

policies of a person other than an individual.

(f) The term "party in interest" means a person described in ERISA section 3(14) and includes a "disqualified person," as defined in Code section 4975(e)(2).

(g) The term "relative" means a relative as that term is defined in ERISA section 3(15), or a brother, a sister, or a spouse of a brother or sister.

(h) A QPAM is "related" to a party in interest for purposes of section I(d) of this exemption 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 exercises control over the management or policies of the party in interest by reason of its ownership interest. For purposes of this definition:

(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; and

(2) A person is considered to own an interest if, other than in a fiduciary capacity, the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose of or to direct the disposition of such interest.

(i) The time as of which any transaction occurs is the date upon which the transaction is entered into. In addition, in the case of a transaction

that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after December 21, 1982, or a renewal that requires the consent of the QPAM occurs on or after December 21, 1982 and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction.

Notwithstanding the foregoing, this exemption shall cease to apply to a transaction exempt by virtue of Part I or Part II at such time as the percentage requirement contained in section I(e) is exceeded, unless no portion of such excess results from an increase in the assets transferred for discretionary management to a QPAM. For this purpose, assets transferred do not include the reinvestment of earnings attributable to those plan assets already under the discretionary management of the QPAM. Nothing in this paragraph shall be construed as exempting a transaction entered into by an investment fund which becomes a transaction described in section 406 of ERISA or section 4975 of the Code while the transaction is continuing, unless the conditions of this exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption.

(j) The term "goods" includes all things which are movable or which are fixtures used by an investment fund but does not include securities, commodities, commodities futures, money, documents, instruments, accounts, chattel paper, contract rights and any other property, tangible or intangible, which, under the relevant facts and circumstances, is held primarily for investment.

(k) For purposes of section V(a)(1) and (2), the term "equity capital" means stock (common and preferred), surplus, undivided profits, contingency reserves and other capital reserves.

(l) For purposes of section V(a)(3), the term "net worth" means capital, paid-in and contributed surplus, unassigned surplus, contingency reserves, group contingency reserves, and special reserves.

(m) For purposes of section V(a)(4), the term "shareholders' or partners' equity" means the equity shown in the most recent balance sheet prepared within the two years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

(n) The terms "employee benefit plan" and "plan" refer to an employee benefit plan described in section 3(3) of ERISA and/or a plan described in section 4975(e)(1) of the Code.

(o) For purposes of section V(a), the term "independent fiduciary" means a fiduciary managing the assets of a plan in an investment fund that is independent of and unrelated to the employer sponsoring such plan. For purposes of this exemption, the independent fiduciary will not be deemed to be independent of and unrelated to the employer sponsoring the plan if such fiduciary directly or indirectly controls, is controlled by, or is under common control with the employer sponsoring the plan. Notwithstanding the foregoing, for the period from December 21, 1982, through the date on which the Department grants a final amendment which addresses relief for financial institutions that serve as investment managers for their own plans, a QPAM managing the assets of a plan in an investment fund will not fail to satisfy the requirements of section V(a) solely because such fiduciary is the employer sponsoring the plan or directly or indirectly controls, is controlled by, or is under common control with the employer sponsoring the plan.

Signed at Washington, DC, this 11th day of August, 2005.

**Ivan L. Strasfeld,**

*Director, Office of Exemption, Determinations, Employee Benefits Security Administration, Department of Labor.*

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

[Application Number D-11270]

#### Proposed Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers

**AGENCY:** Employee Benefits Security Administration, DOL.

**ACTION:** Notice of proposed amendment to PTE 84-14.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to PTE 84-14. The exemption permits various parties that are related to employee benefit plans to engage in transactions involving plan assets if, among other

conditions, the assets are managed by "qualified professional asset managers" (QPAMs), which are independent of the parties in interest and which meet specified financial standards.

Additional exemptive relief is provided for employers to furnish limited amounts of goods and services to a managed fund in the ordinary course of business. Limited relief is also provided for leases of office or commercial space between managed funds and QPAMs or contributing employers. Finally, relief is provided for transactions involving places of public accommodation owned by a managed fund.

Currently, PTE 84-14 requires the QPAM managing the assets of a plan in an investment fund to be independent of, and unrelated to, the employer sponsoring such plan. However, as described in the notice of final amendment to PTE 84-14 contained in this issue of the **Federal Register**, limited retroactive and transitional relief is provided for financial service entities to act as QPAMS for their own plans. If this proposed amendment is granted, a QPAM may prospectively manage an investment fund containing the assets of its own plan or the plan of an affiliate, to the extent the conditions of the proposal are met.

The proposed amendment would affect participants and beneficiaries of employee benefit plans, the sponsoring employers of such plans, and other persons engaging in the described transactions.

**DATES:** Written comments must be received by the Department on or before October 7, 2005.

**ADDRESSES:** All written comments (preferably three copies) should be addressed to the U.S. Department of Labor, Office of Exemption Determinations, Employee Benefits Security Administration, Room N-5649, 200 Constitution Avenue, NW., Washington, DC 20210 (attention: PTE 84-14 Amendment). Interested persons are also invited to submit comments to EBSA via e-mail or fax. Any such comments should be sent either by e-mail to [motta.christopher@dol.gov](mailto:motta.christopher@dol.gov) or by fax to (202) 219-0204 by the end of the scheduled comment period. All comments received will be available for public inspection at the Public Documents Room, Employee Benefits Security Administration, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Christopher Motta, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Room N-5649,

200 Constitution Avenue, NW., Washington DC 20210, (202) 693-8540 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of a proposed amendment to PTE 84-14 (49 FR 9494, March 13, 1984, as corrected at 50 FR 41430, October 10, 1985, and amended elsewhere in this issue of the **Federal Register**). PTE 84-14 provides an exemption from certain of the restrictions of section 406 of ERISA, and from certain taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1) of the Code. The Department is proposing this amendment to PTE 84-14 on its own motion, pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).<sup>1</sup>

### Economic Analysis

#### *Executive Order 12866 Statement*

Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule: (1) Having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, it has been determined that this action is a "significant regulatory

<sup>1</sup> Section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), generally transferred the authority of the Secretary of Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

action." Accordingly, this action has been reviewed by OMB.

### Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Department is soliciting comments concerning the information collection request (ICR) included in PTE 84-14 and this Notice of Proposed Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers. A copy of the ICR may be obtained by contacting Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N-5647, Washington, DC 20210. Telephone (202) 693-8410; Fax: (202) 219-4745. These are not toll-free numbers.

The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriated automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

e.g., permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through October 24, 2005. OMB requests that comments be received within 30 days of publication of the Notice of Proposed Amendment to ensure their consideration.

The provisions for compliance with PTE 84-14 (49 FR 9494, March 13, 1984, as corrected at 50 FR 41430, October 10, 1985), a final amendment to PTE 84-14 published in this issue of the **Federal Register**, and this proposed amendment have been discussed in greater detail earlier in the preamble. Briefly, PTE 84-14 permits various parties in interest to employee benefit plans to engage in transactions involving plan assets if, among other requirements, the assets are managed by a QPAM. Such transactions include, for example, the leasing of office space by an investment fund to a QPAM or the furnishing of services and facilities by a place of public accommodation owned by an investment fund managed by a QPAM. The final amendment, among other things, provides limited retroactive and transitional relief from the sanctions of certain sections of ERISA and the Code for financial institutions such as banks, insurance companies, or registered investment advisers, that act as QPAMs for their own plans. The proposed amendment, if granted, would provide prospective relief for financial institutions to act as QPAMs for their own plans.

The Department included in the final amendment published in this issue of the **Federal Register** and this proposed amendment certain requirements intended to preserve plan assets and protect plan participant benefits with respect to transactions between a party in interest to a plan and an investment fund containing plan assets managed by a QPAM. PTE 84-14, as restated and amended in the final amendment, includes a requirement for a written agreement between a plan and the QPAM it has retained, and written guidelines between a QPAM and a property manager that a QPAM has retained. Because it is customary business practice for agreements related to the investment of plan assets or transactions relating to the leasing of space to be described in writing, no burden was estimated for these provisions of the final amendment.

Accordingly, this ICR includes only the burden for provisions in the proposed amendment.

In order for a transaction to qualify for an exemption under the proposed amendment, a QPAM must, among other requirements, establish written policies and procedures that are designed to assure compliance with the conditions of the proposed amendment, including the steps adopted by the QPAM to measure compliance. Based on information in the 1999 Form 5500 Annual Report, the Department estimates that approximately 6,500 banks, savings institutions, insurance companies, and investment advisers currently acting as QPAMs for employee benefit plans might choose to act as QPAMs for their own plans. QPAMs are assumed to use a service provider, such as an attorney, to develop the written policies and procedures required under the proposed amendment. To meet the Department's requirements regarding written policies and procedures, service providers will most likely develop standardized language that can then be modified to include the specific steps adopted by a particular QPAM to assure compliance. If all 6,500 financial institutions choose to act as QPAMs for their own plans, the start-up cost, assuming one hour of a service provider's time, at \$84 per hour, would be \$546,000. The actual amount of time required, and the resulting cost burden, may be even lower because the Department has described the objective requirements of the exemption that are to be included in the policies and procedures, and because most service providers will handle multiple QPAMs, thereby reducing per-plan costs.

Going forward, the Department is not aware of a basis for estimating how many additional QPAMs will choose to handle investments for their own plans, but assumes the number to be small. Most QPAMs are believed to be large institutions that will take advantage of the proposed amendment soon after it is granted. For purposes of this ICR, the Department has assumed that an additional 1%, or 65 QPAMs, annually, at a cost of approximately \$5,500, will establish policies and procedures in order to manage investments for their own plans.

Finally, under the proposed amendment, an independent auditor is required to conduct an exemption audit, on an annual basis, the results of which are presented in a written report to the plan. Because it is customary business practice for an independent auditor engaged by an entity such as a plan to provide a written report, the Department

has not estimated a cost burden for this provision of the proposed amendment.

*Type of Collection:* New.

*Agency:* Department of Labor, Employee Benefits Security Administration.

*Title:* Proposed Amendment to PTE 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers.

*OMB Control Number:* 1210-NEW.

*Affected Public:* Business or other for profit; Not-for-profit institutions.

*Respondents:* 6,565.

*Responses:* 6,565.

*Frequency of Response:* One time.

*Estimated Burden Hours:* 0.

*Estimated Capital/Startup Costs:* \$546,000.

*Estimated Annual Costs (Operating & Maintenance):* \$5,500.

*Estimated Total Annual Cost:* \$551,500.

The public is not required to respond to a collection of information that does not display a currently valid OMB control number.

### Background

PTE 84-14, which was proposed on the Department's own motion on December 21, 1982, was granted as part of a continuing effort by the Department to improve the administration of the prohibited transaction rules of ERISA. The rules set forth in section 406 of ERISA prohibit various transactions between a plan and a party in interest (including a fiduciary) with respect to such plan. Unless a statutory or administrative exemption applies to the transaction, section 406(a) of ERISA prohibits, among other things: Sales, leases, loans or the provision of services between a party in interest and a plan, as well as a use of plan assets by or for the benefit of, or a transfer of plan assets to, a party in interest. In addition, unless exempted, a fiduciary of a plan is not permitted to engage in any acts of self-dealing or make decisions on behalf of a plan if the fiduciary is in a conflict of interest situation.

The Department has frequently exercised its statutory authority under section 408(a) of ERISA to grant both individual and class exemptions from the prohibited transaction provisions where it has been able to find that the criteria for granting such exemptions have been satisfied. Based on its experience considering requests for individual and class exemptions, and in dealing with instances of abusive violations of the fiduciary responsibility rules of ERISA, the Department determined that as a general matter, transactions entered into on behalf of plans with parties in interest are most

likely to conform to ERISA's general fiduciary standards where the decision to enter into the transaction is made by an independent fiduciary. As granted, PTE 84-14 provides broad relief for various party in interest transactions that involve plan assets that are transferred to a qualified professional asset manager (QPAM) for discretionary management.

#### *Description of Existing Relief*

The relief provided by PTE 84-14 is described in four separate parts. The General Exemption, set forth in Part I, permits an investment fund managed by a QPAM to engage in a wide variety of transactions described in ERISA section 406(a)(1)(A) through (D) with virtually all parties in interest except the QPAM which manages the assets involved in the transaction and those parties most likely to have the power to influence the QPAM.

Part II of the exemption provides limited relief under both section 406(a) and (b) of ERISA for certain transactions involving those employers and certain of their affiliates which could not qualify for the General Exemption provided by Part I.

Part III of the exemption provides limited relief under section 406(a) and (b) of ERISA for the leasing of office or commercial space by an investment fund to the QPAM, an affiliate of the QPAM, or a person who could not qualify for the General Exemption provided by Part I because it held the power of appointment described in Part I(a).

Part IV of the exemption provides limited relief under sections 406(a) and 406(b)(1) and (2) of ERISA for the furnishing of services and facilities by a place of public accommodation owned by an investment fund managed by a QPAM, to all parties in interest, if the services and facilities are furnished on a comparable basis to the general public.

Part V of the exemption contains definitions for certain terms used in the exemption. In this regard, section V(a) defines the term "QPAM" as an "independent fiduciary which is a bank, savings and loan association, insurance company, or registered investment adviser, that meets certain financial conditions." Section V(o) of PTE 84-14, as adopted in the final amendment to PTE 84-14 published in this issue of the **Federal Register**, defines the term "independent fiduciary" to mean a fiduciary managing the assets of a plan in an investment fund that is independent of and unrelated to the employer sponsoring such plan. The definition additionally provides that a fiduciary will not be deemed to be

independent of and unrelated to the employer sponsoring the plan if such fiduciary directly or indirectly controls, is controlled by, or is under common control with the employer sponsoring the plan. Lastly, section V(o) provides that, for the period from December 21, 1982, through the date on which the Department grants a final amendment which addresses relief for financial institutions that serve as investment managers for their own plans, a QPAM managing the assets of a plan in an investment fund will not fail to qualify as a QPAM solely because such fiduciary is the employer sponsoring the plan or directly or indirectly controls, is controlled by, or is under common control with the employer sponsoring the plan.

#### *Description of the Proposed Amendment*

The Department is proposing this amendment on its own motion in connection with its determination that the existing QPAM class exemption does not permit financial services entities to act as QPAMs for their own plans.<sup>2</sup> The proposed amendment, if granted, would provide prospective relief for a financial institution to act as QPAM for its own plan. This relief is set out in a newly designated Part V, which specifically provides relief for transactions described in Parts I, III and IV of PTE 84-14 that involve a QPAM-managed investment fund containing the assets of a plan sponsored by such QPAM. For purposes of this proposed amendment, the exemption's "Definitions" section has been re-designated as Part VI.

PTE 84-14 was developed and granted based on the essential premise that broad relief could be afforded for all types of transactions in which a plan engages only if the commitments and the investments of plan assets and the negotiations leading thereto are the sole responsibility of an independent, discretionary, manager. As noted above, however, the proposed amendment described herein involves the investment of the assets of a QPAM's own plan in an investment fund managed by such QPAM. In the Department's view, retention of discretionary authority by the plan sponsor/QPAM would be inconsistent with the underlying concept of the QPAM exemption as originally adopted. In addition, there is no independent fiduciary present in this situation that would be responsible for monitoring the

activities of the QPAM with respect to its own in-house plan.

In order to address this lack of independence, the proposed amendment relies on an "exemption audit," in addition to the other safeguards currently contained in the exemption. This audit is substantially similar to the audit required under PTE 96-23 (61 FR 15975 (Apr. 10, 1996)), which provides relief for various party in interest transactions that involve the assets of a plan managed by an in-house manager (INHAM). The proposed amendment requires that an independent auditor conduct an annual exemption audit to determine whether the written procedures adopted by the QPAM are designed to assure compliance with the conditions of the exemption. The Department believes that the involvement of an independent party in overseeing compliance with the exemption would serve as a meaningful safeguard without interfering with the QPAM's investment decisions. The audit is further intended to protect plans by ensuring that an investment manager, who may not otherwise have experience managing ERISA plan assets, complies with the provisions of ERISA and the requirements of this exemption.

Accordingly, section V(c) of the proposed amendment requires that the independent auditor conduct an exemption audit on an annual basis to review the written policies and procedures adopted by the QPAM. The purpose of this review is to ensure that such policies and procedures are consistent with the exemption's objective requirements. The independent auditor must also test a representative sample of transactions involving the QPAM's plan in order to make findings regarding whether the QPAM's is in operational compliance with the written policies and procedures adopted by the QPAM and the objective requirements of the exemption. The exemption further requires that the independent auditor make a determination as to whether the QPAM has satisfied the definition of a QPAM under the exemption, and issue a written report describing the steps performed by the auditor during the course of its review and the auditor's findings.<sup>3</sup> Although the proposed amendment limits the auditor's

<sup>2</sup> As described in the notice of final amendment to PTE 84-14 that appears elsewhere in this issue of the **Federal Register**.

<sup>3</sup> The Department also notes that an adverse finding in the auditor's report would not, in itself, render the exemption unavailable for any transaction engaged in by the QPAM on behalf of the plan. The Department cautions that the failure of the QPAM to take appropriate steps to address any adverse findings in an unsatisfactory audit would raise issues under ERISA's fiduciary responsibility provisions.

responsibilities to make findings on the QPAM's compliance with the objective requirements of the proposal, the QPAM remains responsible for assuring compliance with all of the applicable conditions of the exemption.

Accordingly, the failure of the QPAM to comply with a condition of the exemption not described in Section VI(q) would, with respect to a specific transaction, render the exemption unavailable for that transaction.

As noted above, an independent auditor must review the written policies and procedures adopted by the QPAM for consistency with the exemption's objective requirements that apply to such transactions. These written policies and procedures must describe, for example, the requirements to qualify as a QPAM and the requirement that, with respect to transactions described in Part V, the QPAM must have discretionary authority or control over the plan assets that are involved in the transaction.

In addition, if a QPAM manages an investment fund that contains the assets of a plan sponsored by such QPAM, and the QPAM seeks to engage in a transaction described in Part I of the exemption on behalf of the fund, the QPAM's written policies and procedures must describe the objective requirements contained in Part I of the exemption. In this regard, the QPAM's written policies and procedures must describe the exemption's requirements that: (1) The transaction may not be entered into with any party in interest that has the power to appoint or terminate the QPAM as a manager of the plan assets involved in the transaction or negotiate the terms of the management agreement with such QPAM; (2) the transaction may not be entered into with the QPAM or a person related to the QPAM; and (3) the transaction is not described in any of the class exemptions listed in section I(b). The written policies and procedures must also describe the exemption's objective requirements regarding the QPAM's responsibility for: (1) Negotiating the terms of the transaction; and (2) deciding to enter into the transaction on behalf of the investment fund.

The class exemption contains certain other objective requirements that are applicable to transactions described in Part III of PTE 84-14, relating to the leasing of office or commercial space by an investment fund managed by a QPAM to the QPAM or other specified persons. Accordingly, the objective requirements applicable to Part III transactions include: (1) that the amount of space that may be covered by the

lease does not exceed the limitation described in section III(a); and (2) that no commission or other fee may be paid by the investment fund to the QPAM or the persons specified in section III(d).

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of ERISA and 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) If granted, the proposed amendment is applicable to a particular transaction only if the transaction satisfies the conditions specified in the amendment; and

(4) The proposed amendment, if granted, will be supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

#### Written Comments

The Department invites all interested persons to submit written comments on the proposed amendment to the address and within the time period set forth above. All comments received will be made a part of the record. Comments should state the reasons for the writer's interest in the proposed exemption.

Comments received will be available for public inspection at the above address.

#### Proposed Amendment

Under section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990), the Department proposes to amend PTE 84-14 as set forth below:

#### *Part V—Specific Exemption Involving QPAM-Sponsored Plan*

Effective as of the date of publication of the final amendment to PTE 84-14 in the **Federal Register**, the relief provided by Parts I, III or IV of PTE 84-14 from the applicable restrictions of section 406(a), section 406(b)(1) and (2), and section 407(a) of ERISA and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall apply to a transaction involving the assets of a plan sponsored by the QPAM if:

(a) The QPAM has discretionary authority or control with respect to the plan assets involved in the transaction;

(b) The QPAM adopts written policies and procedures that are designed to assure compliance with the conditions of the exemption;

(c) An independent auditor, who has appropriate technical training or experience and proficiency with ERISA's fiduciary responsibility provisions and so represents in writing, conducts an exemption audit (as defined in section VI(p)) on an annual basis. Following completion of the exemption audit, the auditor shall issue a written report to the plan presenting its specific findings regarding the level of compliance with the policies and procedures adopted by QPAM in accordance with section V(b);

(d) The transaction meets the applicable requirements set forth in Parts I, III, or IV of the exemption.

#### *Section VI. Definitions*

(o) For purposes of section V(a), the term "independent fiduciary" means a fiduciary managing the assets of a plan in an investment fund that is independent of and unrelated to the employer sponsoring such plan. For purposes of this exemption, the independent fiduciary will not be deemed to be independent of and unrelated to the employer sponsoring the plan if such fiduciary directly or indirectly controls, is controlled by, or is under common control with the employer sponsoring the plan. Notwithstanding the foregoing, a QPAM acting as a manager for its own plan or the plan of an affiliate (as defined in

section VI(c)(1)) will be deemed to satisfy the requirements of this section VI(o) if the requirements of Part V are met.

(p) Exemption Audit. An “exemption audit” of a plan must consist of the following:

(1) A review of the written policies and procedures adopted by the QPAM pursuant to section V(b) for consistency with each of the objective requirements of this proposed exemption (as described in section VI(q)).

(2) A test of a representative sample of the plan’s transactions in order to make findings regarding whether the QPAM is in compliance with (i) the written policies and procedures adopted by the QPAM pursuant to section VI(q) of the exemption and (ii) the objective requirements of the exemption.

(3) A determination as to whether the QPAM has satisfied the definition of an QPAM under the exemption; and

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor’s findings.

(q) For purposes of section VI(p), the written policies and procedures must describe the following objective requirements of the exemption and the steps adopted by the QPAM to assure compliance with each of these requirements:

(1) The definition of a QPAM in section V(a).

(2) The requirement of sections V(a) and I(c) regarding the discretionary authority or control of the QPAM with respect to the plan assets involved in the transaction, in negotiating the terms of the transaction and with respect to the decision on behalf of the investment fund to enter into the transaction.

(3) For a transaction described in Part I:

(A) That the transaction is not entered into with any person who is excluded from relief under section I(a), section I(d), or section I(e),

(B) That the transaction is not described in any of the class exemptions listed in section I(b),

(4) If the transaction is described in section III,

(i) That the amount of space covered by the lease does not exceed the limitations described in section III(a); and

(ii) That no commission or other fee is paid by the investment fund as described in section III(d).

Signed at Washington, DC, this 11th day of August, 2005.

**Ivan L. Strasfeld,**

*Director, Office of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.*

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## DEPARTMENT OF LABOR

### Employment and Training Administration

#### Proposed Information Collection Request Submitted for Public Comment and Recommendations; Labor Condition Application for Nonimmigrant Workers

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration (ETA), Office of National Programs is soliciting comments concerning the proposed extension of the collection for ETA form 9035—Labor Condition Application for Nonimmigrant Workers. A copy of the proposed Information Collection Request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addressee’s section below on or before October 24, 2005.

**ADDRESSES:** William L. Carlson, Chief, Division of Foreign Labor Certification, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210. Mr. Carlson may be reached at (202) 693-3010; this is not a toll-free number.

**FOR FURTHER INFORMATION CONTACT:** Gregory Wilson, Program Analyst, Division of Foreign Labor Certification, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-

4312, Washington, DC 20210. Mr. Wilson may also be reached at (202) 693-3010; this is not a toll-free number.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Immigration and Naturalization Act (INA) requires that before any foreign worker may be admitted or otherwise provided status as an H-1B, H-1B1, or E-3 nonimmigrant the prospective employer must have filed with the Department of Labor (Department) a Labor Condition Application (LCA). Employers must state on the LCA that they will offer prevailing wages and working conditions, that there is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment, and that they have provided notice of filing in conspicuous locations at the place of employment. Further, the employer must make certain documentation available for public examination. The Department’s review of each LCA filed is limited by law solely to a review for completeness or “obvious inaccuracies.” Complaints may be filed with the Department alleging a violation of the LCA process. If reasonable cause is found to believe a violation has been committed, the Department will conduct an investigation and, if appropriate, assess penalties. The INA places a limit on the number of foreign workers who can be admitted to the United States on H-1B, H-1B1, or E-3 visas. The INA generally limits H-1B workers to a maximum of a six-year duration of stay under H-1B status, although extensions are permitted for certain foreign workers on whose behalf a labor certification or employment-based immigrant petition has been pending for 365 days or more. The INA requires that the Department make available for public examination in Washington, DC, a list of employers which have filed LCAs.

##### II. Review Focus

Currently, the Department is soliciting comments concerning the proposed extension of the collection for ETA form 9035—Labor Condition Application for Nonimmigrant Workers. The Department is particularly interested in comments which:

- Evaluate whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information