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Office of Exemption Determinations
Employee Benefits Security Administration
Attn: Z-RIN 1210 ZA07
Docket ID Number: EBSA-2022-0008
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: Supplemental Comments Regarding Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption), Z-RIN 1210 ZA07

Dear Sir or Madam:

The Coalition of Collective Investment Trusts (the "Coalition")[1] appreciates the opportunity to supplement our comment letter dated October 11, 2022 ("October 11th letter"), which we submitted in response to the request for comments issued by the U.S. Department of Labor (the "Department") regarding the proposed amendments to prohibited transaction class exemption 84-14, also known as the "QPAM Exemption" ("the Proposal"). We wish to express our gratitude to the Department for reopening the comment period and enabling us to submit additional information we believe is important to assisting the Department's understanding of the potential for the proposed amendments to the

[1] The Coalition is a group of fund sponsors and asset managers active in the collective investment trust ("CIT") industry comprising approximately 50 member companies with approximately $4.5 trillion in assets under management. As a matter of course, we note that comment letters submitted by the Coalition do not necessarily represent the views of any particular member.

QPAM Exemption to conflict with existing regulatory requirements to which CITs and their providers are subject.

During the virtual public hearing held on the Proposal on November 17, 2022 ("Hearing"), the Department raised a number of questions about issues pertaining to CIT operations and the potential impact of the proposed amendments to the QPAM Exemption on CIT subadvisor arrangements. More specifically, various Department officials inquired about the discretionary authority and subadvisor oversight exercised by CIT QPAMs,[2] and plan sponsor involvement in the engagement of CIT subadvisors.

In conjunction with the Hearing, the Department reopened the comment period for the Proposal and encouraged interested parties to submit comments. The Coalition closely followed the Hearing and is providing this additional information and clarification supplementing the comments in our October 11th letter in response to the questions the Department raised during the Hearing that relate to, or implicate practices related to, CITs and their operation.

DISCUSSION

As an initial matter, we wish to reiterate and amplify the concerns shared by the Coalition and other industry groups in both written comments and testimony regarding the breadth and expansive scope of the proposed amendments, and in particular, the proposed changes to Section I(c) of the QPAM Exemption. These amendments would limit covered transactions to those for which the "commitments, investment of fund assets and negotiations on behalf of the Investment Fund are the sole responsibility of the QPAM" and would stipulate that "no relief is provided under this exemption for any transaction that has been planned, negotiated or initiated by a Party in Interest, in whole or in part, and presented to the QPAM for approval."

For nearly four decades, the QPAM Exemption has enabled investment managers and other plan service providers, including CIT QPAMs and subadvisors, to develop a wide variety of innovative products and solutions that are beneficial to retirement plan investors, while at the same time providing a method to structure arrangements or transactions in a manner so as to avoid or mitigate potential conflicts of interest and other ERISA prohibitions. These efforts to design solutions that meet the evolving needs of retirement plan investors may involve coordination and collaboration among plan sponsors, consultants, investment managers and subadvisors and other plan service providers under

[2] For purposes of this letter, we use the term "CIT QPAM" to mean the trustee or provider acting as the "bank" maintaining the CIT in accordance with the requirements under section 3(c)(11) of the Investment Company Act of 1940 ("1940 Act").

the auspices of a QPAM, none of which is nefarious, but instead, is intended to ensure that critical perspectives and expertise are brought to bear.

Further, the idea to develop a particular investment solution may originate from a Party in Interest other than the QPAM, in some instances from the plan's investment fiduciaries or outside consultants, as well as subadvisors or other service providers. During the Hearing, Department officials indicated that, in proposing the amendments to section I(c), the Department sought to ensure that commenters and witnesses were not objecting to the notion that the QPAM should not be a rubber stamp and that the Department expected the QPAM to be making the investment decisions, but did not intend to preclude other sorts of ***legitimate*** interactions with Parties in Interest. The proposed amendments to section I(c) would do just that by removing those potentially closest to the plan and participant needs from the initiation, planning and negotiation regarding a given transaction even where a QPAM has the final discretionary authority with regard to the transaction. The Department has not made clear, either in the Proposal or during the Hearing, why it should matter which Party in Interest proposes or initiates a transaction, so long as the approval and terms of the transaction are the ultimate responsibility of a QPAM.

We understand that the Department is concerned that the current QPAM Exemption may be subject to abuse by allowing a Party in Interest to search for a QPAM to "bless" an arrangement that is pre-designed to benefit itself or another Party in Interest, or so-called "rent-a-QPAM" or "QPAM-for-a-day" transactions. We are unaware of any instances of this type of abuse, or any pervasive abuses at all, in connection with the QPAM Exemption, as affirmed by the testimony of virtually every witness at the Hearing, representing a broad swath of the retirement industry, including investment managers, plan service providers, plan sponsor advocates and advisors. Accordingly, as a general matter, we urge the Department to withdraw the proposed language in section I(c) that would broadly condition relief in connection with a given transaction on the QPAM having sole responsibility for the commitments and investments of plan assets and the initiation, planning and negotiations leading thereto.

CIT QPAM Subadvisor Arrangements

In the context of subadvisor arrangements, during the Hearing, Department officials suggested that the aim of the proposed amendments to section I(c) was to make clear that QPAMs understand that the investment management decisions ultimately are their responsibility, they are on the hook for those decisions and are not delegating this responsibility. In this regard, it may be helpful for the Department to have additional background on the roles of the CIT QPAM and the subadvisors within the CIT structure.

With regard to subadvisor arrangements, we note that there is no one-size-fits-all approach in the CIT space, and subadvisor relationships and agreements may vary widely among CIT providers. Notwithstanding these variations, two absolutes are consistent across all CIT subadvisor arrangements – CIT QPAMs are required by law to have and exercise ultimate discretionary authority and responsibility regarding the management of the CITs they maintain and make available to retirement plan investors, and the CIT QPAM is an ERISA fiduciary for purposes of selection, retention, and termination of any subadvisors engaged to manage CIT assets. The CIT QPAM is fully accountable under ERISA as a matter of law, as well as under the investment management or other agreement with the plan sponsor.

A hallmark of the requirement under section 3(c)(11) of the 1940 Act and related Office of the Comptroller of the Currency guidance that a CIT be "maintained by" the CIT QPAM, is that the CIT QPAM must exercise "substantial investment responsibility" with respect to the CIT and have exclusive management of the CIT, except as a prudent person might delegate responsibilities to others.[3] Thus, CIT QPAMs are fully aware of their high standard of investment responsibility and commit to exercising ultimate discretionary authority and prudent oversight under the primary regulatory regime governing CITs, regardless of the decision to use or rely on the QPAM Exemption in connection with a given transaction.

Further, as ERISA fiduciaries, CIT QPAMs are subject to the fiduciary duties and obligations under ERISA section 404, including the care and prudence obligations that extend to their exercise of discretionary authority and subadvisor oversight in connection with the CITs they maintain. Similarly, CIT subadvisors are bound by ERISA's fiduciary duty provisions in carrying out the day-to-day management of their investment portfolios underlying a CIT, with the CIT QPAM ultimately responsible for putting all of the pieces together in constructing the CIT and monitoring subadvisor activity on an ongoing basis to ensure compliance with investment policies and guidelines established by the CIT QPAM as well as performance standards and applicable legal and regulatory requirements. This construct provides multiple layers of fiduciary fortification within the CIT itself, and protection in connection with a CIT transaction.

Oversight by CIT QPAMs of the subadvisors they engage generally entails ongoing communication with subadvisors, ongoing receipt of reporting and disclosures from

[3] See Employee Benefit Plans, Securities Act Release No. 6188 (Feb. 1, 1980), 45 Fed. Reg. 8960, 8972 (Feb 11, 1980); Employee Benefit Plans, Securities Act Release No.6188 (Feb. 1, 1980) ("Employee Benefit Plans Release"); The Citizens & Southern National Bank/Citizens and Southern Investment Advisors, Inc., SEC No-Action Letter (Feb. 10, 1986); General Motors Investment Management Corporation, SEC No-Action Letter (Feb. 2, 2000); 12 C.F.R. § 9.18(b)(2).

subadvisors and ongoing monitoring of overall portfolio transactions and investments. In this way CIT QPAMs are able to manufacture CITs with exposure to a broader range of strategies and asset classes than might otherwise be available solely through the CIT QPAM's investment capabilities and at the same time, ensure that assets are managed in accordance with ERISA's rigorous standards and obligations. The QPAM Exemption, in its current form, with the existing language in section I(c), has provided a roadmap to appropriately allocate responsibilities and oversight within CIT subadvisor arrangements and provide investment solutions to plans and participants in a manner consistent with the Exemption's conflict avoidance and mitigation framework.

Plan Sponsors and the CIT QPAM

With respect to plan sponsor involvement in CIT subadvisor arrangements, during the Hearing, Department officials asked about the extent to which plan sponsors are aware of the subadvisor arrangements and are approving the subadvisor arrangements themselves.[4] In adopting a CIT, the plan sponsor does not negotiate the terms of the CIT itself or who the subadvisors of the CIT will be. Instead under the authority of Section 402(c)(3) of ERISA, they are appointing and relying on the CIT QPAM, as a 3(38) fiduciary investment manager, to construct a specific investment option incorporating the strategies and subadvisors the CIT QPAM, in its discretion, deems appropriate and necessary to meet the principal objectives the fund. Thus, when a plan sponsor enters into a transaction to adopt a CIT, the plan sponsor is provided robust information regarding the CIT and its management, typically including CIT fund fact sheets, detailed responses to requests for proposals, in-person presentations by the CIT QPAM, and the participation agreement or other agreement used by the plan sponsor to adopt the CIT. Through these documents and presentations, the plan sponsor is made aware of the CIT QPAM's use of any subadvisors and its authority to terminate, replace and engage different or additional subadvisors in the future.

By its nature, a CIT provides for the pooling and commingling of assets of potentially thousands of plan investors coming into and out of the CIT at different times across the span of the CIT's existence. To allow each plan sponsor to negotiate and approve each subadvisor's engagement would be not only impractical but imprudent. This is particularly true in circumstances where it may be necessary to terminate and replace a subadvisor in an exigent or emergency situation. Requiring each plan sponsor to approve a subadvisor appointment or termination could result in significant delays to the detriment of the plans and participants investing in the CIT.

[4] For ease of reading, we are using the term "plan sponsor" to include the plan administrator, trustee or other entity responsible for selecting investments.

Instead, when a plan adopts a CIT into its lineup, the plan sponsor evaluates the overall composition of the CIT, including, among a variety of factors, the use of any subadvisors, as well as the style, objective, performance and fees of the CIT in determining whether it is an appropriate investment vehicle for its plan. In this way, the plan sponsor effectively "approves" the subadvisors at the fund level by engaging in the prudent evaluation of the CIT as an investment option, including the component characteristics, such as any subadvisors managing portfolios within the CIT. To the extent there are material subadvisor changes within the CIT following the plan's adoption of the CIT, the plan sponsor would be provided notice, and if the plan sponsor objects to such changes, the plan sponsor has the right to terminate its agreement with the CIT QPAM and remove the CIT from its lineup.

We note that the implication that plan sponsors should be involved in approving the individual subadvisor arrangements within a CIT is also inconsistent with the Department's posture in the proposed amendments to section I(c) of the QPAM Exemption, as it would interpose the plan sponsor within the ambit of the CIT QPAM's ultimate investment management authority. Unlike the proposed amendment language that would preclude plan sponsor involvement in the planning or negotiation of investment transactions, here, the Department seems to imply that a plan sponsor should have a role in negotiating or approving CIT subadvisor arrangements, which appropriately should rest within the CIT QPAM's sole authority. Moreover, this involvement would be inconsistent with Section 405(d) of ERISA, which relieves a plan sponsor-level fiduciary of responsibility and liability when appointing a 3(38) investment manager.

Finally, as alluded to above, in adopting CITs into their lineups, plan sponsors do not enter into individual subadvisory agreements with the underlying subadvisors. Instead, they typically execute a participation agreement with the CIT QPAM that sets forth the terms between the plan sponsor and the CIT QPAM, with responsibility for, and potential liability in connection with, the overall management of the CIT resting with the CIT QPAM, regardless whether any or all of the subadvisors also act as a QPAM. As such, there is no individual contract or privity between the plan sponsor and individual subadvisors. Rather, the individual CIT subadvisor agreements run between the CIT QPAM and the subadvisors, and if a subadvisor engages in some impropriety that would cause it to lose QPAM status, or otherwise, the CIT QPAM has the authority to terminate and replace the subadvisor, or reallocate its portfolio assets among other subadvisors, in accordance with its own investment governance process and guidelines. Allowing or requiring entities other than the CIT QPAM to enter separate agreements with CIT subadvisors substantially increases the risk that the terms of one or more individual

agreements might contradict the terms of the CIT offering documents. To have differing agreements governing a pooled investment fund could lead to issues in having different terms apply to different investors, which is fundamentally at odds with the nature and operation of pooled vehicles such as CITs.

CONCLUSION

Once again, the Coalition appreciates the opportunity to provide these supplemental comments regarding the Proposal. We strongly encourage the Department to withdraw the Proposal as written, in particular with regard to the proposed amendments to section I(c) of the QPAM Exemption, or, alternatively, to release a substantially revised proposal that addresses the comments provided by the Coalition and other industry groups referenced herein.

Respectfully submitted,

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FOR THE COALITION OF COLLECTIVE INVESTMENT TRUSTS

cc: Assistant Secretary Lisa Gomez
Principal Deputy Assistant Secretary Ali Khawar
Deputy Assistant Secretary Timothy D. Hauser