

DOL Issues Proposed Amendment to the QPAM Exemption

July 28, 2022

On June 26, 2022, the U.S. Department of Labor (DOL) announced a proposed amendment to the prohibited transaction class exemption 84-14 (the “QPAM Exemption”). The QPAM Exemption is a broad-based class exemption relied upon by many registered investment advisors (QPAMs) who manage the assets of pension plans and other employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA), and other “plans” described in Section 4975 of the Internal Revenue Code of 1986, as amended (collectively, “Plans”). Without the availability of the QPAM Exemption, many investment managers would frequently be precluded from managing the assets of a Plan. If adopted in its current form, the proposed amendment would be effective 60 days after publication of the final amendment in the *Federal Register*.

Comments on the proposed amendment, which was proposed by the DOL on its own motion, must be submitted to the DOL on or before September 26, 2022.

The proposed amendment would modify the QPAM Exemption as follows:

- For registered investment advisors, the proposed exemption increases the total client assets under management and control threshold from \$85,000,000 to \$135,870,000 and the shareholder equity requirement from \$1,000,000 to \$2,040,000. These new limits will be annually adjusted for inflation.
- An investment manager would be precluded from relying on the exemption for 10 years following the manager, its affiliates or five percent or more owners engaging in certain disqualifying conduct. The proposal retains the list of disqualifying crimes included in the current QPAM Exemption and clarifies that convictions of similar non-U.S. laws would also lead to disqualification (the conviction of any such crime or similar laws, a “Criminal Conviction”). In addition, the proposal would extend disqualification to participating in (i) conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted one of the enumerated crimes, (ii) a systematic pattern or practice of violating the conditions of the QPAM Exemption, (iii) intentionally violating the conditions of the QPAM Exemption or (iv) providing materially misleading information to the DOL in connection with the conditions of the QPAM Exemption (any circumstances described in (i) – (iv), “Prohibited Misconduct”). The

Contact Information

If you have any questions regarding this alert, please contact the Akin Gump lawyer with whom you usually work or

Bruce E. Simonetti

Partner

bsimonetti@akingump.com

+1 212.872.8023

New York

Michael Roebuck

Senior Counsel

mroebuck@akingump.com

+1 212.872.8102

New York

proposed exemption provides that “participating in” Prohibited Misconduct would include not only active participation, but also knowing approval of the conduct or knowledge of the conduct without taking active steps (such as reporting to appropriate compliance personnel) to prohibit such conduct.

- For the first time, the DOL would require notice to it of investment managers relying upon the QPAM Exemption.
 - Presumably the intent of this notice is to enhance the ability of the DOL to audit managers regarding ERISA compliance.
 - In the preamble to the proposed amendment, the DOL stated its intention to compile a list of investment managers relying upon the QPAM Exemption on its publicly available website.
- The proposed amendment would expand upon the current requirement of the QPAM Exemption that a QPAM acknowledge its fiduciary status to a client Plan in a written management agreement. The proposed exemption introduces the concept of a “Written Management Agreement” in which a QPAM must, in addition to acknowledging its fiduciary status, include a statement that, in the event of a Criminal Conviction or receipt by the manager of notice (a “Written Ineligibility Notice”) from the DOL that the manager has participated in Prohibited Misconduct, for at least a period of 10 years, the manager:
 - Agrees not to restrict or limit the ability of the Plan to withdraw from the arrangement (e.g., no gates, slow-pay, etc.).
 - Will not impose any fees or penalties on a Plan in connection with terminating or withdrawing from an investment fund managed by the QPAM except for reasonable fees disclosed in advance that are specifically designed to prevent abusive investment practices or ensure equitable treatment of all investors in the fund.
 - Agrees to indemnify and hold harmless, and promptly restore actual losses to the Plan for any damages that directly result to them from a violation of applicable laws, a breach of contract or any claim arising out of the conduct that is the subject of a Criminal Conviction or Written Ineligibility Notice.
 - While the proposed amendment seems to limit a manager’s potential indemnification obligation to events resulting in, or occurring after, a Criminal Conviction or Written Ineligibility Notice, the language is not entirely clear. Attention should be made to whether the DOL addresses this ambiguity in the final amendment, if any.
 - Will not employ or knowingly engage any individual that participated in the conduct that is the subject of the Criminal Conviction or Written Ineligibility Notice.
- If a manager is subject to a Criminal Conviction or Written Ineligibility Notice, the proposed amendment provides for a one-year winding-down period during which the QPAM Exemption will apply, subject to certain conditions, to a disqualified manager unwinding transactions existing at the time of disqualification.
- The proposed amendment provides that, for the QPAM Exemption to apply to a transaction, the “terms of the transaction, commitments, and investment of fund assets, and any associated negotiations” are the “sole responsibility” of the QPAM

and that no relief will be provided if the transaction has been, “in whole or in part,” planned, negotiated or initiated by a party in interest to a Plan investor. This requirement could be problematic in circumstances or jurisdictions where an entity other than the QPAM is assigned some responsibility for a transaction in which the QPAM Exemption is intended to apply.

- Unlike the current QPAM Exemption, the proposed amendment requires that a manager maintain and make available records necessary to determine whether the conditions of the QPAM Exemption have been met for a period of six years from the date of a covered transaction. The DOL states that this recordkeeping requirement is consistent with similar requirements in other prohibited transaction class exemptions.
- One point of concern is that the proposed amendment includes no grandfathering or transition periods for managers currently relying on the QPAM Exemption. This may be problematic for managers that do not satisfy the amended assets under management or shareholders’ equity requirements and would require all managers to enter into Written Management Agreements by the effective date of the amendment. It is not known whether the DOL will provide any transitional relief in any final amendment.

akingump.com