

DEPARTMENT OF LABOR**Occupational Safety and Health Administration****National Advisory Committee on Occupational Safety and Health; Notice of Meeting**

Notice is hereby given of the date and location of the next meeting of the National Advisory Committee on Occupational Safety and Health (NACOSH), established under section 7(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 656) to advise the Secretary of Labor and the Secretary of Health and Human Services on matters relating to the administration of the Act. NACOSH will hold a meeting on November 28, 2001, in Room 283 of the Hall of States located at 444 N. Capitol Street, NW., Washington, DC. The meeting is open to the public and will begin at 9 a.m. and last until approximately 4 p.m.

The meeting will begin with an overview of activities of the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH). Other agenda items include: a presentation on OSHA and NIOSH's response to the terrorists attacks; ergonomics issues; recordkeeping and outreach.

Written data, views or comments for consideration by the committee may be submitted, preferably with 20 copies, to J. Catherine Sutter at the address provided below. Any such submissions received prior to the meeting will be provided to the members of the committee and will be included in the record of the meeting. Because of the need to cover a wide variety of subjects in a short period of time, there is usually insufficient time on the agenda for members of the public to address the committee orally. However, any such requests will be considered by the Chair who will determine whether or not time permits. Any request to make an oral presentation should state the amount of time desired, the capacity in which the person would appear, and a brief outline of the content of the presentation. Individuals with disabilities who need special accommodations should contact Veneta Chatmon (phone: 202-693-1912; FAX: 202-693-1634) one week before the meeting.

An official record of the meeting will be available for public inspection in the OSHA Technical Data Center (TDC) located in Room N2625 of the Department of Labor Building (202-693-2350). For additional information

contact: J. Catherine Sutter, Occupational Safety and Health Administration (OSHA); Room N-3641, 200 Constitution Avenue NW., Washington, DC 20210 (phone: 202-693-1933; FAX: 202-693-1641; e-mail Catherine.Sutter@osha.gov); or check the National Advisory Committee on Occupational Safety and Health information pages located at www.osha.gov.

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

John L. Henshaw,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 01-26511 Filed 10-19-01; 8:45 am]

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DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration**

[Prohibited Transaction Exemption 2001-38; Exemption Application No. D-10953, et al.]

Grant of Individual Exemptions; The Savings Plan for Employees of Florida Progress Corporation (the 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.

The Savings Plan for Employees of Florida Progress Corporation (the Plan) Located in St. Petersburg, FL

[Prohibited Transaction Exemption 2001-38; Exemption Application No. D-10953]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) and section 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective November 30, 2000, to (1) the receipt, by the Plan, of contingent value obligations (the CVOs), as a result of the Plan's ownership of certain common stock (the Florida Progress Stock) in Florida Progress Corporation (Florida Progress), the Plan sponsor;

(2) the continued holding of the CVOs by the Plan; and the (3) potential resale of the CVOs by the Plan to Progress Energy, Inc. (Progress Energy), a party in interest with respect to the Plan.

This exemption is subject to the following conditions:

- (a) The Plan received one CVO for each share of Florida Progress Stock on the effective date of the share exchange between Florida Progress and CP&L Energy, Inc. (CP&L Energy), the predecessor entity to Progress Energy.
- (b) All Florida Progress shareholders, including Plan participants, received the CVOs in the same manner, so that the Plan participants and beneficiaries were not in a less advantageous position than other Florida Progress shareholders.

(c) The Plan's receipt of the CVOs, including other share exchange

consideration consisting of cash and/or shares of CP&L Energy stock, resulted from shareholder approval and did not relate to any unilateral exercise of discretion by a Plan fiduciary.

(d) Salomon Smith Barney, Inc. (Salomon Smith Barney) advised Florida Progress that the consideration to be received by Florida Progress shareholders in exchange for their shares of Florida Progress Stock was "fair," from a financial point of view.

(e) The Plan did not pay any fees or commissions in connection with the acquisition of the CVOs, nor will it pay any fees or commissions in connection with the holding or potential sale of the CVOs to Progress Energy.

(f) An independent fiduciary, United States Trust Company, N.A.,

(1) Has overseen, and continues to oversee, the Plan's holding or disposition of any CVOs for which the Plan does not receive any investment direction and determines whether it is appropriate for the Plan to sell the CVOs; and

(2) Retains the services of an independent appraiser to calculate the price at which the CVOs are sold to Progress Energy in order to ensure that adequate consideration is received.

(g) Plan participants have the same rights and flexibility as unrelated parties and they may sell their CVOs at any time.

Effective Date: This exemption is effective as of November 30, 2000.

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 July 30, 2001 at 66 FR 39363.

Written Comments

During the comment period, the Department received one written comment with respect to the proposed exemption and no requests for a public hearing. The comment was submitted by the Plan's legal counsel and is intended to clarify the Summary of Facts and Representations (the Summary) of the proposal in two areas. First, in Representation 3 of the Summary, the third sentence of the initial paragraph states, at 39363, that at the time of the share exchange transaction, Progress Energy, then known as CP&L Energy, Inc., operated through three subsidiaries, CP&L, North Carolina Power & Gas, Inc. and Interpath Communications, Inc. The applicant suggests that this sentence be revised to read as follows to correct certain minor inaccuracies:

At the time of the share exchange transaction described in this notice of

proposed exemption, Progress Energy, then known as CP&L Energy, Inc., operated primarily through three major subsidiaries, CP&L, North Carolina Power & Gas, Inc. and Interpath Communications, Inc. (ICI).

Second, in Representation 12 of the proposed exemption, the last sentence of the paragraph states, at 39366, that Salomon Smith Barney advised Florida Progress, in an opinion letter dated July 5, 2000 to the company's Board of Directors, that due to the low trading volume in the "when, as and if issued" market, a mass sale of the CVOs by the Plan would likely depress the value of the CVOs, thereby adversely affecting the interests of the Plan participants. The applicant requests that the phrase "in an opinion letter dated July 5, 2000 to the company's Board of Directors" be deleted since the letter related solely to the fairness of the corporate transaction to the Florida Progress shareholders from a financial point of view, whereas the referenced advice was given separately. Therefore, the applicant recommends that the sentence be revised to read as follows:

However, Salomon Smith Barney advised Florida Progress that due to the low trading volume in the "when, as and if issued" market, a mass sale of the CVOs by the plan would likely affect the value of the CVOs, thereby adversely affecting the interests of the Plan participants.

In response to the applicant's comment letter, the Department has noted the foregoing changes to the Summary. For further information regarding the applicant's comment and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10953) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Accordingly, after giving full consideration to the entire record, including the applicant's comment, the Department has decided to grant the exemption.

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

Independent Fiduciary Services, Inc. (IFS) Located in Washington, DC

[Prohibited Transaction Exemption (PTE) 2001-39; Exemption Application Nos. D-10960 and D-10971]

Exemption

I. General Transactions

The restrictions of section 406(a)(1)(A) through (D) and the sanctions resulting from the application of section 4975(c)(1)(A) through (D),¹ shall not apply, effective from November 3, 2000, 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 PTE 99-46²; provided that the following conditions are satisfied:

(a) IFS, as Named Fiduciary of the Diplomat Account, is an investment 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)³ (relating to securities lending arrangements);

(2) Prohibited Transaction Class Exemption 83-1 (PTCE 83-1)⁴ (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Class Exemption 82-87 (PTCE 82-87)⁵

¹ For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer to the corresponding provisions of the Code.

² 64 FR 61944, November 15, 1999.

³ 46 FR 7527, January 23, 1981.

⁴ 48 FR 895, January 7, 1983.

⁵ 47 FR 21331, May 18, 1982.

(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

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, 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 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 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.

(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 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 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 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 on or after the effective date of this exemption, or if a renewal that requires the consent of the Named Fiduciary occurs on or after the effective date of this exemption, and the requirements of this 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 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 exemption.

Effective Date: This exemption is effective November 3, 2000, the date when IFS was appointed to serve as the independent Named Fiduciary for the Fund with respect to the Diplomat Account.

Background

The Diplomat Resort and Country Club (the Property) is located in Hollywood and Hallandale, Florida. Constructed in the late 1950's, the Property functioned as a premier hotel and resort in the decades from the 1950's to the 1980's. During this period, the Property was in the possession of the family of Samuel Friedland. After the death of Mr. Friedland in 1985, his son-in-law, Irving Cowan, bought out the interests in the Property held by other family members. In 1987, a consortium of trade union pension funds, led by the Union Labor Life Insurance Company (ULLICO) loaned Mr. Cowan \$44 million to continue operation of the Property. In 1991, ULLICO foreclosed on the loan to Mr. Cowan and, as a result, acquired title to

the Property through a subsidiary. In 1991, the hotel on the Property was closed for renovations and did not reopen. In 1997, ULLICO placed the entire Property on the market for sale.⁶

When ULLICO offered the Property for sale, it is represented that the Trustees of the Fund were interested in acquiring it as an investment for the Fund. However, a non-negotiable condition of the sale offer excluded assets of any employee benefit fund subject to the Act from being used to purchase the Property, and prevented the Fund from buying the Property. As a result of the offer to sell the Property, it is represented that ULLICO's subsidiary received seven or eight bids from prospective purchasers, including the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (the Union).

As the successful bidder on the Property, the Union acquired title to the Property on October 1, 1997. In this regard, a wholly-owned subsidiary of the Union, the Diplomat Properties Limited Partnership (the Partnership), purchased the Property from ULLICO's wholly-owned subsidiary for a purchase price of \$40 million, plus closing costs and related expenses. The Partnership financed the purchase of the Property by obtaining a loan from National City Bank of Cleveland, Ohio (NCB) which was guaranteed by the Union and collateralized by Union assets consisting of cash, cash equivalents, and securities held by NCB in a custodial account.

On October 3, 1997, the Department received an exemption application (D-10514) from the Fund. The transaction for which relief was requested was initially described in the application, as the purchase by the Fund from the Union of title to the Property for \$40 million, plus the closing costs and related expenses incurred by the Union in purchasing the Property from ULLICO's subsidiary. Upon submission of application D-10514, the Fund had not yet consummated the transaction, but planned to close the deal within a few days of filing the application with the Department. Accordingly, the Fund requested retroactive relief.

The closing occurred on October 9, 1997. Specifically, the transactions involved in the closing included: (a) The transfer by the Union to the Fund of the Union's limited partnership interests in the Partnership, the sole

asset of which was the Property, and (b) the transfer to the Fund of 100 percent (100%) of the stock in Diplomat Properties, Inc., the corporate general partner of the Partnership (the General Partner), which was owned by the Union. In consideration of these transfers, the Fund made a capital contribution to the Partnership in the amount of \$40 million, plus reasonable costs incurred by the Union in purchasing the Property, on behalf of the Partnership, from ULLICO's subsidiary. On October 10, 1997, the Fund's capital contribution to the Partnership was used to pay off the loan from NCB that the Union, on behalf of the Partnership, had incurred in acquiring the Property. Once the loan was paid off, Union assets were no longer pledged as collateral for the loan, and the Union was released from its guaranty.

During the eight (8) months from October 3, 1997, when application D-10514 was filed until May 29, 1998, when the proposed exemption was published, the Department, in considering the application, received a number of submissions from the Fund, in response to questions from the Department about the details of the transactions and the appropriateness of the acquisition of the Property by the Fund. Representations were made that the \$40 million purchase price paid by the Fund would constitute less than 2% of the assets of the Fund (approximately \$3.1 billion in 1997). Application D-10514 included several reports prepared by Chadwick, Saylor & Co., Inc. (CSC), an investment advisor registered under the Investment Advisors Act of 1940. In this regard, CSC represented that it was independent and qualified to serve as the independent fiduciary acting on behalf of the Fund with regard to the acquisition by the Fund of the Property. In its reports to the Department, CSC stated that, subject to certain assumptions, the acquisition price of the Property was fair, the transaction was a prudent investment for the Fund, and the transaction was in the best interest of the participants and beneficiaries of the Fund. Application D-10514 also contained a copy of an independent appraisal report, dated August 22, 1997, prepared for the Union by Roe Research, Inc., stating that, as of August 8, 1997, the fair market value of the Property was \$40 million "as is" in a "bulk sale of all parcels to a single purchaser." The appraiser indicated that the highest and best use of the Property would be to renovate or to demolish and replace some or all of the existing improvements on the Property. In this

⁶ In this regard, for information on the history of the Property, please refer to an article by Jeff Shields, published in the Hollywood, Florida Sun-Sentinel on May 13, 2001, which was sent to the Department attached to a letter from a commentator.

regard, when application D-10514 was filed, CSC represented in a letter dated September 29, 1997, that "even though redevelopment/construction cost budgets and time schedules and projected operating budgets and cash flow for the development/redevelopment and operational phases of the project were not available, CSC believes that such budgets, schedules and projections, if available, would support the opinion offered herein." Thereafter, in response to questions from the Department, CSC addressed, in a letter dated, December 15, 1997, "* * * the appropriateness of the acquisition of the Property and the contemplated development and redevelopment related to the return and risk characteristics of the Fund." In this regard, CSC represented that nothing came to CSC's attention in reviewing a substantial amount of physical property, area, governmental and legal information that indicated that matters related to budgeting, scheduling and operation could not be favorably resolved. Further, CSC stated its expectation that such matters would be favorably resolved based on the work undertaken at the Property since the issuance of the September 29, 1997, opinion letter.

On May 29, 1998, the Department published in the **Federal Register** a notice of proposed exemption for the acquisition of the Property by the Fund, effective October 9, 1997, from the prohibited transaction provisions of section 406(a) and (b) of the Act and 4975 of the Code. Notice of the publication of the proposed exemption for application D-10514 was provided to all interested persons with respect to the Fund. All comments and requests for a hearing were due on August 3, 1998. During the comment period, the Department received comments from 65 commentators. It was during this comment period that the Department was made aware from commentators that the hotel on the Property had been demolished and that the amount of the Fund's assets to be invested in the Property was likely to exceed the \$40 million capital contribution made by the Fund to acquire the Union's interest in the Partnership which owned the Property.

In response to this issue raised by the commentators, representatives of the Fund advised the Department in a letter, dated August 12, 1998, that the Fund had committed to the Partnership a total of \$100 million (including the \$40 million acquisition cost). It was represented that the additional \$60 million had been placed in a separate account (*i.e.*; the Diplomat Account) to

be drawn down by the Partnership, as necessary. It was represented that, while redevelopment plans for the Property were not yet final, the total cost was anticipated to be approximately \$400 million. However, it was represented that there were no plans for the Fund to invest more than the \$100 million already committed.

On September 14, 1998, an additional submission from the applicant included the Partnership's proposed investment structure for the redevelopment of the Property which indicated equity capital of \$100 million from the Fund, anticipated equity investment from third party investors of \$100 million, and a balance of \$325 million to come from debt financing. It was represented in this letter that any decision to commit more of the Fund's assets to the redevelopment of the Property would be subject to the approval of an independent fiduciary retained by the Fund to monitor the investment. On September 24, 1998, an additional submission from the applicant included a clarification that, to date, less than \$60 million (including the Fund's initial capital contribution of \$40 million to the Partnership) had been spent on the Property.

Because of the facts that came to the Department's attention regarding the Fund's involvement in the redevelopment of the Property, the Department suspended processing the exemption application on February 2, 1999, pending an investigation into the facts surrounding the redevelopment of the Property. Further, the Department began discussions with the Board of Trustees of the Fund (the Trustees) about additional safeguards for inclusion in the final exemption.

In this regard, the Trustees agreed by way of a Term Sheet dated October 13, 1999 (the Term Sheet), to several undertakings in addition to the conditions published in the Notice of Proposed Exemption. The Department was not a party to the Term Sheet. One such safeguard agreed to by the Trustees, pursuant to the Term Sheet, was a percentage limitation on the amount of the total assets of the Fund to be invested in the redevelopment of the Property. The relevant provision of the Term Sheet states that:

[t]he Trustees will instruct the custodian of the Fund to transfer to the Diplomat Account any additional amounts * * * 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 13% Limitation).

Further, the Trustees agreed, pursuant to the Term Sheet, to the appointment of a Named Fiduciary to oversee the Fund's investment in the Partnership and to oversee the continuing redevelopment of the Property. In this regard, on November 8, 1999, the Trustees appointed Actuarial Sciences Associates, Inc. (ASA), to serve as the Named Fiduciary of the Diplomat Account, an account which was established to hold the Fund's interest in the Partnership, the Fund's interest in the General Partner, and any other Fund assets invested in or awaiting investment in the Property. ASA's service contract was subject to the approval of the Secretary of Labor. The performance of ASA's services and responsibilities commenced on the date when the final exemption was executed by the Secretary of Labor or her delegate.

The final exemption for application D-10514 was published in the **Federal Register** by the Department on November 15, 1999, as Prohibited Transaction Exemption 99-46 (PTE 99-46).⁷ PTE 99-46 provided retroactive relief, effective October 9, 1997, from the prohibited transaction provisions of section 406(a) and (b) of the Act and section 4975 of the Code. In this regard, the transaction for which retroactive relief was granted involved the transfer to the Fund by the Union of the Union's limited partnership interests in the Partnership, the sole asset of which is the Property, and the transfer to the Fund of the Union's stock in the General Partner, in consideration of a capital contribution by the Fund to the Partnership in the amount of \$40 million, plus reasonable costs incurred by the Union in purchasing the Property, and in consideration of the release of a certain loan obligation of the Partnership which was guaranteed by the Union and collateralized by Union assets; provided that certain conditions were satisfied. The Department noted in the final exemption that the additional undertakings agreed to by the Trustees, pursuant to the Term Sheet, including the appointment of ASA, to serve as Named Fiduciary on behalf of the Fund, were material factors in the Department's determination to grant PTE 99-46. Accordingly, the provisions of the Term Sheet, which were described in the written comment section of the final exemption, were incorporated by reference into PTE 99-46.

⁷ 64 FR 61944.

Pursuant to the provisions of the Term Sheet, ASA, as the Named Fiduciary of the Fund, could be replaced by the Trustees only upon the concurrence of the Department or pursuant to a court order for cause. Subsequently, when ASA established a wholly-owned subsidiary, ASA Fiduciary Counselors, Inc. (ASA Counselors) to provide the investment advisory services previously performed by ASA for the Diplomat Account, ASA sought and received the consent of the Trustees of the Fund and the Department before assigning those responsibilities to ASA Counselors.

On March 15, 2000, the Department received an exemption application (D-10879) from ASA and from ASA Counselors, requesting retroactive relief from the prohibited transaction provisions of section 406(a) and (b) of the Act and section 4975 of the Code. The requested relief was similar to that available under Prohibited Transaction Class Exemption 84-14 (PTCE 84-14),⁸ to a qualified professional asset manager (QPAM), provided certain conditions are satisfied. As neither ASA nor ASA Counselors were able to satisfy all of the requirements of PTCE 84-14, reliance on the class exemption was not available, and accordingly, an administrative exemption was requested. The Department published a Notice of Proposed Exemption for application D-10879 in the **Federal Register** on June 26, 2000.⁹ The comment period for application D-10879 ended on August 31, 2000. All comments and requests for hearing from interested persons were due for application D-10879 on August 31, 2000. During the comment period, the Department received eleven (11) letters from commentators. Generally, the commentators expressed concern over the acquisition by the Fund of the Property, and over ASA Counselors' authority to use assets of the Fund for the operation of the Property.

After giving full consideration to the entire record for application D-10879, including the comments from commentators and the response to such comments from ASA and ASA Counselors, the Department determined to grant the requested relief. The final exemption for application D-10879, was published in the **Federal Register** on October 11, 2000, as Prohibited Transaction Exemption 2000-49 (PTE 2000-49).¹⁰ 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 Fund with respect to the Diplomat Account, to engage, on behalf of the Diplomat Account, in certain transactions with parties in interest with respect to the Fund. In the case of transactions involving places of public accommodation, PTE 2000-49 also 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.

Effective as of November 3, 2000, ASA Counselors resigned its appointment as Named Fiduciary with respect to the Fund and the Diplomat Account. 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. Pursuant to the terms of such agreement IFS was appointed, effective November 3, 2000, as the successor Named Fiduciary of the Fund. On December 7, 2000, IFS hired LaSalle Investment Management, Inc., a member of the Jones, Lang, LaSalle group, to act as the investment manager with respect to the Property.

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. IFS, as successor Named Fiduciary of the Fund, sought relief identical to that received by its predecessors, ASA and ASA Counselors, pursuant to PTE 2000-49. In this regard, although IFS could not satisfy certain conditions of PTCE 84-14, IFS requested an administrative exemption which would permit IFS to be treated as a QPAM for certain purposes related to the redevelopment and operation of the Property (the Project).

On January 10, 2001, officials of the Department met with IFS to discuss IFS' concern that completion of construction of improvements on the Property would not be possible under a conservative interpretation of the 13% Limitation,¹¹ contained in the Term Sheet described in PTE 99-46. Subsequently, on

February 23, 2001, the Department received an exemption application (D-10971) from IFS, acting as Named Fiduciary on behalf of the Fund, in which IFS requested a modification of the 13% Limitation in the Term Sheet. Because applications D-10960 and D-10971 were both filed by IFS and involved the assets of the Fund in the Diplomat Account, the Department determined to combine its consideration of the relief requested in both applications. In this regard, the Notice of Proposed Exemption (the Notice) for applications D-10960 and D-10971 was published in the **Federal Register** on March 21, 2001.¹²

Written Comments

In the Notice, the Department invited all interested persons to submit written comments and requests for a hearing on the proposed exemption for applications D-10960 and D-10971 within forty-five (45) days of the date of the publication of the Notice in the **Federal Register** on March 21, 2001. All comments and requests for hearing on the proposed exemption for applications D-10960 and D-10971 were due by April 30, 2001.

In notifying interested persons of the pendency of the proposed exemption for applications D-10960 and D-10971 and notifying such interested persons of the right to comment and/or request a hearing on the proposed exemption, IFS furnished by first class mailing, within ten (10) days of the publication of the Notice in the **Federal Register**, a copy of the Notice along with a copy of the supplemental statement, as described at 29 CFR § 2570.43(b)(2), to the Trustees of the Fund and to the interested persons who had commented in writing to the Department in connection with PTE 99-46. In this regard, IFS believes that providing notification to the Trustees of the Fund and to interested persons who commented in writing to the Department in connection with PTE 99-46 was sufficient, because the requested relief was technical in nature, and because it was unlikely that individuals other than the Trustees and those who commented on PTE 99-46 would be concerned with such an exemption.

During the comment period, certain commentators objected to the fact that IFS had only provided notification of the pendency of the proposed exemption for applications D-10960 and D-10971 to the Trustees of the Fund and to those interested persons who had commented on PTE 99-46. In this regard, these commentators believe

⁸ 50 FR 41430, October 10, 1985.

⁹ 65 FR 39435.

¹⁰ 65 FR 60454.

¹¹ IFS seeks the relief requested because of its concern that one possible interpretation of the 13% Limitation could result in the Fund exceeding such Limitation.

¹² 66 FR 15900.

that such notification was inadequate where the requested relief, specifically the modification of the provision of the Term Sheet concerning the 13% Limitation, might seriously affect the stability of the Fund. Accordingly, these commentators suggested that the Department require that every participant and beneficiary in the Fund be notified of the publication of the proposed exemption for applications D-10960 and D-10971 in the **Federal Register**.

The Department has considered the concern raised by commentators that the notification provided by IFS to interested persons was inadequate because the requested relief might seriously affect the stability of the Fund. In this regard, the Department notes that the administrative record for applications D-10960 and D-10971 includes a letter, dated April 2, 2001, from the Fund's counsel which addressed the impact of the proposed exemption on the stability of the Fund. In this regard, the April 2 letter indicates that the Fund's administrator has determined that granting the requested modification to the provisions of the Term Sheet concerning the 13% Limitation would not adversely affect the liquidity of the Fund and/or the ability of the Fund to pay benefits when due.

Further, the Department has considered the expense to the Fund involved in providing notification of the publication of the proposed exemption for applications D-10960 and D-10971 to all the participants and beneficiaries of the Fund. In this regard, the expense of mailing first class to the approximately 123,000 participants and beneficiaries of the Fund would constitute an additional burden to the Fund. Accordingly, the Department has determined that the notification to interested persons as provided by IFS with regard to the publication of the proposed exemption for applications D-10960 and D-10971 was adequate and reasonable under the circumstances.

During the comment period, the Department received four (4) requests from commentators that the Department hold a hearing to evaluate the merits of the representations from IFS with respect to the proposed transactions. In this regard, the commentators requested that the Department delay approval of the requested exemption until all participants and beneficiaries had a chance to review the materials and to present objections to the proposed transactions at a hearing.

The Department has carefully considered the concerns expressed by the individuals who requested a

hearing. After a review of these concerns, the Department does not believe that there are material factual issues relating to the proposed exemption that were raised by commentators during the comment period which would require the convening of a hearing. Thus, the Department has determined not to delay consideration of the final exemption by holding a hearing on applications D-10960 and D-10971.

During the comment period, the Department received eleven (11) letters from nine (9) interested persons commenting on the transactions involved in applications D-10960 and D-10971. At the close of the comment period, the Department forwarded copies of these comment letters to IFS and requested that IFS address in writing the various issues raised by the commentators.

As an initial matter, IFS noted in responding to the Department's request, that none of the comments was directed at application D-10960. Rather, the comments relate to application D-10971 in which IFS requested modification of a provision of the Term Sheet concerning the 13% Limitation. Accordingly, the responses provided by IFS, herein, generally discuss D-10971, but to the extent applicable, are intended by IFS to provide responses with respect to both applications. A description of the comments and the responses from IFS thereto are summarized in the numbered paragraphs, below.

1. A number of commentators expressed concern that the decision to invest the Fund's assets in the Partnership has not been and would not be, made solely to benefit the participants and beneficiaries of the Fund, and that the investment by the Fund in the Partnership has not been, and would not become, profitable.

As an initial matter, IFS notes "that these comments are inapposite to the extent that they relate to the Fund's investment in the Project up to the 13% Allocation Limit." In this regard, IFS maintains that, pursuant to PTE 99-46, the Department has already sanctioned the investment of Fund assets in the Partnership to that extent.¹³

¹³ The Department notes that, in granting PTE 99-46, the Department exempted the initial investment by the Fund in the Partnership. The 13% Limitation or any other limitation on Fund expenditures relating to the Property should not be viewed as an endorsement by the Department of either the amount of the expenditures or its appropriateness. The appointment of an independent named fiduciary and the 13% Limitation were agreed to by the Trustees of the Fund in response to commentator concerns about the risks and costs involved in acquiring and redeveloping the

With regard to whether an additional investment by the Fund above the 13% Limitation would be in the interest of participants and beneficiaries of the Fund, IFS maintains that the requested modification to the provision of the Term Sheet concerning the 13% Limitation will allow an additional investment that can be reasonably expected to enhance the Fund's overall investment and, likely will reduce the risk that the Fund will suffer a significant financial loss.

As indicated in the applications, IFS represents that the Project, since December 14, 2000, has been under the management of LaSalle Investment Management, Inc. (LaSalle), acting as a QPAM within the meaning of PTCE 84-14 with respect to the Project. In its capacity as an independent expert in the hospitality, real property, and construction industries, and after an extensive review of the status of the Project, it is represented that LaSalle (with the assistance of various divisions of the Jones Lang LaSalle group, including the Jones Lang LaSalle Hotels group) has concluded, based on its acknowledged expertise, that a further investment in the Project by the Fund would likely maximize the benefits to the Fund and would, therefore, be in the interest of participants and beneficiaries of such Fund.

It is represented that LaSalle has determined that, due to risk factors inherent in the development process and the still uncompleted state of the Project, the current value of the partially-completed Property (expressed as a percentage of completion) is well below its conceptual completion value, and that an appraiser, bank, or prospective purchaser would discount significantly the current value of the Property for purposes of an appraisal, loan, or purchase, respectively. It is further represented that LaSalle believes, based on its significant expertise within the hospitality and real estate industries, that most investors interested in the Project would view any current effort to sell the Property as akin to a distressed sale and therefore would be looking for a very high opportunistic

Property. The Department further notes that the fact that a transaction is the subject of an exemption under section 408(a) of the Act does not relieve a fiduciary or other party in interest from the general fiduciary responsibility provisions of section 404 of the Act. Section 404 (a)(1)(A) and (B) of the Act requires, among other things, that a fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries in a prudent fashion. Accordingly, it is the responsibility of the Fund's fiduciaries to develop the Property in a manner designed to maximize the Fund's rate of return, consistent with their fiduciary duties under section 404 of the Act.

rate of return on their investment. Accordingly, it is represented that to sell the Property at this stage (rather than to complete it) would likely lead to substantial losses for the Partnership.

In addition, it is represented that if the Project were abandoned or interrupted, because additional investment from the Fund was not permitted by the Department, there would be significant costs associated with shutting down the Project, including operational, legal, contractual, and degradation avoidance costs, many of which costs would not otherwise be incurred. LaSalle has estimated that these costs alone could cause the Fund to substantially exceed the 13% Limitation in any event.

In contrast, it is represented that if additional cash infusions from the Fund enable the Project to be completed and if, as LaSalle expects, the Project subsequently achieves stabilized income, LaSalle projects that the increased value of the Project from completion and income stabilization, less the remaining cost of completion, will likely be significantly higher than the value of the Project, if the Fund was forced to abandon or sell it as a distressed asset. In addition, opening the Property would give the Partnership the opportunity to receive cash flow from operations, as well as to establish a "track record" of performance in actual operation, which is likely to enhance the sale value of the Property. Thus, it is represented that, if the Project were not completed, significant losses would be incurred by the Fund, and the Fund would be prevented from enjoying the benefits of completion, which LaSalle has concluded likely would significantly outweigh the additional costs of completion.

As discussed in the applications, the three principal financing alternatives to further cash infusion from the Fund include outside debt financing (on a non-recourse basis), outside equity investment, and sale of a portion of the assets of the Property. In this regard, it is represented that LaSalle has concluded, based on a conservative interpretation of the 13% Limitation, that completion of the Project is not feasible, absent a modification to that Limitation because none of these three alternatives would be sufficient to provide the requisite financing. First, in light of the status of construction and retention of an operator, it is represented that the Partnership could not timely obtain the requisite non-recourse financing to remain within the 13% Limitation (assuming that non-recourse financing could be obtained at all). Second, it is represented that

bringing in an equity partner at this juncture (assuming that one could be found) would take an unacceptable amount of time (thereby delaying completion of the Project significantly) and would likely result in an extremely unfavorable business arrangement for the Fund because any equity investor would likely treat this as a distressed sale. Finally, it is represented that asset sales of components of the Project, such as future development sites and the country club hotel, would not provide sufficient capital to avoid exceeding the 13% Limitation, and could ultimately reduce the overall return to the Fund.

For the foregoing reasons, IFS maintains that regardless of the merit of the initial investment by the Fund in the Partnership, it is clear that an additional investment by the Fund in the Partnership would be in the interest of participants and beneficiaries and would improve the Fund's investment return on the Project, based on LaSalle's conclusion that such an investment would permit the Fund to realize the substantial benefits of completion (including avoidance of the losses attendant to abandonment, sale, or interruption of the Project at this stage) which are projected to outweigh the completion costs.

2. A number of commentators indicated a concern about a lack of diversification in the Fund's investments resulting from its investment in the Project.

In the opinion of IFS, "[b]y granting PTE 99-46, the Department effectively determined that an investment in the Partnership of 13 percent of Fund assets would not result in a lack of diversification."¹⁴ Accordingly, IFS maintains that the only matter raised by the commentators, that is relevant to application D-10971, is whether the marginal increase in the Fund's investment (*i.e.*, the amount by which \$800 million exceeds 13 percent (13%) of Fund assets) results in a violation of section 404(a)(1)(C) of the Act.

IFS notes that neither section 408(a) of the Act nor the regulations thereunder require a showing of

¹⁴ The Department wishes to correct IFS' apparent misunderstanding of the Department's authority under section 408(a) of the Act. As previously noted, in footnote 13, an exemption under section 408(a) of the Act does not relieve a fiduciary from certain other provisions of the Act, including the general fiduciary responsibility provisions of section 404 of the Act. Section 404(a)(1)(C) of the Act requires, among other things, that a plan fiduciary diversify plan assets in order to minimize the risk of large losses unless, under the circumstances, it is clearly prudent not to do so. It is the responsibility of the appropriate Fund fiduciary or fiduciaries to determine whether the diversification requirements of section 404(a)(1)(C) have been satisfied.

compliance with section 404(a)(1)(C) of the Act in an application for a prohibited transaction exemption.¹⁵ In addition, IFS maintains that it is the independent Named Fiduciary of the Fund only with respect to the Fund's investment in the Project and, as such, is not charged with making any decisions with respect to the overall diversification of the Fund's assets or the Fund's compliance with section 404(a)(1)(C) of the Act. It is the understanding of IFS that this decision generally is made by the Trustees.¹⁶

IFS notes that, even in light of the recent significant downturn in the equity markets, an \$800 million investment in the Partnership represents less than 18.5% of the Fund's assets. In addition, based on information provided by the Fund, IFS understands that most of the remaining Fund assets are invested in a broad range of diversified investments, including investment in at least three other asset classes (domestic and international fixed income, domestic and international equity and alternative investments).

Even if it could be argued that the Fund's investments would not be sufficiently diversified as a result of an additional investment in the Project, IFS points out that one could conclude that it would nevertheless be prudent under the Act to have less diversification, because of the unique circumstances involving the Project. In this regard, independent of any consideration of the overall portfolio of the Fund, LaSalle has concluded that an additional investment in the Partnership would be prudent because of the substantial economic harm to the Fund and the Partnership that would result if application D-10971 were denied. It is represented that if the additional investment were not made (which could be the case if application D-10971 was not granted), the Project likely would not be completed even though the projected benefits of completion (including avoidance of the loss attendant to interruption and/or abandonment) significantly outweigh the additional costs of completion.

In contrast, it is represented that granting the exemption would allow the Project to be completed which, in turn, should allow the Partnership (and,

¹⁵ Conversely, it is the Department's position that both section 408(a) of the Act and the regulations promulgated thereunder make clear that the fiduciaries of a plan that has received an administrative exemption are not insulated from responsibility and/or potential liability under section 404 of the Act.

¹⁶ The Department is expressing no views, herein, as to the person or persons ultimately responsible under the Fund for the overall diversification of the Fund assets.

therefore, the Fund) to realize the expected significant net economic gain of completion, without incurring the potentially substantial costs of interruption or abandonment of the Project.

3. One commentator noted that application D-10514 indicated that the Project was "camouflaged * * * to be about a \$40 million project."

As noted above, IFS maintains that the subject of application D-10971 is not whether the Fund's initial investment in the Partnership was appropriate. Rather, IFS seeks an amendment to the 13% Limitation, because the increase to that limitation (*i.e.*, the amount by which \$800 million exceeds 13 percent (13%) of the assets of the Fund) would, for the reasons set forth above, be in the interest of participants and beneficiaries. Therefore, in the opinion of IFS no further response to this comment would appear to be necessary.

4. Various commentators expressed concern about past actions of the Trustees and the prior independent Named Fiduciary, including whether Fund assets have been wasted or mismanaged with respect to the Project. Other commentators questioned how information could be obtained regarding how the Fund's investment in the Project has been expended, and claimed that IFS did not provide an adequate explanation of the steps to be taken to protect the interests of participants and beneficiaries.

As the current independent named fiduciary, IFS is charged with the responsibility of appropriately reviewing prior (and future) management and expenditure of Fund assets with respect to the Project. It is represented that such review is currently being conducted. However, in the opinion of IFS, the subject of these applications is not whether the Fund's Trustees, the prior Named Fiduciary, service providers, or other fiduciaries mismanaged assets but whether an additional investment by the Fund, as determined by the current independent Named Fiduciary, should be permitted on the grounds that it would clearly be in the interest of the participants and beneficiaries of the Fund.

As discussed in application D-10960, the interests of participants and beneficiaries are protected because IFS is acting prudently as an *independent* Named Fiduciary under an Independent Named Fiduciary Agreement, dated September 12, 2000 (the IFS Agreement), the terms of which were reviewed and approved by the Department prior to its execution.

Under the IFS Agreement, IFS has a continuing responsibility to furnish the Trustees and the Department with monthly written reports concerning the progress of the Project (including, *inter alia*, the operations, assets, receipts, and disbursements with respect to the Project). The IFS Agreement also requires IFS to provide the Department with certain documents upon request and to meet with the Department and its agents as reasonably requested. This will enable the Department to exercise continuing oversight regarding IFS' performance of services under the IFS Agreement, and with respect to the Project overall.

Additionally, there are very strict limitations on the ability of the Trustees to remove IFS from its position as independent Named Fiduciary, which allow IFS to maintain strict independence from the Trustees. Section 14 of the IFS Agreement provides that, until November 5, 2002, no termination of IFS:

shall become effective until the effective date of the appointment of a replacement independent named fiduciary that is acceptable to the U.S. Department of Labor and, in the case of a termination by the Trustees or their duly appointed delegate, such termination shall not be effective unless (i) it has received the concurrence of the U.S. Department of Labor, or (ii) it is pursuant to a court order obtained for "cause" * * * after reasonable notice to the Secretary of Labor * * *

IFS recognizes the concern expressed by these commentators that, unless an independent named fiduciary, such as IFS, remains involved in the Project for an extended time period, the Trustees could again control the Project. However, IFS understands that, if the applications are granted, the Trustees have agreed that the Project will be managed by an independent party for so long as the Fund has a controlling interest in the underlying assets of the Partnership or its successors.¹⁷

IFS respectfully requests that any exemption granted in connection with application D-10960 be coextensive with IFS' service as independent Named Fiduciary, rather than be limited to five (5) years, from November 3, 2000, until November 3, 2005 (as proposed), because the revised arrangement between the Trustees and the Department contemplates a long-term relationship between the Fund and an independent named fiduciary, and because it would be expensive for the Fund to incur the costs of subsequent

applications to renew or modify the exemption.

It is anticipated that the existence of an independent named fiduciary on a long-term basis will help assure completely independent fiduciary decision-making with respect to all aspects of the Project, and will further protect the interests of participants and beneficiaries of the Fund. In addition, the concerns expressed in the comments regarding prior actions by the Trustees or other fiduciaries of, or service providers to, the Fund are inapposite, because IFS will, with the assistance of LaSalle, other industry professionals, and legal counsel independent of the Trustees, continue to exercise its fiduciary discretion independent of any influence from such individuals.

The Department concurs with IFS' request that the effectiveness of the final exemption not be limited to the five (5) year period, from November 3, 2000, until November 3, 2005. Accordingly, the Department has modified the final exemption, as follows:

(a) By deleting the phrase, "until November 3, 2005," from Section I, as published in the **Federal Register** on page 15900, column 1, lines 21-22 of the Notice; and from Section II, as published in the **Federal Register** on page 15901, column 2, lines 51-53 of the Notice;

(b) By deleting in its entirety the paragraph entitled, "Temporary Nature of Exemption," as published in the **Federal Register** on page 15902, column 2, of the Notice; and adding in place of such paragraph the sentence, **EFFECTIVE DATE:** This exemption is effective November 3, 2000, the date upon which IFS was appointed to serve as the Named Fiduciary for the Fund with respect to the Diplomat Account; and

(c) by modifying a sentence in the definition of the "time" as of which any transaction occurs, as published in Section III(i) of the Notice on page 15902, column 1, lines 60-69, and column 2, lines 1-3 of the **Federal Register**. In this regard, words that have been stricken from the language, below, and phrases which have been added to the language appear in brackets, below:

If any transaction is entered into [on or after the effective date of this exemption] or if a renewal that requires the consent of the Named Fiduciary occurs [on or after the effective date of this exemption] 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.

The Department emphasizes that the relief provided for the transactions

¹⁷In this regard, the Department notes that the chairman of the Trustees executed such an agreement on May 31, 2001.

described in the final exemption will be available to IFS, only for the period of time that IFS serves as the independent Named Fiduciary for the Fund with respect to the Diplomat Account. In the event that IFS, resigns, is removed, or is replaced as the independent Named Fiduciary for the Fund, IFS may no longer rely on the relief provided by this exemption for the transactions, described in application D-10960.

Under the agreement, executed by the chairman of the Trustees on May 31, 2001, it is the Department's understanding that the Diplomat Account will be managed by an independent Named Fiduciary for so long as the Fund has a controlling interest in the Project. Accordingly, upon the resignation, replacement, or removal of IFS, as independent Named Fiduciary with respect to the Diplomat Account, any successor to IFS who will serve as the independent Named Fiduciary for the Fund with respect to the Diplomat Account, may submit an application for exemption to the extent that such successor independent Named Fiduciary does not qualify as a QPAM and would need an exemption to be treated as if they were a QPAM.

The relief requested in application D-10971 pertains to the modification of the 13% Limitation described in PTE 99-46. The requested modification involves setting the limitation at \$800 million rather than the 13% Limitation, as set forth in the Term Sheet. If the modification is approved by the Department by the granting of the subject exemption, IFS and any successor to IFS who serves as the independent Named Fiduciary for the Fund with respect to the Diplomat Account would be subject to the \$800 million fixed amount. By letter dated October 11, 2001, IFS indicated that, if the proposed amendment to PTE 99-46 is granted, it does not foresee any circumstances under which it will request from the Department any additional amendments to PTE 99-46 that would have the effect of increasing the maximum amount of assets of the Fund that may be invested in the Project.

5. Various commentators requested information regarding the Department's investigation of the use of Fund assets in the development of the Project. Other commentators indicated that IFS is required to submit copies of all correspondence regarding the substantive issues involved in that investigation.

With respect to the commentators' indication that IFS did not submit copies of all correspondence regarding the substantive issues involved in the

Department's investigation of the use of Fund assets in connection with the development of the Project, IFS noted that it was not, at the time the applications were submitted, aware of any correspondence with the Department that addresses the substantive issues related to the investigation and that is required to be provided to the Department, pursuant to 29 CFR § 2570.35(a)(7) of the Department's regulations.

Since the applications were submitted, IFS has become aware of certain correspondence that cannot clearly be classified as substantive correspondence related to any investigation. However, IFS has submitted certain correspondence that, based on a conservative interpretation of 29 CFR § 2570.35(a)(7), arguably may be appropriate to provide to the Department in connection with the applications. It is IFS' position that the request concerning the release of information about the Department's investigation is solely within the purview of the Department.

The Department notes that the disclosure required by 29 CFR § 2570.35(a)(7) of the Department's regulation (relating to investigations, examinations, litigation, and continuing controversy by or with certain specified Federal agencies), is necessary to ensure that the Department's exemption activities do not compromise its enforcement efforts. In this regard, the Department does not require submission by an applicant of copies of all correspondence, but only requires submission of copies of correspondence relating to substantive issues involved in such investigation, examination, litigation, or controversy. Once copies of such correspondence become part of the administrative record of an application for exemption, 29 CFR § 2570.51 of the Department's regulations provides that the public may examine and copy the administrative record of each exemption application and all correspondence and documents submitted in connection therewith.

To the extent that information submitted in connection with an investigation, examination, litigation, or continuing controversy by or with certain specified Federal agencies, is not contained in the administrative record of an application for exemption, such information is not available to the public and is not considered by the Department in making its determination that the transaction for which relief has been requested is administratively feasible and in the interest of, and protective of a plan, and its participants and beneficiaries, pursuant to section

408(a) of the Act. Thus, the Department's final decision on any exemption is based on the information contained in the official exemption application file. The Department further notes that an exemption does not take effect or protect parties in interest from liability with respect to the exemption transaction unless the material facts and representations contained in the application, and in any materials and documents submitted in support of the application, are true and complete (see 29 CFR § 2570.49(a)).

The final decision on the merits of a requested exemption by the Department entails an administrative process which is based on a careful review of the entire public record of facts and representations as documented in the application file. The Department may not grant an exemption, pursuant to section 408(a) of the Act, unless a determination is made on the record with respect to the findings that such an exemption is administratively feasible, in the interest of the plan and of its participants and beneficiaries, and protective of the rights of the participants and beneficiaries of such plan.

6. One commentator questioned whether IFS and ASA "have a clue about what is going on, except spending the Pension Fund's money."

In response to such comment, IFS notes that neither ASA nor ASA Counselors now has any ongoing relationship with the Fund or the Project. As noted in application D-10960, IFS replaced ASA Counselors as independent Named Fiduciary of the Fund. Pursuant to its authority as independent Named Fiduciary, effective December 14, 2000, IFS appointed LaSalle as QPAM, pursuant to PTCE 84-14, with respect to the Project.

It is represented that both IFS and LaSalle have devoted significant personnel and enormous amounts of time to the Project. In this regard, IFS, the most senior officers of which are personally involved in the Project on a daily basis, has broad expertise in a wide range of subjects and, in particular, the financial and fiduciary aspects of pension fund investing.

It is further represented that LaSalle is a leading global real estate investment manager that frequently acts as a fiduciary. In addition, LaSalle is a member of the Jones Lang LaSalle group, various divisions of which have assisted (and will continue to assist) LaSalle in connection with the Project. These divisions, including Jones Lang LaSalle Hotels, the Project and Development Management Group, the Risk Management Group, and Jones

Lang LaSalle Capital Markets, are staffed with industry professionals collectively familiar with all major aspects of the Project.

IFS' conclusions set forth in application D-10971 regarding the benefit to participants and beneficiaries of further investment in the Project are premised in large part on expert conclusions by LaSalle. In this regard, (based on its careful review of the status of the Project and its extensive expertise as a real estate investment manager), LaSalle has concluded that the Fund is likely to suffer significant economic harm, if the Fund was not able to complete the Project (which would be the case if the Fund could not invest further assets in the Partnership because of the 13% Limitation). It is represented that the various reports prepared by both LaSalle and IFS with respect to the Project are clear evidence of the considerable knowledge of both entities with respect to the Project.

7. One commentator requested information on whether there is a criminal investigation regarding the Project.

IFS has not been formally advised that there is any pending criminal investigation with respect to the Project.

8. Various commentators indicated that IFS did not provide an adequate explanation of whether the exemption transaction is customary in the industry.

IFS disagrees with the contention of the commentators in that regard. It is IFS' view that in granting PTE 99-46, the Department has implicitly determined that the underlying transaction (*i.e.*, the Fund's purchase of the Property and investment in the Partnership) is customary in the industry.¹⁸

Furthermore, as noted in application D-10971, it is customary for an equity investor to use its capital to financially support a real estate project (so long as the investor believes that the incremental investment will either earn a reasonable return or avoid significant losses) and establish an operating history before abandoning the project or engaging in a distressed sale of assets or obtaining equity co-investment on onerous terms that may result in a substantial economic loss that exceeds the benefit of completion of the project. It is represented that the requested

amendment would permit the Fund to continue to financially support the Project to completion, without incurring the risk of possibly violating PTE 99-46.

In summary, IFS maintains that if the relief requested in application D-10971 is not granted, the Fund may not be able to make an additional investment in the Partnership, because of the 13% Limitation. It is represented that after a careful review of the Project, LaSalle has concluded that such an additional investment should (i) allow the Partnership to realize a stabilized value of the Property in excess of its estimated current market value (if the Property were sold today in a distressed sale) plus the costs of completion; (ii) allow the Partnership to receive from operations a current cash yield on its investment; (iii) allow the Partnership to avoid the costs of interruption or abandonment of the Project; and (iv) prevent the Partnership from being forced to sell the Property as a distressed asset and at a significantly reduced amount. Thus, it is represented that LaSalle (and, based on LaSalle's advice, IFS) has concluded that, if the requested relief is not granted, the Partnership, and, through it, the Fund, could suffer significant adverse consequences, which clearly would not be in the interest of participants and beneficiaries.

9. In a letter dated June 15, 2001, IFS notified the Department of a development regarding the Property that, in the opinion of IFS, further supports LaSalle's conclusion that completing the Project is likely to lead to a more financially attractive result for the Fund than not completing it. In this regard, it is represented that LaSalle has conducted a competitive process for the selection of a hotel operator in which a field of ten (10) candidates was narrowed to three (3) major operators. Further, interviews and negotiations with each of the three finalists resulted in the selection of Starwood Hotels and Resorts Worldwide (Starwood) through its corporate vehicle, Westin Management Company East, Inc. It is represented that Starwood is the owner of such well-known brands as Sheraton, Westin, and St. Regis.

Further, it is represented that on June 5, 2001, LaSalle signed a brand and management agreement (together, the Operating Agreement) with Starwood to brand and operate the Property as the Westin Diplomat Resort and Spa and to operate the country club, pursuant to a parallel operating agreement, as a member of Starwood's Luxury Collection. It is represented that the terms of the 15-year Operating Agreement evidence Starwood's

significant, long-term business and financial commitment to the Property. In this regard, it is represented that the Operating Agreement requires Starwood to provide a substantial amount of "key money" to pay for various pre-opening expenses and to provide loans, at very attractive terms, to the Property (without recourse to the Fund), in certain circumstances, including the occurrence of actual future cash flow shortfalls related to either the operation of the Property or its ability to service debt.

It is represented that the willingness of a major international hotel management company to enter into a long-term agreement, the terms of which are very favorable to the Partnership and the Property should be viewed as further evidence of the economic viability of the Property and the commercial reasonableness of permitting the Fund to fund the development of the Property to completion.

As a result of the terrorist attacks of September 11, 2001 and its potential impact on the hotel and convention industry, the Department specifically requested that IFS, as the independent Named Fiduciary of the Fund, confirm that the most prudent course of action for the Fund to follow is completion of the Project. In response to this request, IFS, in a letter dated October 5, 2001, noted that it sought the views of LaSalle and Starwood. Both LaSalle and Starwood, in letters dated October 4, 2001 and October 5, 2001, respectively, indicated that none of the groups that had booked space cancelled their reservations subsequent to the September 11, 2001 events. Both parties also noted that it is not possible to do an assessment of the impact of these events on the The Westin Diplomat Resort and Spa's future hotel and convention business—other than to note the absence of cancellations—because the hotel will not begin operations until January 2002. In a letter dated October 5, 2001, LaSalle stated that it has not changed its opinion that the prudent course of action is to complete construction of the Property as soon as possible. In a separate letter dated October 5, 2001, IFS states that "IFS has discussed this opinion with appropriate parties and finds this conclusion reasonable."

Accordingly, after full consideration and review of the entire administrative record, including the written comments from the commentators and the responses thereto by IFS, the Department has determined to grant the exemption, as modified and amended herein.

¹⁸ In granting an exemption, the Department expresses no opinion as to whether or not a particular transaction for which relief is provided is customary in the industry. In this regard, the Department notes that pursuant to 29 CFR § 2570.34(a)(6) of the Department's regulations, it is the responsibility of the applicant to inform the Department whether the transaction for which relief is requested is customary for the industry or class involved.

The comments submitted by the commentators to the Department and the response by IFS thereto has been included as part of the public administrative record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Pension Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210.

For a complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on March 21, 2001, 66 FR 15900.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 219-8883. (This is not a toll-free number.)

Sierra Health Services, Inc. Profit Sharing Plan (the Plan) Located in Las Vegas, Nevada

[Prohibited Transaction Exemption No. 2001-40; Application No. D-10884]

Exemption

The restrictions of sections 406(a), 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 the proposed sale by the Plan of certain limited partnership interests (collectively, the Interest(s)) to Sierra Health Services, Inc., (the Employer) the sponsor of the Plan and a party in interest with respect to the Plan, provided that the following conditions are met:

(a) The sale is a one-time transaction for cash;

(b) The Plan pays no commissions or any other expenses relating to the sale;

(c) The sales price is the greater of (i) the fair market value of the Interests as determined by a qualified, independent, appraiser (ii) the value of the Interests, as determined by the general partner of each partnership and reported on the most recent account statements available at the time of the sale or (iii) the Plan's original acquisition and holding costs.

(d) The Plan suffers no loss, as a result of its acquisition and holding of the Interests, taking into account all cash distributions received by the Plan as a result of owning the Interests.

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 July 30, 2001 at 66 FR 39356.

Written Comments

The Department received one comment from an interested person on the proposed exemption. The Department forwarded a copy of the comment to the 401(k) committee (the Committee), which approves the guidelines for investment of the Employer directed fund, and requested that the Committee respond in writing to the concerns raised by the commentator. A description of the comment and the Committee's response are summarized below.

The commentator urged that the exemption not be granted because she believed that the Property had been under valued and requested another independent appraisal of the Property.

The Committee, in response represents the following: The valuation used for the purchase price is the highest of the following three items: (1) The fair market value of the Interests, as determined by a qualified independent appraiser; (2) the value of the Interests as determined by the General Partner of each partnership; or (3) the Plan's original acquisition and holding costs.

As part of a long-term employee retention strategy, the Employer ceased to direct the investment of the employer's contributions to the Plan. Prudential Securities was engaged as Trustee, and both the employer's and employees' contributions were combined in a single account. Every participant now has the ability to direct his/her investments, on a daily basis if they so desire. The holding of these Interests prevents participants from being able to direct their investment to the extent that these Interests constitute a portion of their Plan assets.

The qualified, independent, certified appraisal was completed by William P. Geary, a Nevada Certified General Appraiser. The appraisal was prepared in conformity with the current requirements of the Uniform Standards of Professional Appraisal Practice as published by the Appraisal Foundation, and the federal financial institutions regulating agencies. The compensation for the appraisal was not contingent upon the reporting of a predetermined value or direction in value that favors SHS, the amount of the value estimate, the attainment of stipulated result or the occurrence of a subsequent event.

Accordingly, after giving full consideration to the entire record, including the comment by the commentator, and the responses of the Committee, the Department has determined to grant the exemption as

proposed. In this regard, the comment submitted to the Department has been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Ave. NW, Washington DC 20210.

FOR FURTHER INFORMATION CONTACT: Khalif Ford of the Department, telephone (202) 219-8883 (this is not a toll-free number).

Barclays Bank PLC and Barclays Capital Inc. Located in London, England and New York, New York

[Prohibited Transaction Exemption 2001-41; Application No. D-10966]

Exemption

Section I—Transactions

The restrictions of section 406(a)(1)(A) through (D) 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 as of January 24, 2001, to:

(a) The lending of securities, under certain exclusive borrowing arrangements, to:

- (1) Barclays Bank plc (Barclays);
- (2) Barclays Capital Inc. (BCI) and any other affiliate of Barclays that, now or in the future, is a U.S. registered broker-dealer or a government securities broker or dealer or U.S. bank;

(3) Barclays Capital Securities Limited, which is subject to regulation in the United Kingdom by the Securities and Futures Authority of the United Kingdom (the UK SFA); and

(4) Any broker-dealer or bank that, now or in the future, is an affiliate of Barclays which is subject to regulation by the UK SFA or the Bank of England, (each such affiliated foreign broker-dealer or bank referred to as a "Foreign Borrower," and, together with Barclays and BCI, collectively referred to as the "Borrowers"), by employee benefit plans, including commingled investment funds holding assets of such plans (Plans), with respect to which Barclays or any of its affiliates is a party in interest; and

(b) The receipt of compensation by Barclays or any of its affiliates in connection with securities lending transactions, provided that the following conditions set forth in Section II, below, are satisfied.

Section II—Conditions

(a) For each Plan, neither the Borrower nor any affiliate has or exercises discretionary authority or control over the Plan's investment in the securities available for loan, nor do they render investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

(b) The party in interest dealing with the Plan is a party in interest with respect to the Plan (including a fiduciary) solely by reason of providing services to the Plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H) or (I) of the Act.

(c) The Borrower directly negotiates an exclusive borrowing agreement (the Borrowing Agreement) with a Plan fiduciary which is independent of the Borrower and its affiliates.

(d) The terms of each loan of securities by a Plan to a Borrower are at least as favorable to such Plan as those of a comparable arm's-length transaction between unrelated parties, taking into account the exclusive arrangement.

(e) In exchange for granting to the Borrower the exclusive right to borrow certain securities, the Plan receives from the Borrower either (i) a flat fee (which may be equal to a percentage of the value of the total securities subject to the Borrowing Agreement from time to time), (ii) a periodic payment that is equal to a percentage of the value of the total balance of outstanding borrowed securities, or (iii) any combination of (i) and (ii) (collectively, the Exclusive Fee). If the Borrower deposits cash collateral, all the earnings generated by such cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree with the independent fiduciary of the Plan that a percentage of the earnings on the collateral may be retained by the Plan or the Plan may agree to pay the Borrower a rebate fee and retain the earnings on the collateral (the Shared Earnings Compensation). If the Borrower deposits non-cash collateral, all earnings on the non-cash collateral shall be returned to the Borrower; provided that the Borrower may, but shall not be obligated to, agree to pay the Plan a lending fee (the Lending Fee) (the Lending Fee and the Shared Earnings Compensation are collectively referred to as the "Transaction Lending Fee"). The Transaction Lending Fee, if any, shall be either in addition to the Exclusive Fee or an offset against such Exclusive Fee. The Exclusive Fee and the Transaction Lending Fee may be determined in advance or pursuant to an objective formula, and may be

different for different securities or different groups of securities subject to the Borrowing Agreement. Any change in the Exclusive Fee or the Transaction Lending Fee that the Borrower pays to the Plan with respect to any securities loan requires the prior written consent of the independent fiduciary of the Plan, except that consent is presumed where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula. Where the Exclusive Fee or the Transaction Lending Fee changes pursuant to an objective formula, the independent fiduciary of the Plan must be notified at least 24 hours in advance of such change and such independent Plan fiduciary must not object in writing to such change, prior to the effective time of such change.

(f) The Borrower may, but shall not be required to, agree to maintain a minimum balance of borrowed securities subject to the Borrowing Agreement. Such minimum balance may be a fixed U.S. dollar amount, a flat percentage or other percentage determined pursuant to an objective formula.

(g) By the close of business on or before the day the loaned securities are delivered to the Borrower, the Plan receives from the Borrower (by physical delivery, book entry in a securities depository located in the United States, wire transfer, or similar means) collateral consisting of U.S. currency, securities issued or guaranteed by the U.S. Government or its agencies or instrumentalities, irrevocable bank letters of credit issued by a U.S. bank other than Barclays or any affiliate thereof, or any combination thereof, or other collateral permitted under Prohibited Transaction Exemption 81-6 (46 FR 7527, Jan. 23, 1981, as amended at 52 FR 18754, May 19, 1987) (PTE 81-6) (as amended or superseded)¹⁹ Such collateral will be deposited and maintained in an account which is separate from the Borrower's accounts and will be maintained with an institution other than the Borrower. For this purpose, the collateral may be held on behalf of the Plan by an affiliate of the Borrower that is the trustee or custodian of the Plan.

¹⁹ PTE 81-6 provides an exemption under certain conditions from section 406(a)(1)(A) through (D) of the Act and the corresponding provisions of section 4975(c) of the Code for the lending of securities that are assets of an employee benefit plan to a U.S. broker-dealer registered under the Securities Exchange Act of 1934 (the 1934 Act) (or exempted from registration under the 1934 Act as a dealer in exempt Government securities, as defined therein) or to a U.S. bank, that is a party in interest with respect to such plan.

(h) The market value (or in the case of a letter of credit, the stated amount) of the collateral initially equals at least 102 percent of the market value of the loaned securities on the close of business on the day preceding the day of the loan and, if the market value of the collateral at any time falls below 100 percent (or such higher percentage as the Borrower and the independent fiduciary of the Plan may agree upon) of the market value of the loaned securities, the Borrower delivers additional collateral on the following day to bring the level of the collateral back to at least 102 percent. The level of the collateral is monitored daily by the Plan or its designee, which may be Barclays or any of its affiliates which provides custodial or directed trustee services in respect of the securities covered by the Borrowing Agreement for the Plan. The applicable Borrowing Agreement shall give the Plan a continuing security interest in and lien on the collateral.

(i) Before entering into a Borrowing Agreement, the Borrower furnishes to the Plan the most recent publicly available audited and unaudited statements of its financial condition, as well as any publicly available information which it believes is necessary for the independent fiduciary to determine whether the Plan should enter into or renew the Borrowing Agreement.

(j) The Borrowing Agreement contains a representation by the Borrower that, as of each time it borrows securities, there has been no material adverse change in its financial condition since the date of the most recently furnished statements of financial condition.

(k) The Plan receives the equivalent of all distributions made during the loan period, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits, and rights to purchase additional securities, that the Plan would have received (net of tax withholdings)²⁰ had it remained the record owner of the securities.

(l) The Borrowing Agreement and/or any securities loan outstanding may be terminated by either party at any time without penalty (except for, if the Plan has terminated its Borrowing Agreement, the return to the Borrower of a pro-rata portion of the Exclusive Fee paid by the Borrower to the Plan)

²⁰ The Department notes the Applicants' representation that dividends and other distributions on foreign securities payable to a lending Plan are subject to foreign tax withholdings and that the Borrower will always put the Plan back in at least as good a position as it would have been had it not loaned securities.

whereupon the Borrower delivers securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization, or merger of the issuer of the borrowed securities) to the Plan within the lesser of five business days of written notice of termination or the customary settlement period for such securities.

(m) In the event that the Borrower fails to return securities in accordance with the Borrowing Agreement, the Plan will have the right under the Borrowing Agreement to purchase securities identical to the borrowed securities and apply the collateral to payment of the purchase price. If the collateral is insufficient to satisfy the Borrower's obligation to return the Plan's securities, the Borrower will indemnify the Plan in the U.S. with respect to the difference between the replacement cost of securities and the market value of the collateral on the date the loan is declared in default, together with expenses incurred by the Plan plus applicable interest at a reasonable rate, including reasonable attorneys' fees incurred by the Plan for legal action arising out of default on the loans, or failure by the Borrower to properly indemnify the Plan.

(n) Except as otherwise provided herein, all procedures regarding the securities lending activities, at a minimum, conform to the applicable provisions of PTE 81-6 (as amended or superseded), as well as to applicable securities laws of the United States and/or the United Kingdom, as appropriate.

(o) Only Plans with total assets having an aggregate market value of at least \$50 million are permitted to lend securities to the Borrowers; provided, however, that—

(1) In the case of two or more Plans which are maintained by the same employer, controlled group of corporations or employee organization (the Related Plans), whose assets are commingled for investment purposes in a single master trust or any other entity the assets of which are "plan assets" under 29 CFR 2510.3-101 (the Plan Asset Regulation), which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement shall be deemed satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million; provided that if the fiduciary responsible for making the investment decision on behalf of such master trust or other entity is not the employer or an affiliate of the employer, such fiduciary has total assets under its management and control, exclusive of the \$50 million

threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million.

(2) In the case of two or more Plans which are not maintained by the same employer, controlled group of corporations or employee organization (the Unrelated Plans), whose assets are commingled for investment purposes in a group trust or any other form of entity the assets of which are "plan assets" under the Plan Asset Regulation, which entity is engaged in securities lending arrangements with the Borrowers, the foregoing \$50 million requirement is satisfied if such trust or other entity has aggregate assets which are in excess of \$50 million (excluding the assets of any Plan with respect to which the fiduciary responsible for making the investment decision on behalf of such group trust or other entity or any member of the controlled group of corporations including such fiduciary is the employer maintaining such Plan or an employee organization whose members are covered by such Plan). However, the fiduciary responsible for making the investment decision on behalf of such group trust or other entity—

(i) Has full investment responsibility with respect to plan assets invested therein; and

(ii) Has total assets under its management and control, exclusive of the \$50 million threshold amount attributable to plan investment in the commingled entity, which are in excess of \$100 million. (In addition, none of the entities described above are formed for the sole purpose of making loans of securities.)

(p) Prior to any Plan's approval of the lending of its securities to the Borrowers, a copy of this exemption (and the notice of pendency) is provided to the Plan, and the Borrower informs the independent fiduciary that the Borrower is not acting as a fiduciary of the Plan in connection with its borrowing securities from the Plan.²¹

(q) The independent fiduciary of the Plan receives monthly reports with respect to the securities lending transactions, including but not limited to the information set forth in the following sentence, so that an

²¹ The Department notes the Applicants' representation that, under the proposed exclusive borrowing arrangements, neither the Borrower nor any of its affiliates will perform the essential functions of a securities lending agent, i.e., the Applicants will not be the fiduciary who negotiates the terms of the Borrowing Agreement on behalf of the Plan, the fiduciary who identifies the appropriate borrowers of the securities or the fiduciary who decides to lend securities pursuant to an exclusive arrangement. However, the Applicants or their affiliates may monitor the level of collateral and the value of the loaned securities.

independent Plan fiduciary may monitor such transactions with the Borrowers. The monthly report will list for a specified period all outstanding or closed securities lending transactions. The report will identify for each open loan position, the securities involved, the value of the security for collateralization purposes, the current value of the collateral, the rebate or premium (if applicable) at which the security is loaned, and the number of days the security has been on loan. At the request of the Plan, such a report will be provided on a daily or weekly basis, rather than a monthly basis. Also, upon request of the Plan, the Borrower will provide the Plan with daily confirmations of securities lending transactions.

(r) In addition to the above conditions, all loans involving Foreign Borrowers must satisfy the following supplemental requirements:

(1) Such Foreign Borrower is a bank which is subject to regulation by the Bank of England or is a registered broker-dealer subject to regulation by the UK SFA;

(2) Such Foreign Borrower is in compliance with all applicable provisions of Rule 15a-6 (17 C.F.R. 240.15a-6) under the Securities Exchange Act of 1934 (the 1934 Act) which provides foreign broker-dealers a limited exception from United States registration requirements;

(3) All collateral is maintained in United States dollars or in U.S. dollar-denominated securities or letters of credit, or other collateral permitted under PTE 81-6 (as amended or superseded);

(4) All collateral is held in the United States and the situs of the Borrowing Agreement is maintained in the United States under an arrangement that complies with the indicia of ownership requirements under section 404(b) of the Act and the regulations promulgated under 29 C.F.R. 2550.404(b)-1; and

(5) Prior to entering into a transaction involving a Foreign Borrower, Barclays or the Foreign Borrower must:

(i) Agree to submit to the jurisdiction of the United States;

(ii) Agree to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent);

(iii) Consent to the service of process on the Process Agent; and

(iv) Agree that enforcement by a Plan of the indemnity provided by Barclays or the Foreign Borrower will occur in the United States courts.

(s) Barclays or the Borrower maintains, or causes to be maintained, within the United States for a period of

six years from the date of such transaction, in a manner that is convenient and accessible for audit and examination, such records as are necessary to enable the persons described in paragraph (t)(1) to determine whether the conditions of the exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Barclays and/or its affiliates, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest other than the Borrower 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 below by paragraph (t)(1).

(t)(1) Except as provided in subparagraph (t)(2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (s) are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department, the Internal Revenue Service or the Securities and Exchange Commission (SEC);

(ii) Any fiduciary of a participating Plan or any duly authorized representative of such fiduciary;

(iii) Any contributing employer to any participating Plan or any duly authorized employee representative of such employer; and

(iv) Any participant or beneficiary of any participating Plan, or any duly authorized representative of such participant or beneficiary.

(2) None of the persons described above in subparagraphs (t)(1)(ii)-(t)(1)(iv) are authorized to examine the trade secrets of Barclays or its affiliates or commercial or financial information which is privileged or confidential.

Section III—Definitions

(a) An “affiliate” of a person means:

(i) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person. (For purposes of this paragraph, the term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual);

(ii) Any officer, director, employee or relative (as defined in section 3(15) of

the Act) of any such other person or any partner in any such person; and

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

(b) The term “Foreign Borrower” or “Foreign Borrowers” means Barclays Capital Securities Limited and any broker-dealer or bank that, now or in the future, is an affiliate of Barclays which is subject to regulation by the UK SFA or the Bank of England.

(c) The term “Borrower” includes Barclays, BCI, the Foreign Borrowers and any other affiliate of Barclays that, now or in the future, is a U.S. registered broker-dealer or a government securities broker or dealer or U.S. bank.

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 June 28, 2001 at 66 FR 34475.

Effective Date: This exemption will be effective as of January 24, 2001.

Written Comments

The Department received one comment letter with respect to the Notice. The comment letter was submitted by Barclays Bank PLC and certain of its affiliates (the Applicants). The Applicants made three comments that concerned minor modifications to the language of the exemption, as proposed.

First, the Applicants requested that the word “remaining” be deleted from the second sentence in Section II(e) of the Notice. Second, the Applicants requested that the term “financial statements” in Section II(j) of the Notice be replaced with the term “statements of financial condition” in the final exemption. Finally, the Applicants requested that the following language be added to the end of the sentence in Section II(r)(3) of the Notice: “or such other collateral as may be permitted under PTE 81–6 from time to time.”

The Department concurs with the Applicants’ comments and suggested changes, and has modified the language of the final exemption accordingly.

After giving full consideration to the entire record, including the written comments from the Applicants, the Department has decided to grant the exemption, as modified herein.

FOR FURTHER INFORMATION CONTACT:

Karen Lloyd of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

Columbia Savings Plan (the Plan) Located in Wilmington, DE

[Prohibited Transaction Exemption 2001–42; Exemption Application No. D–10977]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) and section 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective November 1, 2000, to (1) the receipt, by the Plan, of Stock Appreciation Income Linked Securities (SAILS), in exchange for common stock in Columbia Energy Group (Columbia Energy), the Plan sponsor; (2) the extension of credit by the Plan to NiSource, Inc. (NiSource), a party in interest, in connection with the receipt of the zero coupon bond portion of the SAILS; (3) the continued holding of the SAILS by the Plan; and (4) the potential sale of the SAILS by the Plan to NiSource.

This exemption is subject to the following conditions:

(a) The Plan automatically received the SAILS in exchange for its shares of Columbia Energy common stock, in accordance with the terms of an agreement and plan of merger, and it paid no fees or commissions in connection with its receipt of the SAILS and other merger consideration.

(b) All Columbia Energy shareholders, including Plan participants, received SAILS in the same manner, so that the Plan participants and beneficiaries were not in a less advantageous position than other Columbia Energy shareholders.

(c) The Plan’s receipt of the SAILS resulted from shareholder approval and did not relate to any unilateral exercise of discretion by a Plan fiduciary.

(d) Morgan Stanley and Salomon Smith Barney, Inc. advised Columbia Energy that the consideration consisting of NiSource common stock, SAILS and cash for Columbia Energy common stock was “fair,” from a financial point of view.

(e) Duff & Phelps, Inc. provided Fidelity Investments, Inc., the Plan trustee (the Trustee), and the Plan’s Savings Plan Committee with independent financial advice concerning the valuation of the SAILS.

(f) The Plan did not pay any fees or commissions in connection with the acquisition and holding of the SAILS, nor will it pay any fees or commissions if any SAILS are sold to NiSource.

(g) An independent fiduciary, United States Trust Company, N.A. (U.S. Trust),

(1) Monitored the Plan’s holding and disposition of the SAILS;

(2) Determined whether it was appropriate for the Plan to dispose of the SAILS (either on the open market or through a direct sale to NiSource) and instructed the Trustee regarding such disposition;

(3) Would determine, in the event of a sale of any SAILS to NiSource, the fair market value of such SAILS either (i) based on their closing price on the New York Stock Exchange (the NYSE) on the date of the transaction, or (ii) on the basis of an independent appraisal if the SAILS were not carried on the NYSE, or in the event it concluded that the closing price on the NYSE was not representative of the fair market value of the SAILS as of the transaction date; and

(4) Disposed of all SAILS held by the Plan on the NYSE before the end of calendar year 2001.

(h) The Plan would not be required to pay any fees or commissions in the event any SAILS were sold to NiSource.

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 July 30, 2001 at 66 FR 39367.

Written Comments

The Department received one written comment with respect to the proposed exemption and no requests for a public hearing. The comment was submitted by a Plan participant who stated that she was initially given the choice of how she wanted her shares of Columbia Energy common stock converted. Although the commenter chose to exchange her Columbia Energy common stock for NiSource common stock, she ended up receiving both NiSource common stock and SAILS. The commenter declared this form of consideration to be unacceptable to herself and to other Plan participants who were treated similarly. The commenter also questioned whether participants who received SAILS would be again taken advantage of by not having a choice or say in the matter and she suggested that Columbia Energy provide meetings and clearer explanations to questions in layman's terms so that all parties involved could make informed choices.

Columbia Energy responded to the commenter's concerns by stating that the Trustee and the Plan fiduciaries had acted prudently and in the best interests of the Plan participants with respect to the subject transactions. In this regard, Columbia Energy noted that the Plan was treated in the same manner as any other holder of Columbia Energy common stock that had made a valid election to receive NiSource common

stock in exchange for Columbia Energy common stock, or to receive consideration in the form of cash and SAILS, in exchange for Columbia Energy common stock. Columbia Energy also noted that due to uncertainty on whether the SAILS constituted qualifying employer securities, the Trustee was required, under the terms of the Trust Agreement and applicable law, to override all Plan participant elections to receive cash and SAILS consideration, and to elect, in the alternative NiSource common stock. However, because a large number of Columbia Energy's shareholders elected to receive NiSource common stock, the stock elections had to be prorated. Thus, Columbia Energy explained that the Plan (and Plan participants) ultimately received SAILS, in addition to shares of NiSource common stock, and cash. The SAILS were held in a separate fund, which was not subject to participant direction, and disposed of during the 2001 calendar year.

To protect the interests of the Plan participants, Columbia Energy indicated that it retained U.S. Trust to serve on behalf of the Plan as an independent fiduciary and oversee the Plan's holding and eventual disposition of the SAILS on the NYSE. As a result of such disposition, Columbia Energy stated that each Plan participant received the proceeds attributable to the number of SAILS held in the participant's SAILS account, thereby entitling the participant to direct the proceeds into one or more investment options under the Plan.

Because the Plan has already disposed of all SAILS it held on the NYSE rather than selling them directly to NiSource, the Department has decided to modify Conditions (g) and (h) of the proposed exemption to reflect more accurately the role of U.S. Trust and what actually transpired. Thus, Conditions (g) and (h) of the final exemption have been revised to read as follows:

(g) An independent fiduciary, United States Trust Company, N.A. (U.S. Trust),

(1) Monitored the Plan's holding and disposition of the SAILS;

(2) Determined whether was appropriate for the Plan to dispose of the SAILS (either on the open market or through a direct sale to NiSource) and instructed the Trustee regarding such disposition;

(3) Would determine, in the event of a sale of any SAILS to NiSource, the fair market value of such SAILS either (i) based on their closing price on the New York Stock Exchange (the NYSE) on the date of the transaction, or (ii) on the basis of an independent appraisal if the SAILS were not carried on the NYSE, or in the event it concluded that the closing price on the NYSE was not representative of the fair market

value of the SAILS as of the transaction date; and

(4) Disposed of all SAILS held by the Plan on the NYSE before the end of calendar year 2001.

(h) The Plan would not be required to pay any fees or commissions in the event any SAILS were sold to NiSource.

Accordingly, after giving full consideration to the entire record, including the written comment and clarifications noted above, the Department has decided to grant the exemption.

For further information regarding the comment and other matters discussed herein, interested persons are encouraged to obtain copies of the exemption application file (Exemption Application No. D-10977) the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department, are made available for public inspection in the Public Disclosure Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219-8881. (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 exemptions 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) These exemptions are 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 these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 17th day of October, 2001.

Ivan Strasfeld,

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

[FR Doc. 01-26568 Filed 10-19-01; 8:45 am]

BILLING CODE 4510-29-P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Polar Programs; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Polar Programs (1130).

Dates/Time: November 5, 2001; 8:30 am to 5 pm; November 6, 2001; 8:30 am to 5 pm.

Place: National Science Foundation, 4201 Wilson Blvd., Arlington, VA—Room 1235.

Type of Meeting: Open.

Contact Person: Brenda Williams, Office of Polar Programs (OPP), National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. (703) 292-8030.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To advise NSF on the impact of its policies, programs and activities on the polar research community; to provide advice to the Director of OPP on issues related to long range planning, and to form ad hoc subcommittees to carry out needed studies and tasks.

Agenda: Discussion of NSF-wide initiatives, long-range planning and GPRA.

Dated: October 16, 2001.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 01-26516 Filed 10-19-01; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-400]

Carolina Power & Light Company; Notice of Issuance of Amendment To Facility Operating License

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. to Facility Operating

License No. NPF-63 issued to Carolina Power & Light Company (CP&L, the licensee), which revised the Operating License (OL) and Technical Specifications (TS) for operation of the Shearon Harris Nuclear Power Plant, Unit 1 (HNP), located in Wake and Chatham Counties, North Carolina. The amendment is effective as of the date of issuance.

The amendment modified the OL and TS for HNP to reflect an increase in the licensed core power level to 2900 Megawatts (thermal), 4.5% greater than the current level.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing in connection with this action was published in the **Federal Register** on February 6, 2001 (66 FR 9110). No request for a hearing or petition for leave to intervene was filed following this notice.

The Commission has prepared an Environmental Assessment related to the action and has determined not to prepare an environmental impact statement. Based upon the environmental assessment, the Commission has concluded that the issuance of the amendment will not have a significant effect on the quality of the human environment (66 FR 51982).

For further details with respect to the action see (1) the application for amendment dated December 14, 2000, and supplements dated March 8, March 27, April 26, May 14, May 18, June 4, June 11, June 26, June 29, July 3, July 16 (2 letters), July 17, August 17, and September 20, 2001, (2) Amendment No. 107 to License No. NPF-63, (3) the Commission's related Safety Evaluation, and (4) the Commission's Environmental Assessment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/NRC/ADAMS/index.html>. If you do not have access to

ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to pdr@nrc.gov.

Dated at Rockville, Maryland, this 12th day of October 2001.

For the Nuclear Regulatory Commission.

N. Kalyanam,

Acting Project Manager, Section 2, Project Directorate II, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 01-26525 Filed 10-19-01; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-445 and 50-446]

TXU Electric; Notice of Issuance of Amendments to Facility Operating License

The U.S. Nuclear Regulatory Commission (NRC or the Commission) has issued Amendment No. 89 to Facility Operating License (FOL) No. NPF-87 and Amendment No. 89 to FOL No. NPF-89 issued to TXU Electric (the licensee), which revised FOL Nos. NPF-87 and NPF-89 and the Technical Specifications for operation of the Comanche Peak Steam Electric Station (CPSES), Units 1 and 2, located in Somervell and Hood Counties, Texas. The amendments are effective as of the date of issuance.

The amendments modified FOL Nos. NPF-87 and NPF-89 and the Technical Specifications to increase the maximum licensed thermal power of CPSES, Units 1 and 2, to 3458 MWt, which represents an increase of approximately 1.4 percent of the currently licensed thermal power for CPSES, Unit 1, and an increase of approximately 0.4 percent for CPSES, Unit 2. In addition, the amendments remove Texas Municipal Power Agency (TMPA) from both Unit 1 and Unit 2 FOLs since transfer of partial ownership from TMPA to TXU was completed.

The application for the amendment, as supplemented, complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing in connection with this action was