AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

October 11, 2022

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW
Washington DC 20210
via Federal rulemaking Portal at www.regulations.gov

Re Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (QPAM Exemption) EBSA-2022-0008

Dear Department of Labor,

The American Retirement Association (ARA) appreciates the opportunity to comment on the Department of Labor's (Department's) Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (Proposal).[1] The ARA urges that as the Department considers public comment, it recognize the Proposal's potential impacts on employer-sponsored retirement plans and their participants. We also recommend that the Department:

- **Modify the exclusive authority condition of the proposed amendment to Section I(c) of the QPAM Exemption[2] so as not to preclude routine business interactions.**
- **Modify the conditions of the one-year winding down period of proposed new Section I(j) so as not to preclude new transactions in existing accounts which are required for a prudent winding down process.**
- **Provide at least 18 months for QPAMs, plan sponsors, and other parties-in-interest to come into compliance with the conditions of an amended QPAM Exemption.**

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). ARA's members include organizations of all sizes and industries across the United States who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has nearly 35,000 individual members who provide consulting and administrative services to the sponsors of retirement plans. ARA and its underlying affiliate

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[1] 87 Fed. Reg. 45204 (July 27, 2022).
[2] Prohibited Transaction Class Exemption 84-14.

organizations are diverse but united in their common dedication to the success of America's private retirement system.

The ARA shares the Department's objective of protecting plans from the dangers of improper influence over decision-making with regard to plan assets in service of competing financial interests – at the expense of plans, participants and beneficiaries. The ARA and our underlying affiliate organizations have long been supportive of the principle that informs the Proposal: participants and beneficiaries are best served when plan fiduciaries and those who are in a position to influence plan investments maintain a high standard of integrity, free of conflicts of interest.

Summary

The ARA supports conditions for exemptive relief which provide **necessary** protections to plans and imparts clarity to the fiduciary investment selection and management process without disrupting and interfering with relationships that otherwise function well. While the Department explains the objective for the Proposal is to protect plans, participants, and beneficiaries, despite over forty years of exemption compliance enforcement, the Department provides little objective support to demonstrate the need for the sweeping changes it proposes. To the contrary, the Department readily admits in many instances, it lacks data for elements of its economic analysis.[3] With this in mind, the ARA is concerned that the Proposal's changes would needlessly disrupt plan relationships and increase costs for plan sponsors and consequently, plan participants—with no obvious corresponding benefit. Our concerns fall primarily into two categories: the Proposal's impacts on (1) plan sponsors and (2) plan investment options.

Discussion

Plan Sponsors

Exclusive Authority Requirement

The Department explains that the Proposal is intended to preclude "transactions that are negotiated by an employer but later presented to the QPAM for approval [because t]he terms of the transaction, commitments, and investment of fund assets, and any associated negotiations," should be the "sole responsibility" of the qualified professional asset manager (QPAM).[4] This would mean that a party in interest could not be involved in any aspect of a transaction, aside from certain ministerial duties and oversight, such as providing general investment guidelines to the QPAM."[5] "[A]ny transaction

[3] *See, e.g.,* 87 Fed. Reg. at 45216, 45218, 45219, 45221, 45222, and 45224.
[4] *Id*. at 45213.
[5] *Id.*

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… planned, negotiated, or initiated by a Party in Interest, in whole or in part" would not meet the conditions for exemptive relief.[6]

Though the Department characterizes this exclusive authority requirement as a "clarification" that aligns with the 1982 proposal for the QPAM Exemption, the ARA believes it adds unjustified and redundant restrictions to a material and meaningful condition of the exemption. Indeed, relief under the existing exemption is "predicated upon the existence of an independent, professional asset manager who is solely responsible for the discretionary management of plan assets that are transferred to its control"[7] and "[no] less than ultimate discretion over acquisitions for an investment fund that it manages."[8] That is, the existing exemption requires that the terms of a transaction be "negotiated on behalf of the investment fund by, or under the authority or general direction of the QPAM" and that the QPAM "make[ ] the decision on behalf of the investment fund to enter into the transaction."[9]

Despite these well-understood conditions, the Department seeks to make "clear that a QPAM must not permit other parties in interest to make decisions regarding Plan investments under the QPAM's control." We understand that the impetus for this stems from a concern that plans sometimes engage "QPAMs for a Day" to uncritically ratify prearranged transactions. The Proposal's exclusive authority requirement, however, would have an outsize effect relative to its potential efficacy relating to the extent of QPAMs' involvement in transactions.

Further, the ARA believes that it should not matter whether a party-in-interest, for example, a plan sponsor, is responsible for identifying a particular potential transaction if final approval and the terms of the transaction are negotiated by and are the ultimate responsibility of a QPAM. In such instances, the QPAM is not a "mere approver," but has a substantive role in determining whether the transaction goes forward and on what terms. Indeed, it is common practice for plans sponsors and other plan fiduciaries to identify or present investment opportunities to a QPAM, while still fully relying on and accepting the QPAM's independent judgement for approval of a transaction. Yet, the Proposal would prohibit a wide variety of routine interactions and plans could lose out on a range of favorable investment opportunities as a result. As examples, the Proposal may have the effect of disallowing the use of the QPAM Exemption by pooled arrangements such as collective investment trusts and insurance company separate accounts which often rely on unaffiliated advisers for investment management services. Eliminating these investment vehicles from a plan's array of investment options would have considerable impacts. The ARA believes that the Proposal is overly restrictive in this regard and that established business practices, which preserve the QPAM's "ultimate discretion," should be permitted even if a party-in-interest has a degree of involvement in the transaction.

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[6] *Id.*
[7] 70 Fed. Reg. 49153, 49309 (Aug. 23, 2005).
[8] 70 Fed. Reg. at 49308.
[9] *Id.* at 45227.

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Mandatory One-Year Winding Down Period

Under the Proposal, if a QPAM becomes ineligible to rely on the exemption, the plan can terminate the relationship over a one-year winding-down period – without penalties.[10] The one-year period is intended to allow plan clients time to decide how to proceed – including whether to terminate the asset manager, a process which is complex and time-consuming.[11] The ARA is concerned that the winding down period may only be used to transition existing clients out of existing investments. New transactions in existing accounts would not be permitted. This limitation puts plans at risk – including risks of violations of otherwise applicable fiduciary duties because the QPAM cannot enter into new transactions, including transactions that might otherwise be required for prudent unwinding of existing transactions. The ARA believes that the Proposal should be modified to permit the QPAM to engage in transactions which are required for a prudent winding down process.

Indemnification / Written Management Agreement

The Proposal requires that written contracts with QPAMs include provisions for indemnification of plan losses. The QPAM must agree to indemnify, hold harmless, and restore actual losses to a plan for any damages if the QPAM becomes ineligible for exemptive relief.[12] This would include losses and related costs for unwinding transactions with third parties, the plan transitioning to another asset manager, as well as any prohibited transaction excise taxes under the Internal Revenue Code.[13] Because these potential liabilities may not be priced into existing arrangements and could be significant, the cost of QPAM services may increase and costs would be passed on to plans. The ARA is concerned that this change to the QPAM Exemption is unsupported, unwarranted interference into the process of contracting with plan service providers that would have enormous consequences for plans.[14]

In addition, the Proposal would require QPAMs' written management agreements with plans to include terms addressing the potential future ineligibility of the QPAM for prohibited transaction relief.[15] Every investment management agreement that is currently in place between an ERISA plan and a QPAM will need to be amended. Modestly stated, the effects of this change are wide-ranging in scope. And because the Proposal does not provide a transition period for existing agreements, plan sponsors and QPAMs would have only 60 days after publication of the final exemption to add

[10] *Id.* at 45227.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] We also point out our concern of whether requiring such a provision is an action outside the Department's jurisdiction. ("DOL may not create vehicles for private lawsuits indirectly through BICE contract provisions where it could not do so directly.") *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 384 (5th Cir. 2018) *citing Astra USA, Inc. v. Santa Clara Cty*., 563 U.S. 110, 117-19 (2011).
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these provisions. We believe that it would be prohibitively difficult for plans to complete the required amendments in such a brief time frame, exacerbating problems resulting from the substance of the Proposal. Some plan sponsors have management agreements with multiple QPAMs. The ARA believes that the extensive changes needed to bring QPAM agreements into compliance with the Proposal require at least 18 months.

Plan Investments

In today's financial markets, the QPAM Exemption is widely relied upon as a source of prohibited transaction relief in connection with investment vehicles that are popular under employer-sponsored retirement plans. The ARA is concerned about the impact of Proposal on these investments and the resulting impact on employer-sponsored retirement plans. Of particular concern are target date funds, frequently selected as qualified default investment alternatives (QDIAs), and collective investment trusts (CITs).

QDIAs

According to a 2020 survey conducted by the Plan Sponsor Council of America, 66.6% of employer-sponsored defined contribution plans include QDIAs. In plans with more than 5,000 participants, the percentage was 80.9%.[16]

Overwhelmingly, target date funds have become the favored choice for QDIAs among plan sponsors. The ARA is concerned that, as with many other managed funds, the Proposal would disrupt the current operation of target date funds. Because of their popularity as QDIAs, the disruption would be acutely felt in employer-sponsored plans where target date funds are heavily used. Ultimately, this would impact plan participation and investments and perhaps employers' decisions to offer plans. The ARA urges the Department to recognize these collateral impacts as it considers revisions to the QPAM Exemption.

Collective Investment Trusts

CITs have become popular retirement plan investment options in recent years, in part as a way to lower investment costs to participants. Some CITs have hundreds or thousands of participating plans. Because each such plan may have an assortment of party-in-interest relationships, a CIT investment manager generally assumes that each counterparty to an investment is a party-in-interest to one or more of the CIT's participating plans, making exemptive relief necessary for the transaction.

The QPAM Exemption is widely relied upon for prohibited transaction relief in CIT investment transactions. It is commonplace for banks and trust companies that act as QPAMs to CITs look to

[16] *See* https://www.psca.org/sites/psca.org/files/Research/2020/QDIA.png.

expert investment sub-advisers for advice on investment and re-investment of CIT assets. Oftentimes, sub-advisers are parties in interest to the plans participating in the CIT and may be involved in negotiating transaction terms and conditions of a transaction. The activities of the subadvisors remain subject to the oversight and ultimate authority of the bank or trust company.

The Proposal explains that a "party in interest should not be involved in any aspect of a transaction, aside from certain ministerial duties and oversight associated with plan transactions."[17] It appears then, that a party-in-interest sub-adviser's usual activities would make relief under the amended QPAM Exemption unavailable for many CIT transactions. The ARA does not believe that plan interests would be served if relief under the QPAM Exemption is unavailable solely because of the involvement of party-in-interest sub-advisers. This change would needlessly disrupt otherwise sound, unconflicted practices, without corresponding gains. The ARA urges the Department to clarify that an advisory role such as that of an unaffiliated CIT sub-adviser would not preclude satisfaction of the exclusive authority requirement of Section I(c) of the Proposal.

Individual Exemptions

Finally, if an asset manager becomes ineligible for the QPAM Exemption, the Proposal explains that the manager may seek an individual exemption from the Department.[18] In those cases, the Department may require a certification and independent audit demonstrating that the manager had met the conditions of the QPAM Exemption, including those of the winding-down period.[19] The ARA is concerned about the feasibility of a solution which involves obtaining individual QPAM exemptions, given the relatively few individual exemptions granted in recent years and the significant new requirements of the Proposal.[20] In order to minimize disruption to plans' relationships with QPAMs, the ARA urges the Department modify the Proposal to provide that the one-year winding down period would not begin until the Department renders a final determination on the QPAM's request for an individual exemption.

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The ARA very much appreciates the Department's commitment to safeguarding America's workers' interests in their workplace retirement savings plans by ensuring that plan fiduciaries and those in positions of influence over plan investments be held to a high standard of integrity, free of conflicts of interest. The ARA shares this goal and would welcome the opportunity to discuss this

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[17] 87 Fed. Reg. at 45213.
[18] *Id.* at 45228.
[19] *Id.* at 45212.
[20] *See Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications*, 87 Fed. Reg. 14722 (March 15, 2022).

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further with you. Please feel free to contact Allison Wielobob, General Counsel, at AWielobob@USARetirement.org or (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

/s/	/s/
Brian H. Graff, Esq., APM Executive Director/CEO American Retirement Association	Allison Wielobob General Counsel American Retirement Association