

# United States Senate

WASHINGTON, DC 20510

December 8, 2022

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

Dear Assistant Secretary Gomez:

We are writing today in support of the Employee Benefits Security Administration’s (EBSA) proposal to amend the prohibited transaction class exemption 84-14 (the QPAM Exemption) and ensure financial institutions responsible for managing Americans’ retirement assets are held to the highest standard of integrity.<sup>1</sup> This proposed amendment marks an overdue change to help ensure that financial institutions found guilty of criminal misconduct are disqualified as “qualified professional asset managers,” or QPAMs. We have long been concerned that EBSA’s use of individual exemptions has undermined the Department of Labor’s (DOL) responsibility to protect American workers and their retirement savings from greed, corruption, and mismanagement.<sup>2</sup> DOL now has an opportunity to hold corporate wrongdoers accountable for their criminal misdeeds and prevent them from conducting business as usual at the expense of American retirees.<sup>3</sup>

Under the Employee Retirement Income Security Act (ERISA), only financial institutions that retain status as QPAMs may manage clients’ 401(k)s and other retirement funds.<sup>4</sup> QPAM status exempts a financial institution from restrictions that ERISA would otherwise place on retirement fund transactions, giving these institutions broad discretion to manage retirement assets despite potential self-dealing or conflicts of interest.<sup>5</sup>

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<sup>1</sup> Employee Benefits Security Administration, U.S. Department of Labor, “Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption),” July 27, 2022, <https://www.federalregister.gov/documents/2022/07/27/2022-15702/proposed-amendment-to-prohibited-transaction-class-exemption-84-14-the-qpam-exemption>.

<sup>2</sup> Letter from Senators Warren and Smith to Department of Labor, February 11, 2022, <https://www.warren.senate.gov/download/20220210-credit-suisse-qpam-letter>; Letter from Senators Warren and Smith to Department of Labor, April 13, 2021, <https://www.warren.senate.gov/download/20210413-letter-to-ebsa-asking-to-rescind-goldman-exemption>.

<sup>3</sup> U.S. Department of Labor, “US Department of Labor Proposed Amendment to Qualified Professional Asset Manager Exemption to Protect Benefit Plans, Participants, Beneficiaries,” press release, July 26, 2022, <https://www.dol.gov/newsroom/releases/ebsa/ebsa20220726>.

<sup>4</sup> Employee Benefits Security Administration, Federal Register Notice, “Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers,” July 6, 2010, <https://www.federalregister.gov/documents/2010/07/06/2010-16302/amendment-to-prohibited-transaction-exemption-pte-84-14-for-plan-asset-transactions-determined-by>.

<sup>5</sup> *Id.*

To protect retirement assets, DOL is supposed to revoke QPAM status for institutions that are found guilty of criminal misconduct pertaining to asset management.<sup>6</sup> But DOL can also grant exemptions to this rule and allow financial institutions to retain QPAM status, which the agency has done in virtually every relevant case, even when institutions have blatantly and repeatedly broken the laws.<sup>7</sup> For example:

- In February 2022, we wrote to DOL expressing concern over a proposed QPAM Exemption to Credit Suisse Group AG (Credit Suisse) given their previous convictions for financing a loan for a tuna fishing project in Mozambique<sup>8</sup> and assisting U.S. taxpayers with filing false income tax returns.<sup>9</sup> That was “just the latest example of a troubling pattern in which EBSA continues to grant regulatory favors for large banks that have been convicted of wrongdoing.”<sup>10</sup> DOL granted Credit Suisse a one-year extension of its QPAM status.<sup>11</sup>
- In April 2021, we wrote to DOL asking DOL to deny Goldman Sachs a QPAM Exemption despite admitting criminal wrongdoing for a subsidiary’s role in the Malaysian 1MDB global bribery scandal.<sup>12</sup> DOL granted Goldman Sachs an additional QPAM Exemption of five years.<sup>13</sup>
- In December 2016, DOL granted individual QPAM Exemptions to five financial institutions despite their criminal convictions for currency price fixing: Deutsche Bank AG, Citigroup Inc., JPMorgan Chase & Co., Barclays Capital Inc., and UBS AG.<sup>14</sup> DOL

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<sup>6</sup> Employee Benefits Security Administration, Federal Register Notice, “Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers,” July 6, 2010, <https://www.federalregister.gov/documents/2010/07/06/2010-16302/amendment-to-prohibited-transaction-exemption-pte-84-14-for-plan-asset-transactions-determined-by>.

<sup>7</sup> Employee Benefits Security Administration, Federal Register Notice, “Exemption From Certain Prohibited Transaction Restrictions Involving the Goldman Sachs Group, Inc. (Goldman Sachs or the Applicant) Located in New York, New York” May 28, 2021, <https://www.federalregister.gov/documents/2021/05/28/2021-11366/exemption-from-certain-prohibited-transaction-restrictions-involving-the-goldman-sachs-group-inc>.

<sup>8</sup> U.S. Department of Justice, “Credit Suisse Resolves Fraudulent Mozambique Loan Case in \$547 Million Coordinated Global Resolution,” press release, October 19, 2021, <https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global>.

<sup>9</sup> U.S. Department of Justice, “Credit Suisse Sentenced for Conspiracy to Help U.S. Taxpayers Hide Offshore Accounts from Internal Revenue Service,” press release, November 21, 2014, <https://www.justice.gov/opa/pr/credit-suisse-sentenced-conspiracy-help-us-taxpayers-hide-offshore-accounts-internal-revenue>.

<sup>10</sup> Letter from Senators Warren and Smith to Department of Labor, February 11, 2022, <https://www.warren.senate.gov/download/20220210-credit-suisse-qpam-letter>.

<sup>11</sup> Bloomberg, “Credit Suisse U.S. Pension Work May Be Imperiled by Conviction,” Neil Weinberg, April 20, 2022, <https://www.bloomberg.com/news/articles/2022-04-20/credit-suisse-u-s-pension-work-may-be-imperiled-by-conviction>.

<sup>12</sup> Letter from Senators Warren and Smith to Department of Labor, April 13, 2021, <https://www.warren.senate.gov/download/20210413-letter-to-ebsa-asking-to-rescind-goldman-exemption>.

<sup>13</sup> Bloomberg Law, “Goldman Gets Proposed Exemption to Manage Retirement Assets,” Ben Penn, December 31, 2020, <https://news.bloomberglaw.com/daily-labor-report/goldman-sachs-gets-proposed-waiver-to-manage-retirement-assets>.

<sup>14</sup> Employee Benefits Security Administration, Federal Register Notice, “Exemptions From Certain Prohibited Transaction Restrictions,” December 22, 2016, <https://www.federalregister.gov/documents/2016/12/22/2016-30566/exemptions-from-certain-prohibited-transaction-restrictions>.

granted UBS a three-year exemption and the other four institutions each a five-year exemption.<sup>15</sup>

These banks have committed serious crimes that raise questions about their ability to manage retiree's assets safely and soundly. DOL has failed to hold these institutions accountable for their criminal actions. A QPAM status is intended to hold banks to high standards of integrity, yet the agency's routine granting of exemptions for large financial institutions completely undermines the safety and purpose of the entire regime. Meanwhile, big bank lobbyists are arguing that foreign criminal convictions or any criminal conduct that does not directly involve investment management of retirement assets should not make the banks ineligible for QPAM status – as if these illegal actions are not a reflection of questionable business practices and standards.<sup>16</sup>

DOL recently proposed amendments to the QPAM Exemption “to ensure the exemption continues to protect plans, participants and beneficiaries, individual retirement account owners and their interests.”<sup>17</sup> These proposed amendments – which include clarifying and expanding the types of misconduct that make a QPAM ineligible, specifically adding foreign criminal convictions to those types of misconduct, mitigating disruption to plans and retirement accounts when a QPAM becomes ineligible, and requiring standard recordkeeping – could strengthen QPAM requirements and allow DOL to impose QPAM restrictions where it could not or would not.<sup>18</sup>

For example, in October 2015, Credit Suisse admitted to operating an “illegal cross-border business for decades that hid offshore assets,”<sup>19</sup> but DOL granted Credit Suisse an exemption under the reasoning that there was “no evidence that the Credit Suisse QPAMs were involved in the criminal activities that gave rise to the conviction.”<sup>20</sup> The amendment, which will specifically add foreign convictions to the types of misconduct that will result in revocation of QPAM status, will prevent future wrongdoers from continuing to manage retirement assets despite their egregious behavior.

Similarly, in April 2021, EBSA officials wrote that the “Department proposed the Goldman Sachs prohibited transaction exemption, because it was concerned that harm may arise to

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<sup>15</sup> Pensions & Investments, “Labor Department grants exemptions to 5 managers affiliated with banks connected to LIBOR cases,” Hazel Bradford, January 12, 2018, <https://www.pionline.com/article/20180112/ONLINE/180119927/labor-department-grants-exemptions-to-5-managers-affiliated-with-banks-connected-to-libor-cases>.

<sup>16</sup> Letter from American Bankers Association to Department of Labor, October 10, 2022, <https://www.aba.com/-/media/documents/comment-letter/clqpam20221010.pdf?rev=0838d073feb24b148f3766fb66e498a0>.

<sup>17</sup> U.S. Department of Labor, “US Department of Labor Proposed Amendment to Qualified Professional Asset Manager Exemption to Protect Benefit Plans, Participants, Beneficiaries,” press release, July 26, 2022, <https://www.dol.gov/newsroom/releases/ebsa/ebsa20220726>.

<sup>18</sup> *Id.*

<sup>19</sup> Reuters, “Credit Suisse granted exemption to continue U.S. pension business,” Karen Freifeld, October 1, 2015, <https://www.reuters.com/article/us-credit-suisse-gp-pensions/credit-suisse-granted-exemption-to-continue-u-s-pension-business-idUSKCN0RV54L20151001>.

<sup>20</sup> Employee Benefits Security Administration, U.S. Department of Labor, “Notice of Exemption Involving Credit Suisse AG (Hereinafter, either Credit Suisse AG or the Applicant) Located in Zurich, Switzerland,” October 2, 2015, <https://www.federalregister.gov/documents/2015/10/02/2015-24919/notice-of-exemption-involving-credit-suisse-ag-hereinafter-either-credit-suisse-ag-or-the-applicant>.

American workers with assets invested in plans and IRAs that are managed by Goldman Sachs-affiliated QPAMs, if those QPAMs were unable to rely on the QPAM Class Exemption after the conviction of Goldman Sachs Malaysia.”<sup>21</sup> The amendment would require the QPAM to “provide a one-year winding-down period to help plans and IRAs avoid or minimize possible negative impacts of terminating or switching QPAMs or adjusting asset management arrangements when a QPAM becomes ineligible,”<sup>22</sup> which will help the agency avoid this reasoning for granting an exemption while still protecting retiree’s retirement assets.

We encourage you to finalize these amendments to close these loopholes and end the practices by which financial institutions that were convicted of or plead guilty to fraudulent schemes continue to enjoy QPAM statuses.<sup>23</sup>

EBSA’s mission is to “ensure the security of the retirement, health, and other workplace-related benefits of America’s workers and their families.”<sup>24</sup> Allowing Wall Street’s bad actors to retain their QPAM status despite their criminal actions is not consistent with this mission. You have the opportunity to send a clear message that the federal government holds corporate criminals accountable for their misdeeds rather than shower them with special regulatory favors. We support your proposed amendments and encourage you to finalize them.

Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren  
United States Senator



Tina Smith  
United States Senator

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<sup>21</sup> Private Letter to Senator Warren from Timothy B. Hauser, Deputy Assistant Secretary for Program Operations, Employee Benefits Security Administration, April 30, 2021.

<sup>22</sup> Employee Benefits Security Administration, U.S. Department of Labor, “Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption),” July 27, 2022, <https://www.federalregister.gov/documents/2022/07/27/2022-15702/proposed-amendment-to-prohibited-transaction-class-exemption-84-14-the-qpam-exemption>.

<sup>23</sup> Employee Benefits Security Administration, U.S. Department of Labor, “Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption),” July 27, 2022, <https://www.federalregister.gov/documents/2022/07/27/2022-15702/proposed-amendment-to-prohibited-transaction-class-exemption-84-14-the-qpam-exemption>.

<sup>24</sup> Employee Benefits Security Administration, U.S. Department of Labor, “Our Mission,” <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/mission-statement>.