

employers. Finally, relief is provided for transactions involving places of public accommodation owned by a managed fund. The amendment affects participants and beneficiaries of employee benefit plans, the sponsoring employers of such plans, and other persons engaging in the described transactions.

DATES: Except where otherwise indicated herein, the amendment is effective August 23, 2005.

FOR FURTHER INFORMATION CONTACT: Christopher J. Motta or Karen E. Lloyd, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Room N-5649, 200 Constitution Avenue, NW., Washington, DC 20210, (202) 693-8540 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On September 3, 2003, a notice was published in the **Federal Register** (68 FR 52419) of the pendency before the Department of Labor (the Department) of a proposed amendment to PTE 84-14 (49 FR 9494, March 13, 1984, as corrected at 50 FR 41430, October 10, 1985). PTE 84-14 provides an exemption from certain of the restrictions of section 406 of ERISA, and from certain taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code. The Department proposed to amend to PTE 84-14 on its own motion, pursuant to section 408(a) of ERISA 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).¹

The notice of pendency gave interested persons an opportunity to comment on the proposed exemption. The Department received six comment letters. In general, the commenters expressed support for the proposed amendments. Upon consideration of all the comments received, the Department has determined to grant the proposed amendment, subject to certain modifications. These modifications and the major comments are discussed below.

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

¹ Section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), generally transferred the authority of the Secretary of Treasury to issue administrative 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.

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Number D-11047]

Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers

AGENCY: Employee Benefits Security Administration.

ACTION: Adoption of amendment to PTE 84-14.

SUMMARY: This document amends PTE 84-14, a class exemption that permits various parties that are related to employee benefit plans to engage in transactions involving plan assets if, among other conditions, the assets are managed by "qualified professional asset managers" (QPAMs), which are independent of the parties in interest and which meet specified financial standards. Additional exemptive relief is provided for employers to furnish limited amounts of goods and services to a managed fund in the ordinary course of business. Limited relief is also provided for leases of office or commercial space between managed funds and QPAMs or contributing

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 amendment has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. Pursuant to the terms of the Executive Order, it has been determined that this action is a "significant regulatory action." Accordingly, this action has been reviewed by OMB.

Paperwork Reduction Act

The information collections in the exemption, as re-stated and amended in the adoption of Amendment to PTE 84-14, and in the Proposed Amendment to Prohibited Transaction Exemption 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers have been combined in one ICR that is described in the Paperwork Reduction Act section of the Notice of the Proposed Amendment also published in this issue of the **Federal Register**.

Description of the Exemption

PTE 84-14 consists of four separate parts. The General Exemption, set forth in Part I, permits an investment fund managed by a QPAM to engage in a wide variety of transactions described in ERISA section 406(a)(1)(A) through (D) with virtually all parties in interest except the QPAM which manages the assets involved in the transaction and those parties most likely to have the power to influence the QPAM. In this regard, under section I(a), the exemption would not be available if a QPAM caused the investment fund to enter into a transaction with a party in interest dealing with the fund, if the party in interest or its "affiliate," (1) was authorized to appoint or terminate the QPAM as a manager of any of the plan's

assets, (2) was authorized to negotiate the terms of the management agreement with the QPAM (including renewals or modifications thereof) on behalf of the plan, or (3) had exercised such powers in the immediately preceding one year. Additionally, under section I(d), the QPAM may not cause the investment fund which it manages to engage in a transaction with itself or a "related" party. Section V(h) provides generally that a party in interest and a QPAM are "related" if either entity (or parties controlling or controlled by either entity) owns a five percent or more interest in the other entity.

Part II of the exemption provides limited relief under both section 406(a) and (b) of ERISA for certain transactions involving those employers and certain of their affiliates which could not qualify for the General Exemption provided by Part I. Part III of the exemption provides limited relief under section 406(a) and (b) of ERISA for the leasing of office or commercial space by an investment fund to the QPAM, an affiliate of the QPAM, or a person who could not qualify for the General Exemption provided by Part I because it held the power of appointment described in section I(a). Part IV of the exemption provides limited relief under section 406(a) and 406(b)(1) and (2) of ERISA for the furnishing of services and facilities by a place of public accommodation owned by an investment fund managed by a QPAM, to all parties in interest, if the services and facilities are furnished on a comparable basis to the general public.

In the notice published September 3, 2003, the Department proposed to amend the General Exemption of PTE 84-14 in several respects. With respect to section I(a) (power of appointment), the Department proposed to delete the "one year look-back rule" under which the exemption would have been unavailable to a party in interest if it had exercised the power of appointment within the one-year period preceding the transaction. The Department also proposed to clarify that section I(a)'s power of appointment refers only to the power to appoint the QPAM as manager of the assets involved in the transaction, as opposed to any of the plan's assets. In addition, the Department proposed to modify section I(a) to make the class exemption available to a party in interest with respect to a plan investing in a commingled investment fund, notwithstanding that the party in interest has the authority to redeem or acquire units of such a fund on behalf of the plan, if the plan's interest in the fund represents less than 10% of the investment fund's total assets. Finally,

the Department proposed to amend section V(c), the definition of affiliate as it applies to section I(a) and Part II, to delete those partnerships in which the person has less than a 10 percent interest and to only include highly compensated employees as defined in section 4975(e)(2)(H) of the Code.

With respect to section I(d) and the definition of "related" under section V(h), the Department proposed to amend section V(h) to provide that a QPAM is "related" to a party in interest for purposes of section I(d) if:

- The QPAM or the party in interest owns a 10 percent or more interest in the other entity;
- A person controlling or controlled by the QPAM or the party in interest owns a 20 percent or more interest in the other entity; or
- A person controlling, or controlled, by the QPAM or the party in interest owns less than a 20 percent interest in the other entity, but nevertheless exercises control over the management or policies of the other party by reason of its ownership interest.

In addition, the Department proposed to modify section V(h) to provide that generally determinations of whether the QPAM is "related" to a party in interest for purposes of section I(d) may be made as of the last day of the most recent calendar quarter. Finally, the Department proposed to amend section V(h)(2) to provide that shares held in a fiduciary capacity need not be considered in applying the percentage limitations.

With respect to the definition of QPAM, the Department proposed to clarify that the phrase in section V(a)(4) "as of the last day of its most recent fiscal year" only modifies the term "total client assets under its management and control in excess of \$50,000,000," and does not refer to the shareholders' or partners' equity requirement.

The Department also proposed to adjust the \$50 million of client assets under management standard utilized in section V(a)(4) to \$85 million, to reflect the change in the Consumer Price Index. Additionally, the Department proposed to increase the shareholders' and partners' equity requirement from \$750,000 to \$1,000,000, to correspond to the preceding subsections of section V(a).

Finally, the Department proposed to clarify the exemption to specifically provide that a QPAM must be independent of an employer with respect to a plan whose assets are managed by the QPAM.

Written Comments

Comments on Proposed Amendments QPAM Independence

A number of commenters addressed the Department's proposed clarification of the QPAM requirement that it must be independent of an employer with respect to a plan whose assets are managed by the QPAM. According to the commenters, many employers in the financial services industry believed, based on the advice of counsel, that they were eligible to serve as QPAMs for their own plans. One commenter stated that as in-house counsel it obtained written legal advice from outside ERISA counsel and, in good faith reliance on such advice, determined that the class exemption allowed an employer to act as QPAM for its own plan. According to the advice memorandum submitted to the Department for the record, the ERISA counsel noted that there are several exceptions to the availability of relief under Part I of the class exemption. The general exemption will not apply to transactions with parties in interest who have the power to appoint the QPAM. In addition, no relief is available for transactions with the QPAM or a person "related to" the QPAM. The memorandum concluded that there is no exception from the availability of Part I relief for situations in which the QPAM is both employer and asset manager.

Another comment submitted on behalf of an asset manager stated that its in-house counsel initially determined that the class exemption did not preclude the manager from acting as QPAM for its own plan based on legal advice from outside counsel; and, subsequently, this determination was confirmed by discussions in-house counsel had with outside counsel and with potential plan counterparties. Another commenter stated that, as in-house counsel to a large financial services organization, it concluded based upon its analysis that the class exemption permitted an investment manager to act as a QPAM for its own plan. In considering the issue, the commenter noted that the class exemption focuses on the relationship between the investment manager and the party in interest. According to the commenter, neither Part I, nor the related definitions and the general rules under Part V, make mention of the relationship between the plan sponsor and the investment manager.

The commenters stated further that they are unaware of any examples of abuse associated with an advisor acting as a QPAM for its own plan. In addition,

these commenters argued that the other conditions of the exemption are sufficient to protect plans from abuse. These commenters urged the Department to reverse its position that a QPAM must be independent of an employer with respect to a plan whose assets are managed by the QPAM.

As to the assertion that many practitioners were "unaware" of the scope of the independence requirement discussed in the paragraph above, the Department notes that the preamble to PTE 84-14 (49 FR 9497) states:

This class exemption was developed, and is being granted, by the Department based on the essential premise that broad exemptive relief from the prohibitions of section 406(a) of ERISA can be afforded for all types of transactions in which a plan engages only if the commitments and the investments of plan assets and the negotiations leading thereto, are the sole responsibility of an independent investment manager. [Emphasis added.]

In addition, the Department has received informal comments from other practitioners who were aware of the requirement that a QPAM must be independent of an employer with respect to a plan whose assets are managed by the QPAM and so advised their clients.

After carefully considering the entire record, the Department acknowledges that good faith efforts appear to have been made by the regulated community to comply with the QPAM independence requirement, based on advice of counsel. Although the Department is not revising the final amendment to permit financial services entities to act as QPAMs for their own plans, we are providing limited retroactive and transitional relief herein.² Accordingly, the independent fiduciary requirement of the QPAM definition will not apply for the period from December 21, 1982, through the date on which the Department grants a final amendment to the QPAM class exemption which specifically addresses relief for a financial institution to act as investment manager for its own in-house plan. In addition, by notice appearing elsewhere in this issue of the **Federal Register**, the Department is publishing a notice of proposed amendment to PTE 84-14 that would permit a financial institution to act as a QPAM for its own plan.

²The Department notes that the definition of independent fiduciary in the final amendment has been re-designated section V(o). The Department has inserted as section V(n) the amendment to the QPAM class exemption pursuant to PTE 2002-13 (67 FR 9483, March 1, 2002) which defines the term "employee benefit plan" or "plan."

Definition of QPAM

As part of the proposed amendment, the Department clarified that the language in section V(a)(4) "as of the last day of its most recent fiscal year" only modified the term "total client assets under its management * * *" and not the term "shareholders' or partners' equity." A commenter noted that the language "as of the last day of its most recent fiscal year" also appears in connection with the shareholders'/partners' equity requirement in another portion of section V(a)(4), and requested that the Department delete that language. The Department concurs with the commenter and has deleted the language.

Assets Involved in the Transaction

The Department proposed to amend section I(a), the power of appointment rule, to focus only on the power of appointment over the plan assets involved in the transaction. One commenter requested that the definition of affiliate in section V(c) be similarly amended. In this regard, an affiliate of a person is defined in section V(c) to include:

(3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets. A named fiduciary (within the meaning of section 402(a)(2) of ERISA) of a plan and an employer any of whose employees are covered by the plan will also be considered affiliates with respect to each other for purposes of section I(a) if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

The commenter requested that the portion of the definition that refers to "any employee * * * who has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets" be amended to refer only to the plan assets involved in the transaction. Likewise, the commenter requested a similar amendment with respect to the language that refers to "a named fiduciary of a plan * * *" The Department concurs with this comment and has revised the final exemption accordingly.

"Related" Definition

The Department has proposed to amend the definition in section V(h) for purposes of determining whether a QPAM is "related" to a party in interest, as follows:

A QPAM is "related" to a party in interest * * * if, as of the last day of its most recent calendar quarter, (i) the QPAM owns a ten percent or more interest in the party in interest; (ii) a person controlling, or controlled by, the QPAM owns a twenty percent or more interest in the party in interest; (iii) the party in interest owns a ten percent or more interest in the QPAM; or (iv) a person controlling, or controlled by, the party in interest owns a twenty percent or more interest in the QPAM. Notwithstanding the foregoing, a party in interest is "related" to a QPAM if: (i) a person controlling, or controlled by, the party in interest owns less than a twenty percent interest in the QPAM and such person exercises control over the management or policies of the QPAM by reason of its ownership interest, or (ii) a person controlling, or controlled by, the QPAM owns less than a twenty percent interest in the party in interest and such person exercises control over the management or policies of the party in interest by reason of its ownership interest.

One commenter suggested that the threshold for determining whether a QPAM and a party in interest are related be increased from a 10 percent or more interest to a 20 percent or more interest. Another commenter suggested that the last sentence of the definition under which the QPAM and a party in interest are considered related parties with an ownership interest of less than 20 percent due to the exercise of actual control, be amended so that only ownership interests of less than 20 percent but greater than 10 percent would be excluded under this part of the definition.

The Department has determined not to adopt the commenter's suggestion to raise the ownership interest from 10 percent to 20 percent. The Department believes that it is not overly burdensome for the QPAM and the party in interest to keep track of ownership interests in each other. In addition, the Department views a 10 percent interest in either the QPAM or the party in interest by the other entity as a meaningful measure for determining whether a QPAM is related to a party in interest. Lastly, the Department has determined to adopt the second comment for ease of administration of this provision. However, the Department cautions that a QPAM that engages in a transaction with a party that has actual control over it (regardless of the percentage of ownership involved) might be engaging in a violation of 406(b) of ERISA for which the General Exemption does not provide relief.

Transitional Relief

Several commenters urged the Department to delay the effective date for certain of the proposed amendments in order to give parties more time to

comply with the changes. In particular, transitional relief was requested for the client assets under management requirement and the shareholders'/partners' equity requirement for QPAMs that are investment advisers registered under the Investment Advisers Act of 1940 (section V(a)(4)). One commenter requested that the client assets under management and shareholders' or partners' equity standards be effective as of the first fiscal year following the publication of the final amendment in the **Federal Register**. Another commenter requested two fiscal years for a QPAM to comply with the increased assets under management standard and one fiscal year for the increased shareholders'/partners' equity standard.

The Department concurs that transitional relief is appropriate in these cases to permit QPAMs to conform to the amended exemption. Accordingly, the effective date of the new client assets under management and the shareholders'/partners' equity standards of section V(a)(4) will be as of the last day of the first fiscal year beginning on or after the date of publication of this amendment in the **Federal Register**. The coordination of this transitional relief with section V(m) of the exemption, which defines "shareholders" or partners' equity," may be illustrated by the following example:

As of December 31, 2004, QPAM A had \$55,000,000 in total client assets under its management and control, and \$800,000 in shareholders' equity as demonstrated by the most recent balance sheet prepared within the immediately preceding two years. Based on these amounts, QPAM A, which operates on a calendar year basis and prepares audited balance sheets as of the last day of each calendar year, may continue to act as a QPAM until December 30, 2006 [assuming that this final amendment is published during 2005]. If QPAM A wishes to continue operating as a QPAM after that date, QPAM A: (i) must have total client assets under management in excess of \$85,000,000 as of the last day of the most recent fiscal year preceding the transaction, and (ii) must have, as of the date of the transaction, shareholders' equity in excess of \$1,000,000 as shown in the most recent balance sheet prepared within the immediately preceding two years.

Securities Lending Class Exemption Amendment

In October 2003, the Department proposed to amend and restate Prohibited Transaction Exemptions 81-6 and 82-63, relating to securities lending arrangements (68 FR 60715, October 23, 2003). The class exemption, if granted, would incorporate both PTEs 81-6 and 82-63 and would expand

those class exemptions to additional parties, subject to modified conditions. It was brought to the attention of the Department that PTE 81-6 is referenced in section I(b)(1) of the QPAM class exemption. The Department intends that, following the finalization of the proposed amendment and restatement of PTEs 81-6 and 82-63, section I(b)(1) will continue to exclude transactions described therein from relief under the QPAM class exemption. Accordingly, the reference to PTE 81-6 in section I(b), as well as the references to other class exemptions therein, have been amended to include the phrase "as amended or superseded."

Comments Requesting Additional Amendments

Newly Formed Entities Serving as QPAMs

Under PTE 84-14, a QPAM that is an investment adviser registered under the Investment Advisers Act of 1940 must satisfy the assets under management test of section V(a)(4) as of the last day of the QPAM's most recent fiscal year. A commenter noted that it is difficult for newly-formed entities to satisfy this test and requested instead that the QPAM be permitted to satisfy the test based on its last fiscal quarter as demonstrated on a quarterly balance sheet.

The Department notes that the original QPAM class exemption required the QPAM to satisfy the client assets under management standard as of the last day of its most recent fiscal year to ensure that entities serving as QPAMs are established financial institutions which are large enough to discourage the exercise of undue influence upon their decisionmaking processes. Therefore, the Department has determined not to revise this condition.

Veto or Approval Power

Commenters on the original QPAM class exemption requested that plan officials be permitted to retain ultimate investment decision-making authority with respect to transactions negotiated by a QPAM. The Department did not adopt the suggestions of the commenters because of its view that retention of a veto or approval power would be inconsistent with the underlying concept of the QPAM exemption. The Department noted in the preamble to the QPAM class exemption that if exemptive relief were to be provided where the QPAM has less than ultimate discretion over acquisitions for an investment fund that it manages, the potential for decision making with regard to plan assets that would inure to the benefit of a party in interest would

be increased. A commenter with respect to the proposed amendments noted that in the INHAM class exemption, which was granted subsequent to the QPAM class exemption, approval power is reserved to the plan sponsor for transactions involving \$5 million or more. The commenter requested that the Department likewise amend the QPAM class exemption to permit approval or veto by plan officials.

The Department is not persuaded by the argument in favor of retention of a veto or approval power by the plan sponsor or its designee. The relief contained in the QPAM class exemption was predicated upon the existence of an independent, professional asset manager who is solely responsible for the discretionary management of plan assets that are transferred to its control. The QPAM class exemption did not provide relief for transactions involving the assets of plans managed by in-house asset managers. Conversely, the INHAM class exemption provided more limited relief for plan assets managed by an in-house manager, subject to a number of conditions, which reflected the differences between the QPAM and the INHAM class exemptions. Thus, for example, relief under the INHAM class exemption is predicated upon an annual exemption audit conducted by an independent auditor to assure compliance with the conditions of the exemption. Although the INHAM class exemption permits the plan sponsor to retain a veto or approval power, the Department notes that the plan's assets under the INHAM class exemption, unlike the QPAM class exemption, remain under the management of an affiliate of the plan sponsor. Accordingly, the Department has determined not to revise this condition.

Section I(e)—20% Limitation

Section I(e) provides that a QPAM may not enter into a transaction with a party in interest with respect to any plan whose assets managed by the QPAM, when combined with the assets of other plans maintained by the same employer or affiliates of the employer, represent more than 20 percent of the total client assets managed by the QPAM at the time of the transaction. One commenter suggested that the Department's grant of the INHAM class exemption indicated that it was no longer concerned about the potential for undue influence by plan sponsors on managers with large amounts of plan assets under management. As a result, the commenter proposed that the 20 percent limitation contained in section I(e) of the QPAM class exemption be eliminated or increased.

The Department notes that the relief provided under both the QPAM exemption and the INHAM exemption, as well as the conditions and restrictions contained in each exemption, were designed to address the issues unique to in-house management and the retention of an independent manager. Since in-house managers primarily manage the assets of in-house plans, it would not have been practical for the Department to impose a 20 percent limitation similar to that found in the QPAM exemption. However, the Department developed other conditions and safeguards that enabled it to provide relief to in-house managers, consistent with the findings under section 408(a) of the Act. In this regard, the Department continues to believe that the 20 percent limitation plays a role in ensuring that the investment decisions of a QPAM are not improperly influenced by any one large plan client. Therefore, the Department has determined not to modify the 20 percent limitation in the QPAM class exemption.

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 ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA 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 ERISA which require, among other things, that a fiduciary discharge his or her duties respecting plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not 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) The Department finds that the amended exemption is administratively feasible, in the interests of plans and of their participants and beneficiaries, and protective of the rights of participants and beneficiaries of plans;

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

(4) The amended 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

Under 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), effective August 23, 2005, the Department amends PTE 84-14 as set forth below:

Part I—General Exemption

Effective as of August 23, 2005, the restrictions of ERISA section 406(a)(1)(A) through (D) and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (D), shall not apply to a transaction between a party in interest with respect to an employee benefit plan and an investment fund (as defined in section V(b)) in which the plan has an interest, and which is managed by a qualified professional asset manager (QPAM) (as defined in section V(a)), if the following conditions are satisfied:

(a) At the time of the transaction (as defined in section V(i)) the party in interest, or its affiliate (as defined in section V(c)), does not have the authority to—

(1) Appoint or terminate the QPAM as a manager of the plan assets involved in the transaction, or

(2) Negotiate on behalf of the plan the terms of the management agreement with the QPAM (including renewals or modifications thereof) with respect to the plan assets involved in the transaction;

Notwithstanding the foregoing, in the case of an investment fund in which two or more unrelated plans have an interest, a transaction with a party in interest with respect to an employee benefit plan will be deemed to satisfy the requirements of section I(a) if the assets of the plan managed by the QPAM in the investment fund, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof described in section V(c)(1) of the exemption) or by the same employee organization, and managed in the same investment fund, represent less than 10 percent of the assets of the investment fund;

(b) The transaction is not described in—

(1) Prohibited Transaction Exemption 81-6 (46 FR 7527; January 23, 1981) (relating to securities lending arrangements) (as amended or superseded),

(2) Prohibited Transaction Exemption 83-1 (48 FR 895; January 7, 1983) (relating to acquisitions by plans of interests in mortgage pools) (as amended or superseded), or

(3) Prohibited Transaction Exemption 82-87 (47 FR 21331; May 18, 1982) (relating to certain mortgage financing arrangements) (as amended or superseded);

(c) The terms of the transaction are negotiated on behalf of the investment fund by, or under the authority and general direction of, the QPAM, and either the QPAM, or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM, makes the decision on behalf of the investment fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest;

(d) The party in interest dealing with the investment fund is neither the QPAM nor a person related to the QPAM (within the meaning of section V(h));

(e) The transaction is not entered into with a party in interest with respect to any plan whose assets managed by the QPAM, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof described in section V(c)(1) of this exemption) or by the same employee organization, and managed by the QPAM, represent more than 20 percent of the total client assets managed by the QPAM at the time of the transaction;

(f) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the QPAM, the terms of the transaction are at least as favorable to the investment fund as the terms generally available in arm's length transactions between unrelated parties;

(g) Neither the QPAM nor any affiliate thereof (as defined in section V(d)), nor any owner, direct or indirect, of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of: any felony involving abuse or misuse of such person's employee benefit plan position or

employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA. For purposes of this section (g), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

Part II—Specific Exemption for Employers

Effective as of August 23, 2005, the restrictions of sections 406(a), 406(b)(1) and 407(a) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code, by reason of Code section 4975(c)(1)(A) through (E), shall not apply to:

(a) The sale, leasing, or servicing of goods (as defined in section V(j)), or to the furnishing of services, to an investment fund managed by a QPAM by a party in interest with respect to a plan having an interest in the fund, if—

(1) The party in interest is an employer any of whose employees are covered by the plan or is a person who is a party in interest by virtue of a relationship to such an employer described in section V(c),

(2) The transaction is necessary for the administration or management of the investment fund,

(3) The transaction takes place in the ordinary course of a business engaged in by the party in interest with the general public,

(4) Effective for taxable years of the party in interest furnishing goods and services after August 23, 2005, the amount attributable in any taxable year of the party in interest to transactions engaged in with an investment fund pursuant to section II(a) of this exemption does not exceed one (1) percent of the gross receipts derived from all sources for the prior taxable year of the party in interest, and

(5) The requirements of sections I(c) through (g) are satisfied with respect to the transaction;

(b) The leasing of office or commercial space by an investment fund maintained by a QPAM to a party in interest with respect to a plan having an interest in the investment fund, if—

(1) The party in interest is an employer any of whose employees are covered by the plan or is a person who is a party in interest by virtue of a relationship to such an employer described in section V(c),

(2) No commission or other fee is paid by the investment fund to the QPAM or to the employer, or to an affiliate of the QPAM or employer (as defined in section V(c)), in connection with the transaction,

(3) Any unit of space leased to the party in interest by the investment fund is suitable (or adaptable without excessive cost) for use by different tenants,

(4) The amount of space covered by the lease does not exceed fifteen (15) percent of the rentable space of the office building, integrated office park, or of the commercial center (if the lease does not pertain to office space),

(5) In the case of a plan that is not an eligible individual account plan (as defined in section 407(d)(3) of ERISA), immediately after the transaction is entered into, the aggregate fair market value of employer real property and employer securities held by investment funds of the QPAM in which the plan has an interest does not exceed 10 percent of the fair market value of the assets of the plan held in those investment funds. In determining the aggregate fair market value of employer real property and employer securities as described herein, a plan shall be considered to own the same proportionate undivided interest in each asset of the investment fund or funds as its proportionate interest in the total assets of the investment fund(s). For purposes of this requirement, the term "employer real property" means real property leased to, and the term "employer securities" means securities issued by, an employer any of whose employees are covered by the plan or a party in interest of the plan by reason of a relationship to the employer described in subparagraphs (E) or (G) of ERISA section 3(14), and

(6) The requirements of sections I(c) through (g) are satisfied with respect to the transaction.

Part III—Specific Lease Exemption for QPAMs

Effective as of August 23, 2005, the restrictions of section 406(a)(1)(A) through (D) and 406(b)(1) and (2) of ERISA and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall not apply to the leasing of office or commercial space by an investment fund managed by a QPAM to the QPAM, a person who is a party in interest of a

plan by virtue of a relationship to such QPAM described in subparagraphs (G), (H), or (I) of ERISA section 3(14) or a person not eligible for the General Exemption of Part I by reason of section I(a), if—

(a) The amount of space covered by the lease does not exceed the greater of 7500 square feet or one (1) percent of the rentable space of the office building, integrated office park or of the commercial center in which the investment fund has the investment,

(b) The unit of space subject to the lease is suitable (or adaptable without excessive cost) for use by different tenants,

(c) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the QPAM, the terms of the transaction are not more favorable to the lessee than the terms generally available in arm's length transactions between unrelated parties, and

(d) No commission or other fee is paid by the investment fund to the QPAM, any person possessing the disqualifying powers described in section I(a), or any affiliate of such persons (as defined in section V(c)), in connection with the transaction.

Part IV—Transactions Involving Places of Public Accommodation

Effective as of August 23, 2005, the restrictions of section 406(a)(1)(A) through (D) and 406(b)(1) and (2) of ERISA and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall not apply to the furnishing of services and facilities (and goods incidental thereto) by a place of public accommodation owned by an investment fund managed by a QPAM to a party in interest with respect to a plan having an interest in the investment fund, if the services and facilities (and incidental goods) are furnished on a comparable basis to the general public.

Part V—Definitions and General Rules

For purposes of this exemption:

(a) The term “qualified professional asset manager” or “QPAM” means an independent fiduciary (as defined in section V(o)) which is—

(1) A bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 that has the power to manage, acquire or dispose of assets of a plan, which bank has, as of the last day of its most recent fiscal year, equity capital (as defined in section V(k)) in excess of \$1,000,000 or

(2) A savings and loan association, the accounts of which are insured by the

Federal Savings and Loan Insurance Corporation, that has made application for and been granted trust powers to manage, acquire or dispose of assets of a plan by a State or Federal authority having supervision over savings and loan associations, which savings and loan association has, as of the last day of its most recent fiscal year, equity capital (as defined in section V(k)) or net worth (as defined in section V(l)) in excess of \$1,000,000 or

(3) An insurance company which is qualified under the laws of more than one State to manage, acquire, or dispose of any assets of a plan, which company has, as of the last day of its most recent fiscal year, net worth (as defined in section V(l)) in excess of \$1,000,000 and which is subject to supervision and examination by a State authority having supervision over insurance companies, or

(4) An investment adviser registered under the Investment Advisers Act of 1940 that has total client assets under its management and control in excess of \$50,000,000 as of the last day of its most recent fiscal year, and either (A) shareholders' or partners' equity (as defined in section V(m)) in excess of \$750,000, or (B) payment of all of its liabilities including any liabilities that may arise by reason of a breach or violation of a duty described in sections 404 and 406 of ERISA is unconditionally guaranteed by—(i) A person with a relationship to such investment adviser described in section V(c)(1) if the investment adviser and such affiliate have shareholders' or partners' equity, in the aggregate, in excess of \$750,000, or (ii) A person described in (a)(1), (a)(2) or (a)(3) of section V above, or (iii) A broker-dealer registered under the Securities Exchange Act of 1934 that has, as of the last day of its most recent fiscal year, net worth in excess of \$750,000; and (C) effective as of the last day of the first fiscal year of the investment adviser beginning on or after August 23, 2005, substitute “\$85,000,000” for “\$50,000,000” and “\$1,000,000” for “\$750,000” in (a)(4)(A) or (B) of section V above;

Provided that such bank, savings and loan association, insurance company or investment adviser has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

(b) An “investment fund” includes single customer and pooled separate accounts maintained by an insurance company, individual trusts and common, collective or group trusts maintained by a bank, and any other account or fund to the extent that the

disposition of its assets (whether or not in the custody of the QPAM) is subject to the discretionary authority of the QPAM.

(c) For purposes of section I(a) and Part II, an “affiliate” of a person means—

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

(2) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, 10 percent or more partner (except with respect to Part II this figure shall be 5 percent), or highly compensated employee as defined in section 4975(e)(2)(H) of the Code (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets involved in the transaction. A named fiduciary (within the meaning of section 402(a)(2) of ERISA) of a plan with respect to the plan assets involved in the transaction and an employer any of whose employees are covered by the plan will also be considered affiliates with respect to each other for purposes of section I(a) if such employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

(d) For purposes of section I(g) an “affiliate” of a person means—

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

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

(e) The term “control” means the power to exercise a controlling influence over the management or

policies of a person other than an individual.

(f) The term "party in interest" means a person described in ERISA section 3(14) and includes a "disqualified person," as defined in Code section 4975(e)(2).

(g) The term "relative" means a relative as that term is defined in ERISA section 3(15), or a brother, a sister, or a spouse of a brother or sister.

(h) A QPAM is "related" to a party in interest for purposes of section I(d) of this exemption if, as of the last day of its most recent calendar quarter: (i) the QPAM owns a ten percent or more interest in the party in interest; (ii) a person controlling, or controlled by, the QPAM owns a twenty percent or more interest in the party in interest; (iii) the party in interest owns a ten percent or more interest in the QPAM; or (iv) a person controlling, or controlled by, the party in interest owns a twenty percent or more interest in the QPAM.

Notwithstanding the foregoing, a party in interest is "related" to a QPAM if: (i) a person controlling, or controlled by, the party in interest has an ownership interest that is less than twenty percent but greater than ten percent in the QPAM and such person exercises control over the management or policies of the QPAM by reason of its ownership interest; (ii) a person controlling, or controlled by, the QPAM has an ownership interest that is less than twenty percent but greater than ten percent in the party in interest and such person exercises control over the management or policies of the party in interest by reason of its ownership interest. For purposes of this definition:

(1) The term "interest" means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation,

(B) The capital interest or the profits interest of the entity if the entity is a partnership, or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an interest if, other than in a fiduciary capacity, the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose of or to direct the disposition of such interest.

(i) The time as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction

that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after December 21, 1982, or a renewal that requires the consent of the QPAM occurs on or after December 21, 1982 and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction.

Notwithstanding the foregoing, this exemption shall cease to apply to a transaction exempt by virtue of Part I or Part II at such time as the percentage requirement contained in section I(e) is exceeded, unless no portion of such excess results from an increase in the assets transferred for discretionary management to a QPAM. For this purpose, assets transferred do not include the reinvestment of earnings attributable to those plan assets already under the discretionary management of the QPAM. Nothing in this paragraph shall be construed as exempting a transaction entered into by an investment fund which becomes a transaction described in section 406 of ERISA or section 4975 of the Code while the transaction is continuing, unless the conditions of this exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption.

(j) The term "goods" includes all things which are movable or which are fixtures used by an investment fund but does not include securities, commodities, commodities futures, money, documents, instruments, accounts, chattel paper, contract rights and any other property, tangible or intangible, which, under the relevant facts and circumstances, is held primarily for investment.

(k) For purposes of section V(a)(1) and (2), the term "equity capital" means stock (common and preferred), surplus, undivided profits, contingency reserves and other capital reserves.

(l) For purposes of section V(a)(3), the term "net worth" means capital, paid-in and contributed surplus, unassigned surplus, contingency reserves, group contingency reserves, and special reserves.

(m) For purposes of section V(a)(4), the term "shareholders' or partners' equity" means the equity shown in the most recent balance sheet prepared within the two years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

(n) The terms "employee benefit plan" and "plan" refer to an employee benefit plan described in section 3(3) of ERISA and/or a plan described in section 4975(e)(1) of the Code.

(o) For purposes of section V(a), the term "independent fiduciary" means a fiduciary managing the assets of a plan in an investment fund that is independent of and unrelated to the employer sponsoring such plan. For purposes of this exemption, the independent fiduciary will not be deemed to be independent of and unrelated to the employer sponsoring the plan if such fiduciary directly or indirectly controls, is controlled by, or is under common control with the employer sponsoring the plan. Notwithstanding the foregoing, for the period from December 21, 1982, through the date on which the Department grants a final amendment which addresses relief for financial institutions that serve as investment managers for their own plans, a QPAM managing the assets of a plan in an investment fund will not fail to satisfy the requirements of section V(a) solely because such fiduciary is the employer sponsoring the plan or directly or indirectly controls, is controlled by, or is under common control with the employer sponsoring the plan.

Signed at Washington, DC, this 11th day of August, 2005.

Ivan L. Strasfeld,

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

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