U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

2007-02A
PTE 84-14

February 26, 2007

Melanie Franco Nussdorf, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, NW
Washington, DC 20036

Dear Ms. Nussdorf:

This is in response to your request for guidance concerning Prohibited Transaction Exemption (PTE) 84-14 (49 FR 9494, March 13, 1984, as corrected, 50 FR 41430, October 10, 1985, and as amended, 70 FR 49305, August 23, 2005). Your request concerns the proper application of section I(a) of PTE 84-14 to certain pooled investment funds that are deemed to hold plan assets within the meaning of 29 CFR 2510.3-101(f)(the Plan Asset Regulation).

You write on behalf of The Goldman Sachs Group, Inc. (Goldman Sachs), a provider of global investment banking, asset management and other financial services. Goldman Sachs seeks the Department's opinion concerning the application of section I(a) of PTE 84-14 in instances where a pooled investment fund (the First Fund) that is deemed to hold plan assets under the Plan Asset Regulation invests in another pooled investment fund (the Second Fund) that also is deemed under the Plan Asset Regulation to hold plan assets. Specifically, you request guidance as to whether, under section I(a), the Second Fund is required to look through to (and thus count separately) the assets of any plan invested in the First Fund.

PTE 84-14 generally provides relief from the prohibited transaction restrictions of section 406(a)(1)(A)-(D) for transactions between a plan and a party in interest provided that the plan is invested in an investment fund managed by a qualified professional asset manager (QPAM). Section I(a) of PTE 84-14 requires that, at the time of the transaction, the party in interest or its affiliate does not have the authority to either appoint or terminate the QPAM as manager of the plan assets involved in the transaction, or negotiate on behalf of the plan the terms of the QPAM's management agreement with respect to the plan assets involved in the transaction. Section I(a) contains an exception to this requirement in the case of two or more unrelated plans invested in an investment fund in instances where the assets of a plan, when combined with assets of other plans established or maintained by the same employer or employee organization, and managed in the same investment fund represent less than 10% of the assets of the investment fund.

As noted above, you have asked for clarification of this requirement in the situation in which the First Fund invests in the Second Fund. You provide the following example:

> Assume that Plan X is a 50% investor in the First Fund and also a 4% investor in the Second Fund. The First Fund purchases a 30% interest in the Second Fund. The underlying assets of both Funds contain plans assets.

You have offered your view that, consistent with the language of section I(a), the manager of the Second Fund need not inquire concerning the presence of plan investors in the First Fund, nor aggregate a plan's interest in the First Fund with its direct investment in the Second Fund for the purpose of determining if the plan holds 10% or more of the assets of the Second Fund. In the example you have provided, the manager would only count Plan X's direct 4% investment in the Second Fund and not the indirect interest held by Plan X as a result of its investment in the First Fund.

You have asked the Department to assume, for purposes of your request, that the two investment funds are not managed by the same manager or an affiliate. Under these circumstances, it is the Department's view that the 10 percent exception contained in section 1(a) of PTE 84-14 does not require the consideration by a QPAM of the ownership interests of any plan investors in an investment fund which is investing in a second fund managed by such QPAM.

The Department cautions, however, that, Part I of PTE 84-14, does not provide any relief from the prohibitions of section 406(b). In addition, section I(c) of the exemption provides, in part, that the transaction not be part of an agreement, arrangement, or understanding designed to benefit a party in interest. Thus, for example, if the investment manager of the First Fund invested in the Second Fund pursuant to an agreement or understanding that the manager of the Second Fund would engage in transactions that benefit the manager of the First Fund or its affiliate, the QPAM exemption would not be available for those transactions. In addition, the investment of plan assets by the First Fund in the Second Fund would violate 406(b) of ERISA.

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