

**ACTION:** Grant of class exemption.

**SUMMARY:** This document contains a final 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). The exemption permits the acquisition, holding and sale of certain 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 Trust REIT or its affiliates. The exemption affects participants and beneficiaries of employee benefit plans involved in such transactions, as well as the REITs and their affiliates that sponsor such plans.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** On June 3, 2003, the Department published a notice in the **Federal Register** (68 FR 33185) of the pendency of a proposed 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>

The notice of pendency gave interested persons an opportunity to comment or request a public hearing on the proposal. The Department received two public comments. Upon consideration of the comments received, the Department has determined to grant the proposed class exemption, subject to certain modifications. These modifications and the comments are discussed below.

**Executive Order 12866**

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 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 exemption 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**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501) (PRA), the Department submitted the information collection request (ICR) included in the Notice of a Proposed Class Exemption for the Acquisition and Sale of Trust REIT Shares by Individual Account Plans Sponsored by Trust REITs [referred to for the purposes of the ICR as Disclosures for Transactions with Trust REIT Shares] to the Office of Management and Budget (OMB) for review and clearance at the time the Notice of a Proposed Rulemaking (NPRM) was published in the **Federal Register** (June 3, 2003, 68 FR 33185). OMB approved the Notice under OMB control number 1210-0124. The approval will expire on July 31, 2006.

The Department solicited comments concerning the ICR in connection with the NPRM. The Department received one comment that provided updated information on the number of REITs and the number of Trust REITs described in

**DEPARTMENT OF LABOR****Employee Benefits Security Administration**

[Prohibited Transaction Exemption 2004-07; Application Number D-10659]

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

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

<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.

the PRA section of the proposed exemption. Specifically, because of consolidation in the industry, rather than the 228 publicly traded REITs discussed in the proposal, there are now 173 such REITs. Likewise, the number of Trust REITs has decreased by one, from 52 to 51. At the suggestion of the commenter, the Department has changed the data used in the preliminary discussion about REITs under PRA 95. The Department notes, however, that the respective changes do not materially affect the hour or cost burdens as originally calculated under the NPRM. The Department considers its original cost and hour burden estimates for this ICR to be appropriate at this time. However, the Department will continue to monitor the number of Trust REITs subject to the exemption's information collection provisions in future years.

#### Discussion of the Comments Received

The comments received by the Department were generally supportive of the issuance of a class exemption to permit certain transactions involving Trust REITs shares. However, the commenters requested specific modifications to the proposal in the following areas:

(1) *Permit the purchase of employer securities pursuant to a plan provision requiring that cash contributions by the employer be used to purchase Trust REIT shares*—The Applicant and the other commenter requested that the exemption permit the purchase, by the Plan, of Trust REIT shares in instances where the terms of the Plan require that the employer's cash contributions be used to acquire Trust REIT shares. The commenters explained that some employers prefer to contribute cash because contributing treasury shares would dilute the value of the shares. NAREIT articulated the concern as follows: "the trustee is directed, and arguably is not acting in a fiduciary capacity. Consequently, the portion of the proposed exemption for fiduciary investment in Qualifying REIT Shares is probably not applicable."

Contrary to NAREIT's analysis of the directed trustee's fiduciary status, the Department notes that a directed trustee is a fiduciary under the Act.<sup>2</sup> That fact, however, is not determinative as to

whether the requested relief is warranted.

After considering the comment, the Department has decided to modify the final exemption as requested by the commenters. The exemption will cover the purchase of Trust REIT shares in accordance with the terms of the Plan that require employer contributions be used to purchase Trust REIT shares. In such instances, the Trust REIT shares may be purchased on the Primary Exchange or by netting within the Plan. In following plan provisions that require the trustee invest employer cash contributions in Trust REIT shares, the Department notes that the trustee must discharge his duties consistent with the fiduciary responsibility provisions of ERISA.

For prospective relief, shares may not be subject to a lockup. The Applicant has explained that, on a prospective basis, the Independent Fiduciary will immediately allocate Qualifying REIT Shares contributed by the employer or purchased with employer cash contributions to the individual participants' Accounts. Therefore, each participant will have discretionary authority to direct the trustee to sell such shares.<sup>3</sup>

(2) *Paired Share Arrangement*—The other commenter requested that the class exemption be modified to cover a "paired share REIT." According to the commenter, in its paired share arrangement, a share of corporate stock and a share of beneficial interest in the Trust REIT trade together on an exchange as a single security. The commenter's paired shares trade on the New York Stock Exchange. The commenter was concerned that this paired share arrangement might be viewed as a trading restriction that would cause the Trust REIT shares to fail to satisfy the definition of Qualifying REIT Shares under section III(j) of the proposed exemption. After considering the comment, the Department has determined to amend the definition of Qualifying REIT Shares to include Trust REIT shares that are part of a paired share arrangement, provided that the Trust REIT shares would otherwise satisfy the requirements of the exemption and the corporate stock with which it is paired is a "qualifying employer security" as defined in section 407(d)(5) of the Act.

(3) *Number of Trust REITs*—The Applicant also informed the Department that, as of June 30, 2003, there are a total of 173 publicly traded REITs in the United States, and 51 publicly traded business trust REITs.

#### Description of the Exemption

The exemption consists of three sections. Section I provides conditional exemptive relief for the acquisition, holding, and sale of Qualifying Trust REIT Shares by individual account plans sponsored by the Trust REITs. Section II(a) describes the conditions for retroactive relief for transactions occurring up to six years prior to the date that the notice granting the final exemption is published in the **Federal Register** and for 60 days thereafter. Section II(b) provides prospective relief for transactions that meet certain additional conditions that are described below. Finally, section III contains definitions for certain terms used in the exemption.

The exemption is generally similar to an individual exemption previously granted by the Department, Crown American, PTE 97-64 (62 FR 66690 (12/19/97)). Among the conditions of the individual exemption was a 25 percent cap on the percentage of trust REIT shares held in an account. Unlike the individual exemption, the Department believed that for purposes of the proposed class exemption 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 the 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 plan's 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 the acquisition or holding of qualifying employer real property or qualifying employer securities. To the extent that the Qualifying REIT Shares do not

<sup>2</sup> Under ERISA section 403(a)(1), a plan may expressly provide that a trustee is subject to the direction of a named fiduciary who is not a trustee, in which case the trustee shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to the Act. 29 U.S.C. 1103(a)(1).

<sup>3</sup> 29 CFR 2550.404c-1(d)(2)(ii)(E)(4)(i) provides that in order for the limitation on liability of plan fiduciaries under 404(c) of the Act to apply, the securities must be qualifying employer securities (as defined in 407(d)(5) of the Act). The Applicant sought this exemption to address its concern that Trust REIT shares might not meet the definition of qualifying employer securities.

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 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.

The Department continues to believe that the scope of the class exemption is consistent with the Applicant's request for relief based on the Applicant's belief that Trust REIT shares were qualifying employer securities subject to sections 407 and 408(e) of the Act.

#### **Retroactive Relief**

The exemption set forth in section I(a) provides 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: (1) The purchase or sale of Qualifying REIT Shares where the decision to purchase or sell the 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 or the purchase of Qualifying REIT Shares pursuant to a plan provision requiring that employer contributions of cash be used to purchase Qualifying REIT Shares; and (3) the holding of Qualifying REIT Shares; provided that the conditions of the exemption were met at the time of the transaction.

The conditions applicable to the retroactive exemption are set forth in Section II(a) described below. Section II(a)(1) provides retroactive relief where participants exercised their discretion to purchase Trust REIT shares for their own account so long as they were permitted to give instructions to sell such shares at least quarterly. Section II(a)(2) provides relief with respect to shares purchased by an independent fiduciary, including shares purchased pursuant to a plan provision requiring that cash contributions by the employer be used to purchase Trust REIT shares. The purchase of Trust REIT shares, by an independent fiduciary pursuant to plan provisions, or the contribution of Trust REIT shares by the employer, where such shares are subject to a lockup, *i.e.*, a restriction on when the

shares could be sold, is covered retroactively, but not prospectively.

The exemption requires that the participant (section II(a)(1)(B)), or a fiduciary independent of the Trust REITs (Section II(a)(2)(C)) had the authority to vote, tender and exercise similar ownership rights with respect to shares controlled by them.

Section II(a)(3) requires that Trust REIT shares be purchased and sold at the prevailing market price on the Primary Exchange on which these shares were traded. In this regard, section III(h) provides that the term "Primary Exchange" means 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).

Under the final exemption, the Department has expanded the scope of section II(a)(4) (netting transactions) to include, not only transactions between Accounts, but also transactions between an Account and the independent fiduciary purchasing Qualifying REIT Shares with employer cash contributions. This change was made to permit the independent fiduciary to use netting transactions where it is purchasing employer securities with employer cash contributions pursuant to a plan provision requiring such purchases. Where investment decisions are implemented through the netting of purchases and sales within the Plan, the transactions must 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 buyer nor the seller is favored in the transaction.

Section II(a)(5) provides that 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.

Pursuant to section II(a)(6) where Trust REIT shares are contributed to, or purchased by, the Plan from the Trust REIT, such shares must be conveyed to the Plan at or below market price and no commissions or other fees may be charged.

Pursuant to section II(a)(7), a participant's purchase or sale of Trust REIT shares is not covered by the exemption if the participant was subject to undue influence with respect to the

investment decision to acquire or sell Trust REIT shares.

#### **Prospective Relief**

The exemption set forth in section I(b) provides prospective 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: (1) The purchase or sale of Qualifying REIT Shares by a participant, or (2) by an Independent Fiduciary; (3) the contribution of Qualifying REIT Shares to the Plan by an employer or the purchase of Qualifying REIT Shares pursuant to a plan provision requiring that employer contributions of cash be used to purchase Qualifying REIT Shares; and (4) the holding of Qualifying REIT Shares; provided that the conditions of the exemption were met at the time of the transaction.

The conditions applicable to the prospective exemption are set forth in section II(b) described below. Section II(b)(1)(A) provides that participants must be able to sell Trust REIT shares purchased by them or contributed to their account at least monthly. As a result, no shares may be subject to a lockup. Section II(b)(1)(B) provides that participants must be able to vote, tender and exercise similar rights with respect to the shares over which the participants have investment discretion.

Section II(b)(2) provides that an Independent Fiduciary must have investment discretion to purchase Qualifying REIT Shares, unless such shares are purchased pursuant to a plan provision requiring that employer cash contributions be used to purchase Qualifying REIT Shares. Shares purchased pursuant to such a plan provision must be transferred to the participants' Accounts. Section III(e) of the exemption 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 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.

Section II(b)(3) provides that, where participants have discretionary authority to purchase or sell Qualifying REIT Shares, neither the Trust REIT, an Employer Affiliate, the Independent Fiduciary, nor any affiliates thereof, has any discretion or authority over such investment decisions, renders any investment advice with respect to these assets, nor exerts any undue influence over the decisions of the participants to acquire or sell Qualifying REIT Shares.

Pursuant to section II(b)(4), prior to or immediately after the initial investment in Qualifying REIT Shares, copies of the most recent prospectus, quarterly report and annual report concerning the REITs, must be provided to the person who is directing the investment. Updates of these documents must also be provided as published.

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 section II(b)(5) of the exemption. In this regard, section II(b)(5)(A) requires the appointment of a fiduciary that is responsible for confidentiality. Pursuant to section II(b)(5)(B), the Plan must 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, section II(b)(5)(C) requires that the Plan 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>4</sup> 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>5</sup>

Where Qualifying REIT Shares are purchased or sold on the Primary Exchange, Section II(b)(6) provides that such shares must be purchased for cash at their market price at the time of the transaction. It further provides that the broker executing the transactions must be independent of the Trust REIT, an Employer Affiliate, the Independent Fiduciary and any affiliates thereof. The Applicant requested, and the Department agreed, to modify the final exemption to provide that the broker executing the transactions covered by this exemption need not be independent of the Independent Fiduciary if that broker does not charge a commission on these purchases and sales.

Section II(b)(7) provides that transactions within the Plan between Accounts and between an Account and the Independent Fiduciary purchasing Qualifying REIT Shares with employer cash contributions are permitted in order to save brokerage costs. Where investment decisions are implemented through the netting of purchases and sales within the Plan, the transactions must be valued at the closing market price for that day on the Primary Exchange on which the shares are traded. Such transactions must take place on the business day on which the instruction is received, or on the next business day, using that day's closing price, if the instruction is received after noon, or such later deadline as designated by the trustee or the named fiduciary.

Pursuant to section II(b)(8) 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.

Section II(b)(9) provides that where Qualifying REIT Shares are purchased from the Trust REIT, contributed by the Plan Sponsor, or purchased by the Plan with employer contributions, such shares must be conveyed to the Plan at or below market price and no commissions or other fees may be charged.

under section 404(c) of the Act. 29 CFR 2550.404c-1(d)(2)(ii)(E)(4)(viii) and (ix).

<sup>5</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).

Under section II(b)(10) certain information must be disclosed to the participant or the Independent Fiduciary prior to the initial covered transaction that occurs 60 days 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.

Section II(b)(11) of the exemption contains a condition requiring the Trust REIT or its Employer Affiliates 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

<sup>4</sup> This requirement was modeled after the regulations on "independent exercise of control"

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) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based on the entire record, the Department finds that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and protective of the rights of the participants and beneficiaries of the plans;

(3) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption; and

(4) The exemption is 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.

#### Exemption

Accordingly, the following exemption is granted 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 April 28, 2004, to June 28, 2004, 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(a) 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, or the purchase of Qualifying REIT Shares pursuant to a plan provision requiring that employer contributions of cash be used to purchase Qualifying REIT Shares; and

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

(b) Effective after June 28, 2004, 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, or the purchase of Qualifying REIT Shares pursuant to a plan provision requiring that employer contributions of cash be used to purchase Qualifying REIT Shares; 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 purchase, hold or sell the Qualifying REIT Shares, or such fiduciary is acting in accordance with a plan provision that requires employer cash contributions be used to purchase Qualifying REIT Shares, 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 those Qualifying REIT Shares for which it has investment discretion. 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 within the Plan between Accounts and between an Account and the independent fiduciary purchasing Qualifying REIT Shares with employer cash contributions, in order to avoid brokerage commissions and other transaction costs, provided that each transaction is executed at 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 affiliate thereof exerts any undue influence over the decisions of the participant 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, his 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, or such fiduciary is acting in accordance with a plan provision that requires employer cash contributions be used to purchase Qualifying REIT Shares for transfer to the participants' Accounts. The Independent Fiduciary has the discretionary authority to exercise the

voting, tender and similar rights with respect to the Qualifying REIT Shares, unless the participant has discretionary authority to direct the trustee with respect to such matters.

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 Qualifying Trust REIT Shares.

(3) Where a participant has discretionary authority to purchase, hold or sell Qualifying REIT Shares, neither the Trust REIT, an Employer Affiliate, the Independent Fiduciary, nor any affiliate 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, hold 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 Trust 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' and beneficiaries' 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 affiliate thereof, or directly with the Trust REIT. Notwithstanding the above, the Independent Fiduciary or its affiliate may execute these transactions if no commission is charged; 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 within the Plan between Accounts and between an Account and the Independent Fiduciary purchasing Qualifying REIT Shares with employer cash contributions, 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 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 and Qualifying

REIT Shares purchased by the Plan with employer cash contributions:

(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 June 28, 2004, 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 Trust REIT or its Employer Affiliates 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 Trust REIT or its Employer Affiliates, 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 Trust REIT or its Employer Affiliates shall be subject 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 whose 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 one 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. Notwithstanding the above, the term “Qualifying REIT Shares” includes a Trust REIT share that otherwise meets the conditions of this exemption but trades only as a unit consisting of a Trust REIT share and a share of corporate stock (a paired share arrangement), provided that the corporate stock with which it trades is a qualifying employer security as defined in ERISA section 407(d)(5).

(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 22nd day of April, 2004.

**Ivan L. Strasfeld,**

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