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Assistant Secretary Ali Khawar
Office of Exemption Determinations
Employee Benefits Security Administration
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted Electronically

Re: Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (the QPAM Exemption), (Application No. D-12022) (EBSA-2022-0008) (RIN 1210-ZA07)

Dear Assistant Secretary Khawar:

Teachers Insurance and Annuity Association of America ("TIAA") and its wholly-owned subsidiary Nuveen, LLC ("Nuveen") appreciate the opportunity to respond to the Department of Labor's ("DOL" or the "Department") proposed amendments to prohibited transaction class exemption 84-14, also known as the "QPAM Exemption" (the "Proposal").[1] For decades, the QPAM Exemption has allowed retirement plans and individual retirement accounts that are managed by a qualified professional asset manager ("QPAM") to engage in transactions that would otherwise be prohibited under Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The QPAM Exemption plays a crucial role in ensuring that retirement plans can access the various services and investments they need to continue operating successfully, while still ensuring that plans are not subject to problematic conflicts of interest.

Given the importance of the QPAM Exemption to the retirement industry, we welcome the chance to participate in this discussion, and we applaud the DOL for its efforts to update the Exemption to function more effectively. However, we have significant concerns with a number of aspects of the Proposal. Namely, we feel that the provisions requiring a QPAM's disqualification upon a foreign criminal conviction or occurrence of prohibited misconduct are overly broad, and

[1] *Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (the QPAM Exemption)*, 87 Fed. Reg. 45204 (Jul. 27, 2022), *available at*: https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15702.pdf.

should be eliminated altogether – or at the very least, significantly narrowed. We also believe the one-year winding-down period for a disqualified QPAM, while logical in theory, would be functionally unworkable as proposed. Additionally, we feel that the DOL has vastly underestimated the time, cost, and challenges involved if QPAMs are required to update their investment management agreements to add the DOL's new required contractual terms. We believe the DOL should eliminate its proposed required contractual terms from the final rule, and should also remove the requirement for QPAMs to notify the DOL of their QPAM status so they can be included on a public list of QPAMs. In addition to the recommendations made in this letter, we have also reviewed the comment letters submitted by the Investment Company Institute ("ICI"), the Investment Advisers Association ("IAA"), and the Society of Professional Asset Managers and Recordkeepers ("SPARK") in response to the Proposal, and we wish to express our general support of the positions taken in those letters. We discuss our views in further detail below.

I. About TIAA and Nuveen.

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over our century-long history, TIAA's mission has always been to aid and strengthen the institutions, retirement plan participants, and retail customers we serve and to provide financial products that meet their needs. Our investment model and long-term approach aim to benefit the approximately five million individual customers we serve across more than 15,000 institutions. To carry out this mission, we have evolved to include a range of financial services, including retail services and the asset management services offered by Nuveen and its subsidiaries.

Nuveen comprises investment advisers that collectively manage over $1 trillion in assets, including in the Nuveen and TIAA-CREF registered fund complexes as well as in private funds and structured vehicles. Nuveen also manages ERISA plan separate accounts and provides fiduciary advice to collective investment trusts and other ERISA plan asset collective vehicles. As part of its asset management services, Nuveen conducts transactions as a QPAM for many of its ERISA retirement plan clients. Given TIAA's leadership in the retirement services space, and Nuveen's experience serving as a QPAM, our organization has a vested interest in sharing our views on the Proposal with the DOL. We hope our comments are helpful as the Department considers how the Proposal might be improved.

II. The foreign criminal convictions provision is overly broad and should be eliminated in favor of a disclosure framework.

As ICI notes in its comment letter, the Proposal's addition of foreign criminal convictions to the list of events that disqualify a financial institution from serving as a QPAM is overly broad and could potentially lead to inappropriate and unjust disqualifications in certain instances. Section I(g) of the QPAM Exemption currently provides that a QPAM will be disqualified for a specified period of time if the QPAM, its various affiliates, or its five percent or more owners are convicted

of certain crimes, including those crimes listed in Section 411 of ERISA.[2] The Proposal would modify this section to "remove any doubt" that the disqualification provision "applies to foreign convictions that are substantially equivalent to the listed U.S. federal or state crimes."[3] Specifically, a QPAM would be disqualified for any conviction ''by a foreign court of competent jurisdiction for any crime . . . however denominated by the laws of the relevant foreign government, that is substantially equivalent to one of the U.S. federal or state crimes" identified in the QPAM Exemption. As justification for this change, the DOL notes that "financial services institutions increasingly have a global reach, both in their affiliations and in their investment strategies," meaning that "transactions involving Plan assets are increasingly likely to involve entities that reside and operate in foreign jurisdictions." The Department reasons that an "ineligibility provision that is limited to U.S. federal and state convictions would ignore these realities and provide insufficient protection for Plans investing through a QPAM's international affiliates."[4]

While we agree that certain foreign criminal convictions should disqualify a financial institution from serving as a QPAM, we share ICI's concerns that the proposed provision as drafted is overly broad and would result in inappropriate disqualifications – which would in turn needlessly inconvenience plans and burden them with unnecessary expenses. The Proposal provides that a conviction in *any* foreign court of competent conviction for a crime that equates to the list of disqualifying crimes in the U.S. will disqualify an institution from serving as a QPAM. However, the Department is undoubtedly aware that in some countries, the criminal justice system is not necessarily fair or transparent, nor are accused parties always afforded due process. We are concerned that the Proposal would inappropriately equate criminal convictions levied in countries that have less robust or reliable legal systems with those convictions handed down by U.S. courts.

The better approach, in our view, is to eliminate the proposed provision on foreign criminal convictions from the final rule and instead require QPAMs to disclose any material foreign criminal conviction to which they, their affiliates, or their five percent or more owners become subject. Because some countries do not differentiate between felony and misdemeanor level crimes, the DOL should assist asset managers with foreign affiliates or business operations by clarifying, where a felony category is not applied, types of foreign convictions in the final rulemaking that require disclosure, such as convictions over a certain threshold of fines and penalties or a certain amount of prison time. This approach would likely reduce the number of asset managers pursuing individual exemptions. This disclosure will give plan fiduciaries the ability to decide for themselves whether the conviction is serious and credible enough to warrant termination of the QPAM relationship and undertake the costs and burdens associated with such a decision. We believe this disclosure-based framework is a more effective way to ensure

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[2] 87 Fed. Reg. at 45206.

[3] *Id.* at 45208.

[4] *Id.*

that plans are not being forced to terminate relationships with their QPAMs over questionable convictions.

III. **The DOL should narrow the proposed "prohibited misconduct" provision to exclude deferred prosecution agreements and non-prosecution agreements**.

The Proposal also includes a new provision specifying that any QPAM found to be participating in certain "prohibited misconduct" will be disqualified. Such prohibited misconduct would include, among other things, "any conduct that forms the basis for a non-prosecution or deferred prosecution agreement, or a similar agreement entered into in a foreign jurisdiction."[5] Under the Proposal, the term "participating in" is defined to include not only active participation in prohibited misconduct, but also "knowingly approving of the conduct or having knowledge of such conduct without taking appropriate and proactive steps to prevent such conduct from occurring, including reporting the conduct to appropriate compliance personnel."[6]

While we agree with the positions expressed by ICI and IAA in their comment letters that the entire prohibited misconduct provision is overly broad and undefined, and should ideally be eliminated in its entirety, we are most concerned about the inclusion of non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs"), as well as their foreign equivalents, as types of prohibited misconduct. The Proposal seems to inappropriately equate NPAs and DPAs with criminal convictions – when in fact, they are negotiated resolutions to criminal allegations that occur outside of the formal judicial process. A financial institution's decision to enter into an NPA or DPA is not an admission of guilt or a decision to agree with a prosecutor's criminal allegations. Rather, these agreements reflect the judgment of the parties involved that a negotiated resolution is a better way to bring an issue to a close rather than a long, drawn-out, and expensive criminal proceeding. These agreements serve a crucial function in allowing parties to settle matters amongst themselves without going through protracted litigation. If the Proposal is finalized as drafted, we fear that QPAMs may be discouraged from making use of this critical tool in order to avoid disqualification. If the DOL decides not to eliminate the prohibited misconduct provision in its entirety from the final rule, we would urge the Department to at least remove DPAs and NPAs as qualifying types of misconduct. We also believe that employees should only be disqualified from being employed by a QPAM if the employee had a legal responsibility to report the disqualifying conduct, and should only be disqualified from certain roles within the asset management firm that involve managing client assets, conducting transactions, managing client custodial relationships, or serving in a compliance or risk oversight role.

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[5] *Id.* at 45209.

[6] *Id.*

IV. **<u>The DOL should amend the proposed one-year winding-down period</u>.**

The Proposal would impose a one-year winding-down period once a QPAM becomes ineligible.[7] During this one-year period, the QPAM would no longer be permitted to enter into new transactions in reliance on the QPAM Exemption, and would only be able to rely on the QPAM Exemption with respect to its existing clients. [8] The Proposal states that the purpose of this requirement is to "help plans and IRAs avoid or minimize possible negative impacts of terminating or switching QPAMs or adjusting asset management arrangements when a QPAM becomes ineligible."[9] Moreover, the Proposal explains that the winding-down period is intended to help alleviate the cost and disruption to plans, participants, and beneficiaries in the wake of a QPAM's disqualification.[10] However, while the mandatory winding-down period appears logical on its face, we believe it would only harm plans, and is ultimately unnecessary to achieve the DOL's intended goals.

As ICI and SPARK note, limiting a QPAM's ability to engage in new transactions during the one-year winding-down period would be detrimental to plans, as they would be left with an investment manager unable to buy or sell any investments. ICI correctly notes that if QPAMs lack the authority to engage in new transactions, the asset-liability disparity for plans would only increase, along with the financial solvency risk of pension funds. All strategies a QPAM may manage for a plan require the asset manager to have the discretion to buy and sell investments. A twelve-month caretaker portfolio is in no one's best interest. What's more, the process of hiring a new manager can be time-consuming, and it may be especially difficult for plans that have established a certain comfort level with their QPAM over their years-long relationship to find an acceptable replacement during the prescribed winding-down period.

Given the costs, risks, and burdens associated with winding down a QPAM relationship over a one-year period, we support the idea that upon receiving notice that a disqualifying event has occurred, plans are given the ability to decide whether to terminate or withdraw from the relationship, as well as the flexibility to determine a timeline for withdrawal. Rather than being forced to undergo a mandated one-year winding-down period, plans should have the opportunity to use one of the various additional compliance tools at their disposal following the disqualification of their QPAM. Even where a plan chooses to dissolve its relationship with its QPAM, we believe that the QPAM should have the authority to enter into new transactions during the winding-down period to support a more organized transition for plans. This would also meet the DOL's goal to "mitigate the cost and disruption" to plans.[11]

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7 *Id.* at 45211.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

V. **The DOL underestimates the costs and burdens associated with implementing the required contractual terms, and should eliminate those terms altogether.**

The Proposal would require QPAMs to include new terms in their written management agreements in order to rely on the QPAM Exemption. The terms would generally require the manager to agree to:

- Not impede a plan's ability to terminate or withdraw from arrangements with the QPAM;
- Not levy fees, penalties, or charges on client plans related to terminating or withdrawing from QPAM's investment fund, except certain reasonable fees that are disclosed beforehand;
- Indemnify, hold harmless, and promptly restore actual losses to each client plan for any damages resulting from a violation of applicable laws, breach of contract, or any such claim arising out of the conduct that causes the ineligibility;
- Not hire or knowingly engage any individual that partook in the conduct that is the subject of the criminal conviction or ineligibility notice.[12]

Such warranties would apply for ten years following the ineligibility date.[13]

We understand the DOL's intended goal is to protect plans from the economic consequences following the disqualification of a QPAM, but the trailing liability provision that would last for ten years is unacceptable. QPAMs should have the authority to negotiate their own contractual terms with plans according to their own business judgment. Additionally, because the proposed required contractual terms are duplicative of plans' current duties and responsibilities under ERISA, they are ultimately unnecessary. The lack of clarity and detail in the proposed new contractual terms will also likely cause confusion and disagreement, as interpretations are bound to differ.

As ICI and IAA argue in their comment letters, we believe the DOL has failed to accurately calculate the cost and time it will take for QPAMs to update their existing contracts to add the Proposal's new required contractual terms. Physically updating every existing agreement will require much more than the single hour the DOL anticipates. For example, Nuveen has ERISA plan clients, and governmental plan clients that require Nuveen to treat them equivalently to ERISA plans, with certain management agreements that are over 20 years old. Many of the agreements are not based on a Nuveen template, as clients often require use of their own investment management agreement template. Some were originally negotiated by predecessor firms that became part of Nuveen. Managed account programs often require use of the program sponsor's agreements, and collective investment trusts use the bank trustee's participation agreement. In some cases, asset managers negotiate agreements with third party fiduciaries to plans. Some heavily templated agreements include check box-driven annexes, so determining

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12 *Id.* at 45208.

13 *Id.* at 45210.

where and how to amend the documents will require a variety of approaches for the same QPAM. And plans will bear the cost directly, retaining outside counsel or diverting internal counsel from other responsibilities to handle this onslaught of IMA amendments.

And the costs associated with updating these agreements extend far beyond the physical process of adding in the new provisions. The new indemnification provision alone would expose QPAMs to so much additional liability, the potential costs associated with that addition are impossible to quantify. Moreover, the addition of such a provision will unavoidably sway the cost of liability insurance, which will ultimately increase plan participants' fees and expenses. We agree with ICI that ERISA already imposes sufficient penalties and remedies for violations of the prohibited transaction rules and breach of fiduciary duty, which do not need to be supplemented by the proposed contractual terms.

For these reasons, we believe the entire written management agreement provision should be eliminated from the Proposal. However, if the DOL decides to proceed with the new required contractual terms, we agree with IAA that the DOL should include a grandfathering provision requiring the new proposed terms to be included only in contracts entered into after the effective date of the final rule.

VI. **QPAMs should not be required to notify DOL of their QPAM status for use in a public list.**

The Proposal would require QPAMs to report to the DOL that they are relying on the QPAM Exemption, and provides that the DOL will publish a list of all QPAMs on its website.[14] Although the Proposal estimates that most QPAMs would only have to report their reliance on the Exemption once, if a QPAM changes its legal name or operating name or stops relying on the Exemption, it would have to report that change to the DOL. The DOL does not provide a justification for this notice requirement, and we would urge the Department to reconsider this provision.

The Proposal fails to align with the way many QPAMs use the Exemption on an irregular basis. As ICI notes, not all QPAMs rely on the Exemption continuously. There may be times where QPAMs that are eligible for the Exemption use it on an "as needed" basis. In addition, some managers may satisfy the requirements for reliance on the QPAM Exemption for some but not all of their clients. If the DOL truly wishes to capture the way financial institutions make use of the QPAM Exemption, a more nuanced approach to reporting would be warranted. Additionally, posting a public list of institutions that rely on the QPAM Exemption could lead to confusion and misunderstanding by plan sponsors, participants, and beneficiaries. The QPAM Exemption is not the only available exemption to the current prohibited transaction rules, and it is not clear to us why the DOL would single out this one exemption for notice and publication but not others. Publishing a list of QPAMs will likely only reinforce the perception that a financial institution's reliance on the QPAM Exemption over other types of exemptions equates to some greater level of sophistication. Moreover, interested parties may assume that if an asset manager is not

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[14] *Id.* at 45224.

included on the DOL's list, its services must be of an inferior quality to those provided by a QPAM.

Given the potential confusion and inaccuracies that may result from the proposed reporting and publication of financial institutions' QPAM status, we support ICI's request that the DOL remove these requirements altogether. However, if the DOL decides to retain this provision, we support SPARK's request that the Department provide QPAMs with at least 180 days to report all changes, since it may take time for a QPAM's compliance team to identify that the name change has occurred and is reportable.

VII. **Conclusion.**

TIAA and Nuveen appreciate the DOL's efforts to update the QPAM Exemption to account for industry developments and strengthen investor protections. However, as we have discussed above, we echo the significant concerns so many in the industry, including a number of major trade organizations, have shared about some of the changes the DOL has proposed. We hope the comments we have provided here are helpful as the DOL works to draft a final rule, and we welcome further discussion with the Department on any of the points in this letter.

Sincerely,

Theresa Brunsman

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