

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

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

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

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

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

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

II. Description of the Proposed Retroactive Exemption

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

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

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

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

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

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

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

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

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

¹⁹ *Id.*