

NOTICES

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application No. D-5600]

Amendments To Prohibited Transaction Exemption (PTE) 82-87 for Transactions
Involving Certain Residential Mortgage Financing Arrangements

Thursday, June 30, 1988

***24811** AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Adoption of amendments to PTE 82-87, and redesignation as PTE 88-59.

SUMMARY: This document amends PTE 82-87. PTE 82-87 provides exemptions for certain categories of transactions from the prohibited transactions restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from certain taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1986 (the Code). These transactions relate to the issuance by employee benefit plans of commitments for the provision of mortgage financing to purchasers of residential dwelling units, the receipt of fees in exchange for the issuance of such commitments, the making or purchase of loans or participation interests therein pursuant to such commitments, the direct making or purchase by one or more employee benefit plans of a mortgage loan or participation interest therein other than where a commitment has been issued, or the sale, exchange, or transfer of mortgage loans or participation interests therein prior to the maturity date of such instrument by employee benefit plans.

The amendments granted pursuant to this notice broaden the applicability of PTE 82-87 to include certain mortgage loan transactions involving multifamily housing and permit the acquisition of a broader range of single-family residential mortgage loans. The amendments affect participants and beneficiaries of employee benefit plans investing in such mortgage loans, the sponsors and trustees of such plans, and ***24812** other persons engaging in the described transactions.

EFFECTIVE DATE: January 1, 1975. [certain conditions, as specified herein, are applicable effective June 17, 1982] Certain amendments, as specified herein, are effective June 30, 1988.

FOR FURTHER INFORMATION CONTACT: Lyssa Hall of the Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, (202) 523-8671 (not a toll-free number) or Daniel Maguire, Esq., Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210, (202) 523-9590 (not a toll free number).

SUPPLEMENTARY INFORMATION: On December 11, 1984, notice was published in the Federal Register (49 FR 48236) of the pendency before the Department of Labor (the Department) of proposed amendments to PTE 82-87. The Department proposed the amendments on its own motion pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, [FN1] and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). The notice set forth a summary of the facts and representations developed by the Department. This information has

been available for public inspection at the Department in Washington, DC.

FN1 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), transferred the authority of the Secretary of the Treasury to issue exemptions of this type to the Secretary of Labor. In the discussion of the exemption, references to the various provisions of section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

The Department received public comments with regard to the amendments to PTE 82-87. Upon consideration of all the comments, the Department has determined to adopt one of the proposed amendments to PTE 82-87 and also to modify one of the requirements for relief under the existing exemption. These comments and modifications are discussed below.

The Department has been informed by the Office of Management and Budget that the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) are not applicable to PTE 82-87 because the exemption does not contain a request or requirement for the collection of information as defined in 5 CFR Part 1320 and therefore is not subject to the requirements of that regulation.

For the sake of convenience, the Department has reprinted the entire text of the exemption, as modified, and has redesignated it as PTE 88-59.

1. Description of Existing Relief

PTE 82-87 (47 FR 21331, May 18, 1982) provides an exemption for several different types of residential mortgage financing transactions in which employee benefit plans participate if certain conditions are met. Specifically, Part I provides relief from the prohibitions of section 406(a) of the Act for the issuance of commitments for the provision of mortgage financing to purchasers of residential dwelling units; the receipt by the plan of a fee in exchange for the issuance of such commitment; the actual making or purchase of a mortgage loan or participation interest therein pursuant to such commitment; the actual making or purchase of a mortgage loan or participation interest therein without the precondition of a commitment; and the sale, exchange or transfer of a mortgage loan or participation therein prior to the maturity date of such instrument provided that the interest sold, exchanged or transferred represented the plan's entire interest in such investment.

Section II A contains both general conditions applicable to all transactions covered by Part I and certain supplemental conditions which took effect 30 days after the grant of exemption was published in the Federal Register. Finally, Part III contains definitions of terms used in the class exemption. Through the interrelationship of these provisions, the Department intended to provide extensive relief to financial institutions and other parties in interest who participate in the enumerated residential mortgage loan financing transactions with employee benefit plans.

PTE 82-87 provides an exemption for covered transactions that involve a "recognized mortgage loan" (defined in Section III D). Pursuant to the definition, the exemption applies to any mortgage loan on a "residential dwelling unit" (defined in Section III E) which, at the time of its origination, was eligible, through an established program, for purchase by the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA) or the Federal Home Loan Mortgage Corporation (FHLMC) (collectively, the Agencies).

The term "residential dwelling unit" has acted to limit the relief available under the exemption by describing the nature of the real estate which collateralizes the subject mortgage loan as non-farm properties comprising 1-4 dwelling units. This limitation was based on the original applicants' request which sought only to obtain relief for mortgage loan transactions involving single family residential properties. The term "residential dwelling unit" represented the Department's understanding of the industry's accepted definition of a single family dwelling. At the request of the commentators to the original proposal, the Department included in the final exemption a variety of types of housing such dwelling unit could take and provided that the structure need not be owner occupied.

2. Description of the Proposal

The December 11, 1984 notice contained two proposed amendments to PTE 82-87. First, the class exemption would be expanded to permit transactions involving real estate mortgage loans secured by multifamily residential properties. As indicated above, the types of mortgage loans qualifying for relief under the class exemption were limited to loans on single-family properties comprising 1- 4 dwelling units. Subsequent to the grant of PTE 82-87, a number of interested persons and groups urged the Department to reconsider this limitation. Accordingly, the Department contacted the Department of Housing and Urban Development (HUD) and requested its assistance in developing a record with respect to the financing of multifamily housing. The Department was advised that the Federal agencies operating in the secondary mortgage market [FN2] have the authority to purchase multifamily housing loans and that the structure of PTE 82-87 could be modified to accommodate transactions involving multifamily properties.

FN2 The Federally operated secondary market consists of the Congressionally authorized mortgage purchase (including guarantee) activities of FNMA, GNMA and FHLMC.

Second, the proposal contained an alternative method of satisfying the "recognized mortgage loan" criterion. This standard initially was developed to provide plan fiduciaries with certainty as to the scope of relief under the exemption by reference to the eligibility standards of the Federal housing agencies. After PTE 82-87 was finalized, several commentators expressed concern that utilization of the recognized mortgage loan standard as the fundamental eligibility condition under the exemption unfairly inhibited the operation of the mortgage marketplace in certain states or metropolitan areas. The commentators suggested that, because of statutorily mandated limits applicable to the principal amount of the mortgages eligible for purchase under Agency *24813 purchase programs, a significant number of mortgage loan transactions originated in such areas did not satisfy the condition of the exemption requiring a recognized mortgage loan. After evaluating these concerns, the Department determined that it was then unable to modify the definition of the term itself. However, in response to the comments, the Department proposed an alternative method of compliance with the definition. Under such an alternative as proposed, a residential mortgage loan would be eligible for purchase under the exemption if the loan obtained a rating from a national rating service that was at least as good as the third highest rating category for similar debt instruments available from one of the national rating services in existence in 1984. The Department proposed the alternative in order to ascertain the degree of ratings available on individual mortgages and in anticipation that such rating programs might develop.

3. Discussion of the Comments

The Department received 13 comments regarding this proposal. The issues raised by the commentators are discussed below.

A. Multifamily Residential Mortgage Loans

The Department received 10 comments regarding its proposal to amend the definition of a "residential dwelling unit" contained in section III(E) of the exemption to include multifamily residential housing. All of the commentators generally supported this expansion of the exemption. Two commentators questioned whether the proposed amendments fully achieved the Department's stated objective of expanding relief to permit plan investments in multifamily residential mortgage loans. It was represented that a number of multifamily mortgage loans utilize Federal Housing Administration (FHA) insurance programs. One commentator suggested that the exemption may not apply to transactions involving multifamily properties financed through FHA insurance programs because of the inability of such loans to satisfy the definition of a recognized mortgage loan. According to the commentator, the acquisition programs established by the Agencies to purchase FHA insured multifamily loans are either no longer in operation or did not provide for the purchase of certain types of FHA insured mortgages. Thus, such FHA insured loans would not qualify as recognized mortgage loans as currently defined. As a result, the commentators urged the Department to modify its policy and expressly include all loans insured by the FHA under the definition of recognized mortgage loan. [FN3]

FN3 None of the commentators expressed any concern with respect to the application of the class exemption to conventional multifamily financing arrangements.

The broad relief provided by PTE 82-87 was predicated on the existence of established acquisition programs in the Federally operated secondary market pursuant to which the Agencies purchase individual mortgage loans in accordance with ascertainable underwriting standards. The Department has determined that, although two of the Agencies (FNMA and GNMA) have the statutory authority to purchase all FHA insured loans, neither Agency currently maintains an established purchase program for FHA insured multifamily mortgage loans. Upon consideration of the comments, the Department is unable to conclude that a record has been developed which demonstrates that expansion of the exemption to include FHA insured multifamily mortgage loans which do not satisfy the "recognized loan standard" (for lack of an established Agency purchase program at the time of loan origination) adequately addresses the Department's concern that mortgage loans acquired by a plan within the context of party in interest relationships be objectively recognized as of investment quality and marketable. Accordingly, the Department has determined not to revise the exemption in this regard.

The Department's proposed expansion of the definition of a "residential dwelling unit" was intended to permit the acquisition of FHA insured GNMA "tandem project mortgage loans" on properties that are designed primarily for residential use. [FN4] The Department determined that the limitation in the proposal to properties "designed primarily for residential use" was appropriate based on its understanding that GNMA's outstanding inventory of tandem project mortgage loans consisted of only multifamily residential properties (i.e., apartment buildings). One commentator suggested that the exemption should extend to all types of properties eligible for inclusion in FHA insured GNMA tandem project mortgage loan programs. [FN5] The commentator noted that any limitation appears to introduce an artificial distinction which is not relevant from the point of view of plans as mortgage loan investors. In this regard, the Department has consulted with GNMA and understands that the tandem mortgage program is no longer in effect, and that GNMA anticipates that its existing mortgage loan portfolio consisting primarily of loans on residential

multifamily structures will be liquidated in the near future. In light of the above, the Department has determined not to extend the exemption to all types of properties eligible for inclusion in FHA insured GNMA tandem project mortgage loan programs. However, the Department has modified the definition of recognized mortgage loan in section III(D) to clarify the scope of the proposal, i.e., that the exemption will be available only for the acquisition of FHA insured GNMA tandem project mortgage loans on properties that are designed primarily for residential use.

FN4 Tandem project mortgage loans include a broad range of FHA insured financing arrangements in which GNMA has made a commitment to purchase upon completion of construction. GNMA in turn resells the mortgage loans to private investors which could include employee benefit plans.

FN5 Such tandem project mortgage loans extend beyond loans on residential multifamily structures to certain buildings that are not residential in the usual sense, e.g., hospitals, nursing homes, group practice facilities and land development projects.

It should be noted that the amendment expanding the scope of the exemption to include investments in multifamily residential housing is effective for transactions on or after June 30, 1988.

B. Rating Alternative for Recognized Mortgage Loans

Under the proposed exemption, the definition of a recognized mortgage loan would have been expanded by providing an alternative method of satisfying the definition where the individual mortgage loan obtains a rating from a national rating service. Various commentators noted that the national rating services currently do not rate individual mortgage loans; nor were the commentators aware of any current intention by any of the rating services to develop such a rating program. Accordingly, the commentators concluded that, as a practical matter, the proposal does not expand the categories of mortgage loans which qualify for relief under the exemption. After considering the comments, the Department agrees that the proposed definition does not appear to achieve its desired objective. Therefore, the Department has determined not to adopt this proposed amendment.

In lieu of a rating alternative, several commentators urged the Department to reconsider its earlier determination to define a "recognized mortgage loan" by reference to all of the eligibility requirements to which mortgages qualifying for purchase under Agency programs are subject. These requirements include the statutorily-imposed limits on the outstanding *24814 principal amount of any mortgage loan that may be acquired under the Agency programs, in addition to the various underwriting standards applicable to borrowers, loan originators and properties that have been adopted by the Agencies in published manuals. The commentators argued that the dollar limits fail to reflect the realities of the housing marketplace in many areas of the country and are not necessary to prudent mortgage investments by plans if the loans otherwise satisfy the underwriting criteria established by the Agencies.

In the preamble to the proposal, the Department expressed its concerns regarding the liquidity of mortgage loans in the resale market where the principal amount of the loan exceeds the dollar limits for purchase eligibility by the Agencies. The requirement that mortgage loans be marketable was a significant factor in the Department's original determination to grant PTE 82- 87. In seeking to address the Department's concerns regarding the liquidity of such loans, one commentator

contacted a number of Wall Street analysts in an effort to profile the current marketplace. According to the commentator, "the market for non-conforming loans has grown and developed dramatically from activity dominated by brokered private placements to an environment where there is active participation and market making by major Wall Street firms and a wide range of private mortgage conduits." The commentator further noted that the marketplace for non-conforming loans (i.e., loans whose principal balance exceeds the ceilings for Agency purchase) " * * * provides a degree of liquidity that is more than adequate to accommodate the private pension fund investors."

The Department remains committed to providing flexible relief to a wide spectrum of entities and types of transactions involved in residential mortgage loan financing consistent with the requirements of section 408(a) of the Act. In this regard, it appears to the Department that the secondary market for non-conforming mortgages has evolved since the grant of PTE 82-87. Accordingly, the Department has determined, based upon the additional record developed, to modify the existing definition of recognized mortgage loan in section III(D) so as to remove application of the dollar limits. However, the Department cautions interested parties that this modification of the class exemption should not be construed as an endorsement of plan investments in large non-conforming mortgages. Decisions regarding specific plan investments must be made by appropriate plan fiduciaries in accordance with the Act's fiduciary responsibility provisions including the prudence and diversification standards contained in section 404(a)(1) of the Act.

The amendment of the exemption to remove application of the dollar limits is effective for transactions on or after June 30, 1988.

C. Miscellaneous

(1) Several commentators urged the Department to delete the requirement that the decision to purchase or sell a mortgage be made on behalf of a plan by a "qualified real estate manager." According to the comments, this condition was unnecessarily restrictive in light of the objective standards already imposed on the investment transaction by the definition of a "recognized mortgage loan." As previously stated in the proposal to PTE 82-87, the Department viewed the existence of an independent decision maker as a significant factor in its ability to provide exemptive relief. It appears to the Department that this requirement is necessary to insulate those plan fiduciaries who might have an interest in the transaction from the decision making process and helps assure that the other conditions of the exemption are met. After further consideration of this issue, the Department continues to believe that the presence of an independent decision maker acting on behalf of a plan is a significant factor in its ability to grant broad exemptive relief.

(2) A commentator noted that not all of the Agencies were acting pursuant to established purchase programs with ascertainable underwriting standards during the period 1975-1980. The commentator suggested that the Department retroactively apply the underwriting standards developed by one of the Agencies in 1980 to mortgage transactions which occurred between 1975 and 1980. The Department is unable to make a finding that the underwriting standards and loan ceilings in effect in 1980 were relevant to purchases made prior to that date. However, the Department is prepared to entertain individual applications for retroactive exemptive relief for transactions not satisfying the conditions of PTE 82-87 if the requisite findings under section 408(a) of ERISA can be made.

(3) Several commentators urged the Department to expand PTE 82-87 to include transactions involving interests in mortgage pools rated by a national rating

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service and pass-through entities such as grantor trusts which only invest in recognized mortgage loans. Another commentator suggested expansion of PTE 83-1 (48 FR 895, 1/7/83) to cover plan investments in, and transactions involving, pools of mortgages or deeds of trust on multifamily residential property. Finally, one commentator argued that the Department should expand PTE 84-14 (49 FR 9494, 3/13/84) to include relief from the prohibited transactions restrictions for any mortgage investment made for a plan by a qualified professional asset manager--"QPAM"--that is not covered by PTE 82-87. The Department is not persuaded by the arguments in favor of amending PTE 82-87 to permit investments in mortgage pools and other pass-through entities. In this regard, the record is insufficient for the Department to clearly define the types of pools and other entities that would comprise the class covered by such broad relief. Moreover, the Department does not believe that a sufficient showing has been made that the conditions currently contained in PTE 82-87, which do not pertain to transactions such as service arrangements involving pooled mortgage assets in which plans purchase undivided equity interests, would adequately protect employee benefit plans investing in such entities. With respect to the comments concerning expansion of PTE 83-1 and PTE 84-14, the Department notes that amendment of these class exemptions is beyond the scope of this 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 or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan; 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 does not extend to transactions prohibited under section 406(b) of the Act or section 4975(c)(1) (E) and (F) of the Code;

***24815** (3) In accordance with section 408(a) of the Act, the Department makes the following determinations:

(i) The amendments set forth herein are administratively feasible,

(ii) They are in the interests of plans and of their participants and beneficiaries, and

(iii) They are protective of the rights of the participants and beneficiaries of the plans;

(4) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(5) The amendments are supplemental to, and not in derogation of, any other provisions of the Act and 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.

Exemption

Accordingly, PTE 82-87 is amended under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

I. Transactions

Effective January 1, 1975, the restrictions of section 406(a) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1986 (the Code) by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to the following transactions if the conditions set forth in Part II below are met:

(A) The issuance of a commitment by one or more employee benefit plans to provide mortgage financing to purchasers of residential dwelling units, either by making or participating in loans directly to purchasers or by purchasing mortgage loans or participation interests in mortgage loans originated by a third party;

(B) The receipt by the plan of a fee in exchange for issuing such commitment;

(C) The actual making or purchase of a mortgage loan or participation interest therein pursuant to such commitment;

(D) The direct making or purchase by one or more employee benefit plans of a mortgage loan or a participation interest therein other than where a commitment has been issued; and

(E) The sale, exchange or transfer of a mortgage loan or participation interest therein by an employee benefit plan prior to the maturity date of such instrument whether or not acquired pursuant to this exemption, provided that the ownership interest sold, exchanged, or transferred represents the plan's entire interest in such investment.

II. Conditions

(A) Effective January 1, 1975, the exemption provided for transactions described in Part I is available only if each of the following conditions, as applicable, is met:

(1) General Conditions.

(a) Any mortgage loan to be acquired must be a "recognized mortgage loan" (as defined in Section D of Part III) or a participation interest in such loan for the purchase of a "residential dwelling unit" (as defined in Section (E) of Part III);

(b) Any mortgage loan must be originated (either directly for the plan or by the origination-purchase process) by an "established mortgage lender" (as defined in Section (B) of Part III); (i) who qualifies the recipient and (ii) as to which neither the plan, nor an employer or group of employers contributing to the plan, nor an employee organization any of whose members are covered by the plan, has the power to exercise a controlling influence over the management or policies of such "established mortgage lender";

(c) The price paid or received by the plan must be at least as favorable to the plan as a similar transaction involving unrelated parties; and

(d) No person who is a developer or a builder involved in the development or construction of the units, or a lender who is associated with the construction financing arrangement for the units, or who, at the time the decision to purchase is made by the plan (whether directly or pursuant to a commitment) is the owner of a mortgage or a participation interest therein which is subsequently sold to the plan, shall have exercised any discretionary authority or control or rendered any investment advice that would make that person a fiduciary with respect to the plan's decision to purchase, or to commit to purchase, a mortgage loan or a participation interest therein or setting the terms thereof.

(2) Specific Conditions Applicable to Commitments.

Where the decision by the plan involves a commitment to purchase either a mortgage loan or participation interest therein:

(a) The commitment must be in writing and must be at least as favorable to the plan as a commitment involving unrelated parties and consistent with customary practices in the residential finance industry; and

(b) The commitment must provide for the use of underwriting guidelines and mortgage instruments which will ensure that all mortgage loans originated pursuant to such commitment will result in a "recognized mortgage loan."

(3) Specific Conditions Applicable to Participations.

Where the acquisition by the plan involves a participation interest in a mortgage loan(s) (whether directly or pursuant to a commitment):

(a) The participation agreement governing such transaction must provide that: (i) The rights and interests evidenced by such participation interest not be subordinated to the rights and interests of other holders of the same participation agreement, (ii) the majority interest in the participation agreement must be owned by parties independent of and not controlled by the person selling the participation interest and servicing the underlying mortgage(s), and (iii) in the event of an inability to obtain collections on any mortgage loan(s) underlying the participation agreement, decisions regarding foreclosure options must be directed by persons other than the seller/servicer; and

(b) Such participation agreement must be in writing and must be at least as favorable to the plan as a participation agreement involving unrelated parties and consistent with customary practices in the residential finance industry.

(B) Effective June 17, 1982, the exemption provided for transactions described in Part I is available only if each of the following conditions is satisfied in addition to each of the applicable conditions described in Section (A) of this Part II:

(1) The decision to purchase or sell the mortgage loan or participation interest therein, or to issue a commitment to do so, must be made on behalf of the plan by a "qualified real estate manager" (as defined in Section (C) of Part III) as to which neither the plan, nor an employer or group of employers contributing to the plan, nor an employee organization any of whose members are covered by the plan, has the power to exercise a controlling influence over the management or policies of such "qualified real estate manager".

(2)(a) The plan shall maintain for the duration of any loan made pursuant to this exemption records necessary to enable the persons described in paragraph (b) of this subsection to determine whether the conditions of this exemption have been met, except that: (i) A prohibited transaction will not be deemed to have occurred, if due to *24816 circumstances beyond the control of the fiduciaries of the plan, records are lost or destroyed prior to the termination of the loan, and (ii) no party-in-interest shall be subject to the civil penalty which may be assessed under section 502(i) of ERISA, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained or are not available for examination as required by paragraph (b) below.

(b) Notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (a) of this sub-section must be unconditionally available at their customary location for examination during normal business hours by: Any trustee, investment manager, participant or beneficiary of the plan, or any duly authorized employee or representative of such person or of the Department or the Internal Revenue Service.

III. Definitions

For purposes of this exemption:

(A) References to persons described in this exemption include their affiliates. an affiliate is defined as:

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

(2) Any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and

(3) Any corporation or partnership of which such person is an officer, director or partner.

(B) An "established mortgage lender" means an organized business enterprise which has as one of its principal purposes in the normal course of business the originating of loans secured by real estate mortgages or deeds of trust and which has satisfied the qualification requirements of one of the following categories:

(1) Approval by the Secretary of the Department of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act;

(2) Approval by the Federal National Mortgage Association or the Federal Home Lona Mortgage Corporation as a qualified Seller/Service; or

(3) A State agency or independent State Authority empowered by State law to raise capital to provide financing for residential dwelling units.

(C) A "qualified real estate manager" means a fiduciary as defined in section 3(21) of the Act who: (1) Is a financial institution or business organization, which in the normal course of business advises institutional investors regarding investments similar to those in which the plan desires to engage and which are described in part I of this exemption; and (2) acknowledges in writing to the plan that it will make decisions regarding plan investments in mortgage loans or participation interests therein in its capacity as a fiduciary of such plan.

(D) A "recognized mortgage loan" is: (1) Any mortgage loan on a "residential dwelling unit" which at the time of its origination, was eligible, through an established program, for purchase by the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation (collectively, the Agencies); or (2) any Federal Housing Administration insured Government National Mortgage Association tandem project mortgage loan on a "residential dwelling unit". Effective for transactions on or after [insert the date of publication in the Federal Register of the final grant of the amended class exemption], compliance with the requirements of this subparagraph (D) may be determined without regard to any principal dollar amount limitation otherwise applicable an established program of the Agencies.

(E) Effective for transactions on or after [insert the date of publication in the Federal Register of the final grant of the amended class exemption], a "residential dwelling unit" or "unit" means non-farm property comprising one or more dwelling units, including detached houses, townhouses, manufactured housing, condominiums, units in a housing cooperative, a unit in a multi-unit subdivision (planned unit development) restricted by recorded documents which limit the use of the unit to residential purposes and provide for maintenance of common facilities, or apartment buildings.

Signed at Washington, DC, this 27th day of June 1988.

David M. Walker,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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