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Submitted Electronically

December 6, 2023

The Honorable Shalanda D. Young
Director
Office of Management and Budget
1650 Pennsylvania Avenue, NW
Washington, DC, 20502

The Honorable Richard L. Revesz
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

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

Dear Director Young and Administrator Revesz:

The Investment Company Institute (ICI)[1] and the undersigned organizations have continually expressed significant concerns regarding the substantial proposed changes and the cost-benefit analysis included in the Department of Labor's (the "Department") proposed amendments to Prohibited Transaction Exemption 84-14 (the "QPAM Exemption"). The Office of Management and Budget (OMB) received for review a final rule representing amendments to the QPAM Exemption (the "Proposal") on November 14, 2023. We are writing again because there are significant flawed assumptions in the Department's estimate of the costs and burdens of the Proposal. As we stated in our comments, the Department offered neither evidence that the QPAM Exemption was not working as intended nor a single instance of harm to plans from the concerns in its Regulatory Impact Analysis.[2] The Proposal's sweeping changes demand more rigor, thoroughness, and analysis for the benefit of plans and their participants. We ask that OMB not approve the Proposal for publication unless and until the Department (a) modifies the

[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. ICI's 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 other jurisdictions. Its members manage $29.9 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $8.5 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

[2] See letter to Office of Exemption Determinations, EBSA, from David Abbey et al. (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 ("ICI Initial Letter") at p. 28.

Proposal to reflect the many substantive concerns expressed by ICI and others about the Proposal, and (b) addresses the significant flaws in the Department's cost-benefit analysis. The Proposal should be withdrawn and reproposed only after comprehensive study and additional stakeholder input.

ICI and the undersigned organizations strongly support 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 available the investment products through which pension plans, defined contribution (DC) plans and individual retirement accounts (IRAs) invest. Total US retirement assets were $36.7 trillion as of June 30, 2023, with our members managing a large portion of those assets through regulated funds, collective investment trusts, and separate accounts.

Much of those trillions of assets is managed by ICI members (and members of the undersigned organizations) utilizing the QPAM Exemption, and our members have decades of experience with the QPAM Exemption, which has worked effectively since 1984. The QPAM Exemption is intended to facilitate routine transactions by regulated financial institutions acting as qualified professional asset managers ("QPAM") for employer-provided retirement plans. For nearly four decades it has allowed investment managers to deliver sophisticated investment strategies to ERISA plans, while adequately protecting plans and participants.

In our comment letters submitted to the Department[3] we detailed many fundamental concerns with the potential impact of the Proposal on retirement plans and their participants and beneficiaries. The Proposal contains numerous provisions which, if adopted, would impede routine plan transactions, limit access to valuable investment opportunities, and ultimately raise costs for retirement plans and their participants. The Proposal would increase both the upfront and ongoing costs of asset managers and dealers complying with the QPAM Exemption, which will be passed on to plans and ultimately to participants saving for a secure retirement.

The Department's cost-benefit analysis of the Proposal failed to address or even consider these real costs. Accordingly, OMB should not move forward with the Proposal until the cost-benefit analysis is reconsidered, the Department has revised its cost-benefit analysis to address concerns raised during the comment period, and the Department has addressed the numerous substantive concerns raised by the regulated community.

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[3] See letter to Office of Exemption Determinations, EBSA, from David Abbey et al. (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 ("ICI Initial Letter"); letter to Office of Exemption Determinations, EBSA, from Elena Chism et al. (Apr. 6, 2023), available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07-3/00006.pdf ("ICI Follow Up Letter"). For comment letters of other signatory organizations, see footnotes 23-26 infra.

I. OMB Should Ensure that the Department's Cost-Benefit Analysis Meets the Requirements of Governing Executive Orders and Applicable Law

We appreciate the key role that the OMB and its Office of Information and Regulatory Affairs (OIRA) play in the regulatory review process for evaluating and scrutinizing a federal agency's cost-benefit analysis to ensure the agency has selected a regulatory approach in compliance with the legal requirements.[4] We rely on you and your staff to scrutinize an agency's regulation, particularly when stakeholders have criticized the agency's economic analysis in the proposal, including because stakeholders cannot review how the agency has purported to address those concerns.

Under Executive Orders 12866 and 13563, federal agencies must design and analyze proposed regulations to ensure that the benefits of their proposed regulations justify the costs.[5] The Biden Administration affirmed this federal regulatory review process in Executive Order 14094, which adopted Executive Orders 12866 and 13563.[6] Unfortunately, as supported by comment letters from ICI and other stakeholders, the Department's cost-benefit analysis of the Proposal does not meet the standards that President Biden has directed.

Executive Order 12866, as reaffirmed by Executive Order 13563 and Executive Order 14904, requires agencies to conduct an analysis of the benefits and costs of a proposed regulation and, to the extent permitted by law, directs that regulatory action may proceed only after a reasoned determination that the benefits of a regulation justify the costs.[7] Executive Order 12866 states that, "in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits."[8] Executive Order 12866 further states that "each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[9]

The need to ensure that an agency adequately considers the costs and benefits of a proposal, and only moves forward when the benefits justify those costs, is also required by the Administrative Procedures Act (APA). Under the APA, federal courts will set aside a federal agency regulation

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[4] Exec. Order No. 12866, 58 Fed. Reg. 51,735, 51,742 (Oct. 4, 1993). ("The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency").

[5] Exec. Order No. 12866, 58 Fed. Reg. at 51,736 ("Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"); *see also* Exec. Order No. 13563, 76 Fed. Reg. at 3,821.

[6] Exec. Order No. 14094, 88 Fed. Reg. 21,879 (Apr. 6, 2023).

[7] Exec. Order No. 12866, 58 Fed. Reg. at 51,736.

[8] *Id*., 58 Fed. Reg. at 51,735.

[9] *Id*., 58 Fed. Reg. at 51,736.

that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10] Courts have invalidated as arbitrary and capricious past efforts by federal agencies to propose new regulations without a thorough cost-benefit analysis. If a federal agency relies on a cost-benefit analysis, the court will evaluate whether the cost-benefit analysis was reasonable and "will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses."[11] Further, exemptions are supposed to allow regulated parties flexibility in the face of otherwise applicable statutory or regulatory obligations, not impose "a raft of affirmative obligations" that would otherwise be beyond the agency's authority.[12]

The D.C. Circuit has invalidated several Securities and Exchange Commission (SEC) regulations due to the agency's inadequate cost-benefit analysis. In *Business Roundtable v. SEC*, the court criticized the agency for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule."[13] The D.C. Circuit vacated the regulation in part because the SEC "did nothing to estimate and quantify the costs it expected companies to incur" under the regulation.[14] In *Chamber of Commerce v. SEC*, the D.C. Circuit similarly held the agency violated the APA by failing to adequately consider the costs of compliance with the regulation and failed to consider an important alternative.[15]

Acting Secretary of Labor Julie Su committed in writing to Congress that the Department would conduct this rulemaking "consistent with the requirements of the Administrative Procedure Act" and that "[i]f a final amendment is published, it will contain a regulatory impact analysis as required by Executive Orders 12866, 13563, and other laws related to the administrative process."[16]

II. OMB and OIRA Must Address Stakeholder Concerns Regarding the Cost-Benefit Analysis of the Proposal

Stakeholders across the plan sponsor, investment management, banking, and insurance community filed comments with the Department highlighting how the Department has not properly considered the costs of the Proposal and has improperly estimated the purported benefits. We raised numerous concerns that the Proposal would increase costs for plans and participants without justification. Below we reference some examples of concerns regarding the Department's analysis described in our comment letters.

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[10] 5 U.S.C. § 706(2)(A).

[11] *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007).

[12] *Chamber of Commerce v. DOL*, 885 F.3d 360, 382 (5th Cir. 2018).

[13] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

[14] *Bus. Roundtable,* 647 F.3d at 1150.

[15] *Chamber of Commerce v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005).

[16] See Department of Labor Responses to Questions for the Record in Connection with June 7, 2023 Hearing, available at https://docs.house.gov/meetings/ED/ED00/20230607/116072/HMTG-118-ED00-20230607-QFR001.pdf.

For example, the proposed amendments would condition availability of the exemptive relief on the QPAM including certain new terms in its written management agreements with clients. The Department grossly underestimated the costs of requiring each QPAM in the country to amend each and every investment management agreement governing ERISA plan assets.[17] Among other errors, the Department estimates a completely unrealistic *one-hour* time frame to amend investment management agreements, despite the fact that some investment managers have thousands of client arrangements, many of which are individually negotiated.[18] In addition, the Department did not consider the costs associated with other amendments to investment management agreements that will result when a QPAM approaches a client to amend an agreement.[19]

As another example, the Department is proposing to amend the QPAM Exemption so that an entity is disqualified from serving as a QPAM when any affiliate is associated with any of a broad swath of foreign criminal convictions. And this is the case even where there is *no connection* between the entity that engaged in the criminal conduct and the entity acting as a QPAM. Even if that rule made any sense—and it does not—the Department made a number of errors in estimating the costs and benefits to plans and participants. The Department incorrectly assumed, for example, that the disqualification of a financial entity to act as a QPAM solely because of conduct by a foreign affiliate (unrelated to managing ERISA plan assets) will result in lower costs, when in fact the disqualification and wind-down will *increase* a plan's costs. This includes not just the cost of finding a new manager, but the cost of prohibiting the plan's current manager from engaging in any new transactions during the wind-down, and investment losses while the QPAM Exemption is not available.[20] But this process is very likely to provide no benefits to the plan, as the disqualifying event had nothing to do with the management of the plan's assets. In addition, the modifications the Department has proposed to what disqualifies an entity from relying on the QPAM Exemption are overly broad and, thus, are likely to generate unnecessary costs by disqualifying more QPAMs than is reasonably necessary to achieve the Department's stated objective.[21]

As one last example, the Department's analysis completely fails to take into account the impacts in the context of a collective investment trust (CIT), by imposing numerous structural and practical challenges to how CITs have successfully operated for decades.[22] As explained in our earlier letters, certain proposed changes would impact the ability of a CIT trustee to use subadvisors and would conflict with other applicable regulatory requirements for CITs. These changes would make CITs more costly and less available to plans, increasing costs and reducing

[17] See ICI Initial Letter at 17-18; ICI Follow Up Letter at 3-4.

[18] See ICI Initial Letter at 18.

[19] See ICI Follow Up Letter at 3-4.

[20] See *id*. at 4.

[21] See ICI Initial Letter at 8.

[22] See ICI Follow Up Letter at 5-6; ICI Initial Letter at 14, n.46.

investment returns for plan participants and beneficiaries invested in CITs. The Department failed to reflect these consequences in its cost estimates.

Other commenters identified the flaws and incorrect assumptions in the Department's cost-benefit analysis too. These include the comments of the Securities Industry and Financial Markets Association,[23] the U.S. Chamber of Commerce,[24] the American Bankers Association,[25] the SPARK Institute,[26] the Managed Funds Association,[27] the Stable Value Investment Association,[28] the Investment Advisor Association,[29] and the Alternative Investment Management Association,[30] all of whom raised similar concerns as ICI, along with other flaws in the Department's analysis. A number of investment managers also wrote to the Department to

[23] See comment letter of SIFMA (Oct. 11, 2022) at 25-26, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00009.pdf.

[24] See comment letter of U.S. Chamber of Commerce (Oct. 11, 2022) at. 1, 7-8, 11, 15, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00007.pdf.

[25] See comment letter of American Bankers Association (Oct. 10, 2022) at 7-8, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00004.pdf.

[26] See comment letter of the SPARK Institute (Oct. 11, 2022) at 8, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00026.pdf.

[27] See comment letter of Managed Funds Association (Oct. 11, 2022) at 3-4, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00011.pdf.

[28] See comment letter of SVIA (Oct. 11, 2022) at 10, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00014.pdf.

[29] See comment letter of IAA (Oct. 11, 2022) at 8, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00016.pdf.

[30] See comment letter of AIMA (Oct. 11, 2022) at 3-4, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00021.pdf.

highlight errors in the Department's analysis, including State Street Global Advisors,[31] T. Rowe Price Associates,[32] BlackRock, Inc.,[33] and Neuberger Berman Group LLC.[34]

Finally, we urge caution in relying on the Department's assertions of purported benefits to plan sponsors, who are the *users* of a QPAM's services, when *not a single organization* that actually represents plan sponsors offered support for the changes in the Proposal and those who commented expressed concern about the negative impact on their plans.[35]

III. Conclusion

For all the reasons set forth in our letters to the Department, the Proposal should be withdrawn and reproposed—only after undertaking more comprehensive study, taking into account the comments received and with a new cost-benefit analysis that will allow for meaningful review and comment by stakeholders. By moving forward to finalization, the Department has apparently failed to adequately consider or address concerns raised regarding the extent of the significant costs and burdens and any subsequent or valuable benefits from the Proposal.

OMB's role is to hold agencies accountable to meet the standards in Executive Order 12866 and related orders, and the APA and send a regulation back to an agency when it has neither met those standards nor adequately addressed public comments. OMB has the ability to ensure that an agency's approach "maximize[s] net benefits" as required under Executive Orders 12866 and 13563.[36] In the interests of plans and their participants, we urge OMB to do so.

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[31] See comment letter of State Street Global Advisors (Oct. 11, 2022) at 4, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00019.pdf.

[32] See comment letter of T. Rowe Price Associates (Oct. 11, 2022) at 2-3, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00022.pdf.

[33] See comment letter of BlackRock (Oct. 11, 2022) at 2, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00010.pdf.

[34] See comment letter of Neuberger Berman Group LLC (Oct. 11, 2022) at 7-8, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00012.pdf.

[35] See comment letters of the ERISA Industry Committee (Oct. 11, 2022); American Benefits Council (Oct. 11, 2022); Committee on Investment of Employee Benefit Assets (Oct. 11, 2022); and U.S. Chamber of Commerce (Oct. 11, 2022), all available at https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07. Even the organization that represents union multiemployer plans expressed concern about an increase in costs, which will impede the normal and customary investment practices of multiemployer plans. See comment letter of National Coordinating Committee for Multiemployer Plans (Oct. 11, 2022); available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00020.pdf.

[36] Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 21, 2011).

ICI and the undersigned organizations would be happy to meet with OIRA to speak to our concerns directly and to the significant costs that will be imposed if the Proposal is adopted. If you have any questions, or if we can be of assistance in any way, please contact Elena Chism at elena.chism@ici.org.

Sincerely,

Investment Company Institute
American Bankers Association
Securities Industry and Financial Markets Association
SPARK Institute
U.S. Chamber of Commerce