equipment or material to which this recognition is tied, or that its recognition is limited to certain products;

CSA shall inform OSHA as soon as possible, in writing, of any change of ownership or key personnel, including details;

CSA will continue to meet the requirements for recognition in all areas where it has been recognized; and

CSA will always cooperate with OSHA to assure compliance with the letter as well as the spirit of its recognition and 29 CFR 1910.7.

Effective Date

This recognition will become effective on March 24, 1995, and will be valid until December 24, 1997, (a period of five years from the date of the original recognition, December 24, 1992), unless terminated prior to that date, in accordance with 29 CFR 1910.7.

Signed at Washington, DC this 20th day of March, 1995.

Joseph A. Dear,

Assistant Secretary.

[FR Doc. 95–7366 Filed 3–23–95; 8:45 am]

BILLING CODE 4510–26–M

Pension and Welfare Benefits Administration

[Application No. D–09602]

Proposed Class Exemption for Plan Asset Transactions Determined by In-House Asset Managers

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed class exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). If granted, the proposed exemption would exempt various transactions involving employee benefit plans whose assets are managed by in-house managers (INHAMS), provided that the conditions of the proposal are met. The proposed exemption, if granted, would affect participants and beneficiaries of employee benefit plans, the sponsoring employers of such plans, INHAMS, and other persons engaging in the described transactions.

DATES: Written comments and requests for a hearing must be received by the Department on or before May 8, 1995.

ADDRESSES: All written comments and requests for a public hearing (preferably 3 copies) should be sent to: Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, 200 Constitution Avenue, NW, Washington, DC 20210, Attention: CIEBA Class Exemption Proposal. The application for exemption (Application Number D–9602), as well as all comments received from interested persons, will be available for public inspection in the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Avenue, NW, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Virginia J. Miller, Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210 (202) 219–8971 (not a toll-free number); or Paul D. Mannina, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210 (202) 219–9141 (not a toll free number.)

SUPPLEMENTARY INFORMATION: This document contains a notice of pendency before the Department of a proposed class exemption from certain of the restrictions of sections 406 and 407(a) 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. The proposed exemption was requested in an application dated December 16, 1993, submitted by the Committee on Investment of Employee Benefits Assets (CIEBA) [1] pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR section 2570 subpart B (55 FR 32836, August 10, 1990).[2]

I. Background

On March 13, 1984, the Department granted Prohibited Transaction Exemption 84–14 (PTE 84–14) (49 FR 9494), a class exemption which 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 a ''qualified professional asset manager'' (QPAM), which is independent of the parties in interest and which meets 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 QPAM exemption was proposed by the Department on its own motion in an effort to give institutional managers greater flexibility to engage in a variety of beneficial transactions which would otherwise have been prohibited by ERISA, without sacrificing the interests of plan participants and beneficiaries. In its proposal for the QPAM exemption, the Department noted its belief that, as a general matter, transactions entered into on behalf of plans with parties in interest are most likely to conform to ERISA's general fiduciary standards where the decision to enter into the transaction is made by an independent fiduciary. Thus, the relief contained in the QPAM exemption was predicated upon the existence of a professional asset manager who is solely responsible for the discretionary management of plan assets that are transferred to its control.

The QPAM exemption did not provide relief for transactions involving the assets of plans managed by in-house asset managers. Nonetheless, in granting the QPAM exemption, the Department noted that the grant of the QPAM exemption did not foreclose future consideration of additional exemptive relief for transactions involving plan assets that are not managed by ''QPAMs'' or for transactions which do not meet all of the conditions of PTE 84–14. The Department further stated that it would consider pursuing additional exemptive relief for transactions involving assets of plans managed by in-house managers if the requisite findings under section 408(a) could be made.

CIEBA, in its application, has requested exemptive relief for in-house managers similar to that available to outside managers under the QPAM exemption. CIEBA represents that in-house managers encounter technical problems under the prohibited transaction rules of ERISA in the course of considering arm's-length transactions that would be in the interests of their plans. The applicant believes that the narrowly focused relief requested, combined with the conditions and restrictions built into the exemption,

---

[1] CIEBA is a committee of the Financial Executives Institute, an organization whose membership is made up of senior financial executives in corporations engaged in, among other things, banking, manufacturing, and insurance.

[2] Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor. In the discussion of the exemption, references to sections 406 and 408 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

should resolve the most common problems faced by CIEBA members while being protective of the interests of plan participants and beneficiaries.

II. Discussion of the Application

A. Summary of Facts and Representations

The application contains facts and representations with regard to the requested exemption which are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the applicant.

The applicant represents that many transactions that have little if any potential for abuse of the plan constitute technical prohibited transactions as a result of the breadth of the rules under section 406(a) and the definition of party in interest. The applicant states that the problem results largely from the inclusion of all persons providing services to a plan in the definition of a party in interest, under section 3(14)(B) of ERISA, as well as persons owning a 10% or more interest in such service providers, under section 3(14)(H) or (I). For example, a broker-dealer who has an ongoing relationship with a plan through its securities brokerage business may be prohibited from selling debt securities issued by itself or its parent organization to the plan, or otherwise from selling property to the plan (other than securities, which meet the requirements of PTE 75–1).[3] Similarly, CIEBA represents that a bank which provides trustee or custodial services to a plan may not be able to engage in any sale or credit transactions with that plan.

CIEBA states that INHAMs have become an established part of many large companies which manage some or all of their plan assets in-house. According to the applicant, many of the large corporations that make up its membership maintain one or more employee benefit plans holding in the aggregate assets in excess of $250 million. These large corporations have determined that they can reduce costs and maintain high quality management by developing an in-house asset management capability rather than relying exclusively on outside managers or consultants. It is represented that, in addition to providing reduced costs for comparable or better quality management, in-house managers are attractive to employers because they devote their time solely to the plan's asset management activities, while outside managers have other clients and responsibilities. The applicant also asserts that the named plan fiduciaries benefit from having access to in-house expertise and advice to assist them in carrying out their fiduciary responsibilities.

The applicant represents that the in-house management of plan assets can take several forms. The in-house manager may be a direct or indirect subsidiary of an employer with respect to a plan. Alternatively, the management of the assets may be performed by a division or group within the employer's corporate structure that reports to the employer's treasurer or senior financial officer. In some instances, the in-house manager is established as a separate membership non-profit corporation, with the majority of the members being officers or directors of the employer. According to the applicant, the in-house manager has direct management responsibility over at least part of the assets, and usually also advises a higher-level investment committee of the employer or other named fiduciary of the plan with respect to asset allocation and the selection and monitoring of outside managers.

The applicant states that the in-house manager's operations are monitored by a plan fiduciary, which may be a senior management employee, a committee made up of, or appointed by, the plan sponsor's board of directors, or a person otherwise appointed by the board or the named fiduciary of the plan. The fiduciary monitors the in-house manager's performance and sets investment guidelines and objectives for the sponsor's plans. The investment guidelines promulgated by the fiduciary generally describe the overall investment strategy and objectives for the plan, any criteria for investment in certain asset classes, and what level of approvals, if any, are required for particular investments.

CIEBA represents that, unless the Department provides broad exemptive relief for in-house asset managers, plans will be disadvantaged because of the restrictions on the types of transactions an in-house manager can engage in on behalf of a plan. The applicant explains that, with very large plans, there may be thousands of parties in interest, so that many transactions may be prohibited. The task of determining whether a particular transaction is prohibited can present a considerable burden for plan fiduciaries. According to the applicant, if the in-house manager wishes to enter into a transaction which he or she believes would be beneficial to the plan but which also involves a party in interest, that manager must either (1) seek an individual prohibited transaction exemption; (2) retain a QPAM for the transaction; or (3) forgo the transaction. The applicant argues that seeking an individual exemption involves time and legal expenses. In addition, the applicant notes that the use of a QPAM entails additional expenses for the plan despite the fact that the in-house manager has already done most of the work required for the transaction, including performing the necessary due diligence as to, for example, the creditworthiness of the other parties to the transaction.[4] Finally, the applicant argues that forgoing the transaction may cause the plan to miss out on a beneficial investment opportunity. Thus, CIEBA argues that an INHAM class exemption is necessary because the existing limitations on a plan's investment choices can raise a plan's investment costs in the short run by limiting the parties with whom it may deal, and adversely affect investment performance in the long run. Accordingly, CIEBA requests relief for three general categories of transactions which are more fully described below.

B. Description of the Requested Exemption

1. The INHAM Concept

Under the requested exemption, an INHAM would be defined as either (1) a direct or indirect wholly-owned subsidiary of an employer with respect to a plan, or a direct or indirect wholly-owned subsidiary of a parent organization of the employer, or (2) a membership nonprofit corporation, a majority of whose members are officers or directors of the employer or a parent organization. In addition, the INHAM would have to be registered as an investment adviser under the Investment Advisers Act of 1940. Under the applicant's proposed definition, the employer with which the INHAM is affiliated must be a plan sponsor (or group of related plan sponsors) whose plan or plans hold in the aggregate assets of at least $250 million of which at least $50 million of such assets must be under the direct management and responsibility of the INHAM.

2. Transactions With Service Providers

The applicant requests broad relief for transactions between a plan managed by an INHAM and a person who is a party in interest with respect to the plan solely by reason of providing services to the plan or solely by reason of a

[3] 40 FR 50845 (October 31, 1975)

[4] The Department is expressing no opinion as to whether the above-described transaction would come within the scope of relief provided by PTE 84–14.

relationship to such service provider. The applicant notes that the broad relief requested is similar to the general exemption in PTE 84–14, but is more restrictive in that it is only available for transactions with service providers. Among the conditions suggested by the applicant is a requirement that the party in interest not be the INHAM or a person related to the INHAM. A party in interest and an INHAM would be considered related under the requested exemption if either entity owns a 5% or more interest, directly or indirectly, in the other entity.

In addition, the terms of the transaction would have to be negotiated by the INHAM on behalf of the plan, and the INHAM would have to make the decision to enter into the transaction. Notwithstanding the foregoing, the applicant requests that the proposed exemption permit the plan sponsor to retain approval or veto power over large transactions since these types of transactions are customarily subject to increased scrutiny by the plan sponsor. The applicant explains that the higher levels of review are generally conducted by an investment committee or other named fiduciary. The applicant further represents that the requirement that the INHAM negotiate and decide upon the transaction is not affected by any such higher levels of review.

The applicant also proposes that the exemption not provide relief for transactions described in three class exemptions previously granted by the Department: PTE 81–6 (46 FR 7527, 1/23/81) (relating to securities lending arrangements); PTE 83–1 (48 FR 895, 1/7/83) (relating to acquisitions by plans of interests in mortgage pools); or PTE 88–59 (53 FR 24811, 6/30/88) (relating to certain mortgage financing arrangements).[5] Lastly, CIEBA has suggested, as an additional condition, the requirement that the INHAM undergo an annual fiduciary audit to determine whether the written procedures adopted by the INHAM are adequate to assure compliance with the terms and conditions of the exemption. The applicant represents that, by requiring a party independent of the employer to be involved in overseeing compliance with the exemption, the fiduciary audit would serve as a meaningful additional independent safeguard while not unduly interfering with the INHAM's investment decisions.

The applicant asserts that plans would be adequately protected under the proposal because the INHAMs would be independent of and unrelated to the service providers with whom they are dealing. In addition, the proposed definition of INHAM is designed to assure that the INHAM is in the business of investment management and, thus, in a position to develop experience and sophistication in dealing with investment issues. The registration of the INHAM as an investment adviser assures that the INHAM is subject to regulation under the Investment Advisers Act of 1940 and oversight by the Securities and Exchange Commission. The applicant represents that the standards proposed for the INHAM limit relief to only those employers whose managers have sufficient resources to assure knowledge and sophistication in financial and business matters.

3. Specific Exemptions for Employers

CIEBA represents that, where a plan is sponsored by a company that is a producer of goods such as appliances or equipment, the plan may not be able to purchase the appliances or equipment for its own use, even at cost, because the purchase could be a prohibited transaction. Similarly, the plan sponsor may provide services in the ordinary course of its business to consumers, such as utility services or maintenance and support services for goods or equipment sold. The applicant notes that, while section 408(b)(2) provides a statutory exemption for the provision of services to a plan by a party in interest, including an employer, that statutory exemption appears to limit the sponsor's compensation for the provision of services to its ''direct costs''.[6] CIEBA argues that, for many types of services, it may be difficult as a practical matter to determine what the ''direct costs'' of these services would be, or the particular division or subsidiary of the sponsor may not be willing to provide the services at direct cost because it would not be economical to do so. In addition, with services such as utilities, the company providing the service may not necessarily know whether the transaction involves a plan asset.

Thus, CIEBA requests an exemption which would permit the sale, leasing or servicing of goods, or the furnishing of services, to a plan by an employer or its affiliate. All covered transactions would be subject to a number of conditions, including the requirement that the transactions must take place in the ordinary course of a business engaged in by the employer or its affiliate with the general public on terms no less favorable than those available to the general public. As a further limitation, transactions engaged in under this exemption could not exceed 1% of the employer's or affiliate's annual gross receipts received from all sources for its prior taxable year.

CIEBA also requests relief for the leasing of office or commercial space to employers. The applicant represents that the statutory exemption under section 408(e) of ERISA, for the acquisition and leasing of ''qualifying employer real property'', may not exempt the lease of a single parcel of property to an employer or affiliate by a plan.[7] This lack of exemptive relief has resulted in inadvertent prohibited transactions where a plan not holding any other employer real property unexpectedly acquires property in which an employer or an affiliate is a tenant, such as upon foreclosure. The applicant explains that the foreclosure may be necessary to avoid the complete loss of the plan's investment, and the plan fiduciaries are unlikely to be aware of the identities of the tenants until after the foreclosure occurs. CIEBA states that the Congressional concerns underlying the requirement that a substantial number of parcels be dispersed geographically are not present where only a small portion of a single parcel is leased by a plan to its employer.

Under the requested exemption for the leasing of office or commercial space to an employer or affiliate, all the conditions otherwise applicable under ERISA section 408(e) would have to be met, including the requirements that the lease be for adequate consideration, that no commission be charged, and that the investment comply with the 10% limitation contained in section 407(a) with respect to the lease or acquisition of qualifying employer real property by plans other than eligible individual account plans.[8] As a further limitation,

[5] In this regard, see section I(b) of PTE 84–14, which contains the identical requirement.

[6] 29 CFR § 2550.408b-2(a) of the Department's regulations provides that section 408(b)(2) does not contain an exemption for an act described in section 406(b) even if such act occurs in connection with a provision of services which is exempt under section 408(b)(2). However, regulation section 29 CFR 2550.408(b)-2(e)(3) provides that if a fiduciary furnishes services to a plan without the receipt of compensation or other consideration (other than reimbursement of direct expenses properly and actually incurred in the performance of such services within the meaning of § 2550.408c-2(b)(3)), the provision of such services does not, in and of itself, constitute an act described in section 406(b) of the Act.

[7] The definition of ''qualifying employer real property'' under ERISA section 407(d)(4) requires, in part, that a substantial number of leased parcels be geographically dispersed.

[8] CIEBA also suggests that this exemption be subject to the requirement that the real property

Continued

the amount of space covered by the lease could not exceed 15% of the rentable space of the property.

The applicant also requests relief for the leasing of residential space owned by a plan to an employee of an employer any of whose employees are covered by such plan, or to an employee of a 50% or more parent or subsidiary of the employer, provided that the amount of space covered by the lease does not exceed 10 percent of the rentable space of the residential property and the employee does not have or exercise any authority with respect to the lease transaction. The applicant represents that this type of relief is necessary because the property manager who manages the property for the plan is unlikely to be aware of any relationship between the tenants and the plan sponsor and the employees are unlikely to be aware that the property is owned by the plan.

The applicant further notes that a plan could inadvertently engage in prohibited transactions with employees of the employer through investments in portfolios of consumer receivables. For example, a plan may purchase an interest in a pool of credit card receivables or mortgages, where the receivables or mortgages may include obligations of officers, directors or employees who are parties in interest under ERISA section 3(14)(H). The applicant represents that the plan fiduciary is unlikely to be aware of the identities of the individual obligors who have some interest in the pool, and even if the fiduciary is aware of the identities, it is unlikely to be aware of the relationship, if any, that these obligors have to the investing plan. In addition, the applicant explains that obligations of parties in interest may be added to the portfolio subsequent to the plan's investment, an event over which the plan would not have any control.

Accordingly, the applicant requests a limited exemption for the acquisition, holding or disposition by the plan of an interest in a consumer receivables portfolio, where a borrower whose obligation is part of the portfolio is a party in interest solely by reason of being an employee, officer, director, or 10% or more shareholder, partner or joint venturer with respect to either the employer, an employee organization whose members are covered by the plan, or a 50% or more parent or subsidiary of the employer.

leased to the employer be suitable or adaptable, without excessive cost, for more than one use. In this regard, see section 407(d)(4), which contains a similar requirement.

4. Places of Public Accommodation

The applicant represents that, if a plan owns a hotel that is part of the property managed by an INHAM, a prohibited transaction may occur if a party in interest stays at that hotel. This would be the case even though the hotel is likely to be operated by persons who are unaware of the party in interest relationship. CIEBA notes that there is little likelihood of abuse in these types of transactions since the persons managing the hotels and motels are generally management companies that would not be aware of the party in interest relationship. In addition, the applicant notes that the Department has granted similar relief in several class and individual exemptions.[9]

Accordingly, CIEBA requests relief for the furnishing of services, facilities and incidental goods to a party in interest by a place of public accommodation, such as a hotel or motel owned by a plan managed by an INHAM if the services, facilities and incidental goods are furnished on a comparable basis to the general public.

III. The Proposed Exemption

The proposed exemption consists of four separate parts. Part I sets forth the general exemption and enumerates certain conditions applicable to the transactions described therein. Parts II and III of the proposal set forth specific exemptions. Part IV contains definitions for certain terms used in the proposed exemption.

A. The INHAM Concept

As proposed, the class exemption would be available for various party in interest transactions that involve those assets of a plan that are managed by an INHAM. The Department has determined to adopt the definition of INHAM proposed by the applicant. Accordingly, an INHAM is defined as either (1) a wholly-owned subsidiary of an employer with respect to a plan, or a wholly- owned subsidiary of a parent organization of the employer, or (2) a membership nonprofit corporation, a majority of whose members are officers or directors of the employer or parent organization. The definition also requires the INHAM to be registered as an investment adviser under the Investment Advisers Act of 1940. Finally, the employer with which the INHAM is affiliated must be a plan sponsor (or group of related plan sponsors) whose plan or plans hold in the aggregate assets of at least $250 million, $50 million of which is under the direct management and control of the INHAM. The Department believes that these standards will help to ensure that the INHAM is an entity that has developed an appropriate level of expertise in financial and business matters.

[9] See PTE 84–14, 49 FR 9494 (March 13, 1984) and PTE 91–38, 56 FR 31966 (July 12, 1991).

B. General Exemption

The general exemption, set forth in Part I, would allow that portion of a plan which is managed by an INHAM to engage in all transactions described in section 406(a)(1)(A) through (D) with virtually all party in interest service providers except the INHAM or a person related to the INHAM.[10] As proposed, this exemption does not extend to transactions which would give rise to violations of section 406(b) of ERISA.

Generally, the relief for service providers proposed herein is based upon that requested by the applicant. However, the Department has modified CIEBA's request in several respects, as more fully described below.

In general, section I(a) of the proposal requires that the INHAM function as the decision maker for the plan in all covered transactions. Specifically, section I(a) requires that the terms of the transaction be negotiated by, or under the authority and general direction of, the INHAM and that the INHAM make the decision to enter into the transaction. Under the proposal, however, the exemption would not be unavailable merely because the plan sponsor retains the right to veto or approve transactions involving amounts

[10] The applicant notes that, with the constantly changing nature of the financial markets, managers seek to invest in new areas to (a) increase investment return, (b) diversify investment portfolios, and (c) better manage investment risk. In this regard, the Department wishes to note that ERISA's general standards of fiduciary conduct would apply to new areas of investment permitted by this proposed exemption, and that satisfaction of the conditions of this proposal should not be viewed as an endorsement of any particular investment by the Department. Section 404 of ERISA requires, among other things, that a fiduciary discharge his duties with respect to a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Accordingly, the manager or other plan fiduciary must act prudently with respect to the decision to enter into an investment transaction, as well as to the negotiation of the specific terms under which the plan will engage in such transaction. The Department further emphasizes that it expects a manager or other plan fiduciary to fully understand the benefits and risks associated with engaging in a specific transaction, following disclosure to such fiduciary of all relevant information. In addition, such manager or plan fiduciary must be capable of periodically monitoring the investment, including any changes in the value of the investment and the creditworthiness of the issuer or other party to the transaction. Thus, in considering whether to enter into a transaction, a fiduciary should take into account its ability to provide adequate oversight of the particular investment.

in excess of $5 million, which have been negotiated on behalf of the plan by the INHAM. In this regard, the Department notes that section I(a) of the proposal would allow the retention of a veto or approval power by the plan sponsor under circumstances where the INHAM negotiated an investment transaction which obligates the plan to make a number of payments which, in the aggregate, exceed $5 million. Thus, for example, section I(a) would be deemed met, despite the retention of a veto or approval power by the sponsoring employer, if a plan is required, as part of an investment in a real estate limited partnership negotiated by the INHAM, to make three capital contributions to such partnership totalling $6 million over a pre-determined period. In this regard, the Department cautions that Part I would not be available for any transaction that is negotiated by an employer which sponsors a plan, and is then subsequently presented to an INHAM for approval.

Under section I(b) of the proposal, no relief is provided for those transactions described in Prohibited Transaction Exemptions 81–6, 83–1 and 88–59.

Section I(c) of the proposed exemption excludes from relief any transaction which is part of an agreement, arrangement or understanding designed to benefit a party in interest. Section I(d) requires that the terms of each transaction must be at least as favorable to the plan as the terms generally available in arm's length transactions between unrelated parties. Moreover, under section I(e), an INHAM could not enter into transactions with a party in interest who has discretionary authority or control with respect to the assets involved in the transaction or otherwise renders investment advice with respect to such assets. In addition, section I(f) provides that the general exemption would not be available if the INHAM and the party in interest dealing with the plan are related parties. Section IV(d) generally provides that a party in interest and an INHAM would be ''related'' if either entity owns a five percent or more interest, directly or indirectly, in the other entity.

PTE 84–14 was developed and granted based on the premise that broad relief from the prohibitions of section 406(a) of ERISA could be afforded to a broad range of transactions if the investment of plan assets and the negotiations leading thereto are the sole responsibility of an independent manager. In addressing this lack of independence of the INHAM under the requested exemption, CIEBA has suggested that any exemption proposed by the Department be conditioned upon a requirement that an independent auditor conduct an annual fiduciary audit to determine whether the written procedures adopted by the INHAM are designed to assure compliance with the conditions of the exemption. The Department has adopted CIEBA's suggestion under section I(g) of the proposal. The term ''fiduciary audit'' is defined in section IV(f) of the proposal as including: (1) a determination by the auditor as to whether or not the plan has developed adequate internal policies and procedures to assure compliance with the terms of the exemption; (2) a test of a representative sample of the plan's transactions to determine operational compliance with such policies and procedures; and (3) a determination as to whether or not the INHAM meets the definition of INHAM set forth in the exemption.

The following examples illustrate the types of transactions which would be covered by Part I of the proposed exemption:

(1) Corporation C designates INHAM X to manage a portion of Plan P's assets. Assume that X meets the criteria for an INHAM that are proposed. X uses Plan P assets to purchase a building from Y, a wholly-owned subsidiary of a broker-dealer that provides services to the Plan. Absent this proposed exemption, the purchase of the building from Y, a party in interest described in ERISA section 3(14)(G), 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 transaction if the conditions contained therein are met.

(2) INHAM X invests part of a pension fund's assets to acquire a parcel of unimproved real property from the president of the employer sponsoring the Plan. Part I does not provide an exemption for the purchase of the property since relief is limited under that Part to transactions with service providers and their affiliates. In addition, no relief would be provided under the proposal for the act of self-dealing described in section 406(b)(1) arising in connection with X's use of the fund's assets in a transaction which benefits a person in whom X has an interest which may affect the exercise of its best judgement as a fiduciary.

(3) Corporation C is the named fiduciary of Plan P. C chooses INHAM X to manage the portion of P's assets allocated for real estate investments. X, using its discretionary authority, locates and negotiates the purchase for $6 million of a commercial building in New York that is being offered for sale by Corporation Z. Z provides accounting services to Plan P. Pursuant to its arrangement with C, X is required to seek the approval of C for all real estate transactions involving amounts in excess of $5 million. On the basis of X's recommendation, C approves the transaction. Despite the retention of approval power by C, Part I of the proposal would be available for the purchase of the building provided there is no arrangement with C that requires X to buy the building from Z and the conditions of Part I are otherwise met.

(4) Corporation C allocates part of the assets of its Plan P to a master trust managed by INHAM X. X uses master trust assets to purchase an office building which is subsequently leased to M. M provides administrative services to Plan P. During the term of the lease, M becomes a wholly-owned subsidiary of Corporation C. Although M is no longer a party in interest with respect to Plan P solely by reason of providing services to such Plan, Part I will continue to be available for the entire lease term since, at the time the transaction was entered into (as defined in section in IV(e)), M was not affiliated with the plan sponsor and its relationship to Plan P was solely that of a service provider.

(5) INHAM X retains Broker-Dealer B to provide brokerage services to Plan P. In a separate transaction, X uses Plan P assets to purchase corporate bonds directly from B. The bonds were originally issued by Corporation Z, an investment manager for a portion of the Plan's assets that are not controlled by INHAM X. Since the Department expects that, as part of its fiduciary responsibilities, the INHAM would have analyzed the terms of the bonds prior to purchase, the relief provided by Part I could extend to both the acquisition of the bonds and the underlying extension of credit. Thus, Part I could cover a subsidiary transaction with a party in interest if such transaction is itself subject to relief under the proposal and the applicable conditions are otherwise met.

C. Specific Exemptions for Employers

Part II of the proposed exemption provides limited relief under both sections 406(a) and (b) of ERISA for certain transactions involving employers and their affiliates who cannot qualify for the general exemption provided by Part I.

In this regard, the Department has not proposed the broad relief requested by the applicant for transactions with employers and their affiliates. The Department does not believe that it has sufficient information at this time to

make the broad findings necessary under section 408(a) of ERISA to propose exemptive relief with respect to transactions that may inure to the direct or indirect benefit of an employer. Nonetheless, the Department believes that it is appropriate to propose more limited relief under circumstances where the potential for the exercise of undue influence that would benefit an employer is more remote. However, the Department wishes to take the opportunity to note that its determination not to propose the broad relief requested does not foreclose future consideration of additional exemptive relief for transactions involving plan assets that are managed by INHAMS.

Part II is divided into two subparts. Section II(a) provides limited relief for the leasing of office or commercial space by a plan to an employer if the plan acquired the property subject to an outstanding lease with an employer or affiliate as a result of foreclosure on a mortgage or deed of trust. As a limitation, the exemption is effective until the expiration of the lease term and any renewal that does not require the consent of the plan. Section II(a) of the proposed exemption further requires that the decision to foreclose on the mortgage or deed of trust be made by the INHAM as part of the exercise of its discretionary authority, and that the unit of space under the lease does not exceed 15 percent of the rentable space of the office building or commercial center. The availability of relief is further conditioned upon the requirement that the transaction satisfy the conditions of sections I(c) and I(g) of the proposed exemption.

The application of section II(a) is illustrated by the following example:

(6) INHAM X is responsible for managing Plan P's assets and uses a portion of the assets to provide financing for Developer D's acquisition of an office building. Plan P's loan to D is secured by a first mortgage on the office building. Subsequently, D defaults on the loan and Plan P forecloses on its mortgage on the property. Upon assuming ownership of the office building, X discovers that a tenant in the building is Corporation Z, a wholly-owned subsidiary of the plan sponsor. Although the relief afforded by Part I of the proposed exemption would not be available to Corporation Z because it is ''related'' to the INHAM, Part II(a) of the proposal is available for the entire lease term if the conditions of Part II(a) are otherwise met.

Section II(b) would permit a plan to lease residential space to an employee of an employer any of whose employees are covered by such plan, or to any employee of a 50% or more parent or subsidiary of the employer. However, no relief is available under this exemption for officers, directors, and 10 percent or more shareholders of the employer or an affiliate of such employer, or for any employees who have or exercise any discretionary authority with respect to the assets involved in the lease transaction. As a further limitation, the proposal requires that the unit of space leased to an employee does not exceed 5% of the rentable space of the residential property and that the total amount of space leased to all employees of the employer, or affiliates not exceed 10% of the rentable space of the residential property. The Department believes that requiring a significant number of unrelated lessees will help to ensure that the terms of the lease(s) are no more favorable to the employee(s) than the terms available to other unrelated lessees of the residential property owned by the plan.

The availability of relief under this section is further conditioned on the requirement that the transactions satisfy the provisions of sections I(b), I(c), I(d) and I(g) of the proposed exemption.

The application of section II(b) is illustrated by the following example:

(7) Inham X is responsible for managing Plan P's assets and invests a portion of the assets in a new garden apartment complex comprised of 25 one bedroom apartments. Three employees of Corporation C, Plan P's sponsor, each rent 1 of the apartments from Plan P. Assume that none of the employees is an officer, director, or 10% or more shareholder of Corporation C or an affiliate, or has discretionary authority or renders investment advice with respect to the assets involved in the lease transactions. The proposed exemption under section II(b) would not be available for these lease transactions because, although each lease represents less than 5% of the rentable space of the residential property, the aggregate amount of space leased to employees of Corporation C exceeds 10% of the rentable space of the property.

D. Places of Public Accommodation

The Department is proposing an exemption, set forth in Part III, that would provide relief from sections 406(a)(1)(A) through (D) and 406(b)(1) and (b)(2) of ERISA for the furnishing of services, facilities and any goods incidental thereto by a place of accommodation owned by a plan managed by an INHAM to a party in interest with respect to the plan, if the services, facilities or incidental goods are furnished on a comparable basis to the general public.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of the participants and beneficiaries;

(3) If granted, the proposed class exemption will be applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Code and Act, 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.

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the proposed exemption to the address and within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection with the application for

exemption at the address set forth above.

Proposed Exemption

The Department has under consideration the grant of the following class exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Part I—Basic Exemption

Effective [date of publication of final class exemption], the restrictions of section 406(a)(1) (A) through (D) of the Act and the taxes imposed by Code section 4975 (a) and (b) of the Code, by reason of 4975(c)(1) (A) through (D), shall not apply to a transaction between a party in interest with respect to a plan and such plan, provided that an in-house asset manager (INHAM) (as defined in section IV(a)) has discretionary authority or control with respect to the plan assets involved in the transaction and the following conditions are satisfied:

(a) The terms of the transaction are negotiated on behalf of the plan by, or under the authority and general direction of, the INHAM, and either the INHAM, or (so long as the INHAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the INHAM, makes the decision on behalf of the plan to enter into the transaction. Notwithstanding the foregoing, a transaction involving an amount in excess of $5,000,000, which has been negotiated on behalf of the plan by the INHAM will not fail to meet the requirements of this section I(a) solely because the plan sponsor or its designee retains the right to veto or approve such transaction;

(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 88–59 (53 FR 24811; June 30, 1988) (relating to certain mortgage financing arrangements);

(c) The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest;

(d) 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 INHAM, the terms of the transaction are at least as favorable to the plan as the terms generally available in arm's length transactions between unrelated parties;

(e) The party in interest dealing with the plan: (1) is a party in interest with respect to the plan (including a fiduciary) solely by reason of providing services to the plan, or solely by reason of a relationship to a service provider described in section 3(14)(F), (G), (H), or (I) of ERISA; and (2) does not have discretionary authority or control with respect to the investment of the plan assets involved in the transaction and does not render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

(f) The party in interest dealing with the plan is neither the INHAM nor a person related to the INHAM (within the meaning of section IV(d)); and

(g) An independent auditor, who has appropriate technical training and proficiency with ERISA's fiduciary responsibility provisions and so represents in writing, conducts a fiduciary audit (as defined in section IV(f)) on an annual basis to determine whether the written procedures adopted by the INHAM are designed to operate in a manner which assures compliance with the conditions of the exemption. Following completion of the fiduciary audit, the auditor shall issue a written report to the plan presenting its specific findings regarding the design of such procedures and the level of compliance with the procedures.

Part II—Specific Exemptions

Effective [date of publication of final class exemption], the restrictions of sections 406(a), 406(b)(1), 406(b)(2) and 407(a) of the Act 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 leasing of office or commercial space owned by a plan managed by an INHAM to an employer any of whose employees are covered by the plan or an affiliate of such an employer (as defined in section 407(d)(7) of the Act), if—

(1) The plan acquires the office or commercial space subject to an existing lease with an employer, or its affiliate as a result of foreclosure on a mortgage or deed of trust;

(2) The INHAM makes the decision on behalf of the plan to foreclose on the mortgage or deed of trust as part of the exercise of its discretionary authority;

(3) The exemption provided for transactions engaged in with a plan pursuant to section II(a) is effective until the later of the expiration of the lease term or any renewal thereof which does not require the consent of the plan lessor;

(4) The amount of space covered by the lease does not exceed fifteen (15) percent of the rentable space of the office building or the commercial center; and

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

(b) The leasing of residential space by a plan to a party in interest if—

(1) The party in interest leasing space from the plan is an employee of an employer any of whose employees are covered by the plan or an employee of an affiliate of such employer (as defined in section 407(d)(7) of the Act);

(2) The employee who is leasing space does not have any discretionary authority or control with respect to the investment of the assets involved in the lease transaction and does not render investment advice (within the meaning of 29 CFR 2510.3- 21(c)) with respect to those assets;

(3) The employee who is leasing space is not an officer, director, or a 10% or more shareholder of the employer or an affiliate of such employer;

(4) 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 INHAM, the terms of the transaction are not less favorable to the plan than the terms afforded by the plan to other, unrelated lessees in comparable arm's length transactions;

(5) The amount of space covered by the lease does not exceed five percent (5%) of the rentable space of the apartment building or multi-unit residential subdivision [townhouses or garden apartments], and the aggregate amount of space leased to all employees of the employer or an affiliate of such employer does not exceed ten percent (10%) of such rentable space; and

(6) The requirements of sections I(a), I(c), I(d) and I(g) are satisfied with respect to the transaction.

Part III—Places of Public Accommodation

Effective [date of publication of final class exemption], 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 a plan and managed by an INHAM to a party in interest with respect to the plan, if the services and

facilities (and incidental goods) are furnished on a comparable basis to the general public.

Part IV—Definitions

For the purposes of this exemption:

(a) The term ''in-house asset manager'' or ''INHAM'' means an organization which is—

(1) either (A) a direct or indirect wholly-owned subsidiary of an employer, or a direct or indirect wholly-owned subsidiary of a parent organization of such an employer, or (B) a membership nonprofit corporation a majority of whose members are officers or directors of such an employer or parent organization; and

(2) an investment adviser registered under the Investment Advisers Act of 1940 that, as of the last day of its most recent fiscal year, has under its management and control total assets attributable to plans maintained by affiliates of the INHAM (as defined in section IV(b)) in excess of $50 million;

Provided that plans maintained by such affiliates of the INHAM have, as of the last day of each plan's reporting year, aggregate assets of at least $250 million.

(b) For purposes of section IV(a), an ''affiliate'' of an INHAM means a member of either (1) a controlled group of corporations (as defined in section 414(b) of the Code) of which the INHAM is a member, or (2) a group of trades or businesses under common control (as defined in section 414(c) of the Code) of which the INHAM is a member; provided that ''50 percent'' shall be substituted for ''80 percent'' wherever ''80 percent'' appears in section 414(b) or 414(c) or the rules thereunder.

(c) The term ''party in interest'' means a person described in Act section 3(14) and includes a ''disqualified person'' as defined in Code section 4975(e)(2).

(d) An INHAM is ''related'' to a party in interest for purposes of section I(f) 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 INHAM or if the INHAM (or a person controlling, or controlled by, the INHAM) owns a five percent or 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.

(e) For purposes of this exemption, 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 [date of publication of final class exemption], or any renewal that requires the consent of the INHAM occurs on or after [date of publication of final class exemption], 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. Nothing in this paragraph shall be construed as exempting a transaction entered into by a plan which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of the 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.

(f) Fiduciary Audit. A ''fiduciary audit'' of a plan must include, among other things, the following:

(1) A determination as to whether the plan has developed adequate policies and procedures designed to assure compliance with the proposed exemption;

(2) A test of a representative sample of the plan's transactions to determine operational compliance with the written policies and procedures;

(3) A determination as to whether the INHAM has satisfied the definition of an INHAM under the proposal; and

(4) A written report describing the steps performed by the auditor during the course of its review and the auditor's findings and recommendations.

Signed at Washington, DC, this 20th day of March, 1995.

Alan D. Lebowitz,

Deputy Assistant Secretary for Program Operations, Pension and Welfare Benefits Administration, Department of Labor.

[FR Doc. 95–7364 Filed 3–23–95; 8:45 am]

BILLING CODE 4510–29–P

Employment Standards Administration

Wage and Hour Division; Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any