

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

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

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

Type of Collection: New.

Agency: Department of Labor, Employee Benefits Security Administration.

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

OMB Control Number: 1210-New.

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

Respondents: 42.

Responses: 42.

Frequency of Response: On occasion; quarterly; annually.

Estimated Burden Hours: 0.

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

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

Estimated Total Annual Cost: \$19,000.

I. Discussion of the Application

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

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

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

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

real estate either directly or through another entity. The term "Employer Affiliate" as used herein, refers to an entity that sponsors an individual account plan and which is owned 50 percent or more by a Trust REIT. The Applicant explains that because the REIT's ownership interest in the Employer Affiliate is 50 percent or more, that entity may be deemed to be an affiliate of the REIT under section 407(d)(7) of the Act³ and, accordingly, the REIT's shares may be considered "employer securities" for purposes of section 407(d)(1) of the Act, in connection with any plan sponsored by such Employer Affiliate.⁴

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

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

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

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

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