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January 6, 2023

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

Re: EBSA-2022-0008; Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption); Supplemental Comment

Dear Assistant Secretary Gomez, Deputy Assistant Secretaries Khawar and Hauser and Mr. Cosby:

The Securities Industry Financial Markets Association ("SIFMA")[1] appreciates the opportunity to file a supplemental comment on the Department of Labor's Proposed Amendment to PTE 84-14, the class exemption for assets managed by a Qualified Professional Asset Managers (the "QPAM Exemption").

As every witness and commenter from the plan sponsor, investment advisory, counterparty, legal, banking and insurance community has testified or commented, the QPAM Exemption has worked extraordinarily well in allowing plans to access the investment markets over the past almost 40 years, facilitating retirement plans' access to a variety of investments, and allowing plans to operate on an efficient and effective basis. These witnesses and commenters were uniformly opposed to changing the exemption, citing the proposed changes as disadvantageous and harmful to plans, costly, unnecessarily burdensome and confusing, and in sum, not in the best interests of plans and their participants.[2] It is especially noteworthy that employers and plan

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] The only witnesses who testified to the contrary mistakenly believed that without the QPAM Exemption, section 3(38) Investment Managers would not be permitted under ERISA to manage plan assets. While Mr. Hauser corrected that impression, they did not appear to understand how the prohibited transaction provisions of ERISA

sponsors overwhelmingly agree that these changes are a mistake, and will hurt their plans' access to the markets. The QPAM Exemption is well understood and accepted by asset managers and by counterparties in various transactions with plans, including with borrowers in the financial markets. QPAMs, plans and parties in interest have developed well accepted approaches for allocating responsibility among themselves that permit plans to access markets efficiently and on an equal footing with other institutional investors. We respectfully submit that the Department's proposed changes do not meet the standards in section 408(a) of ERISA.

The remainder of this supplemental comment will address questions raised by EBSA staff during the public hearing on these proposed amendments that took place on November 17, 2022.

1. The Department suggested that the QPAM Exemption was giving investment managers "a pass" to violate the law, and this "pass" was the reason for the Department's concern. The Department noted: "We're permitting conduct that's otherwise illegal" and "a pass from compliance".[3]

   That view ignores the legislative history of ERISA and the Department of Labor's own actions and commentary in granting prior prohibited transaction exemptions. As written, the prohibited transaction provisions effectively prohibit pension plans from engaging in virtually any investment transactions, or indeed from hiring investment managers in the first place. Obviously, that was not the purpose of ERISA as evidenced by the statutory exemptions enacted in parallel to ERISA § 406. The point can be further illustrated by the fact that, when enacted, ERISA effectively prohibited pension plans from buying U.S. treasury securities, or any other securities for that matter from any person who was legally permitted to hold themselves out as a dealer in the securities. To correct this unfortunate overreach, the Department of Labor's first prohibited transaction class exemption permitted retroactive to the effect date of ERISA, pension plans to buy securities from registered dealers, among other things. The exemptions, including QPAM, the service provider and other statutory exemptions and the hundreds of regulatory exemptions that the Department has issued over the years, do not give investment managers a pass to violate the law. They facilitate the investment of plan assets, an activity on which the country's whole private retirement savings system is based. Without exemptions, plan assets could not be invested, and without the investment of plan assets, funding of plans would not make sense.

   In the legislative history of ERISA and its prohibited transaction provisions, Congress did not refer to the numerous statutory exemptions it granted as "a pass" or the permitting of conduct that is otherwise illegal.[4] Nor has the Department suggested, when asset managers routinely use the nearly two dozen statutory prohibited transaction exemptions

work, or the variety of other exemptions available to managers, none of which contain the restrictions that the proposed amendments would impose. One of those witnesses suggested that many large financial institutions had scores of DPAs, listing several of our members by name. All of those DPA totals were incorrect.

[3] Hrg. Tr. pp. 112, 177, 187, 234.

[44] See ERISA Conference Report, page 309: "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 performs fiduciary functions in connection with these plans consistent with adequate safeguards to protect employee benefit plans."

that Congress explicitly added to the law, or the several dozen class exemptions that the Department has itself granted, that these exemptions were a "pass" from compliance with the law. Nothing in the history of the QPAM Exemption indicates that this exemption is anything other than a utility exemption for sophisticated investment managers that has served the interest of plans and plan sponsors very well.

With a single very recent exception, the Department has not included a disqualification provision at all in any of its class exemptions. The exception is PTE 2020-02, which limits disqualification to the advisor convicted of a crime, and not to all of its affiliates and far flung related parties, The Department has never historically required registration by managers who were using the QPAM Exemption or any other exemption. Nor has the Department given itself the authority to take away the use of the exemption for systematic violations of its terms, presumably because the prohibited transaction provisions have their own built in consequence for failure to meet the terms with respect to every transaction executed under its aegis: the transaction must be reversed and an excise tax paid. It is unclear why the Department has veered so dramatically away from this overwhelming historic practice.

The ERISA conference report, and subsequent statutory exemptions enacted by Congress, make clear that everyday investment transactions are intended to be covered by statutory or class exemptions. For the Department to single out the users of the QPAM Exemption as the sole exemption that requires registration, monitoring, or the Department's imprimatur of integrity or oversight is arbitrary and capricious and, in our view, improper. It takes the most useful and accepted exemption and makes it cumbersome for parties and fraught with foot faults. In short, the proposed amendments plainly harm the plans and plan participants that the proposed amendment are intended to help. We urge the Department to withdraw and reconsider these amendments.

2. Mr. Hesse asked whether, if the Department were to remove the restriction on no new transactions during the winddown period, that restores at least a core utility for plans that would decide to withdraw from the [investment management] arrangement.[5]

   We believe that during the one-year period following the conviction, a QPAM with no direct involvement in the crime (i.e., if the crime was committed by one of the QPAM's affiliates) should be able to use the exemption for existing and new clients without limitation. During that period, the QPAM can either apply for an individual exemption or find other exemptions to employ for the benefit of its clients. We emphasize that there should be no requirement that a manager terminate its relationship with its clients, merely because it must use other exemptions. QPAM status is not and has never been a "gold seal" demonstrating the competence, ability, or fidelity of any particular investment manager. Where the QPAM itself is the convicted entity, one might want to consider whether they should be able to use the exemption for existing clients only, reflecting the likelihood that the Department will not provide individual exemptive relief.

[5] Mr. Hesse, page 40.

3. Mr. Hauser suggested that the ability of the Department to unilaterally disqualify a QPAM was based on "committing specified crimes, including substantially similar foreign crimes . . .essentially misleading the department about eligibility criteria and conditions and the exemption . . . and engaging in systemic violations of the exemptions and the exemptions conditions. . . ." Mr, Hauser asked: "Do you think there should be no ineligibility consequence if the QPAM itself . . . engages in this sort of enumerated felonies . . . ?[6]

   Mr. Hauser's question relates to a set of facts not contemplated by the amendments or even the original exemption. In both, the disqualification occurs if any 5% owner of a QPAM, or any controlled or in common control affiliate, is convicted of a crime. As our original comment made clear, we believe the exemption would be more administrable and equally protective if disqualification related only to the convicted QPAM, and not to the conviction of the QPAM's affiliates or 5% owners. In addition to all of reasons cited in our original comment on why foreign crimes should not be disqualifying, a US asset manager may have no substantive or practical business connection to a foreign affiliate other than through some level of common or direct ownership. A US asset manager will usually have a separate structure and operations from foreign affiliates including separate legal entities, boards of directors and executive officers, legal and compliance staff, supervisors, employees, policies and procedures and training. In addition, foreign criminal convictions are often not substantially equivalent to US criminal convictions. Foreign crimes may not be clearly denominated as felonies or misdemeanors and standards differ widely from country to country on substantive law, criminal procedure and due process. Therefore, a foreign criminal conviction of a foreign affiliate would not be reflective of a US asset manager's culture or integrity and should not disqualify a US asset manager from satisfying the QPAM exemption and managing US retirement plan assets.

4. Mr. Hauser asked whether "each fiduciary for each of the plans that are dealing with [a particular asset manager] would essentially be engaging in that . . same exercise in a circumstance where you have the foreign affiliate engaging and, you know, fairly significant criminal conduct that may or may not be a reflection of what the culture is?[7] In addition, Mr. Motta suggested that the question of whether the investment manager is acting with integrity is a matter for the department, and not each plan sponsor.[8]

   We agree with all of the witnesses at the hearing, and virtually every commenter on the exemption, that plan fiduciaries are the appropriate individuals to decide whether to retain a manager, unless a court, under section 411, bars that manager. Plan fiduciaries regularly engage in this diligence required on manager selection and retention, and are legally responsible for it. Accordingly, in our view, the Department should not relegate to itself a duty and responsibility that Congress assigned to plan fiduciaries. Mr. Hauser suggested that smaller employers do not have sufficient expertise to make these

[6] Mr. Hauser, page 47-8. See also page 54
[7] Mr. Hauser, page 58, 62
[8] Mr. Motta, page 70

decisions. We believe that they do have this ability, as do their consultants, and experience reflects that they exercise it regularly.

5. Mr. Hesse asked whether disqualification should affect the advisor only when the advisor itself was convicted of the conduct; in all other cases, the requirement should be that QPAM clients are notified, rather than a disqualification of the QPAM for non-QPAM corporate misconduct.[9]

   The answer to Mr. Hesse's question is clearly "yes". In particular, SIFMA's members believe that in the event of a conviction of an affiliate of the QPAM, clients should be notified of the crime and the QPAM's involvement, if any, in the crime. In the event that an asset manager is convicted of a crime, we believe that the processes set forth in section 411 should take precedence over any determination of the manager's use of the QPAM Exemption. If an asset management affiliate of the convicted QPAM is also using the QPAM exemption, it should be required to notify clients in writing, setting forth the crime, the involvement of the affiliate, and the extent to which it shared common compliance oversight. Conviction of an affiliate of the QPAM should have no disqualifying effect on the QPAM.

6. Mr. Hesse asked about the subadvisor relationships in collective trusts and the use of the QPAM exemption.[10]

   For a variety of considerable reasons (e.g., cost and efficiency), it is common for collective trusts to have two QPAMs involved in and responsible for aspects of management of trust assets. As Mr. Hesse noted "sitting at the top managing assets" is a QPAM, the trustee of the collective trust, which is responsible for setting up approved investment guidelines for a manager/subadviser to follow. That trustee will then hire a manager/subadviser (often an affiliate and also a QPAM) to negotiate and execute transactions in accordance with the prescribed guidelines set forth by the trustee. The Department's proposed changes would completely disrupt the dual QPAM structure that is commonly used by collective trusts and destroy the established relationship between trustee and manager/subadviser that has existed for almost 40 years. The Department's proposed changes could cause the QPAM Exemption to become unavailable where a manager/subadviser engages in negotiations in a transaction on behalf of a CIT even when the trustee has provided required guidelines and ultimately retains the full investment responsibility for the transaction. Such a result cannot possibly be the intent of the Department, nor would it further its objective to eliminate "rubber stamp" transactions.

   Subadvisory arrangements are among the most cost effective and efficient methods for plans that want to obtain a wide range of investment strategies from leaders in those strategies. Current law clearly permits a transaction to be "negotiated by, or under the authority or general direction of, the QPAM", allowing a trustee/manager to hire subadvisors, and pooled funds to delegate trading authority, often pursuant to "approved

[9] Mr. Hesse, page 98
[10] Mr. Hesse, page 163, 223; see also Mr. Cosby, page 169

lists" of investments, to others who are geographically or by industry, more focused on a subset of investments. The agreements between the trustee/manager and subadvisor clearly delineate responsibility and documentation provided to clients explains this relationship. This process has worked well, virtually without exception, for 40 years. We urge the Department not to make changes that will offer less choice and more expensive solutions to plans without a corresponding improvement in the safety or performance of such investment vehicles.

7. Mr. Cosby suggested that the reason all QPAMs would be required to register is because "it seems like that would be a useful data point for us, not only to know who's using the exemption . . . [but] how many QPAMs are actually out there."[11]

   As we noted earlier, requiring all managers to register with the Department, regardless of whether they once used the exemption for one client, or use it all the time, or use it just with respect to one type of transaction, provides no benefit to the Department or to the public. Moreover, it ignores the fact that street practice is that counterparties expect every large manager to represent that it is a QPAM and meets the terms of the exemption or another exemption. Accordingly, whether the manager is explicitly relying on the QPAM exemption, or PTE 75-1, or ERISA section 408(b)(17) or some other exemption, will not be evidenced by the registration the Department has proposed. If the Department wants to explore this data point, the Department should weigh the relative costs of the Department collecting this information from other agencies rather than requiring every manager to register. We also hope that the Department can consider whether there are any other avenues to obtain the information without putting plan transactions and plans themselves at risk by creating footfaults in the exemption itself.

8. Mr. Hauser asked whether a correction provision in the registration section of the amendments would "answer the problem".[12] The Department did not seem to fully comprehend that there would be so much disagreement about the registration requirement, which Mr. Hauser described as just sending an email saying "we are going to rely on the exemption as a QPAM".[13] He went on to say "are you seriously maintaining there's any administrative cost associated with that provision that should affect our analysis here."

   As noted earlier, a correction mechanism in the exemption does not answer the problem. Counterparties should not need to diligence whether the manager is properly registered or whether it has adequately corrected the failure to register. The benefit of this exemption, as several witnesses pointed out, is its clarity and simplicity; the conditions are easy to diligence and commonly understood. Making it harder to use and less attractive for counterparties to rely on is not in the interest of plans as counterparties could initiate transactions with other institutional investors who are not so shackled by additional compliance requirements. The issue is not the cost of sending an email; it is the

[11] Mr. Cosby page 171
[12] Mr. Hauser, page 174
[13] Mr. Hauser, page 182, 184, 230

disruption to the use of the exemption and the lack of utility in an email registration.[14] As noted above, if the Department realistically needs this information for this exemption when it has never needed it before and apparently does not need it for any other exemption, we respectfully suggest there are other paths forward.

9. With respect to the changes to section I(c) of the exemption, Mr. Hauser asked whether there is any objection, assuming the Department "doesn't mess up the language", to making clear that the QPAM Exemption is not just a rubber stamp for parties in interest.[15]

   As virtually every witness testified, it is already clear that the QPAM Exemption cannot be the rubber stamp for the plan sponsor, or anyone else. ERISA, case law, and the Department have made it abundantly clear that compliance with a prohibited transaction exemption does not demonstrate compliance with the fiduciary obligations under ERISA § 404(a). We see no benefit to adding language to the QPAM Exemption that reiterates a concept well-established through other sources. The language proposed by the Department is dangerous and overbroad, as discussed in SIFMA's original comment. We believe it would be useful to withdraw these changes and propose a set of examples which the Department believes are permissible or impermissible, and ask for public comment (or convene more informal roundtables) to elicit more helpful guidelines here.

10. Mr. Hauser asked if the witnesses would still have the same difficulty with the disqualification provisions if he were only talking about the QPAM itself, and not misconduct by its affiliates.[16] Mr. Hauser was then asked if he had considered that misconduct by the QPAM was covered by ERISA section 411 and he responded that "intentional violations of the exemption conditions, systemic violations of the exemption" – "we'd prefer those folks not rely on this exemption."[17]

    As discussed above, we believe the Department could reasonably apply a disqualification provision to a convicted QPAM itself. With respect to intentional violations of the exemption or systemic violations of the exemption, we respectfully point out that a manager violating the terms of the exemption is not relying on it; it is entirely unavailable unless all of its terms are met. A manager who gave the appearance of relying on the exemption but in fact violated its conditions (intentionally, systematically or otherwise) would be liable for violating Section 406(a) of ERISA and would be subject to all remedies available under Section 409 and 502 of ERISA. Such a manager would also be exposing itself to claims of engaging in fraud.

[14] Our original comment dealt with this point extensively on pages 9-11.
[15] Mr. Hauser, page 237
[16] Mr. Hauser, page 239
[17] Mr. Hauser, page 245

We appreciate the opportunity to provide comments to the Department and the extension of the due date beyond the holidays. We would be happy to meet with the Department, along with our members, who can speak more specifically to the difficulties presented by the Department's proposed amendments.

Sincerely,

Lisa Bleier

Lisa Bleier
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