

level of investment in Qualifying REIT Shares, based on the particular facts and circumstances, consistent with its responsibilities under section 404 of the Act.

III. Description of the Proposed Prospective Exemption

On the basis of the representations made by the Applicant, the Department is proposing prospective relief from the restrictions of sections 406(a), 406(b)(1) and (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 for the following transactions occurring after the date of publication of the final exemption in the **Federal Register**: (1) The purchase or sale of Qualifying REIT Shares where the decision to purchase or sell these securities is made by a participant, or by an Independent Fiduciary; (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 are met at the time of the transaction.

Prospectively, contributed shares may not be subject to a lockup. In addition, 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 the exemption. In this regard, the proposed exemption requires the appointment of a fiduciary that is responsible for confidentiality. It also requires that the Plan 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, the Plan shall 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.²¹

If the Employer Affiliate, or the Trust REIT exerts undue influence over the shareholder decisions of the participants and beneficiaries in Plans covered by this proposed exemption,

this proposed exemption shall not apply to any transactions involving shares subject to such influence. For example, tender offers, mergers and acquisitions are likely to generate the need for an independent fiduciary to provide additional safeguards for participant confidentiality.²²

Section III(e) of the proposal 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 proposed 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.

Where Qualifying REIT Shares are purchased or sold on the Primary Exchange, the broker executing the transactions must be independent of the Trust REIT, any Employer Affiliate, the Independent Fiduciary and any affiliates thereof.

Certain information must be disclosed to the participant or the Independent Fiduciary prior to the initial covered transaction that occurs 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.

Consistent with the practice followed in other prohibited transaction class exemptions granted by the Department, the proposal contains a condition requiring the Trust REIT or its Employer Affiliates utilizing the exemption 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 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) Before an exemption may be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible,

²¹ This requirement was modeled after the regulations on "independent exercise of control" under section 404(c) of the Act. 29 CFR 2550.404c-1 (d)(2)(ii)(E)(4)(viii) & (ix).

²² 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).