

or finance), or any other officer who performs a policy-making function for the entity.

J. The term “directed trustee” means a Plan trustee whose powers and duties with respect to any assets of the Plan involved in the portfolio liquidation or restructuring are limited to (i) the provision of nondiscretionary trust services to the Plan, and (ii) duties imposed on the trustee by any provision or provisions of the Act or the Code. The term “nondiscretionary trust services” means custodial services and services ancillary to custodial services, none of which services is discretionary. For purposes of the exemption, a person who is otherwise a directed trustee will not fail to be a directed trustee solely by reason of having been delegated, by the sponsor of a master or prototype Plan, the power to amend such Plan.

**EFFECTIVE DATE:** This exemption is effective as of February 6, 2003.

For a more complete statement of the facts and representations supporting the Department’s decision to grant this exemption, refer to the notice of proposed exemption published on February 6, 2003 at 68 FR 6187.

#### Written Comments

The Department received one written comment with respect to the notice of proposed exemption (the Proposal). The comment was submitted by the Applicant, who requested certain modifications to the operative language as discussed below. Some additional editorial changes have been made by the Department to improve clarity and readability of the final exemption.

1. The Applicant wished to revise Section II.B. of the Proposal (68 FR 6188, center column) to clarify that this condition permits situations where the Applicant is both the legacy and the destination manager and permits legacy or destination positions in all investments, not just securities (although the exemption for principal transactions covers only securities).

Thus, Section II.B. has been revised to read as follows (note bracketed deletions and italicized additions):

B. [Neither] The Applicant (*including an affiliate*) [nor an affiliate thereof has] *does not have* discretionary authority or control with respect to the investment of the Plan assets involved in the transaction, [or] *nor* renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

Notwithstanding the foregoing, the Applicant may be a directed trustee (as defined in Section III below) with respect to the Plan assets involved in the transaction.

[The original third paragraph has been moved to the end of Section II.B.]

In addition, [a transaction will not fail to meet the requirements of this section solely because the Applicant is being retained as an investment manager with respect to the Plan assets involved in the transaction, provided that:] *although the Applicant does not have discretionary authority or control over such Plan assets at the time of the transaction and has not used its discretion to appoint the transition broker-dealer, it may act as a fiduciary with respect to the Plan assets involved in the transaction, solely as:* (i) [the Applicant has not used its discretion to appoint the transition broker-dealer; (ii)] *the investment manager of such assets to be managed as an Index or Model-Driven Fund; or (ii) [(iii)] the investment manager of such assets who supplies a list of securities or other investments to be purchased, which list is prepared without regard to the identity of the broker-dealer and without reference to the portfolio being liquidated or restructured [(i.e., the] and is substantially the same list [is substantially the same as] that would be provided to other similarly situated investors with substantially similar investment guidelines and objectives, or [consists of] is substantially similar [the same securities as those in other] to the investments in existing [investment] portfolios managed in the same style.*

Lastly, [this condition will be deemed satisfied] *a transaction will not fail to meet the requirements of this section if the Applicant is being terminated as a manager of the Plan assets involved in the transaction, [the termination is effective] its investment discretion is terminated prior to the commencement of the portfolio liquidation or restructuring, and the Applicant has not used its discretion to appoint the transition broker-dealer.*

2. The Applicant wished to eliminate the requirement in Section II.G. of the Proposal (68 FR at 6188, column 3) that the covered securities be “publicly traded.” According to the Applicant, the Independent Fiduciary can assess the fairness of pricing for a non-publicly-traded security by one of the following means: (i) Review the value at which the security is being carried by the Plan; (ii) review the price that other dealers are quoting and the prices at which the security has been trading in the recent past; or (iii) canvass other holders of the security regarding an appropriate trading price.

Further, the Applicant wished to revise Section II.G(2) of this condition (68 FR at 6188, column 3) so that the Independent Fiduciary and the bank or broker-dealer may agree on other objective price references besides “close of market.”

Accordingly, Section II.G., which has been relettered Section II.E. in sequence (while old Section II.E. is now II.F., and old Section II.F. is now II.G.), has been revised to read as follows (note bracketed deletions and italicized additions):

E. [Prior to any transaction, the] *An Independent Fiduciary has given prior approval [agrees] that the transaction [purchase or sale of a security, which must be one that is publicly traded,] may be effectuated [through] as a principal transaction and at a price that—*

(1) [in the case of] *for an equity security, is specified in advance by the Independent Fiduciary and is a stated dollar amount, or is based on an objective measure (as of a specified date or dates), including, but not limited to, the closing price, the opening price, or the volume-weighted average price; or*

(2) [in the case of] *for a fixed income security, is a stated dollar amount, or is within the bid and asked spread, as of the close of the relevant market (or another predetermined time on a specified date or dates), as reported by an independent third party reporting service or a publicly available electronic exchange or trading system.*

Further, Section II.E. of the Proposal (68 FR at 6188, column 3), which has been relettered Section II.F, has been revised to read as follows (note bracketed deletions and italicized additions):

F. *In the case where the price for any transaction is not based on an objective measure, [An] the Independent Fiduciary has given prior approval for the transaction, specifying [(solely in the case where the price for any principal transaction is not based on an objective measure)] whether the transaction is to be agency or principal \* \* \**

Also, Section II.F. of the Proposal (68 FR at 6188, column 3), which has been relettered Section II.G, has been revised by adding the italicized language:

G. All purchases and sales *executed on a principal basis* are effected within two days following the Independent Fiduciary’s direction to purchase or sell a given security—except that, with the approval of the Independent Fiduciary, the Applicant may extend such initial period for a time not exceeding two additional days, *on the same terms.*

3. Regarding Section II.H. of the Proposal (68 FR 6188, column 3), the Applicant noted that this condition requires a Rule 10b-10 confirmation to be sent for every trade, although some trades do not require such confirmations.

Thus, Section II.H. has been revised to read as follows (note bracketed deletions and italicized additions):

H. The Independent Fiduciary is furnished with confirmations including the relevant information required under Rule 10b-10 of the Securities Exchange Act of 1934 (the 1934 Act), *to the extent required under Rule 10B-10*, as well as a report, within five business days [of] *after the transaction is completed*, containing the following information with respect to each security \* \* \*