October 11, 2022

Submitted electronically

Ms. Lisa M. Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Assistant Secretary Gomez:

We write on behalf of the Committee on Investment of Employee Benefit Assets ("CIEBA") regarding the proposed amendment ("Proposed Amendment")[1] issued by the Department of Labor ("DOL") restating the conditions for relief under Prohibited Transaction Class Exemption 84-14[2] (the "QPAM Exemption"). CIEBA appreciates the work that the Department of Labor ("DOL") does to protect plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA") and their participants, but we are concerned that the proposed changes to the QPAM Exemption will prove to do more harm than good.

As explained below, we have identified significant concerns with the proposed changes that will drive up the costs for plans seeking investment management services, and potentially cause experienced, highly effective asset managers to leave the ERISA plan market.

The investment fiduciary community has been extremely well served for decades by the protections and relief afforded by the QPAM Exemption. Rather than cause significant disruption with existing and prospective ERISA investment transactions covered by the QPAM Exemption, we respectfully request that DOL withdraw the Proposed Amendment and instead leave the current QPAM Exemption in place, unchanged.

I. Background on CIEBA

CIEBA represents 114 of the country's largest pension funds and defined contribution plans. Our members manage more than $2 trillion of defined benefit and defined contribution assets on behalf of more than 17 million plan participants and beneficiaries. CIEBA represents the interests of chief

[1] "Proposed Amendment to Prohibited Transaction Class Exemption 84–14", 87 Fed Reg 45204, (July 27, 2022).

[2] "Class Exemption for Plan Asset Transaction Determined by Independent Qualified Professional Asset Managers", 49 Fed. Reg. 9494-02 (March 13, 1984).

investment officer fiduciaries, virtually all of whom have decades of experience in serving as investment fiduciaries for many of the largest and most sophisticated private retirement savings pension and 401(k) plans in the United States. Since 1985, CIEBA has provided a nationally recognized forum and voice for corporate plan fiduciaries on investment and fiduciary issues.

II. Concerns with the Department's Proposed Amendment

As an association of plan fiduciaries, CIEBA members benefit from the QPAM Exemption. Our members rely on the QPAM Exemption to allow them to procure cost-effective, professional asset management, without requiring them to exclude prudent investments simply because an identified investment or strategy may involve an ERISA "party in interest." Our members further benefit from the QPAM Exemption because it allows plans to engage asset managers without either the investing plan fiduciary or the investment manager combing through a complete list of potential investments that might relate to a party in interest.

Notably, the QPAM Exemption does not provide relief for the QPAM to engage in any transactions involving its own self-dealing and conflicts of interest. As such, the QPAM Exemption is appropriately tailored to provide relief only for transactions that would involve a party in interest. Because the existing QPAM Exemption is narrowly tailored and has proven for decades to strongly benefit plans and participants, CIEBA is concerned that the addition of significant new conditions will prove harmful. CIEBA, therefore, respectfully asks DOL to withdraw the Proposed Amendment to help ensure that plans can continue to engage high-quality investment managers to provide non-conflicted fiduciary investment management.

Below we have highlighted four aspects of the Proposed Amendment that we believe would harm plan participants and beneficiaries.

A. The Proposed Amendment's Indemnity Obligation

The Proposed Amendment would require an investment manager relying on the QPAM Exemption to contractually agree to indemnify, hold harmless, and restore actual losses (including losses and costs related to unwinding transactions and transitioning to another asset manager) to plan clients for damages directly resulting from a violation of applicable law, a breach of contract, or any claims arising out of the QPAM's ineligibility[3]. While we recognize that this condition is intended to provide protection to plans in the rare circumstance where an entity loses the ability to rely on QPAM Exemption, we are concerned that the potentially significant negative effects far outweigh the remote benefits.

The potential negative effects of this portion of the Proposed Amendment include that asset managers will be required to factor this indemnification into their pricing. The breadth of the indemnity obligation is of particular concern. More specifically, CIEBA is concerned that the Proposed Amendment's statements that an entity would be responsible for costs associated with replacing that entity will prove unpalatable to asset managers. Further, we are concerned that asset managers will be unable to insure against such losses. Therefore, we do not support the Proposed Amendment's indemnification obligation.

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[3] 87 Fed. Reg. 45204, 45227; Proposed Amendment § I(g)(2)(C).

B. The Proposed Amendment's Winding-Down Period Limitations

The Proposed Amendment's restrictions on the wind-down period would harm plans by limiting the services that an entity relying on the QPAM Exemption can provide during that period.[4] Specifically, we are concerned about the Proposed Rule's restriction that asset managers would not be able to make any new investments even for existing plan clients during the wind-down period. Not allowing asset managers that CIEBA members have hired to invest or continue to re-invest plan assets essentially makes the transition period illusory. Therefore, we ask that if DOL does not withdraw the Proposed Amendment altogether, that DOL at least not restrict the services a QPAM can perform during any wind-down period.

C. The Proposed Amendment's "Sole Responsibility" Language

The Proposed Amendment states that the terms, commitments, investments, and associated negotiations of a transaction on behalf of client Plans are the "sole responsibility" of the QPAM.[5] The preamble to the Proposed Amendment states that this requirement would not be met where a transaction has been "planned, negotiated, or initiated" by a party in interest and presented to a QPAM for approval.

In our view, this essentially undoes the ERISA Section 406(a) relief provided by the QPAM Exemption. Plans rely on the QPAM Exemption because they do not necessarily know, nor do they necessarily need to know, the full list of parties who may meet the technical definition of a "party in interest" under ERISA.

Asset managers learn of investment opportunities from various sources – plan fiduciaries, counterparties, other asset managers, and others. Under the Proposed Amendment, without first determining who is a party in interest, an asset manager could not rely on the exemption. Where the asset manager may know that an entity is a party in interest, for example, with a plan fiduciary, the restriction in the Proposed Amendment is equally problematic. It would preclude an asset manager from entering into a prudent investment on behalf of a plan merely because the plan sponsor or a plan fiduciary identified the transaction first. This is exactly where the QPAM Exemption should provide relief. A sophisticated independent asset manager ought to consider any non-conflicted transaction, regardless of where it is identified, and then act prudently on behalf of the plan.

We ask that DOL reverse its position and instead make clear in separate guidance that a QPAM is expected to act prudently on behalf of its plan clients for any investment opportunity that the QPAM may become aware of and where the QPAM is not conflicted – regardless of how it became aware of the opportunity.

D. The Proposed Amendment Worsens the Affiliate Disqualification Problem

The Proposed Amendment indicates that one of the Department's primary drivers for amending the QPAM Exemption has been that the Office of Exemption Determinations has received "an increasing number of individual exemption requests involving Section I(g) ineligibility." Specifically, the Department notes that since 2000, it has granted nine individual exemption requests to financial institutions where a foreign affiliate has been subject to a foreign conviction.

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[4] 87 Fed Reg. 45204, 45228; Proposed Amendment § I(j).

[5] 87 Fed Reg. 45204, 45227; Proposed Amendment § I(c).

In our view, instead of rewriting the QPAM Exemption in its entirety, the Department should issue guidance that acknowledges that United States asset managers cannot control their foreign affiliates and that current interpretations of QPAM Exemption's foreign conviction ineligibility provision have been too broad. We recognize that in limited circumstances, specifically where the foreign affiliate itself is providing investment management services to a plan, the integrity of the foreign affiliate may be relevant. In general, it should not be. The breadth of current Section I(g) already creates the opportunity for absurd results. For example, a foreign government today could disqualify disfavored asset managers for contrived offenses that technically would trigger I(g).

We believe the QPAM Exemption would be substantially enhanced if it simply narrowed the circumstances where a foreign conviction could lead to disqualification. In our view, the Department could clarify in separate guidance the QPAM Exemption's current disqualification provision to narrow its application if it so chooses, without the need for the Proposed Amendment.

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CIEBA appreciates the opportunity to comment on the Proposed Amendment. Thank you for your consideration of our views.

Sincerely,

Dennis Simmons
Executive Director