

increase, provide a written notice (which may take the form of a proxy statement, letter, or similar communication that is separate from the prospectus of the Fund and that explains the nature and amount of the additional service for which a fee is charged or of the increase in fees) to the Second Fiduciary of the Client Plan. Such notice shall be accompanied by a Termination Form with instructions as described in paragraph (j) above.

Accordingly, the Department hereby corrects such error.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karin Weng of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

Signed at Washington, DC, this 16th day of March, 2001.

**Ivan L. Strasfeld,**

*Director, Office of Exemption Determinations,  
Pension and Welfare Benefits Administration.*

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**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Application No. D-10942, et al.]

#### Proposed Exemptions; Bank of America, et al.

**AGENCY:** Pension and Welfare Benefits Administration, Labor

**ACTION:** Notice of Proposed Exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

#### Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request 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 request for a hearing (at least three

copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. \_\_, stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, N.W., Washington, D.C. 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.

#### Bank of America (BofA), Located in Bethesda, Maryland

[Application No. D-10942]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32,836, 32,847, August 10, 1990). If the exemption is granted, the

restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to (1) the proposed granting to BofA by the Westbrook Real Estate Fund IV, L.P. (LP), a Delaware Limited Partnership, of a first, exclusive, and prior security interest in the capital commitments (Capital Commitments), reserve amounts (Reserve Amounts) and capital contributions (Capital Contributions), whether now owned or after-acquired, of certain employee benefit plans (Plans) investing in the LP; (2) the proposed collateral assignment and pledge by the LP to BofA of its security interest in each Plan's limited partnership interest, whether now owned or after-acquired; (3) the proposed granting by the LP of a first, exclusive, and prior security interest in a borrower collateral account to which all Capital Contributions will be deposited when paid (Borrower Collateral Account); (4) the proposed granting to BofA by Westbrook Real Estate Partners Management IV, L.L.C., a Delaware limited liability company and the general partner of the LP (the General Partner), of its right to make calls for cash contributions (Drawdowns) under the Amended and Restated Agreement of Limited Partnership of Westbrook Real Estate Fund IV, L.P., dated as of September 15, 2000 (Agreement), where BofA is the representative of certain lenders (the Lenders) that will fund a so-called "credit facility" (Credit Facility) providing credit to the LP, and the Lenders are parties in interest with respect to the Plans; and (5) the execution of a partner agreement and estoppel (Estoppel) under which the Plans agree to honor the Drawdowns; provided that (i) the proposed grants, assignments, and Estoppels are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; (ii) the decisions on behalf of each Plan to invest in the LP and to execute such Estoppels in favor of BofA, for the benefit of each Lender, are made by a fiduciary which is not included among, and is independent of and unaffiliated with, the Lenders and BofA; (iii) with respect to Plans that may invest in the LP in the future, such Plans will have assets of not less than \$100 million<sup>1</sup> and not more than 5% of the

<sup>1</sup> In the case of multiple plans maintained by a single employer or a single group of employers treated as a single employer under Sections 414(b), 414(c), 414(m), and 414(o) of the Code, the assets of which are invested on a commingled basis (e.g.,

Continued

assets of such Plan will be invested in the LP; and (iv) the General Partner is unrelated to any Plan and any Lender.

#### Summary of Facts and Representations

1. The LP was formed by the General Partner (as sponsor and sole general partner) with the intent of seeking capital commitments from a limited number of prospective investors who would become partners (Limited Partner) of the LP. There are thirteen current and prospective Limited Partners having, in the aggregate, irrevocable, unconditional capital commitments of approximately \$600 million.

2. The LP will target investments in a broad range of real-estate related assets, portfolios, and companies where the General Partner believes superior risk-adjusted returns are attainable. The LP generally will seek compounded annual returns on its investments in excess of 18%, a portion of which is expected to be comprised of current income.

3. Proceeds from investments may be reinvested to the extent they do not exceed the aggregate Capital Contributions with respect to such investment. To the extent they are not reinvested, net proceeds will be distributed to the Partners on at least a quarterly basis. Under the terms of the Agreement, the LP is expected to dissolve in the year 2008.

4. The Agreement requires each Limited Partner to execute a subscription agreement that obligates the Limited Partner to make contributions of capital up to a specified maximum. The Agreement requires Limited Partners to make Capital Contributions to fulfill this obligation upon receipt of notice from the General Partner. Under the Agreement, the General Partner may make Drawdowns up to the total amount of a Limited Partner's Capital Commitment upon 10 business days' notice. The Limited Partners' Capital Commitments are structured as unconditional, binding commitments to contribute equity when Drawdowns are made by the General Partner. In the event of a default by a Limited Partner, the LP may exercise any of a number of specific remedies.

The Limited Partners constituting over 90% of the equity interest and their investments in the LP are:

Name of partner	Capital commitment
Allstate Insurance Company	\$15,000,000

through a master trust), this \$100 million threshold will be applied to the aggregate assets of all such plans.

Name of partner	Capital commitment
The BellSouth Corporation Health Care Trust—Retirees .....	5,000,000
The BellSouth Corporation Representable Employees' Health Care Trust—Retirees .....	\$10,000,000
The BellSouth Corporation RFA VEBA Trust .....	\$10,000,000
The BellSouth Corporation RFA VEBA Trust for Non-Representable Employees BellSouth Master Pension Trust .....	\$3,000,000
IBM Personal Pension Plan Trust .....	\$92,000,000
NC/TREIT .....	\$50,000,000
New York State Common Retirement Fund .....	\$100,000,000
Teachers' Retirement System of Louisiana .....	\$100,000,000
State of Wisconsin Investment Board .....	\$100,000,000
Bankers Trust Company, as Trustee for the Walt Disney Company Retirement Plan Master Trust .....	\$10,000,000
Westbrook Real Estate Partners Management IV, L.L.C. ....	\$9,060,914

5. The applicant states that the LP will incur indebtedness in connection with many of its investments. In addition to mortgage indebtedness, the LP will incur short-term indebtedness for the acquisition of particular investments. This indebtedness will take the form of the Credit Facility secured by, among other things, a pledge and assignment of each Limited Partner's Capital Commitment. This type of facility will allow the LP to consummate investments quickly without having to finalize the debt/equity structure for an investment or having to arrange for interim or permanent financing prior to making an investment, and will have additional advantages to the Limited Partners and the LP. Under the Agreement, the General Partner may encumber each Limited Partner's Capital Commitments, Reserve Amounts, and Capital Contributions, including the right to make Drawdowns, to one or more financial institutions as security for the Credit Facility. Each of the Limited Partners has appointed the General Partner as its attorney-in-fact to execute all documents and instruments of transfer necessary to implement the provisions of the Agreement. In connection with this Credit Facility, each of the Limited Partners is required to execute documents customarily required in secured financings, including an agreement to honor Drawdowns unconditionally.

6. BofA will become agent for a group of Lenders providing a \$450 million revolving Credit Facility to the LP. BofA will also be a participating Lender. Some of the Lenders may be parties in interest with respect to some of the Plans that invest in the LP by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such Plans for assets other than the Plans' interests in the LP. BofA is requesting an exemption to permit the Plans to enter into security agreements with BofA, as the representative of the Lenders, whereby such Plans' Capital Commitments, Reserve Amounts, and Capital Contributions to the LP, as well as the Plans' limited partnership interests, will be used as collateral for loans made by the Credit Facility to the LP, when such loans are funded by Lenders who are parties in interest to one or more of the Plans.

The Credit Facility will be used to provide immediate funds for real estate acquisitions made by the LP, as well as for the payment of LP expenses. Repayments will be secured generally by the LP from the Limited Partners' Capital Contributions, Reserve Amounts, Drawdowns on the Limited Partners' Capital Commitments, and the Limited Partners' limited partnership interests. The stated maturity date of the Credit Facility is August 15, 2003. The LP can use its credit under the Credit Facility by direct or indirect borrowings or by requesting that letters of credit be issued. All Lenders will participate on a pro rata basis with respect to all cash loans and letters of credit up to the maximum of the Lenders' respective commitments. All such loans and letters of credit will be issued to or for the benefit of the LP or an entity in which the LP owns a direct or indirect interest (a Qualified Borrower), and not to any individual Limited Partner. All payments of principal and interest made by the LP or a Qualified Borrower will be allocated pro rata among all Lenders.

7. The Credit Facility will be a recourse obligation of the Partnership. To secure the Credit Facility, the LP will grant to BofA, for the benefit of each Lender, a first, exclusive, and prior: (1) security interest and lien in and to the Capital Commitments, Reserve Amounts, and Capital Contributions of the Limited Partners; (2) collateral assignment and pledge of the LP's security interest in each Limited Partner's limited partnership interest; and (3) security interest and lien in the Borrower Collateral Account. Additionally, to secure the Credit Facility, the General Partner shall: (1) Pledge, through a partner agreement and estoppel, its partnership interest to BofA

for the benefit of each Lender; and (2) grant to BofA, for the benefit of each Lender, its right to make Drawdowns of the Capital Commitments and Reserve Amounts, and all other rights, titles, powers and privileges related to, appurtenant to or arising out of General Partner's right under the Agreement to require or demand that Limited Partners make Capital Contributions and fund Drawdowns.

8. It is contemplated each Limited Partner will execute an agreement pursuant to which it acknowledges that the LP and the General Partner have pledged and assigned to BofA, for the benefit of each Lender, all of their rights under the Agreement relating to Capital Commitments, Reserve Amounts, Drawdown notices, and Capital Contributions. Such agreement will include an acknowledgment and covenant by the Limited Partner that, if an event of default exists, such Limited Partner will, consistent with its obligations under the Partnership Agreement, honor any Drawdown made by BofA in accordance with the Agreement. Such an agreement and covenant by a Limited Partner effectively limits the assertion of any defense which the Partner might have against the LP or the General Partner with respect to the funding of any Drawdown made by BofA.

9. The applicant represents that at the present time the following Plans are Partners in the LP:

(a) The BellSouth Master Pension Trust (BellSouth Pension Trust) holds the assets of two defined benefit plans (BellSouth Pension Plans) which own interests in the LP. The BellSouth Pension Trust has made a Capital Commitment of approximately \$92 million to the LP. The applicant states that some of the Lenders may be parties in interest with respect to some of the BellSouth Pension Plans in the BellSouth Pension Trust by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such BellSouth Pension Plans with respect to BellSouth Pension Trust assets other than their limited partnership interests in the LP. Thus, BofA states that there is an immediate need for the BellSouth Pension Trust to enter into the Estoppel under the terms and conditions described herein. The total number of participants in the two BellSouth Pension Plans is approximately 137,703, and the approximate fair market value of the total assets of the BellSouth Pension Plans held in the BellSouth Pension Trust as of December 31, 1998 is \$17.9 billion.

The applicant represents that the fiduciary generally responsible for

investment decisions in real estate matters on behalf of both BellSouth Pension Plans is the BellSouth Corporation Treasurer. The fiduciary responsible for reviewing and authorizing the investment in the LP is the BellSouth Corporation Treasurer.

(b) The BellSouth Corporation Representative Employees Health Care Trust—Retirees (BellSouth Health Care Trust) holds the assets of two welfare benefit plans (BellSouth Health Care Plans) which own interests in the LP. The BellSouth Health Care Trust has made a Capital Commitment of approximately \$10 million to the LP. The applicant states that some of the Lenders may be parties in interest with respect to some of the BellSouth Health Care Plans in the BellSouth Health Care Trust by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such BellSouth Health Care Plans with respect to BellSouth Health Care Trust assets other than their limited partnership interests in the LP. Thus, BofA states that there is an immediate need for the BellSouth Health Care Trust to enter into the Estoppel under the terms and conditions described herein. The total number of participants in the two BellSouth Health Care Plans is approximately 130,795. The approximate fair market value of the total assets of the BellSouth Health Care Plans held in the BellSouth Health Care Trust as of December 31, 1998 was \$1.2 billion. The approximate fair market value of the assets in the BellSouth Health Care Plans was \$1.8 billion.

The applicant represents that the fiduciary generally responsible for investment decisions in real estate matters on behalf of both BellSouth Health Care Plans is the BellSouth Corporation Treasurer. The fiduciary responsible for reviewing and authorizing the investment in the LP is the BellSouth Corporation Treasurer.

(c) The IBM Personal Pension Plan Trust (the IBM Trust) holds the assets of one defined benefit plan (the IBM Plan) which owns interests in the LP. The IBM Trust has made a Capital Commitment of \$50 million to the LP. The applicant states that some of the Lenders may be parties in interest with respect to the IBM Plan by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to the IBM Plan with respect to the IBM Trust assets other than its limited partnership interests in the LP. Thus, BofA states that there is an immediate need for the IBM Trust to enter into the Estoppel under the terms and conditions described herein. The total number of participants in the IBM Plan is

approximately 333,295, and the approximate fair market value of the total assets of the IBM Plan as of December 31, 1999 was \$45.6 billion.

The applicant represents that the fiduciary generally responsible for investment decisions in real estate matters on behalf of the IBM Plan is the Retirement Plans Committee, IBM Corporation. The fiduciary responsible for reviewing and authorizing the investment in the LP is the Retirement Plan Committee, IBM Corporation.

(d) The Walt Disney Company Retirement Plan Master Trust (Walt Disney Master Trust) holds the assets of five defined benefit plans (Walt Disney Pension Plans) which own interests in the LP. The Walt Disney Master Trust has made a Capital Commitment of \$10 million to the LP. The applicant states that some of the Lenders may be parties in interest with respect to some of the Walt Disney Pension Plans in the Walt Disney Master Trust by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such Walt Disney Pension Plans with respect to Walt Disney Master Trust assets other than their limited partnership interests in the LP. Thus, BofA states that there is an immediate need for the Walt Disney Master Trust to enter into the Estoppel under the terms and conditions described herein. The total number of participants in the five Walt Disney Pension Plans is approximately 67,188 and the approximate fair market value of the total assets of the Walt Disney Pension Plans held in the Walt Disney Master Trust as of December 31, 1998 was \$1.37 billion.

The applicant represents that the fiduciary generally responsible for investment decisions in real estate matters on behalf of the Walt Disney Pension Plans is the Retirement Plans Committee, Walt Disney Company. The fiduciary responsible for reviewing and authorizing the investment in the LP is the Retirement Plans Committee, Walt Disney Company.

10. The applicant represents that the Plans in the trusts (the Trusts) listed in Rep. 9 are currently the only employee benefit plans subject to the Act that are Limited Partners of the LP and will be included in this exemption. However, the applicant states that it is possible that one or more other Plans will become Limited Partners of the LP in the future. Thus, the applicant requests relief for any such Plan under this proposed exemption, provided the Plan meets the standards and conditions set forth herein. In this regard, such Plan must be represented by an independent fiduciary and the General Partner must

receive from the Plan one of the following:

(1) a representation letter from the applicable fiduciary with respect to such Plan substantially identical to the representation letter submitted by the fiduciaries of the other Plans, in which case this proposed exemption, if granted, will apply to the investments made by such Plan if the conditions required herein are met; or

(2) evidence that such Plan is eligible for a class exemption or has obtained an individual exemption from the Department covering the potential prohibited transactions which are the subject of this proposed exemption.

11. BofA represents that the LP will obtain an opinion of counsel that the LP constitutes an "operating company" under the Department's plan asset regulations (see 29 C.F.R. 2510.3—101(c)).<sup>2</sup>

12. BofA represents that the security and Estoppel constitutes a form of credit security which is customary among financing arrangements for real estate limited partnerships or limited liability companies, wherein the financing institutions do not obtain security interests in the real property assets of the partnership or limited liability companies. BofA also represents that the obligatory execution of the Estoppel by the Limited Partners for the benefit of the Lenders was fully disclosed in the LP's Private Placement Memorandum as a requisite condition of investment in the LP during the private placement of the limited partnership interests. BofA represents that the only direct relationship between any of the Limited Partners and any of the Lenders is the execution of the Estoppel. All other aspects of the transaction, including the negotiation of all terms of the Credit Facility, are exclusively between the Lenders and the LP. BofA represents that the proposed execution of the Estoppel will not affect the abilities of the Trusts to withdraw from investment and participation in the LP. The only

Plan assets to be affected by the proposed transactions are any funds which must be contributed to the LP in accordance with requirements under the Agreement to make Drawdowns to honor a Limited Partner's Capital Commitments.

13. BofA represents that neither it nor any Lender acts or has acted in any fiduciary capacity with respect to the Plans' investment in the LP and that BofA is independent of and unrelated to the fiduciaries (the Trust Fiduciaries) responsible for authorizing and overseeing the Trusts' investments in the LP. The Trust Fiduciaries represent independently that their authorization of the Trusts' investments in the LP was free of any influence, authority or control by the Lenders. The Trust Fiduciaries represent that the Trusts' investments in and Capital Commitments to the LP were made with the knowledge that each Limited Partner would be required subsequently to grant a security interest in Drawdowns and Capital Commitments to the Lenders and to honor unconditionally Drawdowns made on behalf of the Lenders without recourse to any defenses against the General Partner. The Trust Fiduciaries individually represent that they are independent of and unrelated to BofA and the Lenders and that the investment by the Trusts for which the Trust Fiduciaries are responsible continues to constitute a favorable investment for the Plans participating in that Trust and that the execution of the Estoppel is in the best interests and protective of the participants and beneficiaries of such Plans. In the event another Plan proposes to become a Limited Partner, the applicant represents that it will require similar representations to be made by such Plan's independent fiduciary. Any Plan proposing to become a Limited Partner in the future and needing to avail itself of the exemption proposed herein will have assets of not less than \$100 million,<sup>3</sup> and not more than 5% of the assets of such Plan will be invested in the LP.

14. In summary, the applicant represents that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) the Plans' investments in the LP were authorized and are overseen by the Trust Fiduciaries, which are independent of the Lenders, and other Plan investments in the LP from other employee benefit plans subject to the Act will be authorized and monitored by independent Plan fiduciaries; (2) none

of the Lenders have any influence, authority or control with respect to the Trusts' investment in the LP or the Trusts' execution of the Estoppel; (3) the Trust Fiduciaries invested in the LP on behalf of the Plans with the knowledge that the Estoppel is required of all Limited Partners investing in the LP, and all other Plan fiduciaries that invest their Plan's assets in the LP will be treated the same as other Limited Partners are currently treated with regard to the Estoppel; (4) any Plan which may invest in the LP in the future, which needs to avail itself of the exemption proposed herein, will have assets of not less than \$100 million,<sup>4</sup> and not more than 5% of the assets of any such Plan will be invested in the LP, and (5) the General Partner is unrelated to any Plan and any Lender.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

#### **Independent Fiduciary Services, Inc. (IFS)**

Located in Washington, DC

[Exemption Application Nos: D-10960 and D-10971]

#### **Proposed Exemption**

The Department of Labor is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth 29 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).<sup>5</sup>

#### *I. General Transactions*

If the exemption is granted, the restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1)(A) through (D), shall not apply, effective from November 3, 2000, until November 3, 2005, to a transaction between a party in interest with respect to the Plumbers and Pipe Fitters National Pension Fund (the Fund) and an account (the Diplomat Account) that holds certain assets of the Fund managed by IFS while serving as independent named fiduciary (the Named Fiduciary) in connection with Prohibited Transaction Exemption 99-46 (PTE 99-46)<sup>6</sup>; provided that the following conditions are satisfied:

(a) IFS, as Named Fiduciary of the Diplomat Account, is an investment

<sup>4</sup> Id.

<sup>5</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to the corresponding provisions of the Code.

<sup>6</sup> 64 FR 61944, November 15, 1999.

<sup>2</sup> The Department notes that the term "operating company" as used in the Department's plan asset regulation cited above includes an entity that is considered a "real estate operating company" as described therein (see 29 CFR 2510.3-101(e)). However, the Department expresses no opinion in this proposed exemption regarding whether the LP would be considered either an operating company or a real estate operating company under such regulations. In this regard, the Department notes that it is providing no relief for either internal transactions involving the operation of the LP or for transactions involving third parties other than the specific relief proposed herein. In addition, the Department encourages potential Plan investors and their independent fiduciaries to carefully examine all aspects of the LP's proposed real estate investment program in order to determine whether the requirements of the Department's regulations will be met.

<sup>3</sup> See supra note 1.

adviser registered under the Investment Advisers Act of 1940, as amended, (the Advisers Act) that has, as of the last day of its most recent fiscal year, shareholders' equity or partners' equity, as defined in Section III(h), below, in excess of \$750,000;

(b) At the time of the transaction, as defined in Section III(i), below, the party in interest or its affiliate, as defined in Section III(a), below, does not have, and during the immediately preceding one (1) year has not exercised, the authority to—

(1) appoint or terminate the Named Fiduciary as a manager of the Diplomat Account, or

(2) negotiate the terms of the management agreement with the Named Fiduciary (including renewals or modifications thereof) on behalf of the Fund;

(c) The transaction is not described in—

(1) Prohibited Transaction Class Exemption 81-6 (PTCE 81-6)<sup>7</sup> (relating to securities lending arrangements);

(2) Prohibited Transaction Class Exemption 83-1 (PTCE 83-1)<sup>8</sup> (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Class Exemption 82-87 (PTCE 82-87)<sup>9</sup> (relating to certain mortgage financing arrangements);

(d) The terms of the transaction are negotiated on behalf of the Diplomat Account under the authority and general direction of the Named Fiduciary, and either the Named Fiduciary, or (so long as the Named Fiduciary retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the Named Fiduciary, makes the decision on behalf of the Diplomat Account to enter into the transaction, provided that the transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(e) The party in interest dealing with the Diplomat Account is neither the Named Fiduciary nor a person related to the Named Fiduciary, as defined in Section III(f), below;

(f) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the Named Fiduciary, the terms of the transaction are at least as favorable to the Diplomat Account as the terms

generally available in arm's length transactions between unrelated parties;

(g) Neither the Named Fiduciary nor any affiliate thereof, as defined in Section III(b), below, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in the Named Fiduciary is a person who, within the ten (10) years immediately preceding the transaction, has been either convicted or released from imprisonment, whichever is later, as a result of:

(1) any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization;

(2) any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(3) income tax evasion;

(4) any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or

(5) any other crimes described in section 411 of the Act.

For purposes of this Section I(g), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether the judgment remains under appeal.

## II. Specific Exemption Involving Places of Public Accommodation.

If the exemption is granted, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) 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 (E) of the Code, shall not apply, effective from November 3, 2000, until November 3, 2005, to the furnishing of services, facilities, and any goods incidental thereto by a place of public accommodation owned by the Diplomat Account managed by IFS, acting as the Named Fiduciary, to a party in interest with respect to the Fund, if the services, facilities, and incidental goods are furnished on a comparable basis to the general public.

## III. Definitions

(a) For purposes of Section I(b), above, of this proposed exemption, an "affiliate" of a person means—

(1) any person directly or indirectly, through one or more intermediaries,

controlling, controlled by, or under common control with the person,

(2) any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, 5 percent (5%) or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) any director of the person or any employee of the person who is a highly compensated employee, as described in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets. A named fiduciary (within the meaning of section 402(a)(2) of the Act) of a plan, and an employer any of whose employees are covered by the plan will also be considered affiliates with respect to each other for purposes of Section I(b) if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(b) For purposes of Section I(g), above, of this proposed exemption, an "affiliate" of a person means—

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

(2) any director of, relative of, or partner in, any such person,

(3) any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, or a 5 percent (5%) or more partner or owner, and

(4) any employee or officer of the person who—

(A) Is a highly compensated employee (as described in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent (10%) or more of the yearly wages of such person) or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management, or disposition of Fund assets.

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

(d) The term "goods" includes all things which are movable or which are fixtures used by the Diplomat Account but does not include securities, commodities, commodities futures, money, documents, instruments, accounts, chattel paper, contract rights, and any other property, tangible or intangible, which, under the relevant facts and circumstances, is held primarily for investment.

<sup>7</sup> 46 FR 7527, January 23, 1981.

<sup>8</sup> 48 FR 895, January 7, 1983.

<sup>9</sup> 47 FR 21331, May 18, 1982.

(e) The term “party in interest” means a person described in section 3(14) of the Act and includes a “disqualified person,” as defined in section 4975(e)(2) of the Code.

(f) The Named Fiduciary is “related” to a party in interest for purposes of Section I(e), above, of this proposed exemption, if the party in interest (or a person controlling, or controlled by, the party in interest) owns a 5 percent (5%) or more interest in the Named Fiduciary, or if the Named Fiduciary (or a person controlling, or controlled by, the Named Fiduciary) owns a 5 percent (5%) or more interest in the party in interest. For purposes of this definition:

(1) The term “interest” means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation,

(B) The capital interest or the profits interest of the entity if the entity is a partnership; or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights, or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest.

(g) The term “relative” means a relative as that term is defined in section 3(15) of the Act, or a brother, sister, or a spouse of a brother or sister.

(h) For purposes of Section I(a) of this proposed exemption, the term “shareholders’ equity” or “partners’ equity” means the equity shown in the most recent balance sheet prepared within the two (2) years immediately preceding a transaction undertaken pursuant to this proposed exemption, in accordance with generally accepted accounting principles.

(i) The “time” as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into during the period from November 3, 2000, until November 3, 2005, or if a renewal that requires the consent of the Named Fiduciary occurs during the period from November 3, 2000, until November 3, 2005, and the requirements of this proposed exemption are satisfied at the time the transaction is entered into or renewed, then the requirements

will be deemed to continue to be satisfied thereafter with respect to the transaction. Nothing in this subsection shall be construed as exempting a transaction which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of this proposed exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this proposed exemption.

#### Temporary Nature of Exemption

The Department has determined that the relief provided to IFS by this proposed exemption will be temporary in nature. The exemption, if granted, will be effective for a period of five (5) years, beginning on November 3, 2000, and ending on November 3, 2005, so long as IFS retains full fiduciary responsibility with respect to the transactions which are the subject of this exemption. Accordingly, the relief provided by this proposed exemption will not be available upon expiration of such five-year period for any transactions (or renewal that requires the consent of IFS, acting as the Named Fiduciary) first entered into after November 3, 2005. Should IFS wish to extend, beyond the five-year period, the relief provided by this proposed exemption, it may submit another application for exemption.

#### Preamble

In October 1997, the Department received an exemption application (D-10514) from the Fund requesting relief from the prohibited transaction provisions of section 406(a) and (b) of the Act and 4975 of the Code. The Department published a notice of proposed exemption in the **Federal Register** on May 29, 1998.<sup>10</sup> The final exemption, Prohibited Transaction Exemption 99-46 (PTE 99-46), was published in the **Federal Register** on November 15, 1999.<sup>11</sup>

PTE 99-46 provides an exemption, effective October 9, 1997, for the transfer to the Fund by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (the Union), a party in interest with respect to the Fund, of the Union’s limited partnership interests in the Diplomat Properties, Limited Partnership (the Partnership), the sole asset of which is commonly known as the Diplomat Resort and

Country Club (the Property), and the transfer to the Fund of the Union’s stock in Diplomat Properties, Inc., the corporate general partner of the Partnership (the General Partner), provided certain conditions are satisfied.

In addition to the conditions contained in PTE 99-46, the Fund agreed by way of a Term Sheet (the Term Sheet), dated October 13, 1999, to several additional undertakings, including the appointment of Actuarial Sciences Associates, Inc. (ASA), to oversee the Fund’s investment in the Partnership and the continuing development of the Property. Further, pursuant to the Term Sheet, the Board of Trustees of the Fund (the Trustees) agreed to a percentage limitation on the total Fund investment in the development of the Property. Effective November 8, 1999, the Trustees appointed ASA to serve as the Named Fiduciary of the Diplomat Account which holds the Fund’s interest in the Partnership, the General Partner, and other Fund assets invested in or awaiting investment in the Property.

Pursuant to the provisions of the Term Sheet, ASA could be replaced by the Trustees only upon the concurrence of the Department or pursuant to a court order for cause. Accordingly, when ASA established a wholly-owned subsidiary, ASA Fiduciary Counselors, Inc. (ASA Counselors), to provide investment advisory services, ASA sought approval from the Trustees and the Department prior to assigning ASA Counselors the investment advisory services that ASA had previously performed. After ASA Counselors became a registered investment adviser, ASA assigned its responsibilities to ASA Counselors, with the consent of the Trustees of the Fund and the Department.

On March 15, 2000, the Department received an exemption application (D-10879) from ASA and ASA Counselors requesting relief from the prohibited transaction provisions of section 406(a) and (b) of the Act and 4975 of the Code. The Department published a notice of proposed exemption in the **Federal Register** on June 26, 2000.<sup>12</sup> The final exemption, Prohibited Transaction Exemption 2000-49 (PTE 2000-49), was published in the **Federal Register** on October 11, 2000.<sup>13</sup>

PTE 2000-49 permitted ASA, effective from November 8, 1999, to December 20, 1999, and thereafter ASA Counselors, while serving as the Named Fiduciary of the Diplomat Account, to engage on behalf of the Diplomat

<sup>10</sup> 63 FR 29453.

<sup>11</sup> 64 FR 61944.

<sup>12</sup> 65 FR 39435.

<sup>13</sup> 65 FR 60454.

Account in certain transactions with parties in interest with respect to the Fund. In the case of transactions involving places of public accommodation, the exemption permitted, effective November 8, 1999, the furnishing of services, facilities, and any goods incidental thereto by a place of public accommodation owned by the Diplomat Account that is managed by ASA or ASA Counselors, when acting as the Named Fiduciary, to parties in interest with respect to the Fund, if such services, facilities, and incidental goods are furnished on a comparable basis to the general public.

Subsequently, ASA Counselors resigned its appointment as Named Fiduciary with respect to the Fund and the Diplomat Account, effective as of November 3, 2000. Prior to that date, the Trustees entered into an agreement with IFS, dated September 12, 2000, the terms of which were reviewed and found acceptable by the Department prior to execution. Pursuant to the terms of such agreement IFS was appointed, effective November 3, 2000, as successor Named Fiduciary of the Fund with respect to the Diplomat Account.

On December 21, 2000, the Department received an exemption application (D-10960) in which IFS requested relief from the prohibited transaction provisions of section 406(a) and (b) of the Act and section 4975 of the Code which is identical to that provided to ASA and ASA Counselors, pursuant to PTE 2000-49.

On February 23, 2001, the Department received another exemption application (D-10971) from IFS, acting as Named Fiduciary on behalf of the Fund. IFS requested a modification to a provision of the Term Sheet which the Trustees had agreed to in connection with PTE 99-46. The relevant provision provides that:

[t]he Trustees will instruct the custodian of the Fund to transfer to the Diplomat Account any additional amounts requested by ASA for the operations or expenses of the Diplomat Account or the Partnership, so long as the total amount of the Fund assets at risk (*i.e.*, the Fund's investment in the Partnership plus any recourse debt in excess of the value of the assets in the Partnership) does not exceed 13 percent of the Fund assets at the time of the transfer.

The requested change to PTE 99-46 would modify the 13 percent allocation limit (the 13% Limitation). Because both applications were filed by IFS and involve the assets of the Fund in the Diplomat Account, the Department has determined to consider the relief requested in both applications at the same time.

### Summary of Facts and Representations

1. The Fund is a Taft-Hartley multi-employer defined benefit pension fund. The Fund has approximately 123,000 participants and beneficiaries, as of December 28, 2000. As of December 31, 2000, and February 17, 2001, the approximate aggregate fair market value of the total assets of the Fund was \$4.3 billion and \$4.2 billion, respectively. The assets of the Fund include interests in the Partnership and its corporate General Partner which the Fund acquired pursuant to PTE 99-46.

The sole asset of the Partnership consists of the Property located in Hollywood and Hallandale, Florida. The Property, among other things, consists of several improved parcels, including an oceanfront hotel complex, a convention center, a golf course, a country club, a marina, a parcel of oceanfront real estate zoned for development as condominiums units, another parcel currently unentitled and being used for construction trailers, and certain other related assets.

The Fund currently owns 100 percent (100%) of the equity interest in the Partnership. Such interest in the Partnership is not a publicly offered security. Pursuant to regulations issued by the Department, 29 CFR § 2510.3-101 (the Plan Assets Regulation), when a plan acquires an equity interest in an entity, which interest is not a publicly offered security or a security issued by an investment company registered under the Investment Company Act of 1940, the underlying assets of the entity will be deemed to include plan assets, unless certain exceptions apply. However, when 100 percent (100%) of the outstanding equity interests in such entity are owned by a plan or a related group of plans, such exceptions do not apply (see 29 CFR § 2510.3-101(h)(3) of the Plan Asset Regulation). Accordingly, in the situation described herein the applicant represents that the Property, which is the sole asset of the Partnership, would be deemed to be an asset of the Fund; and any transaction involving the Property is treated as a transaction involving Fund assets for purposes of the Act.

2. The current requests for relief from the prohibited transaction provisions of the Act were filed by IFS. IFS is a Delaware corporation which provides a broad range of benefit consulting services to both public and private employee benefit plans with assets ranging from several million to several billion dollars. IFS is a registered investment adviser under the Advisers Act. Among the individuals employed by IFS who are primarily responsible for

the development of the Property (the Project) are Samuel W. Halpern, Esq. (Mr. Halpern) and Francis X. Lilly, Esq. (Mr. Lilly), who are the sole shareholders of IFS. It is represented that Mr. Lilly has broad expertise in a wide range of subjects, including developing investment policy and analysis and regulation of investment activity by pension funds. Mr. Halpern is experienced in a wide variety of issues related to pension plans, including the financial and fiduciary aspects of pension fund investing. It is represented that the fee charged by IFS is paid by the Fund.

3. IFS has requested a general exemption, rather than an exemption involving a specific transaction with a particular party in interest. In this regard, it is represented that due to the size and complexity of the Fund, the identities of the parties in interest which may be involved in the subject transactions were not known at the time the application was filed. With approximately \$4.2 billion in assets, it is represented that the Fund has relationships with a variety of financial institutions and a multitude of other service providers who are now or may become parties in interest or disqualified persons, as those terms are defined respectively, in section 3(14) of the Act or 4975(e)(2) of the Code. Further, because the Project involves a complex real estate development, including a variety of commercial spaces and public accommodation, relief from the prohibited transaction provisions of the Act has been requested for transactions with parties in interest that are expected to occur in the ordinary course of operation.

4. The requested exemption would permit IFS for a period of five (5) years, beginning November 3, 2000, and ending November 3, 2005, while serving as the Named Fiduciary of the Diplomat Account, to engage on behalf of the Diplomat Account in certain transactions with parties in interest with respect to the Fund, without violating section 406(a)(1)(A) through (D) of the Act. Further, in the case of transactions involving places of public accommodation, the requested exemption would permit, effective November 3, 2000, through November 3, 2005, the furnishing of services, facilities, and any goods incidental thereto by a place of public accommodation owned by the Diplomat Account that is managed by the Named Fiduciary, to a party in interest with respect to the Fund.

With respect to the furnishing of services, facilities, and any goods incidental thereto by places of public



accommodation owned by the Diplomat Account, IFS maintains that, absent this exemption, it would not be feasible to monitor routine transactions in the operation of the hotel complex, the golf course, and the other components of the Property. In this regard, given the large number of participants and beneficiaries of the Fund, as well as the large number of contributing employers and service providers to the Fund, and their affiliates, it is not possible to prevent party in interest transactions from occurring. Accordingly, if granted, this exemption will permit the furnishing of services, facilities, and any goods incidental thereto by places of public accommodation owned by the Diplomat Account, and managed by IFS, to parties in interest with respect to the Fund, if such services, facilities and incidental goods are furnished on a comparable basis to the general public.

With respect to transactions with parties in interest, other than those involving places of public accommodation, the requested exemption, if granted, would provide relief to IFS, while serving as Named Fiduciary of the Diplomat Account, which is similar to the relief provided to qualified professional asset managers (QPAMs or a QPAM) under Prohibited Transaction Class Exemption 84-14 (PTCE 84-14).<sup>14</sup> In general, PTCE 84-14 permits various parties in interest with respect to an employee benefit plan to engage, under certain conditions, in transactions involving plan assets, if the assets are managed by persons defined under the exemption as QPAMs.

It is represented that until December 14, 2000, the Fund engaged CS Capital Management Inc. (CSC), as a QPAM to manage the Project.<sup>15</sup> Subsequently, pursuant to its authority as Named Fiduciary, IFS removed CSC as the QPAM and appointed LaSalle Investment Management, Inc. (LaSalle) as replacement QPAM, effective December 14, 2000. It is represented that LaSalle meets the definition of a

QPAM for all purposes under PTCE 84-14.<sup>16</sup>

Although, in many cases the Fund will be able to rely on the ability of LaSalle to qualify as a QPAM under PTCE 84-14, IFS believes that there may be instances in which it will become necessary or desirable for IFS to act more directly with respect to a transaction (if, for example, the transaction is with an entity in some way related to LaSalle or if IFS determines it is prudent to retain discretion with respect to certain significant transactions). Accordingly, IFS has requested relief under conditions which are similar to those required in Part I of PTCE 84-14.<sup>17</sup>

In this regard, Part I of PTCE 84-14 provides relief from the restrictions of section 406(a)(1)(A)-(D) of the Act and 4975(c)(1)(A)-(D) of the Code for transactions between a party in interest with respect to an employee benefit plan and an investment fund in which such plan has an interest which is managed by a QPAM; provided certain conditions are met. One such condition (the Diverse Clientele Test), as set forth in Part I(e) of PTCE 84-14, requires that:

The transaction is not entered into with a party in interest with respect to any plan whose assets managed by the QPAM, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof \* \* \*) or by the same employee organization, and managed by the QPAM, represent more than 20 percent of the total client assets managed by the QPAM at the time of the transaction.

In this regard, IFS represents that due to the nature and scope of its responsibilities as the Named Fiduciary, the assets of the Fund held by the Diplomat Account managed by IFS exceed 20 percent (20%) of the total client assets that it has under management. Accordingly, IFS represents that it is unable to satisfy the Diverse Clientele Test found in Part I(e) of PTCE 84-14.

Additionally, pursuant to Part V(a)(4) of PTCE 84-14, in order for an investment adviser registered under the Advisers Act to qualify as a QPAM, as of the last day of its most recent fiscal year, total client assets under its management and control must exceed

\$50 million (the Managed Assets Test). Although IFS serves as an investment advisor or (on rare occasions) investment manager with respect to over \$8 billion of assets, it is represented that the total client assets under its direct management and control did not exceed \$50 million, as of the last day of its most recent fiscal year.<sup>18</sup> Accordingly, IFS represents that it is unable to satisfy the requirements of the Managed Assets Test, as set forth in Part V(a)(4) of PTCE 84-14.

5. Notwithstanding its inability to meet the requirements of the Managed Assets Test or to satisfy the Diverse Clientele Test, IFS maintains that the requested administrative exemption should be granted where it can be demonstrated that IFS, like a QPAM, acts in the best interest of plan participants, unencumbered by a relationship with parties in interest. With regard to independence, it is represented that IFS had no relationship with the Fund or with the Trustees, prior to the execution of the agreement appointing IFS as Named Fiduciary. In the opinion of IFS, the Department's involvement in the appointment process ensured that when selected to serve as the Named Fiduciary of the Diplomat Account, IFS was independent and qualified to act in that capacity. In addition, it is represented that the reporting obligations of IFS to the Department and the restrictions on the removal of IFS, as the Named Fiduciary under PTE 99-46, by the Trustees of the Fund ensures the continued independence of IFS.

6. It is represented that the proposed exemption is in the best interest of the Fund. In this regard, if granted, the proposed exemption would facilitate the management of the Project in the manner most efficient and beneficial to the participants and beneficiaries that have interests in the Fund. As discussed above, the proposed exemption would facilitate routine operations of the Project. In the absence of the exemption, it would be burdensome to examine each transaction to determine whether such transaction might involve a party in interest.

7. It is represented that without the exemption, the Diplomat Account could be prevented from entering into beneficial financial transactions with parties in interest that would enhance the return to the Fund. As indicated, above, the Fund has party in interest

<sup>14</sup> 49 FR 9494 (March 13, 1984), as corrected, 50 FR 41430 (October 10, 1985).

<sup>15</sup> IFS represents that CSC may not have qualified for the general exemption under Part I of PTCE 84-14, because the assets of the Fund managed by CSC may have represented more than 20 percent (20%) of the total client assets managed by CSC. The Department is offering no view, herein, as to whether CSC has met the definition of a QPAM, as set forth in Part V(a) of PTCE 84-14, and has satisfied all of the conditions, as set forth in Part I of PTCE 84-14, nor is the Department, herein, providing CSC any relief for transactions with parties in interest with respect to the Fund while the assets of the Fund were under the management of CSC.

<sup>16</sup> The Department is offering no view, herein, as to whether LaSalle has met the definition of a QPAM, as set forth in Part V(a) of PTCE 84-14, and has satisfied all of the conditions, as set forth in Part I of PTCE 84-14, nor is the Department, herein, providing LaSalle any relief for transactions with parties in interest with respect to the Fund while assets of the Fund are under the management of LaSalle.

<sup>17</sup> The Department, herein, is not proposing an exemption for the type of transactions which are described in Part II and Part III of PTCE 84-14.

<sup>18</sup> Although IFS represents that it is a fiduciary with respect to most of these assets by virtue of providing investment advice for a fee, IFS does not generally function as an investment manager, within the meaning of section 3(38) of the Act, with respect to those assets.



relationships with a variety of financial institutions and other service providers. In this regard, it is represented that without the requested exemption, the pool of possible lenders and equity investors would be unduly restricted, because any financial institution that has pre-existing relationships with the Fund would be excluded from dealing with the Diplomat Account.

8. IFS maintains that in granting PTCE 84-14, the Department has already determined that the requested exemption is administratively feasible. Accordingly, in the opinion of IFS, the requested exemption would not impose any administrative burdens on the Department which are not already imposed by PTCE 84-14 and by PTE 2000-49.

9. IFS maintains that the proposed exemption would be protective of the rights of participants and beneficiaries of the Fund because of the on-going oversight of both the Trustees and the Department. In this regard, it is represented that under the terms of an agreement with the Trustees, IFS has a continuing responsibility to furnish the Trustees and the Department with monthly written reports concerning the operations, assets, receipts, and disbursements with respect to the Project. Furthermore, it is IFS' responsibility to provide the Department with certain documents and to meet with Department officials upon request.

10. The proposed exemption contains conditions which are designed to ensure the presence of adequate safeguards to protect the interests of the Fund regarding the subject transactions. Except for the Diverse Clientele Test, as set forth in Part I(e) of PTCE 84-14, and the Managed Assets Test, as set forth in Part V(a)(4) of PTCE 84-14, the proposed exemption contains conditions substantially similar to those in PTCE 84-14. In this regard, IFS represents that it satisfies the capitalization requirement for an investment advisor, registered under the Advisers Act, to qualify as a QPAM, in that it has shareholder's equity of more than \$750,000. Further, it is represented that the transactions which are the subject of this proposed exemption are not part of an agreement, arrangement, or understanding designed to benefit a party in interest. In addition, neither the Named Fiduciary nor a person related to the Named Fiduciary may engage in transactions with the Diplomat Account.

11. In the absence of the proposed exemption, IFS may be unable to exercise the degree of control over the financing and operations of the Project, as contemplated by the Department and

the Trustees. In this regard, pursuant to the Terms of ASA's services contract, ASA had full and complete authority, control, and discretion with respect to the construction, use, and/or sale of the Project and all of its components, including performing whatever tasks might be necessary to maximize the financial return to the Fund of its investment in the Partnership. ASA's overall authority remained subject to the requirement that the total amount of Fund assets at risk (i.e., the Fund's investment in the Partnership plus any recourse debt in excess of the value of the assets in the Partnership) not exceed 13 percent of the Fund assets at the time of the transfer. After ASA assigned its responsibilities to ASA Counselors, with the consent of the Trustees and the Department, ASA Counselors was obligated to comply with the 13% Limitation. Thereafter, when ASA Counselors resigned, and the Trustees hired IFS, as successor Named Fiduciary for the Fund with respect to the Diplomat Account, IFS did not initially anticipate that any transfers would be made to the Diplomat Account in excess of the 13% Limitation.

However, shortly after IFS began functioning as the independent Named Fiduciary, IFS alerted the Department of its concern that the amount of the Fund's assets invested in the Project, plus recourse debt, would soon exceed the 13% Limitation. Indeed, exceeding the 13% Limitation seemed likely to IFS, given the difficulty of placing sufficient nonrecourse debt on the Project, the projected budget to complete construction, and the fluctuating value of the Fund's total investment portfolio.

In this regard, as of February 17, 2001, the Partnership had drawn down approximately \$522 million from the Fund. It is represented that IFS was advised that the total value of the assets of the Fund, as of December 31, 2000, was \$4.3 billion (13% of which is \$559 million), and as of February 17, 2001, was \$4.2 billion (13% of which is \$546 million). Based on current budget projections, IFS estimates that the Fund would likely exceed the 13% Limitation well before the Partnership could close on any financing.

Absent a modification to the 13% Limitation, completion of the Project without interruption is not likely, because the Partnership could not promptly obtain the requisite financing or sell sufficient assets to remain within that limit. In this regard, LaSalle concluded that finding alternative debt financing on a best case scenario is likely to take at least three (3) to four (4) months. Any financing obtained prior to

a certificate of occupancy is likely to be advanced under onerous terms to the Partnership and would include recourse to the Fund. Further, LaSalle has concluded that if, because of the 13% Limitation, the Fund now sought to sell the Property, rather than complete it, the Fund would suffer substantial losses.

Instead, LaSalle believes that it would be far more advantageous (assuming it is legally permissible) for the Fund to finance the Project to completion. In this regard, if construction is completed and the Project achieves stabilized income, LaSalle projects that the increased value of the Project, as completed, less the cost of completion will likely be higher than the value of the Project, if it were to be sold as a distressed asset. In addition, if construction were abandoned or interrupted now, there would be significant costs associated with shutting down the Project (either temporarily or permanently) until the Property could be sold that would not otherwise be incurred. LaSalle has concluded that the total expenditures that would result from the abandonment or interruption of the Project would cause the Project to significantly exceed the 13% Limitation.

Although LaSalle is still completing its review of the budget for completion of the Project, it has, nevertheless, concluded that the budget prepared by the Partnership on September 30, 2000, which estimated the cost of the Project at \$614,745,884, does not accurately reflect the true situation. It is represented that, in part, this is because the September 30 budget excludes approximately \$61 million of hard cost increases, various other hard costs that have been identified since that time, and other normal budget scope items (e.g., start-up operating losses). Instead, based on its preliminary review of the budget, LaSalle estimates that the total cost of the development of the Project and the first year operating losses could total approximately, but not more than, \$800 million.

It is the opinion of LaSalle that additional funding by the Fund up to a flat dollar amount of sufficient magnitude to allow for the completion of the Project is the best financing solution currently available to the Partnership. This solution will allow the Partnership to extract the most value from its investment in the long run, and avoid the inevitable but unnecessary losses that the Fund would face if the Project were abandoned now. A flat dollar limitation would also remove the uncertainty as to how and if the Project will be financed to completion.

First, uncertainty will be reduced by setting the limitation at \$800 million because this dollar amount should cover the estimated completion of the Project with a suitable contingency. In the opinion of LaSalle, it would be unwise, due to the history and uncertainties of the Project, not to seek an allocation limit that was in excess of what it believes to be the required need.

Second, aside from providing a sufficient increase in the 13% Limitation, a flat limitation, rather than a percentage limitation will further reduce uncertainty because fluctuations in the total value of Fund assets will not result in constant changes to the limitation.

Elimination of financing uncertainty will, in turn, allow the Project team to focus on completing construction, installing the best hotel operator, opening the hotel, and generating revenues as soon as possible. It would overcome concerns in booking rooms that there will not be enough capital to complete the hotel, an issue which the marketing team must constantly address.

In light of LaSalle's conclusions, as summarized above, IFS has proposed replacement of the 13% Limitation with the following requirement:

The Trustees will instruct the custodian of the Fund to transfer to the Diplomat Account any additional amount requested by the independent named fiduciary for the operations or expenses of the Diplomat Account or the Partnership, so long as the total amount of Fund assets at risk (*i.e.*, the Fund's investment in the Partnership plus any recourse debt in excess of the value of the assets in the Partnership) does not exceed \$800 million at the time of the transfer.

As the Department previously noted in PTE 99-46, the additional undertakings agreed to by the Trustees, including the appointment of an independent fiduciary and the limitation on the total Fund investment in the Project, were and are material factors in the Department's determination to grant that exemption, as well as in considering any modification thereto.

Based upon the arguments presented by IFS, the Department has tentatively agreed to the proposed modification requested by IFS and invites interested persons to comment on such modification.

12. In summary, IFS represents that the transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code because, among other things:

(a) IFS, acting as the Named Fiduciary for the Diplomat Account, is an

investment adviser registered under the Advisers Act, with shareholders' equity in excess of \$750,000;

(b) At the time of the transaction, the party in interest or its affiliate does not have, and during the preceding one (1) year has not exercised, the authority to appoint or terminate IFS, as the Named Fiduciary and manager of the Fund's assets in the Diplomat Account, or to negotiate the terms on behalf of the Fund (including renewals or modifications) of the management agreement;

(c) The subject transactions are not those which are described in PTCE 81-6; PTCE 83-1; or PTCE 82-87;

(d) The terms of the transactions were negotiated on behalf of the Diplomat Account by, or under the authority and general direction of IFS, effective as of November 3, 2000, and either IFS or (so long as IFS retains full fiduciary responsibility with respect to the transaction, a property manager acting in accordance with written guidelines established and administered by IFS, has made or will make the decision on behalf of the Diplomat Account to enter into each transaction;

(e) The transactions are not part of an agreement, arrangement, or understanding designed to benefit a party in interest;

(f) At the time each transaction is entered into, renewed, or modified, the terms of the transaction are at least as favorable to the Diplomat Account as the terms generally available in arm's length transactions between unrelated parties;

(g) Neither IFS, nor any affiliate thereof, nor any owner, direct or indirect, of a 5 percent (5%) or more interest in IFS, is a person who, within the ten (10) years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of any felony, as set forth in Section I(g) of this proposed exemption;

(h) Neither IFS, nor a person related thereto, engages in the transactions with the Diplomat Account which are the subject of this proposed exemption;

(i) Services, facilities, and any goods incidental thereto, provided by a place of public accommodation which is owned by the Diplomat Account managed by IFS, as the Named Fiduciary, will be furnished to any party in interest on a basis which is comparable to the furnishing of such services, facilities and incidental goods to the general public;

(j) Completion of the Project without interruption, absent a modification to the 13% Limitation, is not likely, because the Partnership could not

promptly obtain the requisite financing or sell sufficient assets to remain within that limit;

(k) The Fund would incur significant costs associated with shutting down the Project (either temporarily or permanently) until the Property could be sold that would not otherwise be incurred;

(l) A distressed sale of the Property would cause substantial losses for the Fund; and

(m) The increased value of the Project, as completed, less the cost of completion will likely be higher than the value of the Project, if it were to be sold as a distressed asset.

#### Notice To Interested Persons

IFS will furnish a copy of the Notice of Proposed Exemption (the Notice) along with the supplemental statement (the Supplemental Statement), as described at 29 CFR § 2570.43(b)(2), to the Trustees of the Fund and to interested persons who commented in writing to the Department in connection with PTE 99-46, to inform such persons of the pendency of this exemption. In this regard, some of the Trustees of the Fund are also senior officers of the Union. IFS believes that providing notice to the Trustees of the Fund and to interested persons who commented in writing to the Department in connection with PTE 99-46 should be sufficient, because the requested exemption involves the technical requirements of the Act related to the use of qualified professional asset managers and it is unlikely that individuals other than the Trustees and those who commented on PTE 99-46 would be concerned with such an exemption.

A copy of the Notice, as it appears in the **Federal Register**, and a copy of the Supplemental Statement, will be provided, by first class mailing, within ten (10) days of the publication of the Notice in the **Federal Register**. It is represented that the costs of notifying interested persons will be borne by the Fund. Comments and requests for a hearing are due on or before 40 days from the date of publication of the Notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (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 15th day of March, 2001.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Pension and Welfare Benefits Administration,  
Department of Labor.*

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

**[Prohibited Transaction Exemption  
2001-09; Exemption Application No.  
D-10856, et al.]**

**Grant of Individual Exemptions;  
Trenam, Kemker, Scharf, Barkin, Frye,  
O'Neill & Mullis Professional  
Association Section 401(k) Profit  
Sharing Plan (et. al)**

**AGENCY:** Pension and Welfare Benefits  
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 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are 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 exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

**Trenam, Kemker, Scharf, Barkin, Frye,  
O'Neill & Mullis Professional Association  
Section 401(k) Profit Sharing Plan (the Plan)  
Located in Tampa, Florida**

[Prohibited Transaction Exemption 2001-09; Exemption Application No. D-10856]

### Exemption

The restrictions of sections 406(a), 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 to the sales by the individually directed accounts of certain participants (the Participants) in the Plan of certain limited partnership units (the Units) to the Participants, provided the following conditions are satisfied: (a) each sale is a one-time transaction for cash; (b) no commissions are charged in connection with the sales; (c) the Plan receives not less than the fair market value of the Units at the time of the transactions; and (d) the fair market value of the Units is determined by a qualified entity independent of the Plan and the Participants.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on January 25, 2001 at 66 FR 7801.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

**Cranston Print Works Company General  
Employees' Retirement Plan (the Plan)  
Located in Cranston, Rhode Island**

[Prohibited Transaction Exemption 2001-10; Exemption Application No. D-10909]

### Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to: (1) the purchase by the Plan of shares of common stock (the Stock) of Cranston Print Works Company (Cranston) from Cranston, the Plan's sponsor; (2) the Plan's holding of the Stock; (3) the acquisition and holding by the Plan of an irrevocable put option (the Put