

Application at the address set forth above.

### Proposed Exemption

Based on the facts and representations set forth in the application, under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990), the Department proposes to modify the following individual Prohibited Transaction Exemptions (PTEs), as set forth below: PTE 89–88, 54 FR 42582 (October 17, 1989); PTE 89–89, 54 FR 42569 (October 17, 1989); PTE 89–90, 54 FR 42597 (October 17, 1989); PTE 90–22, 55 FR 20542 (May 17, 1990); PTE 90–24, 55 FR 20548 (May 17, 1990); PTE 90–28, 55 FR 21456 (May 24, 1990); PTE 90–29, 55 FR 21459 (May 24, 1990); PTE 90–30, 55 FR 21461 (May 24, 1990); PTE 90–32, 55 FR 23147 (June 6, 1990); PTE 90–36, 55 FR 25903 (June 25, 1990); PTE 90–39, 55 FR 27713 (July 5, 1990); PTE 90–59, 55 FR 36724 (September 6, 1990); PTE 90–83, 55 FR 50250 (December 5, 1990); PTE 90–84, 55 FR 50252 (December 5, 1990); PTE 90–88, 55 FR 52899 (December 24, 1990); PTE 91–14, 55 FR 48178 (February 22, 1991); PTE 91–22, 56 FR 03277 (April 18, 1991); PTE 91–23, 56 FR 15936 (April 18, 1991); PTE 91–30, 56 FR 22452 (May 15, 1991); PTE 91–62, 56 FR 51406 (October 11, 1991); PTE 93–31, 58 FR 28620 (May 5, 1993); PTE 93–32, 58 FR 28623 (May 14, 1993); PTE 94–29, 59 FR 14675 (March 29, 1994); PTE 94–64, 59 FR 42312 (August 17, 1994); PTE 94–70, 59 FR 50014 (September 30, 1994); PTE 94–73, 59 FR 51213 (October 7, 1994); PTE 94–84, 59 FR 65400 (December 19, 1994); PTE 95–26, 60 FR 17586 (April 6, 1995); PTE 95–59, 60 FR 35938 (July 12, 1995); PTE 95–89, 60 FR 49011 (September 21, 1995); PTE 96–22, 61 FR 14828 (April 3, 1996); PTE 96–84, 61 FR 58234 (November 13, 1996); PTE 96–92, 61 FR 66334 (December 17, 1996); PTE 96–94, 61 FR 68787 (December 30, 1996); PTE 97–05, 62 FR 1926 (January 14, 1997); PTE 97–28, 62 FR 28515 (May 23, 1997); PTE 98–08, 63 FR 8498 (February 19, 1998); PTE 99–11, 64 FR 11046 (March 8, 1999); PTE 2000–19, 65 FR 25950 (May 4, 2000); PTE 2000–33, 65 FR 37171 (June 13, 2000); PTE 2000–41, 65 FR 51039 (August 22, 2000); PTE 2000–55, 65 FR 37171 (November 13, 2000); PTE 2002–19, 67 FR 14979 (March 28, 2002); PTE 2003–31, 68 FR 59202 (October 14, 2003); and PTE 2006–07, 71 FR 32134 (June 2, 2006), each as subsequently amended by PTE 97–34, 62 FR 39021 (July 21, 1997) and PTE 2000–58, 65 FR 67765 (November 13, 2000) and for certain of the

exemptions, amended by PTE 2002–41, 67 FR 54487 (August 22, 2002).

In addition, the Department notes that it is also proposing individual exemptive relief for: Deutsche Bank A.G., New York Branch and Deutsche Morgan Grenfell/C.J. Lawrence Inc., Final Authorization Number (FAN) 97–03E (December 9, 1996); Credit Lyonnais Securities (USA) Inc., FAN 97–21E (September 10, 1997); ABN AMRO Inc., FAN 98–08E (April 27, 1998); Ironwood Capital Partners Ltd., FAN 99–31E (December 20, 1999) (supersedes FAN 97–02E (November 25, 1996)); William J. Mayer Securities LLC, FAN 01–25E (October 15, 2001); Raymond James & Associates Inc. & Raymond James Financial Inc., FAN 03–07E (June 14, 2003); WAMU Capital Corporation, FAN 03–14E (August 24, 2003); and Terwin Capital LLC, FAN 04–16E (August 18, 2004); which received the approval of the Department to engage in transactions substantially similar to the transactions described in the Underwriter Exemptions pursuant to PTE 96–62, 61 FR 39988 (July 31, 1996).

The definition of “Rating Agency” under section III.X. of the Underwriter Exemptions is amended to read:

“Rating Agency” means Standard & Poor’s Ratings Services, a division of The McGraw-Hill Companies, Inc.; Moody’s Investors Service, Inc.; FitchRatings, Inc.; Dominion Bond Rating Service Limited, or Dominion Bond Rating Service, Inc.; or any successors thereto.

If granted, the amendment would be effective for transactions occurring on or after April 5, 2006.

The availability of this amendment, if granted, is subject to the express condition that the material facts and representations contained in the Application are true and complete and accurately describe all material terms of the transactions. In the case of continuing transactions, if any of the material facts or representations described in the Application change, the amendment will cease to apply as of the date of such change. In the event of any such change, an application for a new amendment must be made to the Department.

Signed at Washington, DC, this 17th day of January, 2007.

**Ivan L. Strasfeld,**

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

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Exemption Application No. D–11183]

#### Prohibited Transaction Exemption 2007–01; Grant of Individual Exemptions Involving; The Plumbers and Pipefitters National Pension Fund (the Fund)

**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 Plumbers & Pipefitters National Pension Fund (the Fund) Located in Alexandria, VA**

[Prohibited Transaction Exemption (PTE) 2007-01; Exemption Application No. D-11183]

*Exemption*

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 Investment Management, Inc., Capital Hotel Management, LLC or a successor independent qualified professional asset manager (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 to 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, and executed on May 1, 2006, between CHM 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.

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.

**SUPPLEMENTARY INFORMATION:** On August 21, 2006, the Department published a notice in the **Federal Register** (71 FR 48768) of a proposed individual exemption (the Proposed Exemption). The application for this Proposed Exemption (Application) was submitted by LaSalle Investment Management, Inc. (LaSalle), as qualified professional asset manager (QPAM) for, and on behalf of, the Fund (Applicant). By letter dated April 25, 2006, 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. Independent Fiduciary Services, Inc. (IFS) is the independent named fiduciary of the Fund's account that holds the interests in the Partnership, the General Partner and other assets of the Fund invested in, or awaiting investment in, the Resort (the Diplomat Account). 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, which has six individual members, three of whom are appointed by the Union and three of whom are appointed by contributing employers. The Applicant requested that 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, not apply, effective June 5, 2001, to certain transactions 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).

#### Discussion and Comments Received

Four comment letters from interested persons and one comment from Capital Hotel Management, LLC (CHM) as the QPAM for the Fund were received by the Department. The CHM comment provided further information on the proposed exemption and is discussed below. By letter dated November 20, 2006, CHM responded to the questions raised in the four comments received from interested persons. CHM noted that several commenters raised issues or asked questions regarding the propriety of the initial purchase of the Resort and the Applicant's development of it. The comments included statements alleging that members of the Board of Trustees of the Fund and contractors engaged in the Resort's development and operation received improper benefits. CHM stated that the Proposed Exemption in no way relates to the initial purchase of the Resort or the subsequent investment of the Fund's assets to develop and stabilize it. CHM explained that the exemption was requested because the QPAM concluded that Starwood's provision of Centralized Services, Additional Services and the Associate Room Discount Program will result in improved operating performance beyond that which can be provided by an operator of a single hotel or smaller group of hotels that does not provide those services and products. In addition, the QPAM concluded that (a) by centralizing the 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) the Resort's participation in these programs should result in increased efficiencies and lower operating costs. CHM asserts that none of the commenters has disputed any of these conclusions.

CHM noted that one commenter stated that "not one of the UA Members of the UA PPNPF receive a discount on anything pertaining to the Diplomat Propertys [sic], why should someone else who are not owners of the Deplomat [sic] receive a discount". CHM responded that, while the precise meaning of this comment is unclear, to the extent that the commenter is questioning the purpose of the Associate Room Discount Program, the QPAM concluded that it constitutes a relatively cheap employee benefit for employees of the Resort. CHM stated that, because this arrangement is typically offered by Starwood and all other international branded hotel and resort operators, denying this benefit to Resort employees

would place the Resort at a distinct disadvantage vis-à-vis other competing hotels in its area with respect to hiring and retaining employees.

Another comment questioned whether the Resort can make a profit and stated that the Partnership should sell the Resort immediately to the highest bidder. CHM responded that the purpose of this Application is not to determine whether a sale of the Resort is in the best interest of the Partnership or the Applicant, but to allow the Partnership to enter into arrangements with Starwood, the Resort's operator (through Westin Hotel Management, L.P.), to enhance the operation of the Resort while the Applicant (through the Partnership) owns it.

Another comment stated that the Partnership does not need "additional managers to manage the 'Westin Group'" and that the "Westin Group" should be replaced by managers that can manage the Resort properly and with a profit, such as the "Sheraton Group" or the "Hilton Group." CHM responds that, as an initial matter, Sheraton hotels and Westin hotels are sister brands within the Starwood group of brand hotels. The Applicant submits that this comment is not relevant to the Proposed Exemption because the Application does not seek an exemption to permit the retention of CHM, the current investment manager and qualified professional asset manager for the Applicant's investment in the Resort. The retention of CHM as an investment manager is specifically contemplated by ERISA and does not constitute a prohibited transaction. Rather, it is CHM's involvement in the budget process and general oversight of Starwood as the Resort operator, which limits Starwood's discretion and will prevent abuse of the arrangement for Centralized Services, Additional Services and the Associate Room Discount Program. CHM notes that, in correspondence supplementing the Application, CHM confirmed to the Department that it is responsible for performing the actions ascribed to the QPAM as they relate to both the specific and general limitations on Starwood's activities described in Section II.F of the Application. In addition, CHM confirmed that, as described in Section III.A of the Application, changes to services and products or fees (as limited by the Operating Agreements) must be presented to and approved, if applicable, by CHM in connection with the annual budget process.

CHM states that another commenter asked various questions regarding the retention of Starwood. The commenter asked the additional costs of another management company being involved,

who owns Starwood, whether any pension officials or board members are associated in any way with Starwood or its affiliates, how the Proposed Exemption is going to help pension plan and union members and retirees, and who is the Starwood affiliate presently managing the Resort. CHM responded that, as described in the Application and subsequent correspondence from the QPAM, the hotel is currently managed by Westin Hotel Management, L.P.; a Delaware limited partnership and a wholly-owned subsidiary of Starwood Hotels & Resorts Worldwide, Inc., which is a public company. CHM asserts that no member of the Board of Trustees of the Fund is a director, officer or employee of Starwood or any Starwood ERISA Affiliate. CHM also states that the determination to retain Starwood was made not by the Board of Trustees but by LaSalle, CHM's predecessor as qualified professional asset manager. In addition, La Salle was, and CHM is, overseen by IFS, the Applicant's independent named fiduciary for the Diplomat Account. Starwood was selected after LaSalle, monitored by IFS, engaged in a comprehensive review of all relevant issues that included extensive due diligence, a competitive bidding process (which attracted many of the larger international hotel operating companies, including several well-known brands) and several interviews and on-site visits. The Applicant notes that the purpose of this Application is not to determine whether the retention of Starwood was appropriate or whether the overall fee arrangement with Starwood is reasonable, but rather whether Starwood, as operator of the Resort, will be permitted to engage in certain transactions that the QPAM has determined will inure to the financial benefit of the Partnership (and, therefore, the Fund). Accordingly, the Applicant believes that the overall cost of a management company being involved is immaterial to this Proposed Exemption. CHM states that of more significance is that the QPAM has, after careful consideration, concluded that Centralized Services and Additional Services are likely to result in benefits to the Resort that are both financial (i.e., utilizing these services and products will result in cost savings through aggregation of Starwood's purchasing and organizational power, and there are specific provisions in the Operator Agreements to assure that the Resort will benefit financially from such arrangements) and operational (i.e., value will be achieved through enhancements in quality and service

resulting from the economies of scale and joint participation in these arrangements). Thus, the QPAM expects that Starwood's services and purchasing program, as well as its Associate Room Discount Program, will enhance the value of the Resort, resulting in a benefit to participants and beneficiaries of the Fund.

Another comment inquired as to why certain individuals did not receive notice of the Proposed Exemption. CHM explains that the notice to interested persons, along with the supplemental statement required by Department Regulation 2570.43(b)(2) was sent to each member of the Board of Trustees of the Applicant and to anyone who commented with respect to PTE 99-46, PTE Application D-10960 or D-10971. CHM notes that, with respect to Applications D-10960 and 10971, the Department concluded that, in part due to the burden and expense of a wider distribution, it was reasonable and adequate under the circumstances to provide the notice to interested persons and supplemental statement only to persons who commented on PTE 99-46, the first exemption issued with respect to the Fund and the Diplomat Account. CHM believes that the Proposed Exemption is more technical and less sweeping than either of the prior exemptions the Department has granted regarding the Diplomat Account. It is unlikely that individuals, other than the Board of Trustees and those who commented on PTE 99-46, D-10960 or D-10971 would be concerned with the technical issues regarding the provision of the Centralized Services, Additional Services and Associate Room Discount Program to the Partnership by Starwood (or a Related Company). CHM concludes that the reasonableness of this assumption is reflected in the absence of comments from those who did receive notice that go to the substance of any of those issues.

One commenter requested information concerning any "current or future hearings" before the Department on the Proposed Exemption. Regarding a public hearing, the Department does not believe that there are material factual issues relating to this exemption that were raised by the commenters which would require the convening of a hearing on the Proposed Exemption. Thus, the Department has determined not to hold a hearing.

As previously noted in the Proposed Exemption, in considering exemptive relief for the transactions described herein, 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 exemption is a critical factor in the Department's determination to grant 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 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 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.

**FOR FURTHER INFORMATION CONTACT:**

Wendy McColough of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

**American Maritime Officers Safety & Education Plan (S&E Plan); American Maritime Officers Pension Plan; American Maritime Officers Vacation Plan; American Maritime Officers Medical Plan; and American Maritime Officers 401(k) Plan; (Collectively the AMO Plan(s)) Located in Dania Beach, Florida and Toledo, Ohio**

[Prohibited Transaction Exemption No. 2007-02; Application Nos. L-11148; D11149; L-11150; L-11151; D-11152; and D-11153]

*Exemption*

Section I

The restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act shall not apply to: (1) The S&E Plan entering into an arrangement with the American Maritime Officers (the Union), which is a party in interest with respect to the AMO Plans, for the Union to pay the S&E Plan, where appropriate and at the rate established by the independent fiduciary (the I/F), for the portion of the Union trustees' food and lodging provided by the S&E Plan that is attributable to attendance at certain Union meetings at the Dania Beach, Florida and Toledo, Ohio facilities (collectively, the Facilities); (2) the S&E Plan entering into an arrangement with the Union and certain contributing employers, who are parties in interest with respect to the AMO Plans, to pay the S&E Plan at a rate established by the I/F, for food and lodging provided by the S&E Plan at the Facilities for the representatives of the Union and the respective contributing employers that is attributable to attendance at various conferences; and (3) the S&E Plan entering into an arrangement with the governing bodies of the American Maritime Officers Joint Employment Committee, and the American Maritime Officers Service, who are parties in interest with respect to the AMO Plans, to pay the S&E Plan at a rate established by the I/F, for food and lodging provided by the S&E Plan at the Facilities.

Section II

The restrictions of sections 406(a) 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 to: (1) The AMO Plans sharing expenses

based on an internal expense allocation model (the Allocation Model) for the provision of food and lodging by the S&E Plan at the Facilities to the AMO Plans' trustees (the Trustees); and (2) The AMO Plans, the JEC and AMOS sharing expenses based on the Allocation Model for the provision of food and lodging by the S&E Plan at the Facilities.

Section III

The restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act shall not apply to: (1) Contributing employers contracting with the S&E Plan to provide one of its regular courses at a special time; and (2) The S&E Plan designing training programs or undertaking special research or modeling that is tailored to the needs of a particular contributing employer or its vessels.

Conditions

This exemption is subject to the following conditions:

- (a) Each AMO Plan will pay its appropriate share of expenses based on the Allocation Model;
- (b) The I/F retained by the AMO Plans will:
  - (1) Make a determination of whether the proposed transactions (the Transaction(s)) are prudent and in the best interest of the relevant AMO Plan(s);
  - (2) Establish the terms for each of the Transactions, including:
    - (i) The price to be charged for the services provided pursuant to the Transactions; and
    - (ii) The terms and conditions ensuring that the Transactions are fair to the involved AMO Plans;
  - (3) Develop policies and guidelines for the implementation of the Transactions;
  - (4) Monitor the Transactions on an on-going basis, including periodic reviews of the Transactions, to ensure compliance with the I/F policies and guidelines;
  - (5) On a periodic basis, review the terms of each of the Transactions, including the fair market value of the services provided; and
  - (6) Prepare an annual report, summarizing the Transactions for that year;
- (c) The costs associated with recordkeeping and all forms of independent oversight will be included in the daily rate established by the I/F for food and lodging provided by the S&E Plan at the Facilities;
- (d) An independent auditor will perform annual audits of all the AMO Plans to identify and reconcile any

discrepancies regarding the recordkeeping involving the Transactions and provide an annual evaluation of all allocation models and produce approval letters explicitly affirming that the models are satisfactory;

(e) The Room Master Software System will create an invoice for lodging and food service accounting functions and related services at the Facilities;

(f) The AMO Plans' fiduciaries maintain or cause to be maintained, for a period of six years from the date of the covered transactions, such records as are necessary to enable the persons described in paragraph (g) to determine whether the conditions of this exemption were met, except that:

- (1) If the records necessary to enable the persons described in paragraph (g) to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the AMO Plans' fiduciaries, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and
- (2) No party in interest, other than the AMO Plans' fiduciaries responsible for recordkeeping, 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 the records are not maintained or are not available for examination as required by paragraph (g) below;

(g)(1) Except as provided below in paragraph (g)(2) and notwithstanding the provisions of section (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (f) are unconditionally available for examination during normal business hours at their customary location by the following persons or an authorized representative thereof:

- (i) any duly authorized employee or representative of the Department or the Internal Revenue Service;
- (ii) any fiduciary of the AMO Plans or any duly authorized employee or representative of such fiduciary; or
- (iii) any contributing employer and any employee organization whose members are covered by the AMO Plans, or any authorized employee or representative of these entities; or
- (iv) any participant or beneficiary of the AMO Plans or the duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraphs (ii), (iii) and (iv) of paragraph (g)(1) shall be authorized to examine trade secrets or commercial or

financial information which is privileged or confidential.

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 (the Notice) published on July 21, 2006 at 71 FR 41478.

#### Written Comments

The Department received three written comments from interested persons in response to the Notice. The Department forwarded copies of the comments to the applicant and requested that the applicant and the I/F address, in writing the various concerns raised by the commentators. The principal concern expressed by all three commentators is that the exemption would allow pension assets to be used for purposes other than retirement benefits for plan participants. Two of the commentators link this concern to the investigation of the AMO Plans by the U.S. Department of Justice.

The applicant represents that one of the commentators' concerns that the exemption would allow pension plan assets to be used for a variety of inappropriate uses reflects a misunderstanding of the purpose of the exemption and the conditions under which it has been proposed. The applicant represents that the proposed exemption would allow the Plans' trustee meetings, union meetings, and other meetings or conferences involving the Union, employers who contribute to the Plans, the Joint Employment Committee, the American Maritime Officers Service, and professionals servicing the Plans to be held at the training and meeting facilities in Dania Beach, Florida, which is leased by the S&E Plan, and another facility owned by the S&E Plan in Toledo, Ohio. Under the proposed exemption, meeting participants or the groups they represent are required to pay their proportional share of lodging, catering and meeting costs—the costs would not fall on the facilities or the S&E Plan. Notably, the costs associated with these meetings are substantially less when lodging, food and meeting space are provided at the facilities than if provided by hotels or other conference facilities. Without the requested exemption, there would be legal constraints on the ability of the S&E Plan to contract with the other Plans to provide the necessary services and functions that would have to be scheduled at independent meeting facilities at a higher cost.

In addition, the applicant represents that, as a condition contained in the Notice, the Plans have retained an

independent fiduciary to ensure that the interests of the Plans and their participants are protected. Among other things, the independent fiduciary will monitor all transactions and activities permitted under the proposed exemption to ensure compliance with the conditions set out by the Department. The duties of the I/F will also include ensuring that the parties using the facilities pursuant to the proposed exemption pay a fair price for the services they receive.

Two of the commentators suggest that the exemption should not be granted because of a Department of Justice investigation of the Plans. One of the two requested a hearing on this basis. The applicant represents that contrary to the concern expressed, the application is part of an effort to ensure ERISA compliance and the protection of plan assets. In response to the investigation, the AMO Plans formed a Special Committee, which retained Special Counsel to undertake an independent investigation and to make reports and recommendations for remedial action to the Special Committee. The Special Committee authorized Special Counsel to apply for the exemption on behalf of the AMO Plans as part of an ERISA compliance process.

The I/F has reviewed the comments and represents that proper implementation and compliance with the conditions of the proposed exemption will be protective of the beneficiaries of the AMO Plans because (i) the use of the facilities by parties in interest will be monitored and linked to specific meeting schedules; (ii) costs associated with the use of the facilities by the parties in interest will be properly charged, with the AMO Plans being appropriately compensated for services provided; (iii) costs savings can inure to the beneficiaries as a result of the efficiency of having the multiple meetings associated with the Plans in a single lower cost environment; and (iv) the parties in interest will only be allowed to use the facilities if there is excess capacity so that beneficiaries who require training cannot be displaced. Furthermore, the I/F represents that the I/F's research and analysis results in the belief that usage of the facilities by parties in interest can be effectively monitored, costs can be properly allocated and efficiencies in the scheduling of the meetings can be attained which will result in cost savings to the beneficiaries.

The Department has considered the entire record and has determined to grant the exemption as proposed. Further, the Department does not

believe that there are material factual issues relating to the exemption that were raised by commentators which would require the convening of a hearing. Thus, the Department has determined not to hold a hearing on these matters.

#### FOR FURTHER INFORMATION CONTACT:

Khalif I. Ford of the Department, telephone (202) 693-8540. (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 17th day of January, 2007.

**Ivan Strasfeld,**

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

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