audit uncovers a discrepancy related to any payments to Starwood or its affiliates or a weakness in internal control systems. The Application states that these protections, some of which are general, some of which are specific to affiliate transactions and some of which are triggered by expenditures in excess of a certain amount, significantly reduce the probability of an abuse of authority or conflict of interest that results in harm to participants and beneficiaries. The Application provides that, furthermore, each of these protections will be periodically monitored and scrutinized by LaSalle, who can cause the Partnership to cease to participate in most if not all of the transactions discussed herein.

20. By letter dated April 25, 2006, LaSalle advised the Department that, in connection with an internal restructuring of Starwood Hotels & Resorts Worldwide, Inc., effective as of January 12, 2006, Westin Management Company East assigned its interest in the Operating Agreements to Westin Hotel Management, L.P., a wholly-owned subsidiary of Starwood Hotels & Resorts Worldwide, Inc. References in the Application to Westin Management Company East should therefore be read to include Westin Hotel Management, L.P. Additionally, as of April 30, 2006, LaSalle was replaced by Capital Hotel Management, LLC (CHM) as the qualified professional asset manager for the Fund.

21. In the CHM Letter, CHM confirms that, pursuant to the Discretionary Investment Management Agreement by and among Diplomat Properties, L.P., Independent Fiduciary Services, Inc., on behalf of the Plumbers & Pipefitters National Pension Fund, and Capital Hotel Management, LLC dated February 27, 2006 (CHM Agreement), CHM has been appointed as the successor investment manager and QPAM with respect to the Resort. CHM has also replaced LaSalle as a non-member manager of DPLLC. CHM represents that it is an SEC registered investment advisor, which serves as a QPAM and one of the largest independent hotel asset and investment management companies operating in the U.S. today. CHM is a privately-held hotel investment management company, providing a full-range of acquisition and disposition expertise for its investors, as well as customized strategies proven to maximize asset/portfolio value and increase overall hotel investment returns. CHM has under management a hotel portfolio representing more than 14,000 rooms, collectively valued at more than $5.2 billion. Hotel investments are comprised of urban landmark properties, high-profile destination resorts and convention center hotels operating in major markets across the U.S. and the Caribbean.

CHM provides that, since its appointment as QPAM for the Fund, it has become integrally involved in all aspects of the Diplomat Account, and has made all of the business, operational and fiduciary decisions for the Diplomat Account, pursuant to the CHM Agreement (subject to the oversight or approval of IFS, as appropriate). CHM confirms that it is responsible for monitoring the performance of Westin Hotel Management, L.P. under the terms of the Operating Agreements, including the ongoing tasks described in the Application. CHM states that, for example, CHM is responsible for performing the actions ascribed to the QPAM as they relate to the general limitations on Starwood's activities described in this proposed exemption at 13. above, including with respect to (i) line-item approval of the Resort's Annual Operating Plan; (ii) approval of costs, expenses and expenditures; (iii) audits related to the Resort; and (iv) control of bank accounts. Similarly, CHM is responsible for performing the actions ascribed to the QPAM as they relate to the specific limitations on Starwood's activities including with respect to (i) the approval of certain purchases of products and services by Starwood from itself or its affiliates; (ii) the approval of certain contracts with an aggregate annual expenditure or revenue of more than $50,000 or having a term of more than one year, as well as certain capital expenditures; and (iii) the right to opt out of any Centralized Services and to elect not to receive any Additional Services. Further, as described in this proposed exemption at 9. above, changes to services and products or fees (as limited by the Operating Agreements) will be presented to and approved, if applicable, by CHM in connection with the annual budget process. Therefore, on and after April 30, 2006, references in the Application to LaSalle should, therefore, be deemed to refer to CHM.

22. In determining to propose exemptive relief for the transactions involving the provision of services by Starwood and Related Companies, the Department placed a great deal of emphasis on the significant involvement of IFS, as named fiduciary, and LaSalle and CHM, as investment managers (the Independent Fiduciaries) and their considered and objective evaluation of the subject transactions. These Independent Fiduciaries have represented for the record that the retention of Starwood was in the interests of the Partnership and that the written agreement and the limitations contained therein permit the Independent Fiduciaries to effectively monitor and scrutinize the actions undertaken by Starwood. The initial and continued involvement of the Independent Fiduciaries on behalf of the Fund with respect to the transactions that are the subject of this proposed exemption is a critical factor in the Department's determination to propose exemptive relief. In addition, as the Department has previously stated in PTE 2001–39, the fact that a transaction is the subject of an exemption under section 408(a) of the Act does not relieve a fiduciary from the general fiduciary responsibility provisions of section 404 of the Act. IFS' appointment of an investment manager and QPAM to manage the Diplomat Account and its ongoing determination to continue to retain LaSalle and CHM with respect to the management of the Diplomat Account are subject to section 404 of the Act. Both LaSalle and CHM, as investment managers for the Diplomat Account, retain fiduciary responsibility for the activities undertaken by Starwood on behalf of the Resort. In this regard, section 404(a)(1)(A) and (B) of ERISA requires that a fiduciary discharge his duties to a plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses, and in a

[16] The Application notes that the Operating Agreements provide that, if services are performed by Starwood affiliates in lieu of Starwood, the affiliates are not entitled to be paid more than Starwood would have been paid. Additionally, if goods or services are provided or performed by affiliates, such goods or services will be provided on terms and at prices: (i) better than (or, with the Partnership's approval, at least as favorable to the Resort as) what is available in the relevant market; and (ii) consistent with terms made available to other similar properties operated by Starwood and its affiliates.

prudent manner. Accordingly, it is the responsibility of the Fund's fiduciaries to operate the Resort in a manner designed to maximize the Fund's rate of return, consistent with their fiduciary duties under section 404 of the Act. The fiduciary obligation to act prudently requires, at a minimum, that the Independent fiduciaries conduct an ongoing objective, thorough and analytical critique of the management of the Diplomat Account. If the transactions that are the subject of this proposed exemption result in activity that is not ''prudent,'' and not ''solely in the interest'' of the participants and beneficiaries of the Fund, the responsible fiduciaries of the Fund would be liable for any losses resulting from such a breach of fiduciary responsibility, even if the transactions involved do not constitute prohibited transactions under section 406 of ERISA.

Notice to Interested Persons

The notice to interested persons, along with the supplemental statement required by Department Regulation 2570.43(b)(2), will be given to each member of the Board and to anyone who commented with respect to PTE 99–46, PTE Application D–10960 or D–10971.

Notice will be provided by way of first class mail. The Application states that the Fund will notify interested persons within 15 days following publication by the Department of a notice of the Proposed Exemption in the **Federal Register**. It is intended, therefore, that there will be a 45-day period available for notice and comment (i.e., 15 days for notice and 30 days for comment).

FOR FURTHER INFORMATION CONTACT: Wendy McCollough of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

Mellon Financial Corporation (Mellon) Located in Pittsburgh, PA

[Application No. D–11342]

Proposed Exemption

Section I—Exemption for In-Kind Redemption of Assets

The Department is considering granting an exemption under the authority of section 408(a) of the Act and 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). If the proposed exemption is granted, the restrictions in sections 406(a)(1)(A) through (D) and 406(b)(2) 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 November 30, 2005, to certain in-kind redemptions (the Redemption(s)) by the Mellon 401(k) Retirement Savings Plan or by any other employee benefit plan sponsored by Mellon or an affiliate (the Plan(s)), of shares (the Shares) of certain proprietary mutual funds in which the Plans were invested as of November 30, 2005 (the Funds), for which Mellon or an affiliate (collectively, referred to also as Mellon) provides investment advisory and other services, provided that the following conditions are satisfied:

(A) The Plan pays no sales commissions, redemption fees, or other similar fees in connection with the Redemption—other than customary transfer charges paid to parties other than Mellon;

(B) The assets transferred to the Plan pursuant to the Redemption consist entirely of cash and Transferable Securities, as such term is defined in Section II, below. Notwithstanding the foregoing, Transferable Securities that are odd lot securities, fractional shares, and accruals on such securities may be distributed in cash;

(C) With certain exceptions described below, the Plan receives in any Redemption its pro rata portion of the securities of the Funds equal in value to that of the number of Shares redeemed, as determined in a single valuation (using sources independent of Mellon) performed in the same manner and as of the close of business on the same day, in accordance with the procedures established by the Fund pursuant to Rule 2a–4 under the Investment Company Act of 1940, as amended from time to time (the 1940 Act), and the then-existing procedures established by the board of the Funds that are in compliance with the rules administered by the Securities Exchange Commission (SEC);

(D) Mellon does not receive any direct or indirect compensation or any fees, including any fees payable pursuant to Rule 12b–1 under the 1940 Act, in connection with any Redemption of the Shares;

(E) Prior to a Redemption, Mellon provides in writing to an independent fiduciary (Independent Fiduciary, as such term is defined in Section II, below), a full and detailed written disclosure of information regarding the Redemption;

(F) The Independent Fiduciary provides written authorization in advance of the Redemption to Mellon, such authorization being terminable at any time prior to the date of the Redemption without penalty to the Plan, provided that the termination is effectuated by the close of business following the date of receipt by Mellon of written or electronic notice regarding such termination (unless circumstances beyond the control of Mellon delay termination for no more than one additional business day);

(G) Before approving a Redemption, based on the disclosures provided by the Funds to the Independent Fiduciary and discussions with appropriate operational personnel of the Plan, the Independent Fiduciary determines that the terms of the Redemption are fair to the Plan and comparable to, and no less favorable than, terms obtainable at arm's length between unaffiliated parties, and that the Redemption is in the best interests of the Plan and its participants and beneficiaries;

(H) Mellon makes a ''make-whole payment'' to ensure that the dollar value of the interests received by the Plan from the collective investment funds is not diminished by transaction costs nor by valuation differences as a result of the Redemption;

(I) No later than thirty (30) business days after the completion of a Redemption, Mellon or the relevant Funds provides to the Independent Fiduciary a written confirmation regarding such Redemption containing:

(i) The number of Shares held by the Plan immediately before the Redemption and the related per Share net asset value and the total dollar value of the Shares held;

(ii) The identity and related aggregate dollar value of each security provided to the Plan pursuant to the Redemption, including each security valued (using sources independent of Mellon) in accordance with Rule 2a–4 under the 1940 Act and the then-existing procedures established by the board of the Fund for obtaining current prices from independent pricing services or market-makers;

(iii) The current market price of each security received by the Plan pursuant to the Redemption; and

(iv) The identity of each pricing service or market-maker consulted in determining the value of such securities;

(J) The value of the securities and cash received by the Plan for each redeemed Share equals the net asset value of such Share at the time of the transaction, and such value equals the value that would have been received by any other investor for shares of the same class of the relevant Fund at that time;

(K) Subsequent to a Redemption, the Independent Fiduciary performs a post-transaction review which will include, among other things, testing a sampling of material aspects of the Redemption deemed in its judgment to be representative, including pricing;

(L) Each of the Plan's dealings with the Funds, Mellon, the principal underwriter for the Funds, or any affiliate thereof, are on a basis no less favorable to the Plan than dealings between the Funds and other shareholders holding shares of the same class as the Shares;

(M) Mellon maintains, or causes to be maintained, for a period of six years from the date of any covered transaction, such records as are necessary to enable the persons described in paragraph (N)(1)(i)–(v), below, to determine whether the conditions described in this Section I have been met, except that—

(i) if the records necessary to enable the persons described in paragraph (N)(1)(i)–(v), below, to determine whether the conditions of this exemption, if granted, have been met are lost, or destroyed, due to circumstances beyond the control of Mellon, then no prohibited transaction will be considered to have occurred, solely on the basis of the unavailability of those records; and

(ii) no party in interest with respect to the Plan other than Mellon shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained or are not available for examination as required by paragraph (N) below.

(N)(1) Except as provided in subparagraph (2) of this paragraph (N), and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (M), above, are unconditionally available at their customary locations for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the SEC,

(ii) any fiduciary of the Plan or any duly authorized representative of such fiduciary,

(iii) any participant or beneficiary of the Plan or duly authorized representative of such participant or beneficiary,

(iv) any employer whose employees are covered by the Plan, and

(v) any employee organization whose members are covered by such Plan;

(2) None of the persons described in paragraphs (N)(1)(ii) through (v) shall be authorized to examine trade secrets of Mellon or the Funds, or commercial or financial information which is privileged or confidential; and

(3) Should Mellon or the Funds refuse to disclose information on the basis that such information is exempt from disclosure pursuant to paragraph (N)(2) above, Mellon or the Funds shall, by the close of the 30th day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section II—Definitions

(A) The term ''affiliate'' means:

(1) Any person (including a corporation or partnership) directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(B) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(C) The term ''net asset value'' means the amount for purposes of pricing all purchases and sales calculated by dividing the value of all securities, determined by a method as set forth in the Fund's prospectus and statement of additional information, and other assets belonging to the Fund, less the liabilities charged to each such Fund, by the number of outstanding shares.

(D) The term ''Independent Fiduciary'' means a fiduciary who is:

(i) Independent of and unrelated to Mellon and its affiliates, and

(ii) Appointed to act on behalf of the Plan with respect to the in-kind transfer of assets from one or more Funds to, or for the benefit of, the Plan. A fiduciary will not be independent of, and unrelated to, Mellon if:

(i) Such fiduciary directly or indirectly controls, is controlled by or is under common control with, Mellon;

(ii) Such fiduciary, directly or indirectly, receives any compensation or other consideration in connection with any transaction described herein (except that an Independent Fiduciary may receive compensation from Mellon in connection with the transactions contemplated herein, if the amount or payment of such compensation is not contingent upon, or in any way affected by any decision made by the Independent Fiduciary); or

(iii) More than 1 percent (1%) of such fiduciary's gross income, for federal income tax purposes, in its prior tax year, will be paid by Mellon and its affiliates in the fiduciary's current tax year.

(E) The term ''Transferable Securities'' means securities—

(1) for which market quotations are readily available, as determined pursuant to procedures established by the Funds under Rule 2a–4 of the 1940 Act; and

(2) That are not:

(i) Securities that, if publicly offered or sold, would require registration under the Securities Act of 1933;

(ii) Securities issued by entities in countries that (a) restrict or prohibit the holding of securities by non-nationals other than through qualified investment vehicles, such as the Funds, or (b) permit transfers of ownership of securities to be effected only by transactions conducted on a local stock exchange;

(iii) Certain portfolio positions (such as forward foreign currency contracts, futures and options contracts, swap transactions, certificates of deposit and repurchase agreements) that, although liquid and marketable, involve the assumption of contractual obligations, require special trading facilities, or can be traded only with the counter-party to the transaction to effect a change in beneficial ownership;

(iv) Cash equivalents (such as certificates of deposit, commercial paper, and repurchase agreements);

(v) Other assets that are not readily distributable (including receivables and prepaid expenses), net of all liabilities (including accounts payable); and

(vi) Securities subject to ''stop transfer'' instructions or similar contractual restrictions on transfer.

(F) The term ''relative'' means a ''relative'' as that term is defined in section 3(15) of the Act (or a ''member of the family,'' as that term is defined in section 4975(e)(6) of the Code), or a brother, sister, or a spouse of a brother or a sister.

Summary of Facts and Representations

1. Mellon is a global financial services company headquartered in Pittsburgh, Pennsylvania, with approximately $4.5 trillion in assets under management, administration, or custody, including approximately $766 billion under management, as of September 30, 2005. Mellon is regulated as a bank holding company and a financial holding company under the Bank Holding Company Act of 1956, as amended by the Gramm-Leach-Bliley Act, and subject to the supervision of the Board of Governors of the Federal Reserve System.

The Mellon 401(k) Retirement Savings Plan (*i.e.,* the Plan) is a defined contribution plan maintained by Mellon to provide retirement benefits to eligible employees of Mellon and its subsidiaries and is intended to satisfy the qualification requirements of section 401(a) of the Code. The Plan accepts contributions attributable to ''cash or deferred arrangements'' described in Code section 401(k) (Pre-Tax Contributions), and Mellon makes matching contributions on those Pre-Tax Contributions. Mellon Bank, N.A., a subsidiary of Mellon, serves as Trustee of the Plan. Investments under the Plan are directed by the Plan participants.

2. The applicant represents that the selection and monitoring of the Plan's investment options are overseen by Mellon's Benefits Investment Committee (the BIC), the Plan's named fiduciary for investment purposes and whose members are Mellon corporate officers. Until November 30, 2005, the Plan made available three categories of investment options to Plan participants. The first category, the ''Basic Funds,'' consisted of six Mellon Bank, N.A. collective investment funds and Mellon common stock. The second category, the ''Actively Managed Funds,'' consisted of 14 proprietary mutual funds (*i.e.,* the Funds)[17] and the Mellon Stable Value Fund, a Mellon Bank, N.A. collective investment fund. The third category was a self-directed brokerage window that provided access to more than 7,000 mutual funds.

Thirteen of the proprietary Funds are managed by the following subsidiaries of Mellon: (i) The Dreyfus Corporation (Dreyfus), which is headquartered in New York, New York and serves as the investment adviser to the Dreyfus family of mutual funds; and (ii) Founders Asset Management LLC (Founders), an indirect, wholly-owned subsidiary of Dreyfus that is headquartered in Denver, Colorado, and serves as the investment adviser to the Dreyfus Founders mutual funds (the Dreyfus family of mutual funds and the Dreyfus Founders mutual funds are hereinafter collectively referred to as the Dreyfus Funds). The distributor, transfer agent, and custodian of the Dreyfus Funds relevant to this application are also affiliates of Mellon. As of September 30, 2005, the Dreyfus Funds included more than 200 mutual fund portfolios holding approximately $172 billion. The Plan was invested in 13 of the Dreyfus Funds, as described above. The fourteenth proprietary Fund also has an adviser affiliated with Mellon.

As of September 30, 2005, the assets held in trust under the Plan were valued at $1,380,761,939.46 and were allocated among the following investment options in the following amounts:

Basic Funds:	
Daily Liquidity Money Market	$89,949,424.10
Daily Liquidity Asset Allocation	18,537,191.45
Daily Liquidity Stock Index	234,057,799.50
Daily Liquidity Small Cap Stock Index	7,354,298.25
Daily Liquidity International Stock Index	22,742,989.30
Daily Liquidity Aggregate Bond Index	50,485,047.00
Mellon Stock	409,606,522.50
Actively Managed Funds:	
Mellon Stable Value Dreyfus LifeTime Portfolios	92,584,517.21
Income Portfolio	6,954,841.82
Growth and Income Portfolio	61,604,892.28
Growth Portfolio	30,662,384.91
Dreyfus Appreciation	4,005,837.40
Dreyfus Premier Core Value	39,396,197.50
Dreyfus Disciplined Stock	113,489,817.05
Dreyfus Premier Third Century	4,255,733.72
Dreyfus Premier Technology Growth	12,967,651.48
Dreyfus Founders Growth	9,086,042.62
Dreyfus Premier New Leaders	5,982,309.07
Dreyfus Founders Discovery	52,011,463.46
Dreyfus Founders Worldwide Growth	24,425,613.04
Dreyfus Premier International Value	24,027,831.95
The Boston Company International Small Cap	25,566,295.14
Self Directed Account	18,287,358.28
Participant Loan Fund	22,719,880.43
Total	1,380,761,939.46

3. The applicant represents that the BIC made a decision to simplify the Plan's investment offerings for the benefit of Plan participants; it decided to make available only the Basic Funds as ''core'' options, *i.e.*, as funds in which Pre-Tax Contributions and Mellon matching contributions can be directly invested. The result was to eliminate the Actively Managed Funds from the ''core'' Plan investment line-up. The Mellon Stable Value Fund was moved to the Basic Funds category, and the other 14 Actively Managed Funds continue to be available only through the self-directed brokerage window. In addition to simplifying the investment offerings, the change also has had the advantage of reducing the investment management expenses borne by the Plan and Plan participants, as Mellon absorbs all of the investment management costs for the collective investment funds that comprise the Basic Funds but did not do so for the mutual funds in the Actively Managed Funds category. The BIC believes that being able to offer a streamlined menu of no-cost options to Plan participants represents a tremendous advantage over the long term and is in the best interests of Plan participants.

[17] The applicant represents that the Plan was invested in the Funds pursuant to the terms and conditions of Prohibited Transaction Exemption (PTE) 77–3. PTE 77–3 (42 Fed. Reg. 18734, April 8, 1977) is a class exemption that permits, under certain conditions, the acquisition or sale of shares of a registered, open-end investment company by an employee benefit plan covering only employees of such investment company, employees of the investment adviser or principal underwriter for such investment company, or employees of any affiliated person (as defined therein) of such investment adviser or principal underwriter. Thus, the applicant is not requesting exemptive relief with respect to the Plan's past investment in the Funds. The Department expresses no opinion herein as to whether the terms and conditions of PTE 77–3 were satisfied.

The change was adopted by the BIC on May 20th, to be effective no later than December 31, 2005. After taking into account the administrative, recordkeeping, and communication issues related to a transaction of this size, as well as the availability of the internal and external resources necessary to effect the implementation, the BIC decided to implement the changes effective December 1, 2005. The Plan participants were notified of the upcoming changes and advised to review their investment elections. An announcement entitled ''Important Changes to the Investment Funds in the Mellon 401(k) Retirement Savings Plan,'' dated October 2005, was distributed on or about October 3, 2005.

On the effective date of the transfer, the Actively Managed Fund assets were transferred to the following Mellon collective investment funds included within the Basic Funds:

FUND TRANSFER OR ''MAPPING'' CHART

Actively managed fund	► Recipient basic fund
Dreyfus LifeTime Portfolios, Inc	► Daily Liquidity Asset Allocation Fund.
Income Portfolio.	
Growth and Income Portfolio.	
Growth Portfolio.	
Dreyfus Appreciation.	
Dreyfus Premier Core Value.	
Dreyfus Disciplined Stock	► Daily Liquidity Stock Index.
Dreyfus Premier Third Century Fund, Inc.	
Dreyfus Premier Technology Growth.	
Dreyfus Founders Growth.	
Dreyfus Premier New Leaders.	
Dreyfus Founders Discovery	► Daily Liquidity Small Cap Stock Index.
Dreyfus Founders Worldwide Growth	► Daily Liquidity International Stock Index.
Dreyfus Premier International Value.	
The Boston Company International Small Cap.	

4. According to the applicant, the BIC requested that the Plan receive these redemptions in cash from all of the Funds. However, the Funds have reserved in their prospectuses the authority to ''redeem in kind,'' or make payments in securities rather than cash, if the amount to be redeemed is large enough to affect Fund operations—for example, if it exceeds 1% of fund assets.

In October, the Dreyfus Disciplined Stock Fund (the Stock Fund) and the Dreyfus Founders Worldwide Growth Fund (the Growth Fund)—of which the Plan holds approximately 10% and 30% of Fund shares, respectively—advised the BIC that they would be requiring that the redemptions from those Funds be taken in the form of securities rather than cash (i.e., the Redemptions). In response to this decision, the BIC: (i) Explored bifurcating the mapping of these two Funds from the overall Fund transfer, (ii) Considered pushing back the overall effective date, and (iii) Reconsidered the merits of the entire mapping transaction. As a result of these efforts, the BIC determined that: (a) It was inconsistent with the BIC's investment philosophy to exempt these Funds from the mapping entirely; (b) Due to the administrative, recordkeeping, and communication effort involved in a transaction of this size, it was unreasonable to defer the mapping of two Funds to a later date; and (c) Since offering a streamlined menu of no-cost options was advantageous to Plan participants, it was in their interests to implement the change in its entirety, effective December 1, 2005.

To carry out the Redemptions with minimal disruption and expense, the BIC employed a ''transition management service'' affiliated with Mellon, whereby: (i) The securities received from the two Funds were placed in separate transition management accounts under the Plan; (ii) The transition account investment adviser directed the sale of securities so as to retain only those securities that would be accepted in kind by the applicable target Basic Fund; and (iii) The restructured portfolio of securities and cash were then transferred to the applicable target Basic Fund. The Redemption, restructuring, and transfer occurred overnight on November 30, 2005, without any ''blackout'' period on investment changes.

The Plan did not pay any fees or transaction costs to Mellon affiliates or any other party in connection with the transition. Mellon covered all transaction costs related to the transition, as well as any differences arising from sales of securities by the transition account or the acceptance of the securities by the Basic Funds at values different from the Funds' valuation of the securities. The intended result was that the dollar value of the amounts redeemed from the Funds was no less than the dollar value of the interests acquired in the target Basic Funds on December 1, 2005.

5. The applicant requests that the Department grant individual retroactive exemptive relief for the Redemptions of the Fund Shares. Investment option decisions for the Plan, which is sponsored by Mellon, are made by or under the authority of the BIC, the Plan's named fiduciary for investment purposes and whose members are Mellon corporate officers. Because subsidiaries of Mellon serve as the investment advisers and certain other service providers for the Dreyfus Funds, a transaction between the Plan and the Funds may be prohibited. The role of Mellon in deciding whether to redeem in kind the Plan's shares of the Stock Fund and Growth Fund, and under what conditions, raises the possibility of Mellon's acting in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the Plan or its participants and beneficiaries, as well as raising the possibility of self-dealing.

The applicant notes that PTE 77–3 provides exemptive relief for the sale of shares of a mutual fund by an employee benefit plan covering employees of the investment adviser for the mutual fund and its affiliates, subject to certain conditions. However, in three published exemptions, in which the Department has granted individual relief for the in-kind redemption of shares by plans of the investment advisers of mutual funds—see PTE 2003–01 (Northern Trust Company and Affiliates); PTE 2002–20 (Union Bank of California); PTE 2001–46 (Bank of America Corporation)—the exemption notices describe PTE 77–3 as being available for a redemption of shares for cash, implying that PTE 77–3 would not be available for an in-kind redemption. See, e.g., PTE 2003–01, Proposed Exemption for Northern Trust Company and Affiliates, 67 FR 69561, 69563 (2002).

As the Plan did not have the option of redeeming its investment in the two Funds in cash, Mellon had discussions with the Department, through outside counsel, about obtaining individual relief for the contemplated in-kind Redemptions, modeled on the prior individual exemptions, above, as well as two authorizations granted under PTE 96–62—see Final Authorization Number (F.A.N.) 2003–16E (AmSouth Bancorporation) and F.A.N. 2005–01E (U.S. Trust Company of New York). As further evidence of good faith, Mellon also made efforts to submit an exemption application to the Department in advance of the Redemption date, once it was determined that in-kind Redemptions would be necessary, although it was not possible to obtain a final exemption prior to that date.

Mellon also requests prospective relief for future in-kind Redemptions involving the Funds, in the event that such opportunities should arise, to be carried out in accordance with the conditions of this exemption, if granted.

6. It is represented that Mellon structured the Redemptions based on prior relief granted by the Department for in-kind redemptions from affiliated mutual funds, as described above. The securities transferred in kind from the Funds were a pro rata portion of the Funds' holdings to the extent possible,[18] subject to adjustments for odd lots and securities that cannot be transferred, as determined in accordance with the Funds' valuation and in-kind redemption procedures that are designed to be objective and to comply with the requirements of the 1940 Act. Mellon hired and paid for an Independent Fiduciary to oversee and approve the Redemptions, as described further in item 7, below. Mellon also committed to making a make-whole payment to ensure that the value of the participants' accounts was not diminished by transaction costs or valuation differences as a result of the Redemptions.

Because the in-kind Redemptions from the two Funds involved ministerial transactions performed in accordance with pre-established objective procedures, in accordance with applicable regulatory requirements, including the 1940 Act and the rules and regulations thereunder, Mellon was unable to use its influence or control to cause the Plan to receive particular securities from the Funds.[19] To the extent possible, the Plan exchanged its Fund Shares for a proportionate share of the ''Transferable Securities''—securities for which market quotations are readily available and that are otherwise freely transferable[20]—held by each Fund portfolio. Securities that were not ''Transferable Securities'' (including certain contractual obligations and cash equivalents) were either to be liquidated or retained by the Fund, and the sale proceeds or equivalent value transferred in cash. The value of odd lot securities, fractional shares, and accruals on such securities also were transferred in cash, as appropriate. Therefore, the Redemptions were carried out, to the extent possible, on a pro rata basis as to the number and kind of securities transferred to the Plan.

The boards of the respective Funds have adopted procedures for the fulfillment of in-kind redemption requests in conformity with the no-action letter issued by the SEC staff to Signature Financial Group Inc.[21] The pricing methodology to be applied with respect to a redemption in kind under these procedures complies with Rule 2a–4 under the 1940 Act, the general rule that governs the valuation process for purposes of determining the current price of mutual fund shares. Pursuant to these procedures, for purposes of the in-kind Redemptions, the values of the securities is determined based on, as applicable, current market prices or quotations, as of close of business, other approved valuation methodologies, and any ''fair value'' determinations (as described further below) on the date of the redemption request (the ''Valuation Date''), in accordance with Rule 2a–4

[18] As further explained by the applicant, the reason for the ''to the extent possible'' language here and elsewhere in this paragraph is that it may not always be possible to divide a Fund's holdings of securities on a fully proportionate basis, due to the minimum increments in which the particular securities are traded. For example, the smallest unit of an equity security is typically a share. If the proportionate division of the portfolio would require dividing single shares into fractional shares, then the shares that would otherwise have to be divided would be sold and the cash proceeds divided instead. Even where the proportionate division could be done by dividing down to single shares, it may not be economical to do so because that would result in the creation of ''odd lots''—lots of less than 100 shares—which are more expensive to sell. In such instances, it may be to the advantage of both parties for the round lot of 100 shares to be sold rather than divided, and the parties can then divide the cash proceeds. Bonds are held in larger units, generally of a minimum of $1,000 principal value, so some of those, too, may require conversion to cash to achieve a proportionate distribution.

[19] According to the applicant, the Funds have adopted ''Procedures Relating to Redemptions-In-Kind By Affiliated Persons'' (''Procedures''). As the Plan is considered to be an ''affiliated person'' under the 1940 Act, the Redemptions were made in accordance with the Procedures. The Procedures include the requirement that ''[s]ecurities distributed in connection with any such redemption-in-kind shall represent the affiliated shareholder's pro rata portion of all assets held by the Fund immediately prior to the redemption, with any adjustments as may be necessary in connection with, for example, restricted securities, odd lots or fractional shares.'' The applicant acknowledges that securities held in each Fund may have different purchase dates and tax bases attached to them. In redeeming the Plan's shares of the Funds, each Fund distributed the Plan's pro rata portion of the Fund's assets, including a pro rata portion of each tax lot for each Fund portfolio security, held immediately prior to the Redemption, with any adjustments necessary with respect to odd lots and fractional shares. Among other requirements of the Procedures, the distributed securities were valued in the same manner as they were valued for purposes of computing the Fund's net asset value per share, and the Redemption was consistent with the Fund's redemption policies and undertakings (as set forth in each Fund's then current prospectus and statement of additional information). The Procedures are reflected in the terms and conditions of the requested exemption.

[20] According to the applicant, for purposes of the proposed exemption, the Funds treat as ''securities for which market quotations are readily available'' any securities for which market quotations are normally available, but for which market quotations may not be available on the day of the in-kind distributions, due to events outside the control of Mellon. For example, if the Taiwan stock market were to close because of a typhoon, no market quotations would be available on that day for securities traded on that market, even though those securities are publicly traded. As described further below, such securities would be ''fair valued'' based on the most recent available trading information and any information that would indicate a change in value since the most recent trades or quotations.

[21] In the no action letter to Signature Financial Group, Inc. (Dec. 28, 1999), the Division of Investment Management of the SEC states that it will not recommend enforcement action pursuant to section 17(a) of the 1940 Act for certain in-kind distributions of portfolio securities to an affiliate of a mutual fund. Funds seeking to use this ''safe harbor'' must value the securities to be distributed to an affiliate in an in-kind distribution ''in the same manner as they are valued for purposes of computing the distributing fund's net asset value.'' As explained in footnote 3, above, the Dreyfus Funds have adopted Procedures in accordance with the Signature Financial Letter for use in affiliated transactions, and those Procedures must be followed for transactions with the Plan.

The Signature Financial letter does not address the marketability of the securities distributed in kind. The range of securities distributed pursuant to this ''safe harbor'' may therefore be broader than the range of securities covered by SEC Rule 17a–7, 17 CFR 270.17a–7. In granting past exemptive relief with respect to in-kind transactions involving mutual funds, the Department has required that the securities being distributed in-kind fall within Rule 17a–7. One of the requirements of Rule 17a–7 is that the securities are those for which ''market quotations are readily available.'' SEC Rule 17a–7(a). Under this exemption request, exemptive relief also would be limited to in-kind distribution of securities for which market quotations are readily available, as defined in footnote 4, above. The value of any other security was paid to the Plan in cash. In addition, consistent with the Signature Financial letter, the Procedures adopted by the Dreyfus Funds require pro rata distributions for any in-kind redemptions.

under the 1940 Act and the procedures, using sources independent of Mellon. In general, values are determined as of close of trading on the New York Stock Exchange on the particular day, using market prices such as the last sale price or the most recent bid and asked quotations. In the event that a Fund holds securities for which market quotations are not readily available or illiquid securities, the Fund would determine the fair value of the security in accordance with its ''fair value'' procedures that have been adopted by its board (including a majority of disinterested directors). The fair value procedures require the Fund board, its pricing committee or the Fund's valuation committee to determine an appropriate price or pricing methodology for the particular security, as appropriate, considering such factors as fundamental analytical data, the nature and duration of restrictions on disposition, an evaluation of relevant market forces, and public trading in similar securities. The minutes of any meetings of the pricing and valuation committees describing the action they have taken and information they considered are presented to the Fund board and included in the board minutes. The Fund is required to preserve all relevant records for no less than six years.

The Growth Fund includes a substantial percentage of non-U.S. securities. Under its valuation procedures, this fund values foreign equity securities under certain circumstances using ''fair value'' prices provided by an approved independent pricing service. The service uses a model to adjust the foreign closing price of a security to reflect the historical correlation of that security with subsequent movements in the U.S. market, market indices, and other appropriate market measures, and the fund uses the adjusted price when the change in the U.S. stock market on that day exceeds a pre-determined ''trigger point'' and the security meets a ''minimum confidence interval.'' (The ''confidence interval'' is the confidence level that the pricing service assigns to the fair value price it determines for a particular security based on its historical data on price movements in that security. Founders requires that the adjusted price meet a minimum confidence level to ensure reliability.) Although the Stock Fund invests principally in securities of U.S. issuers, it would use a similar pricing methodology in the event it holds foreign securities.

Each Fund's fair value procedures was provided to, reviewed, and approved by the Independent Fiduciary in advance of the Redemption. The respective Funds retained documentation, in the form of the fair value reports prepared in accordance with the fair value procedures, showing how the procedures were applied and followed for each security valued in this manner.

It was possible that the securities received by the transition accounts would be sold at prices different from the values used by the Funds in determining their distributions. Also, as the collective investment fund that is the target fund for the assets of the Growth Fund generally uses market value pricing for foreign securities, rather than the fair value procedure adopted by the Growth Fund, it was possible that the collective fund would assign a different value to the foreign securities it received than did the Growth Fund. As indicated above, Mellon made up any difference in value such that the dollar value of the interests received by the Plan from the collective funds was no less than the corresponding dollar value distributed by the two Funds.

Not later than 30 business days after completion of a Redemption, the Funds confirmed in writing:

(i) The number of Fund Shares held by the Plan immediately before the Redemption (and the related net asset value per Share and the aggregate dollar value of the Shares held);

(ii) the identity (and related aggregate dollar value) of each security provided to the Plan pursuant to the Redemption, including each security valued in accordance with Rule 2a–4 under the 1940 Act and the then-existing procedures established by the board of the Funds (using sources independent of Mellon) for obtaining current prices from independent pricing services and market-makers;

(iii) the price of each such security for purposes of the Redemption; and

(iv) the identity of each pricing service or market-maker consulted in determining the value of such securities.

7. U.S. Trust Company, N.A. (U.S. Trust), a national bank, was retained by the BIC as the ''Independent Fiduciary'' for purposes of this proposed exemption. U.S. Trust has confirmed its independence from Mellon and its eligibility to serve as Independent Fiduciary—that it is not controlled by, or under common control with, Mellon, does not control Mellon, and that no more than one percent of its gross income for federal income tax purposes will be paid by Mellon. U.S. Trust has acknowledged that it is a fiduciary to the Plan, as defined in section 3(21) of the Act, and has represented that it understands and accepts the duties, responsibilities, and liabilities in acting as a fiduciary under the Act for the Plan.

In its capacity as Independent Fiduciary to the Plan, U.S. Trust's responsibilities pursuant to the terms of an engagement letter, dated November 22, 2005, by and between Mellon and U.S. Trust, were to (i) make a determination as to whether the terms of the Redemptions were fair to the participants and beneficiaries of the Plan and are comparable to, and no less favorable than, terms that would be reached as a result of arms' length negotiations between unaffiliated parties, (ii) provide its opinion in a written report, dated November 29, 2005, (the Report) on behalf of the Plan as to the fairness and reasonableness of each Redemption, as compared to redemption of the Plan's shares for cash, which would involve the liquidation of Fund securities, the transfer of cash to the Plan, and the reinvestment of such cash by, or on behalf of the Plan, in a designated collective investment fund, and (iii) consider and conclude, on behalf of the Plan, whether to approve each Redemption.

In the Report, U.S. Trust has stated that, based upon its review of the methodology of the Redemptions from the Funds and the difference in the costs associated with an in-kind redemption versus a hypothetical cash redemption for the Plan's assets held by each of the Funds, it believes that the proposed Redemptions would be fair to the participants of the Plan and no less favorable than the terms that would be reached at arms' length between unaffiliated parties. Furthermore, U.S. Trust believes that the method to be used in conducting the Redemptions is comparable to, and no less favorable than, a similar in-kind redemption reached at arms' length between unaffiliated parties.

This was because, among other things, Mellon would be paying the transaction costs associated with the Redemptions and would make a cash payment to the Plan to eliminate any implementation shortfall, so that the Plan would be able to redeem its investment in the Funds without bearing the typical costs associated with a redemption, whether that redemption be in cash or in kind. Therefore, U.S. Trust approved the Redemptions from the Funds, provided that the Redemptions were conducted in accordance with the information provided to U.S. Trust by Mellon and the Funds.

8. U.S. Trust conducted a post-transfer review, summarized in a letter

dated January 23, 2006,[22] in which it confirmed that the transfer was carried out in accordance with the required criteria and procedures, by testing a sampling of certain material aspects of the redemption transactions.[23]

According to U.S. Trust, the Plan received (into two collective investment funds) its pro rata portion of each Transferable Security (rounded to the nearest round lot) held by the Funds and its pro rata portion of the cash that the Funds held based upon the ownership percentage that the Plan held in each Fund. The amount of cash transferred to the collective investment funds from each of the Funds was adjusted for the value of all the shares that did not transfer in kind due to rounding and was adjusted for the cash value of the Plan's pro rata share of the Funds' other balance sheet assets (receivables and prepaid expenses net of current liabilities). Neither of the Funds held non-transferable securities,[24] so there was no cash adjustment to reflect the value of any non-transferable securities. Finally, the assets transferred to the Plan were valued in accordance with the Funds' procedures and applicable law.

In the Pre-Trade analysis performed by Mellon Transition Management Services, the costs to sell securities distributed by the Stock Fund that would not be accepted in kind by the corresponding collective investment fund were estimated to be $4,286, combined for both commissions and spread. For the securities distributed by the Growth Fund, that would not be accepted in kind, the combined costs were estimated to be $12,724. The Plan was immediately reinvested after the Transfer; therefore potential opportunity costs associated with reinvestment risk was minimized. If the Plan had received cash instead of its pro rata portion of the assets of the Funds, it would have been forced to incur its pro rata portion of the sell side transactions costs, and it would have had to incur all of the buy side transactions costs when it reinvested the proceeds. Furthermore, there may have been a time lag from the date of the redemption request to the time the Plan had fully redeployed the proceeds. This time lag would have imposed an opportunity cost by not being invested in securities that would have had the potential to match the Plan's stated objective for this portion of the Plan's assets.

After the completion of the transitions from the Funds, a post-trade analysis was performed by Mellon Transition Management Services that listed the actual costs that were incurred. For the Stock Fund, 94% of the portfolio transferred in kind, leaving only 6% that was traded in the open market. The total cost of these trades was $3,163 compared to the pre-trade estimate of $4,286. For the Growth Fund, 42% of the portfolio transferred in kind, and 58% was traded on the open market. The total cost of these trades was $7,886 compared to the pre-trade estimate of $12,724.

Mellon represented that it would pay all of the expenses incurred, including the commissions and spread costs, to conduct the transfer. In addition, Mellon guaranteed that the Plan would not suffer an implementation shortfall if the portfolios of securities fell in value during the transfer. Mellon provided this protection with respect to an implementation shortfall while not seeking to require the Plan to give up its upside if the portfolios of securities increased in value during the transfer. Because the transaction was designed so that the Plan would receive no less than its entire investment in each of the Funds, while not sacrificing any potential upside during the transition period, the Plan held cash and securities equal to or greater in value at the market open on December 2, 2005 than it did at the market open on November 30, 2005.[25]

The applicant represents that, if there is an opportunity for additional Redemptions under this exemption, if granted, involving the Funds, such transactions will occur only if the Independent Fiduciary concludes that an in-kind transaction is in the best interests of the Plan, consistent with the above-described procedures.

9. In summary, the applicant represents that the Redemptions satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons:

(a) By accepting an in-kind redemption and using a transition management account strategy, the Plan lowered its transaction costs compared to the expenses that would have been incurred if it had withdrawn its investments in the two affected Funds in cash and then reinvested the cash because the Plan paid no brokerage commissions nor other fees, either directly or through its investment in either the transferring or receiving funds, in connection with the redeemed amounts (other than customary transfer charges paid to parties other than Mellon and its affiliates);

(b) The Plan received a pro rata portion of the securities of the two affected Funds in the Redemption equal in value to the Fund Shares redeemed, as determined in a single valuation (using sources independent of Mellon) performed at the close of business on the Redemption date, in accordance with Rule 2a–4 under the 1940 Act;

(c) The Redemption was overseen by U.S. Trust as Independent Fiduciary and was subject to prior written authorization by U.S. Trust based on U.S. Trust's determination, following full and detailed written disclosure of information regarding the Redemption, that the terms of the Redemption were fair and reasonable to the Plan, and comparable to and no less favorable than terms obtainable at arm's length between unaffiliated parties, and that the Redemption was in the best interests of the Plan and its participants and beneficiaries; and

(d) Each of the Plan's dealings with the Funds, the investment advisers of those Funds, or any affiliated person thereof, would be on a basis no less favorable to the Plan than dealings between the Funds and other shareholders holding shares of the same class of the particular Fund.

Notice to Interested Persons: The applicant will provide notice of the proposed exemption, after publication in the **Federal Register**, to (i) active participants in the Plan, and (ii) retiree and terminated vested participants, alternate payees, and beneficiaries in pay status. Notice to active participants in (i) above will either be by an individual direct interoffice mailing, or electronically in accordance with the conditions of 29 CFR 2520.104b–1. Notice to participants and beneficiaries in (ii) above will be provided by first

[22] The applicant notes that the post-transaction review was completed within 60 days and represents that other post-transaction reviews in connection with future in-kind Redemptions, if any, would also be completed within that time frame.

[23] Condition (K) of the operative language refers to testing ''a sampling'' of material aspects of the Redemptions by the Independent Fiduciary. The applicant represents, however, that the Independent Fiduciary was provided with data as of the Redemption date that listed each security transferred or sold for both the Stock Fund and the Growth Fund. With all of the data available to it, the Independent Fiduciary chose to review all of the individual security transactions, not merely a sampling.

[24] The applicant further represents that no Rule 144A securities were involved in the Redemptions.

[25] According to U.S. Trust, it determined that the Plan held cash and securities at the market open on December 1, 2005 equal in value to the shares it had redeemed, with the share values determined as of the close of business on November 30, 2005. However, a small number of the securities received were sold by the Plan on December 1st because the Plan did not want to retain them as investments. Mellon reimbursed the Plan for the costs related to these sales. U.S. Trust represents that it then looked at the value of the Plan's holdings as of the market open on December 2nd, by which time the in-kind redemption, sales, and reimbursements had been completed, to ensure that the plan suffered no loss.

class mail, or electronically in accordance with the conditions of 29 CFR 2520.104b–1.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 693–8557. (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 14th day of August, 2006.

Ivan Strasfeldm,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department Of Labor.

[FR Doc. E6–13623 Filed 8–18–06; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2006–09; Exemption Application No. D–11033 et al.]

Grant of Individual Exemptions; The Southwest Gas Corporation (Southwest Gas)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, 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 proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

The Southwest Gas Corporation (Southwest Gas) Located in Las Vegas, Nevada

[Prohibited Transaction Exemption 2006–09; Exemption Application No. D–11033]

Exemption

Section I—Transactions & Conditions

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (D) of the Code, shall not apply to the direct or indirect purchase, from Southwest Gas, of the common stock of Southwest Gas by an individual retirement account (IRA) that is (i) established for the benefit of a non-employee of Southwest Gas,[1] (ii) operated pursuant to the terms of the Southwest Gas Corporation Dividend Reinvestment and Stock Purchase Plan (the DRIP), and (iii) maintained in part through administrative services provided by Southwest Gas, a disqualified person with respect to the IRA, provided that the following conditions are satisfied:

(a) The IRA that is established by a DRIP participant pursuant to the terms of the DRIP (the DRIP IRA) is maintained for the exclusive benefit of the individual covered under the IRA (the IRA Owner), his or her spouse, or their beneficiaries;

(b) Southwest Gas complies with all applicable securities laws relating to the Southwest Gas DRIP;

(c) Administrative and recordkeeping services provided by Southwest Gas to the DRIP IRA are rendered pursuant to a written agreement between Southwest Gas and an independent trustee of the DRIP IRA (the IRA Trustee) in which Southwest Gas agrees to act as the IRA Trustee's agent for the provision of such services;

[1] Pursuant to 29 CFR 2510.3–2(d), the subject IRAs are not ''employee benefit plans'' covered by Title I of the Act. However, because the IRA is a ''plan'' for purposes of section 4975 of the Code, the Department has jurisdiction under Title II of the Act over this matter.