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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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November 29, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Acting Secretary Su:

I write to oppose the Department of Labor's (DOL) poorly conceived Proposed Amendments to the Prohibited Transaction Class Exemption 84-14, (the QPAM Exemption) (EBSA-2022-0008) ("Proposed Amendments"). As you know, the investment manager of any investment plan that holds assets subject to the Employee Retirement Income Security Act (ERISA) is considered a fiduciary as it concerns the plan. Section 406(a) of ERISA imposes significant restrictions on fiduciaries that can hamstring their ability to perform necessary investment functions for these ERISA plans unless an exemption is available.

The QPAM Exemption is one of the most commonly used exemptions. While it continues to block fiduciary "self-dealing" transactions, it facilitates a wide variety of transactions that offer investment options in the best interest of the participants. Without the exemption, such investment options would be artificially limited, thus harming participants. This is crucial for ensuring an efficient and cost-effective retirement system. The current system is efficient and provides a high degree of certainty to these fundamental actors and transactions.

QPAMs are a key component of the asset management ecosystem. Currently, the QPAM Exemption requires exemption seekers to qualify as a QPAM; that they acknowledge in a written management agreement they are a fiduciary with respect to each investing plan; and, that investments are negotiated and decided upon by the QPAM without being subject to the approval or veto of another person. The QPAM Exemption is not available in cases where the counterparty has the ability to appoint or terminate the investment manager; the transaction occurs with an ERISA plan investor whose assets account for over 20% of the total client assets managed by the manager; or, the QPAM is seeking to transact with itself.

The Proposed Amendments put forward a number of concerning policy adjustments. For example, DOL proposes prohibiting many routine investment interactions by excluding planned, negotiated,

or initiated transactions by any party-in-interest.¹ These are common transactions that are core to the retirement business and can keep costs down for savers while ensuring an efficient retirement system.

However, the Proposed Amendments also allow foreign interference in this system. In an especially troubling piece of the proposal, DOL explicitly includes foreign convictions in its list of convictions that could disqualify a QPAM from this exemption. Specifically, the proposal states that “[convictions] by a foreign court of competent jurisdiction for any crime . . . however denominated by the laws of the relevant foreign government, that is substantially equivalent to’ one of the U.S. federal or state crimes identified in subsection VI(r)(1)” would trigger ineligibility.

These adjustments would amount to additional costs that may be passed on to consumers. Under the proposal, retirement plans would almost immediately lose their investment manager, who would be barred from engaging in any new transactions. This would be very disruptive for the plan and its participants, and would trigger a costly and lengthy effort to find a new investment manager, which can take around two years, according to experts.² Firms that lose their regular QPAM exemption status and have to apply for an individual QPAM exemption could face significant additional compliance costs. Firms remaining in compliance would also face additional costs maintaining their status.

I am particularly alarmed that DOL proposes to consider convictions from hostile countries like China, and treat deferred prosecution agreements and non-prosecution agreements as convictions.

As you are no doubt aware, the Chinese Communist Party (CCP) frequently uses trumped up financial crimes to attack dissidents and those who support the revival of democratic norms in Hong Kong. Unfortunately, these practices have spilled onto American soil. The Chinese Government’s Operation Foxhunt and Operation Skynet have targeted detractors by setting them up for financial crimes. On July 6, 2022, Fan Liu and Matthew Ziburis were charged for conspiring to bribe a federal official in connection with their scheme to obtain the tax returns of a pro-democracy activist residing in the United States.³

This matter could be further compounded if the Chinese start using deferred and non-prosecution agreements.⁴ These agreements allow governments to settle with counterparties without having to indict them. Under DOL’s proposal, which for the first time would allow for the explicit

¹ Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption), 87 Fed. Reg. 45204 (proposed Jul. 27, 2022) (to be codified at 29 C.F.R. pt. 2550), <https://www.federalregister.gov/documents/2022/07/27/2022-15702/proposed-amendment-to-prohibited-transaction-class-exemption-84-14-the-qpam-exemption>.

² Comment letter from U.S. Chamber of Commerce on Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption), 87 Fed. Reg. 45204 (proposed Jul. 27, 2022) (to be codified at 29 C.F.R. pt. 2550) (Oct. 11, 2022), <https://www.regulations.gov/comment/EBSA-2022-0008-0012>.

³ Press Release, U.S. Department of Justice, Five Men Indicted for Crimes Related to Transnational Repression Scheme to Silence Critics of the People’s Republic of China Residing in the United States (Jul. 7, 2022), <https://www.justice.gov/opa/pr/five-men-indicted-crimes-related-transnational-repression-scheme-silence-critics-people-s>.

⁴ Wei Tianhui, *How a compliance non-prosecution system benefits IPO planners*, China Business Law Journal, (Jul. 27, 2022), <https://law.asia/compliance-non-prosecution-benefits-ipo/>.

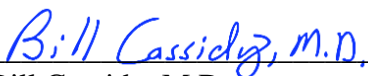
consideration of these agreements, a company or employee would not even need to be found guilty of a crime to lose the QPAM status. They would now be subject to a CCP style-shakedown, which could then harm American investors.

DOL's proposal uses the U.S. legal system to help China suppress its own citizens and harm the American economy by facilitating foreign targeting of American citizens, residents, and businesses. Given the serious nature of these issues, I request your response to the following questions, on a question-by-question basis, by **December 13, 2023**:

- 1) Why does DOL propose to recognize foreign convictions when ERISA assets are required to be held in the United States?
- 2) Does DOL plan to recognize foreign convictions from foreign adversaries? If so, which ones?
- 3) What safeguards did DOL put in place to ensure that political prosecutions are not used against American businesses?
- 4) Did DOL consult with the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) about such safeguards?
 - a. If so, on what date[s]?
 - b. What was the nature of agency feedback?
 - c. Please provide all copies of any internal memoranda summarizing DOJ or the SEC's feedback.
- 5) Did DOL consult the Department of State and other offices with expertise in foreign affairs governments about the proposal?
 - a. If so, on what date[s]?
 - b. What was the nature of agency feedback?
 - c. Please provide all copies of any internal memoranda summarizing the Department of State's feedback.

Thank you for your prompt attention to this matter.

Sincerely,



Bill Cassidy, M.D.

Ranking Member

U.S. Senate Committee on Health,
Education, Labor, and Pensions