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October 11, 2022

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitutional Avenue N.W.
Washington, DC 20210

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

Ladies and Gentlemen:

This letter provides comments on behalf of T. Rowe Price Associates, Inc. and its affiliates (collectively, "T. Rowe Price") with respect to the proposed regulation entitled Proposed Amendment to Prohibited Transaction Class Exemption 84-14 ("the QPAM Exemption") issued by the U.S. Department of Labor ("Department").[1]

About T. Rowe Price

T. Rowe Price Associates, Inc. serves as investment adviser to the T. Rowe Price family of mutual funds and, along with its affiliate T. Rowe Price Investment Management, Inc., provides advisory services to collective funds maintained by its affiliate, T. Rowe Price Trust Company. Through mutual funds, collective trusts, and its sub-advisory and separate account management services, T. Rowe Price provides investment services to retirement plans of all sizes. As of June 30, 2022, more than two-thirds of T. Rowe Price's $1.3 trillion in total assets under management were related to retirement plans.

Overview

We are very concerned with proposed changes to the QPAM Exemption. While the primary purpose of the Proposal is to protect retirement plan participants, we believe these changes do not reflect the modern complexity of the financial services industry and would interfere with investment management functions that benefit plans. These changes may increase the costs for retirement plans, reduce investment opportunities for the plans, and result in fewer asset managers providing services to plans – all without a commensurate benefit to plans.

The QPAM Exemption has been in place since the early 1980s and has been widely used by asset managers with discretionary authority over Employee Retirement Income Security Act of 1974 ("ERISA") plan assets to navigate the statute's broad prohibited transaction rules. It permits a qualified professional asset manager ("QPAM") to engage in transactions with "parties in interest" to a plan[2] and is a critical compliance tool, permitting investment management firms like T. Rowe Price to conduct ordinary business and engage in routine transactions in an environment where plan clients and counterparties have complex structures and relationships. In this kind of environment, QPAM status is a practical necessity. For example, the QPAM Exemption is critical to being a 3(38) investment manager, signing trading agreements, and investing in certain opportunities. The changes to the QPAM Exemption could hinder investment managers' ability to provide asset management services to ERISA-governed plans.[3] We offer the following comments for your consideration.

[1] 87 Federal Register 45204, July 27, 2022.
[2] Pursuant to section 4975 of the Internal Revenue Code of 1986, as amended ("Code"), the QPAM Exemption also applies to Individual Retirement Accounts and disqualified persons. However, for simplicity, our letter refers only to plans and parties in interest.
[3] The set of investment opportunities for ERISA-governed plans is already limited by contractual constraints built into offering documentation for certain securities. To avoid operational and legal risks arising from the interaction of ERISA's plan assets rule, 29 C.F.R. § 2510.3-101, and ERISA exemptions like QPAM, some issuers craft their offering documentation to exclude ERISA-governed accounts (i.e., benefit plan

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The Proposal will increase retirement plan costs without accompanying benefits.

The amendment requiring the QPAM to include certain terms in contracts will substantially increase costs to plans because some qualified firms will be reluctant to serve and therefore forego providing asset management services to ERISA-governed plans. There are two primary reasons for this. First, the Department's required indemnification, which goes well beyond the traditional scope of compensating a plan for direct losses related to the investment manager's wrongdoing, will increase the financial risk associated with the loss of QPAM status. Second, investment managers will be reluctant to risk deprivation of the QPAM status without sufficient procedural protections.

1. Required Investment Management Agreement (IMA) Clauses, Including Indemnification

The Department intends to amend the QPAM Exemption to (1) include a requirement in Investment Management Agreements ("IMAs") that the QPAM agree to indemnify the Plan client against certain losses and costs associated with the investment manager's inability to satisfy the QPAM status and (2) specifically include various other provisions in IMAs.[4]

The breadth of the required indemnification is problematic. The required indemnification goes beyond traditional direct contract damages. It would force the investment manager to pay for losses that have more to do with the timing of the event than any wrongdoing or change in management approach between the old and new manager.[5] The scope is especially onerous given the flaws in the trigger events as discussed in comments below.

The requirement to add indemnification and other provisions to IMAs is also concerning from a timing, cost, and burden standpoint. The Proposal states that changes to the QPAM Exemption must be made 60 days after publication of the final amended Exemption in the Federal Register. This timing is unworkable in our view given that every IMA with ERISA plan clients would need to be revised, presented to the Plan fiduciary, negotiated, and finally executed within that time period. Contracts are holistic arrangements so in adding even one new clause, it is necessary to assess whether other provisions are impacted which increases the amount of time spent reviewing and negotiating changes by both the manager and the client. In addition, it is not unusual for an oversight body or committee of the plan to approve the new contractual provisions. It is unlikely that all of the required contractual steps could occur within the 60-day window. The rule similarly does not address the burden of this work, nor reflect the cost associated with attorneys drafting and reviewing these contract changes. To further illustrate the magnitude of the IMA amendment process, T. Rowe Price alone has more than 200 investment management agreements with ERISA plan clients. In our experience, even fairly straight-forward amendments that are beneficial to clients can take a significant period of time to finalize and may require outside

investors) from the set of investors eligible for the security. We believe the Department has experience with these types of exclusionary ERISA provisions from certain enforcement actions. By way of example, the following contractual provision has been excerpted from an offering document filed with the Securities and Exchange Commission and publicly available in the EDGAR database: "*The Purchaser is not, nor is it acting on behalf of, a 'benefit plan investor' within the meaning of 29C.F.R. § 2510.3-101(f)(2), as modified by Section 3(42) of the Employee Retirement Income Security Act of 1974 (such regulation, the 'Plan Asset Regulation', and a benefit plan investor described in the Plan Asset Regulation, a 'Benefit Plan Investor'). For the avoidance of doubt, the term Benefit Plan Investor includes all employee benefit plans subject to Part 4, Subtitle B, Title I of ERISA, any plan to which Section 4975 of the Internal Revenue Code applies and any entity, including any insurance company general account, whose underlying assets constitute "plan assets", as defined under the Plan Asset Regulation, by reason of a Benefit Plan Investor's investment in such entity*." We ask the Department to carefully consider how the proposed changes to the QPAM Exemption – the most well-known ERISA exemption – will impact the overall ERISA risk calculus for issuers of securities, including whether the Proposal may inadvertently cause a proliferation of these types of exclusionary ERISA provisions in offering documents and further limit investment opportunities for plan participants and beneficiaries.

[4] Other required provisions in the IMA include not restricting the ability of a plan to terminate or withdraw from the arrangement with the QPAM, not imposing unreasonable fees, penalties or charges on client Plans related to terminating or withdrawing from the arrangement, and not employing an individual that participated in the conduct subject to a Criminal Conviction or Written Ineligibility Notice. Subsection I(g)(2) of the Proposal.

[5] Although the Proposal describes the indemnification as restricted to "actual losses that directly result to them [the plan] from violation of applicable laws, a breach of contract, or any conduct that is the subject of Criminal Conduct or Written Ineligibility Notice" the definition of actual losses goes well beyond direct damages, and includes costs associated with unwinding transactions and transitioning to a new manager.

counsel review. The rule's burden calculation of one hour and two minutes severely underestimates the burden of these contractual changes.[6]

It is also important to note that a variety of other agreements such as trading and derivatives agreements, stable value contracts with issuers, and various other investment agreements may contain QPAM-specific provisions.[7] If the amendments to the QPAM Exemption are adopted as proposed, we anticipate having to carefully review these provisions in all of those contracts and assess whether any adjustments are warranted. In addition, the other parties to these agreements would likely conduct a similar exercise and potentially request or require various amendments. These additional reviews and potential changes would be a significant additional undertaking beyond the proposed requirements to revise IMAs and far beyond what the Department has included in its cost and burden analysis.[8] For these reasons, we are not convinced that the proposed indemnification and other proposed IMA provisions are necessary to achieve the Department's policy objectives. [9]

2. Deprivation of QPAM Status After Prohibited Misconduct or Foreign Conviction.

While we support the goal of insuring that only upstanding firms serve as QPAMs, we believe the Department's Proposal to achieve that goal lacks sufficient procedural protections and may result in fewer qualified firms willing to serve as QPAMs.

Under the current QPAM Exemption, a firm is not eligible to utilize the Exemption for 10 years if that firm or any of its various affiliates is convicted of certain specified crimes. The Proposal expands this prohibition to a much broader (and less defined) range of conduct and events called "Prohibited Misconduct," which includes "conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted a crime." Further, a firm becomes ineligible to serve as a QPAM not only for actively participating in Prohibited Misconduct, but also if it, or any affiliate, knowingly approved or had knowledge of misconduct and did not take any "appropriate and proactive steps to prevent such conduct from occurring." This proposed definition of "prohibited misconduct" is impermissibly vague. Without a clear understanding between all parties of what determines a misstep, a firm cannot operate as a QPAM securely, let alone take action to avoid "active participation." If the Department wishes to restrict the category of those who should be able to serve as QPAMs, then it should specify with precision the conduct that will preclude use of the QPAM Exemption.

The Proposal provides that a firm would be ineligible to rely on the QPAM Exemption for foreign crimes or misconduct that are "substantially equivalent" to the Exemption's disqualifying domestic crimes or Prohibited Misconduct. This proposed change sets up a false equivalence between and among foreign jurisdictions and creates a situation where the Department becomes the arbiter of such equivalence. In some jurisdictions with well-developed legal systems, presumptions of innocence and other appropriate protections for those accused of crimes, this may be acceptable, but it is not acceptable if the foreign jurisdiction does not meet that standard. It is not clear that the Department is equipped to make this determination. Therefore, we believe the Department should not do so without providing the firm threatened with loss of QPAM status an opportunity to be heard, and – given the stakes – a determination by an independent decisionmaker.

Furthermore, the appeal process from foreign convictions presents serious concerns. The timing is very troubling because even if a firm appeals the conviction, it must go for an individual exemption to extend the period of time during which it can continue to operate, in a limited fashion, under the QPAM Exemption. Thus, based only on

[6] The Regulatory Impact Analysis states that the IMA's will require only one hour of legal work and two minutes of administrative work to email the updated agreement. 87 Fed. Reg. 45218.
[7] For a more detailed explanation of the issues specific to stable value contracts, we refer to the letter submitted by the Stable Value Investment Association.
[8] In its Regulatory Impact Analysis, the Department states that cost associated with the proposed changes to the Written Management Agreement "only would impose costs related to updating existing management agreements." 87 Fed. Reg. 45218.
[9] Moreover, we note that certain industry groups have raised questions about the authority of the Department to impose contract provisions as a condition of the Exemption. Please refer to letters submitted by the Investment Company Institute and the SPARK Institute, Inc. Regardless of whether the Department has the authority, we believe that the requirement to add indemnification does not protect retirement plans or their participants.

the determination of the Department and without sufficient opportunity to appeal, a company could lose the QPAM Exemption and have to wind-down[10] and indemnify all costs of the client. Faced with this choice, investment managers may choose to forego reliance on the QPAM Exemption. Given the importance of the QPAM Exemption to asset managers servicing ERISA plans, this outcome would narrow the available asset manager choices for retirement plans.

The Department's own regulatory flexibility impact analysis demonstrates the negative impact of these rules on the retirement community. The proposed changes create untenable and costly burdens on QPAMs that will potentially reduce the availability of asset managers serving ERISA plans, but, additionally, the Department is expecting a number of firms currently operating as QPAMs to lose the exemption due to the proposed changes. Initially, the Department stated that the proposed changes would not have a significant impact on a substantial number of small firms. However, after consulting with the Small Business Administration's Office of Advocacy, the Department published an Initial Regulatory Flexibility Analysis (IRFA) explaining its possible impact on small entities.[11] According to these estimates, there are approximately 600 QPAMs in the world and the Proposal is expected to disqualify 16 per year (eight by conviction, plus another eight due to Prohibited Misconduct). Therefore, the Department anticipates that this rule will reduce the QPAM marketplace by more than 25% during the next 10 years (i.e., the period of ineligibility). The IRFA completely ignores that plans and participants will pay significantly more for services when the pool of QPAMs is reduced in this manner. Consequently, rather than protecting retirement plans and their participants, the proposed changes will reduce investment options for participants and increase their costs.

The Proposal will restrict investment opportunities because the Proposal misconstrues how investment managers function today.

We also recommend clarifications to the language regarding the portion of the Proposal that would make the QPAM Exemption unavailable if a party other than the investment manager has any part in "planning, negotiating or initiating" a transaction. While we understand the Department's desire to prevent the QPAM Exemption from being abused, the last sentence of proposed section I(c) of the QPAM Exemption should be deleted as it is overly broad and could prohibit a range of important and routine trading and investment activity by asset managers as discussed below.[12]

In our experience, good ideas for potential investments come from a number of sources. Like other investment managers, we sometimes derive investment ideas from third party research generated by firms that we have carefully analyzed and validated through a rigorous due diligence process and that are on our approved list of providers.[13] Other times, potential investment opportunities are presented to us by broker-dealers, banks or other counterparties with which we have long-standing relationships and are familiar with the types of securities, derivatives and other transactions that are likely to fit our investment thesis. Examples of these opportunities include newly issued securities, availability of securities in a broker-dealer's inventory that are in limited supply,

[10] We also have concerns about the timing of the wind-down period. Should the ability of a QPAM to rely on the Exemption end immediately an undue burden may be placed on the plan, by severely limiting the former QPAMs ability to manage the plan's assets effectively until the plan can transition to a replacement QPAM. Without the ability to enter new transactions using the QPAM Exemption, the former QPAM may be limited in its ability to manage the plan's assets within existing plan directed investment guidelines; thereby immediately impacting the plan's risk allocations and limiting the plans potential investment opportunities that would have otherwise been available to the plan, or otherwise preventing the former QPAM from acting in the best interest of the plan. We support the recommendations made by trade associations such as eliminating the condition that, during the winding down period, the former QPAM "may not engage in new transactions after the Ineligibility Date in reliance on this Exemption for existing client Plans or automatically extending the wind down period while an application for an individual exemption is pending. Please refer to comment letters submitted by the SPARK Institute and the Investment Adviser Association.

[11] 87 Federal Register 56912, September 16, 2022.

[12] Specifically, this sentence in the proposed amendments to the sole responsibility portion of the QPAM Exemption states ["n]o 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 part, and presented to a QPAM for approval because the QPAM would not have the sole responsibility with respect to the transaction as required by this Section I(c)."

[13] Given T. Rowe Price's emphasis on active management, we place great importance on research. While we firmly believe original research produced by our internal analysts is the primary driver of value-added performance, in certain cases research created or developed by third parties serves as a complementary input to T. Rowe Price's investment process.

and investments in certain limited partnerships. In addition, a broker-dealer who has been engaged by the issuer or a selling shareholder about selling shares in a confidentially marketed offering may contact a manager to gauge the manager's interest and receive feedback on anticipated pricing. In each of these instances, we carefully evaluate – independently – whether the investment opportunity is appropriate for our various advisory accounts. These firms play an important role in the market for investment managers, and their involvement in a transaction that the investment manager opts to pursue for the portfolio of assets over which the manager has investment discretion and serves as fiduciary should not deprive the manager of its QPAM status. In sum, failure to remove the constraint on "initiation, planning and negotiation" will have a chilling effect on these types of activities and other similar interactions and would detract from the ability to achieve beneficial plan investment objectives. The potential reduction in the type and sources of research that an asset manager could utilize for the benefit of its clients would be an unfortunate outcome and we urge the Department to modify proposed Section I(c) as we've recommended above.

Conclusion

While we recognize the Department's desire to update the QPAM Exemption, we are very concerned that the proposed amendments will have the opposite impact of the Department's intent. Instead of protecting plan participants, the Proposal will limit firms' willingness to serve as QPAMs, increase costs and deprive plans of access to valuable investment opportunities, all without materially improved protection for plan participants.

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We appreciate the opportunity to provide our perspectives on the Proposal. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

Aliya Robinson
Managing Legal Counsel