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Susan M. Camillo, Esq.  
Dechert LLP  
200 Clarendon Street, 27<sup>th</sup> Floor  
Boston, MA 02116-5021

Dear Ms. Camillo:

This is in response to a request submitted on behalf of Aberdeen Asset Management Inc., Aberdeen Asset Management Investment Services Limited, Aberdeen Asset Management Asia Limited, and Aberdeen Asset Management Limited (collectively, Aberdeen Asset Management or AAM). These entities provide asset management services to employee benefit plans. You requested clarification of previous guidance on Part I(d) of PTE 84-14 (the QPAM Exemption).<sup>1</sup>

Part I of the QPAM Exemption permits an investment fund managed by a QPAM to engage in transactions described in ERISA section 406(a)(1)(A) through (D) with virtually all parties in interest with respect to the plans invested in the fund, except those parties most likely to influence the QPAM. Relief is not provided in Part I of the exemption from section 406(b) of ERISA for conflict of interest or self-dealing transactions by the QPAM. Additionally, Part I(d) of the QPAM Exemption provides that the party in interest dealing with the QPAM's investment fund may not be the QPAM nor a party that is "related" to the QPAM.

The term "related" is defined in Part VI(h) of the QPAM Exemption as follows:

A QPAM is "related" to a party in interest . . . 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

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<sup>1</sup>Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 49 FR 9494 (March 13, 1984), as corrected 50 FR 41430 (October 10, 1985), as amended 70 FR 49305 (August 23, 2005), and as amended 75 FR 38837 (July 6, 2010).

exercises control over the management or policies of the party in interest by reason of its ownership interest.

The term “interest,” as it is used in the “related” definition, is defined in Part VI(h)(1) as follows: “(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.”

Previously, the Department stated that the definition of “related” set forth in Part VI(h) of the QPAM Exemption focuses on ownership interests in the QPAM or the party in interest, but not in their affiliates.<sup>2</sup> Thus, solely for purposes of the exemption, the Department confirmed that the definition does not capture ownership interests in the parent company of the QPAM or of the party in interest.<sup>3</sup> This interpretation was based on the text of the exemption as well as the Department’s view that requiring QPAMs to track ownership interests in their affiliates and in the affiliates of their party in interest counterparties would introduce a level of administrative complexity that the exemption was designed to avoid.

In Advisory Opinion 2011-06A, the Department interpreted Part I(d) of the QPAM Exemption with respect to an investment by Mitsubishi UFJ Trust and Banking Corporation (Mitsubishi Bank), a wholly-owned subsidiary of Mitsubishi UFJ Financial Group (Mitsubishi UFJ), in Aberdeen PLC, the parent company of AAM. By agreement between the parties, Mitsubishi Bank’s ownership interest in Aberdeen PLC was capped at 19.9%. Under the facts described therein, AAM requested an advisory opinion that AAM, acting as QPAM, would not be prevented by Part I(d) of the QPAM Exemption from engaging in transactions with certain subsidiaries of Mitsubishi UFJ referred to as the Mitsubishi Group Brokers. The Department concluded that AAM and the Mitsubishi Group Brokers were not “related.” As part of its discussion of the definition of “related” in Part VI(h)(iv), the Department stated that: “(iv) although Mitsubishi UFJ apparently controls Mitsubishi Group Brokers, it does not own, *directly or indirectly*, a twenty percent or more interest in AAM. In addition, although Mitsubishi UFJ *indirectly* owns more than ten percent of AAM, it does not exercise control over the management or policies of AAM and no entity that controls, or is controlled by, AAM exercises control over the management or policies of the Mitsubishi Group Brokers.” (Emphasis added.) The Department notes that, regardless of its reference to indirect ownership interests, its conclusion that the Mitsubishi Group Brokers were not “related” to the QPAM under the Part VI(h) definition was based on the fact that Mitsubishi UFJ lacked the requisite control over or direct ownership interest in the QPAM. The Department’s mention of Mitsubishi UFJ’s indirect ownership interest in the QPAM (i.e., Mitsubishi UFJ’s subsidiary’s ownership interest in the QPAM’s parent) was purely a factual reference and was not intended to imply that ownership interests in the parent company of the QPAM

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<sup>2</sup>See Advisory Opinion 2003-07A (June 19, 2003); Advisory Opinion 2011-06A (February 4, 2011).

<sup>3</sup>*Id.*

should be counted for purposes of the "related" definition. The Department's view remains that the "related" definition in Part VI(h) of the QPAM Exemption focuses on ownership interests in the QPAM or the party in interest, but not in their affiliates. Thus, the test does not capture ownership interests in the parent company of either the QPAM or the party in interest.

As stated above, Part I of the QPAM Exemption does not provide relief from section 406(b) of ERISA for conflict of interest or self-dealing transactions by the QPAM. In this regard, the Department has cautioned that "a QPAM that engages in a transaction with a party that has actual control over it (regardless of the percentage of ownership involved) might be engaging in a violation of 406(b) of ERISA for which [Part I of the QPAM Exemption] does not provide relief."<sup>4</sup> Also, the Department has pointed out that prohibited transaction issues may arise where the parties create a nonsubstantive parent entity to the party in interest or the QPAM to avoid operation of Part I(d). If the ownership structure of a QPAM is designed solely to take advantage of the relief provided by the exemption, the arrangement would fail Part I(c) of the exemption which requires that the transaction not be part of an agreement, arrangement or understanding designed to benefit a party in interest.<sup>5</sup>

We hope this information is of assistance to you.

Sincerely,

Lyssa E. Hall  
Director  
Office of Exemption Determinations

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<sup>4</sup> Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 70 FR 49305, 49308 (August 23, 2005).

<sup>5</sup>See Advisory Opinion 2003-07A, n.4.