

# How to Lose (or not Lose) the QPAM Exemption in 75 Days - The DOL's Final QPAM Amendments

April 12, 2024

On April 3, 2024, the U.S. Department of Labor (the “DOL”) published the much-anticipated final amendments<sup>1</sup> (the “Amendments”) to the DOL’s Prohibited Transaction Exemption 84-14, as amended (the “QPAM Exemption”). The Amendments reflect a mix of previously proposed changes<sup>2</sup> (the “Proposed Amendments”) (some of which were revised to reflect points raised in the more than 200 comment letters<sup>3</sup> received by the DOL), as well as some new concepts not previously contained in the Proposed Amendments.<sup>4</sup> The Amendments will become effective on June 17, 2024 (the “Effective Date”). Below please find a set of Q&As summarizing high-level action items for the near term.

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<sup>1</sup> Amendment to Prohibited Transaction Class Exemption 84-14 for Transactions Determined by Independent Qualified Professional Asset Managers (the QPAM Exemption), 89 Fed. Reg. 23,090 (Apr. 3, 2024) (to be codified at 29 C.F.R. pt 2550), available [here](#).

<sup>2</sup> See Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption), 87 Fed. Reg. 45,204 (July 27, 2022) (to be codified at 29 C.F.R. pt 2550). See also our publications, Selected Issues for Boards of Directors 2023 and Selected Issues for Boards of Directors 2024, for summaries of the Proposed Amendments, available [here](#) and [here](#), respectively.

<sup>3</sup> See, e.g., Dyer *et al.*, Comment Letter on Proposed Amendments to Prohibited Transaction Class Exemption 84-14 (Jan. 6, 2023), available [here](#).

<sup>4</sup> For example, the Amendments introduce a new ineligibility trigger for “Prohibited Misconduct” that consists of final judgments, or court-approved settlements by a Federal or State criminal or civil court in a proceeding brought by the DOL, the Department of Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve Bank, the Office of the Comptroller of the Currency, the Federal Depository Insurance Corporation, the Commodities Futures Trading Commission, a state regulator, or state attorney general to have “participated in” one or more of a list of categories of conduct irrespective of whether the court specifically considers this exemption or its terms. See the Amendments at 23,143. In addition, the Amendments introduce a requirement to notify the DOL when the QPAM, any Affiliate thereof, or any owner, direct or indirect, of a 5% or more interest in the QPAM executes an agreement with a non-U.S. government that is substantially-equivalent to the U.S. non-prosecution (“NPA”) or deferred prosecution agreement (“DPA”) picked up by the Amendments as ineligibility triggers. Notice must be sent to the DOL within 30 calendar days after the execution date of the substantially-equivalent non-U.S. NPA or DPA, and must include a description of the substantially-equivalent non-U.S. NPA or DPA and the name of and contact information for the QPAM. See the Amendments at 23,139.

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**Q: I sponsor investment funds. While some of our funds have ERISA and/or IRA investors, all of our funds are structured to avoid holding ERISA “plan assets” (i.e., because they rely on the “less than 25%” exception, the VCOC or REOC exception, or the “publicly offered securities” exception). What do I need to do?**

**A:** To the extent that you do *not* intend to operate any ERISA “plan asset” funds:

- Prior to the Effective Date, you should review your fund documentation (including side letters) and take an inventory of any instances in which you have contractually agreed with your investors to qualify as a “qualified professional asset manager” (as defined in the QPAM Exemption) (a “QPAM”). Note that the particular wording of QPAM-related agreements may impact your next steps (e.g., agreeing to qualify as a QPAM vs. agreeing to comply with the conditions of the QPAM Exemption).
- In order to qualify as a QPAM, an entity must meet certain thresholds relating to capitalization, net worth and/or assets under management. The Amendments increase these thresholds in rolling 3-year increments (beginning in 2024). The increases are intended to standardize the thresholds to current values, updated based on price inflation since the QPAM Exemption was initially released in 1984, using the Bureau of Labor Statistics Consumer Price Index.<sup>5</sup> Under the Amendments, as of the end of an investment adviser’s most recent fiscal year ending before December 2024,<sup>6</sup> the adviser must

have: (1) total client assets under management in excess of \$101,956,000 and (2) either shareholders’ or partners’ equity – or payment of liabilities guaranteed by an affiliate, another entity that could qualify as a QPAM, or a broker-dealer with net worth – in excess of \$1,570,300. You will need to ensure timely compliance with the increased thresholds in 2024 and put in place processes for continued compliance with the rolling increases.<sup>7</sup>

- Pursuant to the Amendments, managers must notify the DOL of their intent to rely on the QPAM Exemption within a set timeframe.<sup>8</sup> To the extent that you *may* need to rely on the QPAM Exemption in the future (e.g., upon the occurrence of an ERISA “plan asset” event), careful consideration should be given to this new condition and the timing for notification since you will not be able to rely on the QPAM Exemption unless you have provided proper notice to the DOL.
- You should carefully consider any new side letter provisions and/or other fund documents that could create a contractual obligations with respect to the QPAM Exemption.

**Q: I am an asset manager and I sponsor investment funds, some of which are permitted to hold “plan assets” subject to ERISA and/or Section 4975 of the Internal Revenue Code. I also have (or anticipate having) some investment management agreements with ERISA plans and/or IRAs. In addition, I know that I have agreed (as a contractual matter) to be a QPAM and/or to**

<sup>5</sup> Prior to the Effective Date, these thresholds are as follows: (1) in the case of a bank or trust company, savings and loan, or insurance company, a net worth of at least \$1 million; and (2) in the case of an investment manager registered under the Investment Advisers Act of 1940, total client assets under management in excess of \$85 million as of the end of its most recent fiscal year, and shareholders’ or partners’ equity in excess of \$1 million as shown on its most recent balance sheet prepared within the prior 2 years. Note that the QPAM Exemption provides an alternative to meeting the shareholders’/partners’ equity threshold (i.e., a guarantee).

<sup>6</sup> If your most recent fiscal year ended prior to the Effective Date, you should pay careful attention to the timing for compliance with the increased thresholds.

<sup>7</sup> Pursuant to the Amendments, the additional rolling increases are as follows: (1) for investment advisers, total client assets under management in excess of \$118,912,000 (end of 2027), and \$135,868,000 (end of 2030), and either shareholders’ or partners’ equity – or payment of liabilities guaranteed by an affiliate, another entity that could qualify as a QPAM, or a broker-dealer with net worth – in excess of \$2,140,600 (end of

2027), and \$2,720,000 (end of 2030); (2) for banks, equity capital in excess of \$1,570,300 (end of 2024); \$2,140,600 (end of 2027), and \$2,720,000 (end of 2030); (3) for savings and loan associations equity capital or net worth in excess of \$1,570,300 (end of 2024), \$2,140,600 (end of 2027), and \$2,720,000 (end of 2030); and (4) for insurance companies, net worth in excess of \$1,570,300 (end of 2024), \$2,140,600 (end of 2027), and \$2,720,000 (end of 2030). See the Amendments at 23,115.

<sup>8</sup> Any entity that relies upon the QPAM Exemption must notify the DOL via email and include the legal and operating name(s) of each business entity relying upon the QPAM. This notification must be provided to the DOL only once unless there is a change to the legal or operating name(s) or an entity is no longer relying on the QPAM Exemption. This notice must be provided to the DOL within 90 calendar days of the entity’s reliance on the QPAM Exemption. If an entity fails to provide notice to the DOL within the initial 90-day period, the entity has an additional 90 days to notify the DOL, provided that such notice must include an explanation regarding the failure to provide notice within the initial 90-day period. See the Amendments at 23,140.

*comply with the conditions of the QPAM Exemption. What do I need to do?*

A: Prior to the Effective Date:

- As a threshold matter, you will need to make a determination as to whether you will (or wish to retain the flexibility to) rely on the QPAM Exemption. As part of this determination, you should consider whether you will want to retain the flexibility to rely on alternative exemptive relief and what, if any, changes may be needed to your documentation to permit you to do so.<sup>9</sup>
- You should review your fund documents (including side letters) and all other applicable agreements and take inventory of when you have made QPAM-related representations.<sup>10</sup>
- You should also take inventory of all arrangements where you currently rely on the QPAM Exemption (or may wish to rely on the QPAM Exemption in

the future) regardless of whether you are contractually obligated to do so.<sup>11</sup>

To the extent that you will (or wish to retain the flexibility to) rely on the QPAM Exemption post-Effective Date:

- As noted above, the Amendments require notice to the DOL as a condition for relief under the QPAM Exemption. You will need to comply with this notice requirement within the requisite timeframe.
- The QPAM Exemption is not available if the QPAM, any of its affiliates, or any direct or indirect 5% or more owner of the QPAM has been convicted of certain crimes.<sup>12</sup> Ineligibility as a result of the foregoing lasts for 10 years from either the conviction date or the release from imprisonment, whichever is later. The Amendments add additional ineligibility triggers for certain non-U.S. convictions<sup>13</sup> and “Prohibited Misconduct.”<sup>14</sup> Additionally, the Amendments require notice to be provided to the DOL of certain non-U.S. NPAs and DPAs.<sup>15</sup> Prior to the Effective Date, you should: (1)

<sup>9</sup> One potential alternative is the statutory exemption under Section 408(b)(17) of ERISA (commonly referred to as the “Service Provider Exemption”), which allows certain purchases, exchanges, sales, leases, extensions of credit and transfers of assets between a plan and a service provider, other than a fiduciary or an affiliate that has or exercises fiduciary functions regarding the assets involved in the transaction. The exemption requires that the plan receive no less, and pay no more, than adequate consideration, in connection with the transaction. 29 U.S.C. § 1106. Other potential alternatives include Part II of Prohibited Transaction Class Exemption 75-1 and Section 408(b)(5) of ERISA for certain transactions involving collective investment trusts.

<sup>10</sup> As noted above, special attention should be paid to the wording of such language.

<sup>11</sup> Section I(c) of the Amendments expands the language relating to the QPAM’s role in the transaction. More specifically, the Amendments makes the following changes to Section I(c): “The terms of the transaction are negotiated on behalf of the, commitments, and investment of fund by assets, and any associated negotiations are determined by the QPAM (or under the authority and general direction of, the QPAM, and either) which represents the interests of the Investment Fund. Either the QPAM, or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM, makes the decision on behalf of the Investment Fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement, or understanding designed to benefit Party in Interest. In exercising its authority, the QPAM must ensure that any transaction, commitment, or investment of fund assets for which it is responsible is based on its own independent exercise of fiduciary judgment and free from any bias in favor of the interests of the plan sponsor or other parties in interest. The QPAM may not be appointed or relied upon to uncritically approve transactions, commitments, or investments negotiated, proposed, or approved by the plan sponsor, or other parties in interest. The prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purposes. No relief is provided under this exemption for any transaction that has been planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval to the extent the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c).” See the Amendments at 23,138.

<sup>12</sup> A condition for relief under the QPAM Exemption is that neither the QPAM nor any of its affiliates (or any direct or indirect 5% or more owner of the QPAM) has been convicted in a U.S. federal or state court 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; or any crime that is identified or described in ERISA section 411.” See the Amendments at 23,143.

<sup>13</sup> The Amendments add an ineligibility trigger for a conviction by a non-U.S. court of competent jurisdiction as a result of a crime, however denominated by the laws of the relevant non-U.S. government, that is a substantially-equivalent offence to those described in footnote 12 above. This ineligibility trigger excludes convictions and imprisonments that occur within a non-U.S. country that is included on the Department of Commerce’s list of “foreign adversaries.” See the Amendments at 23,143.

<sup>14</sup> For these purposes, “Prohibited Misconduct” includes (1) NPAs or DPAs entered into on or after June 17, 2024 with a U.S. federal or state prosecutor’s office or regulatory agency, where the factual allegations that form the basis for the NPA or DPA would have constituted a crime described in Section VI(r) of the QPAM Exemption if they were successfully prosecuted; and (2) final judgments, or court-approved settlements by a Federal or State criminal or civil court in a proceeding brought by the DOL, the Department of Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve Bank, the Office of the Comptroller of the Currency, the Federal Depository Insurance Corporation, the Commodities Futures Trading Commission, a state regulator, or state attorney general to have “participated in” one or more of the following categories of conduct irrespective of whether the court specifically considers the QPAM Exemption: (i) engaging in a systematic pattern or practice of conduct that violates the conditions of the QPAM Exemption in connection with otherwise non-exempt prohibited transactions; (ii) intentionally engaging in conduct that violates the conditions of the QPAM Exemption in connection with otherwise non-exempt prohibited transactions; or (iii) providing materially misleading information to the DOL, the Department of Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve Bank, the Office of the Comptroller of the Currency, the Federal Depository Insurance Corporation, the Commodities Futures Trading Commission, a state regulator or a state attorney general in connection with the conditions of the QPAM Exemption. See the Amendments at 23,143.

<sup>15</sup> See footnote 8 above. The Amendments require that notice be given to the DOL when a QPAM, any affiliate thereof, or any owner, direct or indirect, of a 5% or more interest

determine whether you have any circumstances that could be implicated as a result of the expanded ineligibility triggers; and (2) ensure that you have adequate processes in place to identify any circumstances that may be implicated by the new ineligibility triggers. You should consider whether you need to put in place new processes to monitor the broader universe of ineligibility triggers with respect to the QPAM's affiliates and its 5% or more (direct or indirect) owners.

- You should take inventory of any agreements with non-U.S. governments that may become final post-Effective Date. With respect to any such agreements, you will need to make a determination as to whether they may be deemed to be substantially-equivalent to the U.S. NPAs and DPAs that constitute ineligibility triggers pursuant to the Amendments.<sup>16</sup> The Amendments require notice to the DOL within 30 calendar days after the execution date of any substantially-equivalent non-U.S. NPA or DPA. Such notice must include a description of the substantially-equivalent non-U.S. NPA or DPA and the name of and contact information for the QPAM. The DOL noted that QPAMs should err on the side of caution when determining whether an agreement with a non-U.S. NPA or DPA must be reported.<sup>17</sup>
- To the extent that you have any existing (or pending) circumstances that could implicate one of the new or existing ineligibility triggers, carefully consider next steps, including whether to (1) rely upon the 1-year transition period relief incorporated by the Amendments, (2) seek an individual

exemption from the DOL and/or (3) cease relying on the QPAM Exemption.<sup>18</sup>

- The Amendments impose new recordkeeping requirements on QPAMs.<sup>19</sup> Subject to certain exceptions (*i.e.*, for privileged trade secrets, privileged commercial or financial information of the QPAM, or information that identifies other individuals), these records are required to be available for inspection for 6 years from the date of each transaction that relies on the QPAM Exemption. Prior to the Effective Date, you should review these new recordkeeping requirements to ensure that you have adequate processes in place to ensure compliance (and to consider whether certain information may be subject to an exception).

***Q: I am a sponsor of an ERISA-governed plan. What do I need to do?***

- A: If you are a QPAM with respect to your own plan:
- The considerations summarized above apply with respect to your own plan (*i.e.*, determining whether to continue to rely on the QPAM Exemption and ensuring compliance with the new requirements).
- If you are not a QPAM with respect to your own plan:
- Consider touching base with your existing service providers to confirm whether they intend to continue relying on the QPAM Exemption, as applicable, and to discuss what steps they are taking to ensure compliance with the new conditions for relief.
  - Your service providers may reach out to you to request amendments to existing arrangements (*e.g.*,

in the QPAM executes an agreement with a non-U.S. government that is substantially-equivalent to the ineligibility triggers for U.S. NPAs and DPAs. *See* the Amendments at 23,101; 23,104; 23,139.

<sup>16</sup> *See* the Amendments at 23,143.

<sup>17</sup> *See* the Amendments at 23,101; 23,104; 23,139.

<sup>18</sup> Any QPAM that becomes ineligible as a result of a criminal conviction or "Prohibited Misconduct" may wish to rely on the 1-year transition period incorporated by the Amendments. This transitional relief is available for existing clients provided that certain additional requirements are satisfied including, without limitation, that the QPAM (1) provide notice of its ineligibility to the DOL and each ERISA client, (2) indemnify, hold harmless and restore actual losses to such clients as a result of any claim arising out of the conduct that rendered the QPAM ineligible, and (3) terminate the individual(s) that participated in the conduct rendering the QPAM ineligible. After the 1-year transition period expires, the QPAM may not rely on the QPAM Exemption until

the expiration of the 10-year ineligibility period unless it obtains an individual exemption. *See* the Amendments at 23,139.

<sup>19</sup> Pursuant to the Amendments, the QPAM must, for 6 years, maintain the records necessary to enable (1) the DOL, Internal Revenue Service, or another state or federal regulator, and (2) any fiduciary, contributing employer, or employee organization whose members are covered by an ERISA plan (or IRA) whose assets are managed by the QPAM (and the participants and beneficiaries of any such plan) to determine whether the conditions of the QPAM Exemption have been satisfied. If the QPAM refuses to disclose requested information because of the applicability of an exception, the QPAM must provide written notice to the requesting party explaining the applicable exception and providing notice that the DOL may request such information. *See* Amendments at 23,144. The relief provided by the QPAM Exemption will not fall away solely because the QPAM's records are unavailable prior to the end of the 6-year period (*i.e.*, lost or destroyed) due to circumstances beyond the QPAM's control. *See* the Amendments at 23,144.

to revise/delete references to the QPAM Exemption and provide increased flexibility to rely on other applicable prohibited-transaction exemptions, including Section 408(b)(17) of ERISA.

***Q: I am a financial institution that provides services in connection with swaps, futures and other financial derivatives. What do I need to do?***

A: As a result of the Amendments:

- To the extent that your ISDAs, MRAs or other agreements contain QPAM-related representations, counterparties may reach out to request modifications to such representations to provide flexibility to rely on other prohibited transaction exemptions.
- You may want to review your form/standard agreements and consider whether to develop more flexible ERISA representations relating to other applicable prohibited transaction exemptions (*e.g.*, Section 408(b)(17) of ERISA).
- To the extent that you have an in-house policy that requires QPAM-related representations, you may want to begin internal discussions as to whether or not you will agree to institute a more flexible approach with respect to other exemptive relief.

We are still in the early days of reviewing and considering the evolving compliance landscape for QPAMs under the Amendments. As we monitor developments and seek clarity with respect to ambiguities, we will provide further updates. Please do not hesitate to contact us with questions or to discuss the considerations summarized herein.

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