AMERICAN BENEFITS COUNCIL

January 6, 2023

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 supplement our October 11, 2022, letter[1] and November 17, 2022, testimony expressing concerns with the U.S. Department of Labor's (DOL) proposed amendments to Prohibited Transaction Class Exemption 84-14 ("the QPAM Exemption"). Specifically, in response to questions and comments from Department officials during the November 17 hearing, this letter addresses: (1) the situations in which the Council believes automatic QPAM disqualification is appropriate; and (2) the inadequate process under Section I(g)(3)(B) of the proposed QPAM Exemption for issuing Written Ineligibility Notices in response to Prohibited Misconduct.

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.

At the outset, we want to emphasize a key point from our prior comment letter and our testimony: we are commenting on this proposal solely from the plan sponsor

[1] https://www.americanbenefitscouncil.org/pub/0ABBB8EF-ED72-3EB2-1E90-FD933025EF1F

perspective. Our plan sponsor members have underscored to us how disruptive it is to the plan and its participants to lose the services of a trusted and well-performing QPAM. Many investment strategies are quite complex and depend on an investment manager fully understanding the short-term and long-term needs and objectives of the plan. This understanding is often built up over years. It is very disruptive and harmful to be forced to give up this excellent relationship and engage in a lengthy and expensive search for a new investment manager with little or no history with the plan. It is this perspective that underlies much of our letter today, just as it was the foundation of our prior letter and testimony. By disqualifying a QPAM in cases where such treatment is not warranted, the proposal would be harming the plan and its participants.

SITUATIONS WARRANTING AUTOMATIC QPAM DISQUALIFICATION

One of the key discussions during the November 17 hearing revolved around the situations for which an investment manager may be automatically disqualified from relying on the QPAM Exemption. This discussion generally occurred within the context of the proposed QPAM amendments that would newly permit DOL to issue Written Ineligibility Notices in response to Prohibited Misconduct, and the existing rule that attributes the criminal conviction of a QPAM's affiliate or owner to the QPAM itself. As part of this discussion, DOL officials asked witnesses about the types of activity that should automatically disqualify an investment manager from relying on the exemption. Our comments below respond to this inquiry.

To begin, the Council would like to expressly clarify that it agrees with the general premise of the QPAM Exemption's integrity provision – Section I(g) of the current and proposed exemption. That is, the Council believes it is crucial that all investment managers who have responsibility over ERISA plan assets exercise their authority with integrity, and in the context of the QPAM Exemption, the Council believes that there are categories of misconduct that are so severe and so closely related to investment management services that they should automatically disqualify an investment manager from relying on the QPAM Exemption. For example, the Council believes that automatic disqualification should occur when the corporate entity that serves as a QPAM is convicted of a crime described in Section I(g) of the current QPAM Exemption.[2]

[2] Relevantly, this list includes: "Any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA."

Notwithstanding our view that certain categories of misconduct warrant automatic disqualification, as discussed in our October 11 letter and November 17 testimony, we are concerned that the proposed changes to the QPAM Exemption, and even some of the existing QPAM conditions, could automatically and inappropriately disqualify investment managers in far less severe and far more remote circumstances. Additionally, as discussed further in the next section of our letter, we are also concerned about situations under the proposal that would give DOL unilateral discretion to disqualify investment managers from relying upon the exemption. For these less severe, more remote, and more indefinite circumstances, the Council believes that plan fiduciaries are in the best position to determine whether an investment manager should continue providing services to their plan, and more measured regulatory responses should be adopted to prevent unnecessary disruption and costs for retirement plans and their participants. For example, in the case of a foreign affiliate who enters into a non-prosecution agreement in connection with conduct that is unrelated to investment management services, we do not believe that an investment manager should be automatically disqualified from relying on the exemption, as contemplated by the proposal.

With regard to these other types of activities, the Council is especially concerned about the possibility of automatic disqualification when it stems from conduct that is attributable to a QPAM's affiliate or owner, as opposed to the QPAM itself, or the unilateral discretion of DOL. While information about these activities is relevant to a fiduciary's decision to hire or retain an investment manager, an automatic disclosure of these activities would be a more appropriate regulatory response than automatic disqualification. That is, to avoid unnecessary disruptions and harms for their client-plans, the exemption should only require QPAMs to disclose information about these types of events to their clients. In the Council's view, many circumstances exist in which prudent plan fiduciaries would review this information and likely decide that it is in the best interest of their plans and participants to retain a successful and trusted investment manager, rather than force the plan to replace them.

PROPOSED UNILATERAL AUTHORITY FOR DOL TO DISQUALIFY QPAMS

Under the existing QPAM Exemption, only criminal convictions can result in the automatic disqualification of an investment manager. Although the Council has concerns with the substance of this rule when applied to the convictions of entities other than the QPAM itself, we believe that the process supporting this existing condition is workable and fair. That is, because disqualification can only occur as a result of a criminal conviction, disqualification can only occur when there is an actual finding of criminal wrongdoing by an independent third party. This inherently provides important procedural protections that should be in place before a QPAM can become disqualified.

As discussed in our October 11 letter and November 17 testimony, the Council has concerns about the proposed amendments that would authorize DOL to disqualify a QPAM through the issuance of a Written Ineligibility Notice in response to Prohibited Misconduct because these proposed changes would significantly lower the substantive and procedural bars for QPAM disqualification. For example, by authorizing DOL to disqualify an investment manager for entering into a non-prosecution or deferred prosecution agreement, the proposal would permit DOL to unilaterally disqualify a QPAM even when there has been no finding of criminal wrongdoing. In the case of Prohibited Misconduct other than a non-prosecution or deferred prosecution agreement, this is even more concerning since there is no basis for the decision, except DOL's unreviewed discretion.

Given the potential disruptions and harms that can result when a QPAM is disqualified, the Council is very concerned about these proposed procedures because they fail to provide independent review and adequate safeguards for parties who may disagree with DOL's decision to issue a Written Ineligibility Notice. As noted in our November 17 testimony, this is especially concerning because it would effectively permit DOL to block a party from using an otherwise available exemption without public consideration or comment.

During the hearing, DOL officials indicated that they understood the public's concerns about the inadequacy of the proposed process for issuing Written Ineligibility Notices and the public's desire for DOL to address those issues. The Council was encouraged by these comments and is hopeful that DOL's recognition of these concerns will result in meaningful changes to the proposal.

During the hearing, DOL officials also asked witnesses whether the proposal would be improved by eliminating the Written Ineligibility Notice procedures altogether, and instead, DOL could amend the QPAM Exemption so that investment managers would become automatically disqualified if they engage in activities that fall under the proposal's definition of Prohibited Misconduct but do not result in criminal convictions.

This approach would not work. First, in the case of non-prosecution and deferred prosecution agreements, this approach retains the fundamental flaw of disqualifying a QPAM without any finding of criminal wrongdoing. In the case of other Prohibited Misconduct, this approach would create substantial uncertainty about whether an investment manager qualifies as a QPAM, since a later unilateral decision by DOL could find that an investment manager was retroactively disqualified from QPAM status. This is especially concerning in light of the subjective standards embedded in the proposed definition of Prohibited Misconduct. If DOL has concerns about an investment manager's conduct, the Council believes that DOL should use its existing enforcement authority to address those issues, rather than jeopardizing reliance on an exemption that is relied upon to facilitate countless transactions that are beneficial and necessary for plan operations.

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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