



November 3, 2020

By email: lbleier@sifma.org

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Dear Ms. Bleier,

This letter responds to your request of December 18, 2018 on behalf of your members for the Department of Labor's (the Department's) view of whether section I(g) of Prohibited Transaction Exemption 84-14 (PTE 84-14) applies to convictions under foreign law.¹ Given that this is a purely legal question, Deputy Secretary Patrick Pizzella asked that I respond on behalf of the Department.² The opinion that follows reflects the Department's official legal position on this matter pursuant to Secretary Perkins' Order of June 6, 1940, as recently reaffirmed by Acting Secretary Pizzella's Memorandum of July 22, 2019.³ This document is intended to provide clarity to the public regarding existing requirements under the law and agency policies.

In your letter, you stated that nothing in the regulatory proposals underlying PTE 84-14 suggests that the Department intended to reach foreign convictions. You note that section I(g) incorporates by reference section 411 of the Employee Retirement Income Security Act of 1974 (ERISA) (section 411)⁴, and state that this demonstrates that section I(g) of PTE 84-14 does not apply to foreign criminal convictions.

ERISA section 406 prohibits fiduciaries from engaging in various transactions with "parties in interest."⁵ Since 1984, the Department has offered an exemption for qualified professional asset managers, or "QPAMs," known as PTE 84-14.⁶ PTE 84-14 is relied upon by a large number of

¹ Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 49 Fed. Reg. 9494 (March 13, 1984), as corrected at 50 Fed. Reg. 41430 (Oct. 10, 1985), and as amended at 70 Fed. Reg. 49305 (Aug. 23, 2005) and at 75 Fed. Reg. 38837 (July 6, 2010).

² Direction was given by Deputy Secretary Pizzella because Secretary Eugene Scalia is recused.

³ See Administrative Order Placing All Personnel in the Department of Labor Employed in the Capacity of Attorneys or Engaged in Legal Work Under the Solicitor of Labor (June 6, 1940); Memorandum from Acting Secretary of Labor Patrick Pizzella to Agency Heads on the Role of the Office of the Solicitor in Litigation (July 22, 2019).

⁴ 29 U.S.C. § 1111.

⁵ *Id.* § 1106.

⁶ See 49 Fed. Reg. at 9506. PTE 84-14 also provides an exemption from parallel prohibited transaction provisions in Internal Revenue Code section 4975. Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Internal Revenue Code Section 4975 to the Secretary of Labor.

banks, investment advisers, and insurance companies when managing plans subject to ERISA.⁷ It permits “transactions between a party in interest . . . and an investment fund” that would otherwise be prohibited by ERISA section 406.⁸ The Department’s authority to grant that exemption is rooted in ERISA section 408(a), which authorizes the Department to “grant a conditional or unconditional exemption of any . . . class of fiduciaries . . . from all or part of the restrictions imposed by” section 406.⁹ In order to grant such an exemption, the Department must “find[] that such an exemption is—(1) administratively feasible, (2) in the interests of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.”¹⁰ Section I(g) is one of several conditions that PTE 84-14 imposes to satisfy those statutory requirements. It bars QPAMs from relying on PTE 84-14 for a period of 10 years if the QPAM, a five percent or more owner, or an affiliate is “convicted of various crimes . . . that involve abuse or misuse of a position of trust, or felonies generally described in ERISA section 411.”¹¹ The exemption excludes QPAMs from relief under these circumstances because “[a] QPAM, and those who may be in a position to influence its policies, are expected to maintain a high standard of integrity.”¹² The Department occasionally grants individual exemptions to QPAMs who fail to satisfy that condition.¹³ Prior to 2004, every individual exemption granted by the Department related to a domestic conviction.

In light of section I(g)’s plain reference to section 411, when interpreting the scope of PTE 84-14 section I(g), we must consider the reach of section 411. While no federal court has analyzed section 411’s application to foreign convictions, the text of section 411 extends only to domestic convictions.¹⁴ Section 411’s procedural mechanisms reference exclusively “Federal” and “State or local” offenses, reference the jurisdiction of the U.S. district court “in which the offense was committed,” and reference “State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted.”¹⁵ Nothing in the text of section 411 indicates that its listed crimes include foreign equivalents. Some of the listed federal crimes, such as wire

⁷ See PTE 84-14, section V(a), 49 Fed. Reg. at 9506 (defining a QPAM).

⁸ 49 Fed. Reg. at 9504.

⁹ 29 U.S.C. § 1108(a).

¹⁰ *Id.*

¹¹ Proposed Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 47 Fed. Reg. 56945, 56947 (Dec. 21, 1982).

¹² *Id.*

¹³ See, e.g., PTE 2005-06, Riggs Bank N.A., 70 Fed. Reg. 25614 (May 13, 2005).

¹⁴ ERISA section 411 identifies the following crimes:

[R]obbery, bribery extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a-9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), any felony involving abuse or misuse of such person’s position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element.

¹⁵ 29 U.S.C. § 1111. ERISA section 411 also includes additional procedural protections for corporations: “[n]otwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as [a] . . . fiduciary . . . of any employee benefit plan . . . without a notice, hearing, and determination by such [federal] court that such service would be inconsistent with the intention of this section.”

fraud, arguably may be applied to conduct that occurs outside the U.S. but has sufficient domestic nexus.¹⁶ However, that does not mean that section 411 incorporates, for example, other countries' wire-fraud statutes in the absence of explicit language to that effect.¹⁷ Moreover, despite section 411's inclusion of the phrase "any felony," the U.S. Supreme Court noted in an analogous context that "the word 'any' considered alone cannot answer [the] question" of whether "the statutory reference 'convicted in *any* court' includes a conviction entered in a *foreign* court."¹⁸ This express domestic focus differs from statutes where Congress has regulated participants in the financial system on the basis of foreign convictions.¹⁹

Section 411's domestic language also differs from the language Congress has used when addressing extraterritoriality elsewhere in ERISA. For example, ERISA section 4 provides that "this subchapter shall not apply to any employee benefit plan if . . . such plan is maintained *outside of the United States* primarily for the benefit of persons substantially all of whom are nonresident aliens"²⁰ and ERISA section 408 exempts "[a]ny transaction involving the purchase or sale of securities, or other property . . . between a plan and a party in interest if . . . the transaction is executed through an electronic communication network . . . subject to regulation and oversight by . . . such *foreign regulatory entity* as the Secretary may determine by regulation . . ." (emphasis added). In addition, courts have recognized that ERISA does not have extraterritorial effect in other contexts.²¹

For the most part, section I(g) adopts the same crimes as section 411.²² The language of PTE 84-14 generally, and section I(g) specifically, does not indicate that the scope of ERISA section 411 crimes was expanded for purposes of the exemption, nor are there special indicia suggesting that the other enumerated crimes included in PTE 84-14 were intended to include foreign equivalents.²³

¹⁶ See *Pasquantino v. United States*, 544 U.S. 349, 371–72 (2005) (dicta); see also, e.g., *United States v. Hussain*, 972 F.3d 1138, 1143–45 (9th Cir. 2020) (wire fraud); *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017) (wire fraud); *United States v. Georgiou*, 777 F.3d 125, 136 (3d Cir. 2015) (Exchange Act); *S.E.C. v. Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013) (FCPA).

¹⁷ See, e.g., *United States v. Hoskins*, 902 F.3d 69, 95–97 (2d Cir. 2018) (FCPA does not apply to conduct committed abroad except as expressly provided for in the statute).

¹⁸ *Small v. United States*, 544 U.S. 385, 388 (2005).

¹⁹ For example, section 203(e) of the Investment Advisers Act of 1940 permits the U.S. Securities and Exchange Commission to regulate investment advisers convicted "of any felony or misdemeanor or of a substantially equivalent crime by a foreign court . . ." 15 U.S.C. § 80b-3(e)(2). This provision repeatedly uses phrases like "substantially equivalent foreign statute or regulation" and "foreign entity substantially equivalent to any of the above." See *id.* § 80b-3(e) *passim*.

²⁰ 29 U.S.C. § 1003.

²¹ See *In re Reliance Standard Life Ins. Co.*, 386 F. Supp. 3d 505 (E.D. Pa. 2019) (ERISA's jurisdictional grant does not extend to suits by foreign nationals working outside the U.S.); *Chong v. InFocus Corp.*, No. CV-08-500-ST, 2008 WL 5205968 (D. Or. Oct. 24, 2008) (same); *Maurais v. Snyder*, No. C.A. 00-2133, 2000 WL 1368024 (E.D. Pa. Sept. 14, 2000) (same).

²² 29 U.S.C. § 1111 PTE 84-14 § I(g) covers:

[A]ny felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasions any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA.

²³ Other regulators have similarly limited regulatory disqualifications to domestic violations unless explicitly required under the related statute. See, e.g., Securities and Exchange Commission Compliance and Disclosure Interpretations,

Furthermore, section 411's text evinces Congress's intent to establish a bright-line rule barring those convicted of certain crimes from serving as fiduciaries, but Congress declined to explicitly include foreign convictions in that bar. The text also evinces Congress's intent that corporations with foreign convictions should not be precluded, as a class, from serving as fiduciaries.²⁴ These textual and contextual considerations persuade the Department that section 411's limitation to domestic contexts indicates that section I(g) is similarly limited.

In addition, your letter discussed the Supreme Court's decision in *Small v. United States*.²⁵ There, the Court considered whether 18 U.S.C. § 922(g)(1)'s ban on possession of a firearm by any individual "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" was triggered by a foreign conviction.²⁶ The Court answered in the negative, explaining that it was inappropriate to read the statute to include foreign convictions since "foreign convictions differ from domestic convictions in important ways" and there was "no convincing indication" that Congress intended the statute to apply to foreign convictions, particularly since doing so would lead to "anomalies."²⁷ You stated that *Small* resolves any doubt as to whether section I(g) applies to convictions for foreign offenses.

Your letter also pointed to the Supreme Court's decisions in *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*²⁸ and *Morrison v. National Australia Bank Ltd.*²⁹ In *Aramco*, the Court considered whether Title VII's bar on discrimination in businesses "engaged in . . . any activity, business, or industry . . . affecting commerce . . . between a State and any place outside thereof" applied to discrimination that took place in Saudi Arabia.³⁰ Applying the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'" the Court held that Title VII did not apply abroad.³¹ It did so despite the undoubted importance of eliminating employment discrimination by American employers. Similarly, in *Morrison* the Supreme Court applied the same presumption to hold that 15 U.S.C. § 78j's ban on the "use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance" did not support a suit against a bank whose shares were listed in Australia.³² In reaching that conclusion, the Supreme Court observed that "[t]he probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended

<https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>, Question 260.20 (foreign convictions, orders, regulatory orders do not trigger "bad actor" disqualification under Rule 506(d)); cf. Question 203.03 (Rule 405 definition of "ineligible issuer" extends to conviction by a foreign court due to statutory inclusion of "a substantially equivalent foreign statute" (Securities Exchange Act § 15(b)(4)(ii), (iv))).

²⁴ See *supra* note 15.

²⁵ 544 U.S. 385 (2005).

²⁶ *Id.* at 387.

²⁷ *Id.* at 389, 391.

²⁸ 499 U.S. 244 (1991).

²⁹ 561 U.S. 247 (2010).

³⁰ *Aramco*, 499 U.S. at 249.

³¹ *Aramco*, 499 U.S. at 249, 251–52.

³² *Morrison*, 561 U.S. at 261.

such foreign application it would have addressed the subject of conflicts with foreign laws and procedures.”³³

The cited Supreme Court precedent is persuasive support for the conclusion that section I(g) of PTE 84-14 does not extend to foreign convictions. These cases declined to interpret statutes to reach beyond a domestic context absent some explicit indication, and nothing in the text or context of PTE 84-14 provides a “convincing indication” that the exemption was intended to apply to foreign convictions.³⁴ The extraterritorial reach of some criminal statutes does not provide such a contrary indication. It is true that various U.S. laws, such as counterfeiting³⁵ and income-tax evasion,³⁶ prohibit such conduct abroad. It is also true that various other U.S. crimes are expressly territorial,³⁷ and that the United States has begun using existing statutes to regulate foreign financial crime.³⁸ PTE 84-14 thus may recognize U.S. convictions predicated on foreign misconduct as disqualifying events, to the extent the statute violated permits such extraterritorial application.³⁹ It does not follow, however, that PTE 84-14 also recognizes foreign nations’ criminal laws. That would involve recognizing foreign convictions themselves as legally operative acts under U.S. law, not just applying U.S. law to foreign conduct.

Moreover, section I(g) uses the terms “felony,” “judgment of the trial court,” and a “judgment” that “remains on appeal.” These are particular terms applicable in the context of the U.S. state and federal court systems. It is problematic to apply these terms in the same context to legal proceedings outside of the United States. For example, as you point out, many jurisdictions, including the United Kingdom, Canada, Ireland, Australia, and New Zealand, do not rely on a legal category of “felony.” That is similar to the anomalies the Supreme Court referenced in *Small*, and the “probability of incompatibility with the applicable laws of other countries” that the Court noted as problematic in *Morrison*.⁴⁰

Finally, you state that the fact “[t]hat administrative exemptions covering foreign convictions have been sought and granted in the past should not deter the Department from excluding foreign convictions from section I(g) going forward.” The Department has previously granted several individual exemptions as requested by applicants that were premised on foreign convictions. In one instance, the Department observed that “PTE 84-14 is not limited to crimes committed in the United States” and stated further that it had “construed Section I(g) as extending to foreign convictions.”⁴¹ The Department relied for those assertions on the previous exemptions it had granted and a statement in the preamble of the proposed PTE 84-14 that section I(g)’s purpose was

³³ *Morrison*, 561 U.S. at 269 (internal quotation marks omitted).

³⁴ See *Small*, 544 U.S. at 391.

³⁵ See 18 U.S.C. § 470.

³⁶ See, e.g., Jonathan Pickworth et al., “Tax Evasion Knows No Borders,” WHITE & CASE CLIENT ALERT (Oct. 1, 2018), <https://www.whitecase.com/publications/alert/tax-evasion-knows-no-borders>.

³⁷ See CONGR’L RES. SERV., EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 42–52 (Oct. 31, 2016).

³⁸ See cases cited, *supra* note 16; see also Pierre-Hugues Verdier, “The New Financial Extraterritoriality,” 87 GEO. WASH. L. REV. 239 (2019).

³⁹ *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101–03 (2016).

⁴⁰ See *Small*, 544 U.S. at 391; *Morrison*, 561 U.S. at 269.

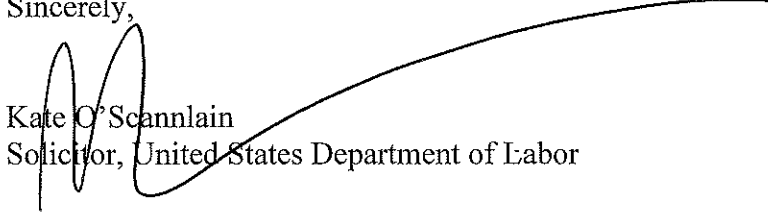
⁴¹ PTE 2019-01, Exemption Involving UBS Assets Management (Americas) Inc.; UBS Realty Investors LLC; UBS Hedge Fund Solutions LLC; UBS O’Connor LLC; and Certain Future Affiliates in UBS’s Asset Management and Global Wealth Management U.S. Divisions, 84 Fed. Reg. 6163, 6164, 6165 (Feb. 26, 2019). The Department had previously issued several exemptions that assumed, without deciding, that section I(g) applied to foreign convictions. See, e.g., PTE 2016-10, Royal Bank of Canada, 81 Fed. Reg. 75147 (Oct. 28, 2016).

to ensure that “[a] QPAM, and those who may be in a position to influence its policies, are . . . maintain[ing] a high standard of integrity.”⁴² It is well settled that an agency’s statement in the preamble of a rule is not law nor does it overcome regulatory text to the contrary. *See Wy. Outdoor Council v. U.S. Forest Srvc.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (“[L]anguage in the preamble of a regulation is not controlling over the language in the regulation itself.”). Furthermore, the Department believes that the purposes set out in the preamble to the proposed PTE 84-14 do not provide evidence of extraterritorial intent, much less the “convincing indication” needed to overcome the “commonsense notion” that agencies adopt legal rules with domestic concerns in mind.⁴³ Congress or the Department may revisit PTE 84-14 on a future occasion, but for now the Department must abide by the plain text of the regulation as it exists.

Accordingly, in the future, the Department will not view a conviction under foreign law as a disqualifying event under PTE 84-14 section I(g). Note, however, that a fiduciary’s duties of prudence and loyalty apply in the context of hiring, monitoring, evaluating, and retaining an asset manager, regardless of whether the PTE 84-14 exemption formally depends on disqualifying a QPAM based on a foreign conviction against the QPAM, its affiliate, or owner, as defined. Moreover, other statutes that expressly condition participation in U.S. financial markets on the absence of a foreign conviction, such as 15 U.S.C. § 80b-3(e), continue to apply. This letter will not impact any exemptions that the Department has previously granted. Further, pursuant to Executive Order 13891, this document does not have the force and effect of law and is not meant to bind the public in any way.⁴⁴

I trust that this opinion letter addresses the issues raised in your December 18, 2018 correspondence. Going forward, the Office of the Solicitor will advise the Department consistent with our legal conclusions expressed herein.

Sincerely,



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Solicitor, United States Department of Labor

cc: William J. Kilberg
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Patrick Pizzella
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⁴² 47 Fed. Reg. at 56947.

⁴³ *See Small*, 544 U.S. at 388, 391; *see also Ashtabula Cty. Med. Ctr. v. Thompson*, 352 F.3d 1090, 1094 (6th Cir. 2003) (“Deference to the Secretary’s interpretation of the regulation only comes into play if its plain language is ambiguous.”); *United States v. Boynton*, 63 F.3d 337, 342 (4th Cir. 1995) (“Although an agency’s interpretation of its own regulations is entitled to deference from the courts, the interpretation will not be enforced if it is plainly erroneous or inconsistent with the regulation’s language or the intent of the regulation as manifest by the agency at the time of the regulation’s promulgation.”).

⁴⁴ Executive Order 13891, 84 Fed. Reg. 55238 (Oct. 9, 2019).