**NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS**

815 16TH STREET, N.W., WASHINGTON, D.C. 20006 • PHONE 202-737-5315 • FAX 202-737-1308

**MICHAEL D. SCOTT**
EXECUTIVE DIRECTOR
E-MAIL: MSCOTT@NCCMP.ORG

October 11, 2022

The Honorable Lisa Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

*Submitted Electronically Through www.regulations.gov*

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

Dear Assistant Secretary Gomez:

The National Coordinating Committee for Multiemployer Plans ("NCCMP") appreciates this opportunity to comment on the Employee Benefits Security Administration ("EBSA"), U.S. Department of Labor's ("the Department" or "DOL") Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption) ("Proposal"), published at 87 Fed. Reg. 45204 (July 27, 2022). For the reasons outlined below, we encourage the Department to withdraw this Proposal in its entirety and to instead issue a proposal to update and streamline existing provisions of Prohibited Transaction Class Exemption 84-14 ("PTE 84-14").

The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans, as well as the unions and the job-creating employers of America that jointly sponsor them, and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America's working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code ("Code") section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. These industries include airline, agriculture, building and construction, bakery and confectionary, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking/transportation. Multiemployer plans are jointly trusteed by labor and management trustees.

**Summary of Comments**

As discussed below, the NCCMP respectfully requests that DOL reconsider its approach to amending PTE 84-14. The NCCMP is particularly concerned that the proposed rule will (1) increase plan expenses by virtue of making QPAMs more expensive due to increased risks to the QPAM as well as the renegotiation of the contracts that underlie the QPAM as well as likely requiring investment structures to be unwound and restructured, (2) make QPAMs less available to multiemployer plans, and (3) impede the normal and customary investment process of multiemployer plans and their QPAMs. Further, the increased costs whether permanent or temporary will be borne by the active workforce, as the only money that a multiemployer trust has comes from the workers' contributions. These contributions represent the deferred wages of the workers who collectively bargain their wage and benefit package.

As such, the NCCMP strongly urges DOL to withdraw the Proposal in its entirety. If there is a need to issue a new proposal, we urge DOL to replace and narrow the provisions of section I(g) and to include new class exemption provisions applicable only to Qualified Professional Asset Managers ("QPAMs") with criminal convictions in order to curtail the need for the current practice of issuing individual exemptions on a case-by-case basis.

The Proposal reflects a fundamental misunderstanding of capital markets and the day-to-day investment practices and operations of employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1] The Proposal seeks to impose substantial regulation on more than six hundred QPAMs as the result of fourteen convictions affecting a relatively small number of QPAMs over the span of almost a decade. The Proposal would certainly, if not withdrawn, create additional and unnecessary disruption, complexity, uncertainty, and expense for multiemployer plans.

The "clarifying updates" to section I(c) are overboard and would disrupt common and beneficial investment practices. The Proposal would also create further uncertainty and disruption by expanding the current disqualification provisions of section I(g). The Proposal's changes would ultimately create new expense and harm for the participants and beneficiaries intended to benefit from EBSA oversight as a result of hampering efficient and beneficial existing industry standard investment practices. Further, it appears that the Proposal anticipates devoting further resources of EBSA's Office of Exemption Determinations to expanding the regulation of QPAMs rather than attending to the vital business of modernizing and issuing beneficial individual and class exemptions useful to the ERISA plan community.

ERISA's prohibited transaction provisions were crafted with the expectation that administrative exemptions would be issued to facilitate established business practices of financial institutions that

[1] The Proposal would affect employee benefit plans subject to ERISA (including the prohibited transaction provisions of ERISA and the Code), their participants and beneficiaries, and IRA owners and beneficiaries (who are subject only to the prohibited transaction provisions of the Code), as well QPAMs. This comment is written from the perspective of trustees of multiemployer plans subject to ERISA and on behalf of the participants and beneficiaries of those multiemployer plans. This comment does not address the multiple adverse consequences that would certainly flow to IRAs and IRA owners and QPAMs from the Proposal.

serve employee benefit plans subject to ERISA ("ERISA Plans") where it is demonstrated that those business practices are in the best interests of plan participants and beneficiaries.[2] Substantially similar, parallel provisions appear in the Code that are applicable to tax qualified plans, including individual retirement accounts.[3] ERISA section 408(a) and Code section 4975(c)(2) [4] grant authority for such administrative exemptions.

PTE 84-14 is perhaps the most widely used administrative exemption facilitating the established business practices of professional asset managers serving ERISA Plans. PTE 84-14 is, in the multiemployer plan context, an essential tool for effectively investing plan assets prudently with a view toward diversification and the appropriate construction and maintenance of an investment portfolio suitable for the purposes and investment horizon of the plan. The NCCMP and its members are grateful to DOL for PTE 84-14. We urge DOL to preserve the usefulness of PTE 84-14 and to further streamline the exemption as suggested herein.

DOL's Proposal suggests that the loss of QPAM status would not prevent an asset manager from effectively investing plan assets.[5] The NCCMP's experience is otherwise. Managing a multiemployer plan's investment portfolio outside of available prohibited transaction exemptions would require identifying an extensive list of parties in interest and disqualified persons. For single employer plans, listing or logging parties in interest is difficult enough, and in some cases virtually impossible, as such party in interest status depends on "functional fiduciary status," employment status, the ever changing relationships of complex conglomerates of entities (including among service providers to an ERISA Plan), and even familial affiliations.[6] For multiemployer plans,

---

[2] H.R. CONF. REP. NO. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. No. 8A (Sept. 20, 1974) at 707-708 ("The conferees recognize that some transactions which are prohibited (and for which there are no statutory exemptions) nevertheless should be allowed in order 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….[T]he conferees expect that the Secretary of Labor and the Secretary of Treasury would grant a variance with respect to...services traditionally rendered by such institutions…provided that they can show that such a variance will be administratively feasible and that the type of transaction for which an exemption is sought is in the interest of and protective of the rights of plan participants and beneficiaries.")

[3] While the significance of PTE 84-14 to the Code's prohibited transaction provisions is just as important as its application to ERISA's prohibited transaction provisions, for brevity of discussion, this comment letter refers to the relevant provisions of ERISA and omits the Code's parallel provisions unless the context requires otherwise.

[4] Pursuant to Section 102 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1), the authority to issue administrative exemptions under Code section 4975(c)(2) was generally transferred from the Secretary of the Treasury to the Secretary of Labor.

[5] Preamble to Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption), 87 Fed. Reg. 45204, 45221 at FN 68 (July 27, 2022) (stating that "Some QPAMs have suggested in the past that there could be costs associated with unwinding transactions that relied on the QPAM Exemption and reinvesting assets in other ways. The loss of QPAM status could also require an asset manager to keep lists of parties in interest to its client Plans to ensure the asset manager does not engage in prohibited transactions. However, even without the QPAM Exemption, a wide variety of investments are available that do not involve non-exempt prohibited transactions.")

[6] For example, in very general terms, ERISA section 3(14) includes four categories of parties whose primary connection to the plan creates party in interest status: (A) fiduciaries, (B) any service provider to the plan, (C) any employer whose employees are covered by the plan, and (D) any employee organization whose members are covered by the plan (collectively, "primary parties"). Moreover (and in simplified terms), party in interest status is

maintaining such a list, if at all possible, would be at unreasonable cost and fraught with the peril of inadvertent prohibited transactions as a result of foot faults. Further, even if such a list could be maintained, the need to forego investment opportunities with parties in interest and disqualified persons would unreasonably limit an asset manager's ability to make investments that are in the interests of the plan and its participants and beneficiaries. The preamble to the original proposal for PTE 84-14 recognized this difficulty.[7]

Neither do alternative exemptions provide the same latitude for an investment manager to execute investment strategies. The relief granted under PTE 84-14 applies to single customer and pooled separate accounts maintained by an insurance company, individual trusts and common, collective, or group trusts maintained by a bank, and any other account or fund to the extent the disposition of its assets is subject to the discretionary authority of the QPAM.[8] Alternative exemptions such as Prohibited Transaction Class Exemption 90-1, Involving Insurance Company Pooled Separate Accounts ("PTE 90-1") and Prohibited Transaction Class Exemption 91-38, Involving Bank Collective Investment Funds ("PTE 91-38") are more narrow in scope and do not serve to support large plan investment portfolios in the comprehensive and flexible manner that PTE 84-14 does. Therefore, the NCCMP strongly urges DOL not to make changes that limit the utility, availability, or the cost of QPAM investment services for multiemployer plans. This is the basis for the NCCMP's request for DOL to withdraw the proposal in its entirety.

The NCCMP urges DOL to propose, for notice and comment, a different amendment that would simplify PTE 84-14 to provide certainty and predictability for the trustees of multiemployer plans and that would reduce costs stemming from the overly broad disqualification provisions of PTE 84-14. Such an alternative proposal would reduce the costs imposed on QPAMs and would be in the interests of plans and in the interests of their participants and beneficiaries with the expectation that the fees passed through to multiemployer plans would ultimately be reduced. Further, the

---

conferred on 50% or more (direct or indirect) owners of such employers or employee organizations. Party in interest status is also conferred upon spouses, ancestors, lineal descendants (and their spouses) of all primary parties (except for employee organizations) and the 50% (direct or indirect) of employers or employee organizations with members covered by the plan. In turn (and in simplified terms) certain entities owned by many of the foregoing parties are parties in interest. Employees, officers and directors or 10% or more (direct or indirect) shareholders (or partners or joint venturers) of many of the foregoing are parties in interest. Some differences exist between ERISA's definition of "party in interest" and the Code's definition of "disqualified persons" under Code section 4975(e)(2). While the differences are minor, they add further complexity.

[7] Preamble to Proposed Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 47 Fed. Reg. 56945, 56946-56947 (Dec. 21, 1982) (stating that "Established financial institutions...must maintain current rosters or [sic] parties in interest with respect to plans that commit assets to single customer accounts, trust funds and those pooled accounts and collective funds which fail to qualify for relief provided by [the predecessor exemptions to Prohibited Transaction Class Exemptions 90-1 and 91-38]. These fiduciaries are required to undertake time consuming ERISA compliance checks for the numerous investment transactions under consideration each year to ascertain whether a party in interest of a plan, any of whose assets are subject to the fiduciary's management, would cause the transactions to be prohibited. In the case of a large plan, there may be thousands of parties in interest. Where a potentially prohibited party in interest transaction is identified and is not covered by an existing class exemption, the asset manager may have to choose between applying for an administrative exemption or forgoing the investment opportunity entirely.")

[8] PTE 84-14, section VI(b) (defining "investment fund" for purposes of Part I of PTE 84-14).

alternative amendments suggested below would continue to protect the rights of participants and beneficiaries.

## I. Proposed Changes to Section I(c)

DOL stated, in the preamble to the original proposed PTE 84-14, that "as a general matter, transactions entered into on behalf of plans with parties in interest are most likely to conform to ERISA's general fiduciary standards where the decision to enter into the transaction is made by an independent fiduciary."[9] The same preamble explained that "minimum capital and funds-under-management standards" were to ensure that QPAMs are "established institutions which are large enough to discourage the exercise of undue influence upon their decision-making process by parties in interest."[10] Thus, positioning the QPAM to be independent and placing all investment decision in the discretion of the QPAM (under the provisions below), DOL determined that transactions would qualify for the exemption.

Accordingly, PTE 84-14's existing conditions are sufficiently protective to preserve the independence of QPAM and to ensure that investment decisions are solely within the discretion of the QPAM. These conditions, very generally and in relevant part, provide as follows:

- At the time of the transaction, the party in interest (or its affiliates) engaging in the transaction with the plan does not have authority to appoint or terminate the QPAM or to negotiate the terms of the QPAM's asset management agreement. Alternatively, the party in interest's aggregate plan assets in the fund must amount to less than ten percent of the fund's value.[11]
- The terms of the transaction are negotiated by, or under the authority and general direction of the QPAM, and either the QPAM, or (so long as the QPAM retains full fiduciary responsibility for the transaction), a property manager acting in accordance with written guidelines established and administered by a QPAM, makes the decision on behalf of the investment fund.[12]
- The transaction must not be part of an agreement, arrangement, or understanding designed to benefit a party in interest or a disqualified person.[13]

---

[9] Preamble to Proposed Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 47 Fed. Reg. 56945, 56946 (Dec. 21, 1982).

[10] *Id.* at 56947.

[11] PTE 84-14, section I(a).

[12] PTE 84-14, section I(c).

[13] PTE 84-14, section I(c). The preamble to the original proposal for PTE 84-14 explains "As is made explicit in a general condition of the proposed exemption, [DOL] is prepared to grant broad exemptive relief only where an independent asset manager has, and in fact exercises discretionary authority to cause an investment fund to enter into a transaction which is otherwise prohibited. Party in interest transactions which are negotiated by, e.g., an employer which sponsors a plan, and then are presented to a QPAM for approval, would not qualify for the class exemption as proposed. However, the exemption, as proposed, would be available even though the transfer of assets by a plan to a QPAM is subject to general investment guidelines, so long as there is no arrangement, direct or indirect, for the QPAM to negotiate, or engage in, any specific transaction or to benefit any specific person."

- The party in interest dealing with the investment fund may not be the QPAM, nor a person related (within the meaning of section VI(h)) to the QPAM.[14]
- The transaction may not be with a party in interest with respect to a plan that makes up more than 20 percent of the assets managed by the QPAM.[15]
- The transaction must be at least as favorable as the terms generally available in an arm's length transaction between unrelated parties.[16]

These conditions have worked together to cause PTE 84-14 to operate in the interests of plans and their participants and beneficiaries, and to be protective of the rights of participants and beneficiaries for almost forty years. Taken together, PTE 84-14's conditions, as currently expressed, are sufficient to preclude an arrangement, direct or indirect, designed to benefit a party in interest and have been so deemed for nearly 40 years since the original exemption was issued. Further, PTE 84-14 does not in most cases provide relief from the conflicts of interest prohibitions in ERISA section 406(b). Those provisions expressly prohibit, among other things, any fiduciary (including a QPAM) from acting in any transaction involving a plan on behalf of a party whose interests are adverse to the plan or its participants and beneficiaries.[17]

Despite the sufficient protections currently afforded by PTE 84-14, the Proposal would change the language in section I(c) as illustrated by the redline below:

> (c) The terms of the transaction, commitments, and investment of fund assets, and any associated negotiations ~~are negotiated~~ on behalf of the ~~investment fund~~ Investment Fund are the sole responsibility ~~by, or under the authority and general direction~~ of~~,~~ the QPAM.~~, and either~~ Either the QPAM, or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM, makes the decision on behalf of the ~~investment fund~~ Investment Fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement, or understanding designed to benefit a ~~party in interest~~ Party in Interest. The prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purposes. No relief is provided under this exemption for any transaction that has been planned, negotiated, or initiated by a Party in Interest, in whole or in

Preamble to Proposed Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 47 Fed. Reg. 56945, 56947 (Dec. 21, 1982).

[14] PTE 84-14, section I(d).

[15] PTE 84-14, section I(e). For this purpose all assets under the QPAM's management for all plans maintained by the same employer (or affiliate, as defined in the exemption) or employee organization, are combined.

[16] PTE 84-14, section I(f).

[17] ERISA section 406(b)(2).

> part, and presented to a QPAM for approval because the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c);[18]

The Proposal's preamble states that this change is "clarifying."[19] The Proposal states a "party in interest should not be involved in any aspect of a transaction, aside from certain ministerial duties and oversight associated with plan transactions, such as providing general investment guidelines to the QPAM." The NCCMP strongly disagrees that the amendment is clarifying. Taken literally, these changes would preclude all transactions with parties in interest, which appears to be the very relief PTE 84-14 was intended to provide.

Further, as a matter of industry practice, banking institutions, underwriters, and other intermediaries seeking investment capital typically approach professional asset managers with investment opportunities. For example, investment managers may secure valuable opportunities to invest in initial public offerings of stock for a favorable price from broker-dealers acting as underwriters who are parties in interest to a multiemployer plan. Investment managers secure purchases of new issues of fixed income securities from parties in interest (such as broker-dealers) because the availability and pricing of such securities is not as favorable on the secondary market. Banks that are parties in interest may be the primary source of derivatives for a QPAM.

Because QPAMs engage in a variety of party in interest transactions, parties in interest often approach a QPAM with a potential transaction. In addition to parties in interests who are in the financial services industry, plan sponsors and multiemployer plan trustees may have significant expertise and exposure to potential transactions that they may refer to, or bring to the attention of, a QPAM. These include for, solely for example, potential investment opportunities in construction projects. The QPAM then evaluates the transaction to determine if it is prudent and in the best interests of the participants and beneficiaries of the plan. The Proposal's amendments would preclude these types of transactions, severely restrict the scope of the exemption, limit valuable investment opportunities on behalf of plans and their participants, and create disruption and uncertainty.

Further, QPAMs often delegate investment responsibilities to sub-advisors while the QPAM retains the authority to approve the transactions. The Proposal's language, while ambiguous, could be read to restrict a QPAM from taking advantage of investment opportunities "planned, initiated, or negotiated" by a sub-advisor (because the sub-advisor is also a party in interest). The Proposal's language would literally preclude a QPAM from relying on the services of other experts including affiliates, consultants, actuaries and others who bring specialized expertise (such as in real estate and construction) to a

[18] PTE 84-14, section I(c) compared to the Proposal, section I(c) in redline to highlight changes.

[19] 87 Fed. Reg. 45207.

transaction, even if their only relationship to the client plan is through the services they provide to the QPAM.

Similarly, some multiemployer plans reserve the authority to exercise certain shareholder rights, such as the voting of proxies, and either retain those rights or delegate them to other third parties. Although the exercise of such shareholder rights by a multiemployer plan's trustees would not be subject to the relief afforded by PTE 84-14, that lack of relief would not contaminate the discretionary investment decisions made by the QPAM under the existing exemption. The language of the proposal, particularly in the context of its preamble, could be read to contaminate all transactions made by the QPAM in the exercise of its discretionary authority. We request clarification that nothing in the proposal would prevent the trustees of multiemployer plans from retaining or delegating the right to vote proxies held by the QPAM, or to exercise other similar shareholder rights, even if such proxies or rights relate to investments in parties in interest or disqualified persons.[20]

The existing and established industry practices described above are currently permissible under PTE 84-14. These industry practices add value and are in the interests of plans and their participants and beneficiaries. The Proposal would disrupt these practices, impairing the value of PTE 84-14 without adding protection to participants and beneficiaries. The changes to section I(c) should be withdrawn.

The NCCMP notes that additional language suggested for paragraph I(c) states that "The prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purposes." This change does not appear to address any problems or add protection for participants and beneficiaries. Further, the change is likely to create new ambiguities to a widely used PTE under longstanding and established practices (such as the practice of engaging a QPAM to evaluate annuity purchases which may or may not be viewed as for "investment purposes" by DOL). The NCCMP urges DOL to withdraw this change and leave the current language unaltered.

## II. Proposed Changes to Section I(g)

Section I(g) of PTE 84-14 disqualifies any asset manager for 10 years if the entity that is the QPAM, any affiliate, or any owner, direct or indirect, of a 5 percent or more interest in the QPAM sustains certain criminal convictions within the preceding 10-year period. As a result of fourteen separate convictions or possible convictions since 2013, DOL seeks to substantially amend the QPAM Exemption in ways that will affect over 600 QPAMs and potentially thousands of plans who use QPAMs for asset management services. This disproportionate imposition of additional

[20] The issue of the exercise of shareholder rights by ERISA Plan fiduciaries is currently the subject of a separate rulemaking. *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, RIN 1210-AC03. If the final QPAM PTE does in fact prohibit Trustees from directly exercising such shareholder rights with respect to assets invested by QPAMs, it would largely gut a significant part of those pending regulations, since ERISA Plans almost universally use QPAMs for their direct securities investments.

regulatory burden on all QPAM entities and will have negative consequences for multiemployer plans.

With regard to QPAMs that have become disqualified pursuant to section I(g), the NCCMP appreciates DOL's history of responding with individual exemptions to preserve the uninterrupted investment management of multiemployer plan assets under management. We strongly agree with DOL that such disqualifications lead to uncertainty and potential disruption for plan asset management. However, we do not agree that the Proposal would mitigate or minimize this disruption. Rather the Proposal amplifies the uncertainty and potential disruption caused by section I(g) significantly. DOL should withdraw the Proposal and offer an alternative amendment for comment instead.

***DOL Should Delete the Proposed Requirement to Report Reliance on the Exemption as a Condition for Prohibited Transaction Relief.*** The Proposal would require any QPAM relying on the exemption to, in effect, register with DOL. DOL does not cite a history of harm to plans, their participants and beneficiaries that this new requirement would seek to correct. A foot-fault in this registration process could have astronomical consequences of triggering thousands of prohibited transactions as a result of a technical compliance issue. If DOL is seeking a list of entities operating as QPAMs, a more straightforward approach would be to assign QPAMs a separate code and to have them report their services to a plan on Schedule C of the Form 5500. DOL would receive the list of entities it is seeking without setting up a potential technical trip-wire to QPAM status.

***DOL Should Not Require Plans to Renegotiate Their QPAM Agreements.*** The Proposal would require a new written management agreement for all QPAMs.[21] The Proposal would impose these conditions on every single existing (and future QPAM) notwithstanding that the majority of these QPAMs have no history of convictions. Very generally, mandatory management agreement provisions in the Proposal include a client's unrestricted ability to withdraw from the QPAM, an agreement not to impose certain types of withdrawal fees and penalties, and indemnities for losses caused by a QPAM's section I(g) disqualification.[22] The proposed management agreement conditions are modeled after and generally mirror conditions imposed under individual exemptions following a section I(g) disqualification.[23] However, the Proposal seeks to impose these conditions on all QPAMs, including those without any history of convictions.

The NCCMP urges DOL not to interfere with multiemployer plan trustees' ability to negotiate their own investment management agreements with QPAMs. Multiemployer plans have decades of authentic experience negotiating their own management agreements. Our agreements are prudently negotiated. Opening up the agreement to new amendments will always open up negotiations on other unrelated terms. Further, investment management agreements for our members do not lend themselves to a "form amendment;" rather the agreements are carefully tailored to the facts and circumstances. These negotiations are expensive and time consuming. The

[21] See section I(g)(2) of the Proposal, 87 Fed. Reg. at 45227.

[22] *Id.*

[23] 87 Fed. Reg. 45208, FN 27.

NCCMP is concerned that the end result of the Proposal's mandated provisions will not inure to the benefit our plans, participants, or beneficiaries, but rather will increase expenses for our plans, and in some cases such increases may be dramatic. Further still, these amendments could not be negotiated in 60 days. Negotiations of investment management agreements for multiemployer plans often take months, often six or more months.

Further, DOL's mandated contractual provisions may have unintended consequences on the investment horizons of QPAM-managed multiemployer plan investment portfolios, causing a QPAM to shorten investment horizons and to curtail investments in illiquid asset classes in order to lower the risk that expenses will be incurred under termination and indemnity provisions. This impact would be felt across the entire QPAM (and the entire multiemployer plan) community, with the result that 14 convictions over the last decade will ultimately lead to the impairment of the entire QPAM investment process under the sweeping and overbroad provisions of the Proposal. The NCCMP urges DOL to withdraw these provisions entirely.

***DOL Should Significantly Narrow the Scope of Parties Who Trigger Section I(g).*** Since PTE 84-14 was originally issued in 1984, the scope of entities that trigger disqualification under section I(g) has not changed. However, the financial services industry has experienced significant consolidation in the intervening decades with the result that a QPAM may be a small part of a very large organization.[24] Industry consolidation has amplified the impact of section I(g) and has created unintended collateral consequences.[25] Specifically, a QPAM may be disqualified due to a related entity's conviction in an unrelated line of business that is remote, both within the chain of ownership and remote in relationship to the QPAM's asset management business. An ownership interest as small as five percent alone can trigger disqualification. [26] The NCCMP disagrees with DOL's unsupported assertion that remote convictions call a QPAM's integrity into question.[27]

DOL asserts that a QPAM's integrity is a vouchsafe for independence. DOL further asserts that in addition to those responsible for the QPAM's operations, "those who are in a position to influence

---

[24] *See* Kenneth D. Jones & Tom Critchfield, *Consolidation in the U.S. Banking Industry: Is the "Long, Strange Trip" About to End?,* 17 FDIC BANKING REVIEW NO. 4, 31 (Feb. 2005) (citing a Brookings Institution study for dramatic consolidation in the banking industry from 1979 to 1994 and continued consolidation through 2005), *available at* https://www.fdic.gov/analysis/archived-research/banking-review/br177n4full.pdf (last visited Sept. 16, 2022); *see also Financial Services, Consolidation,* WORLD TRADE ORG.,https://www.wto.org/english/tratop_e/serv_e/finance_e/finance_devel_e.htm (last visited Sept. 16, 2022).

[25] The Proposal's Regulatory Impact Analysis acknowledges that "[s]ubstantial changes have occurred in the financial services industry since the Department granted the QPAM exemption in 1984. These changes include industry consolidation caused by a variety of factors and an increased global reach for financial services institutions, both in their affiliations, and in their investment strategies, including those for Plan assets." 87 Fed. Reg. at 45214 (July 27, 2022).

[26] Currently PTE 84-14's disqualification provisions may be triggered by QPAM affiliates (as defined in section VI(d)) and five percent or more owners. PTE 84-14, section I(g).

[27] Neither is the public aware of any concrete harm to participants (other than the disqualification of a QPAM's status, or the disruption to appointing fiduciaries as the result of a possibility of such a disqualification) caused by a remote conviction.

the QPAM's policies, are expected to maintain a high standard of integrity."[28] But section I(g) imposes disqualification in circumstances where the entities or individuals engaging in criminal conduct are not, in fact, in a position to influence the QPAM's policies. DOL's broad net captures remote and tenuous relationships that are not expected to result in infectious corruption. DOL's presumption that a remotely related entity's criminal conviction imposes a risk of harm to multiemployer plans and should result in catastrophic consequences to QPAMs and significant disruptions and costs to multiemployer plans is misplaced. Section I(g) extends well beyond an effective connection or nexus between the convicted entity and the QPAM. As a result, the disqualification provisions of current section I(g) are based on an unsubstantiated theory and do not bear a rational relationship to a QPAM's integrity.

In short, DOL's position that remote convictions bear upon a QPAM's integrity have resulted in the overreaching scope of section I(g) and the position is so unrealistic as to seriously undermine DOL's credibility. Further, remote convictions resulting in disqualifications are counter to the purposes of ERISA section 408(a)[29] because remote convictions create potential disruption to a plan's investment operations (even the possibility that a plan's investment manager may be losing QPAM status within the next year or few years can be disrupting). Remote convictions also result in increased costs to the QPAM (and ultimately participants and beneficiaries) for individual exemption applications and additional compliance burdens. DOL's inclusion of indemnification provisions in management agreements do not fully mitigate lost opportunity costs, costs of revising investment strategies and costs of replacing experienced investment managers with others who are not as experienced with the multiemployer plan and its investment strategies. Rather, as discussed above, such costs will flow to all multiemployer plans using QPAMs.

The NCCMP urges DOL to adopt a bright line test of the relationships with entities that may trigger section I(g) that is limited to effective control within the meaning of "controlled group of corporations" or "under common control" with the QPAM as those terms are defined in Code section 414(b) and (c). In this manner, only parties who share meaningful ownership and control with the QPAM would be considered for purposes of section I(g) rather than remote parties such as those that happen to share a small amount of common ownership.

***DOL Should Further Narrow the Type of Convictions that Trigger Section I(g).*** Given the substantial protective conditions already in PTE 84-14, the convictions that trigger section I(g) are overly broad. Neither PTE 84-14 nor the Proposal establishes a requirement that a disqualifying convictions be effectively connected with the management or operation of the QPAM. As a result, there is no basis to assert that the scope of convictions in section I(g) has a meaningful relationship to a QPAM's operations or the integrity of those operations. Further, the NCCMP believes that

[28] 87 Fed. Reg. at 45205, 45216 (July 27, 2022) (stating that "it is critically important for those who are in a position to influence [the QPAM's policies to] maintain a high standard of integrity.")

[29] ERISA section 408(a) provides that to grant an exemption, DOL must find that the exemption is (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan. Clearly, PTE 84-14 meets these conditions as a whole. Ironically, however, the changes under the Proposal are not, as we have explained, in the interests of the plan and of its participants and beneficiaries. Further, we do not think the substantial burden imposed by the Proposal is justified by any marginal protections the Proposal might provide.

convictions that do not arise from the provision of services to QPAM clients do not cast doubt upon a QPAM's integrity.

The scope of crimes triggering section I(g) should be narrowed to those crimes that have a direct impact or connection to the QPAM business. DOL should amend PTE 84-14 to apply any crime described in ERISA section 411 arising out of the provision of services to the QPAM's clients. These are the types of crimes likely to directly contravene the QPAM's ability to maintain a high standard of integrity and to act independently on behalf of the multiemployer plan. Such convictions do have a connection to the QPAM and would replace the tenuous and theoretical connections under PTE 84-14's current provisions. Further, such a definition is consistent with Congressional intent in providing a bar to fiduciary status under ERISA section 411.

In contrast, instead of narrowing the scope of convictions, the Proposal would expand the scope of crimes and bad acts, thus compounding the problems that currently exist under PTE 84-14, section I(g). We object to expanding the circumstances that trigger disqualification or other sanctions (including heightened compliance) for deferred prosecution agreements, non-prosecution agreements or other conduct that does not rise to the level of a conviction as further discussed below.

***Section I(g) Should Not be Expanded for Non-Prosecution or Deferred Prosecution Agreement Triggers.*** The Proposal would add new triggers to potential section I(g) disqualification for non-prosecution agreements or deferred prosecution agreements, or similar agreements in foreign jurisdictions. In these cases, there is no finding of guilt and the relevant authority has made the decision not to pursue such a finding. These agreements may take place in instances where the prosecutor does not believe that the evidence is sufficient for a conviction. To impose consequences in these sensitive situations is clearly an overreach. Further, there are practical considerations to identifying foreign equivalents of these agreements as well as the significant risk that these agreements may be imposed in foreign jurisdictions that do not provide due process protections. Ultimately, DOL is stating that the equivalent of a non-prosecution or deferred prosecution agreement in a foreign country (and perhaps at the local jurisdictional level) casts significant doubt on a QPAM's integrity with the result that the QPAM may subordinate the interests of participants and beneficiaries by participating in transactions with the intent to benefit a party in interest. It is our view that this connection is speculative and tenuous, and does not provide a meaningful protection to participants and beneficiaries. To the contrary it will exacerbate the problems with section I(g) discussed earlier. In the event DOL goes forward with the change, we ask DOL to impose the condition prospectively in light of the disruption it will cause.

***Section I(g) Should Not be Expanded to Impose Disqualification as a Result of Violations of PTE 84-14 or Other Conditions at DOL's Discretion.*** The consequence of not following the provisions of PTE 84-14 should be that party in interest transactions are not exempt from the prohibited transaction provisions of ERISA. This consequence, in itself, is significant. The imposition of excise taxes and the harm to a QPAM's reputation are significant deterrents. Further, a pattern of prohibited transactions affecting a plan's investment portfolio would cause an appointing fiduciary to evaluate whether to retain alternative QPAMs. However, the imposition of disqualification is harmful to the plans and their participants and beneficiaries and prevents

appointing fiduciaries from exercising discretion to determine the best course of action for the ERISA Plan given its investment portfolio under management by the QPAM. DOL should withdraw the provisions in the proposal that could result in additional bases for disqualification of a QPAM.

***The Consequences of Triggering Section I(g) Should be Revised to Conform to the Imposition of Conditions Generally Found in Individual Exemptions Following a Conviction.*** The disruption to a multiemployer plan's investment operations resulting from the disqualification or threatened disqualification of a QPAM is significant and harmful to the plan and participants. Investment strategies and portfolios are interrupted and must be refashioned, and trustees must search for replacement asset managers with similar strategies and strengths. The NCCMP appreciates DOL's efforts to extend relief to disqualified QPAMs through the individual exemption process. However, DOL's current practice of periodic relief under repeating individual exemptions for section I(g) disqualified QPAMs is potentially disruptive to multiemployer plans and creates uncertainty that affects effective investment strategies.

In the event a QPAM is convicted, a multiemployer plan's trustees are in the best position to consider whether to move assets to another QPAM with due consideration to the investments under management and the multiemployer plan's portfolio. The NCCMP requests that DOL replace the disqualification provisions under section I(g) wholly with heightened compliance obligations that DOL has added to the individual exemptions following section I(g) disqualifications that would apply in the event of a criminal conviction that does not relate to the QPAM's services to clients.

DOL has already determined, in a number of cases, that continued operation of a disqualified QPAM is in the interests of the plan, its participants and its beneficiaries upon the imposition of additional protective conditions under the individual exemption process. Further, Section V of PTE 84-14, added by amendment in 2010, provides relief to allow a QPAM to manage its own plan or the plan of an affiliate. In this context, due to the lack of independence, DOL has imposed additional protective conditions of written policies and procedures to maintain compliance (Section V(b)) and to have an independent auditor affirm such compliance on an independent basis. These additional protective conditions could be applied in the event a QPAM is convicted of a crime.

Further, DOL has an established history of granting individual exemptions to QPAMs disqualified under Section I(g). DOL has addressed the majority of Section I(g) disqualifications through the individual exemptions process (although DOL has denied individual exemptions to at least two, and perhaps three, disqualified QPAMs).[30] These individual exemptions were granted based on

[30] *See* Greg Farrell & Elizabeth Dexheimer, *U.S. Bars RBS from Managing 401(k)s in Rare Warning to Banks,* Bloomberg (Oct. 14, 2016), *available at* https://www.benefitnews.com/advisers/news/us-bars-rbs-from-managing-401-k-s-in-rare-warning-to-banks (last visited Sept. 16, 2022) (discussing the denial of an individual QPAM exemption for Royal Bank of Scotland and an Och-Ziff Capital Management Group conviction which is presumed denied because there is no record of DOL granting the exemption); Brian Croce, *DOL Denies BNP Paribas Exemption to Manage U.S. Retirement Assets*, Pensions & Investments, Dec. 21, 2018, *available at* https://www.pionline.com/article/20181221/ONLINE/181229952/dol-denies-bnp-paribas-exemption-to-manage-u-s-retirement-assets. (last visited Sept. 16, 2022).

conditions intended to monitor compliance that could easily be built into the class exemption itself for QPAMs. Individual exemptions granted by DOL following conviction have typically required compliance with ERISA's fiduciary duty provisions, the adoption of written policies and procedures and training to ensure compliance, and independent audits to confirm compliance.

***DOL Should Impose Two Tiers of Consequences Depending on the Type and Relevance of the Conviction.*** In the event DOL continues to believe that the automatic disqualification of a QPAM is appropriate and in the interest of Plans, participants, and their beneficiaries, the NCCMP asks DOL to reserve disqualification only for the most egregious convictions at the QPAM level involving ERISA Plan assets. All other convictions should trigger an automatic imposition of heighted compliance standards without loss of the exemption. Specifically, in the event DOL does not agree that disqualification is inappropriate in all cases, we request the DOL to consider a two-tiered impact in which crimes that do not arise out of the QPAM's provision of services to ERISA plans automatically trigger the additional protective conditions that are typical of the individual exemptions issued to date and without further consequence.

## III. Proposed Winding-Down Period

***The Winding-Down Period Should Be Suspended Pending DOL's Determination of Whether to Grant an Individual Exemption.*** The Proposal would provide relief from immediate disqualification by way of a one-year winding down period.[31] The NCCMP agrees that the one-year winding down period is an improvement over immediate disqualification provisions of section I(g). However, the winding-down period needs to be restructured into two distinct periods: the first to allow a QPAM to apply for an individual exemption, and the second period to prevent disruption and assist plans in the event a transition is needed to a new QPAM. The NCCMP is requesting suspension of the winding-down period to allow the Department to consider a QPAM's application for individual exemption and to allow multiemployer plans to make an orderly transition to a different QPAM if needed when the individual exemption consideration process is completed.

The duty of prudence requires that a multiemployer plan's trustees understand the costs of transitioning to another QPAM (including lost opportunity costs, transition costs, portfolio redesign and strategy costs, and other costs for which indemnities will not compensate the multiemployer plan). Prudence also requires trustees to consider whether those costs will be unavoidable as a result of the QPAM's disqualification or whether the relationship can be continued without disruption. It is critical for multiemployer plan trustees to know if the QPAM will receive an individual exemption that will allow it to continue operations and whether and how those operations will be restricted, before those trustees make the decision to transition the QPAM's investment portfolio to a different QPAM. Therefore, the NCCMP urges the Department to suspend the winding-down period while the individual exemption application is pending. The period should only begin if the QPAM is disqualified as to all or part of its operations.

[31] 87 Fed. Reg. 45228.

***The Suspension of Investment Activity During the Winding-Down Period Should Be Eliminated.*** Section I(j)(3) of the Proposal provides that during the winding-down period, the QPAM may not engage in any new transactions for existing clients. The NCCMP requests that DOL eliminate this provision because it is neither in the interests of the plan and its participants, nor is it protective. Multiemployer plan investment portfolios often cannot be frozen to new investments. The portfolio may be constantly collecting a stream of income that must be deployed, many investment portfolios involve strategies that require ongoing transactions, and the investment portfolio itself may fluctuate with contributions and distributions. Further, transactions often happen in steps or otherwise part of a multiemployer plan's ongoing investment strategy. To restrict the ongoing execution of those strategies is at the detriment of the plans and their participants. During the winding-down period, multiemployer plans need QPAMs to continue to make new investments to fulfill the needs of the plan, which includes both buying and selling securities. To freeze investment transactions might also lead to an imbalanced investment portfolio which is not prudent.

## IV. Other Provisions

***QPAM Records Should Be Available Only to Plan Fiduciaries, the Department of Labor, and the Internal Revenue Service.*** Section VI(t) of the Proposal would require a QPAM to keep records "necessary to enable…persons…to determine whether conditions of this exemption have been met with respect to a transaction for a period of six years from the date of the transaction that is reasonably accessible for examination." While the NCCMP does not object to a recordkeeping requirement, the NCCMP does object to the practicality of having to keep records sufficient for a determination of compliance. In many cases, this will increase the cost of compliance substantially.

Further, to whose satisfaction must such a standard be demonstrated? While the QPAM can expect to demonstrate compliance in the context of a DOL investigation or an Internal Revenue Service audit, it is unreasonable to ask the QPAM to produce documentation for parties other than the plan fiduciaries. Such requirements may be costly and could raise frivolous litigation risk which in turn, ultimately raises expenses for multiemployer plans. Only DOL and the Internal Revenue Service have enforcement authority and the statute does not permit either to delegate that authority. This provision should be withdrawn in its entirety.

***Increase in Capitalization Requirements.*** The NCCMP respectfully requests that DOL maintain the current thresholds for assets under management and capitalization for any QPAMs already providing services to multiemployer plans to prevent disruption in asset management. Such grandfathering should also apply to any future increases as they are implemented. Finally, the NCCMP questions the necessity of this provision in the absence of any showing of harm under the present thresholds and requests DOL to reconsider this change.

## Summary and Conclusion

In closing, we appreciate the efforts of the DOL to protect the interests of participants and beneficiaries, however we are very concerned that DOL's implementation of this Proposal will, in fact, have an opposite effect. We are concerned that the Proposal will limit multiemployer plans'

access to QPAMs and increase multiemployer plan costs significantly, which ultimately are borne by the active workforce through their collectively bargained contributions. These consequences would impose significant harms to multiemployer plans, participants and beneficiaries. The NCCMP requests that DOL withdraw the Proposal and issue a new proposal, subject to notice and comment, that preserves QPAM status for plan asset managers in circumstances that do not impose risk of harm to multiemployer Plans.

Executive Director

Regards,

Michael D. Scott
Executive Director