INVESTMENT COMPANY INSTITUTE®

1401 H Street, NW, Washington, DC 20005-2148, USA
202-326-5800 www.ici.org

October 11, 2022

*Filed Electronically*

Office of Exemption Determinations
Employee Benefits Security Administration
Room N–5655
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attn: Application No. D-12022

Re: Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption) (RIN 1210-ZA07)

Dear Office Director Chris Cosby:

The Investment Company Institute (ICI)[1] writes to express significant concerns with the Department of Labor's (the "Department") proposed amendments to Prohibited Transaction Exemption 84-14 (the QPAM Exemption), the longstanding exemption governing financial institutions acting as qualified professional asset managers (or QPAMs) for employer-provided retirement plans ("plans" or "client plans").[2]

ICI strongly supports efforts to promote retirement security for US workers. As a trade association representing the asset management industry, ICI is especially attuned to the needs of

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $28.8 trillion in the United States, serving more than 100 million investors, and an additional $8.1 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and conducts its international work through ICI Global.

[2] The Department published the proposed amendments at 87 Fed. Reg. 45204 (July 27, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15702.pdf; the Department announced a hearing date and a 15-day extension of the comment period (originally scheduled to end on September 26, 2022) at 87 Fed. Reg. 54715 (September 7, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-09-07/pdf/2022-19317.pdf; the Department subsequently published a notice of its initial Regulatory Flexibility Analysis for the proposed amendments, at 87 Fed. Reg. 56912 (September 16, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-09-16/pdf/2022-20099.pdf.

retirement savers because the industry plays a significant role in US retirement saving by making available the investment products through which pension plans, defined contribution (DC) plans and individual retirement accounts (IRAs) invest. Total US retirement assets were $33.7 trillion as of June 30, 2022, with our members managing a large portion of those assets through regulated funds, collective investment trusts, and separate accounts.

The Employee Retirement Income Security Act of 1974, as amended (ERISA), was enacted in part to protect the retirement savings of participants in their employers' retirement plans from losses due to transactions with persons with specified relationships to the plan. These protections against potential conflicts of interest included far reaching prohibited transaction rules, which generally prevent the parties who are responsible for operating employer-sponsored retirement plans from engaging in almost any transaction with a broad array of "parties in interest" (as defined in ERISA) and "disqualified persons" under the Internal Revenue Code of 1986 (the "Code").[3] Understanding that such an extremely far reaching set of prohibitions would harm plans by preventing them from accessing many services, investments, and transactions that are necessary for, or beneficial to, their creation and operation, ERISA also includes three kinds of possible exemptions from the prohibited transaction rules: statutory exemptions, class exemptions and individual exemptions.[4]

The Department by its own motion proposed the issuance of the QPAM Exemption in 1982 as part of its "continuing effort to improve the administration of the prohibited transaction rules of ERISA,"[5] noting its recognition "that in many instances the prohibited transaction rules continue to present complex problems of compliance for fiduciaries charged with responsibility for employee benefit plan assets."[6] Given that the QPAM Exemption would be available to only certain regulated established financial institutions and would provide only limited relief,[7] the Department stated that "substantial deregulation in this area can be accomplished by administrative means without sacrificing the interests of plan participants and beneficiaries."[8] The Department also understood that issuing the QPAM Exemption "would be appropriate in order to eliminate the need for individual exemptions."[9]

---

[3] ERISA § 406 (29 U.S.C. § 1106) and 26 U.S.C. § 4975(c).

[4] ERISA § 408(a) (29 U.S.C. § 1108(a)) and 26 U.S.C. § 4975(d).

[5] Proposed QPAM Class Exemption, 47 Fed. Reg. 56945 (December 21, 1982), available at https://archives.federalregister.gov/issue_slice/1982/12/21/56936-56952.pdf#page=10.

[6] Id. at 56946.

[7] The QPAM Exemption provides only relief from the prohibition of section 406(a) (allowing the QPAM to engage in a transaction with a party in interest). It does not provide relief for the QPAM to engage in any transactions involving its own self-dealing and conflicts of interest, which are prohibited under ERISA section 406(b)(1) through (3) and Code section 4975(c)(1)(E) and (F).

[8] 47 Fed. Reg. at 56946-7.

[9] Id.

Despite these clear and legitimate purposes behind the issuance of the QPAM Exemption and no indication that it is not working as intended,[10] the Department is now proposing amendments that—as discussed below—will make it more difficult and expensive to use the exemption, put the scope of its coverage in doubt, and in some instances actually harm the very interests of those parties it seeks to protect. If finalized as proposed, the amendments will restrict the ability of the regulated community to make use of an exemption intended to facilitate efficient plan administration, and provide for favorable investments, to the detriment of retirement plans and their participants. Further, the proposed amendments effectively will increase the need to seek individual exemptions from the Department—at a time when the Department has significantly reduced issuance of individual exemptions,[11] and aims to further discourage the regulated community from seeking exemptive relief (*i.e.*, by issuance of its recent proposal that would radically modify the exemption application process and codify new additional burdens on applicants and independent fiduciaries covered by the exemption).[12]

## EXECUTIVE SUMMARY

Our comments and recommendations include the following:

- The Department's approach to including foreign criminal convictions in the list of disqualifying crimes is overly broad and likely to disqualify more QPAMs than is reasonably necessary to achieve the Department's stated objective. Instead of the draconian and potentially unjust application of an automatic disqualification, the Department should take a disclosure-based approach.

- The Department should eliminate completely the proposed new provisions for disqualification due to "prohibited misconduct"—particularly the adoption of the novel concept that a deferred prosecution and non-prosecution agreement would likely result in a QPAM's disqualification. This aspect of the proposal raises due process concerns and would have profound public policy implications that extend far beyond the Department's jurisdiction.

---

[10] See the Department's Regulatory Impact Analysis, beginning at 87 Fed. Reg. 45214; also see the Supplemental Initial Regulatory Flexibility Analysis, published by the Department at 87 Fed. Reg. 56912 (September 16, 2022), explaining the proposal's possible impact on small entities.

[11] See EBSA Index of Individual Exemptions, available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/granted. See also Wade, William P., & Loebl, Richard I. 1994. "Individual Prohibited Transaction Exemptions: The 'Common Law.'" *Real Property, Probate and Trust Journal*, Vol. 29, No. 2 (Summer 1994), pp. 185–261, available at http://www.jstor.org/stable/20782047.

[12] On March 15, 2022, the Department published proposed amendments to its regulations specifying the procedures for applying for class and individual exemptions and the processing of such applications. 87 Fed. Reg. 14722 (March 15, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-03-15/pdf/2022-04963.pdf.

- While the concept of a winding down period has the potential to be beneficial, as currently drafted, the one-year winding down period will actually be harmful and disruptive to plans. By not allowing the QPAM to complete any new transactions, there is essentially no winding down period as of the ineligibility date.

- While the Department offers the possibility of extending the winding down period through the ability to apply for individual exemptions, we have reason to doubt the Department's actual willingness to grant individual exemptions. Indeed, the Department's increasing reluctance to grant individual exemptions would exacerbate the negative impact of the expanded disqualification provisions.

- The Department should eliminate the problematic required contractual terms for management agreements. The Department significantly underestimates (or fails to estimate) the costs associated with adding these terms and the time needed to complete the agreement amendment process. In addition, the required terms may be inconsistent with other management agreement provisions legitimately agreed to by a plan and its manager. Finally, the imposition of such required terms in agreements between private parties arguably exceeds the Department's authority.

- The Department should remove or clarify the "planned, negotiated, or initiated" standard within the "sole responsibility" rule, to avoid unintentionally cutting off plans from transactions where a third-party (potentially a party in interest) initiates discussions with a QPAM about a particular product or opportunity. Read literally, this proposed language is far more limiting than what the Department may have intended and would render ineligible many common types of transactions that benefit plan clients, even where the QPAM has final decision-making authority over the transaction.

- The proposal's transaction-based recordkeeping requirement is inconsistent with the purpose of the QPAM exemption, intended to facilitate efficient investment of plan assets. The Department should modify the recordkeeping requirement to be process-based rather than transactional, as described further herein, and should not require such records to be available beyond employees of the Department and IRS.

- The requirement to notify the Department of reliance on the QPAM Exemption does not appear to serve a worthwhile purpose, would be incompatible with common ways asset managers use the QPAM Exemption, and could lead to confusion in the marketplace. It also presents the opportunity for foot faults and sudden unjustified loss of the ability to rely on the exemption.

- The Department should not propose increases to the asset manager eligibility thresholds without further study. As proposed, the significant increases would be extremely disruptive to those plans whose managers are impacted, could run smaller managers out of business, and would contribute to the overall decline in QPAMs—and corresponding reduction in choice and market competition—that will likely result from this proposal.

- The Department would have benefited from input from the regulated community prior to proposing such a sweeping overhaul of an exemption that has served the mutual interests of the retirement community. The Department, however, choose to not seek any plan sponsor, plan provider, or other stakeholder input before crafting the proposal. Given the need to now make significant changes to the proposal, we respectfully urge the Department to withdraw the proposed amendment and repropose it—taking into account the comments received. If the Department does not withdraw the proposed amendment, the Department should clarify that all changes will apply prospectively only. Further, the Department should provide a one-year transition period for QPAMs to come into compliance with any new requirements.

**BACKGROUND**

ERISA's prohibited transaction rules generally prevent the parties who are responsible for creating and operating employer-sponsored retirement plans from engaging in almost any transaction with parties in interest,[13] which includes just about any person or entity that has any connection to the plan. In other words, Congress created a regime under which almost any transaction with a plan and related party would be prohibited. But because such a regime effectively would prevent plans from accessing many services, investments, and transactions that are necessary for, or beneficial to, the creation and operation of retirement plans, it included a series of statutory exemptions. Additionally, because Congress knew it would not be able to foresee every instance where an exemption would be appropriate so that plans could continue to access investments, products and services, Congress gave the Department the authority to grant administrative exemptions when it determines that such relief is: (1) administratively feasible; (2) in the interests of the plan and its participants and beneficiaries; and (3) protective of the rights of participants and beneficiaries of such plans.[14]

Using its exemptive authority, the Department by its own motion proposed the issuance of the QPAM Exemption in 1982 as part of its "continuing effort to improve the administration of the prohibited transaction rules of ERISA."[15] In doing so, the Department expressed its recognition "that in many instances the prohibited transaction rules continue to present complex problems of compliance for fiduciaries charged with responsibility for employee benefit plan assets."[16] Expanding on this point, the Department explained that—

---

[13] ERISA § 3(14) (29 U.S.C. § 1002(14)) and 26 U.S.C. § 4975(e)(2).

[14] ERISA § 408(a) (29 U.S.C. § 1108(a)).

[15] Proposed QPAM Class Exemption, 47 Fed. Reg. 56945 (December 21, 1982), available at https://archives.federalregister.gov/issue_slice/1982/12/21/56936-56952.pdf#page=10.

[16] Id. at 56946.

> "[t]hese fiduciaries are required to undertake time consuming ERISA compliance checks for the numerous investment transactions under consideration each year to ascertain whether a party in interest of a plan, any of whose assets are subject to the fiduciary's management, would cause the transaction to be prohibited. ln the case of a large plan, there may be thousands of parties in interest. Where a potentially prohibited party in interest transaction is identified and is not covered by an existing class exemption, the asset manager may have to choose between applying for an individual administrative exemption or foregoing the investment opportunity entirely."[17]

Given the limited relief provided by the QPAM Exemption and that it would be available to only certain established and currently regulated financial institutions,[18] the Department found that "substantial deregulation in this area can be accomplished by administrative means without sacrificing the interests of plan participants and beneficiaries."[19] The Department further stated that—

> "based on its experience in considering applications for individual and class exemptions, and in dealing with instances of abusive violations of the fiduciary responsibility rules of ERISA, the Department believes that, as a general matter, transactions entered into on behalf of plans with parties in interest are most likely to conform to ERISA's general fiduciary standards where the decision to enter into the transaction is made by an independent fiduciary."[20]

The Department also understood that issuing the QPAM Exemption "would be appropriate in order to eliminate the need for individual exemptions."[21]

Now, more than 35 years after the Department acknowledged that the rigidity of the party in interest prohibitions were often untenable given that plans often have thousands of parties in interest, the Department proposes significant new amendments to the QPAM Exemption. And it is doing so despite the expansion of the financial services industry and the sophistication of investment strategies, including the adoption of defensive hedging tactics, over the past 35 years and no evidence that the exemption is not working as intended. Indeed, the QPAM Exemption is

[17] Id. at 56947.

[18] See footnote 7, supra.

[19] 47 Fed. Reg. at 56946-7.

[20] Id. at 56946-7.

[21] Id.

even more critical to enable plans and participants to benefit from prudently selected investments than it was in 1982.[22]

Further, the proposed amendments effectively will increase the need to seek individual exemptions from the Department—at a time when the Department has significantly reduced issuance of individual exemptions,[23] and aims to further discourage the regulated community from seeking exemptive relief (*i.e.*, by issuance of its recent proposal that would significantly modify the exemption application process and codify new additional burdens on applicants and independent fiduciaries covered by the exemption).[24] In fact, the amendments if adopted may force plans to choose less beneficial transactions or avoid the transactions altogether—a lost opportunity for plans and their participants.

## CONCERNS WITH PROPOSED AMENDMENTS

We discuss our specific concerns and recommendations relating to the proposed amendments below.

### I. The Department Should Exclude Foreign Criminal Convictions from the List of Disqualifying Crimes and Instead Take a Disclosure-Based Approach.

Section I(g) of the QPAM Exemption provides that an entity is disqualified from serving as a QPAM for a specified period in the event the entity is convicted of certain crimes, including the crimes listed in ERISA section 411. The proposed amendments would modify Section I(g) to "remove any doubt" that this disqualification provision is triggered by foreign criminal convictions that are substantially equivalent to certain U.S. federal or state crimes.[25] Although

---

[22] The Department seems to have shifted its view of the purpose of the QPAM Exemption. In recent public comments, Department staff have opined that that the exemption is meant to be a "gold standard" indication, similar to a Good Housekeeping Seal of Approval. This contrasts with the actual purpose of the exemption, which is simply intended to decrease unnecessary administrative burdens. See section VIII(B) of this letter for additional concerns regarding the "gold seal" myth.

[23] See EBSA Index of Individual Exemptions, available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/granted. See also Wade, William P., & Loebl, Richard I. 1994. "Individual Prohibited Transaction Exemptions: The 'Common Law.'" *Real Property, Probate and Trust Journal*, Vol. 29, No. 2 (Summer 1994), pp. 185–261, available at http://www.jstor.org/stable/20782047.

[24] In recent years, the Department has become increasingly reluctant to grant administrative exemptions. In 2021, for example, the Department only granted *three* individual exemptions, and in 2020, the Department only granted *one* individual exemption. The Department has only granted *three* class exemptions in the past 15 years (and those three were all in connection with the Department's changes to the definition of the term "fiduciary"). This virtual shut-down of the exemption process has discouraged parties from requesting individual relief and prevented plans and service providers from developing new and innovative offerings for retirement savers. See footnote 11, supra.

[25] 87 Fed. Reg. at 45208. We note that the doubt surrounding the disqualification of QPAMs for foreign crimes is due to questions over the Department's authority under federal law, which is reflected in the Department's own contradictory legal positions. *C.f.,* Letter from DOL Solicitor O'Scannlain to L. Bleier (Nov. 3, 2020) *with* Letter

ICI agrees that certain foreign criminal conduct may be relevant to a plan's decision to continue an ongoing investment management relationship with the QPAM, we are concerned that the proposed changes to Section I(g) are unnecessarily broad in application and will create pointless costs and burdens for plans.

There is no question that the disqualification of a financial entity from continuing to act as a QPAM creates costs and burdens for plans. The Department acknowledges as much in the proposed amendment and attempts to mitigate some of those costs by, among other things, requiring QPAMs to contractually agree to assume certain liabilities and by creating a post-conviction wind-down period. As discussed elsewhere in this letter,[26] however, this approach does not reduce costs. It merely shifts the costs temporarily; there is legitimate concern that they will be passed through to plans and other investors.

The Department's primary justification for extending disqualification to a broad swath of foreign criminal convictions is that such convictions are relevant to a QPAM's ability to manage plan assets with "integrity, care, and undivided loyalty" because they call into question a firm's "culture of compliance."[27] This may be true where (i) there is a close connection between the entity that engaged in the criminal conduct and the entity acting as a QPAM or (ii) the criminal conduct bears a relationship to the QPAM's management of plan assets. The proposed amendment, however, does not limit disqualification to foreign convictions that are reasonably related to a QPAM's plan asset management services. Instead, it would disqualify a financial institution from serving as a QPAM in situations where the only connection between the QPAM and the entity convicted of a foreign crime is a small, indirect ownership interest (*e.g.*, 5%). Similarly, automatic disqualification can occur because of foreign convictions that involve conduct completely unrelated to the management of plan or institutional assets. ICI believes the modifications to Section I(g) are overly broad and, thus, are likely to disqualify more QPAMs than is reasonably necessary to achieve the Department's stated objective.[28]

The proposed changes to Section I(g) also raise serious questions of fairness, national security and US sovereignty. The Department has proposed disqualifying a US financial institution from acting as a QPAM—potentially ending an entire line of business—based on decisions of foreign courts that may not even provide basic due process rights. Despite the Department's contention that a QPAM and its related entities "receive due process through the formal judicial process," it

---

from DOL Deputy Solicitor Goldstein to L. Bleier (March 23, 2021). The proposed modification of the definition of "criminal conviction" does not resolve this issue.

[26] See sections III and V of this letter.

[27] 87 Fed. Reg. at 45209.

[28] The Department should also consider this point in the context of domestic convictions. The Department should narrow Section I(g) to align with PTE 2020-02. Section III(a)(1) of that PTE provides that an Investment Professional or Financial Institution will be ineligible to rely on the exemption for 10 years following: "[a] conviction of any crime described in ERISA section 411 ***arising out of such person's provision of investment advice*** to Retirement Investors …" (emphasis added).

is well understood that not all countries have fair criminal justice systems and independent judiciaries.[29] For example, Secretary of State Blinken recently raised "significant concerns with Russia's legal system… to advance its own agenda, using individuals as political pawns."[30] Yet the proposed amendment grants Russia and all other foreign jurisdictions the ability to leverage their courts to negatively impact the operations of domestic financial institutions and the financial markets. The policy implications of this position deserve consideration by other relevant agencies within the Administration, including the State Department, the Justice Department, and the Department of Commerce.

Given the foregoing, we urge the Department to exclude foreign criminal convictions from the list of disqualifying crimes. ICI fully acknowledges that some foreign criminal convictions are cause for concern as they could—based on a review of the overall circumstances—speak to the integrity of a financial institution. However, that does not justify the draconian and potentially unjust application of automatic disqualification. A plan's fiduciary, not the Department, is the proper party to assess the implications to the plan of a QPAM's foreign criminal conviction. Therefore, we urge the Department to take a disclosure-based approach to foreign criminal convictions that empowers fiduciaries to make prudent decisions. ICI would support new conditions of the QPAM Exemption requiring QPAMs to provide reasonable disclosures to plan clients related to foreign criminal convictions that arise from the provision of asset management services. In such cases, plan officials could review the disclosure and assess whether the conviction relates to a party or entity with close enough proximity or connection to the QPAM's business that would necessitate a termination of the relationship.

If the Department determines it is necessary and appropriate to make some foreign criminal convictions disqualifying, we encourage the Department to reduce the resulting cost and disruption by more narrowly tailoring the definition to apply only where there is a nexus between the conduct that resulted in the foreign conviction and the QPAM's role with respect to plans. Specifically, we recommend amending subsection I(g)(3) as follows:

> *(3) Ineligibility due to a Criminal Conviction or Written Ineligibility Notice. Subject to the Ineligibility Date provision set forth in Section I(h), a QPAM is ineligible to rely on this exemption for 10 years following:*

---

[29] 87 Fed. Reg. at 45209, fn. 30.

[30] Press Statement of US Secretary of State Blinken (Aug. 4, 2022), *available at* https://www.state.gov/conviction-and-sentencing-of-u-s-citizen-brittney-griner-in-russia/. See also Fact Sheet entitled "Issuance of a Hong Kong Business Advisory," Office of the Spokesperson, US Department of State (July 16, 2021), available at https://www.state.gov/issuance-of-a-hong-kong-business-advisory/. ("Businesses operating in Hong Kong may face heightened risks and uncertainty related to PRC retaliation against companies that comply with sanctions imposed by the United States and other countries, including through enforcement of the PRC's Countering Foreign Sanctions Law.")

> *(A) A Criminal Conviction, as defined in Section VI(r)<u>(1)</u>, of the QPAM or any Affiliate thereof (as defined in Section VI(d))—or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM<u>; or a Criminal Conviction, as defined in Section VI(r)(2), of the QPAM or any member of its Controlled Group</u>; or*

We further recommend amending Section VI as follows:

> *(r) "Criminal Conviction" means the person or entity:*
>
> ..
>
> *(2) is convicted by a foreign court of competent jurisdiction as a result of a crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in (1), above<u>, and arises from the provision of asset management services</u>.*
>
> …
>
> *<u>(u) "Controlled group" means two entities that would be considered in the same "controlled group of corporations" or "under common control" as those terms are defined in section 414(b) and (c) of the Internal Revenue Code of 1986, as amended, and accompanying regulations.</u>*

These recommendations are consistent with the Department's approach in Prohibited Transaction Exemption ("PTE") 2020-02, an exemption intended to facilitate retail, direct-to-consumer transactions. We also note that the Department previously acknowledged, when proposing the QPAM Exemption in 1982, that there is less concern about failures to conform to ERISA's general fiduciary standards where the decision to enter into the transaction is made by an independent fiduciary.[31]

## II. The Department Should Eliminate Completely the Prohibited Misconduct Provisions of the Proposed Amendment, in Particular the Provision that Deferred Prosecution and Non-Prosecution Agreements Would Result in a QPAM's Disqualification.

The proposed amendments provide that an entity can be disqualified from serving as a QPAM if the entity engages in "prohibited misconduct," including conduct that forms the basis for a non-prosecution or deferred prosecution agreement, or a similar agreement in a foreign jurisdiction (collectively "Negotiated Agreements").[32] Although we have serious concerns with the entirety of this new disqualification provision, we believe it is particularly problematic to include Negotiated Agreements.

---

[31] See text accompanying footnote 20, *supra*.

[32] 87 Fed. Reg. at 45232.

The Department's stated concern with Negotiated Agreements is that they can be used "to sidestep the consequences that otherwise would result from a Criminal Conviction."[33] The Department, however, does not provide any evidence to substantiate its concern, cite any of the academic literature discussing the use of Negotiated Agreements, or acknowledge the framework under which prosecutors consider Negotiated Agreements.

As the Department previously agreed, Negotiated Agreements are not criminal convictions.[34] Rather, they are agreements between the government and private entities to forego a judicial process in favor of a negotiated resolution of a criminal allegation that better serves the interests of both parties. Prosecutors do not enter Negotiated Agreements lightly or with the intention of allowing financial institutions to "sidestep" the consequences of their actions. Instead, prosecutors typically engage in a careful analysis that seeks to balance the equities and benefit the public good. For example, the Department of Justice's Justice Manual requires federal prosecutors pursuing a Negotiated Agreement to first determine that the collateral consequences of indicting business would be significant and harm third parties.[35]

Despite this, the proposed amendment essentially creates a presumption that a financial institution's decision to enter into a Negotiated Agreement is an admission that the institution agrees with prosecutors' allegations. That presumption is unfounded. It often is the case that the institution has simply determined that acceptance of the Negotiated Agreement brings the matter at issue to a conclusion without the need for engaging in costly and uncertain protracted litigation with the federal or state government.[36] Moreover, just because prosecutors allege violations of criminal law does not mean they are confident in their case or their ability to convict. In fact, there is data suggesting that prosecutors often rely on Negotiated Agreements because they do not believe they can successfully convince a judge or jury of the defendant's guilt.[37]

Consequently, it is particularly troubling that the proposed amendment offers, at best, illusory due process rights and procedural protections. A fundamental tenet of due process is that there be an adversarial process adjudicated by an independent third party. Due process is particularly important here where the Department would be potentially seeking to effectively bar a financial

---

[33] 87 Fed. Reg. 45209, 45215.

[34] DOL Adv. Op. 2013-05A (November 1, 2013).

[35] U.S. Department of Justice, *Principles of Federal Prosecution of Business Organizations*, Justice Manual 9-28.1100, available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.1000.

[36] This presumption is even more concerning in the case of foreign Negotiated Agreements (as described in subsection VI(s)(2) of the amendment), an area where there is even less certainty about the prosecutorial motivations, which depending on the country may be political, corrupt or otherwise suspect. See footnote 30, *supra*.

[37] Cindy R. Alexander, Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 Am. Crim. L. Rev. 537 at 554 (2015).

institution from operating an entire line of business and possibly forcing a plan client to terminate its relationship with the institution. The proposed amendment, however, would create the specter of the Department being in a position of violating basic due process rights by acting as both the prosecutor and judge in a quasi-judicial process potentially rife with conflicts and lacking even basic procedural protections. While our concerns here are focused primarily on the Negotiated Agreement aspects of the new Prohibited Misconduct category, these due process concerns extend to the entire provision, including items (3) through (5) of the definition of Prohibited Misconduct. While the Department has the authority monitor compliance with exemptions, it is vital to provide the financial institution a valid opportunity to present a sufficient defense to any such allegations before being sentenced to a draconian ten-year ban.

ICI believes the Department should eliminate completely the prohibited misconduct provisions of the proposed amendments, but if the Department elects to retain them, it is critical that the Department propose for public comment a formal process that protects the rights of the financial institutions being accused of prohibited misconduct.[38] The process should, among other things, include the following:

- (i) Rules for establishing a factual record, including adequate time and opportunity for the accused institution to review, challenge, and supplement the record;[39]
- (ii) Formal rules for soliciting input from federal, state, and/or foreign prosecutors involved in the Negotiated Agreement at issue, if any;
- (iii) Procedures for selecting an independent decision-maker responsible for making factual and legal determinations;
- (iv) Procedural guardrails to ensure that Department officials involved in alleging prohibited misconduct are not able to engage in conduct that would bias the decision-maker (*e.g.*, prohibiting *ex parte* communications); and
- (v) An automatic stay of any agency determinations during the pendency of federal litigation challenging the determination.

Finally, we note that by making disqualification under the QPAM Exemption a collateral consequence of entering a Negotiated Agreement, the Department will almost certainly affect the willingness of financial institutions to enter into Negotiated Agreements. This could have profound public policy implications that extend far beyond the Department's jurisdiction. We strongly encourage the Department to engage directly with the Department of Justice and state

---

[38] Further, if the Department elects to retain the prohibited misconduct provisions and includes improvements to the process, then it may be more appropriate to include foreign convictions under Section VI(s) rather than Section VI(r). This would provide an opportunity for discussion about the appropriateness of considering the foreign conviction, rather than applying an automatic disqualification. Even if moved as we suggest, it is still critical that the Department make the changes to the scope of foreign convictions that we outlined in Section I of this letter.

[39] We note that the proposed 20-day deadline to respond to the Department's warning letter, and the proposed 30-day timeframe within which the Department will schedule a hearing, are incomprehensibly short, especially if the QPAM is dealing with a foreign affiliate. Proposed Section I(i).

prosecutors to consider the implications of the proposed amendment. Moreover, if the Department believes federal and state prosecutors are not properly balancing the equities when considering Negotiated Agreements, the Department could, and should, discuss the issue directly with its sister agencies rather than attempting to override prosecutorial decisions through its exemptive authority.

## III. As Currently Drafted, the One-Year Winding Down Period Will Be Harmful and Disruptive to Plans; Without the Ability to Transact, There Is Essentially No Winding Down Period.

Intended to accommodate a plan's ability to wind down its relations with a QPAM,[40] the Department created a new provision that would impose, upon disqualification of any QPAM, a mandatory one-year winding down period. During the one-year period, exemptive relief will apply but that relief would not be available for new transactions or new clients.[41] While we appreciate the concept of a winding down period, as currently drafted, this amendment would actually be harmful to plans and put them in a worse position than under the current QPAM Exemption. Further, these aspects of the winding down period are unnecessary to achieve the Department's policy goals.

### *A. Restricting the QPAM's Ability to Engage in New Transactions is Harmful and Unnecessary*

First, the prohibition on "engaging in new transactions" during the winding down period is problematic and ignores the practicalities of investment management. Most investment management mandates require ongoing transacting to meet the goals of the mandate. For example, a bond portfolio will have bonds of different durations or maturities. The inability to transact will leave the portfolio out of balance or holding too much cash, or not in a position to meet the funding targets of the plan. In this regard, the structure of pension funds requires them to be substantially invested in assets to fund future pension liabilities. These assets need to appreciate at least in line with the expected increase in liabilities in order to meet retirement income objectives, and thereby help to manage pension funds' funding levels or financial

---

[40] See 87 Fed. Reg. at 45211. ("The winding-down period is designed to accommodate a Plan's ability to wind down its relationship with the QPAM." "The Department designed the proposed winding-down period to mitigate the cost and disruption to Plans, their participants and beneficiaries, and IRA owners that can occur when a QPAM becomes ineligible for relief based on proposed subsection I(g)(3)." "The Department believes that a one-year winding-down period would be necessary to ensure that Plans have sufficient time to engage in a search for an alternative QPAM or discretionary asset manager if they decide it is in the Plan's best interest to do so. The Department understands that searching for and hiring a new QPAM or discretionary asset manager can be complex and expensive and require care and time, including development of a request for proposal and an appropriate transition plan to transfer millions of dollars of investments from one manager to another without causing harm and losses, including lost opportunity costs, to the Plan.")

[41] Proposed Section I(j)(3).

solvency. The inability to engage in new transactions would therefore increase the asset-liability disparity and increase the financial solvency risk of pension funds.

The proposed amendment also ignores that it takes time for a plan to hire a new manager. As the Department is well aware, plans will typically need to go through a request for proposal and due diligence process which can take months—if not longer.[42] The proposed amendment also ignores that plans will often have a long-term relationship with a manager and a comfort level built over years of mutual experience that is difficult to replicate. Further, QPAM managers are not fungible—rather, plans pick certain advisers based on their reputation and expertise in specific areas of asset management. In practice, the plan—having received notice of the disqualifying event[43]—is in the best position to determine if it is in the plan's best interests to terminate or withdraw from the relationship with the QPAM, and, if so, how quickly based on the nature of the disqualifying event. This determination will often be dictated by the plan's ability to access a manager with the needed expertise and experience. Because the winding down period takes effect immediately, beginning on the ineligibility date, the prohibition on new transactions will be extremely disruptive and will put an enormous if not untenable burden on plan sponsors.[44]

Further, application of the winding down period may make plan sponsors and asset managers vulnerable to lawsuits to the extent it inhibits their ability to fully discharge their fiduciary duties.[45] For example, in winding down an interest in a pooled investment fund, asset managers will need to be particularly mindful to balance the interests of the plans leaving the pooled investment fund with the interests of the plans remaining in (or not yet leaving) the fund.[46] Under

---

[42] The Department acknowledges this lengthy process in the preamble. See 87 Fed. Reg. at 45211 ("The Department understands that searching for and hiring a new QPAM or discretionary asset manager can be complex and expensive and require care and time, including development of a request for proposal and an appropriate transition plan to transfer millions of dollars of investments from one manager to another without causing harm and losses, including lost opportunity costs, to the Plan.")

[43] The proposed amendments require that, within 30 days of after a becoming ineligible, a QPAM must send a notice to each client plan with information about the cause of ineligibility and the winding down period. Proposed Section I(j)(1).

[44] The Department itself acknowledges that "[i]mmediate loss of relief under the QPAM Exemption could place Plans in the difficult position of either: (1) searching for a new asset manager for the services previously provided by the ineligible QPAM; or (2) being forced to liquidate assets at inopportune times, incur transaction costs to sell and repurchase assets, and lose returns while the assets are in transition." 87 Fed. Reg. at 45217. The inability of the QPAM to transact during the winding down period will cause these same adverse results.

[45] This risk is another example of a cost that the Department has not adequately considered. See the discussion in section V(A) of this letter.

[46] To illustrate the extent of harm this provision could cause to plans and participants, consider the disqualification of the manager of a collective investment trust. Because of the constrained ability to continue to invest consistent with its strategy, a large number of plan investors would invariably attempt to redeem their plan's interest in the trust as soon as possible. Even once a new manager or fund is identified, substituting a fund option in a DC plan is a complicated communication and administrative undertaking that can take weeks. The collective impact of large numbers of plans taking this action on a single recordkeeping platform would further worsen capacity constraints and result in additional delay. The winding down period, as drafted, does nothing to address these harmful effects.

ERISA fiduciary principles, there will be a need to protect plans that are still invested, and this will be extremely complicated by the winding down provision, as drafted. The manager must also weigh the interests of non-plan investors. Both the wind-down provision and contractual requirements allowing for withdrawals should be qualified to permit continued application of reasonably necessary redemption restrictions (such as those typical of certain private equity or real estate funds) where the restrictions are disclosed in advance.

***B. The Winding Down Period Should Only Be Triggered at the Option of the Manager***

Second, in the text of the proposed amendment, it appears that the winding-down period is mandated.[47] However, the Department's comments in the preamble suggest that this may not be its intention.[48] Rather than burden the plan client with a forced winding-down period, the manager should have the option of using other compliance tools, for example, party in interest checklists together with other available exemptions, to allow the mandate to continue. This may not be practicable in many cases, but it could in some. For this reason, the Department should remove any doubt that such an option is available by clarifying that the winding-down period should be only triggered at the option of the manager if no other option for ERISA section 406(a) compliance is available. More specifically, the Department should clarify the text of Section I(j), to make clear that the winding down only applies with respect to reliance on the QPAM Exemption, not the availability of transacting under other means.

Without significant changes—namely, allowing the manager to engage in new transactions and permitting the winding down period to be triggered at the option of the manager, rather than triggered automatically—the winding down requirement will be extraordinarily disruptive and harmful to plans.

## IV. The Department's Increasing Reluctance to Grant Individual Exemptions Will Exacerbate the Negative Impact of the Expanded Disqualification Provisions.

The proposed amendments include a new subsection detailing how a QPAM may apply for an individual exemption after (or in anticipation of) a disqualification, "to continue to rely on the

[47] Section I(j) of the proposed amendment states that "[a]ny QPAM that becomes ineligible under subsection I(g)(3) [Ineligibility due to a Criminal Conviction or Written Ineligibility Notice] ***must*** engage in a winding-down period during which relief is available under this exemption only for the QPAM's client Plans that had a pre-existing Written Management Agreement required under subsection I(g)(2) above on the Ineligibility Date." (Emphasis added).

[48] The Department explains, "[t]he one-year winding-down period would provide a QPAM's client Plans with time to decide whether to hire an alternative discretionary asset manager that is eligible to operate as a QPAM ***or continue their relationship with the ineligible QPAM, which could only provide discretionary asset management services to them by engaging in transactions in a nonprohibited manner, relying on alternative exemptions, or pursuing alternative investment strategies.***" (Emphasis added.) 87 Fed. Reg. at 45211.

relief provided in this exemption for a longer period than the one-year winding down period."[49] While the subsection is new, the practice is not. Asset managers have regularly applied and worked with the Department on individual exemptions when the QPAM Exemption becomes unavailable (for example, in the case of foreign convictions).[50] Until fairly recently, the Department was willing to work with the asset manager to come to an agreement regarding workable, appropriate exemption terms.

Our concerns regarding this new subsection are similar to the concerns we voiced in our comment letter to the Department regarding its proposal on procedures governing the filing and processing of prohibited transaction exemption applications (the "PTE Procedures Proposal").[51] As in the PTE Procedures Proposal, the Department is increasingly adopting onerous conditions for granting individual exemptions and seems even less likely to grant them.[52] In the end, we fear that a disqualified QPAM may be unlikely to receive an individual exemption that is usable.

In situations where the asset manager can show why the disqualifying event would not impact client plans, and where the asset manager is taking appropriate protective actions, the Department should be willing to grant an exemption. In such cases, the asset manager can show that client plans would not be put at increased risk by continuing the relationship. And given that fact, if the Department were unwilling to grant an exemption, the disruption, cost and burden on the client plan would actually cause greater harm.[53]

---

[49] Proposed Section I(k). The Department provides that an applicant should expect conditions similar to the Department's recently granted individual exemptions and should include argument for why any such condition should not be required. The Department may require certification of winding down compliance. "Such applicants also should provide detailed information in their applications quantifying the specific cost or harms in dollars amounts, if any, their client Plans would suffer if the QPAM could not rely on the exemption after the winding-down period, including the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would be available to client Plans on less advantageous terms." The Department estimates that the additional requirements will require only three hours of outside legal professional time. 87 Fed. Reg. at 45225. This is a gross underestimate of the cost.

[50] The Department states that since the initial grant of the QPAM Exemption, the Department has granted nine individual exemption requests from QPAM applicants in connection with a foreign conviction. See 87 Fed. Reg. at 45216.

[51] See letter to Office of Exemption Determinations, EBSA, from David Abbey and Shannon Salinas, dated May 31, 2022, available at [https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC05/00025.pdf](https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC05/00025.pdf).

[52] See footnote 24, supra, regarding the Department's increasing reluctance to grant administrative exemptions.

[53] The Department seems to suggest that a disqualified QPAM may be able to "extend" the one-year winding down period by applying for an individual exemption. The proposed amendment explains that a QPAM that is ineligible "may apply for an individual exemption from the Department ***to continue to rely*** on the relief provided in this exemption for a longer period than the one-year winding-down period." Proposed Section I(k) (emphasis added). The Department suggests that "an applicant anticipating that it will need relief beyond the end of the winding-down period should apply to the Department for an individual exemption as soon as practicable." 87 Fed. Reg. at 45212. However, given the length of time that the Department currently takes to approve an individual exemption, it does

The addition of this section to the QPAM Exemption (codifying the practice that existed) appears intended to assure plan fiduciaries and asset managers that, despite the new expanded disqualification provisions, the exemption will be workable. In practice, however, given the Department's recent history in granting exemptions, we do not anticipate this section providing any meaningful relief to balance the potential harm that will result from the greatly expanded disqualification provisions.

## V. The Required Terms in Management Agreements Would Involve Greater Cost and Time than the Department Estimates, Would Disrupt Existing Legitimate Agreements Between Private Parties, and May Exceed the Department's Authority.

Subsection I(g)(2) of the proposed amendments would condition availability of the exemptive relief on the QPAM including certain new terms in its written management agreements with clients. These terms generally would require the manager (in the event of disqualification due to a criminal conviction or written ineligibility notice) to agree to:

- not restrict the ability of the client plans to terminate or withdraw from arrangements with the QPAM;
- not impose fees, penalties, or charges on client plans in connection with terminating or withdrawing from the QPAM's investment fund, except certain reasonable fees disclosed in advance;
- indemnify, hold harmless and promptly restore actual losses to the client plan for any damages resulting from a violation of applicable laws, a breach of contract, or any claim arising out of the conduct that causes the ineligibility; and
- not employ or knowingly engage any individual that participated in the conduct that is the subject of the criminal conviction or ineligibility notice.

These warranties would apply for ten years beginning on the date of ineligibility.

We strongly urge the Department to eliminate the proposed required contractual terms for management agreements. The Department significantly underestimates (or fails to estimate) the costs associated with adding these terms and the time needed to complete the agreement amendment process. In addition, the required terms may be inconsistent with other management agreement provisions legitimately agreed to by the plan and its manager. Finally, the imposition of such required terms in agreements between private parties arguably exceeds the Department's authority. Though we recommend eliminating the contractual obligations from the proposed amendments, the Department could achieve its goals by incorporating certain of the obligations as conditions to obtaining an individual exemption, without creating the need to re-open existing management agreements.

---

not seem likely that the Department will generally be able or willing to issue an exemption to a disqualified QPAM prior to the conclusion of the one-year winding down period.

### *A. The Department's Cost and Burden Assumptions are Flawed*

The Department wrongly assumes that the costs associated with adding the required terms under subsection I(g)(2) to a QPAM's written management agreement are limited to the costs related to physically updating existing management agreements.[54] To the contrary, the potential liability exposure associated with the broad and vague indemnification requirements is so extensive to be incalculable, and with trailing liability that could continue for 10 years. We do not believe that it is commercially reasonable to include indemnity provisions of this extent. This extraordinary new burden will likely impact the fees and expenses managers charge plans for their services due to, among other things, higher compliance and liability insurance costs. Almost certainly, fewer managers will continue to rely on the QPAM Exemption. Imposing new and distinct penalties for loss of eligibility for one specific exemption—when a prohibited transaction may not have even occurred—is wholly unwarranted.[55] We understand the Department's goal of insulating plans from the economic consequences of a manager becoming ineligible to rely on the QPAM Exemption. But the benefits of indemnification and requiring amendments to management agreements must be balanced against the potential negative implications, which in this case could be making the provision of QPAM services cost prohibitive. The Department made no attempt to estimate the costs of the indemnification requirement for managers.

Furthermore, the Department's assumptions and estimates of the total time needed to carry out the proposed contract amendment process are utterly unrealistic. First, the one-hour time estimate for amending management agreements to add the proposed new terms is grossly understated.[56] These amendments may need to be tailored to individual client agreements and some managers have thousands[57] of client arrangements that would be subject to the needed changes. It may not be possible for all firms to prepare one standardized form for all client agreements, as the Department assumes.

Second, it is unrealistic for the Department to assume that, even if an asset manager was able to create and distribute one standardized form to all of its clients, the process would end here. Though not clear, the proposal seems to envision that the contract amendments would be done by

---

[54] 87 Fed. Reg. at 45218. We also disagree with the Department's general assessment that it "does not expect the amendment to increase, more than marginally, existing costs associated with QPAM ineligibility and individual exemption requests related to Criminal Convictions." 87 Fed. Reg. at 45217.

[55] Not to mention that ERISA already imposes penalties and remedies for violations of the prohibited transaction rules and breach of fiduciary duty. Violations of the prohibited transaction rules carry an excise tax under section 4975 of the Code and could result in personal liability for a fiduciary under ERISA section 409(a).

[56] 87 Fed. Reg. at 45218.

[57] Throughout the proposal, the Department relies on an estimate that, on average, a single QPAM services 32 client plans and considers this average to be an upper limit for the number of client plans served by a QPAM. See, *e.g.*, 87 Fed. Reg. at 45223, note 74. Based on anecdotal evidence from our member companies, ICI believes this estimate is significantly flawed. One member company has reported serving more than 4000 plans.

notice or "negative consent."[58] Regardless of the Department's view on this point, many asset management agreements do not permit unilateral amendment by one party. Furthermore, from our members' experience, it is likely that plan clients will conclude that to meet their fiduciary obligations in hiring and maintaining service agreements with asset managers, it is incumbent on them to review and analyze (and negotiate) any contract amendments. And many will need advice of counsel to understand the amendments, which will add time and costs to completing the process. Consequently, the proposed 60-day effective date for the amended exemption significantly underestimates the time necessary for asset managers to complete this burdensome contract amendment process with all their clients.

***B. The Required Terms Could Result in Confusing and Internally Inconsistent Written Agreements***

The addition of these terms would be confusing and disruptive in situations where a manager is able to continue to provide asset management services pursuant to other exemptions or other legitimate means. As noted earlier, asset managers may have available options beyond the QPAM Exemption for avoiding party-in-interest transactions. The QPAM Exemption may be used by a manager as a backstop in addition to other methods of compliance or it may be used intermittently as needed. Becoming ineligible for the QPAM Exemption would not necessarily make a manager ineligible to manage the assets of ERISA plans. (To that end, the Department should clarify that the indemnification provision would only become operative if the QPAM is removed as manager.) Moreover, the Department's proposed terms could conflict with other provisions of existing agreements previously negotiated between the parties. For this reason, it would be inappropriate and intrusive for the Department to dictate the specific terms of contractual agreements for services between private parties.

***C. The Required Terms May Exceed the Department's Authority***

The proposed contractual warranties in subsection I(g)(2) recall the written contract requirement in the Department's 2016 Best Interest Contract Exemption for fiduciary investment advice, which was struck down by the Fifth Circuit Court of Appeals in *Chamber of Commerce v. U.S. Department of Labor* ("*Chamber of Commerce*") for creating a private cause of action where one did not exist under relevant law.[59] The contractual rights bestowed under the proposed amendment to the QPAM Exemption would arguably exceed the civil enforcement rights set forth in ERISA section 502(a)(3). In relevant part, section 502(a)(3) allows a fiduciary (A) to enjoin any act or practice which violates any provision of Title I of ERISA or (B) to obtain other appropriate equitable relief to redress such violations. Becoming ineligible for the QPAM Exemption, due to an unrelated foreign conviction for example, does not necessarily result in a prohibited transaction or other violation of Title I of ERISA covered by section 502. Moreover,

---

[58] We believe the language of the proposal should be interpreted to permit amendment of investment management agreements by negative consent, whenever consistent with existing terms of the agreement.

[59] 885 F.3d 360, 384-85 (5th Cir. 2018) ("DOL may not create vehicles for private lawsuits indirectly through BICE contract provisions where it could not do so directly.")

if the manager does engage in a prohibited transaction or other violation of Title I after becoming ineligible for the QPAM Exemption, ERISA provides remedies for those violations.[60] The contractual obligations imposed by the proposed amendment would appear to apply regardless of whether such a violation occurred and thus could exceed the civil enforcement rights, and the remedies for prohibited transactions, provided under ERISA.[61] While the underlying facts and analysis in *Chamber of Commerce* may differ slightly, the tenet espoused by the Fifth Circuit (citing *Alexander v. Sandoval*[62]) holds true: "Only Congress may create privately enforceable rights, and agencies are empowered only to enforce the rights Congress creates."[63]

### *D. The Department Should Consider Alternatives to Requiring Terms in Management Agreements*

For the reasons enumerated above, the entire written management agreement provision should be eliminated from the proposed amendments. If not eliminated, at the very least, the Department should reposition the proposed contractual obligations as conditions of the exemption—to be effective upon the date of a final determination regarding the violation and for which clients would then be notified—rather than as required contractual terms. The Department could condition the ability to obtain an individual exemption on not restricting the client's ability to terminate or withdraw from an agreement,[64] not imposing certain fees and penalties for withdrawal from a fund, and not employing an individual who participated in the relevant misconduct.[65] As in some individual exemptions the Department has granted, the Department could require the manager to provide a notice of the manager's obligations to existing clients and could require the manager to include these obligations in investment management agreements with future clients. This approach would provide comparable protection to clients of an ineligible

[60] Violations of the prohibited transaction rules carry an excise tax under section 4975 of the Code and could result in personal liability for a fiduciary under ERISA section 409(a).

[61] In *Chamber of Commerce*, the Fifth Circuit observed that "[t]he grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties is unreasonable and arbitrary and capricious." 885 F.3d 360, 384.

[62] *Alexander v. Sandoval*, 532 U.S. 275 (2001).

[63] 885 F.3d 360, 384, citing *Alexander*, 532 U.S. at 291.

[64] As noted in section III(A) of this letter, the proposed requirement to not restrict the client's ability to terminate or withdraw should be qualified to permit continued application of reasonably necessary redemption restrictions (such as those typical of certain private equity or real estate funds) where the restrictions are disclosed in advance.

[65] In any case, we recommend that the Department clarify the obligation to not employ or knowingly engage any individual who participated in the conduct that is the subject of the criminal conviction or ineligibility notice. This obligation raises many questions, including the meaning of "participate" in this context. For example, an employee may have been involved in the conduct at issue, but without any criminal intent or knowledge of any wrongdoing. It is unclear whether this person should be considered to have "participated" in the misconduct. Furthermore, firms may encounter difficulty establishing whether an employee participated with criminal intent, as well as difficulty terminating an employee who has not been convicted of a crime.

QPAM, without the extraordinary and undue administrative burdens associated with mass-scale reopening of investment management agreements.

To be clear, however, we strongly urge the Department not to incorporate the overly broad indemnification provision into any generally applicable set of conditions for managers who become ineligible for the QPAM Exemption. As discussed earlier, the proposed indemnification language potentially would result in incalculable liability exposure and is commercially unreasonable.

## VI. The Department Should Clarify and Narrow the Unduly Broad Sole Responsibility Requirement so that Plans are Not Arbitrarily Barred from Legitimate Investment Transactions.

Under the general conditions of the exemption, proposed Section I(c) would specify that the terms of the transaction, commitments, and investment of fund assets, and any associated negotiations on behalf of the investment fund, must be the sole responsibility of the QPAM. The proposed amendment would further specify that the exemption provides no relief for any transaction that has been planned, negotiated, or initiated by a party in interest, in whole or in part, and presented to a QPAM for approval because (purportedly) the QPAM would not have sole responsibility with respect to the transaction. The Department has not identified any evidence of harm necessitating changes to the current language of Part I(c) of the exemption, which already requires the QPAM to have decision-making authority over the transaction. Nevertheless, if the Department proceeds with making changes to this section, ICI urges the Department to clarify the "planned, negotiated, or initiated" standard to avoid unintentionally cutting off plans from transactions where a third-party (potentially a party in interest) initiates discussions with a QPAM about a particular product or opportunity. Read literally, this proposed language is far more limiting than what the Department may have intended and would render ineligible many common types of transactions that benefit plan clients, even where the QPAM has the ultimate decision-making authority over the transaction.

Investment management strategies are based on buying, holding and selling assets—for example, equities, debt and fixed income securities—in pursuit of a particular objective, usually maximizing return on investment by minimizing risk and managing interest rate impact. The objective or mandate under which the portfolio is to be managed is typically negotiated and agreed to by the plan and the investment manager at the initiation of the relationship and the parties will maintain an ongoing dialogue as the mandate proceeds and the plan performs its required oversight. It is quite common and unsurprising that during the course of such an ongoing relationship, plan officials will present ideas for potential transactions that they consider to be consistent with the portfolio's objectives for consideration and ultimate decision making by the investment manager. Similarly, investment managers will have relationships with industry participants—*e.g.*, brokers, dealers, and other counterparties—that facilitate the manager's ability to perform its duties and responsibilities specified in its mandate. For example, bond and derivative portfolio management strategies often involve varying the weight of different types of bonds or derivatives held within a portfolio. An investment manager will form an opinion on the valuation of a specific sector of the bond or derivative market, based on fundamental credit factors, technical factors (such as supply and demand), and relative valuations compared to historical norms within that sector. In many cases the availability of certain bonds and derivatives needed for the portfolio will be limited due to market scarcity or limited sellers. A manager will use its relationships with market participants to ensure that it is made aware of the availability of or interest in bonds and derivatives that are needed to meet these constantly changing factors. Such relationships foster efficiencies that ultimately benefit the portfolio and the plan client.

As the foregoing demonstrates, it is not uncommon for a plan or counterparty to a transaction to be involved in identifying, negotiating and/or initiating a transaction, which could be interpreted to violate the "planned, negotiated, or initiated" standard articulated in the proposed amendment. In addition to initiating discussions, the counterparty to a bond or derivative purchase or sale will obviously have an interest in negotiating the transaction with the QPAM decision maker. We do not believe the Department intended to prevent a counterparty from negotiating its side of a transaction, but again, the wording of the proposal is problematic.

The language of the proposed amendment raises a similar concern for the common practice of using sub-advisor or fund-of-funds arrangements. For example, a plan may hire a QPAM to act as a fiduciary manager to the plan under ERISA section 3(38). That QPAM, who has full fiduciary responsibility to the client plan, may hire sub-advisors to manage segments of the plan's portfolio. This is done when, for example, the sub-advisor has a unique expertise that the QPAM does not have, or the sub-advisor arrangement may offer a cost structure that is beneficial to the plan. The QPAM's agreement with the sub-advisor typically will include representations that the sub-advisor is acting as a fiduciary with respect to ERISA plan assets and that the sub-advisor will adhere to the prohibited transaction rules in connection with transactions under the arrangement. There is concern that this type of arrangement could run afoul of the proposed sole responsibility standard (as articulated in the proposal, including the "planned, negotiated, or initiated" standard)—yet there clearly is no abusive intent or potential for harm and the arrangement is beneficial to the plan.

Given the foregoing realities of investment management, we are very concerned that—as written—proposed Section I(c) could call into question the QPAM's ability to consider any investment transaction that is identified or initiated by another party or a QPAM's ability to hire other managers within an otherwise fully compliant arrangement. As discussed above, typical practices inherent in most investment management relationships and that serve plans and their participants well could be affected by this overly broad language. ICI believes the existing language of the exemption in Part I(c) is a clear and concise statement of the requirement that the

QPAM have decision-making authority over the transaction.[66] In our view, the "planned, negotiated, or initiated" language of the proposed amendment is unnecessary and could be eliminated without diminishing the protective nature of the condition. If not eliminated, the terms "planned," "negotiated," and "initiated" should be clarified to address the Department's concerns more directly. For example, if the Department is concerned about the practice of hiring a QPAM for the sole purpose of approving a particular transaction already contemplated and/or negotiated by another plan fiduciary, the Department should craft language more narrowly aimed at preventing this situation. In fact, language from the original QPAM Exemption proposal could be adapted to address this concern: "[p]arty in interest transactions that are negotiated by, *e.g.*, an employer which sponsors a plan, and are then presented to a QPAM for approval would not qualify for the class exemption as proposed."[67]

A QPAM is a fiduciary with respect to the plan and must adhere to ERISA's high standards of prudence and loyalty in entering into any investment transaction for a plan. In fact, rejecting a potential investment just because another party initiates discussion could violate an asset manager's duties under both ERISA and the Investment Advisers Act of 1940. The proposed changes to this provision seem to ignore the underlying fiduciary duty owed by the QPAM and could place an unnecessary check on the QPAM's authority.

## VII. The Proposed New Recordkeeping Requirement is Inconsistent with the Nature and Purpose of the QPAM Exemption.

The proposed amendment would add a new recordkeeping requirement in Section VI(t), under which the QPAM must maintain "records necessary to enable [regulators and certain private-sector parties related to the plans] to determine whether the conditions of the exemption have been met ***with respect to a transaction*** for a period of six years from the date of the transaction in a manner that is reasonably accessible for examination" (emphasis added). The records must be available for examination by not only the Department, Internal Revenue Service, and other regulators, but also plan fiduciaries, contributing employers, and plan participants and beneficiaries. The recordkeeping provision suffers from overly broad language that similarly plagues many other provisions in the proposed amendments. We encourage the Department to eliminate it or clarify the scope of the recordkeeping requirement as discussed below.[68] The

---

[66] See Part I(c) of PTE 84-14 ("The terms of the transaction are negotiated on behalf of the investment fund by, or under the authority and general direction of, the QPAM, and either the QPAM, or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM, makes the decision on behalf of the investment fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest;").

[67] 47 Fed. Reg. at 56947.

[68] We acknowledge that PTE 91-38 (Exemption for Certain Transactions Involving Bank Collective Investment Funds) has recordkeeping requirements that are similar, but not identical, to the proposed amendment. It is important to note, however, that PTE 91-38 provides relief beyond just ERISA section 406(a) party-in-interest transactions. (PTE 91-38 provides relief from the restrictions of ERISA sections 406(a), 406(b)(2) and 407(a).) It also does not

transaction-based recordkeeping obligation is inconsistent with the purpose of the QPAM exemption, which as discussed earlier, is intended to facilitate efficient investment of plan assets. Further, expansive access to these records beyond the regulators of jurisdiction raises serious concerns about the encouragement of unnecessary litigation.

### *A. Any Recordkeeping Obligation Should be Process-Based Rather than Transactional*

The language of the proposal suggests that a QPAM must keep records of compliance for each transaction. For example, under the standard as written, records would have to be specific enough for a plan participant to verify that a party in interest did not plan, negotiate, or initiate a given purchase transaction.[69] Requiring records of such specificity is inconsistent with the purpose and intent of the QPAM Exemption. The QPAM Exemption was intended to alleviate the need to conduct a review of each transaction for party-in-interest compliance.[70] Having to provide an exemption-compliance analysis of each transaction the QPAM engages in would be a costly exercise and would negate the burden-saving aspect of the exemption.

The Department asserts the recordkeeping requirement would impose only a "negligible" burden, on the assumption managers already maintain these records as part of their regular business practices.[71] ICI believes this assumption is incorrect. Certainly, asset managers keep records of their investment transactions, but the existing conditions of the general QPAM Exemption do not necessitate compliance records specific to meeting those conditions for each transaction.

We therefore urge the Department to modify the proposed amendment to require process-based records of compliance, rather than transactional. For example, under a process-based standard, a QPAM would maintain records necessary to enable the Department to determine whether the QPAM's policies and procedures are reasonably designed to result in compliance with the conditions of the exemption.

We believe that a process-based standard would be similar to the recordkeeping standard from Prohibited Transaction Exemption (PTE) 2020-02 (Improving Investment Advice for Workers & Retirees). Section IV of PTE 2020-02 requires that "[t]he Financial Institution maintains for a period of six years records demonstrating compliance with this exemption and makes such

---

include key language from the proposal that would require maintenance of records necessary to determine whether the conditions of the exemption have been met *with respect to a transaction* (key language in italics). We believe these differences support the requested clarification to the proposed recordkeeping standard for the QPAM Exemption.

[69] In addition to requiring transaction-level specificity, this provision raises concerns about the difficulty of proving a negative (*i.e.*, records showing that no party in interest planned, negotiated, or initiated the transaction).

[70] The preamble to the proposed amendments explains that "[a]s a result of the prohibited transaction relief in the exemption, the QPAM can streamline its compliance with the prohibited transaction provisions of Title I of ERISA and the Code. The QPAM will generally not need to keep and routinely check a list of parties in interest before engaging in a transaction to avoid inadvertently entering into a prohibited transaction with potentially hundreds, if not thousands, of parties in interest." 87 Fed. Reg. at 45206.

[71] 87 Fed. Reg. at 45221.

records available, to the extent permitted by law including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury." This language does not generally require records specific to each transaction (notwithstanding PTE 2020-02's specific documentation requirements related to rollover recommendations) and would be more in line with the QPAM Exemption's purpose of allowing asset managers to operate more efficiently.

### *B. Availability of Records Should Be Limited to Regulators of Jurisdiction*

We also recommend that the Department narrow the availability of compliance records under the proposed amendment to cover only authorized employees of the Department or IRS. The Department has authority to enforce and oversee compliance with the terms of the exemption. Extending availability of compliance records to employers, unions, and, in particular, participants, beneficiaries and IRA owners, raises the risk of unnecessary litigation.

Narrowing the scope of access to the Department and IRS is consistent with the recordkeeping requirement in PTE 2020-02. In comments on the proposed investment advice exemption, ICI and other commenters expressed concern about allowing parties other than the Department to review exemption compliance records, which could lead to frequent requests for information to generate claims for use in litigation. In response to these concerns, the final exemption (PTE 2020-02) limits access to the Departments of Labor and Treasury. Like in that context, we are concerned here that making the QPAM compliance records available to others beyond the regulators with jurisdiction could lead to harmful fishing expeditions. Therefore, we urge the Department to narrow the scope of access to the records, in addition to making the recordkeeping obligations more process based.

## VIII. The Department Should Eliminate the Proposed Reporting Requirement to Avoid Confusion.

Subsection I(g)(1) of the proposed amendment would require any QPAM that relies upon the exemption to notify the Department by email and provide the legal name of each business entity that is relying on the exemption. The QPAM would have to update this notice if there is a change to the legal name or operating name(s) of the QPAM relying upon the exemption, or if the QPAM is no longer relying on the exemption. The Department indicates that it intends to keep a current list of entities relying upon the QPAM Exemption on its publicly available website.

We request that the Department reconsider the need for this notification requirement, as it does not appear to serve a worthwhile purpose, it would be incompatible with common ways asset managers use the QPAM Exemption, and it could lead to confusion in the marketplace. The Department has not provided any explanation of the need for such a notification requirement, which is not typically required in the context of other status-based prohibited transaction exemptions.[72] Furthermore, the requirement for managers to report any legal or operating name

[72] See, *e.g.*, PTE 91-38 and PTE 90-1.

changes to the Department could be an opportunity for foot faults and sudden unjustified loss of the ability to rely on the exemption.

***A. The Standard for Who Must Report Presents Significant Difficulties in Application***

The proposed reporting requirement is tied specifically to whether an asset manager "relies upon" the exemption, which could be a difficult standard to implement in practice. Although many asset managers consider themselves to be relying on the QPAM Exemption on a continuous basis, in some cases, reliance (and compliance) may be intermittent or on an "as needed" basis. In this regard, the asset manager may know at times that it is not engaging in party-in-interest transactions, or the manager may be relying on other exemptive relief, but situations may arise where that asset manager determines to make use of the QPAM Exemption. Furthermore, a manager may satisfy the requirements for relying on the QPAM Exemption with respect to some but not all clients, such as situations where a particular plan client represents more than 20 percent of the manager's total client assets (in which case, the exemption is not available). The obligation to notify the Department of reliance on the QPAM Exemption (and related obligation to notify the Department when no longer relying on the exemption) would be inconsistent with this type of intermittent use of the exemption.

In still other situations, there may be no active reliance at all, but rather a legitimate representation that a manager qualifies for QPAM status (based on the definition), and by inference could use the exemption if it needed to. Under the current exemption, a manager's status as a QPAM (pursuant to the definition of QPAM in Part VI(a)) is a matter separate from whether the manager relies on the exemption. As the Department acknowledges, QPAM status is viewed as an indicator of a manager's size and/or sophistication to attract potential clients, and "if an entity is no longer able to represent that it is a QPAM, client Plans are far less likely to retain the QPAM as their manager, even in situations where the client technically does not need the relief provided by the exemption."[73] It is not clear whether managers would be able to continue representing QPAM status if not technically relying on the exemption. This also raises questions about the significance of the Department's list of QPAMs relying on the exemption, as the list would not necessarily represent the universe of QPAM-eligible managers.

Considering the awkwardness of applying the reporting obligation, potential for foot-faults, and lack of a clear benefit, we recommend eliminating the requirement.

***B. The New Listing Requirements Will Lead to Public Misunderstanding***

The Department's planned maintenance of a public listing of managers relying on the QPAM exemption will lead to confusion and misunderstanding by plan sponsors, participants and beneficiaries. As the Department knows, QPAM is but one method available to comply with the prohibited transaction rules for party-in-interest transactions. If the Department posts a list on its website, it will perpetuate the myth that QPAM status is intended as the "gold seal" of asset

---

[73] 87 Fed. Reg. at 45215.

management. Further, other parties including plans and participants could be misled to think that if an asset manager is not listed, it is somehow "lesser" or lower quality than an asset manager relying on the QPAM Exemption. We question whether it would be appropriate for the Department to perpetuate such a misunderstanding. Also, as discussed above, the list would not necessarily represent the universe of QPAM-eligible managers. Accordingly, we urge the Department to eliminate the notification requirement altogether. If the Department determines to retain the notification requirement in the final amended exemption for its own purposes, we urge the Department not to post the list publicly.

## IX. The Department Should Not Increase QPAM Eligibility Thresholds Without Further Study.

In Section VI(a), the proposed amendment would significantly increase the minimum size requirements (in terms of assets under management, net worth, and equity capital) for the types of entities otherwise eligible for QPAM status (*i.e.*, banks, savings and loan associations, insurance companies, and investment advisers) and would provide for annual inflation adjustments to the thresholds.

The adjustments are quite significant (in some cases more than doubling) and could eliminate many firms currently eligible for QPAM status. Our concerns, therefore, are that smaller asset management firms could be displaced out of the market, which not only could impact the manager's continued existence, but will likely wreak havoc on the plans that use them.[74] The Department has acknowledged that it does not know the cost impact of the proposed increases on smaller managers that would lose QPAM status or the number of plans that may need to find alternative managers as a result of the increases,[75] which would seem to be reason enough to engage in further study before proposing any increases.

More broadly, these significant increases will contribute to the overall decline in the number of QPAMs that will likely result from this proposal. A significant contraction of this marketplace for services is not good for plans and their participants. For all these reasons, the Department should not adopt any threshold increases in the absence of empirical data or results of enforcement actions and investigations that support an increased risk to smaller QPAM clients. We urge the Department to conduct a survey or issue a request for information designed to gather data necessary to make an informed decision as to whether the thresholds should be increased and, if so, to what extent. As part of this study, the Department should carefully weigh any perceived benefits of making annual inflation adjustments to the thresholds against the resulting disruption and uncertainty for smaller financial institutions with QPAM businesses.

---

[74] Annual adjustment of the thresholds will further disrupt the business of firms near the thresholds and harm their client plans.

[75] See Initial Regulatory Flexibility Analysis for Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (the QPAM Exemption), 87 Fed. Reg. 56912, at 56915 and 56918 (September 16, 2022).

## X. The Department Should Withdraw the Proposed Amendment and Repropose After Considering Comments; Otherwise, the Department Should Clarify That All Changes Will Apply Prospectively Only and Provide a Transition Period.

The Department has expressed the view that there is a need to modernize the QPAM Exemption but offers no evidence that it is not working as intended. In the Regulatory Impact Analysis, for example, the Department notes the changes that have occurred in the financial services industry (such as industry consolidation), and various concerns of the Department.[76] The Department does not, however, cite a single instance of harm to plans that has resulted from these concerns, nor harm caused by asset managers' use of the exemption as currently drafted.

The changes proposed by the Department are sweeping and, in many cases, represent newly articulated positions with significant consequences for the continued usefulness of the QPAM Exemption. Although such an overhaul of a critically important exemption would have benefited from prior input from the regulatory community, the Department did not seek any plan sponsor, plan provider, or other stakeholder input before crafting the proposal. With this comment period, and the upcoming November hearing, the Department will have the benefit of receiving such input. We urge the Department to withdraw the proposal and undertake a comprehensive study, obtaining additional stakeholder input prior to proposing any amendments that are shown to be necessary.

In the absence of a withdrawal and re-proposal, we strongly urge the Department to clarify that any changes made to the QPAM Exemption will apply prospectively only. For example, the Department should not apply any new disqualification provisions to actions or events that occur before the effective date of the finalized amendments. Likewise, if the Department elects to finalize the changes regarding new recordkeeping requirements or the new requirement that transactions must be initiated, planned and negotiated solely by the QPAM, such requirements should not be applied to any transaction that occurs prior to the effective date of the finalized amendments. Failing to do so could negatively impact both plans and the financial markets.

Finally, it does not appear that the Department contemplates including a transition period before the proposed amendments would take effect. Rather, the Department proposed that the amendments would be effective 60 days after the date of publication of the final amendment in the Federal Register. Due to the extensive nature of the changes, we urge the Department to provide one full year for existing QPAMs to come into compliance with any new requirements. If the final amendment requires that new recordkeeping processes be put in place, and if asset management contract amendments are required, then an 18-month transition period would be more appropriate.

---

[76] See "Need for Regulation" at 87 Fed. Reg. 45214-5.

* * * * *

ICI and its members appreciate the opportunity to help inform the Department as it considers changes to the QPAM Exemption to ensure that the amendments are consistent with congressional intent and the interests of retirement plans and their participants in accessing services, investments, and transactions that are necessary for, or beneficial to, their creation and operation. We are committed to working with the Department on this matter. If you have any questions, or if we can be of assistance in any way, please contact David Abbey at david.abbey@ici.org, Elena Chism at elena.chism@ici.org, or Shannon Salinas at shannon.salinas@ici.org.

Sincerely,

| | | |
|---|---|---|
| /s/ David Abbey | /s/ Elena Barone Chism | /s/ Shannon Salinas |
| David Abbey<br>Deputy General Counsel<br>Retirement Policy | Elena Barone Chism<br>Associate General Counsel<br>Retirement Policy | Shannon Salinas<br>Associate General Counsel<br>Retirement Policy |