adjustment assistance to be issued, each of the group eligibility requirements of Section 222 of the Act must be met.

(1) That a significant number or proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated.

(2) That sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) That increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

Negative Determinations

In each of the following cases the investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-14,969; West Virginia Malleable Iron Co., Point Pleasant, WV

TA-W-14,921; Carolina Pacific Knitwear, Inc., Statesville, NC

TA-W-14,768; Vernitron Corp., Vernitron Medical Products, Manasquan, NJ

TA-W-14,934; Sandusky Foundry and Machine Co., Inc., Sandusky, OH

In the following cases the investigation revealed that criterion (3) has not been met. Increased imports did not contribute importantly to worker separations at the firm.

TA-W-15,064; Caterpillar Tractor Co., Milwaukee, WI

In the following cases the investigation revealed that criterion (3) has not been met for the reasons specified.

TA-W-14,927; Dressers Industry Corp., Industrial Tool Div., Springfield, OH

Aggregate U.S. imports of boiler tube brushes are negligible.

TA-W-14,976; Falls Yarn Mills, Inc., Woonsocket, RI

Aggregate U.S. imports of yarns are negligible.

TA-W-15,047; Electric Manufacturing and Repair, Inc., Bethel Park, PA

The investigation revealed that criterion (3) has not been met. The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

I hereby certify that the aforementioned determinations were issued during the period February 27, 1984–March 2, 1984. Copies of these determinations are available for inspection in Room 9120, U.S. Department of Labor, 601 D Street, NW., Washington, D.C. 20213 during normal business hours or will be mailed to persons who write to the above address.

Dated: March 6, 1984.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 84-6717 Filed 3-12-84; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-15,099]

Outboard Marine Corp., Galesburg, Illinois; Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, an investigation was initiated on November 7, 1983, in response to a worker petition received on November 2, 1983, which was filed by the Office and Professional Employees International Union and the Industrial Workers of Galesburg on behalf of workers and former workers at the Outboard Marine Corporation in Galesburg, Illinois. The workers produce outboard motor parts and lawn mower parts.

The petitioners requested in a letter that the petition for workers producing remote control assemblies, flywheels and ring gears be withdrawn since these workers are already covered under a previous certification. The investigation revealed that these workers would fall within the scope of the Department's earlier certification TA-W-13, 164 for workers at the Outboard Marine Corporation, Galesburg, Illinois, producing electrical and fuel system components for outboards and lawn mowers. That certification will expire on October 29, 1984.

Signed at Washington, D.C., this 5th day of March 1984.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 84-6718 Filed 3-12-84; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-15,091]

Fox Shoe Manufacturing Corp., New York, New York; Termination of Investigation

Pursuant to Section 221 of the Trade of 1974, an investigation was initiated on October 31, 1983, in response to a worker petition received on October 28, 1983, which was filed (by) the Amalgamated Clothing and Textile Workers Union on behalf of workers and Fox Shoe Manufacturing Corporation New York, New York. An active certification covering the petitioning group of workers remains in effect (TA-W-12,572). Consequently further investigation in this case would serve no purpose; and the investigation has been terminated.

Signed at Washington, D.C., this 5th day of March 1984.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 84-6719 Filed 3-12-84; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-14,577]

Knickerbocker Toy Co., Middlesex, New Jersey, Edison, New Jersey; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

According to section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a certifiction of eligibility to apply for worker adjustment assistance on December 30, 1983 to former workers of the Knickerbocker Toy Company, Middlesex, New Jersey. The Notice of Certification was published in the **Federal Register** on January 10, 1984 (49 FR 1298). The certification was corrected on January 12, 1984 to include the Edison, New Jersey location of Knickerbocker Toy Company. The corrected Notice was published in the **Federal Register** on January 20, 1984 (49 FR 2560).

Based on a request from the Amalgamated, Industrial and Toy & Novelty Workers of America for a change in the May 1, 1983 termination date established in the certification, findings in the investigation were reviewed to determine if there was sufficient information and data to support a change in the termination date. Upon request, Warner Communications, the parent company, provided additional information which showed that several workers worked a few weeks beyond the May 1, 1983 termination date closing down the operation.

The amended certification for TA-W-14,577 is hereby issued as follows:

All workers of Knickerbocker Toy Company, Middlesex and Edison, New Jersey who became totally or partially separated from employment on or after December 1, 1982 and before June 1, 1983 are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed at Washington, D.C., this 5th day of March 1984.

Robert O. Deslongchamps,

Director, Office of Legislation and Actuarial Services, UIS

[FR Doc. 84-6720 Filed 3-12-84; 8:45 am]

BILLING CODE 4510-30-M

Mine Safety and Health Administration

[Docket No. M-83-139-C]

B and B Coal Co., Petition for Modification of Application of Mandatory Safety Standard

B and B Coal Company, 225 Main Street, Joliett, Pennsylvania 17981 has filed a petition to modify the application of 30 CFR 75.1714 (self-contained self-rescue devices) to its Rock Ridge Slope (I.D. No. 36-07175) located in Schuylkill County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's follows:

1. The petition concerns the requirement that each operator make available to each person who goes underground a self-contained self-rescue device or devices approved by the Secretary which is adequate to protect the person for one hour or longer.

2. The mine is wet and virtually dust free. The upper area of the mine was deep and strip mined, leaving ventilation to the surace by means of abandoned slopes, cracks, fissures and strip pits. This creates a natural draft that would sweep noxious fumes to the surface away from the miners.

3. Petitioner states that the mine geology, undulation, thin coal and varying pitches make it impossible to wear the device while working. Sections of the mine are subjected to freezing temperatures, making constant availability of the devices questionable. In addition, the wet conditions of the mine make it difficult to locate a suitable dry storage location for the self-rescuers.

4. Petitioner proposes to continue using the present filter-type self-rescuers as an alternative to providing self-contained self-rescurers.

5. For these reasons, petitioner requests a modification of the standard.

Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or befor April 12, 1984. Copies of the petition are available for inspection at that address.

Dated: March 1, 1984.

Partricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 84-6716 Filed 3-12-84; 8:45 am]

BILLING CODE 4510-43-M

Pension and Welfare Benefit Programs Office

[Prohibited Transaction Exemption 84-14; Exemption Application No. D-4850]

Class Exemption for Plan Asset Transaction Determined by Independent Qualified Professional Asset Managers

AGENCY: Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This document contains a final exemption from certain prohibited transactions restrictions of the Employee Retirement Income Security Act of 1974 (ERISA) and from certain taxes imposed by the Internal Revenue Code of 1954 (the Code). The exemption permits various parties who are related to employee benefit plans to engage in transactions involving plan assets if, among other conditions, the assets are managed by persons, defined for purposes of this exemption as "qualified professional asset managers" (QPAMs), which are independent of the parties in interest and which meet specified financial standards. Additional exemptive relief is provided for employers to furnish limited amounts of goods and services in the ordinary course of business. Limited relief is also provided for leases of office or commercial space between managed funds and QPAMs or contributing employers. The exemption will affect participants and beneficiaries of employee benefit plans, the sponsoring employers of such plans, QPAMs and other persons engaging in the described transactions.

EFFECTIVE DATE: December 21, 1982.

FOR FURTHER INFORMATION CONTACT: Mr. Ivan L. Strasfeld, Office of Fiduciary Standards, Pension and Welfare Benefit Programs, telephone (202) 523-7901; or Ms. Charmaine B. Gordon, Plan Benefits Security Division, Office of the Solicitor, telephone (202) 523-9593, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4526, Washington, D.C. 20216. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: On December 21, 1982, the Department of Labor (the Department) published in the Federal Register (47 FR 56945) a proposed class exemption from certain of the restrictions of section 406 of ERISA, and from certain taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) of the Code.[1] The Department proposed the class exemption on its own motion pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975), specifically section 3.01 of that Procedure. The Department received over 50 public comments with regard to the proposed class exemption. In addition, a public hearing was held on March 10, 1983. Upon consideration of all the comments received and testimony offered at the public hearing, the Department has determined to grant the proposed class exemption, subject to certain modifications. These modifications and the major comments are discussed below.

Discussion of the Comments

A. General Exemption

1. Power of Appointment (Section I(a)). The proposed general exemption, set forth in Part I, permitted an investment fund managed by a QPAM to engage in all transactions described in ERISA section 406(a)(1)(A) through (D) with virtually all parties in interest of investing plans except the QPAM which manages the assets involved in the transaction, and those parties most likely to have the power to influence the QPAM. In this latter regard, under section I(a) of the proposed exemption, the exemption would not be available if a QPAM caused the investment fund to enter into a transaction with a party in interest, if at the time of the transaction, the party in interest dealing with the fund, or its "affiliate" (1) was authorized to appoint or terminate the QPAM as a manager of any of the plan's assets, (2) was authorized to negotiate the terms of the management agreement with the QPAM, or (3) had exercised such powers in the two years immediately preceding the date of the proposed transaction. Several commentators urged the Department to delete or modify the two year "lookback" rule contained in section I(a), asserting that the ability of a party in interest to exercise any influence ceases when the party in interest's power to appoint, or negotiate with, QPAM terminates. The

[1] Hereafter, references to the various provisions of section 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

Department is unable to conclude, as a general proposition, that the power to influence a QPAM ceases upon the termination of the power-holder's formal authority, or that benefits arranged during the period of the party's ability to appoint or negotiate with the QPAM will not inure to his or her benefit after these powers cease. However, in recognition that the ability to exercise undue influence diminishes with the passage of time, the Department has decided to modify the final exemption to provide for a one year "lookback" rule.

Certain comments noted that the class exemption as proposed failed to define "at the time of the transaction" which appeared in section I(a) and in several other provisions under the proposal. In the case of continuing transactions such as leases and loans, the commentators were concerned that events beyond the control of the QPAM which occurred after the date of a transaction could preclude the availability of the class exemption. According to a commentator, a continuing transaction such as a loan or lease which initially satisfied the conditions of the class exemption could later become prohibited if, for example, due to a change of circumstances, the party in interest borrower becomes affiliated with a person possessing the authority to appoint or terminate the QPAM. Another comment raised a related question regarding "after-acquired" party in interest status in the context of continuing transactions. Although, for example, a loan may originally have been entered into between an investment fund and a person who was not then a party in interest, the transaction may become a prohibited debtor-creditor relationship when the person later becomes a party in interest. In light of the above, the Department has adopted a new definition, under section V(i), to clarify that, with respect to continuing transactions, the exemption will be available if the conditions of the exemption were met either at the time the transaction was entered into or renewed, or at the time the transaction would have become prohibited but for this exemption.

Three commentators suggested that section I(a) should be modified to permit a contributing employer to a multiemployer plan to take advantage of the provisions of the general exemption even when such employer is affiliated with a person who is a member of the board of trustees of the plan. In the view of the commentators, in the case of a collectively bargained multiple employer plan whose board of trustees, comprised of representatives of union and management, as a body possesses the power of appointment or negotiation with respect to a QPAM, no one member of the board is likely to be in a position to influence the QPAM to cause an investment fund in which the multiple employer plan invests to engage in transactions with a particular contributing employer. Moreover, an absolute bar to broad relief under section 406(a) of ERISA for all contributing employers who are affiliated with a trustee may tend to result in difficulty in attracting qualified trustees. Nonetheless, considering the significance of this condition, and the fact that this exemption applies to QPAMs which manage single customer accounts, as well as pooled funds, the Department is unable to make a broad finding that, in all or most instances, the decision making authority possessed by a trustee will not be influenced, in fact, by the affiliated employer. Accordingly, the Department has determined not to revise this condition. Contributing employers who are adversely affected by the "power of appointment" rule are reminded that Part II of the exemption provides exemptive relief under section 406 (a) and (b) of ERISA for certain transactions involving those employers and their affiliates who cannot qualify for the general exemption provided by Part I. In addition, multiple employer plans which invest in pooled funds managed by insurance companies or banks would have the exemption for transactions with contributing employers available to them if they meet the conditions for such exemption contained in Prohibited Transaction Exemption 78–19 (43 FR 59915, December 22, 1978) and Prohibited Transaction Exemption 80–51 (45 FR 49709, July 25, 1980).

Other commentators requested that the Department, as a general matter, narrow those persons and entities listed under the definition of "affiliate" contained in section V(c) of the exemption. As part of the effort to lessen compliance burdens under the proposed exemption, the definition of affiliate in V(c) was developed in a manner designed to include fewer persons than similar provisions appearing in other class exemptions.[2] The persons identified as affiliates in section V(c) were persons most likely to share a strong identity of interest with those parties in interest seeking to engage in transactions with the investment fund managed by the QPAM. After considering the comments, the Department has determined that the safeguards contained in the exemption would not be significantly diminished by deleting those partnerships in which the person has less than a 5 percent interest from the definition of affiliate contained in section V(c)(2).

Finally, a commentator urged the Department to clarify whether section I(a) could have the effect of disqualifying parties in interest from engaging in transactions with a commingled investment fund that is managed by a QPAM if the party in interest has the authority to redeem or acquire units of the fund. The exemptive relief provided by Part I will not be available to such person since the ability to redeem or acquire units would be considered, for purposes of this exemption, the authority to appoint or terminate the QPAM as a manager of plan assets.

The general exemption set forth in Part I may be illustrated by the following examples:

Example (1). Plan P establishes a trust fund for a portion of its assets with Bank B. Assume that B meets the criteria for a QPAM under the class exemption. B uses Plan P assets to buy a building whose elevators are serviced by Company X under a maintenance contract. Absent this exemption, an investment of Plan P assets to purchase a modern elevator from X, a party in interest described in ERISA section 3(14)(B), would violate the restrictions contained in section 406(a)(1)(A), and the transaction could not proceed until exempted by the Department. The general exemption set forth in Part I would allow such a transaction if the conditions contained therein are met.

Example (2). QPAM X invests part of a pension fund's managed account to acquire a parcel of unimproved real property from its president Y. QPAM X has engaged in an act of self-dealing described in section 406(b)(1) of ERISA because it has caused the fund's assets to be used in a transaction which benefits a person in whom QPAM X has an interest which may affect the exercise of its best judgment as a fiduciary. Although Part I provides an exemption for the purchase of property from Y, it does not provide relief from acts described in section 406(b) of ERISA.

Example (3). Corporation C is the name fiduciary of Plan P. C chooses Bank B to manage the portion of P's assets allocated for real estate investments. Bank B uses these assets to purchase a commercial building in New York City from Corporation Z. Z is a wholly-owned subsidiary of C. No part

[2] See, e.g., the definition of affiliate contained in Prohibited Transaction Exemption 78–19 and Prohibited Transaction Exemption 80–51.

of the exemption would be available for the purchase of the building because Z is an affiliate (as defined in section V(c) of the exemption) of a party in interest (C) which has the authority to appoint or terminate the QPAM.

Example (4). Corporation C invests part of the assets of its Plan P in a group trust managed by Investment Advisor I. I uses group trust assets to purchase an office building which is subsequently leased to X. X provides administrative services to Plan P. During the term of the lease, X becomes a wholly-owned subsidiary of Corporation C. Although X, the party in interest, became an affiliate (as defined in section V(c)) of Corporation C which has the authority described in section I(a) of the exemption, Part I will continue to be available for the entire lease term since, at the time of the transaction (as defined in section V(i)), X was not affiliated with a party in interest that had the authority to appoint or terminate the QPAM.

Example (5). Plan M is a collectively bargained multi-employer pension plan administered by a joint board of union and employer trustees. The board of trustees chooses Insurance Company Y to manage a portion of its assets in a pooled separate account. The Insurance Company uses a portion of the pooled separate account assets to purchase computers from Corporation Z, a contributing employer to Plan M. These computers will be leased to the general public. Nether Z nor any of its affiliates is a member of the board of trustees. Although Z is a party in interest, as an employer any of whose employees are covered by the plan, the general exemption of Part I is available for the purchase of the computers. In this regard, neither Z nor an affiliate has the authority with respect to the plan described in section I(a) of the exemption.

Example (6). Assume the same facts as in Example (5) except that an officer of Corporation Z was a member of the board of trustees of Plan M for the year ending December 31, 1984. Insurance Company Y is chosen on March 15, 1985 to manage plan assets as a successor to Investment Adviser A whose two year management contract expired on March 14, 1985. Although before January 1, 1985, the officer had the authority to participate in the appointment of the QPAM and to negotiate the terms of the management contract, this authority was never exercised. Corporation Z can engage in transactions under Part I of the exemption because its affiliate, the officer, did not, at the time of the transaction have authority, and during the immediately preceding one year (when it had the authority) did not exercise it, to appoint the QPAM or negortiate a management agreement with the QPAM with regard to the Plan's assets.

Example (7). Plan P chooses a registered investment adviser, QPAM I, to manage 40 percent of its assets. The Plan allocates an additional 30 percent of its assets to a single customer insurance company separate account maintained by QPAM II. QPAM II uses a portion of the separate account's assets to purchase U.S. Government securities directly from Broker-Dealer B, wholly-owned subsidiary of QPAM I. Assuming that the QPAMs are unrelated entities, the general exemption of Part I is available for this transaction because neither QPAM I nor its affiliate, Broker-Dealer B, has, or exercised during the preceding one year, the authority to appoint or terminate QPAM II (or negotiate the QPAM's contract) as a manager of the Plan's assets involved in the transaction. In this regard, a person who is a plan fiduciary, as defined in section 3(21)(A) of ERISA, is deemed to be a fiduciary only with respect to those plan assets over which it exercises, or has responsibility to exercise, those functions which make it a fiduciary (See 29 CFR 2510.3-21(d)(2)). Thus, a fiduciary will be treated as a party in interest other than a fiduciary (i.e., a service provider) when it engages in a transaction involving plan assets with respect to which it is not a fiduciary. Accordingly, no additional relief under the self-dealing provisions of ERISA section 406(b) is required for this transaction which would be covered by Part I of ther exemption. It is to be noted, however, that if a QPAM with respect to a portion of a plan's assets engages all or a portion of those assets in a transaction with a second QPAM which manages a different portion of plan assets pursuant to an agreement, arrangement or understanding whereby it is expected that the second QPAM will engage in a transaction involving the assets managed by the second QPAM for the benefit of the first QPAM, each transaction will be treated as a prohibited transaction not afforded exemptive relief because both QPAM would be in violation of section 406(b)(1) or ERISA.

2. Transactions Specifically Excluded (Section I(b)). Section I(b) of the proposal excluded from exemptive relief those transactions described in prohibited Transaction Exemption 81-6 (46 FR 7527, January 23, 1981) (relating to securities lending arrangements), Prohibited Transaction Exemption 81-7 (subsequently modified and redesignated as Prohibited Transaction Exemption 83-1, 48 FR 895, January 7, 1983) (relating to acquisitions by plans of interests in mortgage pools) and Prohibited Transaction Exemption 82-87 (47 FR 21331, May 18, 1982) (relating to certain mortgage financing arrangements). Two commentators urged the Department to expand the relief provided by Part I of the exemption to include transactions described in Prohibited Transaction Exemptions 81-6, 81-7, and 82-87. As indicated in the preamble to the proposal, the Department believed that the transactions and conditions described in those exemptions were developed with regard to highly standardized industry practices and the generally accepted regulation that surrounds residential mortgage financing, mortgage pool and securities lending arrangements. After considering the issue, the Department continues to believe that the transctions discussed above should be subject to those specialized class exemptions. While other class exemptions for transactions that are shaped by customary industry practice and regulation could have been explicitly excluded from the relief granted herein, the Department did not explicitly exclude those class exemptions because they generally involve fiduciaries who engage in transactions beyond the scope of the 406(a) relief provided by Part I of the exemption and this exemption would not therefore afford them relief.[3]

3. QPAM as Decision Maker (Section I(c)). Section I(c) of the proposal required that the terms of the transaction be negotiated by, or under the authority and general direction of, the QPAM and that the QPAM make the decision to enter into the transaction. Section V(b) indicated that an "investment fund" whose assets could be engaged in transactions covered by this exemption would include any account or fund to the extent that the disposition of its assets is subject to the discretionary authority of the QPAM. Several commentators expressed concern whether the proposed exemption would apply to real estate transactions where the plan sponsor or its designee retains the right to veto or approve the transaction which has been negotiated on behalf of an investment fund by a QPAM. It was represented that the investment manager often has

[3] See, e.g., Prohibited Transaction Exemptions 77-9 (44 FR 1479, January 5, 1979), 79-1 (44 FR 5963, January 30, 1979) and 79-9 (44 FR 17819, March 23, 1979).

broad discretionary authority to locate investments, to negotiate the terms of the investments and to recommend the investments for approval. The commentators argued that where plans turn over large amounts of assets to one or more investment managers for the purpose of selecting suitable investments and delegate the authority to negotiate transactions necessary for their acquisition and income production, the exemption should not be withheld merely because the ultimate investment decision necessary for the acquisition is made by plan officials who retain the authority to insure that the plan's asset allocations are harmonious with its overall portfolio objectives and consistent with the maintenance of proper diversification.

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 investments of plan assets and the negotiations leading thereto, are the sole responsibility of an independent investment manager. It appears to the Department that, if exemptive relief were to be provided where the QPAM has less than ultimate discretion over acquisitions for an investment fund that it manages, the potential for decision making with regard to plan assets that would inure to the benefit of a party in interest would be increased. As a result, we are unable to conclude that the retention of a veto or approval power by the plan sponsor or its designee would be consistent with the underlying concept of the QPAM exemption, that is, the transfer of plan assets to an independent, discretionary, manager. For these reasons, the Department has determined not to revise the exemption in this regard.

Nothing contained in sections I(c) and V(b) would preclude a QPAM and those persons possessing the authority to appoint the QPAM from engaging in discussions and establishing guidelines (for purposes of insertion into the written management agreement described in section V(a)) with respect to the investment objectives and policies of the investment fund and their relationship to the assets of the plan's portfolio as a whole. The QPAM could adhere to these guidelines to the extent that there is no arrangement or requirement that the QPAM cause the plan assets to be engaged in transactions with parties in interest and so long as they otherwise comply with the fiduciary responsibility provisions of part 4 of title I of ERISA.

Several commentators raised the question whether the proposed exemption would apply to transactions which are subsidiary to a primary transaction, but which have not been actually negotiated by the QPAM. It was explained, for example, that a QPAM may purchase an office building from a party in interest on behalf of an investment fund where several of the existing lessees are also parties in interest with respect to plans participating in the investment fund. Under those circumstances, the terms of the investment fund. Under those circumstances, the terms of the subsidiary transaction would not have been negotiated by the QPAM. According to the comments, the value of the exemption would be greatly diminished if it did not provide relief for such transactions. Another commentator suggested that the Department clarify the exemption to include subsidiary transactions with parties in interest where the primary transaction negotiated and approved by the QPAM involves a person who is not a party in interest. It is the view of the department that section I(c) of the exemption will be deemed satisfied in the case of subsidiary transactions if the QPAM reviews the terms of the subsidiary transactions if the QPAM reviews the terms of the subsidiary transactions if the QPAM reviews the terms of the subsidiary transactions as part of its determination that the transaction, as a whole, is prudent and otherwise in the best interests of plan participants. The Department notes, however, that it does not interpret section I(c) as exempting a subsidiary transaction unless such transaction is itself subject to relief under the class exemption and the applicable conditions are otherwise met. In this regard, the Department expects that the determination of the purchase price of a building would appropriately reflect the effect on the value of the building of leases contained therein which mught not contain fair market value terms due to the passage of time or changed economic conditions. In addition, the Department further wishes to emphasize that transactions which are part of a broader agreement, arrangement or understanding designed to benefit parties in interest will not be considered to be transactions for which the QPAM is the independent decision maker.

Other commentators noted that the requirement that "the QPAM makes the decision on behalf of the investment fund to enter into the transaction" is inconsistent with customary practices involving property managers and would create practical problems in the management of real property for investment funds. According to the commentators, real property investments frequently require on-site management by property managers who may engage in hundreds of transactions each year with respect to a particular property. The commentators argued that it would be difficult for a QPAM to approve each property management transaction, Whether large or small, as suggested by Example (7) of the proposal. In addition, the commentators noted that property managers typically act in accordance with detailed budgets or gudelines developed by the QPAM. They further argued that, in all cases, the activities of the property manager are subject to periodic review and monitoring by the QPAM and that the QPAM retains full fiduciary responsibility with respect to the transaction. On the basis of these comments, the Department has determined to modify section I(c) in the final exemption to clarify that property managers may enter into transactions under the authority and general direction of the QPAM in accordance with the terms of guidelines developed and administered by the QPAM so long as the QPAM retains full fiduciary responsibility for such transactions.

Example (8). Investment Adviser I of Plan P locates and negotiates the purchase of an office building. Under the investment management agreement with the plan sponsor, Corporation C, I is required to seek the approval of C for real estate transactions. On the basis of I's recommendation, C approves the transaction. In a separate transaction , not subject to a veto or approval power, I determines, within the exercise of its discretion, to purchase air conditioning equipment from C. Part I of the class exemption would not be available for the purchase of the building due to C's retention of the authority to approve plan acquisitions. However, section II(a) of the exemption would allow the purchase of the air conditioning equipment provided there is no arrangement that requires I to buy the equipment from C and the conditions of section II(a) are otherwise met.

Example (9). Assume the same facts as in Example (8) except that Firm A, which provides accounting services to Plan P, is a major tenant in the building. As previously noted, Part I would not be available for the purchase of the building due to C's retention of the approval power. Similarly, the class exemption would not provide relief for

any subsidiary transaction which was in existence at the time the QPAM engaged in the primary transaction subject to the approval power. Accordingly, the exemption would not be available for the lease to Firm A. This result is destinguishable from the transactions described in Example (8) wherein the purchase of air conditioning equipment subsequent to the purchase of the building separately satisfied the conditions of Part II, whereas both transactions under this example fail by reason of the condition described in section I(c).

Example (10). QPAM X allocates a portion of the assets of a profit sharing plan to purchase corporate bonds directly from Broker-Dealer B, a non-party in interest to the plan. The bonds were originally issued by Corporation Z, an investment manager for a portion of the plan's assets that are not controlled by QPAM X. Under current law, the transaction would be considered an extension of credit between the plan and Corporation Z and would violate the restrictions contained in section 406(a) (1) (B) of ERISA. Since the Department expects that, as part of its fiduciary responsibilities, the QPAM would have analyzed the terms of the bonds prior to purchase, the relief provided by Part I could extend to the underlying extension of credit. Thus, Part I of the exemption could cover subsidiary transactions with parties in interest whether or not the primary transaction, e.g., the purchase, involves a person who is a party in interest.

Example (11). A collective fund for plans managed by a bank that is a QPAM invests assets to acquire a large office building. Under section I(c), the QPAM could contract with an unrelated property manager or leasing agent which would operate the property on a day to day basis, under the authority and general direction of the QPAM, for the purpose of making it a productive investment. So long as written guidelines are established and monitored by the QPAM, and the QPAM is responsible to the plans for the property manager's activities, the property manager could, for example, negotiate lease arrangements with parties in interest eligible for the exemption.

4. Parties "Related" to QPAM (Section I(d)). Subject to a limited exemption for leases of office space, a QPAM or its affiliate could not enter into transactions under the proposal with an investment fund which it managed. Moreover, under section I(d), the general exemption was not available if the QPAM and the party in interest were "related" parties. Section V(h) of the proposal provided that a party in interest and a QPAM would be related if either entity owned a five percent or more interest, directly or indirectly, in the other entity. Two commentators noted that the term "interest" which appeared in section V(h) could be interpreted to require the inclusion of investments owned by the QPAM or party in interest in a legal capacity on behalf of others in determining whether the percentage limitation is exceeded. In response to the comments, the exemption has been modified to provide that interests held in a legal capacity need not be considered so long as the holder does not possess the authority to vote or dispose of such interest.

One of the commentators further urged the Department to delete the phrase "directly or indirectly" from section V(h) as adding unnecessarily to the compliance burdens of a QPAM since remote parties without any significant economic interest would have to be identified. It is the intention of the Department that, for purposes of section V(h), the phrase "a person controlling, or controlled by" the party in interest or the QPAM should include any entity within the vertical chain of ownership containing the QPAM or party in interest. To the extent that the phrase "directly or indirectly" might be construed to require the inclusion of interests other than those intended, the Department has determined to make the requested deletion. Finally, contrary to the position of the commentator, the Department views a five percent interest, and not some larger number, as the meaningful measure for determining generally whether a QPAM is related to a party in interest and, therefore, susceptible to its influence.

Example (12). QPAM X proposes to use Plan P assets to make a mortgage loan on commercial property owned by Corporation C, a provider of services to Plan P. Corporation Y, a wholly-owned subsidiary of Corporation X, owns a controlling interest in Corporation C. Corporation X also owns a nine percent interest in the QPAM. The general exemption set forth in Part I is not available for this transaction because Corporation X, through its intermediary (Corporation Y), controls Corporation C and has an interest in the QPAM which exceeds five percent.

5. The Diverse Clientele Test (Section I(e)). Under section I(e) of the proposal, transactions with parties in interest would not have been covered if the amount of the plan's assets that were managed by a QPAM together with the assets managed by the same QPAM that were attributable to other plans maintained by the same employer (or its affiliate) represented more than 10 percent of all employee benefit plan assets under the management of the QPAM. The comments suggested that this condition was unnecessarily restrictive and would have a potentially adverse impact on many asset managers due to the nature or structure of their particular operations. For example, separate investment management affiliates may be established within a commonly controlled corporate group. Each such member of the affiliated group specializes in a distinct area of investments such as real estate or equity securities, or separate investment managers may be established within a controlled group to manage the assets of one or several large clients. Other commentators suggested that the requirement would discriminate against recently established investment managers that have a limited number of clients. As a result, several commentators urged the Department to delete this requirement or, in the alternative, to limit its application to transactions entered into by employers under Part II of the class exemption. Other commentators suggested raising the percentage limitation or applying the limitation after aggregating employee benefit plan assets of affiliated QPAM's. Finally, several commentators argued that the 10 percent limitation should apply on the basis of total client assets under management rather than only on the basis of total employee benefit plan assets. According to one commentator, all managed assets are treated in a similar manner and should be included under section I(e) for purposes of determining whether this condition is met.

The Department is not persuaded by the arguments submitted in favor of deletion of this percentage requirement or limitation of its application to transactions described in Part II of the class exemption. A plan which provides a significant portion of the QPAM's business as a manager of plan assets would, in many cases, be in a position to improperly influence investment decisions of the QPAM. Thus, in addition to the requirement contained in section I(a) which precludes a person holding the power to appoint the QPAM from benefiting from such authority, the Department believes that a separate condition is warranted to restrict persons having the authority to allocate significant amounts of a plan's assets to a QPAM from using their influence for the benefit of any other person who is a party in interest to the plan. With

respect to the aggregation of plan assets managed by affiliated QPAMs, no comment offered or testimony given at the public hearing was responsive to the Department's expressed belief that since the QPAMs within a controlled group are indeed organized as separate entities, are separately managed and are separately accountable for operating profits or losses, they should be considered separate focal points of potential undue influence for purposes of this requirement. The Department views the existence of a QPAM with a diverse clientele such that no one plan or its parties in interest can dictate the character or terms of specific transactions as a significant factor in its ability to propose and grant exemptive relief. However, the argument of many commentators that, as proposed, the condition may prove to be unduly restrictive has been accepted based, in large part, on the nature of the transactions exempted and the additional protections embodied in the class exemption. On the basis of these comments, the Department has modified section I(e) to increase the percentage limitation to 20 percent of all client assets managed by the QPAM. All funds that are turned over to a QPAM for discretionary management, whether or not constituting the assets of employee benefit plans, may be considered in applying the new 20 percent limitation.

Example (13). A QPAM is organized solely to manage the assets of only three plans. Plans X, Y, and Z delegate responsibility for the management of $3,000,000, $6,000,000 and $2,000,000, of their respective assets to the QPAM. The exemption would be available for transactions involving the parties in interest of Plan Z only.

Example (14). Investment Adviser I manages $100,000,000 in assets derived from public and private pension plans. I's sole remaining client is a private foundation, on whose behalf I manages $25,000,000. Investment Adviser I, which manages $25,000,000 of Plan P assets in a single customer real estate account, proposes to use Plan P assets to purchase a parcel of real estate from a party in interest with respect to such plan. Under the proposal, Part I of the exemption would not have been available for the transaction because Plan P's assets represented more than 10 percent of the total employee benefit plan assets managed by the Investment Adviser. As granted, the final exemption would now be available for this transaction because Plan P's assets represent not more than 20 percent of the total client assets managed by Investment Adviser I.

Example (15). Corporation X and its wholly owned subsidiary, Corporation Y, maintain separate pension plans for their employees. The assets of Corporation X's plan and Corporation Y's plan are managed by Investment Adviser Z (a QPAM) and comprise 14 percent and 12 percent, respectively, of the total client assets managed by the Investment Adviser. The Investment Adviser uses plan assets of Corporation X to purchase a shopping center. The Investment Adviser proposes to purchase landscaping shrubbery from a party in interest of either plan. The proposed exemption would not be available for this transaction because the assets of Corporation X's plan (14 percent) when aggregated with the assets of the plan maintained by its affiliate, Corporation Y, (12 percent) represent more than 20 percent of the total client assets managed by the QPAM. However, the exemption would be available for transactions involving parties in interest with respect to other plans managed by the QPAM if the conditions of the exemption are met.

6. Anti-Criminal Rule (Section I(g)). Section I(g) of the proposed exemption would not be available if either the QPAM or various affiliates (as defined in section V(d)), or an owner of a 5 percent or more interest in the QPAM were convicted of various crimes more fully described under that condition. Two commentators urged the Department to modify the affiliation rules under section V(d) to facilitate efforts to comply with this restriction. It appears that large insurance companies and banks may have several hundred officers, many of whom do not deal with employee benefit plan assets. The Department was urged to limit the number of affiliated officers to those who are highly compensated, or who have authority or control over plan assets. One of the comments further noted that the inclusion in the definition of affiliate of all corporations and partnerships in which the QPAM has an ownership interest could encompass hundreds or even thousands of companies without regard to the size of the QPAMs interest. The commentator argued that it would be difficult for a QPAM to determine for all entities in a QPAM's investment portfolio whether there had been a conviction for a listed crime. Therefore, the commentator urged the Department to modify the definition of affiliate so as to pertain only to entities in which the QPAM is a controlling owner or partner. Finally, a commentator suggested that the Department delete the affiliation rules and substitute a rule limited to individuals having direct access to plan assets. While the Department is unable to conclude that deletion of the affiliation rules would leave plans and their transactions that are covered by this exemption adequately protected, the Department has determined that it would be appropriate to modify the affiliation definition to exclude officers that are not highly compensated and who have no responsibility or control regarding plan assets, and those entities in which the QPAM has a *de minimus* ownership interest.

B. Special Exemptions for Employers

Part II of the proposed exemption provided limited relief under both section 406 (a) and (b) of ERISA for certain transactions involving those employers and certain of their affiliates which could not qualify for the general exemption provided by Part I.

1. Goods and Services. Part II was divided into two subparts. Section II(a) permitted transactions involving the furnishing of goods and services to an investment fund managed by a QPAM if the conditions of that exemption were satisfied. Under the proposal, transactions must have been necessary for the administration or management of the investment fund and must have taken place in the ordinary course of a business engaged in by the party in interest with the general public. As a limitation, section II(a)(4) of the proposal further required that no more than one percent of the party in interest's annual gross receipts from all sources were attributable to transactions engaged in with an investment fund pursuant to this special exemption.

In response to several comments, the Department wishes to specifically point out that where an employer and/or its affiliates may be entitled to relief under both Parts I and II of the class exemption, the employer or its affiliates may engage in transactions pursuant to either Part I or Part II of the class exemption.

A commentator noted that the class of affiliates which, by reason of the restriction of section I(a) (with reference to the definition of "affiliate" contained in section V(c) of the proposal) was excluded from the general exemption, was broader than the group of parties in interest related to an employer which was entitled to relief under Part II(a). According to the commentator, this approach produced a gap whereby certain affiliates of an employer were denied exemptive relief under both Parts I and II of the class exemption. The commentator recommended that Part II

be expanded to include either: (1) All parties in interest (other than the QPAM and persons related to the QPAM) not entitled to relief under Part I, or (2) employers and their affiliates as defined under section V(c). For purposes of consistency, the Department has amended section II(a) to provide relief for an employer and certain affiliates of the employer as defined in section V(c). Other (non-employer) parties in interest who, by reason of the application of section I(a), may not use the general exemption are provided limited relief for plan asset transactions under Parts III and IV of this exemption.

Another commentator urged the Department to expand section II(a) to permit a QPAM to select itself or affiliates to provide multiple services and to receive additional fees for such services, provided that an independent fiduciary authorizes the QPAM in advance to provide the services. The Department believes the situation described by the commentator presents potential violations of section 406(b) for which the Department is not prepared to grant additional relief.

One of the commentators argued that the "goods" which could be provided to the investment fund (as well as which might be acquired from the investment fund) should include securities or other financial instruments. In response, the Department believes that the QPAM is hired to make investment decisions on an objective and prudent basis and should not be subject to real or perceived influence by the appointing employer with respect to acquisitions of plan investments. To clarify this matter, the final exemption includes a new section V(j) which defines the term "goods."

Several comments suggested that it would be impossible to determine the gross receipts of a party in interest for the taxable year in which a transaction occurs for purposes of section II(a)(4) where the taxable year of such party in interest is not yet completed at the time of the transaction. In addition, the comments noted that it would be difficult in some cases to obtain the financial information necessary to determine compliance with this condition. As a result, the commentators recommended that the Department modify section II(a)(4) to provide that the value of goods and services provided by a party in interest to an investment fund not exceed one percent of: (1) The total assets of the investment fund as of the end of its prior fiscal year of (2) the gross receipts of the party in interest as of the end of its prior taxable year. Under the first alternative, the dollar amount involved would be determined by the size of the investment fund and, thus, the value of the goods and services involved in the transaction could be significant. Moreover, the Department believes that the realistic test of influence for purposes of this special relief should be determined by reference to the significance of the transaction, or the series of transactions, within a given year to the employer or its affiliates. The Department, however, agrees that it may be difficult to comply with the condition, as proposed. Therefore, the Department has modified the exemption so that the value of the goods and services provided to each investment fund managed by the QPAM in which assets of the plan(s) sponsored by the employer are invested may not exceed one percent of the gross receipts of such party in interest for its prior taxable year. The one percent limitation is applied on an investment fund by investment fund basis; no aggregation or averaging is permitted. With respect to a particular investment fund, each employer which has invested plan assets and each of its affiliates is entitled to earn up to one percent of its gross receipts from transactions with the fund; aggregation of the receipts of affiliated parties in interest is neither required nor permitted.

Example (16). Pursuant to a proper plan provision, Corporation A, a pension consulting firm which provides actuarial services in the ordinary course of its business, enters into an agreement with a QPAM for the management by the QPAM of the assets of the A-sponsored plan. The QPAM wishes to retain A to provide actuarial services with regard to the trust fund established for the plan. Although the relief afforded by Part I of the proposed exemption would not be available to Corporation A because it has the authority to hire and fire the QPAM, Part II of the exemption would permit Corporation A to provide the type of services that it normally furnishes to the public and that are necessary for the plan, if the remaining conditions of Part II are met.

Example (17). The Board of Directors of Corporation X allocates a portion of Plan P's assets to Investment Adviser I for real estate management under Investment Fund F. I uses these assets to purchase a shopping center. I contracts with X, a lighting fixtures wholesaler, to purchase and install new fluorescent fixtures throughout the shopping center. The contract sales price for the fixtures and installation amounted to 0.5 percent of the total gross receipts received by X during its prior taxable year. The special exemption for employers contained in section II(a) is available for the purchase of fixtures and the accompanying services because the total cost of these goods and services is less than one percent of X's total gross receipts for its prior taxable year and such goods and services are provided in the ordinary course of X's business.

Example (18). Assume that in addition to the facts stated in Example (17), X has an affiliate, Y, which sells and installs neon signs. Pursuant to section II(a) of the exemption, I can contract with Y to provide neon signs for the shopping center in an amount up to one percent of Y's total gross receipts for its prior taxable year. Thus, for each taxable year, each employer and its affiliate may derive up to one percent of its gross receipts from transactions with the same investment fund.

Example (19). Insurance Company I maintains two pooled separate accounts, A and B, for real estate investments. Employer E allocates portions of its plan's assets to accounts A and B for investment management. I contracts with E to provide those services which it provides to the general public in the ordinary course of its business to pooled separate accounts A and B in amounts constituting 0.5 percent and 1.5 percent, respectively, of E's gross receipts for the prior taxable year. The special exemption for employers contained in section II(a) is available for the provision of services to pooled separate account A. No relief is provided for the services to account B because the value of such services exceeds the one percent limitation contained in section II(a). In this regard, the exemption does ot permit an employer to average the value of goods and services provided to investment funds to satisfy this one percent limitation.

2. Leases. Section II(b) of the proposal permitted the leasing of office or commercial space by an investment fund to an employer, or an affiliate of the employer described in section 3(14)(E), (G), (H) or (I) of ERISA, if the unit of space under lease was suitable for use by different tenants and did not exceed 15 percent of the rentable space of the office building or commercial space. In addition, no commission could have been paid by the investment fund in connection with the transaction. Section II(b) further provided relief from the restrictions of ERISA section 407(a) for transactions involving the leasing of office space to employers even where such leases might not otherwise qualify under the employer real property rules by reason of the definition of "qualifying employer real property" contained in

ERISA section 407(d)(4).[4] However, in the case of a plan that was not an eligible individual account plan, immediately after the lease transaction, the aggregate fair market value of employer real property and employer securities held by the investment funds of the QPAM in which the plan had an interest could not exceed ten percent of the fair market value of the assets of the plan held in those investment funds.

Several commentators noted that the no commission rule would prohibit a plan from paying a commission to an independent third party real estate broker who identified and referred a qualified tenant to the QPAM. According to the comments, it is customary business practice for the building owner to pay the agent's commission. It was suggested that this requirement would discourage independent leasing agents and brokers from bringing qualified tenants to the QPAM's attention. The commentators indicated that a requirement prohibiting the payment of commissions to the QPAM, the employer, and any affiliates of the QPAM or employer would provide an adequate safeguard under the class exemption while, at the same time, permitting the QPAM to engage in customary leasing transactions on behalf of the investment fund. The Department has adopted this suggestion and modified the final exemption accordingly.

A number of commentators posed a question regarding whether the 15 percent limitation contained in section II(b)(4) would be exceeded if a QPAM used plan assets to acquire an office or industrial park containing a number of buildings and leased an entire building to a party in interest. While the lease would exceed 15 percent of a particular building, the commentators noted that it would only constitute a small percentage of the entire complex. The Department intends that the 15 percent requirement will apply to the entire office or industrial park if the buildings comprising the park can be viewed as part of a single, integrated investment. Language clarifying this intention has been added to section II(b)(4). Another commentator suggested an alternative approach under which the percentage limitation would apply to all of the real property held by a plan or the total amount of assets in the investment fund. Finally, a commentator urged the Department to adopt exceptions for leases by employers in properties owned by pooled vehicles through which the employer has invested plan assets if the plan has less than a 10 percent interest in the pooled vehicle or if the lease is less than 50,000 square feet. Under the suggested alternatives, the amount of space leased to a party in interest could be significant. Under those circumstances, there may not be a reasonable probability that comparable leases are being executed with unrelated parties so as to assure arm's-length terms in those leases entered into with parties in interest. Consequently, without the significant protections afforded by leases with unrelated parties, the Department does not believe that the suggested alternatives would be protective of the interests of participants and beneficiaries.

Several commentators requested clarification regarding the application of the 10 percent test of section II(b)(5) in the context of a commingled investment fund. According to the comments, because a plan owns only an undivided fractional interest in a commingled fund, it is generally deemed to hold the same fractional interest in any employer security or employer real property held by the fund. Therefore, the Department was urged to clarify section II(b)(5) to clearly indicate that the aggregate fair market value of employer real property and employer securities held by an investment fund should be determined on the basis of the plan's pro rata interest in such employer real property and employer securities. The Department accepts these comments, and has modified section II(b)(5) in the final exemption. Another commentator urged the Department to adopt an alternative approach under which section II(b)(5) would not apply at all to employer real property held in a pooled investment vehicle if the plan holds less than ten percent of the assets of such pooled investment vehicle. In light of the Department's discussion above regarding the application of section II(b)(5) on the basis of a plan's pro rata interest in an investment fund, the Department does not believe that further relief is warranted. A commentator suggested that the Department limit the definition of "employer real property" and "employer securities" contained in section II(b)(5) to only include real property leased to, or securities issued by, an employer or a person having a relationship to the employer described in section 3(14) (E) or (G) of ERISA (and not affiliates of employers decribed in section 3(14) (H) or (I)) in order to alleviate compliance burdens under the exemption. The Department finds merit in this comment and, after consideration of the statutory provisions of section 407(a) and 407(d)(7) of ERISA, upon which section II(b)(5) was predicated, has determined to revise the list of party in interest lease transactions which must be taken into account for purposes of this requirement. In response to another comment, the Department notes that, for purposes of section II(B)(5), the term "employer real property" includes only that portion of the office building or the commercial center actually leased to the party in interest. Lastly, two commentators suggested that the Department revise section (II)(b)(5) to provide an alternative rule which would state that a lease was in compliance with that condition if *all* of a plan's assets whether or not managed by the QPAM satisfy the 10 percent limitation of section 407(a) of ERISA. This suggestion has not been accepted. The Department notes in response that the exemption's 10 percent limitation is to be applied with regard to the assets of the investment funds managed by the QPAM and allows the QPAM to enter into such lease transactions without concerning itself as to whether the lease is qualifying employer real property. However, the overall restrictions on holdings of employer real property and employer securities contained in section 407(a) of ERISA must in any event be satisfied.

Example (20). Corporation X chooses Insurance Company I to manage Profit-Sharing Plan P's assets in a single customer separate account. I uses plan assets to purchase a fifty-story office building. I proposes to lease one floor of the building to Corporation Z, a wholly owned subsidiary of X. Independent real estate agent A will receive a commission payable from plan assets for locating the rental space. A is not related to either Corporation X or Insurance Company I. The special exemption provided by section II(b) is available for this transaction because the amount of space to be leased to Z is less than 15 percent of the rentable space of the office building and no commission will be paid by the separate account to the QPAM or to the employer or any affiliates thereof in connection with the transaction.

Example (21). X Corporation Pension Plan holds units worth $10,000,000 in a collective investment fund managed by Investment Adviser I. This investment represents 10 percent of the value of the investment fund. I purchases a suburban office park containing ten identical buildings. I proposes to lease one entire building with a value of $2,000,000 to X Corporation. The proposed lease would

[4] For example, a lease of an office by the investment fund to the employer may not meet the requirement of ERISA section 407(d)(4)(A) that a substantial number of leased parcels be dispersed geographically.

satisfy section II(b)(4) because the amount of space covered by the lease represents less than 15 percent of the rentable space of the office park. In addition, section II(b)(5) would be met with respect to the pension plan because the plan's pro rata interest in the employer real property (10 percent of $2,000,000) represents less than 10 percent of the plan's interest in the collective investment fund. Therefore, the special exemption provided by section II(b) would allow such a transaction.

Example (22). Pension Plan P allocates $1,000,000 and $2,000,000, respectively, to collective investment Funds A and B managed by a QPAM bank. These investments represent 5 percent of the value of Fund A and 10 percent of the value of Fund B. Fund A and Fund B each separately purchase a large office building and now propose to lease space in such buildings to Plan P's sponsor, Corporation C. Assume that the fair market value of the property leased to C by Fund A would represent $200,000 and 5 percent of the rentable space of Fund A's building. Assume further that the fair market value of the property leased to C by Fund B would represent $400,000 and 12 percent of the rentable space of Fund B's building. These leases will satisfy section II(b)(4) since they represent less than 15 percent of the rentable space on a building by building basis. In addition, section II(b)(5) would be met with respect to the pension plan because the plan's pro rata interest in the employer real property (5 percent of $200,000 plus 10 percent of $400,000) represents less than 10 percent ($50,000/$3,000,000=1.67 percent) of the plan's interest in the collective investment funds. Therefore, the special exemption provided by section II(b) would allow such transactions.

C. Specific Lease Exemption for QPAMs

Part III of the proposed exemption provided limited relief under section 406 (a) and (b) of ERISA for the leasing of office space by an investment fund to the QPAM, an affiliate of the QPAM, or a person who could not qualify for the general exemption provided by Part I because it held the power of appointment described in section I(a). As a limitation, the unit of space under the lease must have been suitable for use by different tenants and could not have exceeded one percent of the rentable space in the office buildings.

Several commentators noted that the one percent limitation on the amount of space leased was not a realistic restriction when applied to leases in small and medium-sized building. According to some of the commentators, one percent of the space in such buildings would be inadequate to conduct even the smallest business operation. As a result, several commentators suggested that the Department raise the percentagte limitation. Another commentator urged the Department to provide an alternative limitation of 7500 square feet. On the basis of these comments, the Department has amended Part III in to permit leases of the greater of 7500 square feet or 1 percent of the rentable space of the office building. In response to two comments, the Department has amended Part III order to clarify that the exemption is not limited to the leasing of office space but also includes leases of commercial property.

D. Definitions

1. QPAM (Section V(a)). Several commentators urged the Department to expand the definition of "bank" to include savings and loan associations. The commentators have represented that savings and loan associations satisfy criteria similar to the criteria used in the definition of a bank contained in section 202(a)(2) of the Investment Advisers Act of 1940. Other commentators noted that the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96–221, 94 Stat. 132, 12 U.S.C. 1464(n), authorized federal savings and loan associations to exercise general fiduciary powers upon application to the Federal Home Loan Bank Board. Another commentator represented that several states have authorized state-chartered institutions to exercise general fiduciary powers. On the basis of these comments, the Department has added a special provision designed to include eligible savings and loan associations in its definition of a QPAM. In this regard, certain savings and loan associations are organized as stock corporations with respect to which the "equity capital" standard as defined in section V(k) is appropriate. Others are established as mutual savings and loan associations or mutual savings banks which, under industry practices, measure capital in terms of "net worth" as defined in section V(1). The one million dollar standard may be satisfied by reference to either "equity capital" or "net worth", as the case may be.

A number of commentators noted that the $750,000 shareholder's equity and the $50 million of client assets under management standards of section V(a)(3) would eliminate many investment advisory firms that are not affiliated with financial institutions. According to the comments, many investment advisory firms are not heavily capitalized and therefore could not qualify as QPAMs. Other commentators posed a related concern by representing that many advisory firms conduct their business operations through a number of affiliated or subsidiary organizations which would similarly fail one or both of these standards unless the exemption permitted the aggregation of client assets and the financial resources of affiliated companies. As a result, several commentators urged the Department to reduce or delete these requirements.

The proposed exemption's premise was that basic financial standards must be required for every entity or person investing plan assets pursuant to the relief provided by the proposed exemption to assure some degree of financial accountability to plans in the event of breaches of fiduciary obligations and to discourage the exercise of undue influence upon the QPAM's decision making processes. None of the comments have persuasively refuted this premise. As indicated earlier (under the discussion of section I(e)), it is the Department's belief that the individual QPAM is more likely to be the focus of undue influence rather than the affiliated group of which it is a member. Moreover, it is apparent that a QPAM, as in the case of any other corporation, may be established as a separate entity to limit the liability of common principals. For these reasons, the Department cannot conclude that the assets under management and the capital of related, but separate, corporate entities should be aggregated mechanically where such aggregation has not practical significance.

However, in consideration of the concerns expressed by the commentators, the Department has determined that it would be appropriate to modify the class exemption to permit a QPAM who is an investment adviser to satisfy section V(a)(3) if an affiliate of the QPAM described in section V(c)(1) (such as a parent or subsidiary) unconditionally guarantees payment of the QPAM's liabilities (including any liabilities for damages resulting from its breach of any of its fiduciary responsibilities under ERISA), and if the QPAM and such affiliate have net worth, in the aggregate, in excess of $750,000. In the case of a QPAM that is a partnership, the Department is of the view that the net worth of the general partners comprising the QPAM partnership may be aggregated with the net worth of the QPAM for purposes of compliance with the minimum capital standard to the extent that the partners'

net worth would be available to satisfy any claims made against the QPAM.

Several of the commentators urged the Department to permit the use of fiduciary liability insurance as a means of satisfying the financial responsibility requirement applicable to investment advisers. It appears that insurance contractors or policies covering both negligent and intentional breaches of the fiduciary responsibility provisions of ERISA, and particularly such breaches of sections 404 and 406 of ERISA, are not readily available. Moreover, it appears that payments under "errors and omissions" or fiduciary liability policies may be made, under many policies, only for claims filed during the period the policies are in force, but not for claims made after expiration of the policies—even though the claims relate to alleged misconduct that arose during a policy's term. In the absence of some clear indication that the terms of currently marketed fiduciary insurance policies or contracts provide suitable protections to employee benefit plans, the Department cannot adopt the alternative of insurance suggested by commentators.

Two commentators urged the Department to expand the definition of QPAM to include real estate investment advisers who meet certain standards of academic and business expertise or who have made or placed in excess of, e.g., $10 million in real estate financing. Another commentator suggested that the Department adopt a revised definition of an investment adviser QPAM based, in part, on membership in a professional organization and compliance with its standards of practice. Other than requiring the necessary minimum standards of financial accountability for discretionary asset managers designed, in part, to discourage the exercise of undue influence by parties in interest, the Department does not believe that it would be appropriate to adopt a difinition that, in effect, would require membership in certain professional organizations, certain levels of educational experience or conformance with specified business practices.

Finally, several commentators recommended that the requirement that the QPAM acknowledge that it is a fiduciary in a written management agreement be clarified so as to permit notification by means of any writting. The commentators represented that investment managers employ different practices in acknowledging their fiduciary status. While noting that some insurance companies and banks acknowledge their fiduciary status in the insurance contract or trust agreement they issue to plans, the commentators suggested that other entities may satisfy this requirement by a separate letter that contains such an acknowledgement. The commentators argued that it would be time-consuming and expensive to require the amendment of thousands of insurance contracts and trust agreements. As noted in the proposal, it is the view of the Department that an entity would not achieve QPAM status unless it enters into a written management agreement or contract that contains a clear delegation of authority to act as a fiduciary with respect to some or all of the assets of a plan. In general, the requirement that there be a written management agreement may be satisfied so long as the necessary provisions, whether contained in a trust agreement, insurance contract, limited partnership agreement, etc., or in a separately executed "Management Agreement", describe with specificity the duties and responsibilities to be assumed by the entity and its management. Similarly, in requiring that the QPAM acknowledge that it is a fiduciary, the Department does not intend to unduly burden those financial entities eligible to achieve QPAM status under the class exemption. Therefore, this requirement would be satisfied if the written acknowledgement of fiduciary status is clearly evidenced in any one or more written documents which, in totality, comprise the written management agreement.

2. Investment Fund (Section V(b)). A number of commentators urged the Department to expand the definition of "investment fund" to expressly include various types of legal entities (other than those listed) in which plans have an interest. The Department had not intended that the definition of investment fund contain an all-inclusive list of investment vehicles. In the Department's view, the definition of investment fund as presently written provides a flexible approach designed to accommodate any account or fund to the extent that the disposition of its assets is subject to the discretionary authority of the QPAM. The Department notes that the written management agreement with the QPAM should adequately describe the investment vehicle in which plan assets are to be invested.

E. Retroactivity

Several commentators urged that the relief provided by the class exemption be given retroactive application. The commentators' suggestions for retroactive relief ranged from the effective date of ERISA's fiduciary responsibility provisions (January 1, 1975) to the date of the notice of proposed exemption (December 21, 1982). Only as of the date of proposal was the Department's prevously articulated general intention to provide deregulatory relief from the prohibited transaction provisions of ERISA reduced to a detailed format of structural guidance for plans and their fiduciaries. Accordingly, in the interests of sound administration, the Department believes it appropriate that this exemption be effective from December 21, 1982.

F. Miscellaneous

1. A commentator asserted the necessity for an additional exemption for the acquisition and holding of employer securities and employer real property where the employer is a contributing employer to a multiple employer pension plan. Prohibited Transaction Exemptions 78–19 and 80–51 already provide substantial relief for acquisitions and holdings of employer securities and employer real property by pooled separate accounts and collective investment funds that are sponsored by insurance companies and banks, respectively, and in which multiple employer plans invest. The Department does not believe that a sufficient showing has been made that the problems associated with the restrictions imposed by ERISA section 407(a) on single customer accounts consisting of multiple employer plan assets are commonplace and, consequently, is unable to make the findings necessary to grant exemptive relief. Of course, upon proper application demonstrating that this is a realistic concern, the Department would be prepared to consider what relief, if any, is appropriate.

2. A commentator urged the Department to relax the conditions under which this exemption is being granted so that, e.g., without regard to the diversification test of section I(e) and the financial standards that qualify a QPAM under section V(a), plans could acquire publicly traded securities that are issued by large, heavily capitalized, companies. The Department has determined that adoption of this approach would arbitrarily encourage one specific form of plan investment over another. Therefore, the Department cannot conclude that further relief is warranted.

3. In response to a comment, the Department has revised section V(c) to clarify that an "independent" individual or entity designated by a plan sponsor as named fiduciary of its plan with authority to appoint or terminate the QPAM as a manager of plan assets will

be considered an "affiliate" of that plan sponsor.

4. A commentator noted that the arm's-length rule contained in sections I(f) and III(c) of the proposed exemption was essentially the same as the arm's-length rule contained in Prohibited Transaction Exemption 78–19 except that the phrase "that requires the consent of the QPAM" was omitted under the proposal. For purposes of consistency, the Department has adopted this comment and modified the final exemption accordingly.

5. A commentator suggested that the Department modify section II(a)(2), permitting the furnishing or servicing of goods by employers if the transactions are necessary for the administration or management of the investment fund, by deleting the word "necessary" and substituting the words "in furtherance of" to clarify that the relief may be available even if there are sources for the goods and services other than the party in interest. Without disagreeing with the commentator, the Department intended that the term "necessary" have the same meaning as a similar provision contained in section 408(b)(2) of ERISA and defined under 29 CFR 2550.408b–2(b). No modification is necessary.

6. Two commentators urged the Department to delete the phrase "with the general public" from section II(a)(3) of the class exemption without further explanation. The Department believes that the presence of independent customer business provides an important protection under the class exemption. Therefore, the Department has determined not to revise this condition.

7. In response to a comment, the Department notes that the terms "commercial space" or "commercial center" as used in section II(b) would include industrial, warehouse, distribution or multi-use space.

8. One commentator raised the question whether an unincorporated sole proprietorship can qualify as a QPAM under section V(a)(4). In the Department's view, a sole proprietorship that satisfies the minimum capital and funds-under-management standards of section V(a)(4) can qualify as a QPAM.

9. Finally, in response to several comments, the Department wishes to takes the opportunity to state that the grant of this class exemption for transactions involving the assets of plans managed by independent institutional managers does not foreclose future consideration of additional exemptive relief for transactions involving plan assets that are not managed by "QPAMs" as defined for purposes of this exemption, or for transactions which do not meet all of the conditions of this exemption. For example, the Department may pursue additional exemptive relief for transactions involving assets of plans managed by in-house managers if the requisite findings under section 408(a) can be made.

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 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 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 ERISA; 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 ERISA and the Code, including statutory exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and (3) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

Exemption

In accordance with section 408(a) of ERISA and section 4975(c)(2) of the Code, and based upon the entire record, including the written comments submitted in response to the notice of December 21, 1982, the Department makes the following determinations:

(a) The class exemption set forth herein is administratively feasible;

(b) It is in the interests of plans and of their participants and beneficiaries; and

(c) It is protective of the rights of participants and beneficiaries of plans.

Accordingly, the following exemption is hereby granted under the authority of section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975).

Part I—General Exemption

Effective December 21, 1982, the restrictions of ERISA section 406(a)(1)(A) through (D) and the taxes imposed by Code section 4975 (a) and (b), by reason of Code section 4975(c)(1)(A) through (D), shall not apply to a transaction between a party in interest with respect to an employee benefit plan and an investment fund (as defined in section V(b)) in which the plan has an interest, and which is managed by a qualified professional asset manager (QPAM) (as defined in section V(a)), if the following conditions are satisfied:

(a) At the time of the transaction (as defined in section V(i)) the party in interest, or its affiliate (as defined in section V(c)), does not have, and during the immediately preceding one year has not exercised, the authority to—

(1) Appoint or terminate the QPAM as a manager of any of the plan's assets, or

(2) Negotiate the terms of the management agreement with the QPAM (including renewals or modifications thereof) on behalf of the plan;

(b) The transaction is not described in—

(1) Prohibited Transaction Exemption 81–6 (46 FR 7527; January 23, 1981) (relating to securities lending arrangements),

(2) Prohibited Transaction Exemption 83–1 (48 FR 895; January 7, 1983) (relating to acquisitions by plans of interests in mortgage pools), or

(3) Prohibited Transaction Exemption 82–87 (47 FR 21331; May 18, 1982) (relating to certain mortgage financing arrangements);

(c) The terms of the transaction are negotiated on behalf of the investment fund by, or under the authority and general direction of, the QPAM, and either the QPAM, or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM, makes the decision on behalf of the investment fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest;

(d) The party in interest dealing with the investment fund is neither the QPAM nor a person related to the QPAM (within the meaning of section V(h));

(e) The transaction is not entered into with a party in interest with respect to any plan whose assets managed by the

QPAM, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof described in section V(c)(1) of this exemption) or by the same employee organization, and managed by the QPAM, represent more than 20 percent of the total client assets managed by the QPAM at the time of the transaction;

(f) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the QPAM, the terms of the transaction are at least as favorable to the investment fund as the terms generally available in arm's length transactions between unrelated parties;

(g) Neither the QPAM nor any affiliate thereof (as defined in section V(d)), nor any owner, direct or indirect, of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of: any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA. For purposes of this section (g), a person shall be deemed to have been "convicted" from the date of the judgement of the trial court, regardless of whether that judgement remains under appeal.

Part II—Specific Exemptions for Employers

Effective December 21, 1982, the restrictions of sections 406(a), 406(b)(1) and 407(a) of ERISA and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of Code section 4975(c)(1) (A) through (E), shall not apply to:

(a) The sale, leasing, or servicing of goods (as defined in section V(j)), or to the furnishing of services, to an investment fund managed by a QPAM by a party in interest with respect to a plan having an interest in the fund, if—

(1) The party in interest is an employer any of whose employees are covered by the plan or is a person who is a party in interest by virtue of a relationship to such an employer described in section V(c),

(2) The transaction is necessary for the administration or management of the investment fund,

(3) The transaction takes place in the ordinary course of a business engaged in by the party in interest with the general public,

(4) Effective for taxable years of the party in interest furnishing goods and services after the date this exemption is granted, the amount attributable in any taxable year of the party in interest to transactions engaged in with an investment fund pursuant to section II(a) of this exemption does not exceed one (1) percent of the gross receipts derived from all sources for the prior taxable year of the party in interest, and

(5) The requirements of sections I (c) through (g) are satisfied with respect to the transaction;

(b) The leasing of office or commercial space by an investment fund managed by a QPAM to a party in interest with respect to a plan having an interest in the investment fund, if—

(1) The party in interest is an employer any of whose employees are covered by the plan or is a person who is a party in interest by virtue of a relationship to such an employer described in section V(c),

(2) No commission or other fee is paid by the investment fund to the QPAM or to the employer, or to an affiliate of the QPAM or employer (as defined in section V(c)), in connection with the transaction,

(3) Any unit of space leased to the party in interest by the investment fund is suitable (or adaptable without excessive cost) for use by different tenants,

(4) The amount of space covered by the lease does not exceed fifteen (15) percent of the rentable space of the office building, integrated office park, or of the commercial center (if the lease does not pertain to office space),

(5) In the case of a plan that is not an eligible individual account plan (as defined in section 407(d)(3) of ERISA), immediately after the transaction is entered into, the aggregate fair market value of employer real property and employer securities held by investment funds of the QPAM in which the plan has an interest does not exceed 10 percent of the fair market value of the assets of the plan held in those investment funds. In determining the aggregate fair market value of employer real property and employer securities as described herein, a plan shall be considered to own the same proportionate undivided interest in each asset of the investment fund or funds as its proportionate interest in the total assets of the investment fund(s). For purposes of this requirement, the term "employer real property" means real property leased to, and the term "employer securities" means securities issued by, an employer any of whose employees are covered by the plan or a party in interest of the plan by reason of a relationship to the employer described in subparagraphs (E) or (G) of ERISA section 3(14), and

(6) The requirements of sections I (c) through (g) are satisfied with respect to the transaction.

Part III—Specific Lease Exemption for QPAMs

Effective December 21, 1982, the restrictions of section 406(a)(1) (A) through (D) and 406(b) (1) and (2) of ERISA and the taxes imposed by Code section 4975 (a) and (b), by reason of Code section 4975(c)(1) (A) through (E), shall not apply to the leasing of office or commercial space by an investment fund managed by a QPAM to the QPAM, a person who is a party in interest of a plan by virtue of a relationship to such QPAM described in subparagraphs (G), (H), or (I) of ERISA section 3(14) or a person not eligible for the General Exemption of Part I by reason of section I(a), if—

(a) The amount of space covered by the lease does not exceed the greater of 7500 square feet or one (1) percent of the rentable space of the office building, integrated office park or of the commercial center in which the investment fund has the investment,

(b) The unit of space subject to the lease is suitable (or adaptable without excessive cost) for use by different tenants,

(c) At the time the transaction is entered into, and at the time of any subsequent renewal or modification thereof that requires the consent of the QPAM, the terms of the transaction are not more favorable to the lessee than the terms generally available in arm's length transactions between unrelated parties, and

(d) No commission or other fee is paid by the investment fund to the QPAM, any person possessing the disqualifying powers described in section I(a), or any affiliate of such persons (as defined in section V(c)), in connection with the transaction.

Part IV—Transactions Involving Places of Public Accommodation

Effective December 21, 1982, the restrictions of section 406(a)(1) (A)

through (D) and 406(b) (1) and (2) of ERISA and the taxes imposed by Code section 4975 (a) and (b), by reason of Code section 4975(c)(1) (A) through (E), shall not apply to the furnishing of services and facilities (and goods incidental thereto) by a place of public accommodation owned by an investment fund managed by a QPAM to a party in interest with respect to a plan having an interest in the investment fund, if the services and facilities (and incidental goods) are furnished on a comparable basis to the general public.

Part V—Definitions and General Rules

For the purposes of this exemption:

(a) The term "qualified professional asset manager"or "QPAM" means—

(1) A bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 that has the power to manage, acquire or dispose of assets of a plan, which bank has, as of the last day of its most recent fiscal year, equity capital (as defined in section V(k)) in excess of $1,000,000 or

(2) A savings and loan association, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, that has made application for and been granted trust powers to manage, acquire or dispose of assets of a plan by a State or Federal authority having supervision over savings and loan associations, which savings and loan association has, as of the last day of its most recent fiscal year, equity capital (as defined in section V(k)) or net worth (as defined in section V(l)) in excess of $1,000,000 or

(3) An insurance company which is qualified under the laws of more than one State to manage, acquire, or dispose of any assets of a plan, which company has, as of the last day of its most recent fiscal year, net worth (as defined in section V(1)) in excess of $1,000,000 and which is subject to supervision and examination by a State authority having supervision over insurance companies, or

(4) An investment adviser registered under the Investment Advisers Act of 1940 that has, as of the last day of its most recent fiscal year, total client assets under its management and control in excess of $50,000,000, and either (A) shareholders' or partners' equity (as defined in section V(m)) in excess of $750,000, or (B) payment of all of its liabilities including any liabilities that may arise by reason of a breach or violation of a duty described in sections 404 of 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 $750,000, 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 $750,000;

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.

(b) An "investment fund" includes single customer and pooled separate accounts maintained by an insurance company, individual trusts and common, collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of the QPAM) is subject to the discretionary authority of the QPAM.

(c) For purposes of section I(a) and Part II, and "affiliate" of a person means—

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person,

(2) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, 5 percent or more partner, or employee (but only if the employer of such employee is the plan sponsor), and

(3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets. A named fiduciary (within the meaning of section 402(a)(2) of ERISA) of a plan and an employer any of whose employees are covered by the plan are affiliates with respect to each other for purposes of section I(a).

(d) For purposes of section I(g) an "affiliate" of a person means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person,

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

(e) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(f) The term "party in interest" means a person described in ERISA section 3(14) and includes a "disqualified person," as defined in Code section 4975(e)(2).

(g) The term "relative" means a relative as that term is defined in ERISA section 3(15), or a brother, a sister, or a spouse of a brother or sister.

(h) A QPAM is "related" to a party in interest for purposes of section I(d) of this exemption if the party in interest (or a person controlling, or controlled by, the party in interest) owns a five percent or more interest in the QPAM or if the QPAM (or a person controlling, of controlled by, the QPAM) owns a five percent of more interest in the party in interest. For purposes of this definition:

(1) The term "interest" means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation,

(B) The capital interest or the profits interest of the entity if the entity is a partnership, or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an interest held in any capacity if the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest. (i) The time as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in 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 the 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 time 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.

(j) The term "goods" includes all things which are movable or which are fixtures used by an investment fund but does not include securities, commodities, commodities futures, money, documents, instruments, accounts, chattel paper, contract rights and any other property, tangible or intangible, which, under the relevant facts and circumstances, is held primarily for investment.

(k) For purposes of section V(a) (1) and (2), the term "equity capital" means stock (common and preferred), surplus, undivided profits, contingency reserves and other capital reserves.

(l) For purposes of section V(a)(3), the term "net worth" means capital, paid-in and contributed surplus, unassigned surplus, contingency reserves, group contingency reserves, and special reserves.

(m) 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.

Signed at Washington, D.C. this 8th day of March, 1984.

Alan D. Lebowitz,

Assistant Administrator for Fiduciary Standards, Office of Pension and Welfare Benefit Programs, U.S. Department of Labor.

[FR Doc. 84-6707 Filed 3-12-84; 8:45 am]

BILLING CODE 4510-29-M

[Prohibited Transaction Exemption 84-15; Exemption Application No. D-4230 et al.]

Grant of Individual Exemptions; East Side Electric Supply, Inc. Pension Plan and Retirement Trust, et al.

AGENCY: Pension and Welfare Benefit Programs, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This documents contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1954 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of pendency were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

East Side Electric Supply, Inc. Pension Plan and Retirement Trust (the Plan) Located in Phoenix, Arizona

[Prohibited Transaction Exemption 84-15; Exemption Application No. D-4230]

Exemption

The restrictions of section 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) The proposed purchase by the Plan of certain unimproved real property (the Land) from Strupp Brothers Investments (the Partnership), a party in interest with respect to the Plan, provided that the purchase price of the Land is not more than its fair market value on the date of transfer; (2) the proposed ground lease (the Ground Lease) of the Land by the Plan to the Partnership; (3) the subsequent sublease of the Land by the Partnership to East Side Electric Supply, Inc: (the Employer), the sponsor of the Plan; (4) the possible resale of the Land by the Plan to the Partnership pursuant to a put option in the Ground Lease exercisable solely by the Plan; and (5) the personal guarantees by the partners in the Partnership of the rental payments due the Plan under the Ground Lease as well as any payments that may be due the Plan under the Plan's right to exercise the put option in the Ground Lease; provided that the terms and conditions of such transactions are at least as favorable to the Plan as those obtainable by the Plan in arm's-length transactions with unrelated parties.

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 January 6, 1984 at 49 FR 960.

FOR FURTHER INFORMATION CONTACT: Ms. Katherine D. Lewis of the Department, telephone (202) 523-8982. (This is not a toll-free number.)

[Prohibited Transaction Exemption 84-16; Exemption Application No. D-4272]

Supplemental Pension Plan of Consolidated Rail Corporation (the Plan) Located in Philadelphia, Pennsylvania

Exemption

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reasons of section

4975(c)(1)(A) through (D) of the Code, shall not apply to the cash sale on January 18, 1983 to the Consolidated Rail Corporation (Conrail), a party in interest with respect to the Plan, by the Penn Central Pension Fund Liquidating Account (the Liquidating Account), which holds certain Plan assets, of all shares owned by the Liquidating Account of common stock of the Pennsylvania Car Leasing Company and the transfer of certain related assets between Conrail and the Liquidating Account pursuant to the terms of a stock purchase agreement dated January 11, 1983, described in the notice of proposed exemption, provided the net amount received by the Liquidating Account was no less than the fair market value of the assets it transferred to Conrail on the dates of such transfer.

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 October 14, 1983 at 48 FR 46884.

Effective Date: This exemption is effective January 11, 1983.

Written Comments: The Department has received 87 written comments from Plan participants and beneficiaries. Four of the comments expressed disapproval of the proposed exemption but offered no reason for the disapproval. Six of the comments expressed approval of the proposed exemption. The remaining comments indicated concern that the exempted transaction would reduce or eliminate benefits payable under the Plan. Conrail's representative has explicitly advised that Conrail believes the transaction will have no adverse effect upon benefits payable under the Plan. Further, Girard Bank, the Plan trustee, has explicitly represented that the transaction is in the interest, and protective of the rights, of the Plan and its participants and beneficiaries, and that the transaction will have no adverse effect upon the payment of benefits under the Plan. The Department has considered this information and has determined, on the basis of the entire record in this case, that the exemption should be granted as proposed.

For Further Information Contact: Mrs. Miriam Freund, of the Department, telephone (202) 523-8971. (This is not a toll-free number.)

[Prohibited Transaction Exemption 84-17; Exemption Application No. D-4335]

National Roofing Industry Pension Plan (the Plan) Located in Miami, Florida

Exemption

The restrictions of section 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reasons of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed purchase by the plan of certain real property (the Property) for cash in the amount of $670,000 from the United Union of Roofers, Waterproofers and Allied Workers provided that this amount is not greater than the fair market value of the Property at the time it is purchased by the Plan.

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 October 14, 1983 at 48 FR 46891.

Comments and Hearing Request

The Department received one written comment which objected in principle to the granting of the exemption. No requests for a hearing were received. The Department has considered the comment and based on the record taken as a whole has decided to grant the exemption in the form in which it was proposed.

For Further Information Contact: Richard Small of the Department, telephone (202) 523-7222. (This is not a toll-free number.)

United Precision Machine & Engineering Company Profit Sharing Plan (the Plan) Located in Salt Lake City, Utah

[Prohibited Transaction Exemption 84-18; Exemption Application No. D-4527]

Exemption

The restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the loan by the Plan of $200,000 (the Loan) the United Precision Machine & Engineering Company, the sponsor of the Plan, provided that the terms and conditions of the Loan are not less favorable to the Plan than those obtainable in a similar transaction with an unrelated party.

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 January 6, 1984 at 49 FR 961.

For Further Information Contact: Mr. David Stander of the Department, telepnone (202) 523-8881. (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 of the Act and/or 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 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) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, D.C., this 8th day of March 1984.

Elliot I. Daniel,

Acting Assistant Administrator for Fiduciary Standards, Office of Pension and Welfare Benefit Programs, U.S. Department of Labor.

[FR Doc. 84-6709 Filed 3-12-84; 8:45 am]

BILLING CODE 4510-29-M

[Application No. D-4150 et al.]

Proposed Exemptions; Five Star Chemical Corporation Profit Sharing Retirement Plan, et al.

AGENCY: Pension and Welfare Benefit Programs, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the