

MEMO# 34239

August 3, 2022

DOL Proposes Significant Amendments to QPAM PTE

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Proposes Significant Amendments to QPAM PTE

The Department of Labor's Employee Benefits Security Administration (EBSA) has released proposed amendments to Prohibited Transaction Class Exemption 84-14 ("PTE 84-14"), a longstanding exemption governing financial institutions acting as qualified professional asset managers (or QPAMs) for IRAs or employer-provided retirement plans.[\[1\]](#) The changes would be significant and would likely increase the cost of using the exemption and significantly expand the instances when the exemption would be unavailable. ICI will be commenting on the proposal; public comments are due by September 26, 2022.

PTE 84-14 allows QPAMs to cause a plan to engage in transactions in which a party in interest to the plan is involved in some manner. For financial institutions managing large pools of ERISA plan assets for multiple plans—and consequently many parties in interest—the PTE is often considered a practical necessity. The proposal, if finalized, would make several substantial changes, including those described below.

Ineligibility Due to Non-Prosecution and Deferred Prosecution Agreements

Currently, PTE 84-14 provides that a QPAM is ineligible to use the exemption for a period of 10 years if the QPAM or any of its affiliates (which includes any person or entity that owns five percent or more of the QPAM) is convicted of any of a range of specified crimes. The Department proposes to extend that prohibition to a broader range of events, including "any conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted a crime" that would have resulted in exclusion from PTE 84-14's coverage.[\[2\]](#) Under the proposal, a QPAM is also ineligible if it or an affiliate knew of such criminal conduct and did not "tak[e] active steps to prohibit" it.[\[3\]](#)

This extension to non-prosecution and deferred prosecution agreements could significantly

expand the instances in which QPAM status is lost. It could also complicate the negotiation of non-prosecution or deferred prosecution agreements.

Ineligibility Due to Foreign Convictions

The proposal would codify the Department's current view that disqualifying QPAM convictions include foreign convictions for offenses that are "substantially equivalent" to the disqualifying domestic criminal offenses listed in PTE 84-14.[\[4\]](#) (PTE 84-14 currently does not mention foreign convictions.) The Department states that it will allow QPAMs to ask the Department whether a particular foreign offense would be disqualifying but does not propose to formalize that process.[\[5\]](#)

Mandatory One-Year Winding Down Period

The Department proposes a mandatory one-year winding-down period after a disqualifying conviction. During that period, and even if they were applying for an individual exemption, QPAMs could rely on PTE 84-14 only for existing clients and a limited range of transactions. This would effectively prevent QPAMs from onboarding new matters that depend on PTE 84-14.

Mandatory Provisions in Agreements with All Clients

Under the proposal, all QPAMs would be required to enter into agreements with clients containing certain mandatory provisions. Most significantly, the QPAM would have to agree "to indemnify, hold harmless, and promptly restore actual losses to the client Plans 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 of the QPAM or an Affiliate . . . or an owner, direct or indirect, of a five (5) percent or more interest in the QPAM."[\[6\]](#)

This provision, which would effectively make any violation of ERISA subject to indemnification, arguably raises issues similar to those considered by the Fifth Circuit in *Chamber of Commerce of U.S.A. v. U.S. Dep't of Labor*, 885 F.3d 360, 384-85 (5th Cir. 2018), where the written contract requirement in the Department's 2016 "Fiduciary Rule" creating a private cause of action was found impermissible.[\[7\]](#)

The proposal would also require that, in the agreement, the QPAM acknowledge that it is a fiduciary with respect to each plan that has retained the QPAM.[\[8\]](#) The agreement also must state that, in the event the QPAM becomes ineligible, the QPAM will not restrict the ability of the client to withdraw from the arrangement and will not impose fees, penalties or charges in connection with the client's withdrawal; and that the QPAM will not employ or knowingly engage any individual that participated in the conduct that is the subject of a criminal conviction or of a written ineligibility notice from DOL.[\[9\]](#)

Other Changes

The proposal would also:

- Require any QPAM that relies upon the exemption to notify the Department, including the legal name of each business entity that is relying on the exemption.[\[10\]](#)
- Require the QPAM to maintain records that demonstrate that the required conditions have been met, and to make the records available to specified persons (including employees of DOL and IRS, plan fiduciaries, and plan participants and beneficiaries).[\[11\]](#)
- Increase the required amounts of client assets under management and shareholders'

or partners' equity necessary to qualify as a QPAM (including annually adjusting these amounts for inflation).[\[12\]](#)

- Explicitly state that the exemption only applies to transactions which are the sole responsibility of the QPAM (it would not apply if another party planned or negotiated the transaction and presented it to the QPAM for approval).[\[13\]](#)

Effective Date

DOL proposes that the changes would be effective 60 days after the final amendment is published in the Federal Register. The proposal does not include any transition or grandfathering provisions.

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endnotes

[\[1\]](#) The amendments were published at 87 Fed. Reg. 45204 (July 27, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15702.pdf>. DOL's press release is available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20220726>.

[\[2\]](#) Proposed section VI(s)(2). Under the proposal, DOL would issue a written warning identifying specific conduct that DOL believes constitutes "prohibited misconduct." The QPAM will have one opportunity to be heard in a conference with DOL before DOL determines whether to issue a written ineligibility notice. Proposed section I(i).

[\[3\]](#) Proposed section I(g)(3)(B).

[\[4\]](#) Proposed section VI(r)(2).

[\[5\]](#) See preamble at 87 Fed. Reg. at 45210.

[\[6\]](#) Proposed section I(g)(2)(C).

[\[7\]](#) See ICI Memorandum No. 31137, dated March 16, 2018, available at <https://www.ici.org/memo31137>.

[\[8\]](#) Proposed section VI(a).

[\[9\]](#) Proposed section I(g)(2).

[\[10\]](#) Proposed section I(g)(1).

[\[11\]](#) Proposed section VI(t).

[\[12\]](#) Proposed section VI(a)(4).

[\[13\]](#) Proposed section I(c).

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