October 11, 2022

Via Electronic Submission

The Honorable Ali Khawar
Principal Deputy Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

RE: Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (the "QPAM Exemption"); RIN 1210 ZA07

Dear Principal Deputy Assistant Secretary Khawar:

The Insured Retirement Institute ("IRI") appreciates the opportunity to provide these comments to the Department of Labor ("Department") in connection with the above-referenced proposed amendments to the QPAM Exemption (the "Proposed Amendments").

The IRI is the leading association for the entire supply chain of insured retirement strategies. IRI members account for 90 percent of annuity assets in the U.S., comprise the foremost distributors of protected lifetime income solutions, and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community. The membership of IRI includes asset managers that act as qualified professional asset managers ("QPAMs") and plan sponsors of plans that utilize the services of QPAMs.

I. General Comments on the Importance of the QPAM Exemption and IRI's View on the Proposed Amendments

For almost 40 years, the QPAM Exemption has been one of the most widely relied upon prohibited transaction exemptions, enabling plans to access a variety of beneficial investment strategies and receive asset management services at reasonable costs. The IRI is concerned that the Proposed Amendments[1] would (a) severely limit the types of transactions covered by the QPAM Exemption; (b) increase the level of legal risk associated with serving as a QPAM; and (c) unnecessarily diminish levels of confidence by plans in the uninterrupted provision of investment management services by their chosen providers by subjecting all QPAMs to new and unwarranted risks of disqualification. The Proposed Amendments would negatively affect the interests of plans and participants because they would cause plans to forego valuable investment opportunities, would likely result in increased asset management costs, and may ultimately

[1] The Proposed Amendments define the term "Plan" to include plans described in section 4975(e)(1) of the Internal Revenue Code of 1986, as amended, which includes IRAs. 87 Fed. Reg. at 45321.

decrease the number of qualified and experienced firms available to provide asset management services to plans. If these Proposed Amendments go into effect as proposed, plans will likely incur significant transition costs, both in terms of the time and attention plan fiduciaries will need to devote to implement the Proposed Amendments, as well as in terms of fees that will be charged to plans. The IRI is particularly concerned that the Department appears to be pursuing the Proposed Amendments to the QPAM Exemption in the absence of any empirical data or investigative results establishing the problems the Department is seeking to solve.

When the QPAM Exemption was initially proposed, the Department recognized that the *per se* prohibited transaction rules under section 406(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), present "complex problems of compliance." 47 Fed. Reg. 56945, 56946 (Dec. 21, 1982). The Department explained that, for any single plan, there may be "thousands" of parties in interest, and that, in the absence of broad, readily available prohibited transaction exemptive relief, financial institutions providing asset management services to ERISA plans would need to undergo "time consuming ERISA compliance checks" for each of the numerous transactions they engage in by confirming whether the counterparty in each transaction is a party in interest. 47 Fed. Reg. at 56946–47. If the counterparty was determined to be a party in interest, the Department noted that the financial institution would then need to apply for an individual exemption or "forego the investment opportunity entirely." 47 Fed. Reg. at 56947. To address those concerns the Department decided to grant the QPAM Exemption, a broad-based exemption covering a wide array of potential investments, which applies regardless of whether asset management services are provided through a single customer account or a pooled investment fund. 47 Fed. Reg. at 56946–47. The QPAM Exemption is unique in that other exemptions granted by the Department only applied to specific types of investments or in connection with the management of specific types of funds.

The QPAM Exemption has largely been a success. It is now one of the most widely relied upon exemptions ever granted. The regulated community has embraced the QPAM Exemption since it affords an efficient means for an asset manager to pursue plan investment interests by engaging in multiple types of transactions on behalf of plan-owned funds without undergoing time consuming, laborious, and ultimately unproductive party in interest reviews of counterparties. Large plans may engage numerous asset managers to invest in each of the sub-asset class components of the equity, fixed income, cash, and alternative asset classes. Such plans may also retain asset managers to carry out different investment strategies within those sub-asset class components. The QPAM Exemption is especially useful because it provides a single prohibited transaction compliance strategy that may be utilized by each asset manager. If the QPAM Exemption were not available, then plan fiduciaries would need to devote significantly more time and resources to overseeing and coordinating with the plan's asset managers to ensure they do not engage in prohibited transactions. And such coordination may not even be possible if the asset manager is managing the assets of several plans through a pooled investment fund. Therefore, plan fiduciaries typically require that any asset manager they engage on behalf of the plan represent that it meets the definition of the QPAM and will satisfy the terms and conditions of the QPAM Exemption.

The terms of the QPAM Exemption afford prohibited transaction relief only from the restrictions of ERISA section 406(a). No relief is provided from the ERISA section 406(b) restrictions on fiduciary self-dealing, acting on behalf of an adverse party, and from the receipt of "kickbacks." Nonetheless, the Department appears to have adopted the view that plans commonly utilize the services of QPAMs due to a belief that the QPAM Exemption will require the QPAM to be "held to a very high standard of conduct." Pensions & Investments, *DOL proposes update to QPAM exemption* (July 26, 2022). ERISA itself – not the QPAM Exemption -- subjects *all* plan fiduciaries, including QPAMs, to high standards of conduct, including the general fiduciary responsibilities under ERISA section 404 and the referenced fiduciary prohibitions under ERISA section 406(b). We do not agree that QPAMs are or should be held to standards of conduct that exceed those of other ERISA plan fiduciaries because ERISA's statutory text supports a uniform standard of conduct applied to all fiduciaries. *See* ERISA § 404. The section 406(a) prohibited transaction relief available under the QPAM Exemption is properly available to skilled asset managers who have demonstrated, through their performance, that they are capable of serving plan investment interests. Moreover, we do not agree that instances of misconduct that may occur within the QPAM's broader organization and in connection with investment management mandates that are unrelated to the provision of investment management services to ERISA plans should have any bearing whatsoever on the QPAM's continued eligibility to serve in that capacity.

The QPAM Exemption has come to be an integral component of the nation's capital markets. ERISA plans and IRAs hold approximately $25 trillion in assets, making them one of the largest sources of investible capital in the United States. Investment Company Institute, Quarterly Retirement Market Data (June 15, 2022), *available at* https://www.ici.org/statistical-report/ret_22_q1. Capital market participants and the financial services industry have recognized the importance of the QPAM Exemption as providing a means for plans to engage in transactions in a compliant manner. Fostering needless ambiguities in the continued availability of the QPAM Exemption is likely to inject new uncertainties and risks into investment transactions involving plans. Those risks and uncertainties are likely to increase levels of complexity and cost but have no offsetting benefits. For instance, a representation regarding an asset manager's compliance with the QPAM Exemption is considered standard language for inclusion in an International Swaps and Derivatives Association (ISDA) agreement where one of the parties to a derivatives transaction is a plan. Therefore, any amendments to the QPAM Exemption will necessarily give rise to systemic changes to the broader capital markets.

While we believe that there may be changes to the disqualification provisions set forth in section I(g) that would serve to improve the QPAM Exemption, our members strongly disagree with the direction of the changes included within the Proposed Amendments. Although the Department presumes, without support, that the criminal conviction of a QPAM's affiliate, or of a related entity or person, indicates a risk of harm to plans, section I(g) has always imposed disqualification regardless of whether such risk of harm in fact exists, and regardless of whether there is any actual connection between the criminal conduct and the QPAM's asset management activities. Section I(g) also goes beyond the prohibition of a convicted person acting as a fiduciary that is imposed by section 411 of ERISA. In situations where a QPAM is disqualified for conduct that does not impose a risk of harm to plans, section I(g) imposes collateral consequences or punishments on a QPAM that are not authorized by Congress. In short, our

members believe that section I(g) should be changed to make it less onerous, not more so, by imposing disqualification only when there is a direct relationship between the crime and the services provided by the QPAM. The Proposed Amendments proceed in exactly the wrong direction.

The Proposed Amendments double down on the existing problems associated with Section I(g) by creating new circumstances that could disqualify a QPAM. The Proposed Amendments would also subject all plan fiduciaries that have engaged a QPAM to a wide-ranging and time-consuming contract amendment exercise. Our members are concerned that these changes would cause QPAMs to raise their investment management fees to account for the tail risk of disqualification and would force plan fiduciaries to face the disruption and costs imposed by a requirement to transition to a new QPAM on a more frequent basis.

The Proposed Amendments' changes to section I(c) of the QPAM Exemption are of equal concern to IRI members. The Department claimed that the Proposed Amendments reflect the Department's longstanding view that a QPAM should not simply act as a "mere independent approver," but the changes sweep much more broadly than the Department may have intended. The changes to section I(c) may cause the QPAM Exemption to become unavailable in a wide variety of transactions, including in connection with transactions that are commonly conducted in reliance on the QPAM Exemption on a day-to-day basis. The changes therefore have the potential to disrupt many plans by requiring them to forego investment opportunities and to disrupt the capital markets by shutting off plans from many types of investments they currently make.

We provide detailed comments on these and other aspects of the Proposed Amendments below.

II. Specific Comments on the Proposed Amendments

A. Section I(c) of the QPAM Exemption

The Proposed Amendments would make several changes to the text of section I(c) of the QPAM Exemption, which currently requires that:

> 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[.]

1. The QPAM Exemption Should Remain Available in Situations Where the QPAM Has Authority to Negotiate and Represent the Interests of the Plan in the Transaction

The Proposed Amendments would revise the first sentence of section I(c) to state that the "terms of the transaction, commitments, and investment of fund assets, and any associated negotiations," must be the "sole responsibility" of the QPAM and would remove the proviso currently included in the sentence that the terms of the transaction may be negotiated "under the authority and general direction of the QPAM." 87 Fed. Reg. at 45227. Additionally, the Proposed Amendments would state in section I(c) that "[n]o relief is provided under this exemption 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 the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c)[.]" The Department explained in the preamble to the Proposed Amendments that these changes would be made to clarify that the QPAM cannot act as a "mere independent approver of transactions" and must "have and exercise discretion." 87 Fed. Reg. at 45213. Additionally, the Department stated that "a party in interest should not be involved in any aspect of a transaction, aside from certain ministerial duties and oversight associated with plan transactions, such as providing general investment guidelines to the QPAM." *Id.*

These changes would appear to render the QPAM Exemption unavailable in a wider array of situations than the Department likely intended. As the Department is aware, the QPAM Exemption is only utilized where a counterparty to a transaction is a party in interest. Counterparties who are parties in interest may, depending on whether the transaction is of a type that is customarily negotiated, negotiate the transaction on their own behalf and present their suggested terms and conditions to the QPAM. Even if the transaction is not of a type that is customarily negotiated, the counterparty party in interest would still be *involved*. To say that the party in interest may not be "involved in any aspect of a transaction" and may not negotiate the transaction, even "in part," suggests that the QPAM Exemption is not available in connection with transactions with any party in interest. We are confident the Department did not intend this result.

Moreover, these changes would, if plainly read, disrupt well-established asset management practices. QPAMs commonly learn of potential investment opportunities through financial intermediaries such as investment banks and broker-dealers, who may approach QPAMs with the opportunity. For example, broker-dealers acting as underwriters may approach a QPAM in connection with a new issue of fixed income securities and invite the QPAM to submit a bid to purchase the securities. It is important for plans to purchase fixed income securities in new issue offerings because the availability and pricing of such securities on the secondary market is less favorable. Banks acting as dealers of derivatives may also approach a QPAM with a potential transaction. The QPAM then considers whether the transaction is in the interest of its plan clients in a manner that is consistent with its fiduciary responsibilities. However, the financial intermediary may be a party in interest. If it is, then the Proposed Amendments would appear to foreclose the QPAM's participation in the transaction on behalf of its client plans because the financial intermediary party in interest has "planned" or "initiated" the transaction (at least in part) and presented it to the QPAM for approval. As a result, it is not clear whether the Proposed Amendments would allow plans to continue accessing valuable investment opportunities in the manner they do today.

Further, these changes would raise new ambiguities as to whether the QPAM Exemption may be available in connection with common sub-advisory arrangements. In connection with these arrangements, plan fiduciaries may engage a QPAM who delegates certain investment responsibilities to a sub-advisor but retains authority to approve transactions. In this scenario, it is unclear whether the QPAM would satisfy the proposed condition that it have "sole responsibility" over the transaction, and whether the proposed restriction on transactions being "planned, negotiated, or initiated" by a party in interest would be violated (because the sub-advisor would be considered a party in interest). For similar reasons, the Proposed Amendments would create uncertainty as to whether a QPAM could utilize the services of any affiliates or subcontractors, or even an outside law firm, to assist in the negotiation of transactions or transaction documentation.

The IRI does not believe that any of the common practices described above raise risks of harm to plans such that they must be restricted in the QPAM Exemption. They do not relate to the concerns identified by the Department in the preamble to the Proposed Amendments. We understand the Department's view that a QPAM should not act as a rubber stamp to approve transactions designed by the party in interest who appointed the QPAM (*e.g.*, a plan sponsor) because of the potential that such a transaction, such as a transaction between the plan and the plan sponsor, would involve a conflict of interest. 87 Fed. Reg. at 45213 n.36; *see also* Preamble to Proposed PTE 1997-50, 62 Fed. Reg. 27625, 27626 n.4 (May 20, 1997) (stating the QPAM Exemption is not available where an asset manager is engaged "solely" to approve a transaction presented for its consideration by a plan sponsor). However, the Proposed Amendments' changes to section I(c) go beyond this area of Departmental concern by potentially prohibiting investments and investment strategies in the absence of circumstances where a QPAM was engaged solely to approve a specific transaction. The new ambiguities raised by the changes to section I(c) would also raise the risk that a QPAM would inadvertently cause a plan to enter into a non-exempt prohibited transaction, for which it would be liable to the plan. This new legal risk, combined with the other risks that would be imposed on QPAMs if the Proposed Amendments are adopted in their current form, such as the requirement to provide new rights of indemnification, would raise the costs of operating as a QPAM and would likely cause at least some QPAMs to exit the ERISA plan market entirely or raise the fees they charge to their client plans.

We also note that section I(a) of the QPAM Exemption already addresses the Department's concerns by prohibiting the QPAM from entering into a transaction with any party with authority for appointing or negotiating the terms of the QPAM's appointment, or an affiliate of such party. Section I(a) would generally prohibit transactions between the plan and the plan sponsor. However, if the Department does not believe section I(a) is sufficient to address its concerns, then the IRI urges the Department to use more tailored language that would not disrupt established asset management practices or lock plans out of valuable investment opportunities. For this purpose, the Department could look to the language it has used in individual prohibited transaction exemptions that involve independent fiduciaries. In those exemptions, the Department addressed its concerns about the possibility of an independent fiduciary acting as a "mere independent approver" or rubber stamp by requiring that the independent fiduciary "represent the interests of the [Plan]" and "review and approve" the transaction. *See* PTE 2021-03 § I(d), 86 Fed. Reg. 34054, 34055 (June 28, 2021); PTE 2019-03 § II(e), 84 Fed. Reg. 36950,

36951 (July 30, 2019). They do not require the independent fiduciary to have "sole responsibility," nor do they prohibit the involvement of any party in interest.

Based on the foregoing, the IRI respectfully recommends that, if the Department proceeds with the Proposed Amendments, section I(c) should be revised as indicated in the bold and italicized text below:

> The terms of the transaction are negotiated on behalf of the investment fund by, or under the authority and general direction of, the QPAM, ***which represents the interests of the Investment Fund in connection with the transaction,*** 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, ***reviews and*** makes the decision on behalf of the investment fund to ***approve or*** enter into the transaction, provided that the transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest[.]

2. The Department Should Remove the Proposed Requirement that the QPAM Be Retained Primarily to Carry out Investment Purposes

The Proposed Amendments would add new language to section I(c) of the QPAM Exemption to state that "[t]he prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purposes." The Department did not explain the impetus for this new sentence or describe, other than the example of hiring a service provider to a welfare plan, what types of engagements or transactions will or will not further an investment purpose. 87 Fed. Reg. at 45213 n.36. As a result, the new language will give rise to ambiguities as to whether an asset manager's retention "primarily" furthers an "investment purpose." Moreover, the Department did not identify any problem the new language purports to solve that would justify the creation of new ambiguities regarding the coverage of the QPAM Exemption.

The IRI is especially concerned that the new language could render the QPAM Exemption unavailable in connection with annuity purchases, such as a pension risk transfer, where a plan purchases an annuity from an insurance company in connection with the termination of the plan or to annuitize a subset of the plan's participant population. In connection with such a transaction, plan fiduciaries will often appoint an independent fiduciary to represent the interests of the plan and decide whether the plan will enter into the transaction. If the insurance company is a party in interest to the plan, it would be necessary to rely on a prohibited transaction exemption in connection with the annuity purchase transaction, and the QPAM Exemption is often relied upon for this purpose, with the independent fiduciary serving as the QPAM. Importantly, the independent fiduciary's evaluation includes determining whether entering into the transaction is consistent with ERISA, taking into account the guidance set forth in Department Interpretive Bulletin 95-1, which indicates that such an evaluation should include, among other things, an assessment of the quality and diversification of the insurance company's investment portfolio; the level of the insurer's capital and surplus; and the structure of the

annuity contract and guarantees supporting the annuities, such as the use of separate accounts.[2] 29 C.F.R. § 2509.95-1(c). This assessment is primarily an investment analysis, and therefore, we believe, that an independent fiduciary's engagement in connection with pension risk transfers is "primarily for investment purposes" such that the QPAM Exemption may continue to be used in connection with the annuity purchase transaction, although the new language in the Proposed Amendments would render it unclear.

Nonetheless, because we do not understand what other types of transactions may be excluded from coverage under the QPAM Exemption by the new language, we respectfully request that this new language be removed from Section I(c).

B. Section I(g) of the QPAM Exemption

The Proposed Amendments would make various changes to section I(g) of the QPAM Exemption, which currently provides that a QPAM will be disqualified from reliance on the QPAM Exemption upon the conviction of the QPAM, an affiliate of the QPAM (as defined in section VI(d) of the QPAM Exemption), or any owner, direct or indirect, of a 5 percent or more interest in the QPAM, of certain enumerated crimes.

1. The Department Should Provide that Disqualification Will Occur Only if There Is a Relationship Between the Conduct Forming the Basis for the Conviction and the QPAM's Asset Management Activities

A QPAM's disqualification gives rise to significant negative consequences and costs for its client plans. If the plans continue to use the services of the QPAM, the plans may not be able to access the broad range of investment and investment strategies permitted under the QPAM Exemption. On the other hand, if the plan transitions to a new asset manager, the plan would be subject to significant transition costs, including:

- costs associated with searching for a new asset manager to replace the disqualified QPAM (such as the costs and time required for a Request for Proposal process, costs associated with consultants to assist or manage the process, legal review and negotiation of a new management agreement, and other due diligence expenses);
- brokerage and other transaction costs associated with the sale of portfolio investments to accommodate the investment policies and strategy of the new asset manager;
- the opportunity costs of holding cash pending investment by the new asset manager; and
- lost investment opportunities in connection with a change of asset managers.

[2] We also note that the independent fiduciary represents the interests of the plan in connection with the negotiation of the terms and structure of group annuity contract with the insurance company and any related purchase agreements. The independent fiduciary's engagement in connection with such a transaction often spans several months.

See, e.g., Preamble to Proposed PTE 2019-07, 84 Fed. Reg. (July 16, 2019).

We understand that the Proposed Amendments would purport to mitigate these costs for a QPAM's client plans by requiring that the QPAM indemnify its client plans and by providing for a transition period in the event of the QPAM's disqualification. However, as described in subsequent sections of this comment letter, these changes would not effectively mitigate the costs that disqualification imposes on plans. Moreover, disqualification imposes catastrophic costs on a QPAM by making it difficult if not impossible to continue to provide services to the ERISA plan market.

To justify the costs of disqualification on plans and QPAMs, there must be some indication that the conduct forming the basis of the disqualification indicates a defined, quantifiable risk of harm to plans. Otherwise, the disqualification would impose needless costs on plans and a punishment for QPAMs that is not authorized by Congress. Other than a presumption of harm, the Department provides no support for its position. We, therefore, must disagree that any conviction of an affiliate or related entity necessarily supports a disqualifying a risk. A conviction could trigger disqualification under section I(g) of the QPAM even if:

- the individuals involved in the misconduct forming the basis for the conviction never provided any services in respect of the QPAM's client plans, or had reason to know who the QPAM's client plans were;
- the individuals involved in the misconduct never interacted with individuals who work for the QPAM;
- the QPAM's directors, officers, and employees were not aware of the misconduct;
- no plans or plan assets were involved or affected by the misconduct forming the basis for the conviction;
- the person or entity that is convicted only owns an indirect 5% ownership interest in the QPAM and does not play any role in the management of the QPAM or in its asset management activities;
- the person or entity that is convicted serves clients in a different country, and does not provide any services related to asset management; and/or
- the QPAM was subject to compliance policies and procedures that were different from the person or entity that was convicted.

Accordingly, the disqualification provisions of section I(g) are not appropriately tailored. Disqualification should only occur if there is some connection or nexus between the conduct forming the basis for disqualification and the QPAM's asset management activities. To provide such a nexus, the IRI respectfully requests that the Department revise section I(g) to provide that a conviction will form the basis for disqualification only if it "arises from the provision of asset management services to Plans."

2. The Department Should Not Treat Non-Prosecution or Deferred Prosecution Agreements as a Basis for Disqualification

The Proposed Amendments would establish new categories of prohibited misconduct that could serve as the basis of disqualification, including conduct that forms the basis for a non-prosecution or deferred prosecution agreement, or a similar agreement in a foreign jurisdiction. 87 Fed. Reg. at 45232. The IRI strongly opposes this aspect of the Proposed Amendments and therefore respectfully urges the Department to refrain from expanding the definition of Prohibited Misconduct as contemplated in the Proposed Amendments. Regardless of the reason for disqualification, plans would be exposed to the substantial costs described above if a QPAM is disqualified. The Department should therefore exercise extreme caution before causing *more* QPAMs to become disqualified. We do not believe non-prosecution and deferred prosecution agreements justify disqualification.

In connection with non-prosecution and deferred prosecution agreements, there is no finding of guilt by an independent jury. There is no court involvement when a non-prosecution agreement is made, and court involvement with a deferred prosecution agreement is minimal. *U.S. v. Fokker Services B.V.*, 818 F.3d 733, 738 (D.C. Cir. 2016). Accordingly, the Department previously recognized that a deferred prosecution agreement is not equivalent to a criminal conviction. DOL Advisory Opinion 2013-05A (Nov. 1, 2013). Empirical evidence shows that the number of non-prosecution and deferred prosecution agreements rose at approximately the same rate as the number of criminal plea agreements rose. 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, 591 (2015). This data suggests that prosecutors use non-prosecution or deferred prosecution agreements in situations where they do not believe a criminal conviction can be secured rather than as an alternative to seeking a criminal conviction. *See id*. at 554. We are also concerned that financial institutions will be less willing to enter into non-prosecution or deferred prosecution agreements if doing so would result in disqualification under the QPAM Exemption. This outcome may not be in the public interest.

Moreover, the Proposed Amendments also provide that an agreement with a foreign government that is "substantially equivalent to a non-prosecution agreement or deferred prosecution agreement" may cause a QPAM to be disqualified. 87 Fed. Reg. at 45232. Other than stating that it would interpret this provision broadly, the Department did not provide any explanation of when it would view an agreement with a foreign government to be "substantially equivalent" to a deferred or non-prosecution agreement. 87 Fed. Reg. at 45210. The IRI is concerned that it would be extremely time-consuming, if not unworkable, for a QPAM to track and assess agreements made by its affiliates with foreign governments to determine whether any such agreement may be substantially equivalent to a non-prosecution agreement or deferred prosecution agreement. As the Department is aware, each country's justice system is different. Governmental authorities may utilize settlement agreements in connection with conduct that blurs the line between civil and criminal offenses.[3] Such an agreement may often be written in a

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[3] For example, authorities in Brazil use "leniency agreements" to enforce antitrust and anti-corruption violations, which could be characterized as either a civil or criminal offense under Brazilian law. Diaulas Costa Ribero et al.,

language other than English. The analysis of whether an agreement with a foreign government is similar to a non-prosecution agreement or deferred prosecution agreement is thus challenging in and of itself. The Proposed Amendment would also require QPAMs to monitor the activities of affiliates with whom they share no operational connections. Establishing and maintaining a new reporting system between a QPAM and all of its foreign affiliates would require the dedication of substantial amounts of resources and employee time. The costs of such a system may cause some QPAMs to increase the fees they charge to plans.

The IRI does not agree that this or the other types of disqualifying prohibited misconduct described in the Proposed Amendments should be included in the QPAM Exemption. However, if the Department does go forward with including new kinds of prohibited misconduct in the QPAM Exemption, the IRI strongly urges the Department to clarify that prohibited misconduct will only disqualify a QPAM on a prospective basis. For example, non-prosecution or deferred prosecution agreements entered into before the effective date of any final amendment to the QPAM Exemption should not form the basis for a QPAM's disqualification. As the Supreme Court has noted, retroactive laws "deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). The Department's guidance has, until now, indicated that a QPAM's deferred prosecution agreement would *not* result in a QPAM's disqualification. *See* DOL Adv. Op. 2013-05 (Nov. 1, 2013) (stating "the Department concurs with your view that [a QPAM] is not disqualified from acting as a QPAM pursuant to Part I(g) of PTE 84- 14 solely because [an affiliate] entered into the DPAs"). As a result, the regulated community has not been on notice that a non-prosecution or deferred prosecution agreement may form the basis for a QPAM's disqualification. Moreover, disqualifying QPAMs on a retroactive basis would cause a significant number of existing transactions to become non-exempt prohibited transactions, which would impose substantial costs and disruptions on such QPAMs and their client plans.

3. The Proposed Amendments Do Not Provide Adequate Due Process Protections to Protect QPAMs from Arbitrary Disqualification by the Department

The Proposed Amendments would provide that the Department may disqualify a QPAM from reliance on the QPAM Exemption in connection with a finding of certain categories of prohibited misconduct, as described above. 87 Fed. Reg. at 45227–28. The Department would issue a written warning of potential ineligibility and provide the QPAM with 20 days to respond and request a meeting, to be scheduled within 30 days of the QPAM's response. 87 Fed. Reg. at 45228. The QPAM would also be permitted to respond in writing but would not be entitled to more than one meeting. *Id*. Following the meeting or written response, the Department would make a final determination of whether the QPAM would be disqualified. In the preamble to the Proposed Amendments, the Department stated it intends to develop findings of most forms of misconduct in connection with its enforcement program. 87 Fed. Reg. at 45209.

The IRI does not believe the approach taken in the Proposed Amendments would adequately protect the due process rights of QPAMs. Traditional notions of due process require

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Interface Between the Brazilian Antitrust, Anti-Corruption, and Criminal Organization Laws: The Leniency Agreement, 22 Law and Bus. Rev. of the Americas 195, 202, 216 (2016).

that decisions be made by an independent, disinterested decision-maker. However, the Department is proposing that it be responsible for investigating whether a QPAM be disqualified, alleging that the QPAM ought to be disqualified, and making a final determination as to whether the QPAM will be disqualified. In other words, the Department would act as a prosecutor, judge, and jury. This procedure stands in contrast to a criminal conviction, where a defendant is entitled to a determination made by a jury, through a process overseen by a judge.

Moreover, the Proposed Amendments fail to provide sufficient clarity with respect to the process by which the Department would determine whether a QPAM should be disqualified. The new categories of prohibited misconduct are subjective in nature and would thus provide the Department with broad discretion in making the determination. For example, as described above, whether an agreement with a foreign government is substantially equivalent to a non-prosecution agreement or deferred prosecution agreement may be unclear. We are also concerned that the review of agreements with foreign governments is outside the scope of the Department's traditional expertise, and the Department's decisions on this point could therefore be unpredictable or inconsistent. Further, the Department would have significant discretion to determine when a QPAM has engaged in a "systematic pattern or practice" of violating the terms of the QPAM Exemption. Among other things, the Department would decide (1) how many violations would cause a "pattern or practice" of violations to be viewed as "systematic;" (2) how linked the violations would need to be to constitute a "pattern or practice;" and (3) whether a QPAM's compliance policies, employee training, or other factors would be treated as mitigating factors in determining whether a systematic pattern or practice of violations has occurred. Some of the forms of prohibited misconduct added by the Proposed Amendments appear to be taken from PTE 2020-02, but PTE 2020-02 was only granted two years ago, and how the Department interprets those provisions is still unclear. New regulatory uncertainty regarding the potential for disqualification would raise the risks of operating as a QPAM – risks that QPAMs may decide to pass on to their client plans through increased fees.

Moreover, the Proposed Amendments' disqualification procedure does not provide adequate time for a QPAM to respond to the Department. A QPAM would be required to expend significant time and resources to gather information in response to a written ineligibility warning, especially if the prohibited misconduct were to relate to a foreign affiliate's non-prosecution or deferred prosecution agreement, in which case relevant documentation may be written in a language other than English. At a minimum, a QPAM should be provided at least 120 days to provide a substantive response to the Department.

We understand that these new procedures are based on the ineligibility provisions of PTE 2020-02, but PTE 2020-02 primarily provides relief from the conflict of interest and self-dealing prohibited transaction provisions of section 406(b) of ERISA, and the QPAM Exemption primarily provides relief from section 406(a) of ERISA only. The consequences of allowing financial institutions to make recommendations and receive compensation as a result of that advice are different from allowing QPAMs to provide asset management services to plans without section 406(b) relief. Additionally, the effects of a financial institution's ineligibility to rely on PTE 2020-02 on its retirement investor clients would be different from the effects of a QPAM's disqualification on its plan clients. Therefore, the fact that similar procedures may be part of PTE 2020-02 does not justify inclusion in the QPAM Exemption.

If the Department determines to add new forms of prohibited misconduct to the QPAM Exemption, it should designate a truly impartial decisionmaker with authority to decide whether a QPAM will be disqualified, rather than reserving that authority for itself. Alternatively, the Department could achieve the same goals through well-established enforcement mechanisms. For example, the Department could enter into settlement agreements with QPAMs requiring them to structure their asset management activities in reliance on other exemptions (or to avoid engaging in prohibited transactions, thereby avoiding the need for an exemption) or pursue judgments or consent decrees requiring them to do so. Whatever the process, however, the QPAM should be able to continue to rely on the exemption unless and until there is a final disposition of the matter.

4. If Retained, Disqualification upon a Foreign Conviction Should Apply on a Prospective Basis Only

The Proposed Amendments would define a "Criminal Conviction" that would trigger the disqualification of a QPAM to include a conviction by a foreign court of competent jurisdiction. 87 Fed. Reg. at 45231–32. The IRI is not providing specific comments on this aspect of the Proposed Amendments, though the IRI does have concerns about the Department relying on authorities in foreign jurisdictions, especially jurisdictions that do not adhere to due process and rule of law conventions similar to those of the United States, to disrupt a QPAM's provision of asset management services to plans. With respect to this aspect of the Proposed Amendments, the IRI's only comment is that any such change, if included in final amendments to the QPAM Exemption, should be made on a prospective basis only.

As the Department noted in the preamble to the Proposed Amendments, the Department's Office of the Solicitor provided an interpretation on November 2, 2020, opining that section I(g) of the QPAM Exemption does not apply to foreign criminal convictions. 87 Fed. Reg. at 45208 n. 28. That interpretation was withdrawn on March 23, 2021. *Id.* The Department stated that the Proposed Amendments would remove "doubt" and "ambiguity" regarding the status of foreign convictions. 87 Fed. Reg. 45208. Given the Department's acknowledgement that this doubt and ambiguity exists, this change should not be made retroactive.

The IRI is aware that the Department has granted several individual exemptions that allow a QPAM to continue to rely on the QPAM Exemption following a foreign criminal conviction. However, exemptions are prefaced by a statement that the granting of the exemption is "not dispositive" as to whether a prohibited transaction will occur. *See, e.g.*, Preamble to PTE 2020-01, 85 Fed. Reg. 8020, 8024 (Feb. 12, 2020). Moreover, at least some applicants for these exemptions sought advisory opinions from the Department to clarify that foreign convictions would not be disqualifying under section I(g) of the QPAM Exemption. 87 Fed. Reg. at 45208 n.29; 85 Fed. Reg. at 8022. The advisory opinion requests indicate that the applicants did not believe that foreign convictions were disqualifying under the QPAM Exemption but rather that they sought individual exemptions as the clearest path to continue the uninterrupted provision of asset management services to plans. Therefore, we do not agree that the status of foreign convictions under section I(g) of the QPAM Exemption has been a settled matter.

5. The Department Should Not Require QPAMs to Amend Their Management Agreements or Provide New Indemnification and Other Related Rights

The Proposed Amendments would require QPAMs to amend their management agreements for existing and future clients to:

- agree not to restrict the ability of the plan to terminate or withdraw from a management agreement or QPAM-managed investment fund in the event that the QPAM is disqualified;

- agree not to impose certain fees, penalties, or charges upon termination or withdrawal from a management agreement or QPAM-managed investment fund in the event that the QPAM is disqualified;

- contractually indemnify, hold harmless, and restore actual losses to client plans for damages directly resulting from a violation of applicable law, a breach of contract, or any claims arising out of the QPAM's ineligibility; and

- agree to refrain from knowingly employing or retaining an individual who has participated in conduct that forms the basis of a conviction, non-prosecution or deferred prosecution agreement, or other disqualifying conduct that would make a QPAM ineligible.[4]

For existing clients, the management agreement amendments would presumably need to be finalized on or before the effective date of the Proposed Amendments – 60 days following publication of the final notice in the Federal Register.

In general, the IRI believes that, in the absence of a demonstrable and significant problem, the Department should not interfere in the contract process between a QPAM and its clients. Moreover, the IRI does not believe that the inclusion of these new contractual terms within QPAM management agreements would be in the interests of plans. For instance, the requirement that the QPAM indemnify all its client plans for any losses that may result from disqualification would dramatically raise the risks and potential costs of operating as a QPAM. The indemnification obligation would likely cause QPAMs to raise their fees, and some, especially smaller QPAMs, may need to stop providing services as QPAMs as a result of the magnitude of the risk. Higher fees and less competition in the QPAM market would clearly not be in the interest of plans. In addition, the requirement that the QPAM agree not to restrict the ability of its plan clients to withdraw from an investment fund following disqualification of the QPAM may be unworkable, especially if the plan invests in illiquid assets such as a private equity or real estate fund. Put simply, there is no practical way for the QPAM to ensure that its plan clients will always have the ability to withdraw from such funds. Thus, to ensure compliance with this requirement in such cases, a QPAM would have to prohibit its plan clients from investing in such funds at all. In effect, then, this requirement would inadvertently harm

[4] 87 Fed. Reg. at 45227.

and their participants by depriving them of access to investment opportunities that are available to other investors and could be in the best interest of the plan or its participants.

The Proposed Amendments would impose these contractual requirements in connection with QPAMs that provide services to both ERISA plans and IRAs. However, the Fifth Circuit Court of Appeals has held that a prohibited transaction exemption's imposition of contractual requirements in connection with IRAs is unreasonable and arbitrary and capricious. *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 384–85 (5th Cir. 2018). These changes thus appear to exceed the Department's regulatory authority as they relate to IRAs.

The Department also drastically underestimated the costs of amending all of a QPAM's contracts with client plans by assuming that QPAMs could create a "single standard form" for each client plan. 87 Fed. Reg. at 45218. In fact, a QPAM's management agreements may be unique to each plan because many plan fiduciaries require QPAMs to use the fiduciary's template asset management agreements. As a result, many QPAMs would need to prepare unique amendments to the contracts with each of their client plans. The requirement to negotiate and execute amendments to each management agreement would constitute a significant undertaking of time and resources.[5]

6. The Department Should Strengthen the Winding-Down Period

The Proposed Amendments would provide for a one-year winding down period in the event of a QPAM's disqualification. 87 Fed. Reg. at 45228. During the period, the QPAM could not make new investments on behalf of its client plans. *Id.* The IRI appreciates the Department's effort to accommodate a plan's transition to a new asset manager following a QPAM's disqualification. However, we request that certain changes be made to allow the winding-down period to meaningfully mitigate the costs that plans would have to incur following a QPAM's disqualification.

First, QPAMs who are disqualified should be permitted to continue to make new investments in line with guidelines approved by a plan fiduciary during the winding-down period. Otherwise, the winding-down period would not mitigate the opportunity costs of lost investment opportunities. In fact, the QPAM may have been engaged to carry out an investment strategy that requires it to continually make new investments. Moreover, plans regularly receive cash that must be invested. In a 401(k) plan, for example, contributions are made at every payroll period. The cash cannot sit uninvested in the plan. Therefore, plans would still need to speedily replace a disqualified QPAM to make sure the cash will be invested – as would be necessary with no winding period at all – if the disqualified QPAM cannot make new investments during the winding-down period as currently set forth in the Proposed Amendments.

[5] IRI also believes that it would be virtually impossible for most QPAMs to complete the amendment process within the 60-day time frame contemplated by the Proposed Amendments. Given the varying contractual arrangements among members and their clients, efforts to complete the process with 180 days could be challenging for some, keeping in mind this is a contractual, not a unilateral process. The administrative complexities and costs attendant to such a requirement further argues for the elimination of this requirement.

Second, if the disqualified QPAM applies for an individual exemption that would permit it to continue to rely on the QPAM Exemption notwithstanding the disqualification, the winding-down period should last until after the Department makes a final determination as to whether the application will be granted or denied. The winding-down period should not lapse while the application is pending. This change would save plans from incurring potentially significant transition costs in terms of searching for and negotiating the appointment of a potential replacement QPAM. It would not be necessary for a plan to incur these costs if the Department decides to grant an individual exemption, which would allow the plan to continue to receive the same services from its original chosen QPAM.

7. The Department Should Not Impose a New Registration Requirement

Among other changes to section I(g) of the QPAM Exemptions, the Proposed Amendments would require all QPAMs to notify the Department of their reliance on the exemption and report the legal and trade name of the QPAM. 87 Fed. Reg. at 45227. The notification would need to be updated if there are any changes to legal and or trade names. In the preamble to the Proposed Amendments, the Department stated that this requirement will ensure it is "aware" of the entities relying on the QPAM Exemption and that it intends to maintain a publicly available list of QPAMs on its website. 87 Fed. Reg. at 45208.

The IRI does not agree that this new proposed registration requirement is appropriate or useful. The QPAM Exemption has worked well for almost 40 years without such a requirement in place, and no other prohibited transaction exemption imposes a similar requirement. Moreover, while it may not appear burdensome to the Department, a QPAM could easily overlook the requirement to update the Department when it updates a legal or trade name, potentially leading to the commission of a series of inadvertent prohibited transactions that would only end when the update is made. Depending on the length of time, the costs involved in correcting the transactions may be significant, and the operations of the QPAM's client plans may be disrupted as well. Therefore, in the absence of a demonstrable problem, the IRI respectfully requests that this requirement not be included in any final amendment to the QPAM Exemption.

C. Recordkeeping Requirements

The Proposed Amendments would require that QPAMs make available records demonstrating compliance with the QPAM Exemption to (1) the Department and the Internal Revenue Service ("IRS"), (2) plan fiduciaries, (3) contributing employers and any employee organizations whose members are covered by a plan that engaged in an investment transaction pursuant to this exemption, and (4) participants, beneficiaries, and IRA owners. 87 Fed. Reg. at 45232. The Department explained in the preamble that the new condition would "ensure the Department will be able to verify" compliance with the exemption conditions. 87 Fed. Reg. at 45214.

Only the Department (with respect to ERISA plans) and the IRS (with respect to IRAs) have the authority to enforce the terms of the QPAM Exemption. The Department did not explain in the Proposed Amendments how making records available to other parties would assist

the Department in verifying compliance with the QPAM Exemption. Requiring that records be made available to employers, unions, and participants, beneficiaries, and IRA owners, raises the risk of unnecessary litigation and could cause QPAMs to increase the fees they charge to plans as a result. In this regard, the IRI is concerned that attorneys representing participants, beneficiaries, and IRA owners may overwhelm QPAMs with requests for documentation they would intend to use in litigation, and QPAMs would have to expend significant portions of their time and resources simply responding to the documentation requests.

Therefore, we respectfully request that the Department narrow the availability of compliance records under the Proposed Amendments to cover only authorized employees of the Department or the IRS (as applicable).

D. Increase of Assets Under Management and Capitalization Thresholds

The Proposed Amendments would revise the definition of a QPAM by raising certain minimum assets under management and capitalization requirements:

- For registered investment advisers, the assets under management threshold would be increased from $50,000,000 to $135,870,000, and the shareholders' or partners' equity threshold would be increased from $740,000 to $2,040,000;
- For banks and savings and loan associations, the equity capital threshold would be increased from $1,000,000 to $2,720,000; and
- For broker-dealers and insurance companies, the net worth threshold would be increased from $1,000,000 to $2,720,000.[6]

While the Department asserts these thresholds must be raised to ensure that QPAMs are large enough to "withstand the influence of other Plan fiduciaries and parties in interest," it did not identify any instance where plans were actually harmed as a result of such influence being exerted on QPAMs. Changes of such significance should not be undertaken in the absence of an identifiable harm or evidence supporting such harm to plans, participants, and/or beneficiaries.

The IRI is concerned that the changes in the Proposed Amendments to the assets under management and capitalization thresholds would effectively disqualify many QPAMs that operate as small businesses. The harm caused by the inability of client plans to continue to receive services from their chosen QPAMs would outweigh any nebulous benefit from the Proposed Amendment's increased minimum assets under management and capitalization thresholds. Moreover, plans would be required to incur transition costs should their chosen QPAMs fail to meet the minimum assets under management and capitalization thresholds upon the effective date of final amendments to the QPAM Exemption. This problem is further exacerbated for smaller QPAMs by the provision in the Proposed Amendments that would adjust the thresholds annually for inflation, further adding to the uncertainty of QPAM status from year-to-year for some. At the very least, the Department should grandfather QPAMs who meet the current requirements and allow them to continue to rely on the QPAM Exemption.

[6] 87 Fed. Reg. at 45230.

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In sum, the QPAM Exemption has worked well for almost 40 years, gaining recognition by plan sponsors and the capital markets as an efficient means for compliance with the prohibited transaction rules of ERISA. While some clarifications regarding the disqualification provisions of the exemption are warranted, the Proposed Amendments would cause significant disruptions and costs for plans and QPAMs, while at the same time severely limiting the coverage provided by the QPAM Exemption and closing plans off from valuable investments and investment strategies. As such, we ask the Department to reformulate the Proposed Amendments as described in the comments above.

Thank you again for the opportunity to provide these comments. If you have questions about any of our comments, or if we can be of any further assistance in connection with the Proposed Amendments, please feel free to contact either of the undersigned.

Sincerely,

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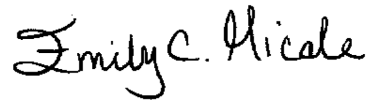

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