

## Raising the Bar: DOL's Amendment Sets Higher Standards for QPAM Qualification

*The DOL's final amendment to the QPAM Exemption sets forth more rigorous compliance requirements and expands the circumstances of ineligibility, potentially affecting the operations and compliance procedures of investment managers that handle plan assets.*

### Key Changes in the Final Amendment:

- **Notification/Reporting Requirement:** The amendment introduces a requirement for entities acting as Qualified Professional Asset Managers (QPAMs) to provide a one-time notice to the DOL regarding their reliance on the QPAM Exemption.
- **Increased Asset and Equity Requirements:** The amendment introduces significant changes to the asset management, net worth, and equity thresholds that are required for an entity to serve as a QPAM.
- **Recordkeeping Requirements:** The amendment includes new recordkeeping requirements mandating that QPAMs maintain records for six years to demonstrate compliance with the exemption.
- **Expanding Ineligibility Criteria:** The amendment expands the scope of criminal activity that may render an entity ineligible to rely on the QPAM Exemption. The amendment explicitly includes foreign convictions, as well as domestic non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) in its scope.
- **Authority of QPAM Over Investment Decisions:** The amendment includes clarifications and enhancements to Section I(c) of the QPAM Exemption, which addresses the authority of a QPAM over investment decisions. These changes reinforce and bolster the independence and discretionary control that a QPAM must exercise when managing plan assets.

On April 3, 2024, the US Department of Labor's (DOL's) Employee Benefits Security Administration published a final amendment (Final Amendment) to Prohibited Transaction Class Exemption (PTCE) 84-14, commonly known as the QPAM Exemption. The Final Amendment, effective from June 17, 2024, carries important implications for investment managers who rely on the exemption to manage employee benefit plan and IRA assets. Significantly, an investment manager's failure to comply with certain of the new and/or revised compliance requirements could result in the loss of the QPAM Exemption, which could have substantial adverse implications for parties engaging in transactions that are not otherwise exempt from ERISA's prohibited transaction rules. This Client Alert summarizes the key changes.

## Notification/Reporting Requirement

The Final Amendment introduces a requirement for entities acting as Qualified Professional Asset Managers (QPAMs) to provide notice to the DOL regarding their reliance on the QPAM Exemption. This notification requirement is designed to ensure that the DOL is aware of which entities are operating as QPAMs and to facilitate DOL's oversight and enforcement of the exemption's conditions.

- **One-Time Notice Requirement:** QPAMs are required to submit a one-time notice to the DOL that they rely upon the QPAM Exemption. This notice must include the QPAM's legal name and any other names under which the QPAM conducts business. The QPAM must provide this notification only once, unless the QPAM changes its legal or operating name(s).
- **Notification Process:** The notice must be sent via email to [QPAM@dol.gov](mailto:QPAM@dol.gov).
- **Public Listing:** The DOL intends to maintain a publicly available list of entities relying upon the QPAM Exemption on its website.
- **Changes in Information:** If a QPAM changes its legal or operating name(s), it must update the DOL with the new information. Failure to report such changes in a timely manner could lead to prohibited transactions and potential penalties.
- **Period to Provide Notice:** The QPAM must provide notice to the DOL within 90 calendar days of its reliance on the exemption or a change to its legal or operating name. Thus, QPAMs that have relied on the QPAM Exemption prior to the effective date of the new rule will have 90 calendar days (inclusive of the effective date) to provide notice. QPAMs that begin to rely on the QPAM Exemption only after the effectiveness of the new rule will have 90 calendar days beginning on the date they first rely on the QPAM Exemption to provide notice.
- **Cure Period for Reporting Failures:** If the QPAM inadvertently fails to provide notice to the DOL within the initial 90-calendar-day period, within the *following* 90-calendar-day period, it must (1) notify the DOL of its reliance on the exemption or name change and its prior failure to report, and (2) provide the DOL with an explanation of its failure to timely provide notice. Otherwise, the QPAM would lose the relief provided by the QPAM Exemption due to the initial reporting failure.
- **Consequences of Non-Compliance:** If a QPAM fails to comply with the reporting requirement, the QPAM Exemption will not be available for transactions that occur until the failure is fully cured. The preamble does not clarify whether, once cured, the QPAM Exemption would be available for transactions that occurred prior to meeting the registration requirements.
- **De-Registration Process:** Entities that have previously reported their reliance on the QPAM Exemption, but no longer wish to rely on it, or cease to operate as QPAMs, can (but are not required to) notify the DOL to be removed from the list of QPAMs who are relying on the QPAM Exemption.

Investment managers who qualify as QPAMs and rely on the QPAM Exemption must take immediate steps to ensure compliance with this obligation. As a first action, QPAMs should prepare and submit a one-time notice to the DOL, including the QPAM's legal name and any other operating names, via [QPAM@dol.gov](mailto:QPAM@dol.gov). Establishing internal procedures for monitoring any changes in the QPAM's legal or operating names and for promptly reporting such changes to the DOL within the specified timeframe is critical.

Additionally, QPAMs should maintain accurate records of their notification submission (e.g., save a copy of the email and ensure it does not get captured by an email deletion policy), including the date and the information provided, to ensure the ability to verify compliance if required. Although not legally required, investment managers that rely on the QPAM Exemption should consider whether they want to update the DOL if they decide to no longer rely on the QPAM Exemption or if they cease to operate as a QPAM.

## Increased Asset and Equity Requirements

The Final Amendment introduces significant changes to the asset management and equity thresholds that define the qualifications for an entity to serve as a QPAM. Below are specific details regarding the adjustments to the asset management and equity thresholds:

**Incremental Increases from 2024 to 2030:** The asset management, net worth, and equity thresholds will be increased in a phased manner over a seven-year period, starting in 2024 and culminating in 2030. By January 31 of each year following 2030, the DOL will publish subsequent annual adjustments to these thresholds to adjust for inflation.

- For QPAMs that are registered investment advisers, the asset management threshold will be increased to:
  - \$101,956,000 (from \$85,000,000) effective as of the last day of the QPAM's fiscal year ending no later than December 31, 2024;
  - \$118,912,000 effective as of the last day of the QPAM's fiscal year ending no later than December 31, 2027; and
  - \$135,868,000 effective as of the last day of the QPAM's fiscal year ending no later than December 31, 2030.
- The equity capitalization threshold for registered investment advisers will be increased to:
  - \$1,346,000 (from \$1,000,000) effective as of the last day of the QPAM's fiscal year ending no later than December 31, 2024;
  - \$1,694,000 effective as of the last day of the QPAM's fiscal year ending no later than December 31, 2027; and
  - \$2,040,000 effective as of the last day of the QPAM's fiscal year ending no later than December 31, 2030.
- For banks, savings and loan associations, and insurance companies, the equity capitalization/net worth threshold will be increased to:
  - \$1,570,300 (from \$1,000,000) effective as of the last day of the QPAM's fiscal year ending no later than December 31, 2024;
  - \$2,140,600 effective as of the last day of the QPAM's fiscal year ending no later than December 31, 2027; and

- \$2,720,000 effective as of the last day of the QPAM's fiscal year ending no later than December 31, 2030).

Investment managers that rely on the QPAM Exemption must closely monitor these threshold adjustments and assess their ability to meet the new criteria. Failure to meet the updated thresholds could result in the loss of QPAM status, which would preclude the investment manager's ability to rely on the QPAM Exemption. Investment managers may need to consider strategic adjustments to their business operations, including capital raising and/or restructuring efforts, to maintain compliance with the QPAM qualifications.

## Recordkeeping Requirements

The Final Amendment introduces a new recordkeeping requirement that mandates QPAMs maintain comprehensive records to demonstrate compliance with the QPAM Exemption's conditions. This requirement brings the QPAM Exemption in line with many other prohibited transaction exemptions that require recordkeeping.

- **Duration of Record Retention:** QPAMs are required to maintain records for a period of six years from the date of the applicable transaction.
- **Accessibility of Records:** The records must be kept in a manner that is reasonably accessible for examination and must be made reasonably available for examination by various parties, including authorized employees of the DOL and the IRS, and by fiduciaries, participants, and beneficiaries of plans the assets of which are managed by the QPAM.
- **Protection of Confidential Information:** While the records must be available for examination, the QPAM is not required to disclose privileged trade secrets or privileged commercial or financial information. Additionally, the QPAM can protect confidential information regarding individuals that are not requesting the records.
- **Consequences of Non-Compliance:** Failure to maintain the necessary records to determine whether the conditions of the exemption have been met will result in the loss of the exemption's relief for the transaction(s) for which records are missing or have not been maintained. However, this failure will not affect availability of the QPAM Exemption for other transactions if the QPAM maintains the required records for those transactions.

## Ineligibility Due to Criminal Convictions

The Final Amendment to the QPAM Exemption includes significant changes related to ineligibility due to criminal behavior.

- **Inclusion of Foreign Convictions:** The Final Amendment explicitly includes foreign convictions as events that can trigger ineligibility under the QPAM Exemption. A QPAM may become ineligible if the QPAM, its affiliates, or its 5%-or-more owners are convicted of crimes in foreign jurisdictions that are substantially equivalent to any of the disqualifying domestic crimes listed in the exemption. However, convictions in countries listed as "foreign adversaries" by the Department of Commerce are excluded from this definition.
- **Expanded Circumstances for Ineligibility:** The Final Amendment broadens the scope of circumstances that may lead to ineligibility. In addition to criminal convictions, entering into non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs) with US federal or state

prosecutor's offices or regulatory agencies will trigger ineligibility if the conduct underlying the NPA or DPA would constitute a disqualifying crime. In addition, participation in conduct that intentionally violates the QPAM exemption's conditions or providing misleading information in connection with the exemption's conditions will lead to ineligibility.

- **Notification Requirements:** QPAMs are now required to notify the DOL within 30 days of an event that causes ineligibility. This includes notification of criminal convictions and domestic NPAs and DPAs. In addition, although foreign NPAs and DPAs are not ineligibility triggers under the QPAM Exemption, QPAMs are still required to notify the DOL of any such event. The DOL explained that the notice of foreign NPAs and DPAs will give the DOL "the ability to take appropriate additional action in specific cases."
- **One-Year Transition Period:** To mitigate potential disruptions, the Final Amendment provides a one-year transition period for QPAMs following the date of ineligibility. During this period, QPAMs must not restrict their clients' ability to terminate or withdraw from their arrangements and must indemnify and restore "actual losses" incurred by any plans or IRAs due to the QPAM's failure to maintain eligibility. "Actual losses" are defined in the rule to mean losses and costs arising from unwinding transactions with third parties and from transitioning plan assets to an alternative asset manager, as well as costs associated with any exposure to excise taxes under Code Section 4975 as a result of a QPAM's inability to rely upon the relief in the QPAM Exemption. The ineligible QPAM must explicitly agree to abide by these terms in a written notice to the plans and IRA accounts. During the transition period, relief is available for transactions (including past transactions), so long as the QPAM complies with certain conditions throughout this one-year period, including providing a clear and detailed explanation to the QPAM's client plans and IRAs of the circumstances that led to the QPAM's ineligibility. Certain questions remain regarding the applicability of the transition period (and associated rules regarding termination, withdrawal and indemnification) in the context of a QPAM that was not actively relying, or intending to rely on, the QPAM Exemption at the time ineligibility was triggered.

## Authority of QPAM Over Investment Decisions

The Final Amendment includes clarifications and enhancements to Section I(c) of the QPAM Exemption, which addresses the authority of a QPAM over investment decisions. These changes reinforce the independence and discretionary control that a QPAM must exercise when managing plan assets.

- **Sole Responsibility for Transactions:** The Final Amendment emphasizes that the QPAM must have sole responsibility for the terms of the transaction, commitments, investment of fund assets, and any corresponding negotiations on behalf of the investment fund. This means that the QPAM must independently exercise fiduciary judgment and cannot act as a "rubber stamp" for transactions planned, negotiated, or initiated by parties in interest. The QPAM also must not permit a party-in-interest to initiate or make decisions regarding plan investments under the QPAM's control.

The preamble to the Final Amendment notes that these modifications are consistent with the DOL's original intent when granting the exemption. However, the preamble also states that the revised language of Section I(c) is intended to clarify that certain sales pitches or offers of investment products from a party-in-interest could run afoul of the condition of the QPAM Exemption, depending on the facts and circumstances, and that QPAMs should interpret Section I(c) expansively and avoid responding to sales pitches or offers that would call into question whether the QPAM is solely responsible for planning, negotiating, and/or initiating the transaction.

The preamble also explicitly reminds QPAMs that plan trustees should not retain or delegate the right-to-vote proxies held by the QPAM, or exercise other similar shareholder rights if such proxies or rights relate to investments in a party-in-interest.

- **Delegation to Sub-Advisers:** While a QPAM may rely on the expertise of sub-advisers, it must retain the ultimate authority and responsibility for the investment decisions. The QPAM must prudently select and monitor any sub-advisers and ensure that the sub-advisers' recommendations align with the QPAM's independent fiduciary judgment. For collective investment trusts (CITs) and similar pooled investment vehicles, the sponsoring trust company or QPAM must retain ultimate investment authority in order to rely on the QPAM Exemption, even if day-to-day investment decisions are delegated to sub-advisers. The QPAM or trust company must ensure that the sub-advisers operate within the guidelines established by the QPAM and that the QPAM maintains control over the investment strategy.

## Next Steps

- **Review and Update Policies:** QPAMs should thoroughly review their current policies and procedures to ensure they align with the new requirements set by the Final Amendment. This includes revising investment decision-making processes to reinforce the QPAM's independent authority.
- **Prepare for Notification Compliance:** QPAMs should prepare to submit the one-time notice to the DOL, confirming their status as a QPAM. This includes gathering all necessary information and establishing a process for any future updates or changes in the legal or operating names of each business entity relying on the exemption, or if the QPAM is no longer relying on the exemptive relief of the exemption.
- **Assess Financial Thresholds:** QPAMs should evaluate the organization's current financial status against the new asset management and equity thresholds. If necessary, investment managers relying on the QPAM Exemption should develop a strategy to meet the updated criteria by the specified incremental dates leading up to 2030.
- **Implement Recordkeeping Systems:** QPAMs should establish or enhance record-keeping systems to maintain the required records for six years, ensuring they are accessible for examination and comply with the new recordkeeping requirements.
- **Monitor for Ineligibility Triggers:** QPAMs should stay vigilant for any events that could trigger ineligibility, such as foreign convictions or agreements with prosecutors.

By taking these proactive steps, investment managers relying on the QPAM Exemption can navigate the changes brought about by the Final Amendment and maintain their ability to act as QPAMs in reliance on the QPAM Exemption, ensuring continued ability to serve their clients effectively.

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