

payable on obligations described in subsection III.B.(1). Such an agreement or arrangement may involve a notional principal contract provided that:

(1) It is denominated in U.S. dollars;  
 (2) The Issuer receives on, or immediately prior to the respective payment date for the Securities covered by such agreement or arrangement, a fixed rate of interest or a floating rate of interest based on a publicly available index (e.g., LIBOR or COFI), with the Issuer receiving such payments on at least a quarterly basis;

(3) It is not "leveraged" as described in subsection III.EE.(4);

(4) It does not incorporate any provision which would cause a unilateral alteration in any provision described in subsections III.II.(1)–(3) without the consent of the Trustee;

(5) It is entered into by the Issuer with an Eligible Swap Counterparty; and

(6) It has a notional amount that does not exceed either:

(i) The principal balance of the class of Securities to which such agreement or arrangement relates, or (ii) the portion of the principal balance of such class represented solely by those types of corpus or assets of the Issuer referred to in subsections III.B.(1), (2) and (3).

The Department notes that this exemption is included within the meaning of the term "Underwriter Exemption" as it is defined in section V(h) of Prohibited Transaction Exemption 95–60 (60 FR 35925, July 12, 1995), the Class Exemption for Certain Transactions Involving Insurance Company General Accounts at (see 60 FR 35932).

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 August 15, 2003 at 68 FR 49304.

**EFFECTIVE DATE:** This exemption is effective for all transactions described herein which occurred on or after April 18, 2003.

**FOR FURTHER INFORMATION CONTACT:** Gary Lefkowitz of the Department, telephone (202) 693–8546. (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 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) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional 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

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 8th day of October, 2003.

**Ivan Strasfeld,**

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

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#### DEPARTMENT OF LABOR

##### Employee Benefits Security Administration

##### Lodgian, Inc. 401(k) Plan and Trust Agreement (the Plan) Exemption Application No. D–11180

**AGENCY:** Employee Benefits Security Administration, Department of Labor (the Department).

**ACTION:** Notice of technical correction.

On September 29, 2003, the Department published in the **Federal Register** (68 FR 56013) a notice of a proposed exemption (the Notice) which would apply, effective December 3, 2002, to (1) the past acquisition and holding by the Plan of certain warrants (the Warrant(s)) issued by the employer, Lodgian, Inc. (Lodgian), a party in interest with respect to the Plan, which would permit the purchase of new common stock (New Lodgian Stock); (2) the cancellation payment (the Cancellation Payment) by Lodgian to the Plan in exchange for the Warrants (i) at

the election of active participants (ii) at the election of the terminated vested participants whose vested interests exceed \$5,000, or (iii) in accordance with the procedures for the automatic cash out of the value of Warrants held in the accounts of terminated vested participants whose vested interests are \$5,000 or less, for an amount that represents the highest value of the Warrants determined by an independent, qualified, appraiser between December 31, 2002 and the date of the individual election; (3) the sale of the Warrants from Plan participants to Lodgian to cash out active and terminated vested participants; and (4) the potential exercise of the Warrants into the New Lodgian Stock.

On page 56015 of the Notice, the first sentence of Representation 8 states the following: Lodgian's obligation to purchase the Warrants is effective at a time when the New Lodgian Stock price is greater than the Warrant exercise price; the Department notes that this sentence is inaccurate and should be deleted, and hereby amends the proposal to incorporate such change.

On page 56016 of the Notice, paragraph (j) of Representation 9 states the following:

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

The Department notes that paragraph (j) of Representation 9 should be corrected to read as follows:

(j) Lodgian is required to purchase the Warrants upon request by a Plan participant provided that on the day of the request the price of the New Lodgian Stock is less than the exercise price of the Warrants; The Department hereby amends the proposal to incorporate such change.

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

Signed at Washington, DC this 8th day of October, 2003.

**Ivan L. Strasfeld,**

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

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