

the rights of participants and beneficiaries of Covered Plans.

The Bank represents that because the Lenders will be generally large, national and international financial institutions, it is likely that, in any given Credit Facility, one or more Lenders will have a relationship with a Covered Plan making it a party in interest with respect to the Plan. A Lender's status as a party in interest to a Covered Plan may cause a transaction proposed herein to be a prohibited transaction under the Act, even though all relationships between the Covered Plan and the Lender will be unrelated to the transaction and do not involve any conflict of interest or opportunity for improper benefit for the Lender. The Bank states that the affected Covered Plans' fiduciaries will be sophisticated investors represented by sophisticated investment advisors. Thus, all participants and beneficiaries of the affected Covered Plans will be adequately protected with respect to the transactions described herein. Finally, the Bank states that none of the Covered Transactions will be part of an overall arrangement, agreement or understanding designed to benefit a party in interest with respect to a Covered Plan.

13. Summary. In summary, the applicant represents that the proposed transactions will satisfy the statutory criteria of section 408(a) of the Act for the following reasons:

(i) Each transaction will be on terms that are no less favorable to the Covered Plans than those which the Covered Plans could obtain in arm's-length transactions with unrelated parties;

(ii) The decision to invest on behalf of each Covered Plan, and the decision to execute an agreement for consent to the Fund's assignment to the Bank of the Fund's right to make Capital Calls, will be made by fiduciaries of the Covered Plan that are independent of, and unaffiliated with, the Lenders and the Fund;

(iii) At the time of the execution of an Investor Consent, a Covered Plan must have assets of not less than \$100 million (other than situations involving multiple plans maintained by the same employer or by members of a controlled group, whose assets are invested on a commingled basis, where this \$100 million threshold can be met by aggregating assets of the commingled entity);

(iv) Not more than five (5) percent of the assets of any Covered Plan, measured at the time of the execution of an Investor Consent, will be invested in the Fund (other than in the case of multiple plans maintained by the same employer, or by members of a controlled

group, whose assets are invested on a commingled basis, wherein this five (5) percent limit will be applied to the aggregate assets of all such commingled entities);

(v) Neither the Bank nor any Lender has any fiduciary authority of control with respect to a Covered Plan's investment in a Fund nor renders investment advice within the meaning of 29 CFR 2510.3-21(c);

(vi) The Covered Plan fiduciaries will receive from the Bank, upon request, a copy of this notice of proposed exemption and a copy of the final exemption, if granted. In addition, fiduciaries of Covered Plans will receive a copy of this proposed exemption, as published in the **Federal Register**, for Covered Transactions that occur during the period from January 1, 2003 until the date of the final exemption, if granted; and

(vii) The Bank will receive from the Covered Plan Fiduciaries a written representation that the conditions set forth in Section II(B), (C), and (D) above are satisfied for each transaction with respect to the Covered Plan for which they are fiduciaries.

Notice to Interested Persons: The applicant states, with regard to the Covered Transactions (as defined in Section III (D), above) for which retroactive relief is requested, that fiduciaries of Covered Plans will receive a copy of this proposed exemption, as published in the **Federal Register**, for those Covered Transactions occurring during the period from January 1, 2003 until the date of the final exemption, if granted. In addition, with respect to Covered Transactions occurring in the future, for which prospective relief has been requested, the applicant represents that such fiduciaries will be notified by publication of this notice in the **Federal Register**.

The applicant represents that because potentially interested fiduciaries of employee benefit plans that may invest in a Fund in the future cannot all be identified, the only practical means of notifying such fiduciaries is by the publication of this notice in the **Federal Register**. However, the applicant states that Covered Plan fiduciaries will receive from the Bank a copy of this notice of proposed exemption, upon request, and a copy of the final exemption, if granted.

Comments relating to this notice of proposed exemption must be received by the Department not later than 45 days from the date of publication of this notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Janet L. Schmidt of the Department, at

telephone (202) 693-8540. (This is not a toll-free number.)

Lodgian, Inc. 401(k) Plan and Trust Agreement (the Plan) Located in Atlanta, Georgia

[Application No. D-11180]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective December 3, 2002, to (1) the past acquisition and holding by the Plan of certain warrants (the Warrant(s)) issued by Lodgian, Inc. (Lodgian), a party in interest with respect to the Plan, which would permit the purchase of new common stock (New Lodgian Stock); (2) the cancellation payment (the Cancellation Payment) by Lodgian to the Plan in exchange for the Warrants (i) at the election of active participants (ii) at the election of the terminated vested participants whose vested interests exceed \$5,000, or (iii) in accordance with the procedures for the automatic cash out of the value of Warrants held in the accounts of terminated vested participants whose vested interests are \$5,000 or less, for an amount that represents the highest value of the Warrants determined by an independent, qualified, appraiser between December 31, 2002 and the date of the individual election; (3) the sale of the Warrants from Plan participants to Lodgian to cash out active and terminated vested participants; and (4) the potential exercise of the Warrants into the New Lodgian Stock, provided that the following conditions were met:

(a) The acquisition and holding of the Warrants by the Plan occurred in connection with Lodgian's bankruptcy proceeding (the Bankruptcy);

(b) The Plan had no ability to affect the Plan of Reorganization filed by Lodgian on December 20, 2001 under Chapter 11 of Title 11 of the United States Code (the Bankruptcy Code), or the First Amended Plan of Reorganization, subsequently filed under the Bankruptcy Code by Lodgian on November 1, 2002 (The First Amended Plan of Reorganization);