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Effect on Private Funds of Recent DOL Amendments to ERISA's Qualified Professional Asset Manager (QPAM) Exemption

By Sarah Downie

The U.S. Department of Labor (the "DOL") issued final amendments ("Amendments") to the DOL's Prohibited Transaction Exemption 84-14, as amended, (the "QPAM Exemption") on April 3, 2024. The Amendments become effective on June 17, 2024 (the "Effective Date").

As summarized below, the Amendments impact private funds and similar investment vehicles by imposing new notification requirements and capitalization thresholds, and by expanding the scope of prohibited misconduct.

This alert is directed primarily to sponsors of private funds that are structured to avoid holding "plan assets" under the Employee Retirement Income Security Act ("ERISA") by relying on an exception such as the "insignificant benefit plan investor"/"less than 25%" exception or the VCOC/REOC exception. However, the summary below under "QPAM Qualification Requirements" is pertinent to all vehicles, including those that hold "plan assets" and rely on the QPAM Exemption.

Fund Documentation Including Side Letters

Although certain private funds may be structured to avoid holding "plan assets," nonetheless, those funds may have agreed in a contract (including a side letter) to utilize the QPAM Exemption in certain circumstances. The language of the contract may be instructive. For example, the fund may have agreed in a side letter that the fund manager "maintain QPAM status" for the duration of the investor's investment regardless of whether the fund holds "plan assets." Alternatively, the fund manager may have agreed that if and when the fund holds "plan assets", the fund manager will qualify as a QPAM and satisfy any applicable conditions of the QPAM Exemption. Funds should carefully review all side letters and other contractual commitments including provisions in ISDAs or other derivatives contracts to determine the extent the fund has committed to QPAM qualification and QPAM Exemption compliance.

QPAM Qualification Requirements

- **DOL Notification**: The Amendments require any entity that relies on the QPAM Exemption to notify the DOL via email and provide the legal and operating name (or names) of each business entity relying on the QPAM Exemption. This notice must be provided only once (unless there is a change in name) within 90 calendar days of the entity's reliance on the QPAM Exemption. For any manager currently relying upon the QPAM Exemption, this notice must be provided within 90 days of the Effective Date (by no later than September 15, 2024 (the "Notification Deadline")). The DOL intends to maintain a publicly-available list of QPAMs on its website. If an entity fails to provide notice to the DOL, the Amendments provide for an additional period of 90 calendar days to notify the DOL and provide an explanation of the failure to initially notify the DOL. If an entity fails to comply with this notification requirement, it will not be able to rely on the QPAM Exemption. As a result, to the extent a fund relies now or may need to rely on the QPAM Exemption in the future, the fund should consider notifying the DOL by the Notification Deadline. Additionally, to the extent a fund may have contractually committed to qualify as a QPAM or maintain QPAM status at any time, the fund should consider notifying the DOL by the Notification Deadline.
- **Assets Under Management/Capitalization**: Prior to the Amendments, the QPAM Exemption provided that a registered investment adviser was required to have a total client AUM in excess of \$85,000,000 as of the last day of its most recent fiscal year and shareholders' or partners' equity in excess of \$1,000,000 (as shown in the most recent balance sheet prepared in accordance with GAAP within the two years immediately preceding a transaction undertaken pursuant to the QPAM exemption. The Amendments increase these thresholds as follows:
 - Effective the last day of the fiscal year ending no later than December 31, 2024: AUM – \$101,956,000; shareholders'/partners' equity – \$1,346,000
 - Effective the last day of the fiscal year ending no later than December 31, 2027: AUM – \$118,912,000; shareholders'/partners' equity – \$1,694,000
 - Effective the last day of the fiscal year ending no later than December 31, 2030: AUM – \$135,868,000; shareholders'/partners' equity – \$2,040,000
 - By publication in the Federal Register, the DOL will make subsequent annual adjustments to AUM and shareholders'/partners' equity

To the extent a fund has committed to maintain QPAM status or qualify as a QPAM, including whether the fund desires the flexibility to utilize the QPAM Exemption in the future, may need to rely on the QPAM Exemption in the future, consideration should be given to these new thresholds and whether the fund meets them on the Effective Date.

- **Recordkeeping**: The Amendments require QPAMs to comply with new recordkeeping requirements, subject to certain limited exceptions. For six years, the QPAM must maintain necessary records to enable certain parties including the DOL, the Internal Revenue Service, other state and federal regulators, fiduciaries, applicable employers and unions and plan participants to determine whether the conditions of the QPAM Exemption have been satisfied. Consideration should be given to these new requirements prior to the Effective Date to determine whether and when these requirements may need to be satisfied. For example, although a fund may not hold "plan assets" on the Effective Date, if it discovers in the future that it holds "plan assets" and requires support to demonstrate that the QPAM Exemption exempted transactions from a particular date, it will need to comply with the recordkeeping requirements (or meet an exception) on that date – even if the date of reliance precedes the date of discovery.

- **Prohibited Misconduct:** Prior to the Amendments, an entity became ineligible for the QPAM Exemption if the QPAM or an affiliate had been convicted of certain crimes. The Amendments provide for new instances of ineligibility, including a new category of “Prohibited Misconduct” as well as certain non-U.S. convictions. Prohibited Misconduct includes certain non-prosecution agreements and deferred prosecution agreements entered into with a U.S. federal or state prosecutor’s office or regulatory agency. Prior to the Effective Date, funds that rely on or may need to rely on the QPAM Exemption in the future (including those that may not hold “plan assets” but have committed to maintaining QPAM status or similar) should determine whether the expanded misconduct categories have been or may be triggered, as well as if processes are in place to monitor the conduct of all fund affiliates.

Checklist/Next Steps Prior to the Effective Date

- Review all fund documentation including side letters and ISDAs/derivative contracts. Has the fund committed to QPAM Exemption compliance with any investors or other counterparties now or at any time in the future?
- Consider DOL notification requirements in light of the September 15, 2024 notification deadline, taking into account contractual commitments as well as desire to rely on the QPAM Exemption (or retain flexibility to rely on the QPAM Exemption).
- Does the fund have sufficient assets under management and capitalization to qualify under the QPAM Exemption in light of the Amendments’ requirements?
- Consider recordkeeping requirements. Does the fund retain sufficient records to support QPAM Exemption compliance and QPAM qualification?
- Has the fund or any affiliate committed prohibited misconduct under the expanded requirements? Does the fund have the ability to monitor all affiliates given the expanded requirements?

We will continue to keep you updated on developments in DOL guidance, including any updated considerations with respect to the Amendments. In the meantime, please do not hesitate to contact us with any questions on this alert.

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