October 11, 2022

Via Electronic Filing

Assistant Secretary Lisa Gomez
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW Room N-5655
Washington, DC 20210

Re: Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption) (RIN 1210-ZA07)

Dear Assistant Secretary Gomez:

The Investment Adviser Association (**IAA**)[1] appreciates the opportunity to comment on the proposed amendment to prohibited transaction class exemption (**PTE**) 84-14 (**QPAM Exemption**).[2] The QPAM Exemption provides relief from certain prohibited transaction restrictions of Title I of the Employee Retirement Income Security Act of 1974 (**ERISA**) and Title II of ERISA, as codified in the Internal Revenue Code of 1986 (**IRC**), and is of fundamental importance to the operation of the modern retirement plan system.

ERISA's prohibited transaction rules generally prevent the parties that are responsible for creating and operating Plans from engaging in almost any transaction with "parties in interest" or

[1] The IAA is the leading organization dedicated to advancing the interests of investment advisers. For more than 85 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *Proposed Amendment to Prohibited Transaction Class Exemption 84-14*, 87 Fed. Reg. 45204 (July 27, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15702.pdf (**Proposal**). A **QPAM** (qualified professional asset manager) is defined as a bank, savings and loan association, insurance company, or registered investment adviser that meets specified standards regarding financial size and acknowledges in a written management agreement that it is a fiduciary with respect to each individual retirement account or employer-sponsored retirement plan (collectively, **Plan**) that retains it as a QPAM.

"disqualified persons,"[3] unless an exemption has been provided by the Department.[4] The QPAM Exemption is the principal exemption on which investment advisers rely to engage in a wide range of transactions with or on behalf of Plans in compliance with ERISA.

The Proposal would significantly narrow the availability of the QPAM Exemption and make it more difficult for QPAMs to use. While we support the Department's efforts to protect the interests of Plans and Plan participants and beneficiaries, we are concerned that the potential impacts of the Proposal would extend beyond these objectives and would have negative consequences that may not be in the best interest of Plans and their participants and beneficiaries. We offer several recommendations below that we believe would better achieve the Department's goals.[5]

I. Executive Summary

We make the following recommendations:

A. Transactions Presented to a QPAM for Approval. The Proposal would amend the QPAM Exemption to require that the material terms of a transaction must be the "sole responsibility" of the QPAM, and that this requirement would not be met where the transaction has been "planned, negotiated, or initiated" by a party in interest and presented to the QPAM for approval. We recommend that the Department modify the proposed language to make clear that the "sole responsibility" of the QPAM condition would be met if the QPAM – and not a party in interest – negotiates and approves the terms of the transaction.

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[3] Title I of ERISA broadly prohibits transactions between Plans and "parties in interest," and Title II includes parallel prohibitions applicable to tax-qualified plans and "disqualified persons." A "party in interest" is broadly defined to include, without limitation, any fiduciary of the Plan, any Plan service provider, and an employer or employees that are covered by the Plan. ERISA § 3(14). Disqualified persons include any fiduciary to the account, a member of the family (which includes a spouse, ancestor, lineal descendent, or a spouse of a lineal descendent), a corporation, partnership, trust, or estate where 50 percent or more of the shares/profits/beneficial interests are owned by any of the above, or an officer, director, or 10 percent or more shareholder or partner of an entity described above. Absent an exemption, ERISA and the IRC prohibit, among other things, sales, leases, loans, and the provision of services between or among these parties.

[4] ERISA § 408(a). The purpose of granting exemptive authority to the Department was to allow transactions so as "not to disrupt the established business practices of financial institutions which often perform[ ] fiduciary functions in connection with these plans consistent with adequate safeguards to protect employee benefit plans." H.R. Conf. Rep. No. 1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 5038, 5089-90.

[5] Given the breadth of the Proposal and the amount of work that would be required to implement and apply the proposed changes, we appreciate that the Department provided an extension of 15 days for public comment. *See* IAA and Joint Trade Associations' Letter Requesting Extension of Comment Period for [the Proposal], available at https://investmentadviser.org/resources/iaa-joint-trades-letter-requesting-extension-of-comment-period-for-qpam-proposal/.

B. New Conditions Regarding the Eligibility of a QPAM. The Proposal clarifies and expands the conditions under which a QPAM may be eligible to rely on the QPAM Exemption. We recommend the modifications described below:

i. **Written Investment Management Agreement.** The Proposal would require QPAMs to make several changes to their existing and future written investment management agreements (**IMAs**). We recommend that this requirement not apply retroactively to contracts entered into before the effective date of the final rule (**Final Rule**). If the Department determines to apply these requirements retroactively, however, instead of requiring that potentially hundreds, if not thousands, of IMAs be renegotiated, it should permit the QPAM to send out a one-time notice that the QPAM is legally obligated to meet the conditions under the Proposal.

ii. **Foreign Convictions.** The Proposal would codify the Department's view that certain convictions handed down by a "foreign court of competent jurisdiction" of the QPAM or an "affiliate" would disqualify a QPAM. The IAA recommends that, instead of an automatic QPAM disqualification based on a foreign criminal conviction of a QPAM or QPAM affiliate, the Department should require the QPAM to make specific certifications and, if the Department believes further action is warranted, it should then provide a process to address the QPAM's or affiliate's foreign criminal conviction.

iii. **Other Prohibited Misconduct.** Under the Proposal, participating in certain broadly defined "prohibited misconduct" would form the basis for disqualification of the QPAM. We recommend that the Department narrow and provide clearer guidance as to the types of misconduct that would disqualify a QPAM. Specifically, in our view, deferred prosecution agreements (**DPAs**) and non-prosecution agreements (**NPAs**) (domestic and "substantially equivalent" foreign actions) do not include findings of misconduct, as in the case of convictions, and should thus not be included as prohibited misconduct. The Department should also clarify the scope of what it considers materially misleading information and confirm that inadvertent errors are not included, and it should limit the individuals "participating in" the misconduct to persons that were actively engaged in the misconduct or in supervisory approval of the misconduct or that had a legal duty to prohibit or report the misconduct.

The Department proposes to provide a QPAM charged with prohibited misconduct the opportunity for one conference, within 30 days of the QPAM's response to a written warning, before issuing a written notice of ineligibility. We recommend that the Department provide at least 60 days for the QPAM to prepare for the conference to provide the QPAM with a more meaningful opportunity to be heard.

iv. **Winding-Down Period.** The Proposal would provide the QPAM with a one-year winding-down period following the date of ineligibility. During this time, the QPAM would not be permitted to make any new investment on behalf of an existing Plan client. So as to mitigate disruption for existing Plan clients, which would need to engage in a search for a new QPAM without the existing QPAM being able to conduct new transactions, we recommend that the Department allow QPAMs to enter into new transactions with existing Plan clients during the winding-down period.

C. Recordkeeping Obligations. The Proposal would add new recordkeeping obligations and require disclosure of certain information to other agencies and the public. We see no reason for and thus recommend against requiring disclosure of compliance information to anyone outside the Department or the IRS. Alternatively, the Department should limit the universe of documents that would be available to the public and provide at least a 60-day window to explain why a QPAM declines to make information available, as opposed to the 30 days proposed.

D. Reporting Obligations to the Department. The Proposal would require every QPAM that relies on the QPAM Exemption to report such reliance to the Department, which would publish a public list of QPAMs on its website. The Department should confirm that a failure to file this report on a timely basis would not by itself cause the entity to lose its eligibility to rely on the QPAM Exemption.

E. Increase in AUM Threshold. We recommend that the Department not raise the assets under management (**AUM**) for a QPAM, as proposed, because these increases are likely to create barriers to entry or force smaller or emerging QPAMs to exit the market. We also recommend that the Department grandfather current QPAMs where their AUM level would no longer meet the proposed threshold under the Proposal. Because virtually all investment advisers with at least $100 million in AUM are registered with the SEC, they are subject to a robust investor-protective regulatory framework designed to address conflicts of interest and they should thus be able to withstand improper influence from parties in interest.

F. Transition Periods. If the Department requires that IMAs be renegotiated, it should provide an adequate transition period of 18 months for QPAMs to come into compliance. Additionally, if the Department raises the AUM threshold, it should provide a transition period of one year for QPAMs that would no longer qualify under the new threshold.

II. Recommendations

A. Transactions Presented to a QPAM for Approval

The Proposal would require that the terms, commitments, investments, and associated negotiations of a transaction on behalf of client Plans must be the "sole responsibility" of the

QPAM. Further, this requirement would not be met where a transaction has been "planned, negotiated, or initiated" by a party in interest and presented to a QPAM for approval.[6]

It is unclear how the requirement that a transaction not be initiated and presented by a party in interest to a QPAM could be met in many common situations. The QPAM Exemption assumes that any counterparty to a Plan transaction could be a party in interest. If a party in interest cannot present or initiate a transaction with a QPAM, it might functionally mean that no one could approach or discuss with a QPAM an investment idea. The limitation on any involvement in the "planning" of the transaction may also prove to be an issue for Plan sponsors, trustees, and investment committees that, for example, engage in high-level discussions with QPAMs regarding particular investments. It is also unclear the extent to which these Plan-level fiduciaries would be able to meet with QPAMs to discuss performance and strategy.

Uncertainties may also arise for sub-advised accounts and funds where QPAM responsibilities may be shared between a trustee and sub-adviser, as well as with collective investment trusts where there is a separate trustee and investment manager.

This element of the Proposal appears to be intended to codify the Department's prior statement as to the ineffectiveness of using a so-called "QPAM for a day," an investment adviser hired by a plan fiduciary to bless transactions that in fact have been negotiated by parties in interest. The Department has expressed a view that the QPAM Exemption is not available in the event of mere perfunctory approval by the QPAM of a transaction that has already been negotiated by another plan fiduciary.[7] While we agree that the QPAM should not be used as a "rubber stamp" for otherwise prohibited transactions, the Proposal goes well beyond what would be necessary to address this issue and would require investment structures to be unwound or restructured at high costs, with potentially no beneficial effect for Plans or Plan participants.

IAA members engage in many common transactions that would likely be prohibited under the Proposal, even though they do not raise the concerns that the Department is trying to address. For example, a dealer may call a QPAM's trader because the dealer is looking to sell a specific bond that fits with the Plan's investment strategy. The dealer may be a party in interest as defined under the QPAM Exemption. Because the dealer, not the QPAM, is "initiating" the transaction, it would be prohibited under the Proposal. We believe this situation often arises in many over-the-counter transactions that are commonly engaged in by our members, specifically in the fixed income and derivatives markets. If these types of transactions were prohibited, it would not only raise costs for Plans, but impact their performance since they would not be able to participate in many beneficial transactions. It is unclear how this would either benefit Plans or further the Department's objectives.

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[6] 87 Fed. Reg. at 45213. The Department explains that it is proposing this change because a QPAM should not be a "mere independent approver of transactions."

[7] *See* McLane Company, Inc. Profit Sharing Plan and Trust, 62 Fed. Reg. 27625 (May 20, 1997), available at https://www.govinfo.gov/content/pkg/FR-1997-05-20/pdf/97-13179.pdf.

It is also not uncommon for a QPAM to hire other QPAMs as sub-advisers for a specific strategy of an investment fund. Under the Proposal, there may be situations where neither the manager nor sub-adviser would be able to use the QPAM Exemption. For example, if the sub-adviser initiates a transaction with the Plan, the manager would no longer qualify for the QPAM Exemption and the sub-adviser could not rely on the QPAM Exemption because the manager would be negotiating the transaction.

The Proposal may also impact investment advisers that work with trust companies, where the investment adviser oversees and advises the trust company pools as a QPAM.[8] Although the investment adviser takes full responsibility for the trades of the pools, it is unclear whether the investment adviser or the trust company would lose its QPAM status based on the Department's position that neither the investment adviser nor the trust company is "solely responsible" for investment decisions of the pools under the Proposal.

Another example of a problematic transaction is when a Plan departs a pooled fund in kind, rather than in cash. Those transactions usually involve several parties – the manager of the fund the Plan is leaving, the manager of the fund the Plan is moving to, a consultant or the Plan sponsor itself, and potentially an independent fiduciary on behalf of the fund's other investors – which could include other Plans – depending on how large a percent of the pooled fund the departing Plan represents. Those transactions, including many purchases of securities, could be argued to be "initiated" by the departing Plan. Without that departure, the QPAM advising the pooled fund would not be engaging in the trades.

It should not matter if a party in interest proposes or initiates a transaction, as long as the negotiation of terms and approval of the transaction are the ultimate responsibility of a QPAM. Therefore, the Department should modify the language in the Proposal to make clear that the "sole responsibility" of the QPAM condition would be met as long as the QPAM negotiates and approves the terms of the transaction. We propose the following language:

> No relief is provided under this exemption for any transaction that has been ~~planned,~~ negotiated~~,~~ or approved ~~initiated~~ by a Party in Interest, in whole or in part, ~~and presented to a QPAM for approval~~ because the QPAM would not have sole responsibility with respect to the transaction…

The modified language would tailor the Proposal to allow for many common beneficial transactions that would otherwise be prohibited under the Proposal and meets the Department's objective to make clear that a QPAM must not permit other parties in interest to *make decisions* regarding Plan investments under the QPAM's control.[9]

[8] The trust company in this situation would also be a QPAM.

[9] 87 Fed. Reg. at 45213 (emphasis added).

B. Conditions Regarding the Eligibility of a QPAM

The Proposal clarifies and expands the circumstances under which a QPAM may become ineligible to rely on the QPAM Exemption. The proposed changes include a requirement to amend written IMAs with clients to provide certain rights to a Plan in the event of a QPAM's ineligibility.

i. Written Investment Management Agreement

The Proposal would require every QPAM to make certain changes to its written IMAs with client Plans to:

- explicitly provide for a penalty-free termination or withdrawal from a management agreement or QPAM-managed investment fund in the event that the QPAM, its affiliates, or a five-percent or more owner engages in conduct resulting in a "criminal conviction" or receipt of an "ineligibility notice";

- contractually indemnify, hold harmless, and restore actual losses[10] 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, NPA, DPA, or other disqualifying conduct that would make a QPAM ineligible, regardless of whether the individual was personally convicted of a crime.[11]

We have significant concerns about this provision, which would apply retroactively to existing contractual arrangements, some of which were entered into a decade before, without exemption or accommodation.

If the Proposal goes through as final, then virtually all QPAMs will need to send out amendments to their current IMAs, which will require negotiations with each manager, along with costs for consultant and legal review. Larger Plans could have hundreds of managers of separate accounts and pooled funds that they will need to interface with. Based on the current language of the Proposal, every IMA would need to be renegotiated and amended within 60 days of the effective date of the Final Rule.

Consistent with grandfathering provisions that the Department has provided in other PTEs, specifically related to newly imposed obligations that would impact existing

[10] Actual losses would include losses and related costs arising from unwinding transactions with third parties and from transitioning Plan assets to an alternative asset manager as well as costs associated with any exposure to excise taxes under IRC § 4975 as a result of a QPAM's ineligibility for the QPAM Exemption. *Id.* at 45208.

[11] *Id.* at 45208.

relationships,[12] the Department should include a grandfathering provision in this case as well, so that the IMA requirements would only apply to contracts entered into after the effective date of the Final Rule.

If the Department nevertheless determines to apply this provision retroactively, instead of requiring a QPAM to revise existing agreements to add the new requirements, the Department should permit QPAMs to send out a one-time notice that the QPAM is legally obligated to meet the requirements under the Proposal. While this approach would still be inconsistent with the view that "[r]etroactivity is not favored in the law," it would at least avoid the time and expense of re-negotiating potentially hundreds, if not thousands, of existing IMAs.[13]

The IAA also believes the economic analysis in the Proposal significantly underestimates the number of QPAMs affected and the number of Plans each such QPAM has. For example, we understand that IAA members would need to amend hundreds of IMAs, compared to the Department's estimate of 32. As noted above, the QPAM Exemption addresses prohibited transactions that occur during some of the most common transactions between a Plan and parties that provide services to the Plan or have some other relationship to the Plan. As such, it is an extremely important exemption, and that the investment adviser is a QPAM is a standard requirement in many IMAs and is also included in ISDA master agreements for derivatives transactions, credit facilities, and numerous other types of agreements.

The Department also significantly underestimates the burdens and costs. For example, it calculates that the new provisions would take each QPAM one hour to implement.[14] This estimate ignores the costs Plans would incur in understanding the Final Rule, how the QPAM Exemption is used by each of their managers, and the compliance, legal, and operational costs to renegotiate the IMAs and implement the changes. It also does not take into account the likelihood that Plan clients would want to revisit their IMAs once open to revision and the legal costs incurred for internal or external counsel review. IAA members have also voiced concerns that in many situations, Plans provide their own legal forms with which QPAMs are not familiar, increasing the amount of time for review and requesting modifications.

We urge the Department to revisit its economic analysis to more realistically assess the costs of this provision.

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[12] *See, e.g.*, *Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 20946 (Apr. 8, 2016), available at https://www.govinfo.gov/content/pkg/FR-2016-04-08/pdf/2016-07924.pdf and *Best Interest Contract Exemption*, 81 Fed. Reg. 21002 (Apr. 8, 2016), available at https://www.govinfo.gov/content/pkg/FR-2016-04-08/pdf/2016-07925.pdf. To ease the transition, the Best Interest Contract (**BIC**) Exemption "grandfathered" certain pre-existing advisory relationships.

[13] *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988). Noting that retroactivity is disfavored, the Supreme Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."

[14] 87 Fed. Reg. at 45218.

ii. Foreign Convictions

The Proposal would codify the Department's view that a conviction handed down to a QPAM or an affiliate by a "foreign court of competent jurisdiction" would disqualify a QPAM, provided that the conviction is for a crime "substantially equivalent" to U.S. federal or state crimes already enumerated in the current definition of criminal conviction.[15] Recognizing that there may be situations where a foreign criminal conviction raises unique issues when compared to U.S. criminal convictions, the Department would grant the QPAM a hearing regarding the substantial equivalence of a foreign crime or misconduct. Instead of providing clarity, however, the Proposal would codify inconsistency and potentially create/increase confusion.[16]

The IAA is concerned about both the breadth and retroactive nature of this aspect of the Proposal. Corporate restructuring and acquisitions often result in new affiliates, which would be aggregated for the five percent ownership and/or control affiliate definition of the QPAM Exemption. As a consequence, investment advisers may unexpectedly lose their QPAM status due to a conviction of a foreign affiliate of which they are unaware and which had no connection to the Plan.

The Department also does not address the potential incompatibility of foreign and domestic convictions and how the Department would view "substantially equivalent" for purposes of foreign convictions under the QPAM Exemption.[17] Indeed, the Department may find it problematic to apply the terms of the QPAM Exemption in the same context to legal proceedings outside of the United States. For example, several jurisdictions, including the United Kingdom, Canada, Ireland, Australia, and New Zealand, do not rely on a legal category of "felony."[18]

Additionally, for criminal proceedings, many countries do not offer the same due process that exists in the United States or these proceedings may be politically motivated in countries where there is no independent judiciary. It would seem unreasonable for the Department to credit a conviction by a foreign tribunal that fails to provide even minimal safeguards for procedural fairness (*e.g.*, a "show trial" with a predetermined outcome or a conviction in absentia with no meaningful right to a defense). While we recognize that there is generally no requirement that a foreign court's proceedings or conviction must conform to U.S. constitutional standards, courts

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[15] *Id.* at 45208.

[16] For example, the Proposal would create inconsistency between ERISA Section 411, which is limited to U.S. convictions, and the QPAM Exemption, which would not be. Section 411's procedural mechanisms for inclusion of convictions reference exclusively "Federal" and "State or local" offenses, the jurisdiction of the U.S. district court "in which the offense was committed," and "State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted."

[17] "Substantially equivalent" is not defined in the Proposal.

[18] *See, e.g.*, United Kingdom, Criminal Law Act 1967, Chapter 58, Part I (July 21, 1967), available at https://www.legislation.gov.uk/ukpga/1967/58?view=plain ("All distinctions between felony and misdemeanor are hereby abolished.").

have reserved the right to question a conviction[19] where the foreign proceedings fall below the "standards accepted by any civilized system,"[20] "call[ ] into question the fundamental fairness of the proceedings,"[21] or amount to "a travesty – a parody – of justice."[22]

The IAA recommends that instead of an automatic QPAM disqualification[23] for conviction of a foreign affiliate, the Department should require the QPAM to certify that it:

- did not know of, have reason to know of, or participate in the criminal conduct of the foreign affiliate that is the subject of the conviction;
- did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the conviction;
- will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the conviction; and
- will not use its authority or influence to direct an "investment fund" (as defined in Section VI(b) of the QPAM Exemption), that is subject to ERISA or the IRC and managed by the QPAM, to enter into any transaction with the foreign affiliate or engage the foreign affiliate to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption.[24]

The QPAM should also be required to certify that its failure to meet the requirements of the QPAM Exemption arose solely from the foreign affiliate's criminal conduct and that no entities holding assets that constitute the assets of any Plan actively participated in the criminal conduct that is the subject of the conviction.

[19] *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995) ("It has long been the law of the United States that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the basics of due process.").

[20] *Lui-Dix v. Holder*, 528 F. App'x 595, 598 (7th Cir. 2013).

[21] *Esposito v. INS*, 936 F.2d 911, 914 (7th Cir. 1991).

[22] *Doe v. Gonzales*, 484 F.3d 445, 451 (7th Cir. 2007).

[23] While the QPAM may seek the Department's view regarding whether the foreign crime or conviction is substantially equivalent to a U.S. federal or state crime, there is no formalized process to do so and, for a criminal conviction, the ineligibility period begins on the date a trial court enters its judgment.

[24] These requirements are derived from recent individual PTE applications granted by the Department.

Based on the certification, the Department could inquire further and make its decision based on the facts of the specific situation.[25] This process would allow entities to continue serving as QPAMs when the foreign affiliate criminal conduct is far removed and the QPAM's services do not "involve entities that reside and operate in foreign jurisdictions" or "call into question a firm's culture of compliance."[26]

iii. Other Prohibited Misconduct

In addition to adding foreign convictions to the current list of disqualifying offenses, the Proposal provides a list of other "prohibited misconduct," which includes:

- An NPA or DPA or the foreign equivalent, for any act that would disqualify the QPAM if convicted;

- Intentionally violating or engaging in a systematic pattern or practice of violating the conditions of the QPAM Exemption in connection with otherwise non-exempt prohibited transactions; or

- Providing materially misleading information to the Department in connection with the conditions of the QPAM Exemption.[27]

The proposed categories of misconduct are very broad and subjective and, according to the Proposal, would be broadly construed.[28] For example, the Department interprets "participating in" prohibited misconduct broadly to include "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."[29]

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[25] The Department could also consider following an "EXPRO" process. This process was established as part of a class exemption (PTE 96-62), rather than through an amendment to the regulations. As a formal matter, the exemptions are also granted under PTE 96-62 and posted on the Department's website, rather than as individual PTEs published in the *Federal Register*. *See Class Exemption To Permit Certain Authorized Transactions Between Plans and Parties in Interest*, Prohibited Transaction Exemption 96-62, 61 Fed. Reg. 39988 (July 31, 1996), available at https://www.govinfo.gov/content/pkg/FR-1996-07-31/pdf/96-19483.pdf.

[26] 87 Fed. Reg. at 45209-10.

[27] 87 Fed. Reg. at 45209.

[28] *Id.* at 45209-10.

[29] *Id.*

We are concerned that these standards provide the Department with potentially unlimited discretion to decide what types of misconduct would trigger ineligibility.[30] Accordingly, we recommend that the Department modify the prohibited misconduct list to:

a) Not include DPAs and NPAs as prohibited misconduct;

b) Clarify the scope of what would be considered as providing materially misleading information to the Department and confirm that it would not include inadvertent, technical errors;

c) Limit "participation" to those actively engaged in the misconduct or in supervisory approval of the misconduct, or that had a legal duty to prohibit or report the misconduct; and

d) Provide QPAMs with adequate time to prepare a response to the Department's Ineligibility Notice.

DPAs, NPAs, and foreign equivalents. According to the Department of Justice, DPAs and NPAs (or the foreign equivalent) "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."[31] They also lack the clarity and certainty of a conviction and should be removed from the list of prohibited misconduct. We agree with the Department's previous advisory opinion that a DPA does not constitute a criminal conviction such that the QPAM status of affiliates would be jeopardized and that the sole judicial action that triggers a violation of the QPAM Exemption should be a criminal conviction.[32] Under a DPA, the government files a charging document with a court, but requests that the prosecution be deferred to allow the defendant to demonstrate its good conduct over a period of time, which, if the defendant does successfully, the charges may be dismissed, and the dismissal is not treated

[30] We appreciate the Department's providing guidance that "[i]n connection with a robust compliance infrastructure, a minor number of isolated violations of [the QPAM Exemption] would not constitute a systemic pattern or practice." *Id.* at 45209. However, whether a compliance infrastructure is "robust," or what constitutes a "minor" number will still be entirely subjective. This guidance also does not address how the Department would exercise its discretion with respect to the other elements on the prohibited misconduct list.

[31] *See* United States Attorneys Manual, Title 9 (Criminal Division), 9-28.200(B), available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.200 ("[u]nder appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement."). *Id.* at 9-28.1100(B).

[32] *See* DOL Advisory Opinion 2013-05A (Nov. 1, 2013). This view has been confirmed in another context by the U.S. Sentencing Commission's *Guidelines Manual* finding that DPAs are not counted as a prior "sentence" that would be considered by a court. U.S. Sentencing Commission, *Guidelines Manual 2021* at § 4A1.2(f), available at https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf.

as a conviction.[33] NPAs are simply letter agreements between a government agency and an entity subject to the agreement that do not lead to any criminal charges. The import of foreign equivalents to DPAs and NPAs is even less clear and understanding the complexities of identifying whether they are substantially equivalent would likely require consultation with foreign criminal lawyers and consultants. For these reasons, we believe that the Department should exclude DPAs and NPAs and foreign equivalents from the list of prohibited misconduct.

Providing materially misleading information to the Department. We recommend that the Department clarify the scope of what it considers materially misleading information and expressly confirm that inadvertent technical errors, such as failure to timely notify the Department of a legal name change, should not be deemed to be providing materially misleading information to the Department in connection with the QPAM Exemption.

Participation. The IAA also recommends that the Department narrow the scope of individuals "participating in" the misconduct to those actively engaged in the misconduct or in supervisory approval of the conduct, or that had a legal duty to prohibit or report the conduct.[34] The Proposal provides that "participating in" refers not only to active participation in the prohibited misconduct, but also to knowing approval of the conduct, or knowledge of such conduct without taking active steps to prohibit such conduct, including reporting the conduct to the appropriate compliance personnel.[35]

Process. The Department would develop its findings in connection with an investigation of a QPAM, and, if appropriate, issue a written warning, giving the QPAM 20 days to respond. Prior to issuing a final Ineligibility Notice, the Department would provide advance notice and an opportunity for the QPAM to explain in writing, in a meeting, or through a combination of both, why the QPAM did not engage in the categories of prohibited misconduct. We recommend that the Department provide at least 60 days between the QPAM's response to the warning and its conference with the Department, in order to provide the QPAM adequate time to prepare and a more meaningful opportunity to be heard. By providing only 20 days for a QPAM to respond to the written warning and then only holding one conference within 30 days of the QPAM's response, the Department does not provide sufficient time for QPAMs to coordinate internally and respond.

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[33] The DPA will generally include conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. United States Attorneys Manual, Title 9 (Criminal Division), 9-28.1100(B), available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.1100.

[34] The IAA is concerned that mere knowledge of the misconduct by any employee of the QPAM, especially in a large or complex organization, absent a duty to report, could cause the QPAM to lose its eligibility.

[35] 87 Fed. Reg. at 45209.

iv. Winding-Down Period

The Proposal would prescribe a mandatory one-year winding-down period that would begin on the date of ineligibility for any QPAM that has triggered a disqualifying condition.[36] The winding-down period is intended to allow existing client Plans (*i.e.*, client Plans of the QPAM that had a pre-existing IMA on or prior to the ineligibility date) to end their relationship with the disqualified QPAM, while also providing a grace period of relief for past transactions and any transactions continued during the one-year winding-down period, so long as the other conditions of the QPAM Exemption remain satisfied.[37]

The Department is providing the one-year winding-down period to help Plans avoid or minimize possible negative impacts of terminating or switching QPAMs or adjusting IMAs when a QPAM becomes ineligible.[38] While we agree and appreciate the Department's objective, Plans will have difficulty with an orderly transition if they lose a QPAM, regardless of the amount of time provided to wind down the relationship. The Plan would need to create and distribute a Request for Proposal (**RFP**) for a new manager, go through the process of selecting a new manager, and incur legal and consulting costs to draft a new IMA and other necessary Plan documents.

The IAA questions the utility of the winding-down period as proposed. Because the relief only applies to existing Plan clients for transactions that occurred prior to the ineligibility date, the QPAM would effectively be prohibited from assisting Plan clients during the transition period.[39]

The IAA recommends that the Department allow QPAMs to enter into new transactions with existing Plan clients during the winding-down period. This would allow for a more orderly transition for Plans and would meet the Department's objectives to mitigate cost and disruption and "ensure that Plans have sufficient time to engage in a search for an alternative QPAM or

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[36] *Id.* at 45211.

[37] Within 30 days of the date of ineligibility, the QPAM would be required to provide a notice to its client Plans and the Department containing the following: notice that the QPAM is ineligible and that the one-year winding-down period has begun; sufficient detail to apprise client Plans of the nature and severity of the criminal conduct or prohibited misconduct so that fiduciaries of client Plans can prudently determine next steps in the best interest of the Plan; notice of the client Plans' ability to terminate its agreement with the QPAM or withdraw from the QPAM's investment fund without fees or penalties; and notice of the QPAM's contractual duty to 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 failure to satisfy the conditions of the QPAM Exemption.

[38] 87 Fed. Reg. at 45205.

[39] "Immediate loss of relief under the QPAM Exemption could place Plans in the difficult position of either: (i) searching for a new asset manager for the services previously provided by the ineligible QPAM; or (ii) being forced to liquidate assets at inopportune times, incur transaction costs to sell and repurchase assets, and lose returns while the assets are in transition. Searching for a new asset manager could require a particularly resource- and time-intensive process for Plan fiduciaries." 87 Fed. Reg. at 45217.

discretionary asset manager if they decide it is in the Plan's best interest to do so."[40] The QPAM would still be required to meet the other conditions listed in the Proposal.

The IAA also urges the Department to focus on the issue of pooled funds, where QPAMs will need to balance the interests of the Plans leaving the fund with those Plans remaining in the fund.

C. Recordkeeping Obligations

The Proposal would add a new recordkeeping requirement, mandating that QPAMs maintain records necessary to maintain compliance with the terms of the QPAM Exemption for six years.[41] The records would need to be made available, to the extent permitted by law, to: any authorized employee of the Department or the IRS or another federal or state regulator; any fiduciary of a Plan invested in an investment fund managed by the QPAM; any contributing employer and any employee organization whose members are covered by a Plan invested in an investment fund managed by the QPAM; and any participant, accountholder, or beneficiary of a Plan invested in an investment fund managed by the QPAM.[42]

While the Department certainly is entitled to access records pertaining to the QPAM Exemption, it is unclear to us why the records would be made available to several non-Department third parties. Other regulators, with the exception of the IRS for IRA accounts, have no authority to enforce the QPAM Exemption and have their own recordkeeping requirements and processes related to matters within their jurisdiction. It is unclear whether this broad provision would, for example, permit the SEC or OCC to request documents pertaining to non-SEC or non-OCC-registered entities? Without qualification, the extent of these requests could be nearly limitless. We thus recommend that the Department not require disclosure of compliance information to any regulatory body outside the Department or the IRS.

In addition, we believe that the Department should not make internal compliance documents available publicly. The requirement to provide information to participants, accountholders, or beneficiaries invested in a fund managed by a QPAM is notable because the Department affirmatively decided not to include a similar disclosure obligation under proposed PTE 2020-02.[43] The Department reasoned that firms' internal compliance documents should be available to the Department but not investors, so as to promote full identification and

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[40] *Id.* at 45211.

[41] 87 Fed. Reg. at 45213-14.

[42] *Id.* at 45214.

[43] *Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees*, 85 Fed. Reg. 82798 (Dec. 18, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-12-18/pdf/2020-27825.pdf.

remediation of compliance issues without undue concern about the widespread disclosure of the issues.[44] The IAA agrees with this reasoning.

If the Department nevertheless decides to require public disclosure, we urge it to limit the universe of documents that would be available to the public to specifically-identified policies and procedures related to the QPAM's compliance with the QPAM Exemption.[45]

Should the Department require disclosure of compliance documents as proposed, we believe the currently proposed 30-day response window for document requests from third parties other than the Department or IRS would be difficult for Plans to meet due to the potential volume and complexity of the materials requested. The IAA recommends at least a 60-day period. In addition, the Department should confirm that the information may be provided through electronic media, similar to the allowance for Plan administrators.[46]

We also believe the Department is grossly underestimating the cost of responding to these requests or preparing responses on why the QPAM is declining to respond to a request. While the Department believes refusal would be rare, it provides no evidence to support its belief and states clearly that it "does not have data on how often such a refusal is likely to occur."[47] We understand that, in many cases, QPAMs would decline to respond to these requests out of concern that they would be required to provide confidential compliance information to the public with no protections. We urge the Department to revisit its analysis in light of our comments.

D. Reporting Obligations to the Department

The Proposal would require entities that rely on the QPAM Exemption for prohibited transaction relief to report such reliance to the Department.[48] The Department intends to keep a current list of entities relying upon the QPAM Exemption on its publicly available website. The IAA questions the need for the Department to publish such a list, especially since the Department does not create such lists for other PTEs.

If the list is created, however, we believe it is likely to serve as a relied-upon resource during the QPAM selection and due diligence process (potentially being added to a firm's initial RFP or ongoing due diligence procedures). The IAA thus urges the Department to ensure it has

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[44] *Id.* at 82839.

[45] The Department should also confirm that in no event would a QPAM be required to disclose privileged trade secrets, privileged commercial or financial information, or information identifying other individuals.

[46] *See Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA*, 85 Fed. Reg. 31884 (May 27, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-05-27/pdf/2020-10951.pdf.

[47] 87 Fed. Reg. at 45221.

[48] 87 Fed. Reg. at 45207. Each QPAM that relies upon the exemption must report the legal name of each business entity relying upon the exemption (and any name the QPAM may be operating under) in the email to the Department. The QPAM must only provide the notification to the Department once unless there is a change to the legal name or operating name(s) of the QPAM relying upon the exemption.

the appropriate resources to keep the list current and provide publicly information on the Department's process and schedule for updating the list. Additionally, we would request that the Department consider separate categories for QPAMs that are currently in the winding-down period and those that are not.

The IAA is also concerned about the requirement that each QPAM that relies on the exemption must report the legal name of each business entity relying upon the exemption (and any name the QPAM may be operating under) in the email to the Department and notify the Department when there is a change to the legal name or operating name(s) of the QPAM or business entity relying upon the exemption. Because old arrangements may be overlooked, new entities may be created, and old entities may be renamed or establish new operating names, the IAA urges the Department to confirm explicitly that the failure of timely notification to the Department alone would not cause the entity to lose its eligibility to rely on the QPAM Exemption.[49]

E. Increase in AUM Threshold

The Proposal would raise the minimum AUM threshold to qualify as a QPAM for registered investment advisers from $100 million to $135,870,000. The Department would annually adjust this amount for inflation.[50]

The Department explains its view that large financial services institutions would be able to withstand improper influence from parties in interest. However, virtually all investment advisers with $100 million in AUM are required to register with the SEC, and we believe that the Department's concern is adequately addressed by the robust investor-protective framework applicable to SEC-registered investment advisers, which requires that they address conflicts of interest.[51] Indeed, we are unaware of any evidence that the current AUM threshold has been problematic. We are also concerned that an increase in the AUM threshold may limit smaller, sophisticated and emerging investment advisers from relying on the QPAM. We thus believe that the Department should allow all SEC-registered investment advisers to qualify as QPAMs.

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[49] *Id.* at 45227 (Proposed Rule Section I(g)(1)). We recommend adding language making clear that failure to timely notify the Department alone would not be deemed by the Department as intentionally violating the conditions of the QPAM Exemption or providing materially misleading information to the Department in connection with the QPAM Exemption.

[50] 87 Fed. Reg. at 45213.

[51] Investment advisers are subject to a well-established and robust fiduciary duty to their clients under the Investment Advisers Act of 1940. This fiduciary duty is an affirmative duty of utmost good faith; it includes the duties of loyalty and care, as well as full and fair disclosure. In addition, this fiduciary duty has always applied to SEC-registered investment advisers that provide investment advice about securities to both retail and institutional investors and to retirement and non-retirement accounts. The fiduciary duty under the Advisers Act was first articulated over 50 years ago by the U.S. Supreme Court. *SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963).

The Proposal also does not provide relief for existing arrangements with investment advisers. There are likely QPAMs that fall within the window between the current AUM requirements and the proposed requirements.[52] Should the Department decide to raise the AUM threshold, the IAA recommends that it grandfather current QPAMs whose AUM would no longer meet the revised threshold.

F. Transition Periods

If the Department requires retroactive application of the new IMA requirements, we recommend that it provide an adequate transition period of 18 months for QPAMs to come into compliance, recognizing the amount of time and resources it will take to renegotiate and amend a large number of IMAs. Additionally, the Department should provide a transition period of one year for QPAMs that would no longer qualify under the new AUM thresholds.

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We appreciate the Department's consideration of our comments on this important Proposal. Please do not hesitate to contact the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein

Gail C. Bernstein
General Counsel

/s/ William A. Nelson

William A. Nelson
Associate General Counsel

[52] According to the latest information from the Investment Adviser Public Disclosure database, over 1,100 SEC-registered investment advisers have AUM between $100,000,000 and $135,870,000 and could potentially be impacted by the Proposal.