

January 6, 2023

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 Post-Hearing Comment Regarding Proposed Amendment to Prohibited
Transaction Class Exemption 84-14 (QPAM Exemption) EBSA-2022-0008**

Dear Department of Labor,

The American Retirement Association (ARA) is pleased to provide supplemental comments on the Department of Labor's Proposed Amendment to the Prohibited Transaction Exemption¹ (Proposal) and the public hearing held on November 17, 2022 (Hearing). As we stated in our October 11, 2022, comment letter on the Proposal, we urge the Department of Labor (Department) bear in mind the Proposal's potential impacts on employer-sponsored retirement plans, their sponsors, and their participants.

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

¹ 87 Fed. Reg. 45204 (July 27, 2022).

Summary

As detailed in our initial comment letter, the ARA urges the Department to modify the exclusive authority condition of the Proposal so as not to preclude routine business interactions and also to change the conditions of the one-year winding down period so as not to preclude new transactions in existing accounts which may be required for a prudent winding down process. We also recommend that the Department provide at least 18 months for affected parties to come into compliance with the conditions of an amended QPAM exemption.

QPAMs are widely relied upon as sources of prohibited transaction relief in connection with many investment vehicles that are popular under employer-sponsored plans. In both our initial comment letter and in our Hearing testimony, we asked the Department to recognize potential significant collateral impacts of the Proposal at the plan level. Impacts on target date funds (TDFs) are of particular concern to ARA's members as these funds are frequently selected as qualified default investment options (QDIAs). Because of the heavy use of TDFs as QDIAs, disruption to the operation of TDFs would be acutely felt in employer-sponsored plans.

Impact on Employer-Sponsored Plans

At the Hearing, a representative of the Department asked us to provide additional information relating to the Proposal's relevance to TDFs, specifically inquiring about the involvement of plan sponsors.²

TDFs typically are structured as tiered or multi-managed investment vehicles. The fund at the top invests in a mix of underlying equity and fixed income funds to achieve a portfolio consistent with the fund's objectives. We believe that elements of the Proposal are inapposite to the operation of tiered or multi-managed investment funds, where the top-level fund manager and most, if not all, of the underlying fund managers are QPAMs and fiduciaries.³ This is because QPAMs engage in a variety of party in interest transactions, some of which originate with a party-in-interest approaching the QPAM about a potential transaction. Financial service providers often are the referring parties, but sometimes plan sponsors are. We believe that the existing conditions of the QPAM exemption are sufficiently protective in these contexts so as to preserve the independence of QPAM and to ensure that investment decisions are solely within the discretion of the QPAM.

² Hearing on Proposed Amendment to the Qualified Professional Asset Manager Exemption (PTE 84-14) 69:13-70:1, Nov. 22, 2022.

³ Investment managers routinely engage in discussions with counterparties about investment ideas. The securities market has a variety of intermediaries, including broker dealers and investment banks, whose purpose is to connect buyers and sellers who might not otherwise connect, and help initiate transactions.

TDFs may be offered as QDIAs⁴ and overwhelmingly, they are the favored choice for QDIAs among plan sponsors.⁵ The ARA is concerned that the Proposal would disrupt the operation of TDFs. The language in the Proposal requiring that “commitments, investment of fund assets and negotiations on behalf of the Investment Fund are the sole responsibility of the QPAM” and that “[a] party in interest should not be involved in any aspect of a transaction aside from certain ministerial duties and oversight” is incompatible with the concept of tiered or multi-managed investment funds where the top-level fund manager and underlying fund managers all are QPAMs and fiduciary parties in interest. Without the QPAM exemption, each investment manager would have to keep a track of *every* party-in-interest with *every* plan investing in the fund and find alternative exemptive relief.⁶ Keeping track of every such party in interest, if even possible, would be at unreasonable cost and fraught with the risk of inadvertent prohibited transactions. Investment managers will forego investment options that are in the interests of the plan and its participants and beneficiaries. The preamble to the original proposal for PTE 84-14 acknowledged this limitation.⁷

Simply stated, the ARA is concerned that the Proposal would increase plan expenses without providing any material safeguards or value to plan participants. Increased costs will be borne by plans and be passed on as increased fees for participants. Some plan sponsors may, as a result, choose not to use TDFs as QDIAs under their plans or sponsor a plan at all.

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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. The ARA shares this goal and would welcome the opportunity to discuss this further with you. Please feel free to contact Allison Wielobob, General Counsel, at AWielobob@USARetirement.org or (703) 516-9300.

⁴ See 29 C.F.R. 2550-404c-5(e)(4) and Information Letter to Christopher Spence (Dec. 16, 2016).

⁵ 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%. See <https://www.pasca.org/sites/pasca.org/files/Research/2020/QDIA.png>.

⁶ However, other exemptions are narrower in scope and do not serve to support large plan investment portfolios in the comprehensive and flexible manner that PTE 84-14 does.

⁷ See Preamble to Proposed Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 47 Fed. Reg. 56945, 56946-56947 (Dec. 21, 1982) (stating that “Established financial institutions...must maintain current rosters or [sic] parties in interest with respect to plans that commit assets to single customer accounts, trust funds and those pooled accounts and collective funds which fail to qualify for relief provided by [the predecessor exemptions to Prohibited Transaction Class Exemptions 90-1 and 91-38]. These fiduciaries are required to undertake time consuming ERISA compliance checks for the numerous investment transactions under consideration each year to ascertain whether a party in interest of a plan, any of whose assets are subject to the fiduciary’s management, would cause the transactions to be prohibited. In the case of a large plan, there may be thousands of parties in interest. Where a potentially prohibited party in interest transaction is identified and is not covered by an existing class exemption, the asset manager may have to choose between applying for an administrative exemption or forgoing the investment opportunity entirely.”)



**AMERICAN
RETIREMENT
ASSOCIATION**

4401 N. Fairfax Drive | Suite 600 | Arlington, VA 22203
P 703.516.9300 | F 703.516.9308 | info@usaretirement.org | usaretirement.org

Working for America's Retirement

Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/

Allison Wielobob
General Counsel
American Retirement Association