

## **Alert** | Investment Management/Private Funds



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### **DOL Makes Significant Changes to QPAM Exemption**

On April 3, 2024, the Department of Labor (DOL) published in the Federal Register long-awaited **final amendments to Prohibited Transaction Class Exemption 84-14** (the Amendment), also known as the Qualified Professional Asset Management (QPAM)<sup>1</sup> exemption (the Exemption).<sup>2</sup> The Amendment (i) imposes new notice and reporting requirements and increased financial thresholds, as conditions to relying on the Exemption; (ii) reiterates the DOL's view that QPAMs must be independent and have sole discretionary authority with respect to transactions covered by the Exemption; and (iii) modifies Section I(g) of the Exemption, a provision under which a QPAM may become ineligible to rely upon the Exemption for a period of 10 years if the QPAM, various affiliates, or 5% or more owners of the QPAM are convicted of certain crimes and engage in certain prohibited misconduct. The Amendment is effective June 17, 2024 (Effective Date).

#### **QPAM Exemption History**

In 1984 the DOL first published the QPAM Exemption, which is one of the broadest and most commonly used exemptions by SEC-registered investment advisers and financial institutions, such as banks (collectively, "Managers"), when managing assets of pension plans, individual retirement accounts, and other employee benefit plans subject to the Employee Retirement Income Security Act of 1974 and other

<sup>1</sup> A QPAM is defined in Part VI of PTE 84-14 as a bank, savings and loan association, insurance company, or SEC-registered investment adviser that meets specified asset and equity thresholds set forth in the Exemption and acknowledges in a Written Management Agreement that it is a fiduciary with respect to each of its clients.

<sup>2</sup> Amendment to Prohibited Transaction Class Exemption 84-14 for Transactions Determined by Independent Qualified Professional Asset Managers, April 3, 2024 ([Release](#)).

plans described in Section 4975 of the Internal Revenue Code of 1986 (collectively, “Plans”). Without the Exemption, Managers would be prohibited, among other things, from entering into sales, leases, loans and obtaining services from a “party in interest” or “disqualified person” to a Plan.<sup>3</sup> A party in interest is typically a person or entity with close ties to a Plan. The Exemption allows Managers that meet the QPAM requirements to enter into a wide range of transactions with counterparties that are parties in interest without requiring the QPAM to identify, maintain records, or avoid transactions with such counterparties.

**Overview of the Amendment**

1. **Reporting QPAM Status to the DOL.** Any Manager that intends to rely on the Exemption is required to notify the DOL by email at [QPAM@dol.gov](mailto:QPAM@dol.gov), stating its intent to rely on the Exemption (including the name of each relying entity) within 90 calendar days of the Manager’s first reliance on the Exemption. The Manager is also required to notify the DOL within 90 calendar days after the Manager changes its name. The DOL has provided an additional 90-calendar-day period (after expiration of the initial 90-day period) to cure any inadvertent failures to report to the DOL. If the Manager fails to properly report within the 180-calendar-day period, QPAM status is not available until the failure is fully cured.
  - Managers relying on the Exemption on or prior to June 17, 2024, have until September 15, 2024, to notify the DOL of their QPAM status.
  
2. **Increased Financial Thresholds.** The Amendment implements an increase over the next seven years in assets under management (AUM) and equity ownership (EO) thresholds<sup>4</sup> a Manager must maintain in order to qualify (or continue to qualify) as a QPAM. The thresholds are also subject to subsequent adjustments for inflation. The increased thresholds, as explained by the DOL in the Release, are intended to ensure that Managers managing Plan assets are established financial institutions and are large enough to be independent from, and not to be unduly influenced by, parties in interest.
  - For smaller Managers, the Amendment’s increased AUM and EO thresholds may make it more difficult for the Manager to rely on the Exemption, thus forcing the Manager in a very short period of time to find another exemption or cease serving as a QPAM as of the Effective Date.
  - The DOL declined to grandfather QPAMs that meet the thresholds prior to the Effective Date but no longer qualify after the Effective Date based on the increased thresholds. It is also notable that after the Effective Date, a Manager that has sufficient AUM to register with the SEC as an investment adviser may no longer have sufficient AUM to qualify as a QPAM.

<sup>3</sup> References to “party in interest” should be read to include “disqualified person.”

<sup>4</sup>

Threshold	Current Threshold	Threshold FYE no Later than 12/31/2024	Threshold FYE no Later than 12/31/2027	Threshold FYE no Later than 12/31/2030
RIAs	\$85,000,000 (AUM)	\$101,956,000 (AUM)	\$118,912,000 (AUM)	\$135,868,000 (AUM)
	\$1,000,000 (EO)	\$1,346,000 (EO)	\$1,694,000 (EO)	\$2,040,000 (EO)
Banks, Insurance Companies, and S&L Associations	\$1,000,000 (EC / Net Worth, as applicable)	\$1,570,300 (EC / Net Worth, as applicable)	\$2,140,600 (EC / Net Worth, as applicable)	\$2,720,000 (EC / Net Worth, as applicable)

- Managers of (i) separately managed accounts owned by Plans, (ii) private investment funds where 25% or more of the fund's interests may be owned by Plans, and (iii) collective investment trusts (CITs) must comply with new thresholds. Managers should consider reviewing QPAM representations in client agreements, fund-governing documents, and trading agreements to ensure compliance, as well as reviewing their internal policies and procedures to ensure the Manager is properly tracking AUM and EO for purposes of compliance with the new Exemption thresholds.
  - Managers to private investment funds that limit Plan investors to less than 25% of the private fund's interests will not be impacted by the Amendment so long as the 25% threshold is not exceeded. Managers should consider reviewing their internal policies and procedures to ensure proper and timely tracking AUM, as there is no ability to rely on the Exemption retroactively if the 25% limitation is exceeded before the Manager notifies the DOL it intends to rely on the Exemption.
3. **DOL Reemphasizes that a QPAM Cannot Be a Rubber Stamp.** The DOL reemphasizes in the Release its view that a QPAM must act independently and retain sole authority with respect to planning, negotiating, and initiating all transactions. A QPAM cannot simply rubber-stamp or sanitize transactions designed (in whole or part) by a party in interest with respect to Plan assets over which the QPAM has discretion. Under the Amendment, a QPAM may delegate certain responsibilities to a sub-adviser so long as the QPAM exercises prudence in selecting the sub-adviser and the QPAM retains sole authority with respect to planning, negotiating and initiating transactions.
- Managers (including consultants, manager of managers, and outsourced chief investment officers) often engage sub-advisers with specialized expertise (e.g., alternative investments and derivatives) to manage a sleeve of assets within a larger account, private fund, or CIT. While Managers oversee the sub-adviser's compliance with investment guidelines and performance, Managers typically are not involved in the sub-adviser's day-to-day management and trading activities. This is a classic co-fiduciary relationship, where neither the Manager nor the sub-adviser has "sole" authority over the managed assets. Therein lies the conundrum the Amendment creates: how can both the Manager and the sub-adviser satisfy the "sole" authority requirement for the same assets to qualify as a QPAM?
  - In the Release, the DOL advises that if an arrangement does not clearly identify the party with ultimate responsibility and authority, the parties should not assume they can rely on the Exemption. The DOL reiterates that a QPAM should not "more readily" rely on a sub-adviser with specialized expertise if the reliance means that the QPAM would not have sole authority with respect to planning, negotiating, and initiating the transaction. The DOL also recommends that affected parties should seek an advisory opinion or request other guidance from the DOL regarding whether the Exemption would be available for these types of transactions.
  - Managers should consider the facts and circumstances of their respective sub-advisory relationships and determine if it is feasible for one party to have sole authority over Plan assets (and amend their agreements accordingly) or whether it is prudent to seek an advisory opinion from the DOL. This is particularly important for CITs because applicable banking and federal securities laws expect a co-fiduciary relationship to exist between a CIT trustee and sub-advisers.

#### 4. **Conduct Resulting in Loss of QPAM Status.**

Under the Amendment a QPAM becomes ineligible to rely on the Exemption for a period of 10 years if the QPAM, its affiliates, or 5% or more owners of the QPAM are convicted of certain crimes or participate in certain prohibited misconduct.

- a. **Criminal Conviction.** The Amendment clarifies that if a QPAM, an affiliate, or 5% or more owners of the QPAM is convicted by a foreign court of a crime, the QPAM will be ineligible to rely on the Exemption. The DOL explicitly includes foreign crimes that are substantially equivalent to the list of serious domestic crimes (e.g., fraud, theft, dishonesty, or similar criminal acts) that cause ineligibility to rely on the Exemption. Due to concern that convictions might occur in foreign countries with the intent to harm U.S.-based asset managers, the DOL has excluded from foreign crimes convictions and imprisonments that occur in a foreign country included on the Department of Commerce’s list of “foreign adversaries.”
- b. **Participation in Prohibited Misconduct.** The DOL has added “Participation in Prohibited Misconduct” as a new category of conduct by a QPAM, its affiliates, or its 5% or more owners that will result in loss of QPAM status. “Prohibited Misconduct” includes (i) misconduct that is sufficient to form the basis for entering into a domestic non-prosecution or deferred prosecution agreement, where the misconduct would have constituted a crime if successfully prosecuted, and (ii) a final judgment or court-approved settlement by federal or state regulators (including, among others, DOL, SEC, CFTC, Federal Reserve, OCC, FDIC, or state attorney general) that the QPAM has participated in conduct that intentionally violated the Exemption’s conditions or provided misleading information in connection with the Exemption’s conditions. “Participation in” refers not only to active participation in prohibited misconduct, but also to knowing approval of the conduct, or knowledge of the conduct without taking active steps to prohibit the conduct, including reporting the conduct to appropriate compliance personnel.
  - The new criminal conduct and Prohibited Misconduct provisions are not retroactive and will only apply to conduct that occurs on or after June 17, 2024.
  - Prohibited Misconduct includes domestic non-prosecution or deferred prosecution agreements but does not include a foreign equivalent. However, a QPAM is required to notify the DOL of its entry into a foreign equivalent of a non-prosecution or deferred prosecution agreement.

**Notice Requirements.** The QPAM is required to notify the DOL by email at [QPAM@dol.gov](mailto:QPAM@dol.gov) within 30 calendar days after the QPAM, its affiliates, or 5% or more owners of the QPAM (i) Participates in Prohibited Misconduct or (ii) enters into an agreement with a foreign government that is substantially equivalent to a domestic non-prosecution or deferred prosecution agreement. The notice must include a description of the Prohibited Misconduct or non-prosecution or deferred prosecution agreement.

**One Year Transition Period.** The DOL has provided an automatic one-year transition period after loss of QPAM status, during which the QPAM can continue to rely on the Exemption for pre-existing arrangements and impacted Plans can manage the costs and disruption of moving to a new manager or amending their management agreements to address the Manager’s loss of QPAM status.

- The Manager may, during the one-year transition period, continue to act as a QPAM for Plan clients who were clients as of the ineligibility date so long as the Manager continues to comply with the conditions of the Exemption. The Manager will have to find a different exemption for

new clients after the ineligibility date and, if not available, apply for relief from the DOL or suspend providing QPAM services.

**Modification to Contractual Relationships.** Within 30 calendar days of a Manager becoming ineligible to rely on the Exemption due to a conviction or engaging in Prohibited Misconduct, the Manager must give notice to its Plan clients and the DOL regarding its ineligibility to rely on the Exemption and agree in writing that during a one-year transition period, the Manager (i) will not restrict a Plan’s ability to terminate or withdraw from its contractual arrangement with the Manager and (ii) will provide indemnification and restore losses incurred by the Plan as a result of the Manager’s violation of applicable laws, breach of contract, or any claim arising out of the Manager’s failure to retain its QPAM status. The notice must include an “objective description” of the “facts and circumstances” related to the conviction or Prohibited Misconduct such that the Plan fiduciaries have sufficient information to evaluate whether to retain the Manager notwithstanding the loss of the Manager’s QPAM status.

- The indemnification obligations that kick in when a Manager loses its QPAM status present unique issues for private investment funds and CITs that may have liquidity limitations. The DOL acknowledges in the Release that there are additional challenges associated with comingled vehicles that are less liquid, but advises that if a Manager faces loss of its QPAM status, the Manager may seek supplemental individual relief from the DOL or may request a more limited scope of relief for a supplemental individual exemption that captures only transactions that present liquidity problems. The DOL urges Managers to submit an individual exemption application as soon as possible after the Manager knows that a triggering event is expected to occur to cause the Manager to lose its QPAM status.

5. **Recordkeeping Requirement.** The Amendment’s new recordkeeping requirements require QPAMs to maintain records for six years from the date of a transaction that permits certain parties (DOL, IRS, contributing employers, fiduciaries, and plan participants) to determine if the Exemption’s conditions were satisfied with respect to that transaction. A Manager’s failure to maintain the necessary records will result in a loss of Exemption only for transactions for which the records are missing.

- Managers are cautioned to consider records requests carefully, as a QPAM-related records request could be a back door to obtain records for potential legal action against the QPAM.

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