

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Number D-11270]

Amendment to Prohibited Transaction Exemption (PTE)

**84-14 for Plan Asset Transactions Determined by Independent
Qualified Professional Asset Managers**

Agency: Employee Benefits Security Administration

Action: Adoption of amendment to PTE 84-14

SUMMARY: This document amends PTE 84-14, a class exemption that permits various parties that are related to employee benefit plans to engage in transactions involving plan assets if, among other conditions, the assets are managed by “qualified professional asset managers” (QPAMs), which are independent of the parties in interest and which meet specified financial standards. Additional exemptive relief is provided for employers to furnish limited amounts of goods and services to a managed fund 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. Finally, relief is provided for transactions involving places of public

accommodation owned by a managed fund. The amendment permits a QPAM to manage an investment fund containing the assets of the QPAM's own plan or the plan of an affiliate.

The amendment affects participants and beneficiaries of employee benefit plans, the sponsoring employers of such plans, and other persons engaging in the described transactions.

Dates: The amendment is effective [insert date which is 120 days after the date on which the amendment is published in the **Federal Register**].

For Further Information Contact: Christopher Motta, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Room N-5700, 200 Constitution Avenue, NW, Washington, DC 20210, (202) 693-8540 (this is not a toll-free number).

Supplementary Information: On August 23, 2005, a notice was published in the **Federal Register** (70 FR 49312) of the pendency before the Department of Labor (the Department) of a proposed amendment to PTE 84-14 (49 FR 9494, March 13, 1984, as corrected

at 50 FR 41430, October 10, 1985, and amended at 70 FR 49305 (August 23, 2005)). PTE 84-14 provides an exemption from certain of the restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (ERISA), and from certain of the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code. The Department proposed the amendment on its own motion 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 part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).¹

The notice of pendency gave interested persons an opportunity to comment on the proposed exemption. The Department received five written comments; each of which raised several issues. Upon consideration of these comments, the Department has determined to grant the proposed amendment, subject to certain modifications. These modifications and the major comments are discussed below.

¹ Section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), generally transferred the authority of the Secretary of Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Executive Order 12866 Statement

Under Executive Order 12866 (58 FR 51735), a “significant” regulatory action is subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a “significant regulatory action” as an action that is likely to result in a rule: (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

When proposed, this amendment was determined to be a “significant regulatory action” and was reviewed by OMB. The

finalization of the proposal has also been determined to be a “significant regulatory action” under Executive Order 12866.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2) (A)). This helps to ensure that the public understands the Department’s collection instructions, respondents can provide the requested data in the desired format, the reporting burden (time and financial resources) is minimized, and the Department can properly assess the impact of collection requirements on respondents.

The Department requested public comments on the information collection requirements of the proposed amendments to PTE 84-14 in the notice published in the **Federal Register** (70 FR 49312) of the pendency before the Department of the proposed amendment to PTE 84-14, described earlier in the preamble. No comments

specifically addressing the Department's paperwork burden estimates were received. Following the closing of the 60-day comment period, the Department submitted an Information Collection Request (ICR) to OMB, which approved the information collection requirements included in the proposed amendments under OMB Control Number 1210-0128 in a Notice of Action dated October 18, 2005. The approval was scheduled to expire October 31, 2008; therefore, on October 22, 2008, the Department filed with OMB a request to discontinue the control number on October 22, 2008, because it was clear that the proposed amendment would not be finalized before the ICR was scheduled to expire. OMB approved the Department's request on the same day. The Department is hereby filing a request to reinstate the control number with the changes discussed below.

The information collection requirements of this final amendment are essentially unchanged from the proposal and consist, in part, of the requirements that the QPAM develop written policies and procedures designed to ensure compliance with the conditions of the exemptions and have an independent auditor conduct an annual exemption audit and issue an audit report to each QPAM-sponsored plan managed by the QPAM. Although

no program changes have been made that would require revision of the prior paperwork burden estimates, the Department is adjusting its estimates of the cost burden of this final amendment in two respects. First, the Department is revising its estimate of the number of respondents, based on more recent Form 5500 data. Second, the Department is revising its estimate of the cost of the exemption audit and report, based on public comments on the substance of the proposed amendments. The Department will submit, contemporaneously with publication of this final amendment, a change worksheet to OMB for approval of these adjustments, which are described further below.

In the proposed amendment, the Department estimated the total number of institutions (banks, savings institutions, insurance companies, and investment advisors) that might choose to act as QPAMs for their own plans at 6,500. Based on more recent information from the 2007 Form 5500 filings, the Department now estimates that number at 4,400. Assuming that all eligible institutions would choose to take advantage of the exemption, the aggregate cost of developing written policies and procedures, assuming one hour of a legal professional's time at

\$119 per hour, is estimated at \$523,700.² As explained in the preamble to the proposed amendment, the actual amount of time required, and the resulting cost burden, may be even lower because the Department has described the objective requirements of the exemption that are to be included in the policies and procedures. In future years, the Department is assuming that an additional one percent of the currently existing QPAMs, or 44 institutions will annually establish new policies and procedures for managing their own plans, at an annual cost of approximately \$5,200.

In the paperwork burden estimates for the proposal, the Department assumed that the exemption audit report would not impose any additional paperwork burden on respondents because preparation of a written report is usual and customary for any independent audit. In several of the comments received in response to the proposed amendment, which are described further below, commenters asserted that the exemption audit as proposed would be substantially different in nature from other internal

² EBSA estimates of labor rates include wages, other benefits, and overhead based on the National Occupational Employment Survey (May 2008, Bureau of Labor Statistics) and the Employment Cost Index (June 2009, Bureau of Labor Statistics). Figures are projected forward to 2010. Legal professional wage and benefits estimates of \$119.03 are based on metropolitan wage rates for lawyers.

audits currently performed by QPAMs, but similar to the exemption audit currently required under PTE 96-23 (relating to the activities of in-house asset managers (INHAMs)). Two commenters estimated the cost of an INHAM exemption audit to be at least \$20,000. The Department further obtained information from industry representatives describing INHAM exemption audits as ranging in cost from \$10,000 to \$25,000, depending on the asset size of the plan. In light of this information, the Department has decided to adjust its burden estimates to recognize the cost of preparing an annual exemption report. Because the asset size of QPAM-sponsored plans is likely to be smaller than the asset size of plans whose assets are managed by INHAMs, the Department has assumed that the average cost of an exemption audit required under the amendment at \$10,000, with an estimated additional annual cost burden of \$44,000,000 ($\$10,000 * 4,400$ QPAMs).

Description of the Exemption

PTE 84-14 consists of four separate parts. The General Exemption, set forth in Part I, permits an investment fund managed by a QPAM to engage in a wide variety of transactions described in ERISA section 406(a)(1)(A) through (D) with

virtually all parties in interest except the QPAM which manages the assets involved in the transaction and those parties most likely to have the power to influence the QPAM.

Part II of the exemption provides limited relief from both section 406(a) and (b) of ERISA for certain transactions involving those employers and certain of their affiliates which could not qualify for the General Exemption provided by Part I.

Part III of the exemption provides limited relief from section 406(a) and (b) of ERISA for the leasing of office or commercial space by an investment fund to the QPAM, an affiliate of the QPAM, or a person who could not qualify for the General Exemption provided by Part I because it held the power of appointment, as such term is described in paragraph (a) of Part I.

Part IV of the exemption provides limited relief from sections 406(a) and 406(b)(1) and (2) of ERISA for the furnishing of services and facilities by a place of public accommodation owned by an investment fund managed by a QPAM, to all parties in interest, if the services and facilities are furnished on a comparable basis to the general public.

In the notice published on August 23, 2005, the Department proposed to amend PTE 84-14 to permit a QPAM to prospectively manage an investment fund that contains the assets of its own plan or the plan of an affiliate (retroactive and transitional relief in this regard is provided in the notice of final amendment to PTE 84-14 that was published on the same day (as cited above)). This prospective relief is described in Part V of the proposed amendment, which specifically provides relief for transactions described in Parts I, III and IV of PTE 84-14 that involve a QPAM-managed fund containing the assets of a plan sponsored by such QPAM. Among other things, relief is contingent upon an "independent auditor" conducting an annual "exemption audit" to determine whether the written procedures adopted by the QPAM are designed to assure compliance with the conditions of the exemption. The term "exemption audit" is defined in Part VI, the "Definitions" section of the proposed amendment.

Written Comments

Independent Audit Requirement

Several of the commenters requested that the "exemption audit" requirement be eliminated. One commenter stated that the

“exemption audit” is unnecessary given existing regulatory oversight and internal audit requirements. This commenter identified numerous regulators that oversee financial institutions that act as QPAMs. Additionally, the commenter noted that that QPAMs are subject to external examinations, internal audits, and reviews designed to assure compliance with the laws and regulations that affect the QPAMs’ activities.

As noted in the preamble to the proposed amendment, PTE 84-14 was developed and granted based on the essential premise that broad relief could be afforded for all types of transactions in which a plan engages only if the commitments and the investments of plan assets and the negotiations leading thereto are the sole responsibility of an independent, discretionary, manager. The arrangement described in the proposed amendment diverges from the original premise of PTE 84-14 in that it involves the retention by a plan sponsor/QPAM of the discretion to invest the assets of plans sponsored by the QPAM in an investment fund managed by the QPAM. In order to address this lack of QPAM independence, the proposed amendment relies on the “exemption audit;” which is an annual audit designed to ensure that, among other things, the conditions of the exemption have been met. None of the

regulatory oversight identified by the commenter similarly addresses this concern. Although financial institutions that act as QPAMs perform certain audits internally, this type of audit does not address the potential for the exercise of undue influence which may arise in the absence of an independent investment manager.

One commenter stated that the "exemption audit" is not necessary where a QPAM has a track record of ensuring that the conditions of the class exemption have been met (i.e., where the QPAM manages more than \$100 million in assets other than the assets of plans sponsored by the QPAM). The Department does not believe that a certain stated dollar amount of plan assets managed by a QPAM (other than the assets of a plan sponsored by the QPAM or an affiliate) is an adequate substitute for the lack of an independent fiduciary that would be responsible for monitoring the activities of the QPAM with respect to its own in-house plan.

Two commenters argue that the Department should modify the "exemption audit" if it determines not to eliminate it altogether. These commenters state that the cost of the audit is burdensome and/or unnecessary given the availability of different

alternatives. One of these commenters recommends that the audit be performed less frequently (i.e., every five years); the other commenter recommends that the audit requirement be altered to consist of an in-house review or in-house "audit of exemption compliance," together with the additional requirement that an independent firm conduct an exemption audit every five years.

It is the view of the Department that performance of the "exemption audit" on a less than an annual basis will weaken an important plan protection. The Department believes that an annual review of, among other things, a QPAM's written policies and procedures and a representative sample of plan transactions by an independent auditor is necessary to address the lack of QPAM independence. With regards to the costs associated with the "exemption audit," the Department notes that a financial services entity is under no obligation to serve as a QPAM for its own plan under the amended exemption if it is determined not to be cost effective.

Two commenters express the view that the "exemption audit" is unnecessary given that QPAMs are motivated to comply with the terms of the class exemption regardless of whether an "exemption audit" is performed. These commenters state that QPAMs are

responsible for any losses resulting from any non-exempt transactions (i.e., losses that arise in connection with transactions that fail to comply with the terms of PTE 84-14) and, accordingly, are self-motivated to comply with the terms of the amended class exemption.

The Department is not persuaded that a QPAM's motivation to avoid losses from non-exempt transactions is an adequate substitute for the "exemption audit." As noted in the preamble to the proposed amendment, the Department believes that the involvement of an independent party in overseeing compliance with the exemption would serve as a meaningful safeguard. In addition, the "exemption audit" protects plans by ensuring that an investment manager, who may not otherwise have experience managing ERISA plan assets, complies with the provisions of ERISA.

Upon considering all the comments, the Department has determined not to modify the "exemption audit" requirement in the final QPAM class exemption. Although the proposed amendment provided only that the "exemption audit" must be performed on an "annual basis," it did not specify the date by which each year's audit must be completed. To avoid any uncertainty on this issue,

the final amendment specifies that the "exemption audit" must be completed within six months following the end of the year to which it relates.

Diverse Clientele Test

Several commenters commented on section I(e) of the class exemption.³ Two of these commenters state that the Diverse Clientele Test is duplicative and/or unnecessary in light the exemption audit and should be waived where a QPAM acts as a manager for its own plan or the plan of an affiliate. Another commenter states that the diverse clientele test should be stricter and recommends that the 20% limitation should be lowered to 10%.

The Department notes that the Diverse Clientele Test, as it applies to the amended class exemption, ensures that the assets of plans sponsored by a QPAM or its affiliates do not constitute a significant percentage of the assets of an investment fund

³ Part I(e) of PTE 84-14 provides that a QPAM may not enter into a transaction with a party in interest with respect to any plan whose assets managed by the QPAM, when combined with the assets of other plans established or maintained by the same employer or affiliates of the employer or by the same employee organization, and managed by the QPAM, represent more than 20 percent of the total clients assets managed by the QPAM at the time of the transaction.

managed by the QPAM. In this regard, as stated in the preamble to PTE 84-14, the Department believes that the presence of independent business provides an important protection under the class exemption.⁴ Accordingly, the Department has determined not to eliminate the percentage limitation of the Diverse Clientele Test. However, in consideration of the nature of the transactions exempted and the additional protections embodied in the class exemption, the Department does not believe that it is necessary to reduce the current percentage to ten percent.

Another commenter notes that PTE 96-23, a class exemption which permits various transactions involving employee benefit plans whose assets are managed by in-house managers (INHAMS), does not contain a limitation that parallels the Diverse Clientele Test in PTE 84-14. This commenter notes that banks and insurance companies; which do not meet the definition of INHAM and therefore do not qualify for relief under that class exemption; will be subject to a limitation that is not otherwise applicable to financial institutions that qualify for relief under the INHAM class exemption.

⁴ 49 FR. 9504.

In this regard, the Department notes that this amendment of PTE 84-14 does not foreclose future consideration of additional exemptive relief under PTE 96-23 for financial institutions that do not meet the Diverse Clientele Test and currently do not qualify as INHAMS, if the requisite findings under section 408(a) of ERISA can be made.

Scope of Relief

One of the commenters stated that it is unclear whether the proposed amendment would permit a QPAM to manage an investment fund that contains the assets of a plan sponsored by an affiliate of the QPAM. The Department has revised Part V of the final amendment to clarify that relief is being granted for a QPAM to manage an investment fund that contains the assets of a plan sponsored by a QPAM and/or a plan sponsored by an affiliate thereof.

Transitional Relief

One commenter urged the Department to delay the effective date of the final amendment in order to give parties more time to comply with the changes. Specifically, the commenter requested

that the amendment be effective 120 days after publication in the **Federal Register**. The Department agrees that additional time may be needed for QPAMs to conform to the amended class exemption. Accordingly, the final amendment is effective 120 days following the date of publication of this amendment in the **Federal Register**. In the interim, a QPAM may continue to act as an investment manager for its own in-house plan in reliance on the transitional relief provided in the amendment to PTE 84-14 published on August 23, 2005.

Definition of QPAM

One commenter recommended that the amendment permit only financial institutions that are registered investment advisers (and not, for example, proprietary trading operations) to act as QPAMs for their own plans. In this regard, the Department notes that Part VI(a) of the amended class exemption defines the term “qualified professional asset manager” or “QPAM” to mean an independent fiduciary which is (1) a bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940, or (2) a savings and loan association, or (3) an insurance company which is qualified under the laws of more than one State to manage,

acquire, or dispose of any assets of a plan, or (4) an investment adviser registered under the Investment Advisers Act of 1940. In light of the above, the Department believes that it is unnecessary to amend the definition of QPAM as requested.

Additional Clarifications

In the preamble to the proposed amendment, the Department noted that the exemption audit is substantially similar to the audit required under PTE 96-23 (61 FR 15975 (Apr. 10, 1996)). However, following publication of the proposed amendment, the Department became aware of practitioner uncertainty regarding certain aspects of the audit requirement in PTE 96-23. Because of the similarity of the audit requirements in the proposed amendment to PTE 84-14 with the audit requirement in PTE 96-23, the Department is providing additional clarifying language in sections VI(p) and V(c) of PTE 84-14 as described below, and, further, is offering the following additional guidance.

Section VI(p) of the proposed amendment requires, in part, an auditor to test a representative sample of a plan's transactions covered by the exemption in order to make findings

regarding whether the QPAM is in compliance with the QPAM's policies and procedures, and with the objective requirements of the exemption. The Department notes, however, that in certain instances, an auditor may need to construct and test more than one set of transactions in order to have a reasonable basis for an opinion on the QPAM's compliance with the exemption. For example, an auditor may initially believe that the most appropriate way to make the required findings is to construct a sample that represents the total universe of relevant transactions engaged in by the QPAM under the exemption. In testing the sample, however, the auditor should look for, and may find, patterns of compliance failures that indicate that certain types of transactions are more prone to compliance failures than others. If such patterns appear, the auditor may need to test additional transactions to more accurately assess the extent and causes of non-compliant transactions. Since, as noted in the preamble to the proposed amendment, the audit requirement is, among other things, intended to protect plans by ensuring that an investment manager complies with the requirements of the exemption, the sample should also be sufficient in size and nature for the auditor to render an overall opinion regarding

whether the QPAM's program complied with the objective requirements of the exemption, and with the QPAM's own policies and procedures.

Accordingly, the Department has clarified section VI(p)(2) of PTE 84-14 in a manner that is consistent with the views expressed above.

Section V(c) of the proposed amendment requires that an independent auditor conduct an exemption audit on an annual basis, and issue a written report to the plan presenting its specific findings regarding the level of compliance with the policies and procedures adopted by the QPAM. However, the proposed amendment does not specify the date by which each audit must be completed. To avoid any uncertainty on this issue, section V(c) of PTE 84-14 now expressly provides that the audit must be completed within six months following the end of the year to which it relates. For consistency with the changes to section VI(p)(2) described above, section V(c) also expressly provides that the written report must contain the specific findings required under section VI(p)(2), and an overall opinion regarding the level of compliance of the QPAM's program with the policies

and procedures adopted by the QPAM and the objective requirements of the exemption.

The Department notes that relief is not available under PTE 84-14 for those transactions that did not satisfy its conditions. As a result, the Department anticipates that an auditor's report will clearly identify each transaction examined by the auditor that does not comply with the QPAM's policies and procedures or the exemption. In this regard, the report should identify the specific policies, procedures or exemption conditions that were not satisfied. The Department expects further that each written report will include a description of the steps, if any, taken by the QPAM to remedy transactions that did not comply with the objective requirements of the exemption. The report should also contain a description of the steps taken by the auditor to construct the sample(s) and an explanation as to why the auditor believes that the sample on which the required findings are based is an adequate representation of the total universe of transactions engaged in by the QPAM.

The QPAM retains responsibility for reviewing the written report and taking any appropriate actions deemed necessary for

assuring compliance with the exemption. The Department cautions that the failure of the QPAM to take appropriate steps to address any adverse findings or prohibited transactions in an audit would raise issues under the fiduciary responsibility provisions of section 404 of ERISA.

For the sake of convenience, the entire text of PTE 84-14 has been reprinted with this notice.

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 ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA 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 ERISA 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.

Additionally, the fact that a transaction is the subject of an exemption does not 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) The Department finds that the amended exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The amended exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the amendment; and

(4) The amended exemption is supplemental to, and not in derogation of, any other provisions of ERISA 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

Under 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), effective as noted, the Department amends PTE 84-14 as set forth below:

Part I - General Exemption

Effective as of August 23, 2005, the restrictions of ERISA section 406(a)(1)(A) through (D) and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (D), shall not apply to a transaction between a party in interest with respect to an employee benefit plan and an investment fund (as defined in section VI(b)) in which the plan has an interest, and which is managed by a qualified professional asset manager (QPAM) (as defined in section VI(a)), if the following conditions are satisfied:

(a) At the time of the transaction (as defined in section VI(i)) the party in interest, or its affiliate (as defined in section VI(c)), does not have the authority to-

(1) Appoint or terminate the QPAM as a manager of the plan assets involved in the transaction, or

(2) 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;

Notwithstanding the foregoing, in the case of an investment fund in which two or more unrelated plans have an interest, a transaction with a party in interest with respect to an employee benefit plan will be deemed to satisfy the requirements of section I(a) if the assets of the plan managed by the QPAM in the investment fund, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof described in section VI(c)(1) of the exemption) or by the same employee organization, and managed in the same investment fund, represent less than 10 percent of the assets of the investment fund;

(b) The transaction is not described in -

(1) Prohibited Transaction Exemption 2006-16 (71 FR 63786; October 31, 2006) (relating to securities lending arrangements) (as amended or superseded),

(2) Prohibited Transaction Exemption 83-1 (48 FR 895; January 7, 1983) (relating to acquisitions by plans of interests in mortgage pools) (as amended or superseded), or

(3) Prohibited Transaction Exemption 82-87 (47 FR 21331; May 18, 1982) (relating to certain mortgage financing arrangements) (as amended or superseded);

(c) The terms of the transaction are negotiated on behalf of the investment fund by, or under the authority and general direction of, the QPAM, and either the QPAM, or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM, makes the decision on behalf of the investment fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest;

(d) The party in interest dealing with the investment fund is neither the QPAM nor a person related to the QPAM (within the meaning of section VI(h));

(e) The transaction is not entered into with a party in interest with respect to any plan whose assets managed by the QPAM, when combined with the assets of other plans established or maintained by the same employer (or affiliate thereof described in section VI(c)(1) of this exemption) or by the same employee

organization, and managed by the QPAM, represent more than 20 percent of the total client assets managed by the QPAM at the time of the transaction;

(f) 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 QPAM, the terms of the transaction are at least as favorable to the investment fund as the terms generally available in arm's length transactions between unrelated parties;

(g) Neither the QPAM nor any affiliate thereof (as defined in section VI(d)), nor any owner, direct or indirect, of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of: any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment,

embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA. For purposes of this section (g), a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

Part II - Specific Exemption for Employers

Effective as of August 23, 2005, the restrictions of sections 406(a), 406(b)(1) and 407(a) of ERISA 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 sale, leasing, or servicing of goods (as defined in section VI(j)), or to the furnishing of services, to an investment fund managed by a QPAM by a party in interest with respect to a plan having an interest in the fund, if -

(1) The party in interest is an employer any of whose employees are covered by the plan or is a person who is a party in interest by virtue of a relationship to such an employer described in section VI(c),

(2) The transaction is necessary for the administration or management of the investment fund,

(3) The transaction takes place in the ordinary course of a business engaged in by the party in interest with the general public,

(4) Effective for taxable years of the party in interest furnishing goods and services after August 23, 2005, the amount attributable in any taxable year of the party in interest to transactions engaged in with an investment fund pursuant to section II(a) of this exemption does not exceed one (1) percent of the gross receipts derived from all sources for the prior taxable year of the party in interest, and

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

(b) The leasing of office or commercial space by an investment fund maintained by a QPAM to a party in interest with respect to a plan having an interest in the investment fund, if -

(1) The party in interest is an employer any of whose employees are covered by the plan or is a person who is a party in interest by virtue of a relationship to such an employer described in section VI(c),

(2) No commission or other fee is paid by the investment fund to the QPAM or to the employer, or to an affiliate of the QPAM or employer (as defined in section VI(c)), in connection with the transaction,

(3) Any unit of space leased to the party in interest by the investment fund is suitable (or adaptable without excessive cost) for use by different tenants,

(4) The amount of space covered by the lease does not exceed fifteen (15) percent of the rentable space of the office building, integrated office park, or of the commercial center (if the lease does not pertain to office space),

(5) In the case of a plan that is not an eligible individual account plan (as defined in section 407(d)(3) of ERISA), immediately after the transaction is entered into, the aggregate fair market value of employer real property and employer securities held by investment funds of the QPAM in which the plan has an interest does not exceed 10 percent of the fair market value of the assets of the plan held in those investment funds. In determining the aggregate fair market value of employer real property and employer securities as described herein, a plan shall be considered to own the same proportionate

undivided interest in each asset of the investment fund or funds as its proportionate interest in the total assets of the investment fund(s). For purposes of this requirement, the term "employer real property" means real property leased to, and the term "employer securities" means securities issued by, an employer any of whose employees are covered by the plan or a party in interest of the plan by reason of a relationship to the employer described in subparagraphs (E) or (G) of ERISA section 3(14), and

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

Part III - Specific Lease Exemption for QPAMs

Effective as of August 23, 2005, 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 leasing of office or commercial space by an investment fund managed by a QPAM to the QPAM, a person who is a party in interest of a plan by virtue of a relationship to such QPAM described in subparagraphs (G), (H), or (I) of ERISA section 3(14) or a person

not eligible for the General Exemption of Part I by reason of section I(a), if -

(a) The amount of space covered by the lease does not exceed the greater of 7500 square feet or one (1) percent of the rentable space of the office building, integrated office park or of the commercial center in which the investment fund has the investment,

(b) The unit of space subject to the lease is suitable (or adaptable without excessive cost) for use by different tenants,

(c) 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 QPAM, the terms of the transaction are not more favorable to the lessee than the terms generally available in arm's length transactions between unrelated parties, and

(d) No commission or other fee is paid by the investment fund to the QPAM, any person possessing the disqualifying powers described in section I(a), or any affiliate of such persons (as defined in section VI(c)), in connection with the transaction.

Part IV - Transactions Involving Places of Public Accommodation

Effective as of August 23, 2005, 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 an investment fund managed by a QPAM to a party in interest with respect to a plan having an interest in the investment fund, if the services and facilities (and incidental goods) are furnished on a comparable basis to the general public.

Part V- Specific Exemption Involving QPAM-Sponsored Plans.

Effective after **[insert date which is 120 days following the date on which this final amendment to PTE 84-14 is published in the Federal Register]**, the relief provided by Parts I, III or IV of PTE 84-14 from the applicable restrictions of ERISA section 406(a), section 406(b)(1) and (2), and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall apply to a transaction involving the assets of a plan sponsored by the QPAM or an affiliate of the QPAM if:

(a) The QPAM has discretionary authority or control with respect to the plan assets involved in the transaction;

(b) The QPAM adopts written policies and procedures that are designed to assure compliance with the conditions of the exemption;

(c) An independent auditor, who has appropriate technical training or experience and proficiency with ERISA's fiduciary responsibility provisions and so represents in writing, conducts an exemption audit (as defined in section VI(p) on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the plan presenting its specific findings regarding the level of compliance: (1) with the policies and procedures adopted by the QPAM in accordance with section V(b); and (2) with the objective requirements of the exemption. The written report shall also contain the auditor's overall opinion regarding whether the QPAM's program complied: (1) with the policies and procedures adopted by the QPAM; and (2) with the objective requirements of the exemption. The exemption audit and the written report must be completed within six months following the end of the year to which the audit relates;

(d) The transaction meets the applicable requirements set forth in Parts I, III, or IV of the exemption.

Part VI - Definitions and General Rules

For purposes of this exemption:

(a) The term "qualified professional asset manager" or "QPAM" means an independent fiduciary (as defined in section VI(o)) which is -

(1) A bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 that has the power to manage, acquire or dispose of assets of a plan, which bank has, as of the last day of its most recent fiscal year, equity capital (as defined in section VI(k)) in excess of \$1,000,000 or

(2) A savings and loan association, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, that has made application for and been granted trust powers to manage, acquire or dispose of assets of a plan by a State or Federal authority having supervision over savings and loan associations, which savings and loan association has, as of the last day of its most recent fiscal year, equity capital (as defined in section VI(k)) or net worth (as defined in section

VI(l)) in excess of \$1,000,000 or

(3) An insurance company which is qualified under the laws of more than one State to manage, acquire, or dispose of any assets of a plan, which company has, as of the last day of its most recent fiscal year, net worth (as defined in section VI(l)) in excess of \$1,000,000 and which is subject to supervision and examination by a State authority having supervision over insurance companies, or

(4) An investment adviser registered under the Investment Advisers Act of 1940 that has total client assets under its management and control in excess of \$50,000,000 as of the last day of its most recent fiscal year, and either (A) shareholders' or partners' equity (as defined in section VI(m)) in excess of \$750,000, or (B) payment of all of its liabilities including any liabilities that may arise by reason of a breach or violation of a duty described in sections 404 and 406 of ERISA is unconditionally guaranteed by - (i) A person with a relationship to such investment adviser described in section VI(c)(1) if the investment adviser and such affiliate have shareholders' or partners' equity, in the aggregate, in excess of \$750,000, or (ii) A person described in (a)(1), (a)(2) or (a)(3) of section VI

above, or (iii) A broker-dealer registered under the Securities Exchange Act of 1934 that has, as of the last day of its most recent fiscal year, net worth in excess of \$750,000; and (C) effective as of the last day of the first fiscal year of the investment adviser beginning on or after August 23, 2005, substitute "\$85,000,000" for "\$50,000,000" and "\$1,000,000" for "\$750,000" in (a)(4)(A) or (B) of section VI above; Provided that such bank, savings and loan association, insurance company or investment adviser has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

(b) An "investment fund" includes single customer and pooled separate accounts maintained by an insurance company, individual trusts and common, collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of the QPAM) is subject to the discretionary authority of the QPAM.

(c) For purposes of section I(a) and Part II, an "affiliate" of a person means -

(1) Any person directly or indirectly, through one or

more intermediaries, controlling, controlled by, or under common control with the person,

(2) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, 10 percent or more partner (except with respect to Part II this figure shall be 5 percent), 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) Any 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 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.

(d) For purposes of section I(g) an "affiliate" of a person means -

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

(2) Any director of, relative of, or partner in, any such person,

(3) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and

(4) Any employee or officer of the person who -

(A) Is a highly compensated employee (as defined in section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or

(B) Has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.

(e) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(f) The term "party in interest" means a person described in ERISA section 3(14) and includes a "disqualified person," as defined in Code section 4975(e)(2).

(g) The term "relative" means a relative as that term is defined in ERISA section 3(15), or a brother, a sister, or a spouse of a brother or sister.

(h) A QPAM is "related" to a party in interest for purposes of section I(d) of this exemption if, as of the last day of its most recent calendar quarter: (i) the QPAM owns a ten percent or more interest in the party in interest; (ii) a person controlling, or controlled by, the QPAM owns a twenty percent or more interest in the party in interest; (iii) the party in interest owns a ten percent or more interest in the QPAM; or (iv) a person controlling, or controlled by, the party in interest owns a twenty percent or more interest in the QPAM.

Notwithstanding the foregoing, a party in interest is "related" to a QPAM if: (i) a person controlling, or controlled by, the party in interest has an ownership interest that is less than twenty percent but greater than ten percent in the QPAM and such person exercises control over the management or policies of the QPAM by reason of its ownership interest; (ii) a person

controlling, or controlled by, the QPAM has an ownership interest that is less than twenty percent but greater than ten percent in the party in interest and such person exercises control over the management or policies of the party in interest by reason of its ownership 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 if, other than in a fiduciary capacity, 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.

(i) 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 December 21, 1982, or a renewal that requires the consent of the QPAM occurs on or after December 21, 1982 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. Notwithstanding the foregoing, this exemption shall cease to apply to a transaction exempt by virtue of Part I or Part II at such time as the percentage requirement contained in section I(e) is exceeded, unless no portion of such excess results from an increase in the assets transferred for discretionary management to a QPAM. For this purpose, assets transferred do not include the reinvestment of earnings attributable to those plan assets already under the discretionary management of the QPAM. Nothing in this paragraph shall be construed as exempting a transaction entered into by an investment fund which becomes a transaction described in section

406 of ERISA or section 4975 of the Code while the transaction is continuing, unless the conditions of this 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.

(j) The term "goods" includes all things which are movable or which are fixtures used by an investment fund but does not include securities, commodities, commodities futures, money, documents, instruments, accounts, chattel paper, contract rights and any other property, tangible or intangible, which, under the relevant facts and circumstances, is held primarily for investment.

(k) For purposes of section VI(a)(1) and (2), the term "equity capital" means stock (common and preferred), surplus, undivided profits, contingency reserves and other capital reserves.

(l) For purposes of section VI(a)(3), the term "net worth" means capital, paid-in and contributed surplus, unassigned surplus, contingency reserves, group contingency reserves, and special reserves.

(m) For purposes of section VI(a)(4), the term

“shareholders’ or partners’ equity” means the equity shown in the most recent balance sheet prepared within the two years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

(n) The terms “employee benefit plan” and “plan” refer to an employee benefit plan described in section 3(3) of ERISA and/or a plan described in section 4975(e)(1) of the Code.

(o) For purposes of section VI(a), the term “independent fiduciary” means a fiduciary managing the assets of a plan in an investment fund that is independent of and unrelated to the employer sponsoring such plan. For purposes of this exemption, the independent fiduciary will not be deemed to be independent of and unrelated to the employer sponsoring the plan if such fiduciary directly or indirectly controls, is controlled by, or is under common control with the employer sponsoring the plan. Notwithstanding the foregoing: (1) for the period from December 21, 1982, through **[insert date which is 120 days after the date on which this final amendment to PTE 84-14 is published in the Federal Register]**, a QPAM managing the assets of a plan in an investment fund will not fail to satisfy the requirements of this

section solely because such fiduciary is the employer sponsoring the plan or directly or indirectly controls, is controlled by, or is under common control with the employer sponsoring the plan; and (2) effective after **[insert date which is 120 days after the date on which this final amendment to PTE 84-14 is published in the Federal Register]** a QPAM acting as a manager for its own plan or the plan of an affiliate (as defined in section VI(c)(1)) will be deemed to satisfy the requirements of this section if the requirements of Part V are met.

(p) Exemption Audit. An "exemption audit" of a plan must consist of the following:

(1) A review of the written policies and procedures adopted by the QPAM pursuant to section V(b) for consistency with each of the objective requirements of this exemption (as described in section VI(q)).

(2) A test of a representative sample of the plan's transactions during the audit period that is sufficient in size and nature to afford the auditor a reasonable basis:

(A) to make specific findings regarding whether the QPAM is in compliance with (i) the written policies and procedures adopted by the QPAM pursuant to section VI(q) of the

exemption and (ii) the objective requirements of the exemption;
and

(B) to render an overall opinion regarding the level of compliance of the INHAM's program with section VI(p)(2)(A)(i) and (ii) of the exemption.

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

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

(q) For purposes of section VI(p), the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by the QPAM to assure compliance with each of these requirements:

(1) The definition of a QPAM in section VI(a).

(2) The requirement of sections V(a) and I(c) regarding the discretionary authority or control of the QPAM with respect to the plan assets involved in the transaction, in negotiating the terms of the transaction and with respect to the decision on behalf of the investment fund to enter into the transaction.

(3) For a transaction described in Part I:

(A) that the transaction is not entered into with any person who is excluded from relief under section I(a), section I(d), or section I(e),

(B) that the transaction is not described in any of the class exemptions listed in section I(b),

(4) If the transaction is described in section III:

(A) that the amount of space covered by the lease does not exceed the limitations described in section III(a); and

(B) that no commission or other fee is paid by the investment fund as described in section III(d).

Signed at Washington, D.C., this ____ day of _____,
2010.

Ivan L. Strasfeld
Director, Office of
Exemption
Determinations,
Employee Benefits
Security Administration,
Department of Labor

