

Melanie Franco Nussdorf, Esq.
Steptoe and Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

2012-__A
PTE 77-4

Dear Ms. Nussdorf:

This letter responds to your request for an advisory opinion concerning section II(d) of Prohibited Transaction Exemption (PTE) 77-4.¹ This class exemption provides relief from the restrictions of section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986, as amended (the Code), for an employee benefit plan's purchase or sale of shares of an open-end investment company registered under the Investment Company Act of 1940 (mutual fund) when an investment advisor for the mutual fund or its affiliate is: (1) a plan fiduciary; and (2) not an employer of employees covered by the plan.

Section II(d) of PTE 77-4 contains certain conditions for the exemptive relief and provides, in pertinent part, that:

A second fiduciary with respect to the plan, who is independent of and unrelated to the fiduciary/investment adviser or any affiliate thereof, receives a current prospectus issued by the investment company, and full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company, including the nature and extent of any differential between the rates of such fees, the reasons why the fiduciary/investment adviser may consider such purchases to be appropriate for the plan, and whether there are any limitations on the fiduciary/investment adviser with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations.

You inquired whether delivery of a "summary prospectus" may be used to satisfy the condition in section II(d) of PTE 77-4 that requires the delivery of a mutual fund's prospectus to the second fiduciary.

In this regard, the Securities and Exchange Commission (SEC) in 2009 published revised disclosure provisions for mutual funds including a summary prospectus rule.² The revisions permit an entity to satisfy its mutual fund prospectus delivery obligations under section 5(b)(2)

¹ 42 FR 18732 (April 8, 1977).

² See 74 FR 4546 (January 26, 2009). The final rule adopted, among other things, parallel amendments to SEC Form N-1A (the registration form for mutual funds) and to Rule 498 (which includes the content requirements for a summary prospectus).

of the Securities Act of 1933 by sending or giving key information directly to investors in the form of a summary prospectus, and providing the statutory prospectus on-line at a specified internet site.³ A statutory prospectus is a prospectus that meets the requirements of section 10(a) of the Securities Act of 1933 and contains more comprehensive information than a summary prospectus. Pursuant to the SEC's revised disclosure provisions, mutual funds also are required to send the statutory prospectus to the investor upon an investor's request.⁴

The summary prospectus must contain the same information in the same order as the summary at the front of the statutory prospectus, and must be written in plain English in a clear and concise format.⁵ A summary prospectus must contain the following information: (1) Investment objectives; (2) costs; (3) principal investment strategies, risks and performance; (4) investment advisers and portfolio managers; (5) purchase and sale and tax information; and (6) financial intermediary compensation.⁶ According to the SEC, the rationale for these rules is to:

[H]elp investors who are overwhelmed by the choices among thousands of available funds described in lengthy and legalistic documents to access readily key information that is important to an informed investment decision. At the same time, by harnessing the power of technology to deliver information in better, more useable formats, the disclosure framework can help those investors, their intermediaries, third-party analysts, the financial press, and others to locate and compare facts and data from the wealth of more detailed disclosures that are available.⁷

Following the SEC's adoption of the summary prospectus rule, the Department concluded in Field Assistance Bulletin 2009-03 (September 8, 2009), that providing a summary prospectus to participants and beneficiaries satisfied the prospectus delivery obligations under ERISA's section 404(c) regulations because the required contents of the summary prospectus provide key information about a mutual fund that will assist participants and beneficiaries in making informed investment decisions. The Department noted that the statutory prospectus is available free-of-charge through various means including on the internet or by e-mail, upon request.

In Advisory Opinion 94-35A (November 3, 1994), the Department addressed the prospectus delivery requirement of section II(d) of PTE 77-4 in the context of a mutual fund that was registered under the Investment Company Act of 1940 but not the Securities Act of 1933.⁸ The

³ 17 CFR § 230.498.

⁴ 17 CFR § 230.498(f).

⁵ 17 CFR § 230.498(b)(2) and 17 CFR § 230.421(b), (c) and (d).

⁶ 17 CFR at § 230.498(b)(2).

⁷ See 74 FR at 4549.

⁸ Because the purchase of shares of the mutual fund described in AO 94-35A was not available to the general public, there was no requirement under the Securities Act of 1933 to furnish a prospectus to the limited group of investors who could invest in the subject mutual fund. Nevertheless, because the mutual fund was subject to the registration requirements of the Investment Act of 1940, the Form N-1A was still required to be completed.

Department considered whether the prospectus delivery requirement could be satisfied by providing an independent plan fiduciary with the SEC Form N-1A Registration Statement and certain additional information (Additional Information), including a table listing management fees, all other expenses broken down by category and total portfolio expenses; a chart showing the effect of such fees on an investment in the fund over one, three, five and ten years; and a list of per share income and capital charges for a share outstanding throughout the year. The Department concluded that the provision of the Form N-1A and the Additional Information would satisfy the prospectus delivery requirement of section II(d) of PTE 77-4 provided that the Additional Information contained all of the information relevant to the decision of the independent fiduciary to approve the purchase and sale of the mutual fund shares that otherwise would be included in the prospectus.⁹

The Department notes that PTE 77-4 does not define the term “prospectus.” However, the summary prospectus, under the SEC’s rule, must provide investors with “key information” about a fund’s investment objectives, costs, principal investment strategies, risks and performance. Additionally, the summary prospectus must include a legend containing an internet address and telephone number for obtaining a statutory prospectus for the relevant mutual fund and other information free of charge. Under such circumstances, it is the Department’s view that the delivery of a summary prospectus to a second fiduciary satisfies the prospectus distribution requirement solely for purposes of section II(d) of PTE 77-4.

The information collection addressed in this advisory opinion is approved under OMB Control Number 1210-0049, which is scheduled to expire on June 30, 2014. The advisory opinion does not revise the information collection. The Department notes that a federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the Paperwork Reduction Act, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. See 44 U.S.C. § 3507. Also, notwithstanding any other provisions of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. See 44 U.S.C. § 3512.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to

⁹ The Department also addressed the use of a summary prospectus in the preamble to PTE 2010-26, 75 FR 56564 (September 16, 2010). PTE 2010-26 provides individual prohibited transaction exemptive relief to PNC Financial Services Group, Inc. (PNC) for transactions similar to those described in PTE 77-4. The preamble to PTE 2010-26 states that PNC may provide a summary prospectus to a second fiduciary for purposes of the conditions contained in sections II(h)(1) and II(m)(1) of the exemption requiring delivery of a current prospectus. 75 FR at 56567. In addition, the preamble to PTE 2010-26 clarifies that the conclusions pertaining to the distribution of a summary prospectus apply to the exemptive relief provided to PNC in PTE 2009-22.

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,

Lyssa E. Hall
Director
Office of Exemption Determinations