

Washington, DC, 20212, telephone: 202-691-5900.

Signed in Washington, DC this 23rd day of May, 2003.

**Elaine L. Chao,**

*Secretary of Labor.*

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application Number D-10659]

#### Proposed Class Exemption for Acquisition and Sale of REIT Shares by Individual Account Plans Sponsored by Trust REITs

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

**ACTION:** Notice of proposed class exemption.

**SUMMARY:** This document contains a notice of a proposed class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). If granted, the proposed exemption would permit the acquisition, holding or sale of publicly traded shares of beneficial interest in a real estate investment trust (REIT), that is structured under state law as a business trust (Trust REIT), by individual account plans sponsored by the REIT or its affiliates. The proposed exemption, if granted, would affect participants and beneficiaries of employee benefit plans involved in such transactions, as well as the REITs and their affiliates that sponsor such plans.

**DATES:** Written comments and requests for a public hearing shall be submitted to the Department before August 4, 2003.

**ADDRESSES:** All written comments and requests for a public hearing (preferably 3 copies) should be sent to: Employee Benefits Security Administration, Room N-5649, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: REIT Class Exemption Proposal. Comments may be sent by fax to (202) 219-0204 or by e-mail to [moffittb@ebsa.dol.gov](mailto:moffittb@ebsa.dol.gov). The application for exemption (Application Number D-10659), as well as all comments received, will be available for public inspection in the Public Documents Room, Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513,

200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Andrea W. Selvaggio, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Washington DC 20210 (202) 693-8540 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** This document contains a notice that the Department is proposing a class exemption from the restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act and from 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. Relief for the transactions was requested in an application (Application No. D-10659) submitted by the National Association of Real Estate Investment Trusts (NAREIT or the Applicant) pursuant to 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).<sup>1</sup> Pursuant to its authority, the Department is proposing additional conditions with respect to the relief requested by the Applicant.

#### Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the

President's priorities, or the principles set forth in the Executive Order.

This proposed class exemption has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this proposed amendment is not a "significant regulatory action" under Executive Order 12866, section 3(f).

Accordingly, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that order.

#### Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, EBSA is soliciting comments concerning the information collection request (ICR) included in this Notice of a Proposed Class Exemption for Acquisition and Sale of REIT Shares by Individual Account Plans Sponsored by Trust REITs (referred to for the purpose of the ICR as Disclosures for Transactions with Trust REIT Shares). A copy of the ICR may be obtained by contacting Joseph S. Piacentini, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N-5618, Washington, DC 20210. Telephone (202) 693-8410; Fax: (202) 219-4745. These are not toll-free numbers.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through August 4, 2003 OMB requests that comments be received within 30 days of publication of the Notice of Proposed Exemption to ensure their consideration.

The Department has submitted a copy of the Notice of Proposed Exemption to OMB in accordance with 44 U.S.C. 3507(d) for review of its information

<sup>1</sup> Section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriated automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

NAREIT has requested this class exemption in order to provide Plans established by Trust REITS with the option of offering a beneficial interest in the Trust REIT in the form of Qualifying REIT Shares (as defined in III(j)) to participants in plans sponsored by the REIT or its Employer Affiliates. Further, NAREIT has requested retroactive relief from sections 406(a), 406(b)(1), and (b)(2) and 407(a) of the Act and from the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (E) of the Code, for certain transactions relating to the prior acquisition, holding, or sale of shares of beneficial interest in Trust REITS. The Department has proposed prospective relief for transactions occurring on or after the date of publication of the grant of the final exemption in the **Federal Register** and limited retroactive relief for transactions that occurred within six years of the publication of the final exemption in the **Federal Register**. Only Section II(b), Prospective Conditions, constitutes a collection of information under PRA 95.

Under section 408(a) of ERISA, prior to granting an exemption, the Secretary must make a finding that the exemption is: (1) Administratively feasible, (2) in the interests of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan. In order for the Department and others to determine that the conditions of this exemption have been met, the Department proposes to require the disclosure of certain information by administrators of Plans that acquire,

hold, or sell Trust REIT shares to participants.

In its application, NAREIT has indicated that among all REITS, 228 are publicly traded, with 52 of these structured as business trusts under state law (Trust REITS). NAREIT has also indicated that of the 52 publicly traded Trust REITS, approximately 80%, or 42, offer individual account pension plans with individual investment direction of participant contributions, and that nearly all of the 42 Plans provide for some form of employer match. Finally, NAREIT has indicated that approximately 14 plans would be considered small, in that they have fewer than 100 participants (such that there are 28 large plans). NAREIT believes that nearly all of the 42 plans will make use of the exemption when it is granted.

The Department has estimated that about 5,300 participants may be affected by the proposed exemption. While the Department does not know the number of participants in plans that may include the option to purchase Trust REIT shares, it bases its estimate on information provided by NAREIT indicating that, of the 42 Trust REITS that sponsor 401(k) plans, 28 are large and 14 are small. Estimating that the 14 small plans have 80 employees each (1,120 employees), and that the remaining larger plans have 150 employees (4,200 employees), approximately 5,300 employees may be offered the option to purchase Trust REIT Shares or may have Trust REIT shares contributed to their individual accounts under the proposed exemption. The Department welcomes comments and relevant data on the estimated number of employees that might take advantage of the proposed exemption.

The information collection provisions of the proposed exemption are found in Sections II(b)(4) (pertaining to the prospectus and reports), II(b)(5) (records and statements regarding confidentiality), II(b)(10) (specific information about REIT share transactions), II(b)(11) (recordkeeping), and III(e)(5) (independent fiduciary acknowledgement). These requirements are summarized below for purposes of the submission for approval under PRA 95. The actual terms of the proposed exemption should be consulted for purposes of relief from ERISA prohibitions otherwise applicable to the purchase of Trust REIT shares.

**Prospectus and Periodic Reports.** In order to obtain prospective relief from statutory prohibitions, a Trust REIT traded on a national securities exchange or market system, or an agent or affiliate

thereof, must furnish the person directing an investment (*i.e.*, the participant or independent fiduciary) the most recent prospectus and quarterly and annual reports concerning the Trust REIT both prior to, or immediately after, the initial investment and regularly thereafter as updated prospectuses and quarterly and annual reports are published.

NAREIT has indicated that issuers of REIT Trust shares currently provide prospectuses and annual reports to investors; therefore, this condition can be satisfied by usual business practices. However, under the proposed exemption, quarterly reports that are filed with the SEC under Rule 15d-13 of the Securities Exchange Act of 1934 must also be distributed to investors in Trust REIT Shares. Because the quarterly report is required for SEC registrants, no preparation burden arises from this requirement. The Department believes that quarterly reports will be distributed to employees in the same manner that prospectuses and annual reports are distributed, either electronically, provided that the requirements for electronic distribution under ERISA are satisfied, or through regular mail. The cost of regular mail at \$.40 per mailing would be about \$6,400 for the distribution of three quarterly reports. The fourth quarter report is assumed to be incorporated in the annual report. Electronic distribution would represent an annual cost savings of \$6,400.

**Disclosures.** The Trust REIT or Employer Affiliate is required to disclose specific information about the operation of the Trust REIT. Under Section II(b)(5), the Plan must provide participants, when they become eligible to participate in the Plan, with a statement describing the procedures established for maintaining confidentiality with regard to the purchase, sale, holding, and share voting rights of Trust REIT Shares, as well as information identifying the fiduciary responsible for monitoring compliance with the confidentiality procedures.

In addition, under Section II(b)(10), the Trust REIT or the Employer Affiliate must furnish to the person that is directing the investment, prior to an initial investment transaction, information about fees or transaction costs, the role of the Trust REIT, if any, as a principal in the transaction, the name of the exchange or market system on which the Qualifying REIT Shares are traded, and the fact that copies of the proposed and final exemption are available upon request. While the Department believes that all of the

information required to be disclosed is readily available, each of the Trust REITs making use of the exemption is expected to expend time and resources to compile the required information and conform it with the other materials customarily used in communicating information that is either required to be provided to plan participants (such as Summary Plan Descriptions, or disclosures required to meet conditions of ERISA section 404(c) and related regulations at 29 CFR 2550.404c-1), or that the employer otherwise provides to assist plan participants in understanding and making use of their benefits. The Department estimates that compiling these disclosures will require a one-time preparation investment of about 4 hours per plan, and that they will be distributed along with other plan materials. It is expected that this work will be completed by outside professionals at a cost of \$75 per hour. The resulting cost burden is estimated to be about \$12,600.

**Recordkeeping.** Although Section II(b)(11) requires that records be maintained to demonstrate compliance with the terms of the exemption, this requirement is consistent with statutory recordkeeping requirements under ERISA, and with requirements pertaining to maintenance of tax records. As such, the provision imposes no additional burden.

**Acknowledgement.** Finally, based on the terms of the definition found in Section III(e)(5), where an Independent Fiduciary is involved in a Trust REIT transaction, the Independent Fiduciary must acknowledge in writing that he or she is a fiduciary and has the appropriate training and experience to perform the services contemplated by the exemption. It is anticipated that the applicable plan fiduciary will incorporate this acknowledgement in the written investment management or trustee agreement outlining the terms and conditions of its retention as a plan service provider that already exists as part of usual and customary business practice. As such, a written acknowledgement is not expected to impose any measurable additional burden.

**Type of Collection:** New.

**Agency:** Department of Labor, Employee Benefits Security Administration.

**Title:** Disclosures for Transactions with Trust REIT Shares (Prohibited Transaction Exemption xx-xx (number to be assigned when granted)).

**OMB Control Number:** 1210-New.

**Affected Public:** Business or other for profit; Individuals or households; Not-for-profit institutions.

**Respondents:** 42.

**Responses:** 42.

**Frequency of Response:** On occasion; quarterly; annually.

**Estimated Burden Hours:** 0.

**Estimated Capital/Startup Costs:** \$12,600.

**Estimated Annual Costs (Operating & Maintenance):** \$6,400.

**Estimated Total Annual Cost:** \$19,000.

### I. Discussion of the Application

The application contains facts and representations with regard to the requested exemption that are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the Applicant.

The Applicant, NAREIT, is a Washington, DC-based trade association that supports the legislative, capital formation, and educational needs of the real estate investment trust (REIT) industry. REITs are entities that combine the capital of investors to acquire, or provide financing for, real estate investment. According to the Applicant, NAREIT represents nearly all of the 228 REITs in the United States whose shares are publicly traded.<sup>2</sup> NAREIT requests this exemption on behalf of publicly traded REITs that are structured under state law as business trusts and which issue equity interests in the form of shares of beneficial interest (Trust REITs).

The Applicant represents that REITs are customarily structured for state law purposes either as corporations or trusts. Corporate REITs issue equity interests in the form of stock. Trust REITs, under state law, issue equity interests in the form of shares of beneficial interest (shares). According to the Applicant, the use of a trust as a REIT business form is becoming more common and, of the 228 publicly traded REITs operating in the United States that are closely followed by NAREIT, 52 are structured as business trusts.

The Applicant explains that, in connection with the management of a Trust REIT's business, either the Trust REIT, or a corporation or a partnership owned by the Trust REIT, employs the individuals who engage in real estate and trust management services (an employer). The Trust REIT owns the

real estate either directly or through another entity. The term "Employer Affiliate" as used herein, refers to an entity that sponsors an individual account plan and which is owned 50 percent or more by a Trust REIT. The Applicant explains that because the REIT's ownership interest in the Employer Affiliate is 50 percent or more, that entity may be deemed to be an affiliate of the REIT under section 407(d)(7) of the Act<sup>3</sup> and, accordingly, the REIT's shares may be considered "employer securities" for purposes of section 407(d)(1) of the Act, in connection with any plan sponsored by such Employer Affiliate.<sup>4</sup>

The Applicant states that many Trust REITs, or their Employer Affiliates, sponsor or have adopted tax-qualified "individual account plans," as that term is defined in section 3(34) of the Act, in which employees of the Trust REIT and/or its Employer Affiliates participate. Typically, these Plans (as defined in section III (f)) contain qualified cash or deferred arrangements within the meaning of Code section 401(k), and may provide for employer matching contributions, profit-sharing contributions, or both. The Applicant represents that in some Plans the participant's account is separated into two parts. The plan administrator may account for a participant's elective deferrals, and earnings thereon, separately from the company's contributions—i.e., the company's matching or profit-sharing contributions. This separate accounting usually occurs in situations in which the participant has the right to direct investment of his or her elective salary deferral amounts and their earnings, but does not direct the investment of contributions made on his or her behalf.

The Applicant asserts that it is common for employers, including employers that are publicly traded REITs formed as corporations, to offer

<sup>3</sup> Section 407(d)(7) of the Act provides that "a corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of Title 26, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter percentage appears in each section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation. A person other than a corporation shall be treated as an affiliate of an employer to the extent provided by regulations of the Secretary. An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary \* \* \*."

<sup>4</sup> No regulations have been issued under 407(d)(7) of the Act. In the absence of regulations, the Department is providing no opinion herein as to whether non-corporate entities may be deemed an affiliate of a REIT.

<sup>2</sup> The Applicant has limited its request to REITs whose shares of beneficial interest are publicly traded on the following national exchanges or market systems: the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers Automated Quotation National Market System (NASDAQ National Market). Accordingly, the term "publicly traded" as used below refers only to shares traded on these exchanges or market systems.

employer securities as an investment or investment option under the individual account plans that they sponsor. The stock of a corporate REIT may constitute "qualifying employer securities" for purposes of section 407(d)(5) of the Act,<sup>5</sup> and, if so, the individual account plans sponsored by corporate REITs may invest in and hold such stock without engaging in a prohibited transaction.<sup>6</sup> The Applicant notes that statutory provisions under the Act specifically allow plan investments in qualifying employer securities, and Department regulations specifically reference the acquisition of qualifying employer securities with respect to participant-directed individual account plans.<sup>7</sup>

The Applicant believes that shares issued by a publicly traded Trust REIT constitute "securities" within the meaning of section 2(1) of the Securities Act of 1933. The Applicant argues that because shares of beneficial interest issued by a Trust REIT are securities, they also constitute "employer securities" in connection with Plans covering employees of such Trust REIT and its Employer Affiliates.<sup>8</sup> The Applicant asserts that, while it is clear that shares issued by Trust REITs do not constitute "marketable obligations" (as defined under section 407(e) of the Act) or interests in a "publicly traded partnership," as defined under the Code, it is unclear whether such shares would constitute "stock" and, thus, satisfy the definition of "qualifying employer security" in section 407(d)(5) of the Act. In this regard, section 407(a)(1) of the Act provides that a plan

may not acquire or hold any employer security, which is not a qualifying employer security. If the shares are not qualifying employer securities, the Plans sponsored by the Trust REITs and their Employer Affiliates cannot rely on sections 407<sup>9</sup> and 408(e)<sup>10</sup> of the Act to obtain relief from the prohibitions of sections 406 and 407 of the Act for the acquisition, holding or sale of Trust REIT shares.<sup>11</sup>

The Applicant believes that REITs structured as business trusts are virtually indistinguishable from REITs structured as corporations. The Applicant notes that under the Code, all tax-qualified REITs are treated as corporations for federal income tax purposes, notwithstanding their business structure.<sup>12</sup> According to the Applicant, Treasury Reg. section 1.856-1(d)(1) requires that a Trust REIT's trustees have the rights and powers "to meet the requirement of centralization of management," meaning that REIT trustees must have the "continued exclusive authority" to manage the affairs of the Trust REIT. The Applicant further notes that: the shareholders of Trust REITs possess the same limited liability protection as do stockholders of corporate REITs; Trust REITs are managed by trustees in much the same way as corporations are managed by directors; and shareholders of Trust REITs elect trustees just as stockholders of corporate REITs elect directors. According to the Applicant, in many states, Trust REITs may issue more than one class of shares, or may issue preferred or convertible classes of shares.<sup>13</sup> Further, in many states, the

rules that govern procedures for amending a Trust REIT's declaration of trust conform to the rules that govern amending a corporate charter, and the rules governing the amendment of a Trust REIT's bylaws conform to the rules governing the amendment of a corporation's bylaws.<sup>14</sup> The Applicant argues that the marketplace makes no distinction between publicly traded Trust REITs and publicly traded corporate REITs. In addition, Trust REIT shareholders and corporate REIT stockholders receive the same type of disclosure documents required by the Securities and Exchange Commission, and the trading rules of the stock exchanges apply in the same manner. The Applicant concludes that the ownership and legal operation of Trust REITs and corporate REITs are virtually the same and that the hallmark of corporate status, limited liability to equity investors, is provided under state law to shareholders of Trust REITs just as it is to stockholders of corporations.<sup>15</sup>

The Applicant represents that, despite these similarities and uniform treatment for federal income tax purposes, the distinction in REIT business form for state law purposes creates an anomaly for those Trust REITs that sponsor individual account plans. Thus, in the absence of an administrative exemption, the Applicant asserts that a Trust REIT which has roughly the same capitalization as a corporate REIT, whose shares bear the same indicia of ownership and offer the same investor protection against liability as shares issued by a corporate REIT, whose business is managed by shareholder-appointed trustees just as a corporate REIT's business is managed by shareholder-appointed directors, whose shares are traded on the same national exchange as a corporate REIT, and whose shares are traded at nearly the same daily volume as a corporate REIT, may be prohibited from allowing its employees to share in the growth of the business through the company's individual account plan, even though it may be permissible for the corporate REIT to do so.

The Applicant requests a class exemption to permit Trust REITs whose shares are publicly traded the same opportunity as corporate REITs by allowing their employees to share in the growth of the business through their

<sup>5</sup> Section 407(d)(5) provides, in part: "The term qualifying 'employer security' means an employer security which is:

(A) Stock,

(B) a marketable obligation (as defined in subsection (e) of this section), or

(C) an interest in a publicly traded partnership (as defined in section 7704(b) of title 26), but only if such partnership is an existing partnership as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Pub. L. 100-203)."

<sup>6</sup> Section 407(b)(1) provides that the percentage limitations of "subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan." The Department notes that, for plan years beginning on or after 1/1/99, plans may not require that more than 10 percent of an elective deferral account be invested in qualifying employer securities, subject to certain exceptions. Section 407(b)(2), as amended by Pub. L. 105-34 section 1524(a) (August 8, 1997).

<sup>7</sup> 29 CFR 2550.404c-1(d)(2)(ii)(E)(4).

<sup>8</sup> Under ERISA section 3(20), the term "security" has the same meaning as such term has under section 2(1) of the Securities Act of 1933. ERISA section 407(d)(1) defines an employer security as "a security issued by an employer of employees covered by the plan, or by an affiliate of such employer."

<sup>9</sup> See note 5, *Supra*.

<sup>10</sup> Section 408(e) provides that: "sections 406 and 407 [29 U.S.C. 1106 and 1107] shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5) [29 U.S.C. 1107(d)(5)]) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4) [29 U.S.C. 1107(d)(4)])—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 407(e)(1) [29 U.S.C. 1107(e)(1)]),

(2) if no commission is charged with respect thereto, and (3) if (A) the plan is an eligible individual account plan (as defined in section 407(d)(3) [29 U.S.C. 1107(d)(3)]), or (B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a) [29 U.S.C. 1107(a)]."

<sup>11</sup> In proposing this exemption, the Department is providing no opinion herein as to whether shares of a Trust REIT constitute "stock" for purposes of section 407(d)(5).

<sup>12</sup> See Code section 856(a)(3).

<sup>13</sup> The Applicant provides the following citation in support of its assertion: Tex. Civ. Stat. 3.1.

<sup>14</sup> The Applicant provides the following citations in support of its assertion: Md. Corps. & Assns. Ann. 8-501; Tex. Corps. & Assns. Ann. 9.1, 23.1.

<sup>15</sup> The Applicant provides the following citations in support of its assertion: Md. Corps. & Assns. Ann. 8-601; 3 Cal. Corp. Code 23001; Del. Code Ann. Tit. 12, 3803; Ill. Rev. Stat. Ch. 745, para. 60.2.; Tex. Corps. & Assns. Ann. 6138A-9.1, 6.138A-9.1.

individual account plans. The Applicant believes that employees of Trust REITs are disadvantaged compared with employees of REITs structured as corporations under state law, even though all REITs are treated as corporations for federal income tax purposes.

The requested exemption is limited to Plans sponsored by a Trust REIT or its affiliates in which the Plan's investment was in Qualifying REIT Shares (as defined in section III(j)) which are not subject to any restrictions on transfer other than restrictions required under applicable securities and exchange rules or to maintain REIT status under the Code. The Applicant represents that, in order to maintain REIT status, it is routine for the REIT's trust instruments to restrict shareholders from transferring shares of beneficial interest if such transfer would result in shareholders violating the Code's closely-held ownership test, or if such transfer otherwise would cause the REIT to fail to qualify as a REIT under the Code.<sup>16</sup> The Applicant believes that, particularly in the context of publicly traded REITs, these customary restrictions would not impair in any way the ability of Plans to quickly sell or dispose of Trust REIT shares previously acquired. According to the Applicant, no Trust REIT would contribute to, or allow the acquisition by, an individual account plan of REIT shares not subject to these customary restrictions.

The Applicant asserts that this exemption is in the interest of participants and beneficiaries because it will afford employees of publicly traded Trust REITs, or their Employer Affiliates, the opportunity to invest in shares of beneficial interest issued by their employers through individual account plans, thus enabling such persons to share in the growth of each respective employer's business. Further, the Applicant believes this investment option will generally afford participants and beneficiaries an efficient and

inexpensive means to participate in the growth and profitability of the real estate sector of the economy.

The Applicant asserts that the requested exemption is protective of the rights of participants and beneficiaries because the participant determines whether or not his or her elective deferrals will be invested in shares of beneficial interest. In addition, only those Trust REITs with publicly traded shares are included in the exemption, thus providing sufficient liquidity and pricing protections. Finally, the Applicant proposes that, with respect to the participant directed portion of an Account (as defined in section III(a)), no more than 25 percent of the account balance may be invested in Trust REIT shares.

The Applicant requests prospective and retroactive relief for the contribution, purchase, holding or sale of Trust REIT shares by plans sponsored by the Trust REIT and/or its affiliates. The Applicant submits that the requested exemption meets the standards of section 408(a) for granting exemptive relief from the prohibited transaction provisions.

## II. Description of the Proposed Retroactive Exemption

On the basis of the representations made by the Applicant, the Department is proposing limited retroactive relief from the restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act and from the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code for the following transactions for the period beginning six years prior to the date of publication of the final exemption in the **Federal Register** and ending on the date of publication of the final exemption: (1) The purchase or sale of Qualifying REIT Shares where the decision to purchase or sell these securities was made by a participant, or by a fiduciary that was independent of the Trust REIT and its affiliates; (2) the contribution of Qualifying REIT Shares to the Plan by an employer; and (3) the holding of Qualifying REIT Shares; provided that the conditions of the exemption were met at the time of the transaction.

The Applicant has requested that the period of retroactive relief be sufficient to encompass transactions for which the applicable statute of limitations under the Act has not yet run.<sup>17</sup> Specifically,

the Applicant has requested that the relief look back six years, nine months from the date of publication of the exemption, based on its belief that a court might find that the beginning of the statutory period was the date that the transaction was reported on the Form 5500,<sup>18</sup> rather than the date on which the transaction occurred. Because the six-year statute of limitations, unlike the three-year statute of limitations, does not require actual knowledge of the transaction, the statute of limitations runs from the date of the transaction, absent fraudulent concealment.<sup>19</sup> The Department has determined that it is appropriate to provide retroactive relief for a period of six years prior to the date the final exemption is published in the **Federal Register**.

The Applicant initially requested retroactive relief for all Trust REIT Share contributions, purchases, holdings, and sales. The Applicant explained that because Trust REIT plans believed that the employers' shares were covered by the statutory exemption under ERISA section 408(e) for "qualifying employer securities," some of the shares contributed by the employer were subject to a lockup, *i.e.* participants could not sell the shares contributed to their account for some period of time. The Applicant is unaware whether any shares purchased by participants or independent fiduciaries were also subject to a lockup. Therefore, the Department has determined to limit proposed retroactive relief to employer contributed shares, including those subject to a lockup. The Department is also providing relief where either the participant or an independent fiduciary had investment discretion to sell such shares. Where participants exercised their discretion to invest in Trust REIT shares for their own account they must have been permitted to give instructions to sell such shares at least quarterly. In the case of Trust REIT shares purchased by the independent fiduciary, that independent fiduciary must have had the authority to divest the Account of

<sup>16</sup> According to the Applicant, in order for an entity to qualify as a REIT under the Code, no more than 50 percent in value of outstanding shares of beneficial ownership may be owned, actually or constructively, by five or fewer individuals during the last half of a taxable year or during a proportionate part of a shorter taxable year. See Code section 856(h). In addition, if a REIT or an owner of 10% or more of a REIT actually or constructively own 10% or more of a tenant of that REIT (or a tenant of a partnership in which the REIT is a partner), the rent received by the REIT (either directly or indirectly) from such tenant will not be qualifying income for purposes of the REIT gross income tests of the Code unless such tenant is a taxable REIT subsidiary of the REIT and certain other requirements are met. See Code section 856(d)(2)(B). A REIT's shares also must be beneficially owned by 100 or more persons. See Code section 856(a)(5).

<sup>17</sup> Section 413 of the Act provides, "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation."

<sup>18</sup> Section 104(a)(1) provides "The administrator of any employee benefit plan subject to this part shall file with the Secretary the annual report for a plan year within 210 days after the close of such year \* \* \*."

<sup>19</sup> *Id.*

the Qualifying REIT Shares without restriction. The Department, however, specifically solicits comments from interested persons on whether the scope of the exemption should be modified to include additional retroactive relief for other transactions involving Trust REIT Shares that were subject to a lockup.

Where the participant or the independent fiduciary had discretion to purchase or sell Qualifying REIT Shares, the proposed exemption requires that the participant or a fiduciary independent of the Trust REIT had the authority to vote, tender and exercise similar ownership rights with respect to those such shares.

The Applicant suggested that any person or entity independent of the Plan Sponsor (as defined in section III(g)) or its affiliates should qualify as an independent fiduciary for purposes of the exemption. The Department has clarified the Applicant's suggestion to make it clear that the independent fiduciary must also be independent of any affiliates of the Trust REIT or its Employer Affiliates.

The Department has adopted the Applicant's suggestion that the price at which shares must have been contributed, purchased and sold must be the prevailing market price on the Primary Exchange on which these shares were traded. In addition, no commissions or other fees could be charged if share transactions were directly with the Trust REIT or the shares were contributed by the Plan Sponsor.

The Department believes that it is appropriate to narrow the Trust REIT class of shares covered by this exemption by limiting the definition of the term "Primary Exchange." Accordingly, for purposes of this proposed exemption, relief is limited to Trust REIT shares traded on: The New York Stock Exchange (NYSE), the American Stock Exchange (AMEX), or the National Association of Securities Dealers Automated Quotation System National Market (NASDAQ National Market). In this regard, the Applicant has represented that the opening and closing prices for REIT shares listed on the exchanges or the NASDAQ National Market are published daily in numerous newspapers throughout the country, and trading prices for such listed securities are readily available on the Internet. Therefore, by limiting the proposed exemption to Trust REIT shares traded on the NYSE, AMEX or the NASDAQ National Market, the Department believes that participants and beneficiaries will have easy access to the current trading prices of the Trust REIT shares held in their Accounts.

In response to the Department's concern as to whether there would be sufficient trading liquidity to ensure that Plans could readily dispose of REIT shares, the Applicant provided the following information: The NYSE, AMEX, and the NASDAQ National Market each impose requirements relating to minimum capitalization, minimum number of publicly-held shares eligible for trading, and minimum number of shareholders in order for a public company to be listed, or in the case of the NASDAQ National Market, designated, on such exchange or system.<sup>20</sup>

The Department adopted the Applicant's suggestion that transactions between Accounts, initiated at the direction of the participants or an independent fiduciary, be permitted in order to save brokerage costs. Under the proposed exemption, where investment

<sup>20</sup> According to the Applicant, the NYSE listing rules include, *inter alia*, a requirement of 2,200 public shareholders together with average monthly trading volume of 100,000 shares, or 500 public shareholders together with average monthly trading volume of 1,000,000 shares, or 2,000 shareholders holding at least 100 shares. See NYSE Rule 102.01A (NYSE Listed Company Manual, 2002). Rule 102.01B generally requires companies to demonstrate an aggregate market value of publicly-held shares (*i.e.*, shares held by persons other than directors, officers, their immediate families or 10% stockholders) of not less than \$60 million, in the case of companies applying for listing in connection with their initial public offerings or a spin-off, or \$100 million for other companies. See NYSE Rule 102.01B (NYSE Listed Company Manual, 2002).

The rules of the AMEX require that a listed company have (1) at least 500,000 shares publicly held and eligible for trading and a minimum of 800 public shareholders or (2) 1,000,000 shares publicly held and eligible for trading together with a minimum of 400 public shareholders. AMEX may also consider listing the equity securities of companies with at least 500,000 shares publicly held and eligible for trading, a minimum of 400 public shareholders, and an average daily trading volume of 2,000 shares for the six months prior to the date application is made for the listing. For purposes of satisfying the requirement of 400 or 800 minimum public shareholders, shares held by officers, directors and persons with a 10% interest or more are not taken into account. The AMEX also generally requires a minimum market price of \$3 per share, and at least \$3 million aggregate market value for publicly held shares "for a reasonable period of time prior to the filing of the listing application." See American Stock Exchange Rule 102 (The American Stock Exchange Company Guide, CCH, 2000).

The NASDAQ National Market imposes alternative criteria in order to be designated on the system, but in general an equity issuer may not be designated unless (1) at least 1,100,000 shares are held by the public and eligible for trading (shares held by officers, directors, or beneficial owners of more than 10 percent of the outstanding shares are not counted toward the 1,100,000 share requirement); (2) the market value of the publicly held shares eligible for trading are at least \$8 million, \$18 million, or \$20 million (depending on length of operating history and number of market makers); (3) the minimum bid price is \$5 or more; and (4) the issuer has a minimum of 400 shareholders who own 100 shares or more. See NASD Manual, Rule 4420 (CCH, 1998).

decisions are implemented through the netting of purchases and sales between Accounts, the transactions would be valued at the closing market price for that day on the Primary Exchange on which the shares are traded. The Department cautions that, in order for transactions to satisfy this condition, such trades must be done in an objective and a mechanical fashion, so that neither the buying nor the selling participant is favored in the transaction.

Under the Department's proposed exemption, the covered transactions must meet an arm's-length test. Under this test, at the time of the transaction, the terms of the transaction must be at least as favorable to the Plan or the Account as the terms generally available between unrelated parties.

The Applicant had originally requested retroactive relief for all Accounts, including those whose assets were invested up to 100 percent in REIT Shares. After careful consideration of the issue, the Department has determined that it would not be practical to develop a single percentage limitation that would apply to investment in Qualifying REIT Shares by all individual account plans maintained by Trust REITs or their Employer Affiliates, in view of the variety of REITs that would be subject to the proposal and the different types of real estate activities engaged in by such entities. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that a fiduciary discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and in a prudent fashion. Section 404(a)(1)(C) further requires that a fiduciary diversify the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Section 404(a)(2) provides that, in the case of an eligible individual account plan, the diversification requirement of section 404(a)(1)(C) and the prudence requirement (only to the extent that it requires diversification) of section 404(a)(1)(B) are not violated by acquisition or holding of qualifying employer real property or qualifying employer securities. To the extent that the Qualifying REIT Shares do not constitute stock for purposes of section 407(d)(5) of the Act, the exception contained in section 404(a)(2) from the diversification requirements of the Act would not apply to a Plan's investment in Qualifying REIT Shares. Accordingly, it is the responsibility of a fiduciary of each Plan intending to take advantage of the relief provided by this proposed exemption to determine the appropriate

level of investment in Qualifying REIT Shares, based on the particular facts and circumstances, consistent with its responsibilities under section 404 of the Act.

### III. Description of the Proposed Prospective Exemption

On the basis of the representations made by the Applicant, the Department is proposing prospective relief from the restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code for the following transactions occurring after the date of publication of the final exemption in the **Federal Register**: (1) The purchase or sale of Qualifying REIT Shares where the decision to purchase or sell these securities is made by a participant, or by an Independent Fiduciary; (2) the contribution of Qualifying REIT Shares to the Plan by an employer; and (3) the holding of Qualifying REIT Shares; provided that the conditions of the exemption are met at the time of the transaction.

Prospectively, contributed shares may not be subject to a lockup. In addition, to help ensure that participants are not subject to pressure to invest in, or to continue to hold, employer securities, the confidentiality of their investment and voting decisions with respect to all such shares are protected under the exemption. In this regard, the proposed exemption requires the appointment of a fiduciary that is responsible for confidentiality. It also requires that the Plan provide participants, in writing, the procedures established to protect confidentiality of information relating to the purchase, holding, and sale of Qualifying REIT Shares and the exercise of voting, tender and other similar rights with respect to such shares. Further, should any situation arise where the fiduciary determines that there is a potential for undue influence upon participants and beneficiaries with respect to the exercise of shareholder rights, the Plan shall appoint an independent fiduciary (who may, but need not be, the Independent Fiduciary (as defined in section III (e)) to carry out activities related to this particular situation.<sup>21</sup>

If the Employer Affiliate, or the Trust REIT exerts undue influence over the shareholder decisions of the participants and beneficiaries in Plans covered by this proposed exemption,

this proposed exemption shall not apply to any transactions involving shares subject to such influence. For example, tender offers, mergers and acquisitions are likely to generate the need for an independent fiduciary to provide additional safeguards for participant confidentiality.<sup>22</sup>

Section III(e) of the proposal defines the term "Independent Fiduciary" as a trustee or investment manager who had equity capital of at least \$1 million and has assets under management of over \$50 million. This fiduciary must be independent of the Trust REIT, the Employer Affiliate, and any of their affiliates. In this regard, the Trust REIT, the Employer Affiliate, or any of their affiliates, may not own any interest in the Independent Fiduciary and the Independent Fiduciary may not own more than 5 percent of the Trust REIT, the Employer Affiliate or any of their affiliates. The Independent Fiduciary must acknowledge in writing that it is a fiduciary and that it has the appropriate technical training or expertise to perform the services contemplated by this proposed exemption. The Independent Fiduciary may not receive more than one percent (1%) of its current gross income for federal tax purposes, (as measured by the prior year's taxable income) from the Trust REIT, the Employer Affiliate and their affiliates. Lastly, while serving as an Independent Fiduciary and for 6 months after it ceases to serve in this capacity, the Independent Fiduciary may not acquire property from, sell property to, or borrow any funds from the Trust REIT, the Employer Affiliate, or any affiliates thereof.

Where Qualifying REIT Shares are purchased or sold on the Primary Exchange, the broker executing the transactions must be independent of the Trust REIT, any Employer Affiliate, the Independent Fiduciary and any affiliates thereof.

Certain information must be disclosed to the participant or the Independent Fiduciary prior to the initial covered transaction that occurs after publication of the final exemption in the **Federal Register**. The disclosures must describe, among other things, any fees or transaction costs, the role, if any, of the Trust REIT as a principal in the transaction, and the exchange or market system where Qualifying REIT Shares are traded. Finally, the participant or Independent Fiduciary must be

informed that copies of the proposed and final exemption are available upon request.

Consistent with the practice followed in other prohibited transaction class exemptions granted by the Department, the proposal contains a condition requiring the Trust REIT or its Employer Affiliates utilizing the exemption on a prospective basis to maintain, for a period of six years from the date of each covered transaction, subject to limited exceptions, the records necessary to enable certain persons to determine whether the applicable conditions of the exemption have been met. Such persons include any duly authorized employee or representative of the Department or the Internal Revenue Service, any plan fiduciary, any participant or beneficiary of the plan whose Account is invested in Qualifying REIT Shares, any employer of employees covered by the Plan, and any employee organizations whose members are covered by the Plan. All records must be unconditionally available at their customary location for examination during normal business hours by the above-described persons. However, the Trust REIT or its Employer Affiliates may refuse to disclose to a person, other than a duly authorized employee or representative of the Department or the Internal Revenue Service, commercial or financial information that is privileged or confidential.

### 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 section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible,

<sup>21</sup> This requirement was modeled after the regulations on "independent exercise of control" under section 404(c) of the Act. 29 CFR 2550.404c-1 (d)(2)(ii)(E)(4)(viii) & (ix).

<sup>22</sup> In the preamble to the 404(c) regulations cited above, the Department stated that it agreed with the commentators that "situations where the potential for undue employer influence may exist include tender offers, exchange offers and contested board elections." 57 FR 46906, 46927 (October 13, 1992).

in the interests of plans and their participants and beneficiaries and protective of the rights of the participants and beneficiaries of plans;

(3) If granted, the proposed class exemption will be applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

#### *Written Comments*

All interested persons are invited to submit written comments or requests for a public hearing on the proposed exemption to the address and within the time period set forth above. All comments will be made a part of the record. Comments and requests should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection with the application for exemption at the address set forth above.

#### **IV. Proposed Exemption**

The Department has under consideration the grant of the following class 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, 32847 August 10, 1990.)

##### *Section I. Covered Transactions*

(a) For the period from six years prior to the date of publication of the final class exemption in the **Federal Register** to the date of publication of the final class exemption in the **Federal Register** the restrictions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the following transactions, if the relevant conditions set forth in section II(b) below are met at the time of the transaction:

(1) The purchase or sale of Qualifying REIT Shares (as defined in section III(j)) on behalf of an Account (as defined in section III(a)) at the direction of the participant;

(2) The purchase or sale of Qualifying REIT Shares on behalf of the Plan (as

defined in section III(f)) at the direction of an independent fiduciary (as defined in section II(a)(2));

(3) The contribution in-kind of Qualifying REIT Shares to a Plan by an employer; and

(4) The holding of the Qualifying REIT Shares by the Plan. (b) Effective after the date of publication of the final class exemption in the **Federal Register**, the restrictions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the following transactions, if the relevant conditions set forth in section II(b) below are met at the time of the transaction:

(1) The purchase or sale of Qualifying REIT Shares on behalf of an Account in a Plan at the direction of the participant;

(2) The purchase or sale of Qualifying REIT Shares on behalf of the Plan at the direction of the Independent Fiduciary (as defined in section III(e));

(3) The contribution in-kind of Qualifying REIT Shares to a Plan by an employer; and

(4) The holding of the Qualifying REIT Shares by the Plan.

##### *Section II. Conditions*

###### *(a) Retroactive Conditions*

(1) The participant has discretionary authority to direct the trustee to:

(A) Sell the Qualifying REIT Shares purchased by the participant for his own Account no less frequently than quarterly; and

(B) Vote, tender and exercise similar rights with respect to those Qualifying REIT Shares in the Account over which the participant has discretion; or

(2) An independent fiduciary has discretionary authority to sell the Qualifying REIT Shares purchased at the direction of the independent fiduciary and such independent fiduciary:

(A) Is a trustee, named fiduciary or investment manager with respect to the Qualifying REIT Shares;

(B) Is neither the Trust REIT (as defined in section III(i)) an Employer Affiliate (as defined in section III(d)) nor an affiliate thereof; and

(C) Has the discretionary authority to exercise the voting, tender and similar rights with respect to the Qualifying REIT Shares purchased on behalf of a Plan. Notwithstanding the foregoing, this paragraph (2)(C) shall be deemed met if another fiduciary that is independent of the Trust REIT had the right to exercise the voting, tender and similar rights with respect to the Trust REIT Shares.

(3) Purchases and sales of Qualifying REIT Shares by the Plan are executed:

(A) For cash;

(B) On the Primary Exchange (as defined in section III(h)) or directly with the Trust REIT; and

(C) At the market price for the Trust REIT shares on the Primary Exchange at the time of the transaction.

(4) Notwithstanding paragraph (3) above, the exemption shall apply to purchases and sales of Qualifying REIT Shares between Accounts within a Plan in order to avoid brokerage commissions and other transaction costs, provided that the price received by each Account is equal to the closing price for the Trust REIT shares on the Primary Exchange on the date of the transaction.

(5) At the time the transaction is entered into, the terms of the transaction are at least as favorable to the Plan or the Account as the terms generally available in comparable arm's-length transactions between unrelated parties.

(6) Qualifying REIT Shares contributed to, or purchased by, the Plan from the Trust REIT:

(A) Are conveyed to the Plan at or below the market price for the Trust REIT shares on the Primary Exchange at the time of the transaction; and

(B) Are conveyed to the Plan without the payment of any commission or other fee in connection with the transaction.

(7) Where a participant has discretionary authority to purchase or sell Qualifying REIT Shares, neither the Trust REIT, an Employer Affiliate, the independent fiduciary, nor any affiliates thereof exerts any undue influence over the decisions of the participants to acquire or sell Qualifying REIT Shares.

###### *(b) Prospective Conditions*

(1) The participant has discretionary authority to direct the trustee:

(A) To sell Qualifying REIT Shares purchased by, or contributed to, an Account no less frequently than monthly; and

(B) To vote, tender and exercise similar rights with respect to those Qualifying REIT Shares in the Account over which the participant has discretion; or

(2) An Independent Fiduciary, as defined in section III (e), has discretionary authority to purchase, hold or sell the Qualifying REIT Shares and has the discretionary authority to exercise the voting, tender and similar rights with respect to the Qualifying REIT Shares. Notwithstanding the foregoing, this paragraph (2) shall be deemed met if another fiduciary that is independent of the Trust REIT, the Employer Affiliate and any affiliates thereof, has the right to exercise the

voting, tender and similar rights with respect to the Trust REIT shares.

(3) Where a participant has discretionary authority to purchase or sell Qualifying REIT Shares, neither the Trust REIT, an Employer Affiliate, the Independent Fiduciary, nor any affiliates thereof:

(A) Has discretionary authority or control with respect to the investment of the Plan assets involved in the transaction;

(B) Renders any investment advice [within the meaning of 29 CFR 2510.3-21(c)] with respect to those assets; or

(C) Exerts any undue influence over the decisions of the participants to acquire or sell Qualifying REIT Shares.

(4) Prior to or immediately after an initial investment in Qualifying REIT Shares, either the Trust REIT, or an agent or affiliate thereof provides the person who is directing the investment (*i.e.*, the participant or the Independent Fiduciary) with the most recent prospectus, quarterly report, and annual report concerning the REIT, and thereafter, either the Trust REIT, or an agent or affiliate thereof, provides such participants and/or Independent Fiduciary with updated prospectuses, quarterly statements and annual reports as published.

(5) Information relating to the purchase, holding, and sale of Qualifying REIT Shares, and the exercise of voting, tender and similar rights with respect to such Qualifying REIT Shares by participants is maintained in accordance with procedures designed to safeguard the confidentiality of such information except to the extent necessary to comply with Federal or state laws not preempted by ERISA. To safeguard confidentiality, the Plan shall:

(A) Designate a fiduciary responsible for safeguarding confidentiality;

(B) Provide participants, when they become eligible to participate in the Plan, with a statement describing the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of Trust REIT shares, and the exercise of voting, tender and similar rights, by participants and beneficiaries and the name, address and telephone number of the fiduciary responsible for monitoring compliance with the procedures; and

(C) Appoint, if the fiduciary responsible for safeguarding participant confidentiality determines that a situation involves a potential for undue employer influence upon participants and beneficiaries with regard to the direct or indirect exercise of shareholder rights, an independent fiduciary (who

may, but need not be, the Independent Fiduciary), to take appropriate action to protect the confidentiality of the participants' votes. For purposes of this subparagraph (C), a fiduciary is not independent if the fiduciary is affiliated with the Trust REIT, an Employer Affiliate, or any affiliate thereof.

(6) All purchases and sales of Qualifying REIT Shares by the Plan are executed:

(A) For cash;

(B) On the Primary Exchange (as defined in section III (h)) by a broker that is independent of the Trust REIT, the Employer Affiliate, the Independent Fiduciary, and any affiliates thereof, or directly with the Trust REIT; and

(C) At the market price for the Trust REIT shares on the Primary Exchange at the time of the transaction.

(7) Notwithstanding paragraph (6) above, the exemption shall apply to purchases and sales of Qualifying REIT Shares between Accounts within a Plan in order to avoid brokerage commissions and other transaction costs, provided that the transaction is executed at the closing price for the Trust REIT shares on the Primary Exchange on the date of the transaction. All such transactions will take place at the closing price on the business day on which the participant instruction is received, or at the closing price on the next business day if the instruction is received after noon or such later deadline as designated by the trustee or named fiduciary.

(8) At the time the transaction is entered into, the terms of the transaction are at least as favorable to the Plan or the Account as the terms generally available in comparable arm's-length transactions between unrelated parties.

(9) Qualifying REIT Shares that are contributed to, or purchased by, the Plan from the Trust REIT:

(A) Are conveyed to the Plan at or below the market price for the Trust REIT shares on the Primary Exchange at the time of the transaction;

(B) Can be immediately sold on the Primary Exchange; and

(C) Are conveyed to the Plan without the payment of any commission or other fee in connection with the transaction.

(10) Prior to a participant, Plan Sponsor (as defined in section III (g) or an Independent Fiduciary engaging in an initial transaction under this exemption, after the date of publication of the final class exemption in the **Federal Register**, the Trust REIT or its Employer Affiliate provides the following disclosures to the person who exercises discretionary authority with respect to the Qualifying REIT Shares (*i.e.*, the participant or the Independent

Fiduciary). The disclosure must contain the following information regarding the transactions and a supplemental disclosure must be made to the person directing the covered investments if material changes occur subsequent to the initial disclosure. This disclosure must include:

(A) Disclosure of any fees for brokerage services or transaction costs that will be incurred as a result of the transactions;

(B) Disclosure of the role of the Trust REIT, if any, as a principal in the transactions;

(C) The exchange or market system where the Qualifying REIT Shares are traded; and

(D) A statement that a copy of the proposed and final exemption shall be provided to participants and the Independent Fiduciary upon request.

(11) The plan fiduciary for a period of six years maintains the records necessary to enable the persons described below in paragraph (12) to determine whether the conditions of this exemption have been met, except that:

(A) If the records necessary to enable the persons described in paragraph (12) to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the plan fiduciary, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(B) No party in interest other than the plan fiduciary shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (12) below.

(12) (A) Except as provided below in paragraph (12)(B) and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (11) are unconditionally available at their customary location for examination during normal business hours by —

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service,

(ii) Any fiduciary of the Plan or any duly authorized employee or representative of such fiduciary,

(iii) Any employer of participants and beneficiaries and any employee organization whose members are covered by the Plan, or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of the Plan who's Account is invested in Qualifying REIT Shares or the duly authorized employee or representative of such participant or beneficiary;

(B) None of the persons described in paragraph (12)(A)(ii)–(iv) shall be authorized to examine trade secrets of the Trust REIT, or an Employer Affiliate or commercial or financial information which is privileged or confidential.

### Section III. Definitions

For purposes of this exemption,

(a) **Account**—The term “Account” means the individual account of a participant in a defined contribution pension plan in which benefits are based solely upon the amount contributed to the participant's account, and any income, expenses, gains or losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(b) **Affiliate**—The term “affiliate” of a person means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with such person;

(2) Any officer, director, employee, or relative (as defined in section 3(15) of the Act) of such person or partner in such person; and

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

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

(d) **Employer Affiliate**—The term “Employer Affiliate” means any corporation, limited liability company (LLC), or partnership 50 percent or more owned by a Trust REIT.

(e) **Independent Fiduciary**—The term “Independent Fiduciary” means a person who:

(1) Is a trustee or an investment manager (as defined in 3(38) of the Act) who had equity capital of at least \$1 million as of the last day of its most recent fiscal year and has client assets under management or control of over \$50 million;

(2) Is not an affiliate of the Trust REIT, the Employer Affiliate or an affiliate thereof;

(3) Is not a corporation, partnership or trust in which the Trust REIT, its Employer Affiliate or an affiliate thereof has a one percent or more ownership interest or is a partner;

(4) Does not have more than a five percent ownership interest in the Trust REIT, its Employer Affiliate or an affiliate thereof;

(5) Has acknowledged in writing that:

(i) It is a fiduciary; and  
(ii) It has appropriate technical training or experience to perform the services contemplated by the exemption;

(6) For purposes of this definition, no organization or individual may serve as Independent Fiduciary for any fiscal year in which the gross income received by such organization or individual (or partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder) from the Trust REIT, its Employer Affiliate and affiliates thereof, (including amounts received for services as an independent fiduciary under any prohibited transaction exemption granted by the Department) exceeds 1 percent of such fiduciary's gross income for federal tax purposes in its prior tax year; and

(7) In addition, no organization or individual which is an Independent Fiduciary and no partnership or corporation of which such organization or individual is an officer, director or 10 percent or more partner or shareholder may acquire any property from, sell any property to or borrow any funds from the Trust REIT, its Employer Affiliate or their affiliates, during the period that such organization or individual serves as an Independent Fiduciary and continuing for a period of six months after such organization or individual ceases to be an Independent Fiduciary or negotiates any such transaction during the period that such organization or individual serves as an Independent Fiduciary.

(f) **Plan**—The term “Plan” means an individual account plan sponsored by the issuer of Qualifying REIT Shares or an Employer Affiliate thereof.

(g) **Plan Sponsor**—The term “Plan Sponsor” means the Trust REIT or the Employer Affiliate that is the employer of the employees covered by the Plan.

(h) **Primary Exchange**—The term “Primary Exchange” means the national securities exchange or market system on which the Trust REIT shares are primarily traded, and which is either the New York Stock Exchange, the American Stock Exchange, or the National Association of Securities Dealers Automated Quotation System National Market.

(i) **Trust REIT**—The term “Trust REIT” means a “real estate investment trust” within the meaning of section 856 of the Code that is organized as a trust under applicable law.

(j) **Qualifying REIT Shares**—The term “Qualifying REIT Shares” means shares of beneficial interest in a Trust REIT that:

(1) Are publicly traded (as defined in section III(k)); and

(2) Have no trading restrictions other than those necessary to qualify for REIT status or otherwise to satisfy securities law or applicable exchange or market system trading rules.

(k) **Publicly Traded**—The term “publicly traded,” for purposes of this exemption, means Trust REIT shares of beneficial interest which are traded on the New York Stock Exchange, the American Stock Exchange, or the National Association of Securities Dealers Automated Quotation System National Market System.

(l) **Participant**—the term “participant” includes beneficiaries.

Signed at Washington, DC this 28th day of May, 2003.

**Alan D. Lebowitz,**

*Deputy Assistant Secretary for Program Operations, Employee Benefits Security Administration, Department of Labor.*

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## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended, the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA-W) issued during the period of May 2003.

In order for an affirmative determination to be made and a certification of eligibility to apply for worker adjustment assistance to be issued, each of the group eligibility requirements of section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated, or are threatened to become totally or partially separated; and

(2) That sales or production, or both, of the firm or sub-division have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production of such firm or subdivision.