



April 25, 2011

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2011-07A
PTE 84-14

Dear Ms. Nussdorf,

This letter responds to your request on behalf of Deutsche Bank Trust Company Americas (Deutsche Bank) for an advisory opinion from the U.S. Department of Labor (the Department) regarding Section I(a) of Prohibited Transaction Exemption 84-14 (the QPAM Exemption).¹ The QPAM Exemption provides conditional relief for transactions between an investment fund managed by a qualified professional asset manager (QPAM) and parties in interest with respect to employee benefit plans invested in the investment fund. Section I(a) of the QPAM Exemption provides that the party in interest engaging in a transaction with the fund may 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.

You inquired about compliance with Section I(a) in the context of a stable value program, where a stable value manager (SVM) is responsible for negotiating stable value wrap contracts with various banks or insurance companies (Wrappers). The SVM may, or may not, also act as the manager of the fixed income assets subject to the stable value wrap contract. You wish to confirm that the involvement of the SVM and the Wrapper in the stable value program, as described below, will not violate Section I(a) of the exemption, thereby causing the fixed income manager to be unable to enter into subsequent transactions with the Wrapper and the SVM (where the SVM is separate from the fixed income manager). We have assumed for purposes of this advisory opinion that the SVM is independent of the Wrapper, and that where the SVM is separate from the fixed income manager, the fixed income manager also is independent of the Wrapper and the SVM.

You have made the following representations:

Where the stable value manager is also the fixed income manager

¹ 49 Fed. Reg. 9494 (Mar. 13, 1984), as corrected at 50 Fed. Reg. 41430 (Oct. 10, 1985), as amended at 70 Fed. Reg. 49305 (Aug. 23, 2005), and as amended at 75 Fed. Reg. 38837 (July 6, 2010).

In this first scenario, the SVM, as the QPAM, is responsible for both negotiating the stable value wrap contracts and managing the fixed income assets subject to the stable value wrap contract. The SVM is appointed by a plan fiduciary who has the authority to appoint investment managers and the SVM's investment management agreement is negotiated solely with that plan fiduciary. Only the plan fiduciary has the authority to terminate the SVM, set the SVM's compensation, and approve the SVM's investment guidelines for the fixed income assets subject to the stable value wrap contracts.

The SVM negotiates the stable value wrap contract with the Wrapper pursuant to its sole authority under its investment management agreement with the plan or under its pooled fund documents. As part of the negotiation of the wrap contract, the SVM and the Wrapper negotiate a set of investment guideline parameters for the fixed income assets subject to the stable value wrap contracts that must be complied with when the plan and the fixed income manager (here, also the SVM) negotiate the investment guidelines that are attached to the fixed income manager's investment management agreement or that are attached to the pooled fund documents.

You represent that the guideline parameters attached to the wrap contracts do not specify permitted or prohibited issuers or particular securities. Nor do they give the Wrapper the authority to approve the purchase or sale of particular securities. However, they may specify the terms of maturity, duration, credit quality and type of security (e.g., percentage limits on the purchase or holding of mortgage backed securities, asset backed securities, foreign securities, maximum exposure parameters for certain types of securities, such as credit card receivables or auto loans, and flat prohibitions on certain types of securities such as TBAs, dollar rolls, bank loans or collateralized loan obligations) to which the wrap contract will apply. These guideline parameters also generally specify a benchmark.

There is no agreement or understanding between the SVM and the Wrapper that the plan or pooled fund must adopt word-for-word the guideline parameters. The plan or pooled fund sponsor may choose to set more conservative percentage limitations or to prohibit a security type that the Wrapper would permit. Thus, where the SVM is maintaining a pooled fund, and controls the guidelines for that fund, the SVM may use guidelines that do not exceed the Wrapper's negotiated guidelines. There may often be "back and forth" conversations with a particular Wrapper regarding duration, credit quality or percentage limits if the SVM believes that the Wrapper is out of line with other Wrappers, or where the SVM's particular abilities and track record (e.g., mortgage securities) were among the reasons why the plan selected the SVM, or where the SVM is willing to more strictly limit a different asset class to obtain exposure to a particular asset class.

Where the stable value manager is separate from the fixed income manager

In the second scenario, the plan fiduciary selects the SVM to negotiate the stable value wrap contract and manage the stable value program. However, the plan fiduciary does not select the SVM to serve as the QPAM to manage the fixed income assets subject to the stable value wrap contract. The plan selects its own fixed income managers, negotiates their investment management agreements and solely sets the guidelines for these managers, subject to guideline parameters that are attached to the stable value wrap contract. Neither the Wrapper nor the SVM has the power to terminate the fixed income manager. Again, the SVM negotiates the stable value wrap contracts with the Wrapper and, as part of the stable value wrap contract negotiations, the SVM and the Wrapper negotiate a set of investment guideline parameters for the fixed income assets subject to the stable value wrap contracts. These parameters are attached to the wrap contract and the plan fiduciary must abide by them in setting its own guidelines with the fixed income manager. Thus, these guideline parameters form the outer limits when the plan and the fixed income manager negotiate the investment guidelines that are attached to the fixed income manager's investment management agreement with the plan.

In this scenario, there may be "back and forth" between the SVM, the fixed income manager, the plan fiduciary and the Wrapper, where the Wrapper is imposing a standard or restriction that the plan fiduciary and its fixed income manager believe is unreasonable. For example, the fixed income manager may be particularly adept at mortgage backed securities, and willing to forego all asset backed securities in order to have higher limits on mortgage backed securities. Or, for example, the fixed income manager may object to a 3-year average duration requirement, because it knows that, for other plan portfolios wrapped by the same wrapper, the average duration limit is 3.5 years. To resolve these issues, the Wrapper communicates its views to the SVM, who notifies the plan fiduciary and the fixed income manager. The plan fiduciary, SVM, and fixed income manager discuss the Wrapper's guideline parameters and, as a result of those conversations, the SVM may propose different parameters (e.g. lower limits, longer duration or fewer or different security type prohibitions) with the Wrapper. Ultimately, the plan fiduciary can always impose guidelines for its fixed income manager that are more conservative than those specified by the Wrapper. The plan need not adopt word-for-word the guideline parameters negotiated between the SVM and the Wrapper.

Opinion requested

For the first scenario, Deutsche Bank seeks an advisory opinion that the Wrapper's involvement in setting guideline parameters for the fixed income assets will not cause the Wrapper to have the power to negotiate the terms of the SVM's investment management agreement within the meaning of Section I(a) of the QPAM Exemption. For the second scenario, where the SVM is separate from the fixed income manager, Deutsche Bank seeks an advisory opinion that the negotiations of guideline parameters

in a stable value program will not cause either the Wrapper or the SVM to have the power to negotiate the terms of the investment management agreement of the fixed income manager, within the meaning of Section I(a) of the QPAM Exemption. In either case, such a power would make the exemption unavailable for securities transactions between the fixed income fund and the Wrapper or SVM.

Analysis

As noted above, Section I(a) of the QPAM Exemption provides that:

At the time of the transaction . . . the party in interest [transacting with the plan], or its affiliate . . . 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[.]

You represent that, although the Wrapper is directly involved in setting the guideline parameters for the fixed income assets subject to the stable value wrap contract, the Wrapper does not negotiate the terms of the investment management agreement between the fixed income manager and the plan or fund. You also state that the guideline parameters negotiated by the Wrapper and the SVM do not specify permitted or prohibited issuers or particular securities. The parameters do not give the Wrapper the authority to approve the purchase or sale of particular securities. They form the outer limits when the plan and the fixed income manager negotiate the investment guidelines that are attached to the fixed income manager's investment management agreement. Where the SVM is separate from the fixed income manager, these same representations apply to the SVM.

Based on the circumstances you have described above and the representations you have made, it is the view of the Department that neither the Wrapper's nor the SVM's negotiation of the investment parameters gives them the authority to negotiate on behalf of the plan the terms of the QPAM's investment management agreement with the plan or fund. In the scenarios you have described, the Wrapper is not negotiating on behalf of the plan. Instead the Wrapper is negotiating the terms of the investment parameters to reduce its own exposure under the wrap contract. While the SVM is negotiating on behalf of the plan, in the Department's opinion, negotiating the investment parameters does not amount to negotiating the terms of the QPAM's

investment management agreement. The plan or fund and the QPAM retain broad authority to negotiate these terms.²

We note, however, that this letter applies only to the facts and representations set forth herein and does not address the application of other conditions for the QPAM exemption. Thus, for example, if the Wrapper's parameters at issue left the plan or fund and the QPAM significantly less discretion in negotiating the investment guidelines, the arrangement might fail to provide the QPAM with sufficient discretion to make fiduciary decisions as required by section I(c) of the exemption.

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

² You have explained that where an insurance company separate account contract is involved, the process differs from what is described above. The insurer makes available a list of investment managers who manage the insurer's separate accounts. The plan fiduciary selects one of the identified fixed income managers and directs the SVM to notify the insurance company/Wrapper of that selection; that fixed income manager's agreement is negotiated between the insurance company/Wrapper and the fixed income manager, and only the insurance company/Wrapper has the authority to terminate the fixed income manager. The SVM may discuss or facilitate a discussion of the guidelines with the insurance company/Wrapper, the plan client and the identified fixed income manager, but the plan fiduciary consents to the guidelines and only the insurance company/Wrapper has the authority to establish the final guidelines. Under these circumstances, the Wrapper negotiates the terms of the investment management agreement within the meaning of Section I(a) of the QPAM exemption. Therefore, the exemption would not be available for transactions between the fixed income fund and the Insurer/Wrapper. However, assuming the SVM is independent of the insurer, its involvement does not give it the power to negotiate the terms of the fixed income manager's investment management agreement within the meaning of Section I(a) of the QPAM exemption.