U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210

November 1, 2013

Susan M. Camillo, Esq.
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200 Clarendon Street, 27th Floor
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2013-05A
PTE 84-14

Dear Ms. Camillo:

This letter is in response to your request for guidance concerning the application of Part I(g) of Prohibited Transaction Exemption (PTE) 84-14.[1] Subject to its conditions, this class exemption permits certain transactions between a party in interest with respect to an employee benefit plan and an investment fund in which the plan has an interest and which is managed by a qualified professional asset manager (QPAM). You write on behalf of Scottish Widows Investment Partnership Limited (SWIP), which acts as a QPAM pursuant to PTE 84-14, and certain of its current and future affiliates. You have asked if SWIP is disqualified from acting as a QPAM pursuant to Part I(g) of PTE 84-14 as a result of certain deferred prosecution agreements entered into by a SWIP affiliate, as described below.

You represent that SWIP is an asset management company based in Edinburgh, Scotland, with investment discretion over a diverse range of funds for numerous institutional clients, including large pension plans located in the United States. SWIP has an affiliate, Lloyds TSB Bank, plc (Lloyds), which is a retail bank located in the United Kingdom offering a full range of financial services, including international banking.[2] On January 9, 2009, Lloyds entered into separate deferred prosecution agreements (the DPAs) with the U.S. Department of Justice (the DOJ) and the District Attorney of the County of New York (the DANY). The DPAs relate to investigations into Lloyds' payment processing services and other activities by the DANY, the DOJ and the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury.[3] According to the factual statement accompanying both DPAs, from the mid-1990s until January 2007, Lloyds, in the United Kingdom, systematically violated both New York State and U.S. federal law by falsifying outgoing United States Dollar payment messages that involved countries, banks, or persons listed as sanctioned parties by OFAC, including Iran, Sudan, and Libya.

Under its DPA with the DOJ, Lloyds agreed to the filing of a criminal information in the U.S. District Court for the District of Columbia, and not to contradict or contest the admissibility of the

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[1] See 49 FR 9494, March 13, 1984, as corrected at 50 FR 41430, October 10, 1985, as amended at 70 FR 49305, August 23, 2005, and as amended at 75 FR 38837, July 6, 2010.

[2] You represent that SWIP and Lloyds are subsidiaries of Lloyds Banking Group plc.

[3] On December 22, 2009, OFAC entered into a settlement agreement with Lloyds relating to these same activities, but only with respect to the federal government's civil claims.

factual statement in the event the United States were to initiate a prosecution. Lloyds also agreed to pay the United States the sum of $175 million in lieu of forfeiture. In consideration of Lloyds' acknowledgement of responsibility for its actions, termination of the conduct set forth in the factual statement, and certain other actions, the DOJ agreed to recommend to the court that prosecution on the information be deferred for 24 months. The DPA was expressly subject to approval by the court. The court approved the DPA, and on March 21, 2011, following a motion by the DOJ, dismissed the information.

The DPA between Lloyds and the DANY provides that Lloyds will pay $175 million to the DANY in lieu of fines and forfeiture. In consideration of the same acknowledgements and actions by Lloyds recited in the DPA with the DOJ, the DANY agreed to defer prosecution for 24 months, except with respect to certain conduct specified in the agreement. If the DPA between Lloyds and the DOJ were not approved by the court, then Lloyds' DPA with the DANY would also be null and void. The DPA provides that if Lloyds complies with all its obligations under both DPAs, the DANY will not prosecute Lloyds except as to the specified conduct. By letter dated February 27, 2013, the DANY confirmed that the terms of its DPA with Lloyds were satisfied, the DPA was terminated, and that there is no New York State criminal conviction against Lloyds.

We note that PTE 84-14 contains numerous conditions that must be met by a QPAM. As relevant here, Part I(g) of QPAM provides as follows:

> (g) Neither the QPAM nor any affiliate thereof (as defined in Part 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 Part I(g), a person is deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

Part VI(d) of PTE 84-14 defines an "affiliate" for purposes of Part I(g) as: (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.

We note that the sole judicial action described in Part I(g) of PTE 84-14 is a criminal conviction. However, in your view, the DPAs do not constitute criminal convictions. You support this view with the following representations: under a DPA, the government files a charging document with the court, but simultaneously requests that the prosecution be deferred to allow the defendant company to demonstrate its good conduct. If the company successfully completes the term of the agreement (typically two or three years) the government will then move to dismiss the filed charges. A company's successful completion of a DPA is not treated as a criminal conviction.

Based on your representations, it is the view of the Department that the DPAs described above do not constitute criminal convictions of Lloyds. Accordingly, the Department concurs with your view that SWIP is not disqualified from acting as a QPAM pursuant to Part I(g) of PTE 84-14 solely because Lloyds entered into the DPAs.

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,

Lyssa E. Hall
Director
Office of Exemption Determinations