October 11, 2022

Submitted electronically via www.regulations.gov

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Proposed Amendments to the QPAM Exemption (EBSA-2022-0008)

Dear Sir or Madam:

On behalf of the American Benefits Council ("the Council"), we are writing to express concerns with the U.S. Department of Labor's (DOL) proposed amendments to Prohibited Transaction Class Exemption 84-14 ("the QPAM Exemption"). The Council does not believe that DOL should be adding any new categories of QPAM conditions that would make it more difficult for plan sponsors to retain their investment managers. Additionally, as discussed further below, the Council is concerned about how the proposal would effectively prohibit QPAMs from accessing key investment options that plan sponsors need to manage the risk in their plans.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

OVERVIEW

The prohibited transaction rules contained in the Employee Retirement Income Security Act (ERISA) and Internal Revenue Code ("Code") are intentionally overbroad

and prohibit nearly every transaction between a plan and a "party in interest," which is a term defined to include sponsoring employers, fiduciaries, service providers and their affiliates. In the absence of relief, these rules would generally make the management of plan assets incredibly inefficient as there may be thousands of parties in interest to track and avoid in a single transaction. Furthermore, in circumstances involving collectively managed assets, it would be virtually impossible, in the absence of relief, to manage plan assets as there is virtually no way to track and avoid every party in interest for every plan when dealing with many different plans sponsored by many different employers.

Fortunately, and consistent with congressional intent, DOL has granted administrative exemptions from the prohibited transaction rules to enable a wide range of transactions and arrangements that are necessary and beneficial for routine and customary plan operations. The QPAM exemption is one of the most important exemptions that DOL has granted because it broadly permits certain large financial institutions to direct plan funds into arrangements that incidentally involve parties in interest without any conflicts of interest or potential for self-dealing, notwithstanding the technical prohibited transactions that may result. This important relief substantially reduces compliance burdens, permits investment in necessary and beneficial products and creates efficient markets for such products. The exemption has been in place for almost 40 years and, while DOL has updated the exemption several times, DOL has never proposed such sweeping changes.

These routine and customary transactions are exactly the types of arrangements that employer plan sponsors hire investment managers to perform on behalf of their plans in an effort to maximize returns and minimize costs. Thus, QPAM status and compliance with the exemption is generally a legal and business necessity for any plan hiring an investment manager.

If an investment manager does not satisfy each and every condition of the QPAM exemption, it is not eligible for relief and is prohibited from entering into many of these necessary and beneficial arrangements that incidentally involve parties in interest. This loss of relief can be devastating to a plan's investment strategy as it may require the plan sponsor to unexpectedly switch its investment manager.[1] This is particularly concerning in the context of retirement plan management because investment managers are often hired to execute long-term investment strategies that would be harmed by inconsistent management or abrupt changes to a plan's manager. It is also concerning because plan sponsors cannot suddenly replace investment managers who fail to qualify for the QPAM exemption. Such a switch would not only require extensive due

[1] As discussed below, DOL's current proposal includes a framework for a new type of "winding down period" for investment managers who are disqualified from relying on the QPAM exemption. Even this relief, however, which is unworkable as proposed, only delays temporarily all of the challenges and disruptions that are caused when a plan must unexpectedly replace an investment manager.

diligence by an employer plan sponsor, it would also disrupt any strategies that were originally designed or authorized by the manager being replaced. We understand, for example, that it typically takes about two years for a large plan to switch investment managers, following a thorough request for proposal (RFP) and vetting process.

Rather than replacing a manager who fails to qualify for the QPAM exemption, it is also possible for a plan to tentatively retain the manager and wait to see if the manager can obtain an individual exemption providing retroactive relief. This approach, however, is speculative and can create substantial uncertainty for any affected plan sponsor. Furthermore, while retroactive individual relief has been granted by DOL to handle QPAM violations in the past, plan sponsors and their investment managers cannot assume that such relief will necessarily be granted by DOL in the future. And even assuming for the sake of argument that individual retroactive relief can be obtained, affected plans and investment managers cannot know in advance the conditions that will be required in exchange for relief.[2]

Because relief under the QPAM exemption is essential to the management of ERISA plan assets, the Council is concerned about all of the newly proposed categories of QPAM conditions that, if violated, would prevent an investment manager from engaging in the transactions that it has been hired to perform by an employer plan sponsor. The Council appreciates that many of the newly proposed conditions are intended to protect plans and participants. However, the risks created by each of these new conditions and the unfortunate consequences that would result from even the most minor violations far outweigh the indeterminate benefits and modest protections that could result from many of DOL's proposed changes.

The Council believes that the QPAM exemption has worked well for nearly 40 years and has facilitated countless transactions to the benefit of plans and participants. Furthermore, we believe that the types of conditions imposed through the current QPAM exemption are appropriately protective of the interests of plans and participants in the circumstances that it covers. Thus, in these circumstances, which present no risks in terms of the harms and abuses that ERISA's prohibited transaction rules are intended to prevent, DOL should not be unnecessarily adding conditions that could abruptly and severely thwart the options that are available to plan sponsors and their investment managers. In this regard, we would note that it is concerning that DOL is proposing to add a series of new conditions to the QPAM exemption. The preamble accompanying DOL's proposal offers no examples or evidence of how plans or participants have been harmed or inadequately protected by the terms of the current exemption.

---

[2] *See* Proposed Labor Reg. § 2570.30(g) ("The existence of previously issued administrative exemptions is not determinative of whether future exemption applications with the same or similar facts will be proposed, or whether a proposed exemption will contain the same conditions as a previously issued administrative exemption.").

NEW CONDITIONS UNNECESSARILY JEOPARDIZING QPAM RELIEF

The Council is urging DOL to reconsider and remove all of the proposed QPAM conditions that would add new categories of conditions to the exemption. This includes, for example, the removal of: (1) the proposed provisions limiting the potential universe of investments that may be considered by QPAMs; (2) the proposed provisions newly requiring certain contract terms in all investment management agreements; (3) the proposed expansion of the events that would result in an investment manager failing to qualify as a QPAM; and (4) the proposed reporting and recordkeeping requirements.

The Council believes that all of these new conditions will either inhibit the ability of investment managers to serve their clients' interests, or only offer modest or indeterminate benefits to the plans and participants that they are intended to benefit, while also materially increasing the expense of a plan obtaining QPAM services. Thus, in light of the potential risks and harms that would result from any violations of these newly proposed conditions, we believe that each of these changes should be removed from any final rule. Additionally, as discussed further below, we have unique concerns regarding each of these proposed conditions that further warrant their removal.

New Limitations on Investment Options Available to QPAMs

The Council is very concerned about how the proposal would substantially limit the universe of investment options that are available to QPAMs and the parties that QPAMs may consult before executing any transaction in reliance on the exemption. In particular, the Council is concerned about the language in the proposal that would prohibit "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."[3] The Council believes that, when executing a strategy on behalf of its clients, a QPAM should be permitted to consider the entire universe of potential investments that fall within the scope of the exemption's broader conditions and QPAMs should be permitted to consult anyone who may provide relevant information or appropriate direction, even if such considerations result in a transaction that was planned, negotiated, or initiated by a party in interest. Accordingly, we strongly urge DOL to remove this new condition.

For example, because an employer plan sponsor is a party in interest to its own plan, the proposed prohibition on transactions that have been planned, negotiated, or initiated by a party in interest would prevent plan sponsors from planning, negotiating, or initiating investment transactions and strategies to be executed by their investment managers in reliance on the exemption. It is very concerning how, in this case, DOL's proposal would effectively limit the ability of sponsoring employers to participate in investment decisions regarding their own plans. Additionally, these proposed changes

[3] Proposed QPAM Exemption, Section I(c).

could discourage discussions between plan sponsors and their investment managers out of a fear that such discussions could prevent reliance on the QPAM exemption.

In this regard, it is critical to note that plan sponsors often hire multiple investment managers to execute the plan's overall investment strategy, with each manager often being given certain assets to manage in a particular manner. Since only the plan sponsor knows the overall strategy, it is natural and beneficial for the plan sponsor to be able to have ongoing dialogues with their managers without those dialogues disqualifying the manager from serving as a QPAM.

As another example, we understand that, in the fixed income and derivatives markets, broker-dealers and other financial professionals constantly present opportunities to investment managers, thus clearly "initiating" at a minimum. Conversely, investment managers often request investment opportunities that are appropriate for their clients and that have already been planned, negotiated or initiated by these outside professionals. In these over-the-counter markets, broker-dealers and other investment professionals play a critical role in connecting investment managers to beneficial investment options and helping investment managers understand what is available in the market. Investment managers cannot effectively access these critical risk-managing investments on their own without involvement by third parties.

If adopted as proposed, QPAMs would be prohibited from consulting with parties in interest, including broker-dealers and other investment professionals, who could otherwise advance the interests of a QPAM's clients by bringing the QPAM valuable insights and opportunities. Furthermore, for pooled and collectively managed funds, this new prohibition could potentially exclude investment managers from accessing these options altogether, as the vast majority of broker-dealers are likely to be a party in interest to at least one participating plan. As a result, some plan fiduciaries may need to discontinue their plans' participation in pooled and collectively managed funds that may have been selected, in part, for their potential cost savings.

As long as the QPAM has the ultimate discretionary authority and responsibility for deciding whether to enter into a given transaction, the Council does not believe that a QPAM should be prohibited from pursuing these types of transactions merely because it is planned, negotiated, or initiated by a party in interest. As ERISA fiduciaries, QPAMs must exercise prudence in evaluating every investment transaction that they enter into on behalf of their clients. Also, as ERISA fiduciaries, they retain ultimate responsibility for any transactions that they enter or approve. Investment managers take these responsibilities seriously and do not merely act as a "rubber stamp" for transactions that are presented to them by third parties, especially when considering the liability that could arise from a single fiduciary breach. These fiduciary responsibilities do not, however, mean that the QPAM should or must be the party that originally conceives of every transaction that it eventually executes. Such a construct would shut out their ERISA clients from valuable opportunities that are facilitated by third-party

investment professionals, placing ERISA plans at a disadvantage relative to asset managers' non-ERISA clients.

Newly Required Provisions for All Investment Management Agreements

According to the proposal, a QPAM would not be eligible for relief unless its investment management agreements include a provision contractually requiring each QPAM to "indemnify, hold harmless, and promptly restore actual losses to the client Plans for any damages that directly result to them from a violation of applicable laws, a breach of contract, or any claim arising out of the conduct that is the subject of a Criminal Conviction or Written Ineligibility Notice of the QPAM."[4] For this purpose, "actual losses" are expressly defined to include, "losses and 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 Code section 4975 as a result of a QPAM's inability to rely upon the relief in the QPAM Exemption."[5] Although these newly required provisions are apparently intended to help protect plans, participants and plan sponsors, the Council is concerned about this proposed provision because it will create significant legal and implementation costs for QPAMs in ways that will increase pricing for investment management and limit employer choices.

Impact on Pricing

First, this new requirement would dramatically increase the amount and types of risk that investment managers will be required to assume and, as a consequence, increase the cost of investment management services for ERISA-covered plans. Effectively, it would require investment managers to insure any losses or costs that may result from a manger's loss of QPAM status, even if the QPAM has otherwise fulfilled its fiduciary duties with respect to the plan. This type of protection will necessarily affect pricing.

When hiring investment managers today, employers have the ability to freely negotiate the prices they are willing to pay, the services they expect to receive and how the risks associated with those services will be allocated among the parties. In negotiating their agreements with investment managers, the Council's members can make fully informed decisions about each of these elements to achieve the balance that is most appropriate for their plans. If, however, DOL requires every investment management agreement to include the above-described terms as a condition for relief, the Council is concerned that our members will lose this important flexibility and, as a consequence, will be forced to accept the higher investment management fees that will be needed to account for the manager's increased risk. As ERISA fiduciaries, investment

[4] Proposed QPAM Exemption, Section I(g)(2)(C).

[5] Proposed QPAM Exemption, Section I(g)(2)(C).

managers must be liable for any fiduciary breaches.[6] Beyond this liability, however, we believe that plan sponsors and investment managers should be permitted to freely negotiate the terms of their agreements.

Implementation

Second, from a practical standpoint, these new conditions would require plan sponsors and investment managers to amend existing agreements that were the product of careful negotiations. We have heard from our plan sponsor and investment manager members that the process involved to interpret the indemnification requirement, propose precise terms and negotiate such terms will be extremely long, difficult and expensive. We do not understand the statement in the preamble to the proposal stating that "[f]or each QPAM, DOL estimates it will take one hour of in-house legal professional time to update and supplement their existent standard management Agreements . . ." First, drafting amendments by the QPAM could take months alone. Second, the preamble effectively indicates that plan sponsors will accept the QPAM's draft amendments without review. We are not aware of any of our plan sponsor members that would simply accept the QPAM's amendment without extensive review and likely revisions; it could, in fact, be a fiduciary breach not to review the proposed amendment carefully. Third, the negotiations could easily take a year or more.

Additionally, there may be certain circumstance involving pooled and collectively managed funds where, because of their collective nature, the ability to negotiate individual terms for individual plans is limited. In that case, if a plan sponsor does not believe that the contract terms presented by an existing fund manager fully satisfy the exemption's new requirements, the plan sponsor may determine it is necessary to replace the fund, notwithstanding the fact that the plan sponsor would otherwise conclude that the fund continues to be a prudent option for its plan.

In short, this is a difficult and complicated process and will take much longer than 60 days to appropriately implement. Furthermore, if an agreement is not revised within this short window, the consequence of such a failure would apparently be the loss of the exemption.[7] In this case, the potential penalties and harms that would result from such a loss are not justified by the benefits that would be achieved by the addition of these provisions. Finally, if these new contractual terms are retained in the final rule, we

[6] ERISA § 410.

[7] As the proposal is drafted, the loss of the exemption is not clearly limited to transactions involving clients that fail to have the proper contractual terms in place. If these new contractual requirements are retained in any form resembling the proposal, DOL must make clear that the absence of the necessary contractual provisions with respect to a particular plan will not result in the loss of the exemption with respect to transactions involving plans for which the necessary provisions are in place.

urge DOL to consider a "grandfather" for existing agreements and a transition period of at least one year for new agreements.

Expansion of Disqualification Events

The Council is concerned with how the proposal would: (1) expand the types of conduct that can disqualify a QPAM to newly include conduct that forms the basis of a non-prosecution agreement, deferred prosecution agreement, or its equivalent;[8] and (2) give DOL significant discretion in determining whether to disqualify a QPAM through the issuance of a "Written Ineligibility Notice."[9]

Non-Prosecution & Deferred Prosecution Agreements

The Council is especially concerned about the proposed conditions regarding non-prosecution and deferred prosecution agreements because they could unnecessarily prohibit an investment manager from relying on the QPAM exemption, even when it has not been convicted of a crime or otherwise been found to have engaged in unlawful conduct. Non-prosecution and deferred prosecution agreements do not typically involve a finding of fault and are often used in circumstances when there are reasonable disagreements about whether or not a company has engaged in any unlawful conduct.

If these provisions are included in DOL's final amendments, QPAMs and their affiliates will no longer enter into these types of agreements, even when they would result in the most efficient resolution of any legal uncertainty facing a QPAM. This is because, when faced with the possibility of losing their entire ERISA business, investment managers will be forced to vigorously and exhaustively defend against all prosecutorial activity. This is not an efficient use of an investment manager's or regulator's resources when the facts and/or law are uncertain and a settlement agreement presents the best resolution for all interested parties. If DOL continues to explore this new condition, we strongly encourage DOL to consult with DOL of Justice and the Securities Exchange Commission to get a better sense of how its proposed changes would impact their enforcement abilities. Additionally, if DOL concludes that it must add new conditions regarding these agreements, we alternatively recommend that, instead of disqualifying a QPAM based on these types of agreements, DOL condition its relief upon any QPAM that enters into one of these agreements notifying each plan it manages that: (1) the QPAM has entered such an agreement; and (2) the plan can terminate its relationship with the QPAM if it chooses to do so, without penalty.

[8] Proposed QPAM Exemption, Part VI(s)(1)-(2).

[9] Proposed QPAM Exemption, Part I(g)(3)(B).

Written Ineligibility Notice Procedures

With regard to the other proposed procedures regarding Written Ineligibility Notices for "Prohibited Conduct," the Council is concerned that the proposal grants DOL too much discretion in disqualifying a QPAM and that the proposed process for issuing these notices lacks procedural safeguards for parties who may disagree with DOL's assessment.

Investment managers seeking to rely on the QPAM exemption, and the plans that they serve, must be able to confidently rely on the exemption without concern for disqualification based on discretionary standards. Unlike the bar on criminal convictions, the proposal does not provide guidance on when DOL may choose to exercise its authority to issue a Written Ineligibility Notice. Thus, it appears possible that two similarly situated entities could receive different treatment from DOL. Additionally, the proposal fails to objectively define key terms, such as what DOL means by a "systematic pattern or practice" of violating the exemption or what it means to provide "materially misleading" information in connection with the exemption. For example, because the QPAM exemption is used to provide relief for transactions that may occur many times each day, any violation of the exemption's conditions could arguably create a "pattern" of violations if the QPAM enters into more than one transaction after the violation. All of this creates uncertainty for the regulated community.

Moreover, we are concerned about how the proposed procedures would only give investment managers a very limited opportunity to rebut the allegations included in the proposed disqualification proceedings, without independent review. For example, we find it concerning that investment managers would only be granted the right to have one conference with DOL to respond and would only be given a total of 50 days to prepare such a response. This is not enough time to appropriately investigate and respond to claims that could effectively prevent an investment manager from servicing its ERISA clients. It is also concerning given the consequences that any appeal would be made to DOL, as opposed to a third party.

New Reporting and Recordkeeping Requirements

Under the proposal, each QPAM would be required to report their reliance on the exemption to DOL and update this reporting if there is a change in the legal or operating name of the QPAM. Additionally, the proposed exemption would newly condition its relief upon each QPAM maintaining records for six years to demonstrate compliance and to make such records reasonably accessible to: (a) state and federal regulators; (b) plan fiduciaries, contributing employers and contributing employee organizations; and (c) any participant or beneficiary invested in a fund managed by the QPAM.

As discussed above, we are generally concerned with how each of these new conditions unnecessarily increases the risk that an investment manager could lose reliance on the QPAM exemption, while only providing modest or uncertain benefits to plans and participants. For example, in the event that a QPAM changes its legal or operating name, we do not believe that a transaction should become ineligible for relief solely because the investment manager fails to notify DOL about the change. The potential consequences for such a failure – *i.e.*, the loss of the exemption for all of the manager's ERISA assets – are far too severe for the violation.

We are also concerned about the proposed recordkeeping and disclosure requirements because we do not believe that they would provide any benefits to the parties who could request and obtain such information. State and federal regulators already have the authority to request and subpoena records from the entities that they oversee. Plan fiduciaries, employers and employee organizations already insist on receiving confirmation of their investment manager's QPAM status through representations and commitments included in their investment management agreements. And finally, in the case of plan participants and beneficiaries, we cannot think of any way that participants and beneficiaries could meaningfully use this information, except to file a lawsuit against a fund manager or plan sponsor. For example, we do not believe that participants and beneficiaries could use the information produced as part of such a request to assist in any decisions that they might make about allocating their 401(k) accounts among different investment managers available through their plan. Thus, we are concerned that these requirements will increase investment management costs, without providing any meaningful benefits.

PROPOSED WINDING-DOWN PERIOD

The Council is also concerned about the new "One-Year Winding-Down Period" described in the proposal because, as proposed, it would not actually provide any relief. As proposed, in the event that a QPAM is disqualified due to a criminal conviction or Written Ineligibility Notice, the QPAM would be required to satisfy a series of conditions for a one-year period.[10] Thus, we believe that the intent of this provision is to provide an investment manager a special type of QPAM relief for existing clients during the one-year period following the disqualification event, provided that a series of additional conditions, including client notices, are satisfied. Presumably, during that one-year period, DOL envisions any disqualified QPAM either: (1) requesting individual relief; or (2) transitioning its clients to a different investment manager.

[10] Proposed QPAM Exemption, Section I(j).

Very oddly, however, one of the conditions for the One-Year Winding-Down Period states that "[t]he QPAM may not engage in new transactions after the Ineligibility Date in reliance on this exemption for existing client Plans."[11] Thus, as proposed, the One-Year Winding-Down Period expressly denies any relief that it might seek to create. No relief is needed prior to the disqualification and, as a result of the prohibition on "new transactions," no relief is available after the disqualification.

For many reasons, including operational and legal reasons, it is critical that DOL provide a workable winding-down period. For example, if the manager of an investment fund is abruptly disqualified and can longer engage in transactions in reliance on the QPAM exemption, it would be very difficult from a fiduciary perspective to continue making such fund available on an investment menu that is offered to employees in a participant-directed plan, such as a 401(k) plan. Such a change, however, creates challenges because it is not operationally feasible for plans and their service providers to simply remove an investment option overnight. In this regard, we understand that most recordkeepers typically require at least 90 to 120 days to implement any changes to a plan's investment lineup. Additionally, from a legal standpoint, ERISA imposes notice and disclosure requirements on plans when making changes to their investment lineup. These notice and disclosure rules, which have detailed timing rules, trigger a variety of difficult issues for plan sponsors to consider and implement.[12] Failure to comply with these notice requirements also exposes plan fiduciaries to potential fiduciary liability and significant civil penalties.[13]

Assuming that the unworkable prohibition described above is eventually removed, the Council would welcome and appreciate some type of "winding-down period" to provide QPAM relief to investment managers who become disqualified, while seeking to obtain an individual exemption or transitioning clients to a new manager. As mentioned above, however, the process for replacing an investment manager for a larger plan typically takes more than one year. Accordingly, we would request that, in

---

[11] Proposed QPAM Exemption, Section I(j)(3).

[12] *See* Labor Reg. § 2550.404a-5(c)(1)(ii) (requiring disclosure of any change to a designated investment alternative at least 30 days, but not more than 90 days, in advance); Labor Reg. § 2520.101-3(b)(2) (requiring a blackout notice to be furnished at least 30 days, but not more than 60 days, in advance of a blackout period); *see also* Labor Reg. § 2550.404c-1 (conditioning 404(c) relief on compliance with the requirement of Labor Reg § 2550.404a-5; ERISA § 404(c)(4) (requiring at least 30 days, and no more than 60 days, advance notice to obtain fiduciary relief for a qualified change in investment options); Labor Reg. § 2550.404c-5(c)(3) (requiring notice at least 30 days in advance of the date of any first investment in a qualified default investment alternative). We recognize that some of these regulations contain exceptions to the timing requirements for unforeseeable events beyond the control of the plan administrator and when the notice period would result in violation of ERISA's prudence rules. Nonetheless, there is uncertainty about when these exceptions are available and, as a practical matter, it is critical that plan fiduciaries and participants have sufficient notice of changes to the plan menu.

[13] Labor Reg. § 2550.404a-5(b); 87 Fed. Reg. 2328, 2338 (Jan. 14, 2022) (increasing civil penalties under ERISA § 502(c)(7) to $152 per participant, per day).

addition to permitting new transactions as discussed above, DOL extend any winding down period to a period of at least two years.

Additionally, although a winding down period would help provide flexibility to plan sponsors in the event that a QPAM is disqualified, the costs, effort and disruption associated with replacing a manager are substantial. Similar concerns also arise when a plan sponsor must wait to see whether its manager can obtain individual relief. Accordingly, because of the harms and disruptions that are created for plans in the event of a disqualification, the Council is urging DOL to be extremely cautious not to use any potential winding down period as a justification for adding new conditions to the exemption that could result in the disqualification of a QPAM.

The Council is also very concerned with DOL's statement in the preamble to the proposal that a QPAM's failure to satisfy the conditions of the winding-down period "would affect the availability of relief for all transactions covered by this exemption," which DOL says would include "relief for past transactions and any transaction continued during the one-year winding-down period."[14] Loss of exemptive relief for transactions that occurred before a QPAM's ineligibility date is unworkable and would indefinitely create uncertainty regarding the application of the exemption for every transaction. DOL should clarify that any loss of exemptive relief due to a QPAM's failure to comply with the conditions of the winding-down period is prospective and not retroactive.

EFFECTIVE DATES

General Effective Date

According to DOL's proposal, any amendments to the QPAM exemption would become effective 60 days after the date of publication of the final amendment in the Federal Register. The Council does not believe that this 60-day period provides adequate time for plan sponsors and investment managers to prepare for these changes. For example, as noted above, we do not believe that the proposed changes requiring certain provisions to be included in investment management agreements can be appropriately implemented within this window. Investment managers will need to propose new language, plan sponsors will need to review these changes with counsel and it is reasonable to expect that some negotiations will ensue, in some cases, taking up to two years. Sixty days for all of this activity is unrealistic.

[14] 87 Fed. Reg. 45204, 45211 (July 27, 2022).

Need for Grandfathering

DOL's proposal would expand the events that can cause a QPAM to be disqualified from relying on the exemption for a period of 10 years. This would include, for example, a potential 10-year disqualification based on non-prosecution agreements or deferred prosecution agreements entered into prior to the final rule's effective date. Because those agreements could have been entered at a time when they were not relevant to QPAM disqualification, if such provisions are retained, the Council requests that DOL provide grandfathering relief for any such agreements entered or agreed to prior to the publication of the final amendments. As discussed above, if the disqualification provisions regarding these agreements are retained in the final rule, this will significantly alter any company's decision to enter into these agreements and the consequences that such agreements will have for their business.

* * * * *

Thank you for your consideration of our comments. If you have any questions or if we can be of further assistance, please contact me at 202-289-6700 or at ldudley@abcstaff.org.

Sincerely,

Lynn Dudley
Senior Vice President, Global Retirement & Compensation Policy