NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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January 5, 2023

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 provide a supplemental 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).

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.

Nature of Supplemental Comment

This comment letter supplements the NCCMP's comments filed on October 11, 2022 (the "NCCMP Comment").[1] The NCCMP respectfully reiterates its comments in that letter and supplements those comments below. We continue to 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").

Summary of Supplemental Comments

The NCCMP remains concerned that the Proposal would increase plan expenses without providing any material incremental protection or value for plan participants. These increased costs 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.

The Proposal would also create further uncertainty and disruption by expanding the current disqualification provisions of PTE 84-14 section I(g). The Proposal's changes would ultimately create additional expense and harm for the participants and beneficiaries intended to benefit from EBSA oversight. The Proposal would hamper efficient and beneficial existing industry standard investment practices.

Further, the NCCMP remains concerned that the Proposal would devote 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 as specifically authorized under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Supplemental Comments

1. *Prohibited Misconduct Provisions That May Lead to Ineligibility Under Section I(g) Should not be Expanded.*

Section VI(s) of the Proposal would expand the events triggering ineligibility under PTE 84-14 section I(g) to include "any conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted a crime…." The NCCMP notes that the essence of a non-prosecution or deferred prosecution agreement is that the conduct has not been successfully prosecuted. Therefore, the conduct is not appropriate as a basis for disqualification.

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[1] *See* Comment Letter from Michael D. Scott, Executive Director of the National Coordinating Committee for Multiemployer Plans (Oct. 11, 2022) posted at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07//00020.pdf

Financial institutions, such as those serving as QPAMs, are subject to a number of "safety and soundness" regulators both domestically and globally. Domestically, these regulators include the Federal Reserve, the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency ("OCC"), the Securities Exchange Commission ("SEC"), the Commodities Futures Trading Commission ("CFTC"), the Financial Industry Regulatory Authority ("FINRA"), state banking and insurance regulators, and many others.[2] The fitness of a financial institution to provide investment management services appropriately rests in the hands of these regulators rather than the Department.[3]

In the event regulators with primary jurisdiction for oversight of the safety and soundness of financial institutions have determined that these financial institutions are fit to serve the public, then the Department should not substitute its own judgment in matters that are outside the Department's area of expertise and responsibility. If the Department disqualifies a QPAM on the basis of a non-prosecution or deferred prosecution agreement, in the absence of additional relief, the Department effectively precludes that QPAM from serving multiemployer plans capably in the manner that Congress intended.[4] Such a result would be incongruent with the actions of those regulators who are primarily responsible for safety and soundness of those very same financial institutions within the financial markets.

2. *The Scope of Parties Who May Trigger a Disqualification Should Be Narrowed to Require a Nexus to the QPAM's Business.*

PTE 84-14 section I(g) 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. 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.[5] An ownership interest as small as five percent alone can trigger disqualification.[6] The

[2] Congressional Research Service, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework*, Updated March 10, 2020, accessed at https://sgp.fas.org/crs/misc/R44918.pdf.
[3] Furthermore, even though an overseas affiliate of a QPAM is not directly regulated by one of these government agencies, by definition the QPAM itself is. QPAM 84-14, Part VI, section (a).
[4] *See* NCCMP Comment for further discussion and explanation that 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 serve employee benefit plans subject to ERISA where it is demonstrated that those business practices are in the best interests of plan participants and beneficiaries.
[5] *See* NCCMP Comment for further discussion and explanation of the negative impact of the overbroad reach of the parties who may trigger disqualification.
[6] 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).

NCCMP disagrees with DOL's unsupported assertion that remote convictions call a QPAM's integrity into question.[7]

Many of the larger financial institutions who serve as QPAMs have multiple entities without any nexus to the QPAM line of business, any of which, under the sweeping provisions of PTE 84-14 section I(g), could trigger a disqualification. To illustrate, the Legal Entity Identifier database at LEI-Lookup.com lists more than 1,027 legal entities for JPMorgan[8] and more than 2,700 for BlackRock.[9] The same database reports that JPMorgan Chase Bank, National Association lists over 90 subsidiaries or "children."[10]

Section I(g)'s expansive net covers hundreds, if not thousands, of entities within large financial institutions that have no meaningful connection or relationship to the services provided by the QPAM. 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.

The NCCMP asks the Department 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.

3. *The Suspension of Investment Activity During the Winding-Down Period Should be Eliminated.*

The NCCMP respectfully refers the Department to the NCCMP Comment's discussion of the necessity of having two separate distinct periods following any disqualification under PTE 84-14 section I(g). One period is needed to allow a QPAM to apply for an individual exemption. In the event DOL does not grant an individual exemption, or in the event the DOL grants a limited exemption that might restrict a QPAM's capability to fully manage the assets of a multiemployer plan, a second period is needed prevent disruption and assist multiemployer plans in transitioning to a new QPAM.

[7] 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.
[8] LEI search results for "JPMorgan", *available at* lei-lookup.com/record/?keyword=JPMorgan, *accessed on* Dec. 30, 2022.
[9] LEI search results for "Blackrock", *available at* lei-lookup.com/record/?keyword=Blackrock, *accessed on* Jan. 2, 2023.
[10] JPMorgan Chase Bank, National Association, LEI: 7H6GLXDRUGQFU57RNE97, *available at* lei-lookup.com/record/7H6GLXDRUGQFU57RNE97/, *accessed on* Dec. 30, 2022.

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 Comment explained that this approach is impractical and harmful to a multiemployer plan's investment portfolio. To freeze investment transactions in a multiemployer plan investment portfolio is infeasible. To supplement, and to illustrate, even a sale without a subsequent purchase is an investment transaction that represents a decision to invest in cash.

Summary and Conclusion

In closing, we appreciate the efforts of the DOL to protect the interests of participants and beneficiaries. However, the NCCMP remains very concerned that DOL's implementation of this Proposal would, 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. The Proposal would impose significant harms on 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.

Finally, we are enclosing a written version of the NCCMP's testimony presented at the November 17, 2022 hearing.

Regards,

Michael D. Scott
Executive Director

Attachment

Testimony of

Michael D. Scott, National Coordinating Committee for Multiemployer Plans

Presented November 17, 2022, before the Employee Benefits Security Administration of the United States Department of Labor

My name is Michael Scott, and I am the Executive Director of the National Coordinating Committee for Multiemployer Plans or NCCMP.

On behalf of the NCCMP, I want to thank the Department for allowing us to testify about the proposal ("Proposal") to amend prohibited transaction class exemption ("PTE") 84-14, the QPAM Exemption.

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 twenty million active and retired American workers and their families who rely on multiemployer retirement, health, 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.

As the Department is aware, multiemployer plans are typically organized as so-called "Taft Hartley Trusts" pursuant to the requirements of the Taft-Hartley Act. By definition, multiemployer plans always involve two or more employers, sometimes numbering in the hundreds or even thousands, and one or more unions.

Furthermore, these plans are administered by joint boards of trustees composed of equal numbers of employee (union) and employer representatives, and possibly one or more neutral Trustees. The number and complexity of these relationships can result in a very large number of "parties in interest."

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.

As a threshold matter, the NCCMP is particularly concerned that the proposed changes will significantly increase plan administrative expenses by making QPAMs more expensive and less available to plans.

We are also concerned that the proposed changes will increase investment expenses, reduce the ability to diversify the portfolio, and reduce investment returns for strategies for which QPAM's are often used, such as long-duration illiquid investments. All of which are to the specific detriment of the plan, its participants, and beneficiaries.

This is particularly true for multiemployer plans because the only money that a multiemployer plan has comes from the contributions of the active workers.

These contributions represent the collectively bargained deferred wages of the workers in these plans. As such, any increase in a plan's administrative or investment expense, or in the reduction of investment opportunity, must be made up either through increased contributions, which lowers the take-home pay of the active worker, or through a reduction of non-vested future benefits. Neither of which is in the interests of the plan, its participants or beneficiaries.

DOL's proposal reflects a fundamental misunderstanding of capital markets and the day-to-day investment practices and operations of employee benefit plans subject to ERISA.

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 overly broad 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.

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

DOL's Proposal suggests that the loss of QPAM status would not prevent an asset manager from effectively investing plan assets. The NCCMP believes that this reflects a poor understanding of the history and importance of QPAM's. For multiemployer plans, maintaining a list of parties in interest or disqualified persons, if at all possible, would be at an 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.

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 the extent the disposition of its assets is subject to the discretionary authority of the QPAM.

Alternative exemptions such as PTE 90-1 and PTE 91-3 are narrower 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.

Our written comments filed on October 11th provide our views in great detail on the specific changes that DOL has proposed to PTE 84-14. We note that each is contrary to nearly 40-years of established investment practice, contrary to the statutory intent of ERISA, significantly more expensive to plans than DOL's grossly simplified cost assumptions, and most importantly, impose significant harms to multiemployer plans, participants, and beneficiaries. We urge DOL to withdraw the proposal, and if needed, issue a new proposal for notice and comment that addresses the many concerns raised during the current notice and comment period.

Before I close, I want to provide a solution to Tim's QPAM identification question, which is simply to establish a QPAM code on the 5500 for service provider information. This would provide DOL with the information it says it needs in the most efficient manner.

Thank you for the opportunity to appear in this proceeding. In addition to the comments the NCCMP filed on October 11th, we will be filing a written version of this testimony. I look forward to addressing your questions.