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October 11, 2022

Via Electronic Submission

The Honorable Ali Khawar
Acting Assistance Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

RE: Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (the "QPAM Exemption"); RIN 1210-ZA07

Dear Acting Assistant Secretary Khawar:

Neuberger Berman Group LLC (together, with its affiliates, "Neuberger Berman") appreciates the opportunity to provide comments to the United States Department of Labor (the "Department") in connection with the above-referenced proposed amendments to the QPAM Exemption (the "Proposed Amendments").

Neuberger Berman was founded in 1939 to do one thing: deliver compelling investment results for our clients over the long term. As a private, independent, employee-owned investment manager, Neuberger Berman is structurally aligned with the long-term interests of its clients. Neuberger Berman has no external parent or public shareholders to serve, nor other lines of business to distract it from its core mission. From offices in 38 cities across 25 countries, Neuberger Berman manages a range of equity, fixed income, private equity and hedge fund strategies on behalf of institutions, advisors and individual investors worldwide. With 696 investment professionals and 2,563 employees in total as of June 30, 2022, Neuberger Berman has built a diverse team of individuals united in their commitment to client outcomes and investment excellence.

Neuberger Berman champions retirement security through our products and services and several of our entities are asset managers that qualify and act as qualified professional asset managers ("QPAMs").

I. General Comments on the Importance of the QPAM Exemption

The QPAM Exemption has been one of the most widely-utilized prohibited transaction class exemptions since its inception in 1984. We believe that the QPAM Exemption has worked well to protect the interest of accounts subject to the prohibited transaction rules of the Employee

Retirement Income Security Act of 1974 (as amended, "ERISA") and Section 4975 of the Internal Revenue Code of 1986 (as amended, the "Code") (collectively, "Plans"). We believe that institutional money managers such as U.S. registered investment managers, banks, trust companies and insurance companies that are subject to substantial regulatory oversight and that are also subject to ERISA's exacting fiduciary duties are well positioned to make independent decisions on behalf of Plan accounts on a discretionary basis without undue influence by parties in interest.[1]

We are concerned that the Department appears to have adopted the view that Plans commonly utilize the services of QPAMs because the QPAM Exemption will require the QPAM to be "held to a very high standard of conduct."[2] While we cannot speak for the entirety of the capital markets, it is our experience with Plan fiduciaries that it is the QPAM Exemption's flexibility in enabling managers to execute a broad range of transactions without the necessity of having to tailor practices into other transaction-based exemptions that is most important.

We believe that our Plan clients come to us because of our expertise in providing prudent investment advice and not because of a stamp of approval that the QPAM exemption may convey. We believe it is our strong record of performance, long-lived history, and corporate culture (including a strong culture of compliance) that Plan fiduciaries want to learn about when deciding whether to engage us as a discretionary manager. They generally do not, in our experience, use the QPAM Exemption as a substitute for separately reaching a comfort level about our firm's integrity. They ask about our QPAM status to ensure that we can efficiently execute transactions on the Plan's behalf.

Accordingly, while we appreciate that many of the Proposed Amendments proceed from the standpoint of promoting a manager's "integrity," we believe that the history of the QPAM Exemption demonstrates a different purpose: providing protections against what otherwise could be nonexempt prohibited transactions under Section 406(a) of ERISA (and the analogous provisions of the Code). In this regard, the QPAM Exemption was designed to provide protections from the *per se* prohibited transaction rules of Section 406(a) of ERISA (and the analogous provisions of the Code) by ensuring that the QPAM was an institution that was sufficiently regulated and that had demonstrated experience. We believe that the other protections of the QPAM Exemption were designed to avoid transactions with those with power to influence the QPAM's decision making process. As further detailed in the remainder of this letter, we believe that the approach of the Proposed Amendments should be reconsidered in light of that history and purpose.

To begin with, as the observation in the Preamble to the Proposed Amendments notes, the breadth of the term "party in interest" means that as a practical matter, almost any financial counterparty or intermediary with whom the QPAM effects transactions on behalf of a Plan must be presumed (although not necessarily concluded) to be a party in interest. Therefore, each transaction that we, as a discretionary manager, enter into on behalf of our client Plans must

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[1] For ease of discussion, references to parties in interest within the meaning of Section 3(14) of ERISA will also be deemed to include disqualified persons under Section 4975 of the Code, except otherwise noted or the context clearly indicates otherwise.

[2] Pensions & Investments, *DOL proposes update to QPAM exemption* (July 26, 2022).

generally be presumed (although not necessarily be concluded) to require an exemption as a matter of ordinary course. In addition, counterparties and service providers will often not proceed to engage in transactions with Plans unless they have reached a sufficient level of comfort (generally through representations, warranties and other contractual assurances from the manager) that an applicable exemption is available.

When proposing the original QPAM Exemption, the Department recognized that the *per se* prohibited transaction rules under section 406(a) of ERISA (and the analogous provisions of the Code) present "complex problems of compliance." 47 Fed. Reg. 56945, 56946 (Dec. 21, 1982). The Department explained that for any single plan, there may be "thousands" of parties in interest, and that, in the absence of broad, readily available prohibited transaction exemptive relief, financial institutions providing asset management services to ERISA plans would need to undergo "time consuming ERISA compliance checks" for each of the numerous transactions they engage in by confirming whether the counterparty in each transaction is a party in interest. 47 Fed. Reg. at 56946–47. If the counterparty were determined to be a party in interest, the Department noted that the financial institution would then need to apply for an individual exemption or "forego the investment opportunity entirely." 47 Fed. Reg. at 56947. To address those concerns, the Department decided to grant the QPAM Exemption, a broad-based exemption covering a wide array of potential investments, which applies regardless of whether asset management services are provided through a single customer account or a pooled investment fund. 47 Fed. Reg. at 56946–47.

The Department is also quite right when it indicates that absent the QPAM Exemption, money managers may have to "forgo investment opportunities that would be in the interest of Plans . . . . . merely because a party in interest is involved." The QPAM Exemption facilitates institutional investment managers like us with the ability to transact on behalf of Plan accounts not only those arrangements that may be covered under a transaction-specific exemption, but a whole host of other transactions which may not be covered under these tailored and narrow exemptions, including, as the Preamble to the Proposed Amendments notes: "complex transactions, such as when a QPAM designs a fund to replicate the return of certain commodities indices by investing in futures, structured notes, total return swaps, and other derivatives." The QPAM Exemption's efficient solution to complex transactions has been the primary benefit of the QPAM Exemption for Plans and their agents. This is particularly the case in the context of pooled funds in which multiple unrelated Plans may invest. The QPAM Exemption is especially useful because it provides a single prohibited transaction compliance strategy that may be utilized fund-wide.

We note that the QPAM Exemption's relief was predicated on the belief that institutions already subject to substantial regulatory oversight, such as investment managers registered under the U.S. Investment Advisers Act of 1940, banks, trust companies and insurance companies subject to the oversight prescribed in the QPAM Exemption were best suited to comply with the exemption's conditions and maintain independence. Implicit in this requirement was the belief that those regulated entities would already manifest cultures of compliance because they were familiar with the demands and rigors of these other regulatory regimes.

II. Changes to Part I(g) of the Exemption and Related Considerations.

Generally. Part I(g) was introduced as an additional safeguard, to stress that a criminal conviction of one of the enumerated crimes by the QPAM entity was enough in and of itself to vitiate the exemption. In addition, Part I(g) gives the Department the additional opportunity to weigh the specific facts and circumstances in cases where affiliates other than the QPAM may have engaged in behavior predicated by a covered criminal conviction that would bear on the QPAM's ability to meet the conditions of the exemption. The Preamble and the Proposed Exemption take the approach that criminal convictions occurring within "the corporate family of large financial institutions" are sufficient to confer not only disqualification, but a mandatory "winding-down" period. We disagree that a criminal conviction in an entity that is unrelated to the conduct of investment management, including investment management services for Plans, should result in an automatic and presumptive disqualification.

We believe that the Proposed Amendments to Section I(g) go beyond the prohibition of a convicted person acting as a fiduciary that is imposed by section 411 of ERISA and disagree that foreign crimes in affiliated entities that are unrelated to a QPAM's business necessarily "call[s] into question a firm's culture of compliance." We also disagree that foreign crimes are always translatable into those disqualifying crimes in the United States. While we are sympathetic to the Department's desire to include similar foreign crimes to those listed in Part I(g) for foreign entities engaged in Plan-related fiduciary services, we do not necessarily agree that a conviction of those affiliates that have no such connection "are relevant to a QPAM's ability to manage Plan assets with integrity, care, and undivided loyalty."

We do not believe that a conviction of a foreign affiliate doing unrelated business in an obscure foreign jurisdiction necessarily has a bearing on a QPAM's duties or in keeping with the protections designed to benefit Plans in connection with Section 406(a) (and the Code's corresponding) *per se* prohibited transaction rules. They do not bear on the QPAM's independence from parties in interest or the Plan fiduciary which hires the QPAM, both of which are and remain the lynchpins behind the exemption. Nor do they call into question a QPAM's ability to appropriately negotiate and approve transactions as fiduciaries under Part I(c). They do not cause the QPAM to cease being subject to the supervision of rigorous regulators, such as the Securities and Exchange Commission, the Office of the Comptroller of the Currency, or state insurance agencies. It is also why, to our knowledge, no similar disqualification event applies under the U.S. Investment Advisers Act of 1940 or Regulation 9, or any other state insurance agency.

History. We note that in its history, the Department has shown a laudable appreciation of the nuances that individual case of potential disqualification may present.[3] We believe that

[3] Among others: The Boston Co. Real Estate Counsel, Inc, 53 Fed. Reg. 38803, (Oct. 3, 29188); IDS Institutional, Inc. 55 Fed. Reg. 39754 (Sept. 28, 1990); American Express Company and Affiliates, 59 Fed. Reg. 19247 (Apr. 22, 1994); CS Holding and Affiliates. 59 Fed. Reg. 17590 (Apr. 13, 1994); PaineWebber Incorporated, 60 Fed. Reg. 53810 (Oct. 17, 1995); PanAgora Asset Management, Inc., 62 Fed. Reg. 4813 (Jan. 31, 1997); GE Capital Investment Advisors, Inc., 62 Fed. Reg. 7278 (Feb. 18, 1997); HSBC Holdings plc, 65 Fed. Reg. 80466 (Dec. 21,

Part I(g) has historically existed to permit the Department to determine the likely impacts of affiliates' convictions on the QPAM's ability to meet the conditions of the exemption. In the past, it has interpreted Part I(g) in a manner that seeks to minimize disruption for Plans and QPAMs alike. Similarly, it has not caused an automatic mandatory "winding-down" period (more on this, later) as a practical matter. As Acting Assistant Secretary Ali Khawar recently indicated: "In those circumstances, I think it's appropriate for us to ask the hard questions and determine what relief is warranted. That's going to mean different things in different contexts."[4] We agree with that perspective.

We understand the QPAM Exemption's inclusion of criminal convictions as a disqualifying event at the QPAM entity level, and we understand that it may be appropriate for disqualifying crimes at a parent entity that can exercise management and control over the QPAM's day-to-day business and decision-making. We believe, however, that there are a great number of situations in which affiliates of a QPAM are effectively firewalled (for numerous reasons, including regulatory ones) or where their parents are sufficiently removed from the day-to-day operations of the QPAM (i.e., they are passive economic owners) so as to conclude that their misdeeds should not necessarily impact the credibility of the QPAM itself. We urge the Department, in the Proposed Amendments, to consider the facts and circumstances of a particular situation before triggering any automatic disqualification event and "winding-down" period.

We believe it is important to remember that ERISA itself – not the QPAM Exemption -- subjects *all* Plan fiduciaries of Plans subject to ERISA to its exacting standards of behavior. Indeed, courts have interpreted ERISA's duty to loyalty as "the highest known to the law." (*Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.))

More Recent Department Approach. Recently, the Department promulgated PTCE 2020-02 to address prohibited transaction issues that could arise with respect to the provision of fiduciary investment advice and the advice-giver's sale of products or services stemming from that advice for a fee. Unlike the QPAM Exemption, which is designed to deal with Section 406(a) party in interest prohibited transactions (and the analogous provisions of the Code), PTCE 2020-02 provides relief under Section 406(b) of ERISA (and the analogous provisions of the Code). While we understand that the *per se* prohibited transaction rules of Section 406(a) are designed to address potential abuses in transactions between unrelated parties, we would suggest that Section 406(b) is designed to protect against transactions that are by their very nature far more susceptible to abuse. In that regard, it is noteworthy that PTCE 2020-02 limits disqualification *only* to the advice-providing entity or other affiliates engaged in the business of providing investment advice to Plans.

Expansion of Prohibited Conduct. What also would like to address the fact that the Proposed Amendments expand the universe of potential disqualifying events by including non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs"). In doing so, the Proposed Amendments have the potential to magnify certain existing issues that apply under

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2000); HSBC Holdings plc, 65 Fed. Reg. 20836 (Apr. 26, 2002); and Deutsche Bank AG, 67 Fed. Reg. 42072 (June 20, 2002).

[4] Mejdrick, Kellie, "3 Issues To Watch In DOL's Transaction Waiver Proposal," *Law360*, Aug. 12, 2022.

Part I(g). It is a general principle of law that a person is innocent until proven guilty in a court of law. And yet, the impact of the Proposed Amendments signifies a departure from that standard not only with respect to U.S. courts, but foreign courts, whose rules and practices may deviate substantially from those here. The Department appears to conflate entering into an NPA or a DPA to an admission that rises to guilt. The fact is that there are many reasons why an institution may agree to an NPA or DPA, some of which do not bear on what a trier of fact might determine. And there may be a number of reasons why a regulator—including a U.S. regulator—may prefer a NPA or DPA. Even where an institution believes it has done no wrong and would prevail on the merits in a court of law, there may be circumstances in which it may prefer to enter into that arrangement for a variety of reasons, including that it may be concerned with its reputation on unrelated matters (that do not rise to the level of covered convictions) that could be introduced during a protracted trial, or perhaps there are issues that have nothing to do with the facts involved, or that relate to local political or other factors.

Entering into a DPA or NPA in a country with less rigorous standards of justice than the United States may have entirely different origins and predicates than in other jurisdictions. Not all jurisdictions should be assumed to play by (or even aspire to) the norms that we have in the United States. In fact, the Proposed Amendments have the potential to play into the hands of foreign nations that wish to do harm to investment managers having substantial operations in the United States or its allies. Knowing that they can bring dubious claims that force a DPA or NPA offers a potentially powerful tool that can be used by unfriendly nations.[5] We disagree that institutions will "simply sidestep" the consequences of a conviction by agreeing to an NPA or DPA.

We have similar concerns about how the Proposed Amendments may utilize the "providing materially misleading information" portion of this section and we are troubled that the QPAM Exemption could be vitiated where an entity "participates in" Prohibited Misconduct. In the latter case, the Proposed Amendments indicate that participation includes knowing approval of the conduct, or knowledge of such conduct without taking active steps to prohibit such conduct. To avoid the allegation of "participation" envisioned in the Proposed Amendments, it appears that the Proposed Amendments could require a QPAM to spend a great deal of time and resources policing activity of employees across its organization. Not even Section 404 of ERISA, which dictates standards of behavior, contemplates such a condition. We suggest that those requirements are misaligned with the primary purpose of the QPAM Exemption: to avoid conflicts with parties in interest and maintaining sufficient independence from those parties in interest.

Should the Department include any of those new kinds of prohibited misconduct in the final modifications to the QPAM Exemption, we strongly urge it to make it clear that Prohibited Misconduct will only disqualify a QPAM on a prospective basis. As the Supreme Court has

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[5] We also note that the following language in Part VI(s) of the Proposed Amendments could be read to assume the conclusion: "Any conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, ***if successfully prosecuted***, would have constituted a crime . . ." How will the Department know if something would be "successfully" prosecuted? Moreover, we are concerned that this formulation could be read as an assumption: "[assuming the case was] successfully prosecuted" already provides the conclusion, since a prosecutor's case would not be "successful" unless it obtained the conviction.

noted, retroactive laws "deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). If QPAMs were to become disqualified on a retroactive basis, it would mean that a significant number of transactions they entered into would be considered non-exempt prohibited transactions. As a result, the substantial costs and disruptions would be enormous to Plans.

III. Requirements that QPAMs Amend Their Management Agreements to Provide New Indemnification and Other Related Rights

The Proposed Amendments would require QPAMs to amend their management agreements for existing and future clients to:

- agree not to restrict the ability of the plan to terminate or withdraw from a management agreement or QPAM-managed investment fund in the event that the QPAM is disqualified;
- agree not to impose certain fees, penalties, or charges upon termination or withdrawal from a management agreement or QPAM-managed investment fund in the event that the QPAM is disqualified;
- contractually indemnify, hold harmless, and restore actual losses to client plans for damages directly resulting from a violation of applicable law, a breach of contract, or any claims arising out of the QPAM's ineligibility; and
- agree to refrain from knowingly employing or retaining an individual who has participated in conduct that forms the basis of a conviction, non-prosecution or deferred prosecution agreement, or other disqualifying conduct that would make a QPAM ineligible.

87 Fed. Reg. at 45227. For existing clients, the amendment would presumably need to be made within the effective date of the Proposed Amendments – 60 days following publication of the final notice in the Federal Register.

As a threshold matter, we believe that the Department has vastly underestimated the costs associated with making the required amendments. Requiring those additional conditions may actually impair Plans' ability to hire quality investment managers. The inclusion of the new contractual terms within QPAM management agreements are also unlikely to advance the interests of Plans as intended. Additionally, the requirement that the QPAM indemnify all of its client Plans for any losses that may result from any (and expanded universe of) disqualification would dramatically raise the risks and potential costs of operating as a QPAM.

The requirement that the QPAM agree not to restrict a Plan's ability to withdraw from an investment fund that invests in illiquid assets such as a private equity or real estate fund, may also not only be operationally unworkable, but also be counterproductive to Plans' investment returns. Plans may need to be prevented from investing in those funds as a result of the Proposed

Amendments in the first place, causing them to lose out on investment opportunities available to other investors.

We also note that the Fifth Circuit Court of Appeals has held that a prohibited transaction exemption's imposition of contractual requirements in connection with IRAs is unreasonable and arbitrary and capricious. *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 384–85 (5th Cir. 2018). The proposed changes could therefore exceed the Department's regulatory authority as they relate to IRAs.

The Proposed Exemption's requirement that the QPAM indemnify the Plan, including and specifically for transition costs would appear to give a Plan fiduciary an unlimited "put" if the QPAM suffers a (now expanded) disqualification event — even if other exemptions may be available and applicable to the transactions for the Plan. We therefore believe that the proposed provisions could amount to a punitive outcome where Plans are otherwise protected under other exemptions.

We also believe that the Department drastically underestimated the costs of amending all of a QPAM's contracts with client Plans by assuming that QPAMs could create a "single standard form" for each client plan. 87 Fed. Reg. at 45218. We think we speak for many of our peers in saying that the Department's envisioned world is simply not the commercial reality. Different Plan fiduciaries negotiate different terms and conditions of any given investment management agreement, and different pooled funds have clauses for different provisions. Overriding those important details and the nuances that apply across the capital markets, the Department vastly underestimates the difficulty and sheer impracticability of assuming a "one size fits all" approach. Ignoring the fact that investment management agreements may vary widely from manager to manager, we note that a QPAM's management agreements may be unique to each Plan because many Plan fiduciaries maintain (and dictate) their own templates.

Should the Department insist upon including the new provisions, we believe that a better approach would be to mandate that they be required only in contracts entered into after the effective date of the final rule. If the Department were to still require the adoption of such amendments currently in any final rulemaking, we urge the Department to consider the vast difficulty, in not impossibility, to assure that the process could be completed within a 60-day time period. We believe that not less than 18 months would be more appropriate.

IV. One-Year "Winding-Down" Period.

The Proposed Amendments would provide for a one-year "winding down" period in the event a QPAM's disqualification. 87 Fed. Reg. at 45228. During the period, the QPAM could not enter into new investments on behalf of its client Plans in reliance on the exemption. *Id.* While we appreciate the Department's effort to accommodate a Plan's transition to a new asset manager following a QPAM's disqualification, we believe the Proposed Amendments could cause more disruption and cost to Plans than assumed. While we believe it may make sense to impose some conditions associated with the transition of Plan assets from a QPAM that suffers a disqualification event, we would argue that the architecture of the Proposed Amendments may

unfairly burdens Plans, effectively force Plans to terminate relationships with their QPAMs before all events are known concerning future relief, and unnecessarily avoid less restrictive and more protective alternatives.

First, QPAMs who are disqualified should be permitted to continue to make new investments in line with guidelines approved by a Plan fiduciary during the period. Otherwise, the period would not mitigate the opportunity costs of lost investment opportunities. In fact, the QPAM may have been engaged to carry out an investment strategy that requires it to continually make new investments. To frustrate that objective may be detrimental, not protective of Plans. Moreover, Plans regularly receive cash that must be invested. Having cash uninvested for a Plan raises substantial issues for both the Plan fiduciary and QPAM under Section 404. We do not believe that the Proposed Amendments focus on the potential loss of investment opportunity in its cost analysis, or potential litigation costs arising out of such outcomes.

Second, if the disqualified QPAM applies for an individual exemption that would permit it to continue to rely on the QPAM Exemption notwithstanding the disqualification, any "intermediate" (rather than "winding-down") period should last until after the Department makes a final determination as to whether the application will be granted or denied. That period should not lapse while the application is pending. This change would save Plans from incurring potentially significant transition costs in terms of searching for and negotiating the appointment of a replacement manager. It would not be necessary for a plan to incur those costs if the Department were to decide to grant an individual exemption, which would allow the Plan to continue to receive the same services from its original chosen QPAM.

V. Proposed Changes to Part I(c) of the QPAM Exemption.

We believe that the Proposed Amendments' changes to section I(c) of the QPAM Exemption are intended to clarify the Department's views on that provision. We believe that in so clarifying, the Department may have created opportunities for greater confusion and disruption than it had intended.

We have regarded Part I(c) as reflecting the Department's longstanding view that QPAMs should not simply act as a "mere independent approver." Our role is to serve as discretionary asset manager when managing Plan assets. We have always understood our role to be the sole decision-maker in negotiating and approving transactions effected on behalf of Plan assets. We believe that this interpretation is widespread in the market and does not require significant clarification. And while we appreciate the Department reminding market participants that no veto power may inure to an employer or other affiliated party in interest, we feel that the broad language that the Department has added may have adverse unintended consequences. Specifically, we believe that the Proposed Amendments to section I(c) may cause the QPAM Exemption to become unavailable in a wide variety of transactions, including in connection with transactions that are commonly conducted in reliance on the QPAM Exemption on a day-to-day basis (as further detailed later in this section). The changes therefore have the potential to disrupt many Plans by requiring them to forego investment opportunities and to disrupt the capital markets by shutting off Plans from many types of investments they currently make.

The Proposed Amendments indicate that no "relief is provided . . . .for any transaction that has been planned, negotiated or initiated by a party in interest, in whole or in part, and presented for the approval of the QPAM." Reasoning that the QPAM would not then have "sole responsibility", the Preamble to the Proposed Amendments states that a "party in interest should not be involved in any aspect of the transaction, aside from certain ministerial duties and oversight associated with plan transactions, such as providing general investment guidelines to the QPAM . . . . engag[e] in discussions and establish[] guidelines (for purposes of insertion into a written management agreement. . . .) with respect to the investment objectives and policies [of the Plan] and their relationship to the assets of the plan's portfolio as a whole."

We note that a party in interest must be involved in a transaction for which the QPAM Exemption is utilized: after all, if there is no party in interest involved in the transaction, no nonexempt prohibited transaction under Section 406(a) of ERISA or the analogous provisions of the Code would obtain for which the QPAM Exemption would be needed. But more fundamentally, the Department's language risks causing many market participants confusion, uncertainty and needless worry about the application of the exemption. For example, the language used by the Department, read literally, would mean that an investment bank that is a party in interest could never "initiate" a discussion about a potential idea with a QPAM, even where the decision to undertake any transactions associated with the idea are under the sole authority of a QPAM. A financial party may also discuss an investment idea with another Plan fiduciary. The Plan fiduciary may then hire a QPAM to manage a portion of the Plan's assets to implement the strategy as part of, or sufficient in and of itself, the entirety of the investment guidelines. In that case, even if the Plan agreed in an investment management agreement to give full and complete authority to engage in transactions over a particular portion of the Plan's assets, and the investment guidelines expressly contemplated this idea, the QPAM Exemption could be inadvertently suspect. We understand that the QPAM Exemption was not intended for "one-time" transactions, in which a single transaction would be largely pre-negotiated and pre-approved by an appointing fiduciary of the QPAM. But that should not supplant a Plan fiduciary's ability, or a QPAM's desire to engage in discussions with parties in interest that may generate investment ideas that then give a QPAM sufficient bandwidth to not only consider how to implement the idea and with whom.

QPAMs commonly learn of potential investment opportunities through financial intermediaries such as investment banks and broker-dealers, who may approach QPAMs with an opportunity. For example, broker-dealers acting as underwriters may approach a QPAM in connection with a new issue of securities. The QPAM may wish to bid for these securities prudently believing that they are in the best interest of their Plan clients. Banks, broker-dealers, futures commission merchants, swap counterparties and other financial intermediaries may often approach a QPAM with a potential transaction idea. The QPAM then considers whether the transaction is in the interest of its Plan clients in a manner that is consistent with its fiduciary responsibilities. Where the institution is a party in interest (which it will likely be presumed, although not necessarily concluded to be), the Proposed Amendments would appear to foreclose the QPAM's participation in the transaction on behalf of its client Plans out of concern that the financial intermediary party in interest has "planned" or "initiated" the transaction (at least in

part). As a result, it is not clear whether the Proposed Amendment would allow plans to continue accessing valuable investment opportunities in the manner they do today.

Similarly, we are concerned that this expansive language calls into question a number of common arrangements, such as sub-advisory arrangements, which do not raise heightened risk to Plans. We note already that Part I(a) of the QPAM Exemption and Part I(d) of the QPAM Exemption contain effective protections to avoid transactions as to which the QPAM's independence might be called into question. We understand the Department's view that a QPAM should not act as a rubber stamp to approve transactions designed by the party in interest who appointed the QPAM (e.g., a plan sponsor) because of the potential that such a transaction, such as a transaction between the plan and the plan sponsor, would involve a conflict of interest. 87 Fed. Reg. at 45213 n.36. And we agree. We note, however, that section I(a) of the QPAM Exemption already addresses this concern by prohibiting the QPAM from entering a transaction with any party with authority for appointing or negotiating the terms of the QPAM's appointment, or an affiliate of such party. Section I(a) would generally prohibit transactions between the Plan and the Plan sponsor.

In connection with these arrangements, Plan fiduciaries may engage a QPAM who delegates certain investment responsibilities to a subadvisor but retains authority to approve transactions. In this scenario, it is unclear whether the QPAM would satisfy the proposed condition that it have "sole responsibility" over the transaction, and whether the proposed restriction on transactions being "planned, negotiated, or initiated" by a party in interest would be violated (because the subadvisor would be considered a party in interest).

If the Department determines that clarifications to Part I(c) are necessary, we believe that they should be addressed to the specific situations intended and avoid broader unintended consequences described above. We assume that the Department is primarily concerned with the so-called "rent-a-QPAM" case, in which a Plan fiduciary presents the QPAM with a pre-packaged and pre-negotiated transaction for the QPAM to rubber-stamp. If so, we believe the Department can emphasize this specific situation to the exclusion of others, for example, by making it clear that one-off transactions without meaningful participation in the negotiation of all material terms of the transaction under consideration (i.e., not just offering a "yea" or "nay") are suspect.

VI. The Proposed Amendments May Not Provide Adequate Due Process Protections to Protect QPAMs from Disqualification by the Department

Under the Proposed Amendments, if the Department seeks to disqualify a QPAM, it would be required to provide a written warning of potential ineligibility and provide the QPAM with only 20 days to respond and request a meeting, to be scheduled within 30 days of the QPAM's response. 87 Fed. Reg. at 45228. The QPAM would not be entitled to more than one meeting. *Id.* Following the meeting or written response, the Department would make a final determination of whether the QPAM would be disqualified. In the preamble to Proposed Amendments, the Department stated in intends to develop findings of most forms of misconduct in connection with its enforcement program. 87 Fed. Reg. at 45209.

As discussed above, we do not believe new categories of Prohibited Misconduct should be included in the QPAM Exemption. We also believe that the Proposed Amendments may not provide adequate due process rights. Traditional notions of due process require that decisions be made by an independent, disinterested decision-maker. However, the Department is proposing that it be responsible for investigating whether a QPAM should be disqualified. What is more, it is unclear how the Department intends to carry out the procedures and decide whether a QPAM should be disqualified. We respectfully submit that on a matter of such grave importance, more protections are needed,

For example, the Proposed Amendments' disqualification procedure does not provide adequate time for a QPAM to respond to the Department. A QPAM would be required to expend significant time and resources to gather information in response to a written ineligibility warning, especially if the alleged prohibited misconduct were to relate to a foreign affiliate's NPA or DPA, in which case relevant documentation may be written in a language other than English. In the context of diversified financial institutions, accessing, assessing, and marshalling all the relevant information to ascertain the nature of and validity of the claims under consideration is simply not attainable within the time frame contemplated. Even in criminal cases, the defendant is given the opportunity for mounting a defense, with a presumption, at law, that he is innocent until proven guilty.

If the Department does proceed with including new categories of Prohibited Misconduct, we urge that it provide a truly impartial decisionmaker with authority to decide whether a QPAM will be disqualified, as opposed to providing that authority to itself. And, we would also strongly suggest that the time frame for both response and opportunity for hearing be meaningfully lengthened.

VII. The Department Should Not Impose a New Registration Requirement

Among other changes to section I(g) of the QPAM Exemptions, the Proposed Amendments would require all QPAMs to notify the Department of their reliance on the exemption and report the legal and trade name of the QPAM. 87 Fed. Reg. at 45227. The notification would need to be updated if there are any changes to those names. In the Preamble to the Proposed Amendments, the Department stated that this requirement will ensure that the Department is "aware" of the entities relying on the QPAM Exemption and that it intends to maintain a publicly-available list of QPAMs on its website. 87 Fed. Reg. at 45208.

We do not agree that this new proposed registration requirement is as useful for Plans as intended. We are unaware of any other prohibited transaction exemption imposing a similar requirement. We would like to better understand the basis for this proposed change—is it a desire for the Department to know who is and who is not a QPAM? That would be consistent with certain recent statements made by Department officials: "We want people to let us know" about who is a QPAM because we "don't have a good sense of how many firms are QPAMs" (Timothy Hauser, Deputy Assistant Secretary for Program Operations, speaking at Practising Law Institute's "ERISA 2022: the Evolving World," August 1, 2022).

While we appreciate the desire of the Department to learn about QPAMs, we believe there are less intrusive ways to do so, and conditioning QPAM Exemption relief on registration provides opportunities for foot-faults. A QPAM could easily overlook the requirement to update the Department when it updates a legal or trade name, potentially leading to the commission of a series of inadvertent prohibited transactions that would only end when the update is made. Moreover, the Proposed Amendments do not appear to provide for any mechanism for an entity to "de-register" (i.e., no longer act as a QPAM).

The QPAM Exemption has always been – by design—self-executing: if an institution met the definition of QPAM, it was a QPAM. We note that many, although not all, QPAMs are registered investment advisers, and that under the Investment Advisers Act of 1940, covered investment advisers are required to provide detailed information in SEC Form ADV, including identifying information such as the adviser's full legal name and all names under which it conducts its business, as well as address, and assets under management. (Instructions for Form ADV, Part IA). Information that the Department may desire is likely to be obtained by reviewing an entity's Form ADV.

Should the Department mandate QPAM registration as a condition for relief under the QPAM Exemption, we urge it to be maintained by, and made available to, the Department only. We strongly believe that the QPAM Exemption is not about an imprimatur of excellence. Any suggestion to the contrary could fuel misperceptions about its purpose and value.

VIII. Recordkeeping Requirements and Threshold Changes

The Proposed Amendments would require that QPAMs make available records demonstrating compliance with the QPAM Exemption to the Department, Internal Revenue Service ("IRS"), plan fiduciaries, any contributing employer and any employee organization whose members are covered by a plan that engaged in an investment transaction pursuant to this exemption, participants and beneficiaries, and IRA owners. 87 Fed. Reg. at 45232. The Department explained in the Preamble that the purpose of the new condition would be able to "ensure the Department will be able to verify" compliance with the exemption conditions. 87 Fed. Reg. at 45214. It is unclear what it means to "verify" compliance with the conditions of the QPAM Exemption. Indeed, one of the reasons the QPAM Exemption has been so successful is precisely because of its objective requirements. QPAM status is largely fact-based. A QPAM must acknowledge fiduciary status in writing in a written investment management agreement. The QPAM Exemption is unavailable for Plans (or groups of unrelated Plans) that constitute

over 20 percent of client assets under the QPAM's management. Those are easily verifiable without the introduction of formal recordkeeping requirements. As for the other conditions of the exemption, including that the transaction entered into satisfy the arm's-length protections of Part I(f) and the independence requirements of Part I(d) also be met, we do not think it is necessary for QPAMs to keep records about how those determinations are made. Most QPAMs already know who may be related to them and keep track of this for a whole host of regulatory reasons. For firms such as ours, which are not affiliated with other large diversified financial services businesses, requiring us to keep records of how and why we are not affiliated with a given bank or broker-dealer could be burdensome. Should we unexpectedly fail to meet this independence requirement, then, of course, we would fail to meet the condition of the exemption and would not be able to rely upon it.

Only the Department (with respect to ERISA plans) and the IRS (with respect to IRAs) have the authority to enforce the terms of the QPAM Exemption. The Proposed Amendments did not explain how making records available to other parties would assist verification of compliance with the QPAM Exemption. Requiring that records be made available to employers, unions, and, particularly, Plan participants, beneficiaries and IRA owners, will likely raise the risk of frivolous litigation. It is possible that those fees may be borne not only Plans, but other investors (for example, in respect of pooled Plan asset funds). In this regard, we are concerned that attorneys representing participants, beneficiaries, and IRA owners will be unnecessarily overwhelm QPAMs with requests for documentation many of which may be gratuitous which they would then intend to use (or threaten to use) in litigation, and QPAMs would have to expend significant portions of their time and resources simply responding to the documentation requests. Accordingly, we respectfully request that this requirement be removed. In the alternative, we request that the Department further define the scope of these recordkeeping requirements and conduct a more detailed cost-benefit analysis. In addition, we would propose that such records should be available only to the Department and IRS, as may be relevant.

We are also troubled by the increase in the client assets under management and shareholder or partner capital requirements. We did not see any case in which there was evidence that a fiduciary of the existing thresholds was unduly influenced because of those thresholds. No less important is the potential impact of these changes and the needless opportunities for inadvertent foot-faults. If the Department nonetheless insists on adopting a cost of living increase, we would strongly recommend that it not impose a "catch up" from the changes made in 2005 and that, to avoid such inadvertent foot-faults, the QPAM would be able to meet the requisite changes at any time during the relevant year for which change is required.

* * *

We appreciate the Department's desire to provide greater clarity with respect to the QPAM Exemption. However, taken in its various parts and taken as a whole, we believe the Proposed Amendments, in their current form, may create greater uncertainty, raise costs, and not offer the intended benefits in return to Plans. While we agree with the Department's focus on integrity, we submit that the protections afforded by Section 404 of ERISA and Section 406(b) of

the Code already in place are powerful and should not be underestimated. The utility of the QPAM Exemption as it stands now has served the test of time. We urge the Department to reconsider and quantify both the expected benefits and likely costs associated with these Proposed Amendments.

With all of our comments, we sincerely respect that the Department is determined to protect Plans from what they believe are investment managers that lack "integrity." We urge it instead to focus on the original purposes behind the exemption: to provide Plans with quality investment management services by highly regulated entities with gravitas and experience and with protections designed to directly address the specific abuses that Section 406(a) (and the analogous provisions of the Code) were designed to thwart. We urge it to adhere to well-established principles, including tying disqualification events to those that are directly relevant to the conduct of the QPAM's business, resisting the impulse to presume guilt where it is proven in a court of law and affording appropriate respect to procedural due process. We appreciate that the Department may be resource constrained, and that the number of QPAMs experiencing unanticipated disqualifications that require its input may have increased. We understand that there are real administrative purposes for the Proposed Amendments. However, they are not reason to limit, rather than enhance, the protections for Plans.

Thank you again for the opportunity to provide these comments. If you have questions about any of our comments, or if we can be of any further assistance in connection with the Proposed Amendments, please feel free to contact the undersigned.

Sincerely,

Neuberger Berman Group LLC

By: William Braverman
Title: General Counsel – Asset Management