U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

January 22, 2007

2007-01A
PTE 84-14

Melanie Franco Nussdorf, Esq.
Steptoe & Johnson LLP
1330 Connecticut Ave NW
Washington DC 20036

Dear Ms. Nussdorf:

This is in response to your request for guidance concerning the application of section I(a) of Prohibited Transaction Exemption (PTE) 84-14 (49 FR 9494, March 13, 1984, as corrected at 50 FR 41430, October 10, 1985, as amended at 70 FR 49305, August 23, 2005).[1] PTE 84-14 permits certain transactions between a party in interest with respect to an employee benefit plan and an investment fund (as defined in section V(b) of PTE 84-14) in which the plan has an interest and which is managed by a qualified professional asset manager (QPAM), if the conditions of the exemption are satisfied.

You write on behalf of an investment banking, securities and investment management firm (Firm A). You represent that Firm A is a broker-dealer which is a frequent counterparty to plans and vehicles that hold plan assets. A subsidiary of Firm A (Subsidiary B) provides investment advice for a fee to participants in self-directed individual account plans.

You request our views on a scenario under which a participant-directed individual account plan offers a separate account that is managed by a QPAM as one of its investment options. The QPAM is not related to either Firm A or Subsidiary B. You represent that Subsidiary B's services to the plan are limited to advising participants with respect to allocation of their investments in the plan. Subsidiary B does not have authority or control over any participant accounts and does not participate in the selection or oversight by the plan sponsor of investment options available under the plan. The plan sponsor (or a named fiduciary unrelated to Firm A and Subsidiary B) would possess and exercise the authority to appoint and terminate the QPAM for the plan. Neither Firm A nor Subsidiary B would participate in the negotiation of the terms of the management agreement with the QPAM. You note that, under certain circumstances, a fiduciary who provides investment advice to a plan for a fee may exert so much influence over the plan sponsor (or named fiduciary) so as to have effectively "exercised" authority or control over the operation of the plan or its assets. You ask,

[1] See also Proposed Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 70 FR 49312 (August 23, 2005).

however, that the Department assume, for purposes of this opinion, the absence of such influence, control or authority over the plan sponsor (or named fiduciary).

You have requested guidance as to whether transactions between Firm A and the investment fund managed by the QPAM as an option under the plan would fail to satisfy the condition in section I(a) of the exemption if plan participants investing in such fund receive investment allocation recommendations from Subsidiary B. You state that, since the plan sponsor (or named fiduciary) of each plan, as opposed to Firm A or Subsidiary B, is the party that possesses and exercises the power to select the investment vehicles that may be managed by a QPAM, and since plan participants, as opposed to Firm A or Subsidiary B, have the power to select investment options under the plan in which to invest, such transactions should fall within the relief provided by PTE 84-14.

Section I(a) of PTE 84-14 provides that, at the time of the transaction, the party in interest, or its affiliate (as defined in section V(c)), does not have the authority to appoint or terminate the QPAM as a manager of the plan assets involved in the transaction, or negotiate on behalf of the plan the terms of the management agreement with the QPAM (including renewals or modifications thereof) with respect to the plan assets involved in the transaction.

Section V(c) of the exemption defines an affiliate of a person as:

> (1) [a]ny person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person,
> (2) [a]ny corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, 10 percent or more partner . . . or highly compensated employee as defined in section 4975(e)(2)(H) of the Code (but only if the employer of such employee is the plan sponsor), and
> (3) [a]ny director of the person or any employee of the person who is a highly compensated employee, as defined in section 4975(e)(2)(H) of the Code, or who has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets involved in the transaction. A named fiduciary (within the meaning of section 402(a)(2) of ERISA) of a plan with respect to the plan assets involved in the transaction and an employer any of whose employees are covered by the plan will also be considered affiliates with respect to each other for purposes of section I(a) if such an employer or an affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary's employment agreement.

It is the Department's view that, based upon the circumstances you have described, neither Firm A nor Subsidiary B has the authority to appoint or terminate the QPAM as

a manager of plan assets involved in the transaction, or to negotiate the terms of the QPAM's management agreement. The fact that Subsidiary B provides investment advice for a fee to participants in a plan who invest in a separate account under the plan managed by such QPAM would not cause a transaction between the separate account and Firm A to fail section I(a) of the QPAM class exemption solely by reason of the provision of such participant advice.

The Department notes that Part I of PTE 84-14 provides no relief for transactions described in section 406(b) of ERISA. If Subsidiary B is a fiduciary by virtue of rendering investment advice within the meaning of 29 CFR 2510.3-21(c), the provision of such investment advice involving self-dealing will subject the fiduciary adviser to liability under section 406(b) of ERISA. Thus, for example, a violation of section 406(b) would occur if Subsidiary B advised plan participants to invest in a QPAM-managed fund pursuant to an arrangement or understanding with the QPAM which would result in a benefit being conferred upon Firm A or Subsidiary B as a result of such investment.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10, relating to the effect of advisory opinions. This opinion relates only to the specific issue addressed herein.

Sincerely,

Ivan L. Strasfeld
Director , Office of Exemption Determinations