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

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Kathleen Ziga, Esq.
Dechert LLP
2929 Arch Street, Cira Centre
Philadelphia, PA 19104-2808

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ERISA SEC
406(b) & PTE 84-14

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

Dear Ms. Ziga and Ms. Camillo:

This is in response to an advisory opinion request submitted on behalf of Aberdeen Asset Management Inc., Aberdeen Asset Management Investment Services Ltd., Aberdeen Asset Management Asia Ltd., and Aberdeen Asset Management Ltd. (collectively, Aberdeen Asset Management or AAM). These entities provide asset management services to employee benefit plans. The request concerns the application of section 406(b) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) to the AAM's selection of broker-dealers affiliated with Mitsubishi UFJ Financial Group (Mitsubishi UFJ) to provide services to plans managed by AAM.

Background

Aberdeen Asset Management PLC (Aberdeen PLC) is a publicly-traded asset management company with certain asset management subsidiaries, including the four U.S. registered investment advisers identified above as AAM. Aberdeen PLC wholly owns AAM. A significant amount of AAM's assets under management in the U.S. consists of assets of employee benefit plans subject to ERISA.

Aberdeen PLC and Mitsubishi UFJ Trust and Banking Corporation (Mitsubishi Bank) have entered into one or more agreements under which Mitsubishi Bank agrees to acquire and hold up to 19.9% of Aberdeen PLC's common stock. Currently, Mitsubishi Bank owns 18.75% of Aberdeen PLC's common stock. Mitsubishi Bank is a major international banking organization which is a wholly-owned subsidiary of Mitsubishi UFJ. Mitsubishi UFJ has numerous broker/dealer subsidiaries (Mitsubishi Group Brokers). As a result, Mitsubishi Group Brokers and Mitsubishi Bank are brother-sister corporations.

Under the agreement(s), Mitsubishi Bank has the right to appoint one member of Aberdeen PLC's board of directors so long as it holds a minimum of 15% of Aberdeen PLC ordinary stock. On November 26, 2009, Mitsubishi Bank appointed a director to Aberdeen PLC's board. Aberdeen PLC's board of directors consists of eleven members. There is limited overlap between the members of the Aberdeen PLC board and the AAM board of directors. Mitsubishi Bank-appointed members of the Aberdeen PLC board will not serve as AAM board members. In

addition, a Mitsubishi Bank-appointed board member has no veto power or special rights for extraordinary events (e.g., mergers, recapitalizations, etc.) which require action by the entire Aberdeen PLC board. The Aberdeen PLC board does not make any decisions with respect to AAM's trading partners, policies, or procedures.

With respect to any selection of a broker-dealer to perform a service involving the trading of securities for clients of AAM, including the potential selection of a Mitsubishi Group Broker by AAM, you represent that AAM maintains a number of policies and procedures to be followed in selecting brokers to execute portfolio transactions for client accounts. These procedures are intended to provide a framework for evaluating factors associated with selecting broker-dealers to execute client transactions and ensuring that potential conflicts are identified and avoided, with best execution being sought for all client accounts. You further represent that under these policies and procedures, AAM ordinarily must evaluate potential arrangements with multiple brokers before selecting the broker that AAM believes will provide best execution in connection with a particular transaction. Currently, the Mitsubishi Group Brokers are excluded from engaging in transactions with ERISA-covered plans for which AAM acts as the investment manager. You represent that such exclusion results, at times, in significant harm to such plans in terms of lost opportunities for, and/or best execution of, investments in securities.

Advisory Opinions Requested

You ask whether service transactions that may occur between the Mitsubishi Group Brokers and employee benefit plans for which AAM acts as a fiduciary (e.g., as an investment manager) would violate ERISA section 406(b), due to Mitsubishi Bank's ownership of up to 19.9% of the common stock of Aberdeen PLC, the parent corporation of AAM, and its appointment of one member to Aberdeen PLC's board of directors. You are concerned that, if it is determined that a Mitsubishi Group Broker is deemed an indirect shareholder of ten percent or more of the stock of AAM, then pursuant to the Department's regulations at 29 C.F.R. §2550.408b-2(e), any service transaction between a client plan of AAM and such broker would be a *per se* violation of section 406(b) of ERISA.

You are also concerned that such a determination would affect the ability of AAM to act as a qualified professional asset manager (QPAM) and to select a Mitsubishi Group Broker to perform any of the designated transactions pursuant to class exemption PTE 84-14.[1]

Relevant Law, Analysis, and Conclusion

Section 3(14) of ERISA defines the term "party in interest" with respect to a plan to include, among others, a fiduciary (section 3(14)(A)), a person providing services to the plan (section 3(14)(B)), and a 10 percent or more shareholder, directly or indirectly, of certain persons described therein (section 3(14)(H)), including a person described in section 3(14)(B). In this regard, AAM would be a party in interest to plans for which it provides a service, including any services as a fiduciary, and a Mitsubishi Group Broker would become a party in interest to such plans to the extent it provides one or more services as a broker-dealer.

[1] *See* 49 Fed. Reg. 9494 (Mar. 13, 1984), as corrected at 50 Fed. Reg. 41430 (Oct. 10, 1985), and as amended at 70 Fed. Reg. 49305 (Aug. 23, 2005) and 75 Fed. Reg. 38837 (July 6, 2010).

Section 408(b)(2) of ERISA provides, in pertinent part, a statutory exemption from the prohibitions of ERISA section 406(a) for contracting or making reasonable arrangements with a party in interest, including a fiduciary, for services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefore. The Department's regulation at 29 C.F.R. §2550.408b-2(a) states that section 408(b)(2) of ERISA does not contain an exemption for an act described in section 406(b) of ERISA, even if such act occurs in connection with a provision of services that is exempt under section 408(b)(2).

Section 406(b) of ERISA prohibits, in pertinent part, a fiduciary with respect to a plan from dealing with the assets of a plan in his or her own interest or for his or her own account, or from acting, in his or her individual or in any other capacity, in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. The Department has explained in regulations at 29 C.F.R §2550.408b-2(e) that the prohibitions of section 406(b) are imposed upon fiduciaries to deter them from exercising the authority, control, or responsibility that makes them fiduciaries when they have interests that may conflict with the interests of the plans for which they act. Thus, a fiduciary may not use the authority, control, or responsibility that makes him a fiduciary to cause a plan to pay an additional fee to such fiduciary, or to a person in which he has an interest that may affect the exercise of his best judgment as a fiduciary, to provide a service. However, 29 C.F.R §2550.408b-2(e)(2) provides that a fiduciary does not engage in an act described in section 406(b)(1) of ERISA if the fiduciary does not use any of the authority, control, or responsibility that makes him a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which the fiduciary has an interest that may affect the exercise of his best judgment as a fiduciary.

As examples of persons in which a fiduciary would have an interest that might affect its best judgment, the regulation at 29 C.F.R. §2550.408b-2(e) identifies persons who are parties in interest by reason of a relationship to such fiduciary described in section 3(14)(E), (F), (G), (H), or (I). As noted above, section 3(14)(H) states that a party in interest to a plan includes any person who is a 10 percent or more direct or indirect shareholder of a service provider (including a fiduciary) to such plan (section 3(14)(B)).

Based upon your representations, the direct or indirect shareholders of AAM would include Aberdeen PLC, Mitsubishi Bank, and Mitsubishi UFJ. However, in the Department's opinion, no Mitsubishi Group Broker would be a party in interest to such plans under section 3(14)(H) as an indirect shareholder of AAM by virtue of the ownership relationships that have been established with Aberdeen PLC by Mitsubishi Bank and its parent corporation, Mitsubishi UFJ. In this regard, the Department takes the position that only entities in a vertical chain of ownership with Aberdeen PLC can become parties in interest to plans for which AAM provides services as "indirect" shareholders of AAM. For this purpose, the Department presumes that the Mitsubishi Group Broker is not otherwise a party in interest to an AAM-managed plan by reason of a relationship to AAM under sections 3(14)(E), (G), or (I).

Although a Mitsubishi Group Broker is not necessarily a party whose relationship to AAM would affect AAM's judgment, by virtue of Mitsubishi UFJ's ownership interests in such

persons or their affiliates, this is not dispositive of whether AAM's selection of a Mitsubishi Group Broker would violate section 406(b). Whether a fiduciary has an interest in another party that may affect the fiduciary's best judgment, as described in 29 C.F.R. §2550.408b-2, is an inherently factual question. The Department believes that consideration must be given to all relevant facts and circumstances, including evidence bearing on all relationships between the fiduciary and the other party, and should not be confined only to party in interest relationships under section 3(14) of ERISA. Thus, the nature and degree of any common ownership or control connections between AAM and a Mitsubishi Group Broker would be a relevant circumstance. Some common ownership and control connections may be so substantial that they would give rise to an impermissible interest within the meaning of 29 C.F.R. §2550.408b-2(e), even though they do not rise to the level of a party in interest relationship under section 3(14) of ERISA. For example, parties belonging to a controlled group of corporations as described in Internal Revenue Code section 414(b), under common control as described in Code section 414(c), or that are members of an affiliated service group within the meaning of Code section 414(m), generally would be sufficiently affiliated so that such relationships would affect the fiduciary's best judgment. In other cases, a disqualifying affiliation or other significant relationship may be established by a showing of substantial control and close supervision by a common parent.

In determining whether other types of common ownership or control relationships between fiduciaries and potential service providers constitute an interest in the service provider that may affect the fiduciaries' best judgment, the fiduciaries should consider all the facts and circumstances relating to the nature and extent of the common ownership or control relationship. Whether any particular common ownership or control relationships would give rise to an impermissible interest within the meaning of 29 C.F.R. §2550.408b-2(e) involves inherently factual questions on which the Department generally will not opine. *See* ERISA Procedure 76-1, section 5, 41 Fed. Reg. 36281 (Aug. 27, 1976). Where a relationship with a service provider may affect the exercise of a fiduciary's best judgment as fiduciary, the fiduciary may not exercise the authority, control, or responsibility that makes such person a fiduciary with respect to the transaction. For some transactions, it may be possible for an investment manager to implement objective criteria and policies, approved by the investing plans, so that the investment manager does not exercise any fiduciary judgment in connection with the transaction. Whether any particular criteria or policies would have this effect also involves inherently factual questions on which the Department generally will not provide an opinion.

Although your inquiry was limited to the fiduciary prohibitions contained in section 406, the Department notes that the general standards of fiduciary conduct under ERISA also apply to any selection of a service provider by a plan fiduciary. Thus, under section 404(a)(1) of ERISA, AAM, as the responsible plan fiduciary, must act prudently and solely in the interest of the plan participants and beneficiaries in deciding whether to enter into, or continue, service provider arrangements.

QPAM

With respect to your second concern, the Department notes that AAM, acting as a plan fiduciary, may be considered, under certain circumstances, a QPAM for purposes of the prohibited transaction relief provided by PTE 84-14, as amended. Thus, plan transactions with a Mitsubishi Group Broker that would only violate section 406(a) of ERISA (e.g., principal transactions involving securities), due to such Broker being a "party in interest" to the plans involved, would be exempt by PTE 84-14, Part I, if the conditions of the exemption are met.

Part VI(h) of PTE 84-14 defines, among other things, whether a party in interest is "related" to a QPAM and thus excluded from the relief provided in PTE 84-14, Part I.[2] Part VI(h) provides:

> 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.[3]

You represent that Mitsubishi UFJ does not control AAM. Based upon your representations, we conclude that Mitsubishi Group Brokers are not "related" to AAM, for purposes of this definition, for the following reasons: (i) AAM owns no interest in the Mitsubishi Group Brokers; (ii) Mitsubishi UFJ does not control AAM; (iii) the Mitsubishi Group Brokers own no interest in AAM; and (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.[4] The Department has previously noted that the "related to" definition focuses on ownership interests

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[2] *See* Part I(d) of PTE 84-14.

[3] Under Part VI(h), 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.

[4] The term "control" is defined in Part VI(e) of PTE 84-14 to mean the power to exercise a controlling influence over the management or policies of a person other than an individual.

in the QPAM or the party in interest, but not their affiliates.[5] Thus, the test does not capture ownership interests in a QPAM's parent company. The fact that a corporation under common control with a Mitsubishi Group Broker owns an interest of ten percent or more in AAM's parent company (i.e., Aberdeen PLC) does not make the Mitsubishi Group Broker "related" to AAM for purposes of Part VI(h)(iii) of PTE 84-14.

The Department notes that PTE 84-14, Part I, provides an exemption only from violations of section 406(a) of ERISA and does not extend relief to transactions that violate section 406(b). Therefore, no relief would be provided if a violation of section 406(b) occurred in connection with AAM's decision to retain a Mitsubishi Group Broker.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

Ivan L. Strasfeld
Director
Office of Exemption Determinations

[5] *See* Advisory Opinion 2003-07A (Jun. 19, 2003).