INVESTMENT ADVISER ASSOCIATION

January 2, 2024

Via Electronic Filing

Assistant Secretary Lisa Gomez
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW Room N-5655
Washington, DC 20210

Re: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210-AC02); Proposed Amendment to Prohibited Transaction Exemption 2020-02 (ZRIN 1210-ZA32)

Dear Assistant Secretary Gomez:

The Investment Adviser Association (**IAA**)[1] appreciates the opportunity to comment on the proposed amendments to the definition of an investment advice fiduciary and the Department's proposed amendments to Prohibited Transaction Exemption (**PTE**) 2020-02.[2] The Proposed Exemption would continue to provide relief from the restrictions of the Employee Retirement Income Security Act of 1974 (**ERISA**) Sections 406(a)(1)(A), (D), and 406(b) and the Internal Revenue Code of 1986 (**Code**) Sections 4975(c)(1)(A), (D), (E), and (F) for the receipt of prohibited compensation in connection with the provision of non-discretionary investment advice.

The IAA strongly supports the goal of ensuring that Clients receive investment advice that is in their best interest and the Department's efforts to protect the interests of Retirement Investors.[3] The IAA's members are fiduciary investment advisers (**Advisers**) subject to a fiduciary duty to their Clients under the Investment Advisers Act of 1940 (**Advisers Act**) as soon as they enter into an advisory relationship. Although virtually all of the IAA's members are

[1] The IAA is the leading organization dedicated to advancing the interests of fiduciary investment advisers. For more than 85 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *Retirement Security Rule: Definition of an Investment Advice Fiduciary*, 88 Fed. Reg. 75890 (Nov. 3, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf (**Proposed Definition**); *Proposed Amendment to Prohibited Transaction Exemption 2020-02*, 88 Fed. Reg. 75979 (Nov. 3, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23780.pdf (**Proposed Exemption**).

[3] Unless separately defined in this letter, we use capitalized terms as they are used in the Proposed Exemption or Proposed Definition.

discretionary investment managers and therefore already ERISA fiduciaries, the Proposed Definition and Proposed Exemption would be applicable to some aspects of their activities. We therefore appreciate the Department's continued efforts to provide clarity and certainty in this area. We also appreciate the Department's intent to align the scope of the Proposed Definition and Proposed Exemption with the SEC's interpretation regarding an Adviser's fiduciary duty under the Advisers Act.[4] We believe, however, that in some respects the potential impacts of the Proposed Definition and Proposed Exemption would extend beyond these objectives and would have negative consequences that may not be in the best interest of Retirement Investors. We offer several recommendations relating to both the Proposed Definition and the Proposed Exemption that we believe would better achieve the Department's goals.[5]

I. Executive Summary

We make the following recommendations:

A. Recommendations Relating to the Proposed Definition

i. **Hire Me Conversations.** The Department should confirm in its final release that a request by an Adviser[6] to "hire me" that does not include a "recommendation" is not fiduciary investment advice.

ii. **Engagement with Independent Plan Fiduciaries.** The Department should include an "independent fiduciary exception" where an Adviser would not be deemed to provide fiduciary "investment advice" if the advice is provided to an independent fiduciary of a Plan that is either a licensed and regulated provider of financial services, or a Plan fiduciary with responsibility for the management of $50 million or more in Plan assets.

B. Recommendations Relating to the Proposed Exemption

i. **Legally Required Distributions.** The Department should clarify that the rollover disclosure requirements in the Proposed Exemption do not apply to legally required distributions, including through required minimum distributions

[4] *Proposed Exemption* at 75991 ("This proposal is intended to align with other regulators' rules and standards of conduct"); *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Rel. No. IA-5248 (June 5, 2019) (**Advisers Act Fiduciary Duty Interpretation**), available at https://www.sec.gov/files/rules/interp/2019/ia-5248.pdf.

[5] We request that where the Department makes a change to one of the proposals (or its accompanying preamble) in response to an IAA recommendation, it make conforming changes to the other proposal (or accompanying preamble) where necessary to ensure consistency.

[6] Financial Institution is defined in the Proposed Exemption as an Adviser, bank, insurance company, or broker-dealer. We are only addressing the Proposed Definition and Proposed Exemption's application to Advisers and not other entities included as Financial Institutions. However, when discussing rules of general applicability, we may use Financial Institution where appropriate.

(**RMDs**) and those made to inherited IRAs and 401(k) accounts. This is because neither the Retirement Investor nor the Adviser has the ability to stop or limit these mandatory distributions, making an analysis unnecessary.

ii. **Digital Advice**. The IAA strongly supports providing exemptive relief under PTE 2020-02 for the provision of all digital (robo) advice, regardless of whether the advice involves human interaction, and agrees that the Department should remove the current prohibition, as proposed.

iii. **Website Disclosures**. The Department should not require Advisers to disclose information on a public website that is already publicly available through multiple sources, as a condition for exemptive relief.

iv. **Plans Sponsored by a Financial Institution.** The Department should remove the existing exclusion in PTE 2020-02 that currently prohibits participants in Plans sponsored by a Financial Institution from receiving investment advice from an Investment Professional at the Financial Institution or an affiliated Financial Institution.

v. **New Conditions Regarding the Eligibility of an Adviser to Use the Proposed Exemption.** The Proposed Exemption would make it unnecessarily difficult for an Adviser to be eligible to rely on PTE 2020-02. The Department should modify and clarify the eligibility conditions regarding foreign convictions and other prohibited misconduct to ensure they are applied fairly and consistently.

vi. **Recordkeeping Obligations and Access to Records.** The IAA strongly opposes requiring disclosure of compliance information to anyone outside the Department or the Internal Revenue Service (**IRS**). If the Department insists on including these requirements, we urge it to limit the universe of documents required to be made available. We also urge it to provide at least a 60-day window for an Adviser to explain why it declines to make information available to a member of the public, as opposed to the 30 days proposed.

vii. **Consider the Impact of the Proposed Exemption on Smaller Advisers.** The Department should consider the significant and disproportionate impact of the Proposed Exemption on smaller Advisers.

The IAA hopes that these comments are helpful to the Department in finalizing the Proposed Definition and Proposed Exemption.

II. Recommendations

A. The Department Should Confirm That "Hire Me" Conversations That Do Not Include a "Recommendation" Are Not Fiduciary Investment Advice

The IAA commends[7] the Department for confirming that, "[u]nder this proposal, the Department does not intend to suggest … that a person could become a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property." Indeed, as the Department recognizes, "[t]outing the quality of one's own advisory or investment management services would not trigger fiduciary obligations" and "[a]n investment advice provider can recommend that a retirement investor enter into an advisory relationship with the provider without acting as a fiduciary."[8]

The IAA appreciates the Department's stated intent to exclude pre-recommendation communications from the Proposed Definition's scope and the Department's view that the definition of investment advice fiduciary does not capture conversations where an Adviser describes its service offerings and investment philosophies in general terms to enable informed Client comparison, or engages in discussions about the prospective Client's financial goals, risk tolerance, investment experience, and other relevant factors to gather information for potential future advice, without making a "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property."[9]

The reality of the Adviser selection process is that an Adviser must describe its investment offerings and services and its investment approach in general to provide a basis for the Retirement Investor to make an informed decision on whether or not to retain the Adviser and to distinguish itself from the other Advisers the Retirement Investor may be considering. The Retirement Investor is usually considering the services of multiple potential Advisers and often asks for and benefits from detailed comparisons of the differences. This free flow of information will best promote the interests of Retirement Investors by enabling them to understand and distinguish the services of various candidate Advisers, and permit Advisers the flexibility to be appropriately responsive and informative.[10]

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[7] The IAA has previously expressed strong support for the Department's providing clarity on pre-advisory relationship communications. *See* Letter from IAA General Counsel Gail C. Bernstein, *Improving Investment Advice for Workers and Retirees* (ZRIN 1210-ZA29) (Aug. 6, 2020) (**Bernstein Letter**), available at https://www.investmentadviser.org/iaatoday/news/iaa-comments-dol-proposed-fiduciary-exemption/.

[8] *Proposed Definition* at 75906.

[9] *Proposed Definition*, § 2510.3–21(f)(10).

[10] *See* Bernstein Letter, *supra* note 7.

We believe it would be helpful for the Department to confirm in the final preamble that this free flow of information would not cause an Adviser to become an investment advice fiduciary to a prospective Client.[11]

B. The Department Should Include a Limited Exception for an Adviser's Engagement with Independent Plan Fiduciaries

The IAA recommends that the Department include the "independent fiduciary exception" that had been included in the Department's vacated 2016 rule. Under that exception, an Adviser would not be deemed to provide "investment advice" if, among other conditions, the advice is provided to an independent fiduciary of a Plan that is either a licensed and regulated provider of financial services, or a Plan fiduciary with responsibility for the management of $50 million or more in Plan assets. This limited exception for transactions with certain independent Plan fiduciaries with financial expertise provided a level of certainty to Advisers interacting with these Plan fiduciaries as to whether they would be deemed to be providing fiduciary "investment advice," and provided relief for many common sales and marketing practices involving certain institutional investors. The premise of the exception was that both sides of such transactions understood that they were acting at arm's length[12] and the Department's belief that the "impact of the final rule in this regard should largely be limited to retail retirement investors because, to the extent the communications involve sophisticated financial professional or large money managers, the final rule's provision that allows such communications to be excluded from fiduciary investment advice" would address commenters' request for clarification of the issue.[13] The Department recognizes this by stating that the Department "granted the new exemptions with the objective of promoting the provision of investment advice that is in the best interest of *retail* investors."[14] We believe that this same reasoning applies today.

Instead of including an "independent fiduciary exception" in the Proposed Definition, however, the Department suggests that, to the extent Advisers wish to avoid fiduciary status,

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[11] As noted above, in the case of Advisers, once a Retirement Investor becomes a Client, the Adviser is an investment advice fiduciary with respect to ERISA assets it advises on under section 3(21)(A)(ii) of ERISA and is also subject to an ongoing fiduciary duty to its Clients for all aspects of the advisory relationship under the Advisers Act Fiduciary Duty Interpretation.

[12] The independent fiduciary exception was intended for "communications that the Department believes Congress did not intend to cover as fiduciary 'investment advice' and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality." *Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 20946, 21941 (Apr. 8, 2016), available at https://www.govinfo.gov/content/pkg/FR-2016-04-08/pdf/2016-07924.pdf. For example, ERISA Plan fiduciaries regularly issue Request for Proposals (RFPs) as part of their fiduciary responsibility to research and compare potential Advisers before selecting a particular manager. ERISA fiduciary status should not attach if an Adviser responds to a plan's RFP by discussing the investment philosophy and the types of investments it might recommend if the Plan were to hire the Adviser, even where such response may be construed as a recommendation.

[13] *Id.* at 20963.

[14] *Proposed Definition* at 75894 (emphasis added). *See also Proposed Exemption* at 75994 ("most SEC-registered investment advisers and broker-dealers with *retail* investors already provide disclosures that the Department expects would satisfy" the exemption) (emphasis added).

they can structure their relationships where it is clear that their recommendations are not based on the particular needs or individual circumstances of the Retirement Investor (including when the Retirement Investor is an independent plan fiduciary) and may not be relied upon by the Retirement Investor as a basis for investment decisions that are in the Retirement Investor's best interest.[15] However, because Advisers hold themselves out as fiduciaries and may already have discretionary authority over some or all Plan assets, it will be difficult to structure the relationship in such a way.[16]

We believe the Department's approach introduces an unnecessary lack of clarity, adding a layer of complexity to these transactions. IAA members are also struggling with how, in the absence of an exception, they could give plan design advice to plan sponsors, while also making other recommendations to sophisticated plan fiduciaries using PTE 2020-02. For example, in certain wrap fee arrangements, Advisers provide non-discretionary advisory services in the form of generic model portfolios (**model providers**) to a portfolio manager for its use in managing Client accounts. The program sponsor or overlay manager generally has investment discretion and is therefore a fiduciary under ERISA with respect to Plan and IRA Clients. In this context, the model provider's only Client is the financial services entity, the model provider only has contractual privity with that entity, and the model provider does not individualize its advice to a specific ERISA plan or IRA owner. Because the manager already serves as an ERISA fiduciary with respect to the Plan or IRA, we believe that imposing fiduciary responsibility on the model provider would not provide any additional protections to these Clients. Furthermore, it is not clear how an Adviser model provider would be able to comply with ERISA's fiduciary responsibility provisions under PTE 2020-02 with respect to such underlying Clients; indeed, it has no information about them (including their identities). Additionally, PTE 2020-02 currently requires a "rollover disclosure" form that would not be applicable when providing advice to independent plan fiduciaries.

Based on our discussion above, we urge the Department to incorporate the "independent fiduciary exception" from the Department's vacated 2016 rule into the Proposed Definition. By limiting this exclusion to recommendations made to certain sophisticated entities, this exception promotes efficient market interaction without compromising investor protection.[17]

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[15] *Proposed Definition*, § 2510.3–21(c)(1)(ii).

[16] *See Proposed Definition* at 75903. While the Department allows parties to define their relationship, any disclaimer must not contradict oral communications, actions, marketing materials, state and federal law, or other relevant interactions. Given that Advisers are fiduciaries under the Advisers Act and hold themselves out as such, a disclaimer is unlikely to be consistent with these obligations.

[17] We recommend inclusion of the following rule text from the Department's vacated 2016 rule:

§ 2510.3–21 Definition of "Fiduciary."

…

(c)(3) *Transactions with independent fiduciaries with financial expertise* The provision of any advice by a person (including the provision of asset allocation models or other financial analysis tools) to a fiduciary of the plan or IRA

C. The Department Should Confirm that Legally Required Distributions and Inherited IRAs and 401(k)s are not Subject to the Rollover Disclosure Requirements in the Proposed Exemption

The IAA recommends that the Department confirm that legally required distributions are not subject to the rollover disclosure requirements in the Proposed Exemption.[18] This issue frequently arises in the context of RMDs for purposes of ERISA and the Code. Because the Retirement Investor does not have discretion as to whether to take an RMD – the assets are required to be distributed from the Plan regardless of whether the Retirement Investor wants to make the withdrawal – an analysis of alternatives to a rollover, including leaving the money in

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(including a fiduciary to an investment contract, product, or entity that holds plan assets as determined pursuant to sections 3(42) and 401 of the Act and 29 CFR § 2510.3–101) that is independent of the person providing the advice with respect to an arm's length sale, purchase, loan, exchange, or other transaction related to the investment of securities or other investment property, shall not be deemed to be fiduciary "investment advice," within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code if, prior to entering into the transaction, the person providing the advice satisfies the following requirements of this paragraph (c)(3).

(i) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is:
(A) A bank as defined in section 202 of the Investment Advisers Act of 1940 or similar institution that is regulated and supervised and subject to periodic examination by a State or Federal agency;
(B) An insurance carrier which is qualified under the laws of more than one state to perform the services of managing, acquiring or disposing of assets of a plan;
(C) An investment adviser registered under the Investment Advisers Act of 1940 or, if not registered an as investment adviser under the Investment Advisers Act by reason of paragraph (1) of section 203A of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business;
(D) A broker-dealer registered under the Securities Exchange Act of 1934; or
(E) Any independent fiduciary that holds, or has under management or control, total assets of at least $50 million (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(i));
(ii) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(ii));
(iii) The person fairly informs the independent fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and fairly informs the independent fiduciary of the existence and nature of the person's financial interests in the transaction;
(iv) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is a fiduciary under ERISA or the Code, or both, with respect to the transaction and is responsible for exercising independent judgment in evaluating the transaction (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(iv)); and
(v) The person does not receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner for the provision of investment advice (as opposed to other services) in connection with the transaction.

[18] The Proposed Definition defines a "recommendation" to include "rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution." *Proposed Definition* at 75979.

the Plan, and the fees and expenses associated with the Plan, would be inapposite and unnecessary.

The IAA believes the same reasoning would apply to Inherited IRAs, i.e., an IRA that is opened when someone inherits an IRA or employer-sponsored retirement account after the original owner's death or an inherited 401(k) transferred to an Adviser's Client's IRA. Similar to an RMD, the Adviser would not have discretion over whether to open the account or transfer the funds to an existing IRA, so it would not be necessary to engage in the rollover analysis. Additionally, once the distribution has been made, the Adviser will either not manage those assets or manage them on a discretionary basis as a fiduciary.

We believe the Department could clarify any ambiguity in the Proposed Exemption by confirming in any final preamble that the disclosure requirements of the Proposed Exemption do not apply to an RMD or asset transfer due to an inheritance.

D. The IAA Strongly Supports Exemptive Relief for All Types of Robo Advice

The IAA believes that all investment advice provided by an Adviser is subject to a fiduciary duty regardless of the platform or method through which the advice is provided, and regardless of whether the advice involves direct human interaction. This is consistent with the SEC's view, as stated in the Advisers Act Fiduciary Duty Interpretation: "Automated advisers, like all SEC-registered investment advisers, are subject to all of the requirements of the Advisers Act, including the requirement that they provide advice consistent with the fiduciary duty they owe to their clients."[19] We thus urged the Department, in our response to the last proposed exemption, to treat all robo (i.e., digital) advice the same – and the same as other advice – for purposes of PTE 2020-02, and include all such advice in the exemption. This would allow firms to continue developing alternative Client experiences that cater to the preferences of many Retirement Investors, enabling them to engage with their Advisers in a way and at a price point that best suits them.

It would also be simpler and fairer.[20] As noted in our earlier letter on the current exemption, we recognize that a separate statutory exemption exists for computer model-based investment advice programs under ERISA Section 408(g), and that, at least theoretically, that exemption is available for what the Department refers to as "pure robo advice." However, the industry widely regards the Department's implementing regulations for that exemption as excessively burdensome and prescriptive, and thus largely unworkable, and we strongly favor the Proposed Exemption as a less restrictive and more practical alternative. We also believe that mandating a separate exemption with distinct policies and procedures for pure robo advice, as

[19] Advisers Act Fiduciary Duty Interpretation at n.27.

[20] We thank the Department for recognizing that "[i]ncluding computer-generated advice in this exemption would simplify Financial Institutions' compliance, so that a Retirement Investor could request an Investment Professional's assistance with a particular transaction, or an Investment Professional could review the computer model's recommendations, without separate analysis as to whether an Investment Professional has provided fiduciary investment advice." *Proposed Exemption* at 75982.

opposed to hybrid robo advice – i.e., advice that involves at least some human interaction – is both illogical and impractical, since Advisers may offer several forms of advice. For these reasons, we strongly support the Proposed Exemption as it relates to robo advisers and we urge the Department to retain the proposed inclusion of all robo advice in any final amended PTE 2020-02.

E. The Department Should Not Require Website Disclosures as a Condition of Exemptive Relief

The Department has requested comments on whether it should require Advisers to maintain a public website containing additional disclosures.[21] The IAA believes that maintaining a public website and providing these disclosures on that website is unnecessary since investors are already able to easily obtain this information from a variety of sources, including Advisers' public filings with the SEC.

For example, Advisers are already required to provide this information to Retirement Investors through the Form ADV Part 1, which is publicly available on the Investment Adviser Public Disclosure (**IAPD**) website, and the Form ADV Part 2A, which is also available on the IAPD website and must be provided to prospective Clients prior to or at the time of entering into an advisory relationship. Advisers are also required to provide the Form CRS to existing and prospective Clients. This form provides information about an Adviser's business model, compensation, and conflicts of interest, among other things.

We also note that while many Advisers also include this information on their website, not all Advisers do so. In addition, not all Advisers currently have a public website.[22] Thus we do not believe that exemptive relief should be conditioned on this website disclosure requirement. We also note that this requirement would be particularly burdensome for smaller Advisers with more limited resources, many of which may not currently have a public website.

F. The Department Should Permit PTE 2020-02 to be Used when Participants of Plans Sponsored by an Adviser Receive Investment Advice from Investment Professionals at the Adviser or an Affiliated Adviser

The IAA recommends that the Department delete the exclusion in Section I(c)(1) of the Proposed Exemption. Employees often obtain advice relating to their employer's plan from an Investment Professional who is also an employee. The Proposed Exemption would require the employee, who may have been working for many years with the Investment Professional, to seek

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[21] *See Proposed Exemption* at 75986. The required disclosures would include pre-transaction disclosure, a description of the Financial Institution's business model, associated Conflicts of Interest (including arrangements that provide Third-Party Payments), and a schedule of typical fees.

[22] Form ADV data analyzed by the IAA indicates that, in 2022, 8.9% of SEC-registered investment advisers reported not having a public website or any other online presence. *See IAA-NRS Investment Adviser Industry Snapshot 2023*, June 2023, p. 34, available at https://www.investmentadviser.org/wp-content/uploads/2023/06/Snapshot2023_Final.pdf.

advice from an unaffiliated third party for any transaction that would involve their Plan assets, including advice with respect to a rollover. The condition is likely to be perceived as unfair and arbitrary for employees of an Adviser who know, trust, and appreciate the expertise of their colleagues and do not want to go elsewhere for their advice.

We can think of no other exemption that imposes a similar condition with respect to participant-level advice. For example, participants may invest in affiliated mutual funds, affiliated insurance pooled funds, affiliated bank collective trusts, and affiliated deposits. Adviser employees should be able to choose their adviser, whether a third-party advice provider or an affiliated advice provider, as they see fit. The general requirements to comply with ERISA's fiduciary standards of care and the conditions of the Proposed Exemption, in and of themselves, serve to mitigate any potential conflict concern. In addition, Investment Professionals who are employees of an Adviser must fully and fairly disclose their conflicts and act in their Clients' best interest, including when those Clients are also employees of the Adviser.

G. Conditions Regarding the Eligibility of Advisers to Rely on the Proposed Exemption

The IAA firmly believes in the importance of honesty and ethical conduct in the investment advisory profession, and we commend the Department's dedication to these values. However, we believe that certain proposed eligibility provisions in the Proposed Exemption are broader than necessary to achieve this goal and will unnecessarily limit Advisers' ability to use the Proposed Exemption in some circumstances. As we discussed in our letter to the Department regarding the proposed amendments to the Qualified Professional Asset Manager (QPAM) exemption, we are concerned about the breadth of some of the disqualification triggers, particularly concerning foreign convictions and certain "prohibited misconduct" categories.[23]

i. Foreign Convictions

The Proposed Exemption would codify the Department's view that a conviction handed down to a Financial Institution or an affiliate by a "foreign court of competent jurisdiction" may disqualify a Financial Institution from relying on PTE 2020-02, provided that the conviction is for a crime "substantially equivalent" to U.S. federal or state crimes already enumerated in the current definition of criminal conviction.[24] Recognizing that there may be situations where a foreign criminal conviction raises unique issues when compared to U.S. criminal convictions, the Department would grant an Adviser a hearing regarding the foreign crime or misconduct. Instead of providing clarity, however, the Proposed Exemption would codify inconsistency, potentially create or increase confusion, and raise issues about fairness.

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[23] *See* Letter from IAA General Counsel Gail C. Bernstein and Associate General Counsel William A. Nelson, *Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption)* (Z-RIN 1210 ZA07) (Oct. 11, 2022), available at https://www.investmentadviser.org/resources/comments-on-dol-proposal-to-amend-the-qpam-exemption/ (**IAA QPAM Letter**).

[24] *See Proposed Exemption* at 76001.

Consistent with the arguments made in the IAA QPAM Letter, we recommend that instead of a disqualification for conviction of a foreign affiliate with the option to petition for a hearing, the Department establish a less disruptive process that would allow an Adviser that meets certain Retirement Investor-protective conditions to continue to rely on the exemption unless the Department determines that further review is warranted.

Our proposed alternative process would require the Adviser to certify that it: did not know or have reason to know of, or participate in the criminal conduct of the foreign affiliate; did not financially benefit from the criminal conduct that is the subject of the conviction; will not employ or knowingly engage any of the individuals that the Adviser knows or has reason to know participated in the criminal conduct; and will not use its authority or influence to direct a Retirement Investor to enter into any transaction with the foreign affiliate or engage the foreign affiliate to provide any service to such Retirement Investor. The Adviser would also be required to certify that the sole basis for its failure to meet the requirements of the Proposed Exemption is the foreign affiliate's criminal conduct. Based on the certification, the Department could inquire further and make its decision based on the facts of the specific situation.

The IAA also recommends that the Department allow an Adviser to submit the certification within 10 days of becoming aware or when it reasonably should have become aware of a foreign affiliate's conviction and, if the Department determines that a follow-up conference is warranted, that it provide at least 60 days for the Adviser to prepare for the conference to provide a more meaningful opportunity to be heard. Should the Department not agree with our recommendation, we urge it to modify the timing of the filing of a petition and subsequent conference to 10 days and 60 days, respectively, as described above.[25]

ii. Other Prohibited Misconduct

The proposed list of "prohibited misconduct" provides the Department with broad discretion to decide what types of misconduct would trigger ineligibility. However, the Proposed Exemption does not adequately address how the Department would exercise its discretion.[26] As discussed in the IAA QPAM Letter, to provide more guidance to Advisers, we recommend that the Department modify the prohibited misconduct list to clarify the scope of what it considers materially misleading information and expressly confirm that inadvertent immaterial errors, i.e., "foot faults," without more, should not be deemed to be providing materially misleading information to the Department or intentional violations of the conditions of the Proposed Exemption. We are concerned that Advisers working in good faith to comply with the conditions of the Proposed Exemption could be captured by this provision. For example, if an Adviser, acting in good faith and with reasonable diligence, believes that the information provided to a Retirement Investor constitutes investment education as defined in Interpretive Bulletin 96-1,

[25] We refer you to the IAA QPAM Letter for a more detailed discussion of these recommendations.

[26] We appreciate that the Department has provided elements it would consider during a hearing, including the gravity of the offense, the recency of the conduct at issue, and any remedial measures that have been taken, but this guidance does not address how the Department would exercise its discretion with respect to these elements.

would the Department consider this an intentional violation if it disagrees with the Adviser's analysis? Similarly, what if an Adviser does not file a Form 5330, based on advice of an accountant or attorney?[27] We believe that the Department should take these factors into consideration prior to issuing a written ineligibility notice to an Adviser, and the final preamble should clarify that factors such as these will be considered.

The IAA is also concerned that the eligibility provisions may be internally inconsistent. For example, the Department's single excise tax example[28] is not necessarily helpful for an Adviser to determine when a different one-time intentional violation of the conditions of the Proposed Exemption would or would not render an Adviser ineligible. Additionally, the Department does not discuss how the eligibility provisions interact with the self-correction provision, i.e., if an Adviser self-corrects an intentional violation of the conditions of the Proposed Exemption, would the Department nevertheless find that the Adviser is not eligible to rely on the exemption?[29] The Department should ensure that it has provided sufficient guidance and that the eligibility provisions are consistent in any final rule.

We recommend that the Department provide at least 60 days between the end of the six-month cure period and the Adviser's conference with the Department and request that the Department provide 20 days after the conference for the Adviser to provide "any additional written data, arguments, or precedents discussed at the conference but not previously or adequately presented in writing."[30]

H. Recordkeeping Obligations and Access to Records

The Proposed Exemption keeps the current recordkeeping requirement, mandating that Financial Institutions maintain records necessary to demonstrate compliance with the Proposed Exemption for six years.[31] The records would need to be made available, to the extent permitted by law, to any authorized employee of the Department or the IRS.

The Department is seeking comment on whether to expand the recordkeeping provision to require Financial Institutions to make records available to any authorized employee of a state or Federal regulator, any fiduciary of a Plan that engaged in a transaction pursuant to the

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[27] *See U.S. v. Boyle*, 469 U.S. 241, 251 (1985) ("When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice."); s*ee also Commissioner of Internal Revenue v. American Ass'n of Engineers Employment, Inc.*, 204 F.2d 19, 21 (7th Cir. 1953) ("We think that this is a case where the taxpayer did all that it was required to do and that it should not be penalized for an error made by its expert tax counsel in deciding a close question of law.").

[28] We appreciate the Department's providing guidance that "[a] single missed excise tax would not make the Financial Institution ineligible for 10 years, but Financial Institutions that regularly disregard their legal obligation to pay excise taxes on prohibited transactions would need to find alternative relief." *Proposed Exemption* at 75989.

[29] For example, paying the excise tax and correcting the transaction in and of itself resolves any non-exempt prohibited transaction without the need for using the Proposed Exemption's self-correction program.

[30] 29 C.F.R. § 2570.40(h).

[31] *Proposed Exemption* at 76002.

Proposed Exemption, any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to the Proposed Exemption, or any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to the Proposed Exemption.[32] We have several concerns relating to this aspect of the proposal.

First, while the Department certainly is entitled to access records pertaining to the Proposed Exemption, it is unclear to us why the records would be made available to several non-Department third parties. Other regulators, with the exception of the IRS for IRAs, have no authority to enforce the Proposed Exemption and have their own recordkeeping requirements and processes related to matters within their jurisdiction. It is unclear whether this broad provision would, for example, permit the SEC or OCC to request documents pertaining to non-SEC or non-OCC-registered entities. Without qualification, the extent of these requests could be nearly limitless. We thus strongly urge that the Department not require disclosure of compliance information to any regulatory body outside the Department or the IRS.

Second, we believe that the Department should not make internal compliance documents available publicly. This information is likely to be competitively sensitive, and its disclosure could economically harm Advisers without a commensurate benefit to Retirement Investors. Furthermore, we strongly support and believe that the Department should encourage and facilitate the development and implementation of robust internal processes. We are concerned that exposing sensitive information in the public domain could lead to potential misuse – whether by well-intentioned actors or those with malicious intent – or otherwise harm Advisers. This would create an additional and wholly unnecessary layer of risk for Advisers and could have a chilling effect on how Advisers approach their internal compliance processes.

The Department's request is notable because it affirmatively decided not to include a similar disclosure obligation under the current PTE 2020-02.[33] The Department in our view correctly reasoned that firms' internal compliance documents should be available to the Department but not investors, to promote full identification and remediation of compliance issues without undue concern about the widespread disclosure of the issues.[34] The IAA strongly agrees with this reasoning and the Department has not provided sufficient evidence on why its position would have changed.

If the Department nevertheless decides to require public disclosure, we urge it to limit the universe of documents that would need to be made available to the public to specifically

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[32] *Proposed Exemption* at 75990.

[33] *Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees*, 85 Fed. Reg. 82798, 82845 (Dec. 18, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-12-18/pdf/2020-27825.pdf ("The Department accepts that Financial Institutions may have concerns about internal compliance records, particularly the record of their retrospective reviews, becoming widely accessible.").

[34] *Id.* at 82839.

identified policies and procedures related to the Adviser's compliance with the Proposed Exemption.

Moreover, should the Department insist on requiring disclosure of compliance documents, we believe the currently proposed 30-day response window for document requests from third parties other than the Department or IRS would be difficult for Advisers to meet due to the potential volume and complexity of the materials requested. The IAA recommends at least a 60-day period. In addition, the Department should confirm that the information may be provided through electronic media, similar to the allowance for Plan administrators.[35]

While the Department believes that Advisers could easily share their documentation of compliance and that refusal would be rare, it provides no evidence to support its belief. We understand that, in many cases, Advisers would decline to respond to these requests out of concern that they would be required to provide confidential compliance information to the public with no protections. We urge the Department to revisit its analysis in light of our comments.

I. Consider the Impact of the Proposed Exemption on Smaller Advisers

The Department should consider the significant impact of the Proposed Exemption on smaller Advisers. The Proposed Exemption, if adopted as written, will impose a disproportionately greater operational and compliance burden on smaller Advisers. For example, smaller Advisers, which have limited personnel and other resources, will likely need to divert resources from client-servicing functions and other compliance requirements to invest in either building out or expanding websites to present information that Advisers are currently already providing to the public. We also believe the Department is significantly underestimating the cost of responding to requests for records relating to compliance with PTE 2020-02 or preparing responses on why the Adviser is declining to respond to a request.

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We appreciate your consideration of our comments on this important issue. Please do not hesitate to contact the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein
Gail C. Bernstein
General Counsel

/s/ William A. Nelson
William A. Nelson
Associate General Counsel

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[35] *See Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA*, 85 Fed. Reg. 31884 (May 27, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-05-27/pdf/2020-10951.pdf.