125 High Street
Oliver Street Tower, 5th Floor
Boston, MA 02110
Tel. 617-357-5200
www.wagnerlawgroup.com

Submitted Electronically

December 16, 2022

The Honorable Lisa Gomez
Assistant Secretary
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

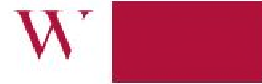
RE: Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption) Application No. D-12022

Dear Secretary Gomez:

The Wagner Law Group appreciates the opportunity to comment on the amendment (Proposed Amendment) proposed by the U.S. Department of Labor to Prohibited Transaction Exemption 84-14, a class exemption which generally covers transactions between a party in interest and an employee benefit plan or individual retirement account (referred to collectively as "plans") that is managed by a qualified professional asset manager (QPAM). The Wagner Law Group is a full-service law firm with a specialized practice in the Employee Retirement Income Security Act of 1974, as amended (ERISA), also advising asset managers that act as QPAMs as well as employers in their capacity as sponsors of employee benefit plans. Wagner generally supports certain aspects of the proposal but has concerns regarding aspects of the Proposed Amendment that would be overly burdensome and reduce the effectiveness and purposes of the QPAM Exemption.

Background

ERISA §408(a) allows the Department to grant administrative exemptions from all or part of the prohibitions of ERISA §406 to classes of fiduciaries or transactions. Under the QPAM Exemption, relief is available from the party in interest restrictions of ERISA §§406(a)(1)(A)-(D) for transactions between an "investment fund" in which a plan has an interest and a party in interest, provided that the investment fund is managed by a QPAM, such as a bank, federally insured savings and loan association, insurance company or registered investment adviser that is independent of the parties in interest and otherwise meets the requirements for being a QPAM. This exemption from the prohibited transaction rules is especially valuable for larger plans that have a multitude of party in interest relationships that are difficult to track.



The current requirements for being a QPAM involve minimum thresholds for equity capital or net worth. In addition, the power to appoint or terminate a QPAM cannot be held by the party in interest that is involved in the applicable transaction. So that a QPAM will not be unduly influenced, the current QPAM Exemption also requires that the assets of a plan under the QPAM's management, combined with the assets of similar plans sponsored by related employers, may not be greater than 20% of the total client assets managed by the QPAM. Further, the exemption does not apply to transactions involving a party in interest related to the QPAM, for which purpose, a QPAM is considered related to a party only if the QPAM or the party have certain levels of ownership in one another.

By its terms, the current QPAM exemption does not apply to prohibited transactions listed in ERISA §406(a)(1)(E), (a)(2) and (b). Accordingly, it does not provide relief to fiduciaries regarding the prohibitions on self-dealing, conflicts of interest and kickbacks contained in ERISA §406(b) or the rules relating to investments in employer securities or employer real property.

General Comments on QPAM Exemption

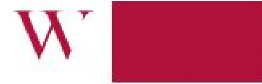
In our view, the current and prior versions of the QPAM Exemption have successfully served the interests of plans and their participants, but we believe that certain aspects of the Proposed Amendment would increase costs and impose burdens on the plans and their participants and beneficiaries in contravention of the Department's goals. Accordingly, we recommend that the Department should reconsider certain elements of the Proposed Amendment as follows:

I. Reporting to the Department

The Proposed Amendment requires QPAMs to report to the Department by email notice that they are relying on the exemption and to provide an updated notice if there are changes to the QPAM's legal or operating name. The Department will also maintain a list of the entities relying on the QPAM Exemption on its website. This proposed requirement does not appear to provide a material benefit, financial or otherwise, to plans. In fact, such requirement may result in confusion to the extent that there are any errors or updating delays in the Department's proposed QPAM list. To date, the Department has never imposed a reporting obligation for plan fiduciaries or any other party as a general condition for exemptive relief in its class exemptions. The interests of a plan and its participants would not be further served or protected by the Department's establishing and maintaining such a list on its website. We further note that the Proposed Amendment does not provide for any notice period, so it would be required for QPAM compliance that any entity seeking exemptive relief would have an immediate, and logistically challenging, need to notify DOL of any change in the legal or operating name of the entity.

II. The Written Management Agreement and Indemnification Obligation

The Proposed Amendment would require a QPAM to include in its written management agreement specific provisions giving plan clients the ability to terminate or withdraw from the arrangement without the imposition of fees, penalties, or charges in the event of the QPAM's ineligibility under the QPAM Exemption. The QPAM must also "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 or an Affiliate." Presumably, these changes are driven by the Department's views that the "fundamental premise of Section I(g) is to require QPAMs to act with integrity." However, a QPAM is already obligated to acknowledge its fiduciary status in a written management agreement in order to satisfy the "QPAM" definition under the current QPAM Exemption. Further, ERISA already provides comprehensive remedies for plan clients that incur losses as a result of an asset manager's breach of its fiduciary duties as confirmed and informed by longstanding case law (*e.g.*, ERISA Section 409 would require restoration of losses).

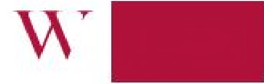
The proposed changes relating to the written management agreement for a QPAM appear to have unfavorably wide ranging administrative consequences – every agreement between a plan client and its QPAM will most likely need to be amended or renegotiated. The Proposed Amendment is overly broad as well, insofar as it would apply to breaches of contract or the law which are unrelated to the QPAM Exemption and its purpose. The Proposed Amendment would require such amendments within 60 days of finalizing the QPAM Class Exemption – a hurdle not easily cleared in the marketplace. The proposed indemnification language will create significant and unnecessary administrative burdens and costs for plans and those asset managers relying on the QPAM Exemption. The costs associated with these proposed provisions are hard to quantify and may require QPAMs to significantly raise fees or even exit the marketplace. Clearly, the risks that investment managers are required to assume will fuel the cost increases. Ultimately, these additional costs and burdens would be passed down to plans and their participants.

III. Foreign Convictions

The Proposed Amendment significantly broadens the categories of prohibited misconduct that could serve as the basis of ineligibility and disqualification for a QPAM. Specifically, it broadens the scope of disqualifying violations that may potentially be committed by the QPAM, its affiliates or owners of a five percent or more interest in the QPAM. While we understand the need to protect plans and their participants from bad actors, we are concerned with the automatic disqualification for foreign convictions as currently proposed.

The Proposed Amendment seeks to clarify that foreign crimes or misconduct that are "substantially equivalent" to the exemption's disqualifying domestic crimes or Prohibited Misconduct are included. The Department notes that "[a]n ineligibility provision that is limited to US federal and state convictions would ignore these realities and provide insufficient protection for Plans investing through a QPAM's international affiliates." Further, "[f]foreign crimes of the sort described in the proposed amendment call into question a firm's culture of compliance just as much as domestic crimes."

The Department appears to be imputing responsibility for individuals, of whom the QPAM has no control or even potential knowledge, based on the QPAMs mere association with an affiliated entity. Further, the determination of the "substantially equivalent" concept will add significant burdens for both QPAMs and the Department due to the lack of consistency among non-U.S. legal interpretations and applications. In addition, there may be convictions arising from bad faith prosecutions in foreign jurisdictions, especially those that are hostile to the U.S. and American companies, potentially resulting in an arbitrary disqualification of a QPAM. We are concerned that the Proposed Amendment may inadvertently disqualify asset managers who are in fact substantively



qualified and providing a necessary service for a plan and its participants. In the alternative, a disclosure-based approach that allows for foreign convictions to be reviewed on a on a case by case basis would provide the necessary protections and limit the burden to plans.

IV. Recordkeeping

The Proposed Amendment would require each QPAM to maintain records for six years as necessary to enable the Department, Internal Revenue Service, any other federal or state regulator, as well as any fiduciary, sponsor, or participant of any plan for whom the QPAM provides investment management services to determine that the conditions of the exemption were satisfied. State and federal regulators already have the authority to request, and if necessary, subpoena records from entities under their respective jurisdiction. There is no meaningful use of this information in the hands of participants or beneficiaries save the filing of a lawsuit. Providing access to such records to such a broad range of parties may be disruptive and add significantly to the burden of compliance, without any significant benefit to plans or their participants. We recommend that the Department narrow access to such records to the Department and the Treasury Department. This approach would be consistent with PTE 2020-02, where the Department originally proposed to give a similarly broad range of parties access to the applicable financial institution's records but ultimately decided that such access should be limited to the Department and Treasury Department in the final version of PTE 2020-02.

V. Higher Thresholds

The Department has proposed raising the "QPAM" definition's thresholds for asset management and capitalization and also making further adjustments to such thresholds annually for inflation. These higher thresholds may be problematic for smaller QPAMs, who may be at risk of failing to meet the required thresholds on a prospective basis as proposed. The resulting departure of smaller asset managers from the service market for QPAMs could increase the operational burdens and create transition costs for certain plans with no corresponding benefit. Further, the intent of the Department to index the thresholds annually will create further uncertainty for smaller asset managers who potentially may be unable to reach the adjusted thresholds in the future.

The Department should consider the potential "grandfathering" of existing QPAMs, delay the new thresholds, and consider other than annual increases to the thresholds.

Conclusion

The Wagner Law Group understands and appreciates the Department's need to periodically review and update its exemptions to reflect changes in the constantly evolving financial services industry. As previously discussed, the Proposed Amendment in its current form would significantly impact investment managers acting or seeking to act as QPAMs and those plan clients responsible for engaging or monitoring QPAMs. In its present form, we believe it will raise costs, add uncertainty to in the marketplace, and dissuade Plans and those seeking to act as QPAMs and counter-parties from undertaking transactions that will benefit the Plan and its participants. We urge the Department to provide for a transition period of at least twelve months following an amended QPAM Exemption so that impacted parties have a reasonable time frame within which to come into compliance

We are asking that the Department reconsider the Proposed Amendment and address the concerns raised herein and by others that have submitted similar comments. The aggregate of comments and testimony obtained by the Department indicate that a new economic analysis of the Proposed Amendment would be appropriate and helpful

Please feel free to contact myself, or my partners Stephen Wilkes (swilkes@wagnerlawgroup.comn) or John Sohn (jsohn@wagnerlawgroup.com) if you care to discuss any of our comments further. Again, thank you for the opportunity to comment.

Very truly yours,

Marcia S. Wagner
Managing Partner