U.S. Department of Labor Proposes Changes to the QPAM Exemption

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The U.S. Department of Labor ("Department") has published proposed changes to its Prohibited Transaction Class Exemption 84-14 (the "QPAM (qualified professional asset manager) Exemption"). The QPAM Exemption is heavily relied on by qualified investment professionals because it provides relief from numerous prohibited transactions. The qualified investment professionals who rely on the QPAM Exemption are those who manage the assets of certain employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), plans and accounts subject to section 4975 of the Internal Revenue Code ("Code"), and plan asset vehicles (collectively, "Benefit Plans").[1]

The Department has given interested parties until **September 26, 2022**, to provide comments on the proposed changes to the exemption. Below we have briefly summarized the proposed changes:

Updates to the Financial Eligibility Thresholds for Registered Investment Advisers (RIAs), Banks, Savings and Loan Associations, and Insurance Companies

The current QPAM Exemption contains financial thresholds for assets under management, equity capital, and net worth. Currently, an RIA relying on QPAM has at least $85 million in current assets under management as of the end of the most recent fiscal year and has a minimum of $1 million in owner's equity, while banks, savings and loan associations, and insurance companies have a $1 million "equity capital and/or net worth" threshold.

Proposed changes:

- the $85 million "assets under management" threshold of RIAs will increase to $135.87 million, while the "shareholders and partners equity" threshold will increase from $1 million to $2,040,000;

- the $1 million threshold for the "equity capital and/or net worth" threshold of banks, savings and loan associations, and insurance companies will increase to $2,720,000; and

- these amounts will adjust annually.

New QPAM Filing Requirement

Currently, QPAMs have no filing requirements with the Department.

Proposed change:

- The Department will now require each QPAM that relies on the exemption to file a report with the Department via email. The report must include the legal name of each business entity relying upon the exemption (and any name the QPAM may be operating under). The report would only need to be filed once, unless there is a change to the legal or operating name of the QPAM. In addition, the Department has indicated it intends to keep a current listing of all entities relying on the QPAM exemption on its website.

Proposed Changes to the Ten-Year Disqualification

Currently, a number of crimes result in QPAM disqualification.

Proposed Changes:

- The Department has expanded the list of disqualifying crimes and prohibited misconduct and has included foreign crimes that are substantially equivalent to those crimes currently listed in the QPAM exemption.

Wind Down for Disqualified QPAMs

Currently, the QPAM Exemption contains no wind-down provisions.

Proposed Change:

- A one-year wind-down period will be added to allow Benefit Plans to reexamine and possibly restructure their relationship with a disqualified QPAM.

Recordkeeping

Currently, the QPAM Exemption is silent with respect to the retention of records demonstrating a QPAM's compliance with the QPAM Exemption.

Proposed Change:

- A QPAM will be required to maintain, for six years, records that demonstrate its compliance with the QPAM Exemption (with access to records available to the Department, the Internal Revenue Service, or another federal or state regulator, as well as plan fiduciaries, employers, employer organizations, participants, and beneficiaries).

Mandatory Management Agreement Language

Although most QPAMs include standard provisions in their management agreements with Benefit Plans—i.e., acknowledgment of fiduciary status—there are no mandatory QPAM provisions that must be included in a management agreement with Benefit Plans.

Proposed changes:

- A QPAM will be required to include certain provisions in its management agreement with its Benefit Plan clients that are triggered in the event the QPAM is disqualified or criminally convicted, e.g., provisions addressing (i) the Benefit Plan's ability to terminate or withdraw its relationship with the QPAM; (ii) indemnification from the QPAM for losses and damages resulting from the QPAM's violation of law, breach of contract, or conduct related to the

QPAM's disqualification or criminal conviction; and (iii) restrictions on employing certain individuals that participated in conduct that is the subject of a criminal conviction or disqualification.

Winston Takeaways

Investment professionals that rely on the QPAM Exemption should review these proposed changes in light of their current practices and procedures. If the QPAM Exemption changes are finalized, QPAMs (particularly smaller ones) will need to be aware of the increased financial thresholds for assets under management, equity capital, and net worth and monitor the annual changes to these amounts. QPAMs will also need to update their written management agreements and reporting and recordkeeping procedures. Fiduciaries who engage QPAMs for investment of their Benefit Plans' assets should also monitor these proposed changes and possibly revise their due diligence efforts in reviewing agreements with current and future investment professionals to ensure compliance with the new requirements. Contact your Winston & Strawn attorneys for additional information.

[1] See Winston & Strawn's previous Benefits Blasts for additional posts regarding the QPAM Exemption and monitoring conduct of affiliates in the United States and abroad.

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