

respect to the Plans, albeit one without any authority or responsibility with respect to the assets involved in the subject transaction.

Subsequently, on February 17, 1993, the GP and the Seller executed a purchase and sale agreement (the Purchase Agreement) in which the Seller agreed to sell the Property to the GP for a purchase price of \$60,000,000. For purposes of the Purchase Agreement, the Property included: (a) the Land; (b) the Building; (c) the related tangible personal property and fixtures (the Personalty); (d) all leases, licenses, and occupancy agreements demising the space in the Building (the Leases); (e) prepaid rents and deposits; (f) certain contracts (e.g., warranties, indemnities, licenses, permits) to the extent assignable without cost; (g) other miscellaneous property (e.g., telephone exchanges, trade names, trademarks, plans, drawings, surveys, and technical descriptions; and (h) except as specifically limited or excluded, all maintenance, service, and utility contracts that relate to the ownership, maintenance, construction, repair, and/or operation of the Land, the Building, the Personalty, and the Leases. In accordance with the terms of the Purchase Agreement, the GP subsequently, at closing on May 21, 1993, assigned its rights as purchaser of the Property to the Partnership.

7. Pursuant to the terms of the Subscription Agreement, the GP and the Group Trust agreed to form the Partnership on the date that the Partnership first invested in real estate. Accordingly, prior to the date the Partnership acquired the Property, it is represented that the Partnership had no assets. In this regard, the capital contributions of the Hourly Trust and the Salaried Trust committed through the Group Trust to the Partnership were used to pay the Group Trust's *pro rata* share of the purchase price for the Property. It is represented that the Partnership acquired the Property at closing on May 21, 1993, for a purchase price of \$60,000,000.

8. An appraisal of the Property was performed independently by Delta Associates, Inc. (Delta), a qualified appraisal firm in Alexandria, Virginia. The appraisal report, dated April 5, 1993, was prepared in conjunction with a loan disbursed at closing on May 21, 1993, by Credit Lyonnais Cayman Island Branch to the Partnership secured by the Property. However, Delta has consented to the use of such appraisal report in conjunction with this proposed exemption.

In the appraisal report, Delta estimated that, as of March 1, 1993, the

market value of the leased fee interest in the Property on an "as is" basis was \$72 million and on an "as if stabilized" basis was \$88 million. In the opinion of Delta after the "first stabilized year of operation," assumed to be March 1995, the fair market value of the leased fee interest in the Property will be \$95 million. In addition, Delta estimated that the "insurable value" of the Property, as of March 1, 1993, was \$47.4 million.

9. Subsequently, on December 16, 1993, the subject application for retroactive exemption from the prohibited transaction restrictions of the Act was filed on behalf of the Plans with the Department.

10. The applicants maintain that, while the issue is not free from doubt, the Partnership is a real estate operating company, as defined in 29 CFR § 2510.3-101 and therefore the sale of the Property to the Partnership by the Seller was not a *direct* prohibited transaction between the Plans and a party in interest. In this regard, the applicants obtained an opinion of counsel with respect to the issues of whether the Partnership constituted a "real estate operating company" on the date of the purchase by the Partnership of the Property and whether the purchase of the Property by the Partnership from the Seller, a party in interest with respect to the Plans, constituted a prohibited transaction under section 406 of the Act.

In the opinion of the applicants, no exemption from the restrictions of section 406 of the Act relating to direct prohibited transactions is necessary in connection with the sale of the Property by a party in interest to the Partnership nor for receipt of any compensation by the GP of the Partnership, because the purchase of the Property by the Partnership did not involve assets of the Plans by virtue of the operation of the Partnership as a "real estate operating company."⁵

⁵ Under the "plan asset" regulations of the Department, as set forth in 29 CFR § 2510.3-101(h)(3), when a plan or a related group of plans owns all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity. The applicants maintain that, while for purposes of establishing a limited partnership under Texas law, a general partner must be named in the certificate of limited partnership, the GP, here, is obligated to contribute a significant amount of capital to the Partnership and, thus, is participating in the Partnership for reasons other than to satisfy the minimum state law requirements for treatment of the Partnership as a partnership. Accordingly, the applicants believe that the Partnership assets would not be treated as plan assets for the purpose of applying the fiduciary responsibility requirements of the Act.

In addition, under the "plan asset" regulations of the Department, as set forth in 29 CFR § 2510.3-

Notwithstanding their reliance on the plan assets analysis described above, the applicants continue to request retroactive relief under section 406(a) for any *indirect* prohibited transaction that may have occurred. The applicants point out that authority on the issue of what constitutes an "indirect" prohibited transaction is still quite sparse. In the opinion of the applicants, the following elements of the subject transaction, taken together, raise an *indirect* prohibited transaction issue: (1) the purchase of the Property by the Partnership and the Group Trust's investment in such Partnership occurred on the same day; (2) the Group Trust's investment provided the Partnership with 95 percent (95%) of the funds used to cover the purchase price of the Property; and (3) the Property and the Seller had been specifically identified prior to the time the funds were forwarded by the Group Trust to the Partnership. Further, of particular interest to this issue is the fact that the Partnership is not designed to be a "blind pool" investment vehicle where a general partner, so long as it follows the criteria set forth in a partnership agreement, has plenary discretion to invest committed partnership funds in any real property meeting those criteria and the unfettered ability to call funds from a limited partner to complete such investments without any approval rights in such limited partner. Rather, the Group Trust as subscriber had a right to examine and approve or disapprove the specific investment opportunity of the Partnership in the Property, although upon the signing of the Subscription Agreement in 1991, the Group Trust became committed to invest up to \$95 million in the Partnership at such times as appropriate investments were identified and the Partnership was formed. Accordingly, at the time the Group Trust actually purchased its interest in the Partnership and

101(e), an entity is treated as a real estate operating company if at least 50 percent of its assets are invested in real estate which is managed or developed and with respect to which the entity has the right to substantially participate directly in management or development activities. Further, in the ordinary course of its business, the entity must actually engage in real estate management or development activities. The applicants maintain that they are comfortable in relying on their own analysis that the Partnership operation meets these requirements.

The Department, herein, is expressing no opinion whether the underlying assets of the Partnership are "plan assets" or whether the Partnership, as established or in the manner operated, satisfies the definition of a "real estate operating company." Further, the Department is not proposing relief, herein, for any *direct* transaction between the Partnership or the Plans and a party in interest with respect to such Plans.