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**BLOG**

# The QPAM Exemption: Watch Out for Affiliates Convicted of Crimes Outside the U.S.

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The Department of Labor's (the Department) Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption) (see our previous Benefits Blast Blog) is the most widely utilized prohibited transaction relief by investment professionals who manage assets of ERISA plans and IRAs (collectively, ERISA Plans). The Department's recent individual prohibited transaction exemption activity highlights a critical requirement for relying on the QPAM Exemption: monitoring criminal conduct of affiliates in the United States and abroad.

## The Prohibition Against Being Convicted of a "Crime"

Among other requirements, in order to qualify as a Qualified Professional Asset Manager (QPAM) under the QPAM Exemption, Section I(g) of the QPAM Exemption requires that:

> Neither the QPAM nor any affiliate thereof… is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of… any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element…

Further, the QPAM Exemption broadly defines "affiliate" for this purpose as: (1) any person directly or indirectly controlling, controlled by, or under common control with the QPAM; (2) any director of, relative of, or partner in the QPAM; (3) any entity in which the QPAM is an officer, director or five percent or more owner; and (4) any employee or officer of the QPAM that is a highly compensated employee and has control over the management or disposition of ERISA Plans' assets.

Of note is that neither Section I(g) of the QPAM Exemption nor the definition of "affiliate" is limited to the United States and the Department has interpreted each to capture affiliates and crimes committed outside the United States. This prohibition from conviction of a wide scope of crimes applies even if such convicted affiliate is not involved with the QPAM's management activities.

## Individual Exemptions

In the past, the Department granted individual prohibited transaction exemptions that allowed QPAMs to continue to rely upon the QPAM Exemption despite an affiliate's criminal convictions (the Individual Exemptions), so long as the QPAM had no involvement with the criminal activity and was able to demonstrate that granting the exemption was in the best interest of the ERISA Plans managed by the QPAM. Recently, the Department granted such Individual Exemptions to BNP Paribus and UBS AG (the Banks), allowing them to continue managing assets of ERISA Plans in reliance on the QPAM Exemption despite the criminal convictions of affiliates outside the United States. However, unlike the individual prohibited transaction exemptions granted by the Department in the past for similar foreign convictions to banks such as JP Morgan Chase & Co., Deutsche Bank AG, Citigroup, Barclays Capital Inc., and even UBS AG, the Department attached several new restrictions and requirements in the Individual Exemptions.

## Conditions of the Banks' Individual Exemptions

Firstly, the Banks' Individual Exemptions were granted for a one-year period (from the date of judgment in the foreign court), as opposed to the five-year period of previous similar exemptions. Among other requirements, the Banks' Individual Exemptions are also conditioned on the institutions:

- Adopting written policies and procedures to ensure compliance with the conditions of the Individual Exemptions;
- Developing annual compliance training;
- Designating a compliance officer to be responsible for ensuring compliance; and
- Conducting periodic compliance audits.

In the comments and preamble to the UBS AG Individual Exemption, UBS AG requested an Advisory Opinion from the Department that an adverse judgment outside the United States would not constitute a conviction within the meaning of Section I(g) of the QPAM Exemption, but the Department responded in no uncertain terms that it construes Section I(g) of the QPAM Exemption not to be limited to crimes committed in the United States and extends to crimes committed in foreign jurisdictions.

## QPAM Best Practices

In light of the Individual Exemptions' short duration and extensive conditions, we urge investment professionals that rely on the QPAM Exemption in order to manage assets of ERISA Plans to monitor and be mindful of the criminal convictions of their affiliates, including outside the United States.

Additionally, fiduciaries of ERISA Plans entering into investment management agreements should obtain a representation that the investment advisor will qualify for QPAM status and that it will notify the fiduciary if that status changes.

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