

**MEMO# 34308**

October 12, 2022

# **ICI Submits Comment Letter in Response to DOL's Proposed Changes to QPAM PTE**

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TO: ICI Members  
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: ICI Submits Comment Letter in Response to DOL's Proposed Changes to QPAM PTE

On October 11, 2022, the Institute sent the attached comment letter to the Department of Labor (DOL) in response to its 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.[\[1\]](#)

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.

## **ICI Comments**

ICI's letter expresses significant concerns regarding the proposal and explains that the changes, if finalized, will make it more difficult and expensive to use the exemption, put the scope of its coverage in doubt, and in some instances actually harm the very interests of those parties it seeks to protect. The amendments will restrict the ability of the regulated community to make use of an exemption intended to facilitate efficient plan administration, and provide for favorable investments, to the detriment of retirement plans and their participants.

The letter includes the following comments and recommendations:

- DOL's approach to including foreign criminal convictions in the list of disqualifying crimes is overly broad and likely to disqualify more QPAMs than is reasonably necessary to achieve DOL's stated objective. Instead of the draconian and potentially

unjust application of an automatic disqualification, DOL should take a disclosure-based approach.

- DOL should eliminate completely the proposed new provisions for disqualification due to "prohibited misconduct"—particularly the adoption of the novel concept that a deferred prosecution and non-prosecution agreement would likely result in a QPAM's disqualification. This aspect of the proposal raises due process concerns and would have profound public policy implications that extend far beyond DOL's jurisdiction.
- While the concept of a winding down period has the potential to be beneficial, as currently drafted, the one-year winding down period will actually be harmful and disruptive to plans. By not allowing the QPAM to complete any new transactions, there is essentially no winding down period as of the ineligibility date.
- While DOL offers the possibility of extending the winding down period through the ability to apply for individual exemptions, we have reason to doubt DOL's actual willingness to grant individual exemptions.<sup>[2]</sup> Indeed, DOL's increasing reluctance to grant individual exemptions would exacerbate the negative impact of the expanded disqualification provisions.
- DOL should eliminate the problematic required contractual terms for management agreements. DOL significantly underestimates (or fails to estimate) the costs associated with adding these terms and the time needed to complete the agreement amendment process. In addition, the required terms may be inconsistent with other management agreement provisions legitimately agreed to by a plan and its manager. Finally, the imposition of such required terms in agreements between private parties arguably exceeds DOL's authority.
- DOL should remove or clarify the "planned, negotiated, or initiated" standard within the "sole responsibility" rule, to avoid unintentionally cutting off plans from transactions where a third-party (potentially a party in interest) initiates discussions with a QPAM about a particular product or opportunity. Read literally, this proposed language is far more limiting than what DOL may have intended and would render ineligible many common types of transactions that benefit plan clients, even where the QPAM has final decision-making authority over the transaction.
- The proposal's transaction-based recordkeeping requirement is inconsistent with the purpose of the QPAM exemption, intended to facilitate efficient investment of plan assets. DOL should modify the recordkeeping requirement to be process-based rather than transactional, as described further herein, and should not require such records to be available beyond employees of DOL and the IRS.
- The requirement to notify DOL of reliance on the QPAM Exemption does not appear to serve a worthwhile purpose, would be incompatible with common ways asset managers use the QPAM Exemption, and could lead to confusion in the marketplace. It also presents the opportunity for foot faults and sudden unjustified loss of the ability to rely on the exemption.
- DOL should not propose increases to the asset manager eligibility thresholds without further study. As proposed, the significant increases would be extremely disruptive to those plans whose managers are impacted, could run smaller managers out of business, and would contribute to the overall decline in QPAMs—and corresponding reduction in choice and market competition—that will likely result from this proposal.
- DOL would have benefited from input from the regulated community prior to proposing such a sweeping overhaul of an exemption that has served the mutual interests of the retirement community. DOL, however, choose to not seek any plan sponsor, plan provider, or other stakeholder input before crafting the proposal. Given the need to now make significant changes to the proposal, we respectfully urge DOL to withdraw the proposed amendment and repropose it—taking into account the

comments received. If DOL does not withdraw the proposed amendment, DOL should clarify that all changes will apply prospectively only. Further, DOL should provide a one-year transition period for QPAMs to come into compliance with any new requirements.

#### **Next Steps: Hearing and Reopening of Comment Period**

As a reminder, DOL announced that it will hold a virtual public hearing on the proposal.<sup>[3]</sup> DOL will reopen the comment period again for a supplemental comment period beginning on the hearing date and ending approximately 14 days after DOL publishes the hearing transcript. The hearing will be held via WebEx on November 17, 2022, and November 18, 2022 (if necessary).

Shannon Salinas  
Associate General Counsel - Retirement Policy

#### **Notes**

[1] For a summary of the proposed amendments, see ICI Memorandum No. 34239, dated August 3, 2022, available at <https://www.ici.org/memo34239>. The comment period was originally scheduled to be open for only 60 days, and ICI joined several other trade organizations in a letter requesting that DOL extend the comment period by an additional 60 days. See ICI Memorandum No. 34267, dated August 22, 2022, available at <https://www.ici.org/memo34267>. In response, DOL extended the comment period for an additional 15 days, through October 11, 2022. See ICI Memorandum No. 34280, dated September 7, 2022, available at <https://www.ici.org/memo34280>.

[2] Our concerns regarding this issue are similar to the concerns we voiced in our comment letter to DOL regarding its proposal on procedures governing the filing and processing of prohibited transaction exemption applications. For a summary of the proposal, see ICI Memorandum No. 34068, dated March 9, 2022, available at <https://www.ici.org/memo34068>. For a summary of our comment letter, see ICI Memorandum No. 34166, dated June 1, 2022, available at <https://www.ici.org/memo34166>. DOL held a hearing on this proposal on September 15, 2022. The transcript is available at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC05/hearing-transcript.pdf>.

[3] The notice was published at 87 Fed. Reg. 54715 (September 7, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-09-07/pdf/2022-19317.pdf>.