U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

Via Electronic Delivery

December 16, 2022

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Rule; Employee Benefits Security Administration; Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption) (87 Fed. Reg. 45,204-45,232, July 27, 2022); Z–RIN 1210 ZA07

To Whom It May Concern:

This is the supplemental comment from the U.S. Chamber of Commerce (Chamber) to the Employee Benefit Security Administration's (EBSA) Proposed Amendment to the Prohibited Transaction Exemption (PTE) 84-14 (Proposed Amendment) and the public hearing held on November 17, 2022 (Hearing). As stated in our initial comment letter and our testimony, the Proposed Amendment includes significant changes to the current PTE 84-14, which has been in place for nearly four decades, and these changes could have unintended negative impacts not only on asset managers, but also on plan sponsors and participants and beneficiaries. As such, we again urge EBSA to withdraw the Proposed Amendment, and repropose it based on community input.

Background

ERISA Section 406(a) prohibits a plan fiduciary from causing the plan to engage in a transaction if it causes a direct or indirect:

- sale or exchange, or leasing, of any property between the plan and a party in interest;
- lending of money or other extension of credit between the plan and a party in interest;
- furnishing of goods, services, or facilities between the plan and a party in interest;
- transfer to, or use by or for the benefit of a party in interest of any of the plan assets; or
- acquisition, on the plan's behalf of any employer security or property in violation of 29 U.S.C. Section 1107(a).

ERISA contains certain statutory exemptions to ERISA Section 406(a) in ERISA Section 408 and a grant of authority to the DOL to issue exemptions that are:

- administratively feasible;

- in the interests of the plan and its participants and beneficiaries; and
- protective of participants' and beneficiaries' rights.

In 1984, EBSA exercised this authority and granted class PTE 84-14 to exempt investment transactions from ERISA Section 406(a) prohibitions.[1] As EBSA has stated,

> PTE 84–14 was granted based on an effort to improve the administration of the prohibited transaction rules of ERISA. … [because the] prohibited transaction rules sweep very broadly and, in some circumstances, could work to prevent beneficial transactions. For example, large employers and funds necessarily engage in a wide range of transactions with parties in interest that pose little danger to plan participants. For example, all of the different service providers to plans are technically parties in interest. Accordingly, Congress gave the Department authority to issue exemptions from the broad reach of the prohibited transaction rules where it has determined that such exemptions are in the interest of, and protective of, affected plans and the participants and beneficiaries thereof, as well as administratively feasible. Prohibited Transaction Exemption 84–14 is one such exemption. …. Primarily, PTE 84–14 simply permits QPAMs to engage in various arm's length transactions with parties in interest and obviates the need to undertake time consuming compliance checks for parties in interest, forego investment opportunities, or seek an individual exemption from the Department for each transaction. The conditions in the exemption were designed to ensure that the transactions covered therein are protective of and beneficial to affected plans.[2]

For almost forty years the QPAM exemption has worked well and has, and continues, to serve its purpose. Because the definition of a party in interest is so broad, especially for multiemployer plans, as the DOL noted, it can be extremely difficult and time consuming to keep track of which entities are parties in interest. It is due to that challenge that asset managers rely on the QPAM exemption for most transactions entered into on behalf of plans. Further, the QPAM exemption is also a straightforward and cost-effective exemption that allows asset managers to enter into beneficial investment arrangements for plans.

Proposed Amendment Attempts to Replaces a Fiduciary's Duty with EBSA's Judgement

There is nothing in PTE 84-14 that exempts a fiduciary who selects a QPAM from its fiduciary duties in selecting, engaging and monitoring the QPAM. This means that the fiduciary must go through a rigorous process to determine whether the QPAM or other asset

---

[1] As noted in the Hearing, PTE 84-14 generally does not exemption fiduciaries from the self-dealing prohibitions in ERISA Section 406(b).

[2] 72 Fed. Reg. 20261 (Apr. 15, 2015). It is important to note that the QPAM exemption as is not meant to solve the ills of the banking system, but rather to facility pension plan investments by ERISA fiduciaries, that might otherwise be prohibited because of ERISA's expansive list of prohibited transactions, which prohibited all interaction between a plan and a party in interest, regardless of whether it is beneficial or necessary for participants and beneficiaries.

manager is suitable for the task at hand. As part of this process, the fiduciary will look at the entity's legal and regulatory compliance and ask for and review the following, among the many items they may consider:

- SEC, FINRA or other registrations;
- Regulatory investigations, complaints or disciplinary actions;
- Qualified Professional Asset Manager status;
- Date and outcome of any regulatory reviews;
- Criminal convictions or indictments;
- Litigation history;
- Insurance Coverage: Professional Liability, E&O, D&O, ERISA Fiduciary Liability and Bonding;
- Code of Ethics;
- Personnel Compliance Policies, staffing, monitoring process, reporting exceptions.[3]

This review is done to ensure that any entity selected does not have a history of noncompliance, including convictions and non-prosecution and deferred prosecution agreements (NPA and DPAs). Furthermore, once an entity is selected, the fiduciary has a duty to negotiate the contract, including whether to include indemnity provisions.[4] This is also an important part of prohibited transaction exemption under ERISA 408(b)(2) which provides that not only must the compensation to the service provider be reasonable, but the contract itself must be reasonable. As such, ERISA explicitly requires not only that the fiduciary review the contract, but that it negotiates the terms if the initial offer is not reasonable. Finally, once the contract is in place, the fiduciary has an ongoing obligation to monitor the asset manager, not only for its investments but also "all of the items originally reviewed in the RFP and evaluating any changes", which includes any regulatory investigations, complaints or disciplinary actions, including NPA, DPAs and criminal convictions.

As noted above and expressed by many of the witnesses at the Hearing, a plan fiduciary has fiduciary obligations in selecting, retaining and monitoring an asset manager. By expanding the Prohibited Misconduct, which would immediate disqualify a QPAM, EBSA is, in essence, replacing the fiduciary's judgement with its own.[5] As expressed during the hearing, fiduciaries are experienced, sophisticated investors who are in the position to determine

---

[3] *See ERISA Benefit Plan Investment Management Agreements: Selecting 3(38) Investment Managers, Structuring the IMA Documenting the Relationship to Minimize Risks for Plan Sponsors and Investment Advisers* (Investment Management Agreements), slide 15, Sharon M. Goodman, Principal, Slevin & Hart, Washington, D.C. and David A. Russell, CFA, Senior Investment Strategist, Senior Consultant available at http://media.straffordpub.com/products/erisa-benefit-plan-investment-management-agreements-selecting-3-38-investment-managers-structuring-the-ima-2017-04-18/presentation.pdf.

[4] Investment Management Agreements, slide 41; see also "Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan" where EBSA states that a fiduciary must "make sure you understand the terms of any agreements or contracts you sign with service providers and the fees and expenses associated with the contracts. In particular, understand what obligations both you and the service provider have under the agreement and whether the fees and expenses to be charged to you and plan participants are reasonable in light of the services to be provided."

[5] If EBSA is concerned with a QPAM's conduct, because the QPAM is an ERISA fiduciary, EBSA has authority to bring an action under ERISA Section 502(a) against the QPAM.

whether an NPA, DPA or foreign conviction is severe enough or closely enough related to the retirement plan to terminate an investment management agreement.[6] As such, as spelled out in our initial comment letter, we suggest that instead of such events resulting in automatic disqualification, the QPAM should be required to notify all of its ERISA clients so that the fiduciary is armed with enough information to decide whether to continue or terminate the relationship.

With respect to the contract, as noted above, contracting with a QPAM is a fiduciary obligation. However, the Proposed Amendment would require that certain items be in every contract, including a broad indemnity agreement from the QPAM. Whether to include an indemnity agreement is a fiduciary decision, which must be weighed against the increased cost versus increased exposure. The plan fiduciary has been granted that responsibility, not EBSA.

Wind down Period Should Be Expanded

Because the Proposed Amendment likely will increase the number of QPAMs that become disqualified by expanding what is Prohibited Misconduct, the Proposed Amendment includes a one year "wind down period". Although EBSA states it developed the one-year wind down period to protect plans and participants, EBSA also notes that the QPAM would be prohibited from engaging in any new transactions in reliance on the QPAM Exemption for the existing clients during this period, even though EBSA notes that it is important in the transition from one QPAM to another not to cause harm or loss, including opportunity cost to the plan.

As stated in our initial comment letter and noted by several witnesses during the Hearing, if EBSA is to allow for a wind down period, it should be at the election of the fiduciary and be allowed to be at least 24 months and the QPAM should be allowed to fully function in its QPAM capacity.[7]

Registering

The Proposed Amendment would require any QPAM that relies on the exemption to notify the Department via email of the legal name of each business entity relying on the exemption and any name the QPAM may be operating under. This only needs to be reported once unless there is a change to the legal name or operating name. EBSA intends to keep a list of all QPAMs on a publicly available website. In the Preamble to the Proposed Amendment

---

[6] In the Proposed Amendment, EBSA does not explain why in Advisory Opinion 2013-05A EBSA determined that the DPAs in that case would not cause the entity to lose its QPAM status, but in the Proposed Amendment, any DPA or NPA would.

[7] Allowing for at least a 24-month wind down period will also give the asset manager time to apply for an individual QPAM exemption. In the past, EBSA has given provisional QPAM status of at least one year to individual entities when they apply for an individual exemption which allows them to act as a QPAM as their application is being processed. This is done to avoid the disruption that immediate termination would cause.

EBSA stated that the reporting is necessary to ensure EBSA is aware of entities that rely on the QPAM Exemption, but it does not say why. During the Hearing, EBSA did not explain why it needs this information even though no other class exemption requires such a registration. As explained in our initial comment letter and by other witnesses at the Hearing, such a requirement, including posting on a publicly available webpage, could have unintended consequences.

First, it is unclear whether inadvertent failures would give rise to Prohibited Misconduct that could cause the QPAM to lose its status. Secondly, it is unclear when an entity would need to register as a QPAM, and when an entity could and should remove itself from the list. For example, an asset manager may use the exemption in some instances and not use it in others, or might use it at one point, but then chooses to no longer rely on it. Finally, by requiring this reporting and making it publicly available, it could be perceived that any entity on the list is endorsed as an asset manager by EBSA.

As stated in our initial comment letter, the Chamber recommends deleting this requirement. However, if EBSA insists on keeping it, EBSA should explain why it needs this information, how it would be used, and the consequences of not providing it or inadvertently providing incorrect information and how to cure it.

Conclusion

The Chamber appreciates the opportunities to comment on the Proposed Amendment and the opportunity EBSA afforded us to testify at the hearing. We look forward to working with EBSA on improving the Proposed Amendment to better serve all involved, including plan sponsors and participants.

Sincerely,

Chantel Sheaks

Chantel L. Sheaks
Vice President, Retirement Policy