Martin J. Walsh
Secretary of Labor
Office of Regulations and Interpretations Employee Benefits Security Administration Room N-5655 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)

Dear Secretary:

Comment on the proposal by the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) to amend the Qualified Professional Asset Manager (QPAM) Exemption to protect benefits plans, participants, and beneficiaries. Strongly supported is the proposed rule, and expanded here are the reasons to support two key aspects of
it: 1) the inclusion of non-prosecution and deferred prosecution agreements within the definition of prohibited misconduct that triggers QPAM ineligibility; and 2) the requirement that QPAMs include an indemnification provision in their contractual agreements with clients.

Non-Prosecution and Deferred Prosecution Agreements

Because QPAMs are awarded a blanket exemption from prohibited transactions when managing the retirement savings of their clients, they "are expected to maintain a high standard of integrity," as the DOL itself noted in 1982 when it first proposed the QPAM exemption. Since then, the use of non-prosecution and deferred prosecution agreements has skyrocketed, with many companies avoiding prosecution for serious misconduct due to factors unrelated to their culpability. Therefore, to fully protect plans and their beneficiaries from unscrupulous behavior by asset managers, the EBSA must, as proposed, include non-prosecution and deferred prosecution agreements within the definition of prohibited misconduct that triggers QPAM ineligibility when the conduct at issue involves a listed crime.

In a 2019 study of non-prosecution and deferred prosecution agreements, Public Citizen found that since 1992, the Department of Justice had entered into 535 such agreements,1 with the yearly figures generally increasing over time. Indeed, before 2003, the DOJ reached fewer than five agreements annually, but the number increased to double digits by
2005.2 An analysis by Gibson Dunn shows that although non-prosecution and deferred prosecution agreements have decreased from a peak of over one hundred in 2015, they have consistently been in the double digits since then, ranging from 24 to 40 in subsequent years.3 Meanwhile, formal convictions have significantly decreased — from 296 convictions in fiscal year 2000 to 99 in fiscal year 2018.4

Additionally, Gibson Dunn notes that other countries have adopted deferred prosecution regimes, including Brazil, Canada, France, Singapore, and the United Kingdom.5 Therefore, we support the EBSA's proposal to not only make clear that foreign crimes that are substantially equivalent to listed crimes are criminal convictions that trigger QPAM ineligibility, but also to include foreign non-prosecution and deferred prosecution agreements in the definition of prohibited conduct that triggers QPAM ineligibility when the conduct at issue involves a listed crime.

Unfortunately, entering into a non-prosecution or deferred prosecution agreement does not mean that the company will not reoffend. Indeed, Public Citizen's study found that 38 companies that entered into

such an agreement faced additional federal criminal enforcement actions after the fact.6 One reason may be related to conflicts of interest concerns that have been raised about independent consultants hired by offending
companies,7 a frequent requirement of non-prosecution and deferred prosecution agreements.

Importantly, there is significant evidence suggesting that the decision of a prosecutor to offer a company a non-prosecution or deferred prosecution agreement instead of proceeding with formal criminal charges can largely be made based on factors unrelated to culpability. For example, a 1999 memo issued by then-Deputy Attorney General Eric Holder instructed prosecutors to consider "[c]ollateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable" when making prosecutorial decisions.8In 2003, Deputy Attorney General Larry Thompson released a memo that instructed prosecutors to consider a list of factors when making prosecutorial decisions. The list included "collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution," and a company's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents," amongst other factors.9 Assistant Attorney General Lanny Breuer, head of the DOJ's criminal division in the Obama administration, argued in 2012 that "[i]n reaching every charging decision, [the DOJ] must take into account the effect of an indictment on innocent employees and shareholders" and that "in some cases, the health of an industry or the markets are a real factor."10 For a more detailed account of the evolution of DOJ policies governing the prosecution of corporations, see Professor Brandon L. Garrett's 2020 article titled "Declining Corporate Prosecutions."

Non-prosecution and deferred prosecution agreements have been — and continue to be — controversial, especially in the wake of the financial crisis when there was public outrage about the lack of accountability of financial institutions and their executives.12 However, their rampant use, as well as the prosecutorial policies and justifications underlying their use, are an undeniable reality that must be taken into account by the EBSA as it fulfills its mission "to ensure the security of the retirement, health, and other workplace-related benefits of America's workers and their families." Given this reality, the EBSA is correct in including these types of agreements within the definition of prohibited misconduct that triggers QPAM ineligibility.

Indemnification

In order for the QPAM exemption framework to be properly protective of plans and their beneficiaries, asset managers that lose their QPAM status due to misconduct must make their clients whole. If not, retirees are unfairly penalized for their asset managers' misconduct. Indeed, without this safeguard in place, asset managers can argue that not being granted an individual exemption after losing the QPAM exemption would hurt retirees. It is not fair — and anathema to the EBSA's mission — to place retirees in this position of having to either bear the costs associated with transitioning their plans to another asset manager, or stick with an asset manager that has been deemed ineligible for the QPAM exemption due to criminal activity or misconduct. Therefore, we strongly support the EBSA's proposed requirement that QPAMs include an indemnification provision in their contractual agreements with clients.

We thank the EBSA for engaging in this important rule-making process to protect benefits plans, participants, and beneficiaries. We hope the rule will be finalized, with all its proposed components intact, as soon as possible.

Yours sincerely,
Robert E. Rutkowski

cc:
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