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Filed Electronically

Office of Exemption Determinations
Employee Benefits Security Administration
Room N–5655
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attn: Application No. D-12022

Re: Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption) (RIN 1210-ZA07)

Dear Office Director Chris Cosby:

The Investment Company Institute (ICI)[1] writes to reiterate our significant concerns with the Department of Labor's (the "Department") proposed amendments to Prohibited Transaction Exemption 84-14 (the "QPAM Exemption"), the longstanding exemption governing financial institutions acting as qualified professional asset managers (or QPAMs) for employer-provided retirement plans.[2]

ICI strongly supports efforts to promote retirement security for US workers. As a trade association representing the asset management industry, ICI is especially attuned to the needs of retirement savers because the industry plays a significant role in US retirement saving by making

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $29.1 trillion in the United States, serving more than 100 million investors, and an additional $8.1 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[2] The Department published the proposed amendments at 87 Fed. Reg. 45204 (July 27, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15702.pdf; the Department announced a hearing date and a 15-day extension of the comment period (originally scheduled to end on September 26, 2022) at 87 Fed. Reg. 54715 (September 7, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-09-07/pdf/2022-19317.pdf; the Department subsequently published a notice of its initial Regulatory Flexibility Analysis for the proposed amendments, at 87 Fed. Reg. 56912 (September 16, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-09-16/pdf/2022-20099.pdf.

available the investment products through which pension plans, defined contribution (DC) plans and individual retirement accounts (IRAs) invest. Total US retirement assets were $33.6 trillion as of December 31, 2022, with our members managing a large portion of those assets through regulated funds, collective investment trusts, and separate accounts.

In our comment letter submitted to the Department on October 11, 2022 (the "Initial Letter"),[3] ICI detailed many fundamental concerns with the potential impact of the proposed amendments to the QPAM exemption (the "Proposal") on retirement plans and their participants and beneficiaries. The Proposal contains numerous provisions which, if adopted, likely would impede routine plan transactions, limit access to valuable investment opportunities, and ultimately raise costs for retirement plans and their participants.

The Department on March 23, 2023, published a notice that it was reopening the comment period for the Proposal until April 6, 2023, explaining that at least one interested party may have additional information that was not submitted by the earlier comment deadline.[4] Although we appreciate the additional opportunity to comment on a matter of great significance, we note that the very short re-opened period of two weeks, combined with a lack of advance notice, is of limited utility. A longer comment period would allow interested stakeholders to provide more meaningful input to the Department. Nevertheless, we are writing now to further elaborate on the concerns expressed in the Initial Letter.

As a threshold matter, we note that in the time since we submitted our Initial Letter, no additional information has come to light—including through the public hearing that the Department held on November 17, 2022—to mitigate the significant concerns we earlier expressed. More importantly, as we requested in the Initial Letter, we urge the Department to withdraw the Proposal rather than moving forward with a final exemption at this time. Comments received by the Department demonstrate that the Proposal will have significant adverse consequences for plans. The unforeseen consequences of the Proposal are so extensive that it would be inappropriate for the Department to proceed to a final exemption without first proposing modifications to those amendments for another round of public comment. The overhaul of a critically important exemption such as the QPAM Exemption would have benefited from prior input from the regulatory community. Unfortunately, however, the Department did not seek any plan sponsor, plan provider, or other stakeholder input before crafting the Proposal. We urge the Department to withdraw the Proposal and undertake a comprehensive study, obtaining additional stakeholder input prior to proposing any amendments that are shown to be necessary.

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[3] See letter to Office of Exemption Determinations, EBSA, from David Abbey et al., dated Oct. 11, 2022, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00017.pdf.

[4] 88 Fed, Reg. 17466 (March 23, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-03-23/pdf/2023-05522.pdf.

THE PROPOSAL WOULD INCREASE COSTS FOR PLANS AND PLAN PARTICIPANTS WITHOUT JUSTIFICATION

We remain concerned that the Department has proposed wholesale changes to the QPAM Exemption without any indication that the QPAM Exemption has not been working as intended. Absent such evidence, the Proposal appears to simply make the QPAM Exemption more difficult and costly to use, contrary to its fundamental purpose of facilitating efficient plan administration.[5] These costs will, in the end, be borne by plans and their participants and beneficiaries.

The Department appears to have significantly underestimated the costs of implementing the Proposal. The Proposal notes that "certain aspects of the QPAM Exemption would benefit from a focus on mitigating potential costs and disruption to Plans when a QPAM becomes ineligible for the exemptive relief because of a conviction under Section I(g)."[6] However, while the Initial Regulatory Flexibility Analysis calculates de minimis costs for each QPAM to amend QPAM management agreements as required by subsection I(g)(2) of the Proposal,[7] it grossly underestimates these costs by incorrectly assuming that a firm's QPAM clients operate under one standard management agreement. Depending on a firm's service model, it may operate using multiple template agreements, and/or may have numerous QPAM clients engaged pursuant to individually negotiated management agreements. Each of these forms of agreement will require significantly more time and legal work to amend than the Department has estimated. The Department's estimates also do not consider that amendments may not be limited to those required by the Proposal. As a practical matter, when a QPAM approaches a client to amend an agreement the client often will request additional changes. These discussions will significantly increase the amount of time required to amend management agreements.

The Proposal also does not consider increased costs for plans to retain a QPAM. The various requirements of the Proposal would impose additional costs and risks on QPAMs' operations, which will impact the fees charged to QPAM clients. These increased costs for plans (and, by extension, for plan participants) do not appear to have been appropriately considered in the Department's impact analyses.

In addition to the above, the Proposal would significantly increase a plan's expenses where the incumbent QPAM has been disqualified. The Proposal provides for a 12-month wind-down

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[5] As noted in the Initial Letter, the purpose of the exemption has always been to decrease unnecessary administrative burdens, rather than to be viewed as a "gold standard" indication, as Department staff have recently opined.

[6] 87 Fed. Reg. at 54215.

[7] 87 Fed. Reg. at 56916. In addition, the Proposal's required new terms in written management agreements unnecessarily ascribe criminality to an entire industry and impose untenable burdens where no criminal activity (or even ERISA non-compliance) may ever occur.

period following the disqualification of a QPAM.[8] As we detailed in the Initial Letter, this wind-down period would actually *increase* a plan's costs when utilizing the QPAM Exemption. The Proposal would prohibit a disqualified QPAM from "engaging in new transactions" during the wind-down period. Because most investment management mandates require ongoing transacting to meet the goals of the mandate, a plan would find it necessary to immediately find a second QPAM to handle new transactions. The process to retain a new QPAM can be costly, requiring a prudent search process. Moreover, during this search process a plan may suffer investment losses due to the incumbent QPAM's inability to enter into new transactions.[9] In addition to these otherwise avoidable expenses, the prohibition on new transactions will be extremely disruptive to plans and would place an enormous—and untenable—burden on plan sponsors.

THE PROPOSAL UNDERMINES THE DISCRETION OF PLAN FIDUCIARIES

As detailed in the Initial Letter, we are concerned that the Proposal in numerous instances—disqualification due to specified crimes (foreign or domestic), mandatory terms in investment management agreements, a defined wind-down period with significant limits on QPAM activities during the wind-down period, and others—would severely restrict plan fiduciaries' discretion to act in the interests of plans and their participants and beneficiaries.[10] We are sympathetic to the Department's concerns regarding the continued qualification and retention of a QPAM in the face of certain developments. That said, we firmly believe that plan fiduciaries are best positioned to determine what steps are most appropriate for a plan both when initially retaining and when deciding whether to continue to do business with a given QPAM.

Rather than the proscriptive measures in the Proposal, we urge the Department to consider a disclosure-based framework under which a QPAM is required to provide certain information to plan fiduciaries. A disclosure-based framework would ensure that plan fiduciaries have complete information regarding matters of concern to the Department, while continuing to vest decision-making with the party best equipped to determine what is in the interests of a plan under given circumstances.

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[8] As explained in our Initial Letter, the Proposal's wind-down period appears to presume that in the event of QPAM ineligibility the asset manager must withdraw from managing client assets, rather than allowing the parties to continue a relationship using other valid compliance approaches.

[9] While we recognize that the Department has suggested that a disqualified QPAM could apply for an individual prohibited transaction exemption, for the reasons stated in the Initial Letter we do not view this as a viable option.

[10] ICI believes the modifications to Section I(g) related to foreign criminal convictions are overly broad and, thus, are likely to disqualify more QPAMs than is reasonably necessary to achieve the Department's stated objective. The proposed amendment does not limit disqualification to foreign convictions that are reasonably related to a QPAM's plan asset management services. Instead, it would disqualify a financial institution from serving as a QPAM in situations where the only connection between the QPAM and the entity convicted of a foreign crime is a small, indirect ownership interest (e.g., 5%). Similarly, automatic disqualification would occur because of foreign convictions that involve conduct completely unrelated to the management of plan or institutional assets.

THE PROPOSAL CONFLICTS WITH THE RESPONSIBILITIES OF CIT TRUSTEES

In our Initial Letter we explained our concerns related to the impact of proposed section I(c) (the sole responsibility standard) on multi-manager structures, such as the use of subadvisors to manage segments of a portfolio, as well as fund-of-funds arrangements *(e.g.*, target date funds and other asset allocation funds). We expand on these concerns here specifically as they apply to collective investment trusts (CITs). As other comments have noted, CITs differ from investment vehicles such as mutual funds and ETFs in many ways—including that they are subject to oversight by CIT bank trustees' primary regulator, the Office of the Comptroller of the Currency (OCC) (or its state counterpart). Section 3(c)(11) of the Investment Company Act of 1940 (the "40 Act") (the exemption from registration as mutual funds that CITs operate under) requires that a CIT be "maintained by" a bank. OCC regulations similarly require that a bank administering a CIT have exclusive management of the CIT, except to the extent such responsibilities are delegated to another party. To this end, CIT trustees often delegate investment management responsibilities to one or many subadvisors. These subadvisors, like the CIT trustee, are ERISA fiduciaries subject to ERISA's prohibited transaction rules, and as such often rely on the QPAM exemption in carrying out their responsibilities.

The Proposal imposes numerous structural and practical challenges to how CITs have successfully operated for decades. If enacted, these changes would make CITs more costly and less available to plans, increasing costs and reducing investment returns for plan participants and beneficiaries invested in CITs.

Section I(c) of the Proposal requires that the terms of the transaction, commitments, and investment of fund assets, and any associated negotiations on behalf of the investment fund, must be the "sole responsibility" of the QPAM. The Proposal further states that "no relief is provided under this exemption for any transaction that has been planned, negotiated or initiated by a Party in Interest, in whole or in part, and presented to the QPAM for approval because the QPAM would not have sole responsibility with respect to the transaction." Our Initial Letter explained how this "sole responsibility" standard, and specifically the "planned, negotiated, or initiated" condition, would create significant challenges for the management of retirement assets. This impact is particularly significant for CITs, which as part of their basic structure may have multiple managers that are parties in interest simultaneously relying on the QPAM Exemption. If a CIT QPAM were precluded (under the sole responsibility standard) from involving its advisors and subadvisors in negotiating transactions, many CIT transactions would not be covered under the QPAM Exemption.

To cover the use of subadvisory structures in a CIT, the Proposal could be construed to require that a plan enter into a *separate* agreement with *each* manager involved in managing CIT assets. Such an approach is not only unwarranted, but likely would conflict with the 40 Act requirement that a CIT be bank maintained, as well as the OCC's exclusive management requirement. The only written agreement between a CIT and a plan investor is a CIT fund's participation agreement, which is functionally equivalent to a written management agreement. Neither plans nor plan sponsors are parties to any agreements with a CIT trustee's advisors and subadvisors, a limitation which is necessary to comply with the 40 Act and OCC requirements. Additionally, if separate agreements between plans and subadvisors were required CIT trustees would encounter significant impediments to the efficient management of CIT assets due to the nature of CITs as pooled investment funds. If a CIT trustee decided to terminate or replace a subadvisor, for example, it would first need to obtain consent from each participating plan/plan sponsor, and a new subadvisor would need to enter into an agreement with each of these parties. Such a process would be impractical and disruptive to the ongoing management of plan assets invested in CITs.

THE DEPARTMENT SHOULD CONSULT WITH OTHER AUTHORITIES BEFORE PURSUING THE PROPOSAL

In the Initial Letter we expressed concern that the Proposal misconstrues the role of non-prosecution and deferred prosecution agreements (collectively, "Negotiated Agreements") in resolving criminal matters. Negotiated Agreements often are used to resolve matters where a criminal conviction is uncertain or where a prosecutor in their discretion has determined that pursuing a criminal conviction is not a desired result. The Proposal would improperly create a presumption under the QPAM Exemption that a Negotiated Agreement is an admission that a financial institution agrees with prosecutors' allegations. Treating financial institutions as criminals absent a judicial process having determined their culpability is fundamentally at odds with the purpose of Negotiated Agreements as a tool to resolve criminal allegations.[11]

This treatment of Negotiated Agreements would severely limit the discretion of the Department of Justice and state prosecutors to enter into such agreements with financial institutions. Under an amended QPAM Exemption as proposed by the Department, financial institutions may well determine that they have no choice but to exhaustively defend themselves—even when a prosecutor desires to resolve a matter though a Negotiated Agreement to avoid the risk of trial and the institution would rather avoid the significant expense of defending itself though a trial. Given the potentially significant impact of the Proposal on the tools available to federal and state prosecutors, we again urge the Department to consult with these entities before considering further action on the Proposal.

CONCLUSION

As we requested in the Initial Letter, we urge the Department to withdraw the Proposal rather than moving forward with a final exemption. As explained herein and in the Initial Letter, the Proposal makes significant changes to the QPAM Exemption which would, if adopted, impose significant new costs and burdens on plans and plan sponsors. Moreover, the Department appears to not fully appreciate the extent of these costs and burdens. To facilitate a more effective update of the QPAM Exemption, we urge the Department to go back to the drawing board and craft a new proposed amendment—one that seeks to incorporate not only the extensive feedback already provided by interested parties but also the input of other agencies potentially impacted by

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[11] This concern also applies to foreign convictions. As we explain in the Initial Letter, decisions of foreign courts may lack even basic due process rights.

an amendment. ICI and our members look forward to working with the Department on a reproposal. If you have any questions, or if we can be of assistance in any way, please contact Elena Chism at elena.chism@ici.org, Shannon Salinas at shannon.salinas@ici.org, or David Cohen at david.cohen@ici.org.

Sincerely,

/s/ Elena Barone Chism	/s/ Shannon Salinas	/s/ David A. Cohen
Elena Barone Chism Deputy General Counsel Retirement Policy	Shannon Salinas Associate General Counsel Retirement Policy	David A. Cohen Associate General Counsel Retirement Policy