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Testimony of

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for the hearing

“Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption)”

before the

Employee Benefits Security Administration

United States Department of Labor



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Members of the panel, my name is Tim Keehan. I am Vice President and Senior Counsel for the American Bankers Association. ABA is the voice of the nation’s \$23.7 trillion banking industry. Its membership is comprised of small, regional, and large banks that together employ more than 2 million people, safeguard \$19.6 trillion in deposits, and extend \$11.8 trillion in loans. ABA appreciates the opportunity to be here regarding the Department of Labor’s proposed amendments to Prohibited Transaction Class Exemption 84-14, commonly referred to as the QPAM Exemption.

Rather than covering the substance of the Proposal, my testimony today instead will focus on the regulatory *process* leading up to the Proposal’s release. Specifically, I will address: first, the directives on regulatory rulemaking expressly affirmed by this Administration through Executive Order; second, guidance on regulatory analysis provided by the Office of Management and Budget to federal agencies; third, the Department of Labor’s perilous deviation from the rulemaking process as laid out by Executive Order and OMB guidance, which has resulted in at least one critical error in the Department’s drafting and projected cost of the Proposal; and finally, recommendations that would remediate the Department’s actions and preserve a rulemaking process that is consistent with federal regulatory standards and guidance.

At the outset, ABA notes that since its issuance nearly four decades ago, the QPAM Exemption has functioned well and exactly as intended. The Exemption has become a core market practice of the retirement services industry across the spectrum of financial lines of business and products. The QPAM Exemption’s guardrails ensure proper use of the Exemption, and provide the Department with full authority to supervise its implementation and to sanction improper conduct – including, where necessary – QPAM disqualification. While we acknowledge the Department’s regulatory authority to revise the Exemption, we also understand that the Department must abide by the regulatory rulemaking process as laid out by White House directives and OMB guidance.

Specifically, in the January 2021 Memorandum, *Modernizing Regulatory Review*, President Biden reaffirmed the basic principles of the federal regulatory process as set forth in Executive Order 13563 (on improving regulations and regulatory review). Executive Order 13563, among other things, states that “[b]efore issuing a notice of proposed rulemaking, each agency, where

feasible and appropriate, *shall* seek the views of those who are likely to be affected, including . . . those who are potentially subject to such rulemaking.”¹

Likewise, OMB Circular A-4, which addresses regulatory analysis, directs federal agencies, as they design, execute, and write their regulatory analysis, to “seek out the opinions of those who will be affected by the regulation.” OMB adds that “[c]onsultation can be useful in ensuring that [an agency’s] analysis addresses all of the relevant issues and that [the agency has] access to all pertinent data.” In doing so, OMB stresses that “[e]arly consultation can be especially helpful,” and that an agency “should *not* limit consultation to the final stages of [the agency’s] analytical efforts.”² Executive Order 13563 and OMB Circular A-4 thus make clear that, in proposing amendments to the QPAM Exemption, the Department’s obligation was to seek input from QPAMs, their client plans, and service providers and other stakeholders likely to be impacted from the revisions and additions to the QPAM Exemption.

It appears that the Department has not complied with these directives. We believe that the Proposal would have greatly benefitted from a collaborative process between the Department and representatives from banks and other asset managers that are QPAMs to discuss the operation and functioning of the QPAM Exemption and to identify any issues of concern, as well as any compliance or administrative challenges, which the Department then could have factored into the Proposal. Unfortunately, the Proposal was drafted and released without any input from our membership. In fact, we are not aware of any Department efforts, prior to the Proposal’s issuance, to study, survey, analyze, or evaluate banks or any other asset managers serving as QPAMs, their retirement plan clients, or the retirement marketplace, to understand how current activities would be directly or indirectly impacted by the Proposal. Likewise, the Department has not presented any evidence of systemic misconduct, violations, or abuse, to support its conclusion that the QPAM Exemption is flawed and in need of a significant overhaul. Instead, the Department simply released the Proposal without any advance public reaction or input.

Failure to engage those subject to the QPAM Exemption prior to issuing the Proposal has led to at least one crucial error in the Department’s calculation of the estimated time, resources, and costs for QPAMs to comply with the revised Exemption, if finalized as proposed. In its regulatory impact analysis to the Proposal, the Department states that a single QPAM services, on average 32 client plans. In fact, the Department considers 32 as “an upper limit” for the average number of client Plans served by a QPAM. However, as we point out in our comment letter, our member banks serving as QPAMs have client plans numbering in the hundreds and the thousands.

This is a serious and costly miscalculation by the Department and has widely skewed the cost of the Proposal to retirement plans and the retirement services industry. For instance, the Department estimates that the total cost of QPAMs amending their investment management agreements with their client plans – which the Proposal would require – is approximately \$135,000. This dollar amount, however, is based on the erroneous assumption that a QPAM, on average, has 32 plan clients. When factoring in the true number of plan clients, the cost of complying with the Proposal’s requirement soars from \$135,000 to nearly \$1 billion, even by conservative estimates.

¹ Executive Order 13563 (Jan. 18, 2011). [Emphasis added.]

² OMB, Circular A-4 (Sept. 17, 2003). [Emphasis added.]

Moreover, this amount does not account for the multitude of contracts with IRA owners. The Department's miscalculation thus significantly raises the costs of implementing the Proposal. On the other hand, if the Department had followed the procedures of the Executive Order and OMB guidance and had consulted with QPAMs as it was drafting the Proposal, or if Department staff had simply asked QPAMs the number of client plans they service, this costly mistake easily could have been avoided.

This miscalculation further compounds the Proposal's regulatory burdens and costs. To illustrate, the proposed recordkeeping requirements imply that the QPAM establish and maintain complete and accurate records of each and every investment transaction. For a QPAM managing 32 client plans, this is an unnecessarily prescriptive and costly requirement. However, it would amount to an overwhelming cost overrun for a QPAM with thousands of client plans, further raising the Proposal's costs to retirement plans. These and other provisions of the Proposal would have benefitted from a preceding dialogue between Department staff and QPAMs and their client plans.

It is not too late to correct the Department's course of action. As we recommend in our comment letter, the Department can withdraw the Proposal and, as required by Executive Order and OMB guidance, reach out to those that would be impacted by the Proposal to get their input and perspectives and to access pertinent industry data. This Department action could include roundtable discussions with QPAMs, client plans that retain QPAMs, and industry stakeholders, to determine whether significant revision of the QPAM Exemption is necessary or appropriate. The Department could also issue a Request for Information, or RFI, to seek public views on the QPAM Exemption and follow the RFI with an Advance Notice of Proposed Rulemaking, or ANPR, to give the retirement industry the opportunity to react, comment, and provide feedback on proposed revisions to the Exemption.

Such approach is not new. The Department has successfully employed this administrative procedure for lifetime income regulation. The Department first published an RFI requesting input from marketplace participants and the public regarding lifetime income options for those covered in retirement plans. Over 700 comments were provided in response to the RFI. The Department subsequently held public hearings to flesh out specific issues. The Department next issued an ANPR, focusing on lifetime income illustrations that would be provided to participants in defined contribution retirement plans. Following federal legislation on the subject, the Department published an interim final rule on lifetime income illustrations that became effective last year, providing plan participants annually with valuable lifetime income information and disclosures regarding their retirement savings.

ABA and its member banks acting as QPAMs would be glad to support and promote such a regulatory approach. We stand ready to work with Department staff to ensure that the QPAM Exemption remains a standard-bearer for responsible investment management of the nation's retirement assets.

Panel members, thank you for your time, and I'm happy to answer any questions you may have.