Managed Funds Association

The Voice of the Global Alternative Investment Industry

Washington, D.C. | New York | Brussels

October 11, 2022

Via Electronic Submission:

Ali Khawar
Principal Deputy Assistant Secretary
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington DC, 20210

Re: Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption); Application No. D-12022

Dear Principal Deputy Assistant Secretary Khawar,

Managed Funds Association ("**MFA**")[1] appreciates the opportunity to provide comments to the Department of Labor (the "**DOL**") in response to the proposed amendment (the "**Proposed Amendment**") to the class exemption (the "**QPAM Exemption**") for qualified professional asset managers ("**QPAMs**") from the prohibitions of section 406(a)(1)(A) through (D) of the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**"), and section 4975(c)(1)(A) through (D) of the Internal Revenue Code (the "**Code**").[2]

We support the DOL's efforts to review its regulations periodically in light of changes to the financial services industry and the DOL's experience in administering its regulations. In the case of the QPAM Exemption, however, we have significant concerns that the Proposed Amendment, if adopted, would be counterproductive and contrary to the interests of plan participants and beneficiaries and IRA owners. The QPAM Exemption is perhaps the best-understood and most widely utilized prohibited transaction exemptions under ERISA and has served plan participants and beneficiaries and IRA owners well for nearly 40 years. Our members rely on the QPAM Exemption to offer a variety of investment strategies to ERISA plan investors through a variety of managed investment vehicles.

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[1] Managed Funds Association (MFA), based in Washington, DC, New York, and Brussels, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 150 member firms, including traditional hedge funds, crossover funds, and private credit funds, that collectively manage nearly $2.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

[2] Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption), 87 Fed. Reg. 45,204 (July 27, 2022) (to be codified at 29 C.F.R. 2550) (the "Release"). Capitalized terms not otherwise defined herein have the meanings ascribed to such terms in the Proposed Amendment.

We believe that the Proposed Amendment, if adopted, would significantly disrupt the operation of the QPAM Exemption and impose significant additional and unnecessary costs and risks on managers, many of which we expect would ultimately be borne, directly or indirectly, by plan participants and beneficiaries and IRA account owners. The Release does not fully appreciate these costs and risks, which could result in: (i) fewer products available and thus fewer investment opportunities for ERISA investors, (ii) higher costs (*e.g.*, higher fees and expenses) associated with investment products that remain open to ERISA investors, (iii) a race to the exit and forced liquidations as well as improper shifting of expenses among investors (rather than the orderly transition envisioned by the DOL), and (iv) other unintended costs and risks, such as broader use by QPAMs of other available exemptions, which are difficult to anticipate or quantify.

As noted above, the QPAM Exemption has served plan participants and beneficiaries and IRA owners well for many years, and we believe that the many costs imposed and risks created by the Proposed Amendment do not justify its adoption. Accordingly, we believe that the DOL should reconsider whether adoption of the Proposed Amendment is consistent with the statutory purposes and requirements of ERISA, including that the amendments are in the interests and protective of the rights of plan participants and beneficiaries and IRA owners.

If the DOL does move forward with amendments to the QPAM Exemption, we believe that several key refinements and clarifications should be made to mitigate the unnecessary costs that would be imposed by the Proposed Amendment.

Specifically, we believe that the DOL should:

- Eliminate the requirement in Section I(g)(2) of the Proposed Amendment to include specified contractual provisions in the QPAM's written management agreements, which will impose significant costs and other adverse consequences on managers and plan participants and beneficiaries and IRA owners with limited to no offsetting benefit.
- Revise the disqualification provisions in Section I(g) of the Proposed Amendment to be more tailored to the serious misconduct that should operate to disqualify a QPAM from relying on the QPAM Exemption. In this regard, the DOL should:
    - establish a formal process by which a QPAM may request a determination of whether a foreign conviction is substantially equivalent to a domestic conviction *before* it results in ineligibility; and
    - remove deferred prosecution and non-prosecution agreements (including foreign equivalent agreements) from the list of Prohibited Misconduct in Section VI(s), as their inclusion would represent a fundamental and unfounded change in the DOL's approach to disqualification.
- Refine the DOL's approach in Section I(c) to ensure that QPAMs will continue to be able to collaborate with affiliated entities and receive market information, insights and investment opportunities from counterparties.

- Eliminate the requirement in Section I(g)(1) of the Proposed Amendment for QPAMs to report reliance on the QPAM Exemption to the DOL or, at a minimum, refrain from publishing a list of such entities on the DOL's website.
- Eliminate the standalone record-keeping requirements of Section VI(t) of the Proposed Amendment, which are costly and unnecessary.
- Reconsider the increase in the eligibility thresholds in Section VI(a) of the Proposed Amendment.

We discuss each of these recommendations in more detail below.

Discussion

1. The DOL Should Eliminate the Requirement in Section I(g)(2) of the Proposed Amendment to Include Specified Contractual Provisions in the QPAM's Written Management Agreements.

Section I(g)(2) of the Proposed Amendment would require QPAMs to include certain contractual terms in their management agreements with client Plans. These terms would apply upon the disqualification of the QPAM based on a Criminal Conviction or Ineligibility Notice and include (i) an agreement not to restrict the termination or withdrawal of a client Plan; (ii) an agreement not to impose fees in connection with a client Plan's termination or withdrawal, other than reasonable fees disclosed in advance that prevent abusive investment practices or ensure equitable treatment of all investors; (iii) an agreement to indemnify client Plans; and (iv) an agreement not to employ any individual that participated in the conduct that is the subject of a Criminal Conviction or Ineligibility Notice.[3]

We believe that the contractual provisions that would be required by section I(g)(2) of the Proposed Amendment are unnecessary and the burdens that would be imposed, which we believe the DOL has seriously underestimated, do not justify any benefits that these provisions may provide. This aspect of the Proposed Amendment would require virtually every QPAM to amend virtually every one of its management agreements with client Plans, yet the likelihood that any of the mandated provisions would actually apply is extremely remote. The DOL's data indicates that, on average, only eight QPAMs become ineligible to rely on the QPAM Exemption each year (which the DOL estimates would increase to 16 if the Proposed Amendment is adopted).[4] Yet, according to the DOL's estimates, 616 QPAMs would be required to go through this costly exercise if the Proposed Amendment is adopted as proposed.[5]

The DOL's estimate of the costs that would be imposed by this aspect of the Proposed Amendment is entirely unrealistic. For all QPAMs in aggregate, the DOL estimates costs of

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[3] Proposed Amendment Section I(g)(2)(A)–(D).

[4] Release, at 45,218.

[5] *Id.* at 45,223.

$135,540 based on *one hour* of legal work and *two minutes* of clerical time per QPAM. We believe the time required to plan, review and amend every management agreement would certainly involve discussions both with outside counsel and with each individual client Plan. It could also include bilateral negotiations, as well as consideration by the QPAM and its investors of other potential amendments that may be necessary or desirable in light of the amended rule. Insofar as the required amendments are likely to adversely affect the QPAM's investors (as further described below), implementation of the required changes may in fact require investor consent in advance, including consent by non-ERISA investors in comingled funds. This would involve a significant amount of legal and non-legal work for each QPAM. In fact, we believe the costs of this aspect of the Proposed Amendment for a *single* QPAM in many cases is very likely to exceed (and possibly significantly exceed) the DOL's estimate of the total cost for *all* QPAMs. In addition, for funds where investor consent is sought, there is no guarantee that the changes will be approved—especially on the timeline provided by the Proposed Amendment[6]—in which case the applicable QPAM may be forced to wind down the applicable fund or involuntarily withdraw plan investors from a fund so that the fund falls below the 25% ERISA plan asset threshold, thereby exposing Plans and other investors to material and immediate harm.

Accordingly, we do not believe that any potential benefits would justify the burdens of this aspect of the Proposed Amendment on managers and plan participants and beneficiaries and IRA owners, even if the approach proposed by the DOL were the only way to protect plan participants and beneficiaries and IRA account owners following a QPAM's loss of eligibility for the QPAM Exemption.[7] But we believe the DOL could better tailor its approach simply by conditioning reliance on the one-year winding-down period in the Proposed Amendment upon the QPAM agreeing to the conditions set forth in Section I(g)(2)(A)–(D) of the Proposed Amendment—rather than requiring every QPAM to include these provisions in their management agreements with client Plans at the outset, when in the vast majority of cases they will never be implicated.

Further, we do not believe it is appropriate for the DOL to impose conditions on managers related to the QPAM Exemption even in cases where a manager may not continue to rely on the exemption. The required contractual provisions in Section I(g)(2) apply upon a manager's ineligibility to rely upon the QPAM Exemption, even if no prohibited transactions actually occurred as a result of such ineligibility and even if the manager does not rely on the exemption after it becomes ineligible. For example, a manager may have been able, and may be able going forward, to rely on other exemptions in lieu of the QPAM Exemption. Similarly, a manager may be able to take other actions to avoid the need to rely on the exemption, such as reducing plan assets in the manager's comingled funds to below the 25% threshold. However,

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[6] The Release states that the Proposed Amendment would be effective 60 days after the date of publication of the final amendment in the Federal Register, without providing any conformance period for implementing the requirements of the amendment.

[7] In addition, we believe ERISA and its implementing regulations already provide appropriate protections to plan participants and beneficiaries and IRA owners with regard to the matters that the requirements in Section I(g)(2) are intended to address. *See, e.g.*, ERISA section 409.

because the requirements of the contractual provisions of Section I(g)(2) would apply upon a manager's ineligibility to rely on the QPAM Exemption, Section I(g)(2) effectively imposes conditions on the manager even in circumstances where the manager does not continue to rely on the exemption. While we believe such conditions could be appropriate in circumstances in which a manager has asked the DOL for an individual exemption so that it can continue to rely on the QPAM Exemption, we do not believe it is appropriate to impose such restrictions indiscriminately in all cases.

If the DOL nonetheless determines to adopt Section I(g)(2) of the Proposed Amendment, the DOL should make three specific modifications to better tailor the Proposed Amendment.[8]

First, the DOL should expressly provide that the agreement not to restrict withdrawals in Section I(g)(2)(A) of the Proposed Amendment does not prohibit investor-protective withdrawal-related provisions and restrictions that are fully disclosed. For example, specific market-standard withdrawal-related provisions that should be allowed include specified withdrawal dates, withdrawal notice periods, tranched withdrawal payments, investor gates, suspension and delay provisions, and provisions limiting withdrawals in the event of legal, regulatory or other similar restrictions.[9] These types of provisions are designed in whole or in part to protect investors. Without this clarification, the blanket restriction on withdrawals under Section I(g)(2)(A) as proposed would result in significant harm to all investors, including by allowing a race for the exit as investors (whether or not they are client Plans) attempt to be the first to pull their money out, potentially forcing the manager to sell assets at firesale prices to meet the withdrawal demands. This is a significant problem for investors in all funds, but would be especially acute for those in funds with illiquid assets (*e.g.*, open-end or closed-end funds with credit, private equity, real estate or other similar investments). The above market-standard withdrawal provisions and restrictions are designed to prevent precisely this harm to investors, and therefore the DOL should recognize these protections in Section I(g)(2)(A).

Second, the DOL should clarify that Section I(g)(2)(B) would permit a manager to impose offsets or reserve provisions to cover (i) a withdrawing investor's pro rata share of any expenses, liabilities and/or obligations of the fund and (ii) any investor-specific expenses, liabilities and/or obligations. The Proposed Amendment would require managers to "not impose any fees, penalties, or charges" on plans in connection with a client Plan's withdrawal "except for reasonable *fees*" that are disclosed in advance and are designed to prevent abusive investment practices or ensure equitable treatment of investors. The DOL should clarify that charges such as those described above are also permitted under this exception as they are designed to ensure that

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[8] If the DOL adopts the more tailored approach of conditioning the one-year winding-down period on compliance with the conditions of Section I(g)(2)(A)–(D)—rather then requiring the amendment of all written management agreements—the DOL should also incorporate the recommendations proposed above.

[9] The DOL should also clarify that these market-standard withdrawal-related provisions designed to protect investors can apply across multiple funds and accounts that pursue substantially the same investment strategy, including an ERISA plan fund-of-one.

remaining investors are not left to shoulder the burden of expenses, liabilities and/or obligations properly borne by withdrawing investors.

Third, the DOL should clarify that the phrase "arising out of the conduct that is the subject of a Criminal Conviction or Written Ineligibility Notice" in Section I(g)(2)(C) of the Proposed Amendment modifies "violation of applicable laws" and "breach of contract," as well as "any claim." Without this clarification, this provision could be read as a broadening of the standard of care applicable to managers, imposing a new, ambiguous standard of care that will harm investors by increasing costs related to potential lawsuits and insurance for fiduciaries.

Accordingly, the DOL should eliminate the requirement in Section I(g)(2) of the Proposed Amendment to include specified contractual provisions in the QPAM's written management agreements. If the DOL nonetheless determines to adopt Section I(g)(2) of the Proposed Amendment, the DOL should make three specific modifications to better tailor the Proposed Amendment.

2. The DOL Should Revise the Disqualification Provisions in Section I(g) to Be More Tailored to the Serious Misconduct That Should Operate to Disqualify a QPAM from Relying on the QPAM Exemption.

Section I(g)(3) of the Proposed Amendment provides that a QPAM would be ineligible to rely on the QPAM Exemption following a Criminal Conviction or receipt of an Ineligibility Notice for participating in Prohibited Misconduct by the QPAM, an affiliate or an owner, direct or indirect, of a 5% or more interest in the QPAM. Proposed Section VI(r) would define Criminal Conviction to include criminal convictions by a foreign court of a crime "substantially equivalent" to an offense listed in Section VI(r)(1). Further, and most concerning, Prohibited Misconduct would be defined in Section VI(s) to include "any conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted a crime described in Section VI(r)" and "any conduct that forms the basis for an agreement, however denominated by the laws of the relevant foreign government, that is substantially equivalent to a non-prosecution agreement or deferred prosecution agreement described in [Section VI(s)](1)."

The Release states that part of the justification for the Proposed Amendment is the increasing number of managers seeking individual exemption requests after becoming ineligible to rely on the general QPAM Exemption due to a criminal conviction within the manager's corporate family.[10] However, these convictions often have nothing to do with the manager itself, but rather involve distant affiliated companies and may occur even where the manager has robust compliance policies and procedures. This is particularly true for managers that are part of large, global corporate families. Part of the original justification for the QPAM Exemption was the belief that large financial institutions would be better able to withstand improper influence from

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[10] *See* Release at 45,207.

parties in interest.[11] The expanded disqualification provisions would result in the ineligibility of more of these large financial institutions for reasons that have nothing to do with the QPAM and its integrity. In this regard, the Proposed Amendment's expansion of these provisions specifying the conduct for which a manager would be disqualified from relying on the QPAM Exemption would be an unjustified penalty on the size and complexity of firms relying on the exemption. It also risks depriving plans and their beneficiaries of access to some of the most successful and sophisticated investment advisers available and does so even in cases where the risk the DOL intends to address (*i.e.*, a lack of integrity on the part of the QPAM) may be highly speculative and attenuated.

To be clear, we support an approach that holds QPAMs to the highest standards of integrity by tailoring the disqualification provisions to the serious misconduct that should result in automatic disqualification. Accordingly, we believe it is critical for the DOL to modify the Proposed Amendment in the following two ways.

First, as suggested in the Release, the DOL should establish a formal process whereby a QPAM can request a determination regarding whether a foreign conviction is substantially equivalent to a domestic conviction before the foreign conviction results in ineligibility.[12] Only after the formal determination is made that the foreign conviction is "substantially equivalent" to a domestic conviction would the manager become ineligible to rely on the QPAM exemption. Foreign convictions should not result in automatic ineligibility for the QPAM Exemption because foreign convictions may implicate a manager's integrity less often than domestic convictions of the type specified in QPAM Exemption do. For example, foreign convictions are more likely to involve distant affiliates of the QPAM, not the manager itself. In addition, the procedures, standards of proof, due process protections, and judicial independence of a foreign court, among other things, may vary substantially from those of a domestic court, such that a foreign conviction may not carry the same implications regarding a manager's integrity.

Accordingly, we believe the DOL should establish a formal process to allow a QPAM the opportunity to request a review of any foreign convictions, with an opportunity for the QPAM to present its position as to why a foreign conviction may not be substantially equivalent to a domestic conviction, and to provide that such a review be conclusively settled prior to ineligibility taking effect.

Second, and most critically, the DOL should remove conduct that is the basis of deferred prosecution and non-prosecution agreements from the list of Prohibited Misconduct in Section VI(s), as well as the corresponding provision for foreign-equivalent agreements. Firms often enter into deferred prosecution or non-prosecution agreements when there are real questions of law or fact involved in the conduct at issue, but have concluded that it would be in the best interest of the firm and its clients to settle a matter quickly and efficiently, rather than engaging in a long and costly legal proceeding. Making these agreements the basis of an Ineligibility

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[11] *See id.* at 45,213.

[12] *Id.* at 45,210.

Notice would allow the DOL, rather than a judge or jury, to decide those questions in determining whether the conduct at issue implicates the QPAM's integrity and thus requires its ineligibility. Furthermore, including deferred prosecution and non-prosecution agreements in the list of Prohibited Misconduct could disincentivize firms from entering into these agreements, which could harm both managers and plan participants and beneficiaries and IRA owners and be contrary to the public interest more generally.[13]

Accordingly, the DOL should revise the disqualification provisions in Section I(g) to be more tailored to the serious misconduct that should operate to automatically disqualify a QPAM from relying on the QPAM Exemption.

In addition to these recommendations regarding the disqualification provisions themselves, we would also request that the DOL clarify the scope of the protections of the winding-down period provided for in Section I(j) upon a manager's disqualification from reliance on the QPAM exemption. Upon a manager's disqualification, Section I(j) of the Proposed Amendment would introduce a mandatory one-year winding-down period for any manager that becomes ineligible to rely on the QPAM Exemption. The winding-down period is only available for client Plans with a management agreement existing at the time of ineligibility.[14] During the winding-down period, the manager "may not engage in new transactions" for existing client Plans in reliance on the QPAM Exemption.[15]

It is unclear what "may not engage in new transactions" means in the context of the winding-down period. If it means that the manager can neither buy nor sell assets for existing client Plans in reliance on the QPAM Exemption, then the winding-down period would have little utility and only serve to force client Plans to withdraw from asset management arrangements that the Plans incurred significant time and money evaluating and establishing. If it means that the manager may only sell the assets it already holds for existing client Plans, this raises questions for specific types of transactions, *e.g.*, closing out a short position (which technically requires that the manager buy the applicable asset it had previously borrowed and sold), renewing a hedge or other similar position, funding margin or maintaining other forms of existing leverage, or complying with a contractual obligation such as a follow-on investment requirement. These restrictions could inhibit the manager's duty to manage Plan assets "prudently," which is an express requirement of Section I(j).

Accordingly, the DOL should clarify the meaning of "may not engage in new transactions" and should not interpret that requirement to restrict managers' ability to prudently manage investors' assets.

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[13] For example, deferred prosecution and non-prosecution agreements often contain provisions requiring a firm to implement measures to address and prevent future instances of the misconduct at issue.

[14] Proposed Amendment Section I(j).

[15] *Id.* Section I(j)(3).

3. The DOL Should Refine the Approach in Section I(c) to Ensure That QPAMs Will Continue to Be Able to Collaborate with Affiliated Entities and Receive Market Information, Insights and Investment Opportunities from Counterparties.

Section I(c) of the Proposed Amendment would make certain changes to the text of the regulation regarding the requirements for a transaction to be solely the responsibility of the QPAM. It further provides that the exemption would not apply to any transaction that has been "planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval."[16]

Although we are supportive of the apparent intent of the Proposed Amendment to prevent so-called "QPAM for a day" transactions, we are concerned that the changes in the text of the Proposed Amendment and the related guidance go far beyond this goal. In particular, we are concerned that this language is so broad as to potentially prohibit numerous ordinary-course and unobjectionable structures and arrangements. For example, if the proposed counterparty to a swap wants to contact the QPAM or the plan to discuss the specifics of the transaction, that should be permitted, so long as the QPAM makes the ultimate decision on behalf of the plan. Similarly, if a bank that is a counterparty to a lending transaction with an ERISA separate account or "plan assets" fund thought it helpful to suggest certain aspects of the arrangement to the QPAM, that should be allowed, again with the understanding that the QPAM has ultimate responsibility. Many asset managers operate their businesses through multiple affiliated entities, and these affiliated entities may interact in various ways (*e.g.*, one affiliate may own all of the intellectual property of a business, including intellectual property licensed to the QPAM and which the QPAM relies on in making its investment recommendations). Pension plans and their beneficiaries benefit from such arrangements, and precluding affiliated asset managers from collaborating on transactions—which many asset managers do when implementing global trading strategies, leveraging expertise in various jurisdictions around the world—would harm such plans and beneficiaries. Further, the sweeping term "Party in Interest" could be read to cover various trading, prime brokerage and other counterparties that are involved in a transaction even though they do not raise the conflicts of interest that the proposed changes in this provision appear intended to target. This in turn would chill communication between QPAMs and service providers and create significant disincentives for such counterparties to share market and other intelligence.

Accordingly, the DOL should clarify these provisions to ensure that plan participants and beneficiaries and IRA owners can continue to benefit from the experience of a QPAM's affiliated entities and receive information and opportunities from broker-dealers and other counterparties without risk to the QPAM of losing the availability of the exemption, so long as the QPAM retains full fiduciary responsibility with respect to the transaction.

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[16] *Id.* Section I(c).

4. The DOL Should Eliminate the Requirement in Section I(g)(1) of the Proposed Amendment for QPAMs to Report Reliance on the QPAM Exemption to the DOL or, at a Minimum, Refrain from Publishing a List of Such Entities on the DOL's Website.

Section I(g)(1) of the Proposed Amendment would impose a new requirement that any QPAM relying on the exemption must report such reliance to the DOL. Each QPAM would only need to provide this notice once unless there is a change to the legal or operating name of the QPAM or the QPAM is no longer relying on the exemption. The Release notes that this information would be used by the DOL to publish a publicly available list of managers relying on the QPAM Exemption on its website.[17]

Section I(g)(1)'s reporting requirement and the publication of a list of QPAMs on the DOL's website are not in the interests of plan participants and beneficiaries and IRA owners. The DOL has noted in the preamble to individual exemptions that reliance on the QPAM Exemption should not be regarded as an indicator of the DOL's approval of the QPAM. The publication of a list of QPAMs on the DOL's website has the potential to mislead plan participants and beneficiaries and IRA owners into thinking that a manager's inclusion or exclusion signifies more than their eligibility to rely on the exemption, especially because the QPAM Exemption would be the only prohibited transaction exemption with a publicly available list of those managers relying on it. Furthermore, it is not clear how plan participants and beneficiaries and IRA investors benefit from the DOL having a list of every manager that could possibly rely on the QPAM Exemption.

Accordingly, the DOL should eliminate the reporting requirement in Section I(g)(1) or, at a minimum, refrain from publishing a list of QPAMs on its website.[18]

5. The DOL Should Eliminate the Record-Keeping Requirements of Section VI(t) of the Proposed Amendment as Record-Keeping Requirements already Exist.

Section VI(t) of the Proposed Amendment would require QPAMs to maintain the records necessary to enable the DOL and certain other specified persons to determine whether the conditions of the QPAM Exemption have been met with respect to a transaction for at least six

[17] Release, at 45,208.

[18] If the DOL nevertheless determines that the reporting requirement and published list is warranted, the DOL should provide guidance regarding the timing and the circumstances under which a QPAM must notify the DOL that it is no longer relying on the QPAM Exemption, particularly in cases where the QPAM is not presently relying on the QPAM Exemption but intends to or may rely on the exemption in the future. We do not believe a notification would be necessary or appropriate in those circumstances. Accordingly, we recommend that the DOL provide generally that the only time a notice that a QPAM is no longer relying on the exemption under Section I(g)(1) would be required is in the case of disqualification, which would be satisfied by the QPAM giving notice pursuant to Section I(j)(1).

years from the date of the transaction. A QPAM's failure to maintain those records would result in the loss of the relief provided by the QPAM Exemption for the transaction at issue.[19]

The DOL should eliminate the specific record-keeping requirements of Section VI(t) as it is unnecessary given existing record-keeping requirements. Due to their status as fiduciaries and other applicable record-keeping requirements such as those imposed by the Securities and Exchange Commission, QPAMs already keep comprehensive records and do so for a substantial period of time. However, the Proposed Amendment would require QPAMs to keep records proving their compliance with each condition of the exemption for every single transaction. In addition to the enormous burden this places on QPAMs, it is not clear what kind of records would satisfy this requirement for certain aspects of the exemption, such as the proposed requirement in Section I(c) that a transaction not be planned, negotiated or initiated by a Party in Interest, which would essentially require the QPAM to "prove a negative."

Further, we are concerned that another set of record-keeping requirements will not provide additional protection but impose additional costs on managers and ultimately Plan investors. The Release states the DOL's expectation that the record-keeping requirement of Section VI(t) would impose a negligible burden on QPAMs because it "assumes that QPAMs already maintain such records."[20] However, we believe that the new, specific record-keeping requirements of Section VI(t) are unclear and would impose substantial costs on QPAMs, particularly those that engage in high-volume trading strategies.

Accordingly, we believe the DOL should eliminate the specific record-keeping requirements of Section VI(t) of the Proposed Amendment.

6. DOL Should Reconsider the Increase in the Eligibility Thresholds in Section VI(a).

Section VI(a) of the Proposed Amendment would raise the equity capital, net worth and assets under management thresholds above which a bank, savings and loan association, insurance company or investment adviser must be to qualify as a QPAM, which for investment advisers would increase from $85,000,000 to $135,870,000. Although these increases are not generally expected to affect MFA members, they would prevent small managers and start-up managers from utilizing the QPAM Exemption, thus putting them at a competitive disadvantage and decreasing the number of managers from which Plans could choose.

Accordingly, the DOL should reconsider the increase in the eligibility thresholds in Section VI(a).

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[19] Proposed Amendment Section VI(t)(5).

[20] Release, at 45,221.

Conclusion

We support the DOL's efforts to review its regulations periodically in light of changes to the financial services industry and the DOL's experience in administering its regulations. However, in the case of the QPAM Exemption, we have significant concerns that the Proposed Amendment, if adopted, would be counterproductive and contrary to the interests of plan participants and beneficiaries and IRA owners. We believe that the Proposed Amendment, if adopted, would significantly disrupt the operation of the QPAM Exemption and impose significant additional and unnecessary costs, risks and other adverse consequences on plan participants and beneficiaries and IRA account owners with limited to no offsetting benefit.

Accordingly, we urge the DOL to reconsider whether adoption of the Proposed Amendment is consistent with the statutory purposes and requirements of ERISA, and, if the DOL determines to move forward with amendments to the QPAM Exemption, to incorporate the recommendations set forth above.

MFA appreciates the opportunity to provide comments to the DOL on the Proposed Amendment. If you have any questions about these comments, please do not hesitate to contact David Lourie, Vice President & Senior Counsel or the undersigned at (202) 730 2600.

Respectfully Submitted,

/s/ Jennifer W. Han
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Chief Counsel & Head of Regulatory Affairs
Managed Funds Association