

For purposes of section V(a)(4), the term "shareholders" or partners' equity" means the equity shown in the most recent balance sheet prepared within the two years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

According to the interested person, the two-year time period referenced in section V(m), which defines the term "shareholders" or partners' equity," appears to conflict with the phrase "as of the last day of its most recent fiscal year" contained in section V(a)(4). The Department proposes to amend section V(a)(4) to clarify that the phrase "as of the last day of its most recent fiscal year" only modifies the term "total client assets under management and control in excess of \$50,000,000," and does not refer to the shareholders' or partners' equity requirement.

The Department also notes that the \$50 million of client assets under management standard utilized in section V(a)(4) for investment advisers has not been revised since 1984 and may no longer provide significant protections for plans in the current financial marketplace. The Department has determined to adjust the \$50 million figure to \$85 million, to reflect the change in the Consumer Price Index. Additionally, the Department proposes to increase the shareholders' and partners' equity requirement from \$750,000 to \$1,000,000, to correspond to the preceding subsections of section V(a).

As amended, section V(a)(4) would read as follows:

An investment adviser registered under the Investment Advisers Act of 1940 that has total client assets under its management and control in excess of \$85,000,000 as of the last day of its most recent fiscal year, and either (A) shareholders' or partners' equity (as defined in section V(m)) in excess of \$1,000,000, or (B) payment of all its liabilities including any liabilities that may arise by reason of a breach or violation of a duty described in sections 404 and 406 of ERISA is unconditionally guaranteed by—(i) A person with a relationship to such investment adviser described in section V(c)(1) if the investment adviser and such affiliate have, as of the last day of their most recent fiscal year, shareholders' or partners' equity, in the aggregate, in excess of \$1,000,000, or (ii) A person described in (a)(1), (a)(2) or (a)(3) of section V above, or (iii) A broker-dealer registered under the Securities Exchange Act of 1934 that has, as of the last day of its most recent fiscal year, net worth in excess of \$1,000,000; provided that such bank, savings and loan association, insurance company or investment adviser has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

In response to inquiries regarding the definition of QPAM contained in section V(a), the Department proposes to modify the exemption to specifically provide that a QPAM must be independent of an employer with respect to a plan whose assets are managed by the QPAM. As the Department noted in the preamble to PTE 84-14 (49 FR 9497):

This class exemption was developed, and is being granted, by the Department based on the essential premise that broad exemptive relief from the prohibitions of section 406(a) of ERISA can be afforded for all types of transactions in which a plan engages only if the commitments and the investments of plan assets and the negotiations leading thereto, are the sole responsibility of an independent investment manager.

To avoid further uncertainty on this issue, the Department has amended the definition of QPAM accordingly.

The Department also has received inquiries about section V(i) of PTE 84-14, which defines "the time as of which any transaction occurs." The Department understands there is uncertainty regarding the role of a QPAM in a continuing transaction. Section V(i) states the following with respect to a continuing transaction:

[I]n the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after December 21, 1982, or a renewal that requires the consent of a QPAM occurs on or after December 21, 1982 and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Notwithstanding the foregoing, this exemption shall cease to apply to a transaction exempt by virtue of Part I or Part II at such times as the percentage requirement contained in section I(e) is exceeded, unless no portion of such excess results from an increase in the assets transferred for discretionary management to a QPAM. For this purpose, assets transferred do not include the reinvestment of earnings attributable to those plan assets already under the discretionary management of the QPAM. Nothing in this paragraph shall be construed as exempting a transaction entered into by an investment fund which becomes a transaction described in section 406 of ERISA or section 4975 of the Code while the transaction is continuing, unless the conditions of this exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption.

In the Department's view, the exemption would be available for a continuing transaction (e.g., a loan or lease), provided that all the conditions of the exemption are satisfied on the date on which the transaction is entered

into (or on the date of a renewal that requires the consent of the QPAM), notwithstanding the subsequent failure to satisfy one or more of the conditions of the exemption. The only exception to the availability of the exemption for a continuing transaction is the requirement that section I(e) must be satisfied throughout the duration of the transaction. Nonetheless, the Department cautions that, although Part I may continue to be available for the entire term of a continuing transaction which subsequently fails to satisfy one or more of the conditions of that Part, no relief would be provided for an act of self-dealing described in section 406(b)(1) of ERISA if the QPAM has an interest in the person which may affect the exercise of its best judgment as a fiduciary. Although Part I provides an exemption from section 406(a)(1)(A) through (D) of ERISA, it does not provide relief from acts described in section 406(b) of ERISA. The Department urges fiduciaries to take appropriate steps to avoid engaging in 406(b) violations should circumstances change during the course of a continuing transaction.

An interested person also was concerned about the availability of Part I in the context of a continuing transaction where the QPAM becomes unable to continue to serve as a QPAM, or is terminated, prior to the appointment of a replacement QPAM. In the Department's view, the exemption would continue to be available provided no decisions were required to be made by the QPAM on behalf of the investment fund with respect to the transaction (e.g., how to respond to a default in payments on a lease) during the interim period before the appointment of the replacement QPAM.

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 ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA 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 ERISA which require, among other things, that a fiduciary discharge his or her duties respecting plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the