American Bankers Association
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Assistant Secretary Lisa M. Gomez
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Amendment to PTE 84-14 (the QPAM Exemption) (Application No. D-12022) (EBSA-2022-0008): Post-Hearing Comments (Z-RIN 1210 ZA07)

Dear Assistant Secretary Gomez:

The American Bankers Association[1] (ABA) wishes to thank the Department of Labor (Department) for permitting ABA to testify at the Department's public hearing on November 17, 2022 on the proposed amendments (Proposal) to prohibited transaction class exemption (PTE) 84-14,[2] commonly referred to as the QPAM exemption (QPAM Exemption or Exemption).[3] ABA is pleased to provide additional comments in response to the Department of Labor's request at the hearing for certain supplementary information on (i) the average number of client plans of qualified professional asset managers (QPAMs), and (ii) the Proposal's requirement that QPAMs notify the Department of their reliance on the QPAM Exemption.

I. QPAM Client Plans.

Our testimony focused on the regulatory process surrounding the Proposal. We pointed out that it would have been helpful if the Department had adhered to the procedural requirements referenced by the Biden Administration in the January 2021 Memorandum, *Modernizing Regulatory Review*, which affirmed the federal regulatory process as set forth in Executive Order 13563, which in turn requires federal agencies to seek the views of those parties affected by a proposed rule prior to issuing a Notice of Proposed Rulemaking.[4] The Department did not follow the Executive Order's directive to consult beforehand with QPAMs. Consequently, the

[1] The American Bankers Association is the voice of the nation's $23.6 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $19.4 trillion in deposits, and extend $12 trillion in loans. Learn more at www.aba.com.
[2] *See* Department of Labor, *Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption)*, 87 *Fed. Reg.* 45,204 (2022) (Proposal).
[3] *See* Department of Labor, *Posting of Hearing Transcript Regarding Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption) and Closing of Reopened Comment Period*, 87 *Fed. Reg.* 77,140 (2022).
[4] *See* ABA Testimony, *Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption)* (November 17, 2022).

Department significantly miscalculated the number of client plans per QPAM, which in turn led to a critical error of multiple magnitudes in the Department's calculation of the estimated time, resources, and costs for QPAMs to comply with the revised Exemption, if finalized as proposed. This significant unintended consequence, together with the omission of advance input from QPAMs and other marketplace participants and stakeholders, provide compelling reasons to withdraw the Proposal.[5]

For example, in its regulatory impact analysis of the Proposal, the Department states that a single QPAM services, on average, 32 client plans – which the Department considers an "upper limit" for the average number of client plans served by a QPAM. In our comment letter of October 10, 2022 (ABA Comment Letter), we state that the Department's method of calculating an estimated industry cost of $135,000 for QPAMs to amend, as required under the Proposal, their standard investment management agreements with client plans to incorporate indemnification language (Indemnification Requirement) was deeply flawed by its unverified assumption of 32 client plans per QPAM. We provided a conservative estimate of nearly $1 billion as the actual cost for industry compliance with the Indemnification Requirement. At the hearing, the Department asked us to provide more information on the number of client plans per QPAM that are ABA members in order to more accurately gauge the industry cost of complying with the Indemnification Requirement.

In the ABA Comment Letter, we point out that in order to comply with the Indemnification Requirement, a QPAM would need to re-open and separately review and re-negotiate each investment management contract with its client plans. We have since confirmed the approximate number of investment management contracts of QPAMs that are ABA members. The median number of contracts per QPAM from which we received data is 14,500 and the average number of contracts per QPAM is 14,180. These figures indicate a number of client plans per QPAM that is significantly higher than the 32 client plans per QPAM relied upon by the Department. If the number of client plans per QPAM for the industry as a whole reflect the data provided to ABA, the cost of implementing the Indemnification Requirement could soar exponentially from the Department estimate of $135,000 to a staggering $12.3 billion.[6] Given this considerable cost to QPAMs and to their client plans and participants and beneficiaries, we recommend that the Department delete the Indemnification Requirement from the Proposal.[7]

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[5] *See* ABA Comment Letter (October 10, 2022) at 5.

[6] For a QPAM with 14,180 investment management contracts (the lower of the two figures provided), this assumes a minimum of 10 hours spent on each contract in order to complete the new contractual arrangement that reflects the insertion of the Department's indemnification language, and using the Department's adopted hourly rate of $140.96. The cost for each contract would be $1409.60 (10 hours multiplied by $140.96/hour). For each QPAM, the average cost to comply with the Indemnification Requirement would then amount up to $19.99 million (14,180 multiplied by $1409.60). For the entire industry, the cost would be up to $12.3 billion ($19.99 million multiplied by 616, the number of QPAMs). Even allowing only one hour for a pro forma review and revision to each contract (which assumes no re-negotiation of, or conflict in, the contractual terms), this would still place the industry compliance cost at $1.23 billion. Note also that these figures do *not* account for review and revision of contracts with IRA owners, nor do they include the costs to client plans themselves to re-open and re-negotiate the investment management contracts on their own behalf.

[7] As noted in the ABA Comment Letter, investment management agreements between QPAMs and their client plans already provide mutually agreed-upon and sufficiently protective liability and indemnification clauses in their contracts that would apply to and address the possibility of the QPAM's ineligibility to rely on the QPAM Exemption. *See* ABA Comment Letter, *supra*, at 8.

II. Proposed QPAM Registration/Notification Requirement.

The Proposal would require any entity that relies on the QPAM Exemption (*i.e.*, every QPAM) to notify the Department by e-mail of its reliance on the Exemption.[8] At the hearing, Department staff repeatedly asked the testifying parties about their reservations and concerns over what the Department appears to characterize as a simple procedural exercise. We do not object to the Department's desire to confirm which institutions are relying on the QPAM Exemption as part of exercising its supervisory authority under ERISA. On the other hand, we are not aware of any instance in which the Department was not able to determine at any time whether an institution was relying on the QPAM Exemption in connection with investment decision-making on behalf of its client plans. In the absence of an expressed policy rationale, we assume that the Department has proposed the QPAM registration/notification requirement largely as an administrative convenience for Department examination staff.

Our concerns lie, first, in the precedent this sets for reliance on PTEs generally. If a registration or notification to the Department is required for the QPAM Exemption, what prevents the Department from establishing a similar requirement for other PTEs, such as PTE 2020-02? And what would be the regulatory rationale for providing a registration/notice requirement for one class exemption, but not for another class exemption? This course of action eventually may lead the Department to impose registration/notification requirements for multiple exemption(s) upon which institutions are relying with respect to investments or other transactions or activities, which could quickly spin a complex and entangling regulatory compliance web, while inadvertently placing a hazardous compliance/violation tripwire for QPAMs and other ERISA fiduciaries.[9]

Second, we are concerned about the possibility that a registration/notification requirement would inadvertently convey information that the Department could misinterpret as incomplete and/or inaccurate. Specifically, requiring an institution to state affirmatively that it is relying on the QPAM Exemption does not necessarily mean that the institution is relying *solely* on the QPAM Exemption for its investment decision-making activity generally, or that the institution is relying on the Exemption *with respect to a particular client plan, or transaction.* It may be that the institution instead is relying on one or more other available exemptions. Unfortunately, this may lead to the Department concluding, erroneously, that an institution actually relying on another exemption is relying instead on the QPAM Exemption with respect to a particular transaction or series of transactions that the Department may be examining for compliance. This further poses a liability and litigation risk for asset managers if the information were posted – as the Proposal requires – on the publicly available portion of the Department's website. In such instance, parties in interest and other stakeholders (including potential litigants) could be inadvertently

[8] *See* Proposal § I (g)(1), 87 *Fed. Reg.* at 45,227. The reporting entity must again notify the Department if there is a change to its legal or operating name or if the entity no longer relies on the QPAM Exemption. *See id.*

[9] These consequences would result from the continual need to update the Department on which exemptions are being relied upon for particular investment decision-making and other fiduciary-related activities and transactions. This would likely amount to a "moving target" compliance obligation that would be fraught with compliance uncertainty and liability exposure.

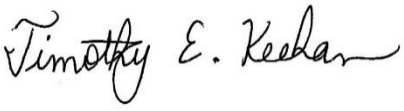
confused or could misinterpret the use or meaning of an asset manager's stated reliance on the QPAM Exemption.[10]

Consequently, we believe the better course of action for the Department, in discharging its supervisory and examination responsibilities, is simply to ask the institution at the time its activities are being reviewed or examined whether, and which transactions, the institution is relying on the QPAM Exemption, in order to determine whether there is a compliance or supervisory issue. This would render superfluous any registration/notification requirement and avoid the above-stated concerns.

We would be glad to meet with Department staff to discuss and dialogue on the issues raised in the ABA Comment Letter and at the hearing as part of our efforts to work with the Department to address any concerns raised by the QPAM Exemption or by the Proposal in a thoughtful and constructive manner. Given ongoing concerns about transmission of COVID-19 and its variants, we would be willing and available to engage in such discussion through video and/or audio conference calls with Department staff.

Thank you for your consideration of our views and recommendations. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5479 (tkeehan@aba.com).

Sincerely,



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[10] As stated in the ABA Comment Letter, the QPAM Exemption is a transactional exemption, not a functional exemption. *See* ABA Comment Letter, *supra*, at 16. Therefore, it is possible that an investment manager of retirement assets relying on the QPAM Exemption further may be relying, with respect to any given investment transaction, on another available exemption (class exemption or individual exemption) in lieu of or in addition to the QPAM Exemption. A notification/ registration requirement for the QPAM Exemption would *not* account for this distinction, and therefore, possibly mislead retirement plan and plan participants and beneficiaries, and possibly even the Department, into concluding that an investment manager is relying solely on the QPAM Exemption.