specifically objected to the condition stated in section IV(b) and suggested that it should be deleted or clarified. The commenters asserted that this condition could be interpreted to preclude a party in interest from receiving any benefit from a transaction with a general account since virtually every agreement, arrangement, or understanding is designed to benefit all parties thereto. One commenter suggested that the Department clarify section IV(b) by noting that its purpose is to keep a party in interest from benefiting from a ''side deal.''

The Department agrees that under most circumstances parties will not enter into agreements in the normal course of business unless each gains or benefits from the arrangement. The intent of the condition in section IV(b) was not to deny direct benefits to the other parties to a transaction but, rather, to exclude relief for transactions that are part of a broader overall agreement, arrangement, or understanding designed to benefit parties in interest. The Department has determined not to delete this condition.

F. Definitions

1. Under the proposed exemption, an ''insurance company'' was defined under section V(d) as an insurance company authorized to do business under the laws of more than one state. One commenter suggested that this definition should be modified to include a company qualified to do business in one or more states so that smaller insurance companies that are authorized to do business in only one state will not be disadvantaged. The Department concurs with this suggestion and has modified the definition of an insurance company accordingly.

2. In response to a commenter's request that the Department modify the definition of affiliate in section V(a), the Department notes that the term affiliate is not referenced in section III of the exemption and, thus, no modification is necessary.

3. Since the date of publication of the proposal, three additional Underwriter Exemptions have been granted. The Department is adding PTEs 94–70, 94–73, and 94–84 to the definition of Underwriter Exemption contained in section V(h) of the final exemption.

G. Miscellaneous

1. Two commenters were generally opposed to providing any relief to the insurance industry with respect to the problems created by the *Harris Trust* decision. Several other commenters expressed support for the broad relief requested by the ACLI in its exemption application.

2. One commenter requested a hearing. However, the issues raised by the commenter appear to be outside the scope of the proposed exemption. Specifically, the issues identified by this commenter involve problems with guaranteed investment contracts, the insolvency of insurance companies, and nonpayments by state guaranty funds. The Department has determined that no issues were identified that would require the convening of a hearing and has determined not to hold a public hearing.

3. One commenter raised the question whether a fiduciary adviser can assist more than one client with respect to negotiating general account contracts involving the same insurance company general account. Specifically, the commenter was concerned that a fiduciary consultant helping one client to negotiate a general account contract with an insurance company could be viewed as engaging in a violation of section 406(b)(2) of ERISA under circumstances where the consultant previously assisted other clients in negotiating general account contracts with the same insurance company. The Department notes that this commenter raises issues that are beyond the scope of this exemption proceeding.

4. Another commenter requested that the Department clarify what portion of a general account will be considered to be plan assets when a general account invests in an entity. The commenter also urged the Department to fix the amount that will be so considered as of the date of the general account's investment, regardless of changes in the level of plan investment in the general account over the time of the general account's investment in an entity. In a footnote contained in the preamble to the proposed exemption, the Department noted that, for purposes of calculating the 25% threshold under the significant participation test (29 CFR section 2510.3–101(f)), only the proportion of an insurance company general account's equity investment in the entity that represents plan assets should be taken into account. In this regard, the commenter is concerned that, the 25% test may be satisfied at the time the general account makes its investment, but then failed by virtue of an increase in the general account's assets that constitute plan assets. In the Department's view, a change in the level of plan investment in a general account subsequent to the general account's purchase of an interest in an entity would not, by itself, trigger a determination of significant plan participation. However, it is the Department's further view that a purchase by the general account of an additional interest in the entity subsequent to its initial investment would trigger a determination of significant plan participation. In addition, a new acquisition in the entity by any other investor subsequent to the general account's initial investment would require a new determination of significant plan participation under 29 CFR § 2510.3–101(f).[3] Lastly, the commenter requests that the Department confirm that if, for example, a general account, 10% of whose assets constitute plan assets, makes a $10,000,000 investment in an entity, $1,000,000 of that investment will be considered plan assets. The Department concurs with the example set forth by the commenter.

5. The ACLI disagreed with the Department's characterization of the Supreme Court's holding in *Harris Trust* and requested that the Department modify the preamble to reflect what the ACLI believes to be the proper interpretation of the *Harris Trust* decision. The Department notes that the description of the *Harris Trust* decision in the preamble to the proposed exemption was part of a brief background explanation of what precipitated the ACLI's determination to seek exemptive relief from the Department. It was not the Department's intent to fully address the effect of the *Harris Trust* decision on insurance companies under title I of ERISA. The ACLI's comment raises issues beyond the scope of this exemption proceeding.

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

[3] In this regard, see Advisory Opinion 89–05 (April 5, 1989) in which the Department addressed other transactions that would constitute an acquisition triggering a determination of significant plan participation.