

combination of securities that compose such index, or (ii) sampling the securities that compose such index based on objective criteria and data;

(2) For which the Applicant does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That contains "plan assets" subject to the Act, pursuant to the Department's regulations (*see* 29 CFR 2510.3-101, Definition of "plan assets"—plan investments); and

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund that is intended to benefit the Applicant or any party in which the Applicant may have an interest.

G. The term "Model-Driven Fund" means any investment fund, account, or portfolio trusted or managed by the Applicant, in which one or more investors invest, and—

(1) Which is composed of securities, the identity of which and the amount of which, are selected by a computer model that is based on prescribed objective criteria using independent third party data, not within the control of the Manager, to transform an Index (as defined in Paragraph E, above);

(2) Which contains "plan assets" subject to the Act, pursuant to the Department's regulations (*see* 29 CFR 2510.3-101, Definition of "plan assets"—plan investments); and

(3) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund, or the utilization of any specific objective criteria, that is intended to benefit the Applicant or any party in which the Applicant may have an interest.

H. The term "Plan" means an employee benefit plan that is subject to the fiduciary responsibility provisions of the Act.

I. The term "Independent Fiduciary" means a fiduciary of a Plan who is unrelated to, and independent of, the Applicant. For purposes of the exemption, a Plan fiduciary will be deemed to be unrelated to, and independent of, the Applicant if such fiduciary represents that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for transactions described in Section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Applicant and represents that such fiduciary shall advise the Applicant if those facts change.

(1) Notwithstanding anything to the contrary in this Section III, I, a fiduciary is not independent if:

(i) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Applicant;

(ii) Such fiduciary directly or indirectly receives any compensation or other consideration from the Applicant for his or her own personal account in connection with any transaction described in the exemption;

(iii) Any officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Applicant, responsible for the transactions described in Section I, is an officer, director, or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the Plan sponsor or the fiduciary responsible for the decision to authorize or terminate authorization for transactions described in Section I. However, if such individual is a director of the Plan sponsor or the responsible fiduciary, and if he or she abstains from participation in (A) the choice of the Plan's broker-dealer or bank executing the transactions covered herein, and (B) the decision to authorize or terminate authorization for transactions described in Section I, then Section III, I(1)(iii) shall not apply.

(2) The term "officer" means a president, any vice president in charge of a principal business unit, division or function (such as sales, administration 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 April 16, 2003 at 68 FR 18698.

### 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 clarification of a certain statement in Item 3 of the Summary of Facts and Representations in the Proposal. The Applicant wished to revise the first full sentence in the first column of 68 FR at 18701 as follows (note bracketed deletions and italicized additions):

The Applicant [delete "believes"] *is concerned that some of its Plan clients may believe* that the principal transactions at issue may fall outside the scope of relief provided by PTE 75-1 (40 FR 50845, October 31, 1975), Part II, [footnote 32] because that class exemption is unavailable where the broker-dealer's affiliate is the trustee of a Plan, even if only a directed trustee, *and is unavailable where the broker-dealer or an affiliate thereof is otherwise a fiduciary with respect to the Plan, such as an asset manager.*

The Department acknowledges the Applicant's clarification to the record.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karin Weng of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

### 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/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest 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) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of