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Legal Alert:
DOL Issues ERISA Opinions on Investment Issues

February 8, 2007

The Department of Labor has released two advisory opinions addressing the permissibility of certain investment arrangements under the ERISA prohibited transaction rules.

Advisory Opinion 2007-01A (January 22, 2007) considers the availability of PTE 84-14, the exemption for transactions managed by "qualified professional asset managers" or QPAMs, in the context of investment advice for plan participants. DOL concluded that PTE 84-14 is available to exempt transactions between a QPAM-managed investment fund and a broker-dealer where a subsidiary of the broker-dealer provides, for a fee, investment allocation recommendations to plan participants for whom the investment fund was an investment option, based on the following facts:

- The broker-dealer and investment adviser are unrelated to the QPAM;
- The investment adviser does not participate in the selection of the investment options under the plan, and does not have investment management authority or control (either formally or functionally) over participant accounts;
- The plan sponsor or other fiduciary unrelated to the broker-dealer and investment adviser has, and exercises, the authority to appoint and terminate the QPAM for the plan. Neither the broker-dealer nor the investment adviser participates in negotiating the terms of the management agreement with the QPAM.

PTE 84-14 provides ERISA section 406(a) relief where the broker-dealer is a counterparty to the investment fund even though an affiliate is providing investment advice for a fee to plan participants. DOL specifically noted that PTE 84-14 does not provide section 406(b) relief, and that a section 406(b) violation would occur, if the investment adviser advised participants to invest in the investment fund pursuant to an arrangement or understanding with the QPAM conferring a benefit on the broker-dealer or investment adviser by reason of that investment.

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Advisory Opinion 2006-09A (December 19, 2006) addresses a proposed investment in an IRA in notes issued by a corporation that was 95% owned by children of the IRA owner. In a straightforward application of the prohibited transaction rules, DOL opined that the corporation was a disqualified person as to the IRA and that the purchase of the note would be a prohibited loan or extension of credit between the IRA and a disqualified person under Internal Revenue Code section 4975. While the legal conclusions are not remarkable, the advisory opinion (like the Pension Protection Act) is another periodic reminder of the applicability of the prohibited transaction rules to IRAs.

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