

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

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

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

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

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

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

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

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

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

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

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

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

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