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January 6, 2023

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

RE: Proposed Amendments to Prohibited Transaction Class Exemption 84–14

The signatories hereto appreciate the opportunity to submit our comments to the Department of Labor (the "***Department***") in response to the Department's recently proposed amendment (the "***Proposal***") to Prohibited Transaction Exemption 84-14 ("***PTE 84-14***" or the "***QPAM Exemption***").[1] We are a group of attorneys from leading international law firms who routinely advise plan sponsors, investment fiduciaries, fund sponsors, financial institutions and financial intermediaries with respect to the application of the Employee Retirement Income Security Act of 1974, as amended ("***ERISA***"),[2] including with respect to the application of PTE 84-14.[3] Our comments expressed herein do not seek to take sides on policy matters. Rather, we focus on the effects that we believe the Proposal would have on ERISA plans and the market, many of which may be unintended. We have provided alternative approaches for the Department's consideration wherever possible.

PTE 84-14 allows ERISA plans to efficiently and effectively access the financial marketplace. Prior to the adoption of PTE 84-14, ERISA plans maintained exhaustive lists of Parties in Interest (as defined below) to track whether a proposed transaction was prohibited and frequently requested individual exemptions for, or would forego, common transactions now covered by PTE 84-14.[4] PTE 84-14 has since become one of the most widely utilized prohibited transaction exemptions. ERISA plans,[5] investment fiduciaries and counterparties alike have become uniformly comfortable with the use of PTE 84-14 and the related representations, warranties and covenants that have developed in the marketplace across a wide range of transactions.[6] Throughout PTE-84-14's life, the Department has made few changes to PTE 84-14, and the market (including ERISA plans) has come to rely on its stability and efficient, yet protective, framework for avoiding non-exempt prohibited transactions under Section 406(a) of ERISA and Section 4975 of the

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[1] 87 Fed. Reg. 45204 (July 27, 2022).

[2] References to ERISA's prohibited transaction provisions herein include the parallel provisions of Section 4975 of the Internal Revenue Code of 1986, as amended (the "***Code***").

[3] We are: Elizabeth Dyer and Michael Albano of Cleary Gottlieb Steen & Hamilton LLP; Patrick Menasco and Bibek Pandey of Goodwin Proctor LLP; Matthew Rutchik of Katten Muchin Rosenman LLP; Josh Lichtenstein and Alexa Voskerichian of Ropes & Gray LLP; Erica Rozow, George Gerstein and Nicholas Prendergast of Simpson Thacher & Bartlett LLP.

[4] 47 Fed. Reg. 56947, 56945 (December 21, 1982).

[5] References to "ERISA plans" herein are intended to include all "benefit plan investors" as defined in Section 3(42) of ERISA.

[6] By way of example, PTE 84-14 is frequently utilized in connection with: (i) the management and operation of "plan asset" entities and accounts; (ii) swap transactions; (iii) structured finance transactions; (iv) sales; (v) leases; and (vi) loans and other extensions of credit.

Code. The extensive reliance on PTE 84-14 and the development of related market terms help streamline negotiations and reduce costs for ERISA plans.

In our experience, PTE 84-14 has successfully achieved its intended purpose—to provide broad relief, across a wide range of transactions, to ERISA plans represented by established, independent financial institutions (i.e., "qualified professional asset managers" ("***QPAMs***")).[7] As currently formulated, the Proposal would introduce significant changes to PTE 84-14's conditions for relief that we believe will disrupt the longstanding market stability provided by PTE 84-14 and have a chilling effect on the willingness of investment fiduciaries and counterparties to enter into transactions involving ERISA "plan assets." As a result, we fear that the Proposal would result in increased transaction costs and lost investment opportunities for ERISA plans, which would ultimately harm ERISA plan participants and beneficiaries. We do not believe that the Department intends for the Proposal to have a negative impact on ERISA plans or their participants and beneficiaries, and we urge the Department to withdraw the Proposal in its entirety. Further, should the Department decline to withdraw the Proposal we respectfully submit our recommendations with the hope that they will be helpful to the Department in refining the Proposal to mitigate any such unintended negative impact.

Below please find an executive summary of our recommendations followed by a more in depth discussion.

EXECUTIVE SUMMARY*:*

1. We recommend that the Department retain the current language of Section I(c) of PTE 84-14 and clarify its intent to the greatest extent possible (e.g., in the preamble to the final amendment, as applicable). Alternatively, we recommend that the Department retain the current language in Section I(c) and limit its changes to the addition of a single additional sentence describing those excluded practices, again, with as much specificity as possible.

2. We recommend that the Department withdraw the proposed changes requiring the inclusion of specific provisions in investment-related agreements (such provisions referred to herein as the "***Contract Provisions***"). If the Department retains a version of this proposed condition, we recommend: (i) grandfathered relief for existing agreements or a grace period of at least one (1) year before the Contract Provisions must be included in existing agreements; (ii) (a) clarification that the indemnity provisions set forth in the Contract Provisions only cover breaches/violations of ERISA or disqualification under Section I(g) of PTE 84-14, or (b) inclusion of indemnification by the QPAM for breaches/violations of ERISA or disqualification under Section I(g) of PTE 84-14 as a condition for relief under PTE 84-14 (instead of as a Contract Provision); (iii) clarification that the withdrawal/termination requirements set forth in the Contract Provisions must be included only if ERISA plans cannot withdraw from or terminate a contract on reasonably short-term notice under the circumstances; (iv) clarification that the Contract Provisions are only required if/when PTE 84-14 is *actually* utilized by an investment fiduciary under a specific investment contract; (v) clarification that the terms "pooled fund" and "QPAM-managed investment fund" exclude investment funds, entities and accounts that do not hold "plan assets" subject to ERISA and/or Section 4975 of the Code; and (vi) specification that the Contract Provisions can be incorporated into existing agreements through a negative consent process, regardless of whether the existing agreement permits negative consent.

3. We recommend that the Department withdraw the condition requiring a QPAM to notify the Department of its reliance on PTE 84-14. If the Department retains this condition, we recommend: (i) clarification of the subsequent notification obligations; (ii) a grace period of at least ninety (90) days (beginning on the date the notice obligation arises) for *all* notification obligations; and (iii) clarification that a good faith

[7] 47 Fed. Reg. 9494 at 9497 (March 13, 1984) ("This class exemption was developed, and is being granted by the Department based on the essential premise that broad exemptive relief from the prohibitions of section 406(a) of ERISA can be afforded for all types of transactions if the commitments and investment of plan assets and the negotiations thereto, are the sole responsibility of an independent investment manager.").

failure to comply with the notification obligations will not be treated as a failure to comply with the terms of PTE 84-14.

4. With respect to the adjustments to the "assets under management" ("***AUM***") and equity thresholds for QPAMs, we recommend: (i) adoption of the "incremental increase" alternative discussed in the initial regulatory flexibility analysis (the "***IRFA***"); and (ii) grandfathered relief for existing arrangements where a QPAM would fail to satisfy the conditions of PTE 84-14 solely due to an inability to meet the increased thresholds (or, alternatively, a grace period of at least one (1) year (beginning on the date of the final amendment's adoption) for compliance with the adjusted thresholds).

5. We recommend that the Department withdraw Section VI(r)(2) of the Proposal in its entirety because: (i) of the "probability" that determinations made through the lens of U.S. law will find "incompatibility" with foreign law;[8] (ii) the Department lacks the authority to make foreign law determinations; and (iii) the Department lacks expertise with respect to complex foreign law and legal process issues. Alternatively, we recommend that the Department defer to a court of competent jurisdiction for a determination that a conviction by a foreign court of a crime under foreign law is "substantially equivalent" to the list of offenses set forth in proposed Section VI(r)(1) or, at a minimum, provide a more formal and defined process pursuant to which the affected QPAM may meaningfully engage with the Department (i.e., where due process is afforded to the QPAM).

6. We recommend that the Department withdraw proposed Sections VI(s)(1)-(3) because the inclusion of non-criminal conduct in the definition of "prohibited misconduct" violates basic notions of fairness and may undermine competing interests of various regulators.

DISCUSSION:

1. *The Proposal's Modifications to Section I(c) Will Prevent or Complicate Many Commonly Occurring Transactions and Arrangements to the Detriment of ERISA Plan Participants and Beneficiaries.*

While we appreciate the clarity that the Department wishes to bring to PTE 84-14 with its proposed changes to Section I(c), we believe that these changes would have the unintended consequence of barring reliance on PTE 84-14 in connection with many common, longstanding investment practices. For that reason, we recommend that the Department retain the current language of Section I(c) of PTE 84-14 and clarify its meaning to the greatest extent possible (in supplemental guidance or in the preamble to the final amendment, if applicable). Alternatively, we recommend that the Department retain the current language in Section I(c) and limit its changes to the addition of a single additional sentence describing those excluded practices, again, with as much specificity as possible.

The preamble to the Proposal states that "[t]he Department anticipates that the modifications to Section I(c) will not change the costs of the exemption as compared to cost of the current QPAM Exemption because the *types of transactions that were intended to be excluded by current Section I(c) are the same types of transactions intended to be excluded by modified Section I(c)*" (emphasis added).[9] While we agree that the proposed changes to Section I(c) would prevent "rubber stamp" practices that were never intended to be covered by PTE 84-14, the new "sole responsibility" requirement and related clarification in the proposed final sentence of Section I(c) would also preclude reliance on PTE 84-14 where the investment fiduciary engages in common, longstanding investment practices (described below) that we believe to have been

[8] *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010) (later superseded by statute). For a more robust discussion of the principle underlying *Morrison*, see footnote 22 below.

[9] 87 Fed. Reg. 45204 (July 27, 2022).

historically permitted.[10] Eliminating PTE 84-14's application in these situations would unduly restrict the range of investment strategies and opportunities available to ERISA plans and disrupt existing relationships with their investment fiduciaries, thereby harming participants and beneficiaries. We do not believe the Department intends such a result.

Sub-Advised Accounts. Collective investment trusts ("***CITs***") are pooled vehicles in which ERISA plans frequently invest, given their favorable cost structures and the fact that ERISA and its fiduciary protections continue to apply to the plan assets invested in a CIT. The federal securities laws, exemptions therefrom and applicable Office of the Comptroller of the Currency rules require the bank/trustee of the CIT to exercise "substantial investment responsibility" and retain ultimate discretionary authority over the transactions in which the CIT engages. However, the bank/trustee often lacks the substantive expertise or practical ability to carry out all aspects of applicable investment strategies using internal resources. In these cases, the bank/trustee may rely on affiliated or unaffiliated sub-advisers with the ability to carry out transactions directly, albeit under the supervision and monitoring of the bank/trustee. The bank/trustee will typically set the investment guidelines, monitor for compliance and performance, and review trades after settlement for liquidation or other action. If the sub-adviser independently satisfies the QPAM eligibility requirements, it is common practice for the CIT to rely on the sub-adviser's QPAM Exemption to cover any transactions or trades directed by the sub-adviser, particularly where the availability of Prohibited Transaction Exemption 91-38 is uncertain because the CIT has investors holding more than a 10% interest in the CIT.[11] The bank/trustee's ongoing supervisory authority means that *neither entity has "sole responsibility."* Thus, if adopted as proposed, the Department's new language would appear to preclude sub-advised CITs from relying on PTE 84-14, a practice in which they have engaged for almost forty (40) years.

This same problem may arise in connection with sub-advised separately managed accounts. For example, it is a longstanding common practice for plans to permit a Section 3(38) "investment manager" to utilize affiliated or unaffiliated sub-advisers, on a fully discretionary basis subject to investment guidelines, so long as they retain full contractual responsibility for the sub-advisers' decisions. In such circumstances, neither the investment manager nor the sub-advisers will have "sole responsibility" over transactions.

We do not believe that the Department intends to preclude such common supervisory practices. Indeed, such relationships are not materially different from the classic relationship between a named fiduciary and a QPAM—in each case, the appointing fiduciary sets applicable guidelines, monitors performance and consistency with guidelines, and retains authority to modify or terminate the QPAM's mandate in whole or part, including by directing the liquidation of specific positions. In neither relationship is the QPAM relieved of substantive decision-making responsibility. Thus, whether the Department decides to clarify its intent (including, as applicable, in the preamble to the final amendment) or actually change the language in Section I(c), we recommend clarification that relief is not precluded if another entity has and may exercise authority to supervise (or be supervised by) the QPAM, including through setting guidelines, monitoring performance and adherence to such guidelines, and modifying or terminating the mandate, in whole or part, including by directing, on a one-off or programmatic basis, the liquidation of certain positions.

Transactions Not Initiated By the QPAM and Transactions Presented for QPAM Approval. The Proposal's "sole responsibility" requirement and new final sentence of Section 1(c) in the Proposal do not appear to permit many common investment transactions long believed to be covered because the terms of

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[10] Exclusionary language should be tailored as narrowly as possible to achieve the desired goal. Given that fiduciaries wishing to rely on an exemption bear the burden of establishing that its conditions have been met, the use of general or ambiguous language that is subject to broad interpretations will have an unintended chilling effect.

[11] Some CIT fiduciaries have been wary of relying on PTE 91-38 for relief for over 10% investors due to uncertainty over the meaning of its particular exclusionary language (i.e., "discretionary authority, control, responsibility or influence").

the transactions are fixed by the offeror (e.g., equity linked notes or secondary market offerings of debt) and the QPAM decides only whether (or not) to make the investment. As explained in the preamble to the Proposal, the proposed modifications would disallow relief "for any transaction that has been planned, negotiated, or initiated" by a "party in interest" under ERISA or a "disqualified person" under the Code (each, a "***Party in Interest***"), "in whole or in part, and presented to a QPAM for approval because the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c)."[12]

We believe that this would preclude relief in a broad range of situations, including, for example:

- a QPAM's decision to approve (or disapprove) of a bankruptcy settlement where the ERISA plan has an interest in the debtor, and that settlement has already been negotiated by lead creditors and the debtor, which could be a Party in Interest;

- a QPAM's decision to participate in a loan syndicate where the lead lender and borrower, which could be a Party in Interest, have already negotiated terms, and the QPAM's only decision is whether or not to participate; and

- a QPAM's decision whether to buy debt offered to the market on fixed terms by the issuer, which may be a Party in Interest.

To avoid unintended results such as those highlighted above, we propose removing the "sole responsibility" language and related new final sentence and including, instead—either in the preamble or the final exemption—a caveat to this effect.

Successor QPAMs. The Proposal's modifications to Section I(c) also introduce new challenges for a replacement manager stepping in as the QPAM for an existing investment portfolio. If the original QPAM becomes disqualified, is terminated or resigns, any replacement QPAM would inherit transactions negotiated by its predecessor that such replacement QPAM would not have entered into in its "sole responsibility"—and may, accordingly, be unable to rely on PTE 84-14 for a continuation of those transactions.[13] This is of particular concern for transactions involving ongoing extensions of credit and open-ended positions under derivative contracts for which a replacement QPAM would be required only to periodically consider whether to continue the transaction but not to renegotiate its terms. We recommend that the Department clarify that a replacement QPAM may rely on PTE 84-14 for ongoing transactions negotiated by its predecessor in reliance on PTE 84-14.

Subsidiary Transactions. Futures commission merchants and investment fiduciaries generally rely on PTE 84-14, under the "subsidiary transaction" doctrine, to liquidate, hedge and closeout cleared swaps (among other investments) held by defaulting plan investors. The "subsidiary transaction" doctrine extends PTE 84-14 relief to transactions subsidiary to a primarily covered transaction, even if such subsidiary transactions are not negotiated and specifically approved by the QPAM, provided that "the QPAM reviews the terms of the subsidiary transactions as part of its determination that the transaction, as a whole, is prudent and otherwise in the best interests of plan participants."[14] Such subsidiary transactions include "transactions that are authorized by default or other contractual provisions forming an integral part of a primary transaction negotiated by the QPAM, but that are contemplated to occur subsequent to the execution of a primary transaction," provided "the agreement governing the primary transaction includes

[12] 87 Fed. Reg. 45204 (July 27, 2022).

[13] The continuing relief provision in the Proposal's Section I(j) provides only a partial solution, as it ceases to apply whenever the QPAM decides to extend, modify or perhaps even simply continue an ongoing transaction.

[14] 49 Fed. Reg. 9494 (March 13, 1984).

specific provisions relating to the subsidiary transactions such that the QPAM can reasonably foresee their potential outcomes."[15] Accordingly, the Proposal introduces new challenges for transactions that rely on the "secondary transaction" doctrine under PTE 84-14 and the Department has not indicated whether the "subsidiary transaction" doctrine applies with respect to other exemptions.

2. *The Inclusion of the Contract Provisions will Create a Significant Burden for ERISA Plans.*

Under the Proposal, investment-related agreements that rely (or may rely) on PTE 84-14 would be required to contain the Contract Provisions (further described below). We appreciate that the Department intends the incorporation of the Contract Provisions to give ERISA plans the contractual tools to mitigate potential disruptions caused by a QPAM becoming ineligible. However, for the reasons discussed below, we believe that the significant burdens relating to compliance with this proposed condition (on both ERISA plans and investment fiduciaries) outweigh any potential future benefits.

The Contract Provisions are as follows:

- In the event that the QPAM or its affiliate (or a 5% or more owner) engages in conduct resulting in a "criminal conviction" or receipt of an "ineligibility notice" (each as discussed in the Proposal), ERISA plans must have the contractual right to withdraw from their arrangement with the QPAM without the payment of any fees, penalties or charges (except for certain reasonable fees that are adequately disclosed).

- The QPAM must contractually agree to (i) refrain from knowingly employing or retaining an individual who has participated in conduct that forms the basis of a conviction, non-prosecution, deferred prosecution agreement, or other disqualifying conduct that would make a QPAM ineligible; and (ii) "indemnify, hold harmless, and promptly restore actual losses to the client plans for any damages that directly result to them from 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."[16]

<u>*Existing Agreements and Timeframe for Compliance*</u>. In our experience, a single ERISA plan can have hundreds of unique investment-related contracts relying on PTE 84-14 (e.g., investment management agreements, "plan asset" fund agreements, bespoke derivative agreements and credit agreements). These agreements frequently do not follow a standard form but more commonly reflect careful drafting and negotiation (including, in particular, with respect to indemnification provisions) to address the individualized needs of the parties. Because the Proposal does not grandfather existing agreements, it would require each investment-related agreement to be reviewed and amended to incorporate the Contract Provisions. We believe that this amendment process would impose a significant burden on ERISA plans, investment fiduciaries and counterparties—i.e., a single ERISA plan and its service providers could spend hundreds of hours and incur related legal costs first identifying all in-scope agreements, then determining if alternative exemptions are available and, if not, finally negotiating changes, and this burden outweighs any potential future benefit. In addition, the Proposal provides an unrealistically short window for incorporation of the Contract Provisions (i.e., 60 days from adoption of the final amendment). By way of illustration, an ERISA plan's fiduciary committee, which regularly meet quarterly, would need to convene more frequently to review (likely in consultation with counsel) and identify any agreements that need to be amended and negotiate/approve amendments within this short time period. We expect that it will be particularly onerous for ERISA plan fiduciaries to negotiate the Contract Provisions with multiple

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[15] DOL Ad. Op. 2013-01A (February 7, 2013).

[16] 87 Fed. Reg. 45204 (July 27, 2022). "Actual losses" are defined as "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 [E]xemption."

counterparties at once, since, as noted above, existing contracts are typically not uniform. If the Department does not withdraw this proposed condition in its entirety or include a grandfather clause for existing agreements, the window for compliance with this proposed condition should be lengthened to at least one (1) year to provide sufficient time for thoughtful and efficient implementation.

Indemnification Provisions. As stated above, investment-related agreements frequently contain carefully drafted and negotiated bespoke indemnity provisions that can be difficult to amend in a straightforward manner. In addition to ERISA-specific clauses, these indemnity provisions typically address breaches and other violations unrelated to ERISA and/or compliance with applicable exemptions (e.g., PTE 84-14). Accordingly, we recommend that, if the Department does not withdraw this proposed condition in its entirety, it (i) clarify that the indemnity provisions cover only breaches of contract or violations of law arising under ERISA and disqualifications under Section I(g) of PTE 84-14; or (ii) include indemnification by the QPAM for breaches or violations of ERISA or disqualification under Section I(g) of PTE 84-14 as a condition for relief under PTE 84-14 (instead of as a Contract Provision).

Termination/Withdrawal Provisions. Termination/withdrawal provisions contained in investment-related agreements are typically carefully formulated to the liquidity profile of the underlying investments. If not properly tailored to the investment strategy, the exercise of withdrawal/termination rights could require an investment fiduciary to liquidate investments at a disadvantageous time. Further, in the context of pooled investment funds, investment fiduciaries are often precluded by the governing documents (or other applicable law) from granting more favorable termination/withdrawal rights to a subset of investors. We recommend that the Department eliminate the requirement that investment-related agreements incorporate the termination/withdrawal provisions where—echoing the conditions for relief under Section 408(b)(2) of ERISA—ERISA plans may withdraw from or terminate the services arrangements on reasonably short-term notice under the circumstances.

Technical Clarification. We recommend that, if the Department does not withdraw this proposed condition in its entirety, it should clarify that the terms "pooled fund" and "QPAM-managed investment fund" in the Proposal do not refer investment funds, entities or accounts that do not hold "plan assets" subject to ERISA and/or Section 4975 of the Code.

Transactions that are Eligible for Other Exemptive Relief. In our experience, it is not uncommon for investment-related agreements to contractually require compliance with "PTE 84-14 *or another applicable exemption*" or "PTE 84-14 *for so long as the entity/account holds 'plan assets' subject to ERISA and/or Section 4975 of the Code*." In other instances, investment-related agreements may reference PTE 84-14 but prohibited transaction relief may not be required (e.g., because there is no Party in Interest relationship or because an arrangement may be structured so that ERISA does not apply at all times).[17] Alternatively, another prohibited transaction exemption may be being relied upon. In the preamble to the originally proposed PTE 84-14, the DOL stated that, "with respect to continuing transactions, the exemption will be available if the conditions of the exemption were met either at the time the transaction was entered into or renewed, *or at the time the transaction would have become prohibited but for this exemption*."[18] To

[17] In the pooled investment fund context, it is not uncommon for a fund to be structured such that the fund *may*, at certain times, hold "plan assets" subject to ERISA and/or Section 4975 of the Code (i.e., because participation by "benefit plan investors" may not be "significant" at all times). Such funds may never actually hold "plan assets" and/or may rely on alternative exemptions such that PTE 84-14 is not needed. In addition, certain pooled investment funds that rely on a "plan asset" exception (e.g., the "venture capital operating company" or the "less than 25%" exception) may be required by ERISA-governed investors to agree that, in the unlikely event that such fund holds "plan assets," the GP/manager will meet the conditions to qualify as a QPAM. Lastly, certain ISDAs (swap agreements) include ERISA-related representations requiring a party to represent, warrant and covenant that either (i) it does not hold ERISA "plan assets" or (ii) PTE 84-14 will be applicable. In these circumstances, there may be no intent to rely on PTE 84-14 but the language may have been included so as not to deviate from the counterparty's form of agreement.

[18] 49 Fed. Reg. 9393 (March 13, 1984).

this end, if the Department does not withdraw this proposed condition in its entirety, adoption of the Contract Provisions should only be required if/when PTE 84-14 is actually utilized by an investment fiduciary under a specific investment contract.

Negative Consent. The incorporation of the Contract Provisions into existing agreements will, in many cases, require consent from ERISA plans, counterparties and, in the context of pooled funds, other investors (which may number in the hundreds or more for many pooled funds). Such consent may be difficult to obtain in a timely manner (if at all). Further, the stakes for failing to incorporate the Contract Provisions within the requisite time period are extremely high—i.e., the apparent loss of relief under PTE 84-14. Accordingly, if the Department does not withdraw this proposed condition in its entirety, it should specify, at least with respect to pooled funds, that the Contract Provisions can be incorporated into existing agreements through a negative consent process, regardless of whether the existing agreement permits negative consent.

3. The Reporting Requirement Reflects a Fundamental Change in the Nature of Relief Provided by PTE 84-14.

As currently formulated, the Proposal would require each QPAM to notify the Department (via e-mail) of its reliance on PTE 84-14 and provide the legal name of each business entity relying on PTE 84-14 and any name under which such QPAM operates. The Department intends to maintain a list of QPAMs on its public website. Additionally, a QPAM must notify the Department if there is a change in the legal or operating name of the QPAM or the QPAM no longer relies on PTE 84-14.

We recommend that the Department withdraw this condition in its entirety for the following reasons:

- The notification condition changes the nature of relief provided by PTE 84-14 from transactional relief that can be relied upon from time to time, into registration-based relief. This shift represents a departure from other statutory and regulatory exemptive relief under ERISA where registration with the Department is not a condition for relief. The Department does not offer an explanation as to why a fundamental change in approach is necessary for the relief under PTE 84-14 to continue to satisfy the conditions under Section 408(a) of ERISA.

- The list of QPAMs on the Department's public website could be perceived by risk-adverse ERISA plan fiduciaries as a pre-approved list of QPAMs or as an endorsement by the Department of each entity on the list, notwithstanding any disclaimers to the contrary.[19]

- The Department anticipated that compliance with this proposed condition would take fifteen (15) minutes on average per entity and would cost approximately fourteen (14) dollars. The foregoing estimation does not reflect the potential complexities created by the ongoing nature of the notice obligations. By way of example, a pooled investment fund managed by a QPAM may spring in and out of holding ERISA "plan assets." In this circumstance, we do not believe that the Department intends to require a QPAM to provide notice each time the fund's "plan asset" status changes and we ask the Department to clarify this point in any final amendment.

- The initial notification is a condition precedent to transactional relief under PTE 84-14 and the Proposal does not specify the timing of the initial or subsequent notification obligations.

[19] Unlike other parts of the Proposal and the IRFA where the Department asked for input, the Department instead summarized the feedback it received from individual exemption applicants on the import of an entity's ability to hold itself out as a QPAM: "the Department understands that some entities use their QPAM status as an indicator of their size and/or sophistication to potential client Plans."

If the Department retains this condition, we recommend: (i) clarification of the subsequent notification obligations; (ii) a grace period of at least ninety (90) days for *all* notification obligations beginning on the date that such notification obligation arose; and (iii) clarification that a good faith failure to comply with the notification obligations will not be treated as a failure to comply with the terms as a failure to comply with the terms of PTE 84-14. These changes will help make the condition workable and decrease the likelihood of inadvertent non-compliance, which could, depending on the facts, give rise to excise tax penalties.

4. The Department Should Adopt the "Incremental Increase" Approach for the AUM and Equity Thresholds.

The Proposal imposes an initial and annual adjustment to the AUM and equity thresholds for QPAM status. On the effective date of the amendment to PTE 84-14, the current thresholds would be adjusted based on the Bureau of Labor Statistics Consumer Price Index. No later than January 31st each year, the Department would publish subsequent annual adjustments to the thresholds.

While we think it is not unreasonable for the Department to propose increases to these thresholds, we encourage the Department to adopt the "incremental increase" alternative (the "***Incremental Increase Approach***"), which is described in the IRFA. We note that in the IRFA, the Department rejected the Incremental Increase Approach because it would result in a delay to the effectiveness of the threshold adjustments, which provide additional protections to ERISA plans.[20] However, we believe that benefits of the Incremental Increase Approach outweigh the Department's concerns and that this approach should be adopted for the following reasons:

- The Department previously concluded that PTE 84-14 satisfied the conditions of Section 408(a) of ERISA without an automatic increase to these thresholds.

- The Department correctly identified smaller investment fiduciaries as a group that may be significantly impacted by the threshold changes. The Incremental Increase Approach would provide these smaller investment fiduciaries with time to consider and implement compliance approaches, thereby minimizing the negative impact of the changes.

- The Incremental Increase Approach would include meaningful transitional relief, which is otherwise absent from the Proposal.

In addition, we recommend that the Department grandfather existing arrangements for any QPAM that would fail to satisfy the conditions of PTE 84-14 *solely* due to an inability to meet the increased thresholds. As stated above, the threshold adjustments may disproportionately impact smaller investment fiduciaries. While it is not a legal requirement for an investment fiduciary to qualify as a QPAM in order to manage ERISA plan assets, it has become a commercial reality that PTE 84-14 is the preferred transactional relief by ERISA plans, investment fiduciaries and counterparties alike. As a result of the adjusted thresholds, ERISA plans may be required to terminate arrangements with fiduciaries who can no longer meet the thresholds, even where such fiduciary is complying with applicable laws and the ERISA plan has prudently selected and continues to monitor such investment fiduciary.

Grandfathering existing arrangements for QPAMs that fail to satisfy the conditions of PTE 84-14 solely due to an inability to meet the adjusted thresholds will lessen the impact of these changes on smaller investment fiduciaries and on those ERISA plans who have retained (and are happy with the services provided by) such fiduciaries. Alternatively, such fiduciaries should be provided with a grace period of at

[20] 87 Fed. Reg. 56912, 56919 (September 16, 2022).

least one (1) year (beginning on the date of the final amendment's adoption) for compliance with the adjusted thresholds.

5. The Inclusion of "Substantially Equivalent" Foreign Crimes Presents Material Issues that are not Addressed by the Proposal.

Whether a QPAM or certain of its affiliates has been the subject of a "criminal conviction" under Section I(g) of PTE 84-14 is one of the factors that dictates whether such QPAM may rely on PTE 84-14 for its asset management business. This determination is, therefore, of vital importance. It is for this reason that we express concern over the Proposal's re-definition of "criminal conviction" to encompass convictions by a foreign court of a crime, however denominated by the laws of the respective foreign government, which are "substantially equivalent" to the list of offenses set forth in proposed Section VI(r)(1). For the reasons set forth below, we recommend that the Department withdraw the proposed Section VI(r)(2). Alternatively, we recommend that the Department defer to a court of competent jurisdiction for a determination that a conviction by a foreign court of a crime under foreign law is "substantially equivalent" to the list of offenses set forth in proposed Section VI(r)(1) or, at a minimum, provide a more formal and defined process pursuant to which the affected QPAM may meaningfully engage with the Department (i.e., where due process is afforded to the QPAM).

In our view, the inclusion of "substantially equivalent" foreign crimes as a basis for a disqualifying conviction pays short shrift to jurisprudential complexities. The Proposal could result in the Department serving as the *sole* arbiter of whether: (i) the foreign court has competent jurisdiction over the matter that led to conviction; (ii) the foreign court's ruling amounts to a "conviction" which may be challenging where legal systems differ significantly from the U.S. legal system; (iii) the conduct in question is a "crime" under foreign law;[21] and (iv) the crime at issue is "substantially equivalent" to a crime enumerated in proposed Section VI(r)(1) of the Proposal.

Unlike an individual exemption—where the Department's grant of relief is carefully considered and relies upon the applicant's full record, including the applicant's assertions as to the nature of the crime and whether there has been a conviction—the Proposal empowers the Department to make those determinations *at its own behest* with respect to any QPAM. Thus, proposed Section VI(r)(2) presents several material issues that the Proposal inadequately addresses: (i) the Department does not give sufficient weight to the fact that it is "probable" that there will be "incompatibility" with foreign law when such determinations are made through the lens of U.S. law;[22] (ii) the absence of a mechanism within ERISA for the Department to make foreign law determinations evinces Congressional intent that the Department does not have such power; and (iii) the Department lacks expertise with respect to complex foreign law and legal process issues.

[21] For example, as the Department has previously been made aware, various countries do not have "felonies," as that term is understood under U.S. law. *See* Letter from Kate O'Scannlain, Solic., Off. of the Solic. of Lab., U.S. Dep't of Lab., to Lisa Bleier, Dir. & Assoc. Gen. Counsel, SIFMA 5 (November 3, 2020) ("[M]any jurisdictions, including the United Kingdom, Canada, Ireland, Australia, and New Zealand, do not rely on a legal category of 'felony.'"), *withdrawn by* Letter from the Off. of the Solic. Of Lab. to Lisa Bleier (March 23, 2021) (on procedural grounds).

[22] *Morrison*, 561 U.S. 269 (later superseded by statute). In *Morrison*, the Supreme Court "reject[ed] the notion that the [Securities Exchange Act] reach[ed] conduct in [the United States] affecting exchanges or transactions abroad" based on the principle that "[t]he probability of incompatibility with other countries' laws is so obvious that if Congress had intended such foreign application," it would have done so explicitly. Id. at 269. Akin to the Exchange Act in Morrison, ERISA does not "address[ ] the subject of conflicts with foreign laws and procedures," nor does it contemplate a role for the Department in making such determinations. *Id*.

For further support underlying this principle, see, for example, *EEOC v. Arabian Am. Oil Co.*, 449 U.S. 244, 256 (244) (later superseded by statute), discussing the extraterritorial application of Title VII.

6. The Inclusion of Non-Criminal Conduct in the Proposed Definition of "Prohibited Misconduct" Violates Basic Notions of Fairness and May Undermine Competing Interest of Various Regulators.

The Proposal also creates a separate tier of non-criminal activity, called "prohibited misconduct," which similarly prevents an asset management firm from relying on PTE 84-14 for ten (10) years. For the following reasons, we recommend that the Department retract proposed Sections VI(s)(1)-(3).

There are five (5) different types of conduct that constitute "prohibited misconduct" under the Proposal. Here, we focus on the following three (3) types:

- *Section VI(s)(1)*: "any conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted a crime described in Section VI(r)."

- *Section VI(s)(2)*: "any conduct that forms the basis for an agreement, however denominated by the laws of the relevant foreign government, that is substantially equivalent to a non-prosecution agreement or deferred prosecution agreement described in (1)."

- *Section VI(s)(3)*: "engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions."

Any conduct that is non-criminal in nature, and which can be used to preclude an asset manager from relying on PTE 84-14, should be narrowly tailored. In our view, and as described below, the proposed definition of "prohibited misconduct" violates basic notions of fairness and has the potential to undermine competing interests of other regulators.

Consider, for example, the Proposal's first form of "prohibited misconduct," conduct undertaken by a QPAM that forms the basis for a non-prosecution agreement ("***NPA***") or deferred-prosecution agreement ("***DPA***") that, if successfully prosecuted, would have constituted a crime under proposed Section VI(r). Prosecutors, such as the U.S. Department of Justice ("***DOJ***"), "are granted significant discretion to decide how best to approach each case" and NPAs/DPAs are two tools at their disposal.[23] In its quest for judicial efficiency and other policy reasons, the DOJ has increasingly entered into these types of arrangements.[24] The hallmark of an NPA/DPA, however, is the *absence* of an actual prosecution, unless there is a breach of the agreement by the defendant.[25] Where there is a breach, the prosecutor may then decide to bring a criminal case against the defendant, in which case the prosecutor would have to prove the criminal conduct. If the prosecutor proves the criminal conduct, and is, in the Proposal's terms, "successful," then the defendant is considered to be convicted of those crimes. Conversely, where the defendant satisfies the conditions of the NPA/DPA, then the prosecutor would forego prosecution and the possibility of conviction.[26]

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[23] *United States v. Saena Tech Corp.*, 140 F.Supp. 3d 11, 12 (D.D.C. 2015).

[24] *See* Michael Yangming Xiao, *Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime*, 23 Cornell J.L. & Pub. Pol'y: 233, 235 (2013) ("Between 2000 and 2010, the number of DPAs and NPAs issued by the Department of Justice for corporate crimes rose by 3200%.").

[25] *See Saena Tech. Corp.*, 140 F. Supp. 3d at 12-13 ("The concept [of a deferred prosecution agreement] is simple: The government intends to prosecute a defendant for criminal wrongdoing, but decides that the defendant is worthy of a chance at rehabilitation and avoiding the collateral consequences that accompany a criminal conviction. Rather than seeking a conviction through a trial or guilty plea, the government agrees to defer prosecution for a period of time during which the defendant will be monitored for compliance with various conditions, in an attempt to assess the defendant's rehabilitation. If the defendant succeeds, the government does not prosecute. If the defendant does not succeed, the government may prosecute.").

[26] We do not here address situations where entering into an NPA/DPA itself constitutes a "conviction" under the respective statute.

Because it would be *impossible* to know beforehand whether (i) a prosecutor would in fact exercise its discretion to prosecute a defendant for conduct covered under the NPA/DPA, which agreement the defendant would have had to breach, and (ii) the defendant would ultimately be convicted of covered crimes related to that conduct (i.e., the prosecution is "successful"), proposed Section VI(s)(1) effectively treats the mere entering into an NPA/DPA—*without more*—as "prohibited misconduct" for purposes of the Proposal.[27] This means that, under the Proposal, a QPAM that enters into an NPA/DPA, where there is neither a prosecution nor a conviction, is treated the same as a different QPAM who has in fact been convicted by a court. In our view, this result is fundamentally unfair and will likely undermine the interests of the DOJ and other regulators who, for various reasons, prefer that a defendant enter into an NPA/DPA in lieu of prosecution.[28]

Next, consider that, under the Proposal, a QPAM could be barred from relying on PTE 84-14 because of a "systematic pattern or practice" of violating the terms of PTE 84-14. Under an ordinary reading of proposed Section VI(s), this form of "prohibited misconduct" does *not* require the QPAM to have acted in bad faith or with an intent to violate the conditions/terms of PTE 84-14.[29] Thus, the "systematic pattern or practice" of "prohibited misconduct" is *not* designed to only intercept bad actors but could be used to disqualify QPAMs who are *otherwise acting in good faith* to comply with PTE 84-14. While it is true that a systematic pattern or practice of violating a government rule could, under the circumstances, *evidence* bad intent or gross negligence, which would merit higher penalties, the Proposal requires no such showing.[30] Instead, a QPAM acting in good faith, but whose technology issues, clerical errors and the like resulted in technical violations of PTE 84-14, could be treated no differently than a QPAM that is charged, tried and convicted of fraud in a court of law. This result strikes us as punitive and grossly disproportionate.

CONCLUSION

We believe that PTE 84-14 currently serves its intended purpose of enabling ERISA plans to efficiently and effectively access the investment marketplace. For over 40 years, ERISA plans, investment fiduciaries and counterparties have relied on the stability created by PTE 84-14 and we are concerned that the proposed changes would fundamentally disrupt longstanding practices, create additional costs and complexities for ERISA plans and reduce reliance on PTE 84-14—all without any significant benefit. We urge the Department to withdraw the Proposal and sincerely hope that our recommendations and observations are helpful to the Department.

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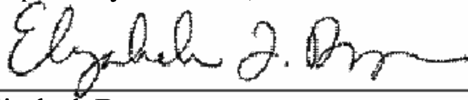
[27] Therefore the Proposal contravenes the Department's position in DOL Ad. Op. 2013-05A (November 1, 2013) providing that DPAs do not constitute criminal convictions for purposes of Section I(g) of PTE 84-14).

[28] These concerns, coupled with our aforementioned discussion of foreign crimes, apply to proposed Section VI(s)(2), as well.

[29] *Compare* proposed Section VI(s)(3) (defining "prohibited misconduct" as "engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions") *with* proposed Section VI(s)(4) (defining "prohibited misconduct" as "intentionally violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions….").

[30] Routine clerical errors, software glitches, and other benign bases for technical violations of PTE 84-14's conditions are examples of conduct that, if they happened to affect many retirement accounts managed by the QPAM, could be ensnared under the Proposal's "systematic pattern or practice" definition of "prohibited misconduct." Moreover, in the context of a pooled investment fund that may, at times, hold "plan assets," failure to meet the Proposal's notice requirements could potentially be deemed by the Department to constitute a "systematic pattern or practice" of "prohibited misconduct." We do not think that the Department intends this result.

Respectfully submitted,



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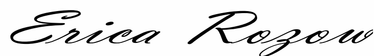

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