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October 10, 2022

Via Electronic Submission

The Honorable Ali Khawar
Acting Assistance Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

RE: Proposed Amendments to Prohibited Transaction Class Exemption 84–14; RIN 1210 ZA07 |

Dear Acting Assistant Secretary Khawar:

Dechert LLP ("Dechert") appreciates the opportunity to provide these comments to the Department of Labor (the "Department") in connection with the above-referenced proposed amendments (the "Proposed Amendments") to Prohibited Transaction Class Exemption ("PTCE") 84-14, as amended (the "QPAM Exemption").[1] The QPAM Exemption (if its conditions are met) generally provides an exemption from the per se prohibited transaction rules of Section 406(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and Section 4975(c)(1)(A)-(D) of the Internal Revenue Code of 1986, as amended (the "Code") with respect to plans that are subject to Title I of ERISA or Section 4975 of the Code ("Plans").[2]

Dechert is an international law firm with a wide-ranging practice that serves clients in the United States and globally involving retirement plan investments. We represent a broad swath of investment managers, fund sponsors and fund complexes,

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[1] Unless the context indicates otherwise, section references herein are to sections of the QPAM Exemption.
[2] For convenience, we will generally refer to ERISA (and use its nomenclature) in the discussion herein to also be applicable to the corresponding provisions (and nomenclature) of the Code. We note in this regard that certain administrative responsibilities regarding (among other things) ERISA's and the Code's prohibited transaction provisions have been consolidated with the Department. See Reorg. Plan No. 4 of 1978, 3 C.F.R. (1978) Comp. 332, §102(a); see also Pub. L. No. 98-532, 98 Stat. 2705 (statutorily ratifying and reaffirming then-prior reorganization plans).

banks, broker-dealers, insurance companies and other financial intermediaries and also represent Plans and their fiduciaries. Our combined years of professional experience give us a perspective that we hope will be useful to the Department in considering the Proposed Amendments.

A number of our clients advance the cause of benefits security through their products and services. Many are asset managers that act as qualified professional asset managers ("QPAMs") under the QPAM Exemption or are institutions that trade with or provide financial services to managers that manage Plan assets, and others are Plan investment committees charged with prudently selecting and monitoring Plan investments.

Congress in enacting ERISA recognized that the inflexible enforcement of the prohibited transaction rules was not in the interest of Plans, and that the Department (and, as applicable, the Department of the Treasury) should, pursuant to Section 408(a) of ERISA, grant exemptions in situations where the relief is administratively feasible and in the interest of Plans.[3] Consistently with the foregoing, the QPAM Exemption is predicated on the Department's belief that "as a general matter, transactions entered into on behalf of plans are most likely to conform to ERISA's general fiduciary standards where the decision to enter into the transaction is made by an independent fiduciary," and was promulgated in light of the Department's belief that it would be appropriate "to eliminate the need for individual exemptions wherever feasible, and that substantial deregulation in this area can be accomplished by administrative means without sacrificing the interests of plan participants and beneficiaries."[4]

We believe that the QPAM Exemption has been successful in promoting administrative efficiency and in providing consistency and certainty for Plans about the types of transactions in which they can engage without need for Plan-by-Plan (or transaction-by-transaction) individual exemptive relief. We note that, while the Department has issued exemptions tailored for specific types of investment vehicles and

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[3] See, e.g., ERISA Conference Report 93-1280 at 309. ("[T]he conferees recognize that some transactions which are prohibited (and for which there are no statutory exemptions) nevertheless should be allowed in order not to disrupt the established business practices of financial institutions which often perform fiduciary functions in connection with these plans consistent with adequate safeguards to protect employee benefit plans.").

[4] 47 Fed. Reg. 56,945, 56,947 (Dec. 21, 1982).

specific types of transactions,[5] the QPAM Exemption provides for broad relief with conditions that are not generally tied to the type of transaction or service involved, without requiring the use of any particular form or type of investment vehicle.[6]

We are concerned that certain of the Proposed Amendments may undermine the usability of and access to this important exemption, calling into question many QPAMs' ability to manage Plan assets under the QPAM Exemption. Thus, for example, we believe that, if the Proposed Amendments are adopted in their current form, they could (i) introduce increased administrative burdens by leading to more, rather than less, applications by managers for individual relief for the manager, and (ii) in certain cases, lead to an unwillingness of managers to continue to act as such, thus in turn leading to a decrease in the choice of managers and, by extension, in investment opportunities.

There is also the risk that, if managers start to try to make increased use of exemptions other than the QPAM Exemption, transaction counterparties and other parties presently dealing with plans will not be sanguine with the use of such other exemptions, precisely because they too prefer the history and utility of the QPAM Exemption discussed above. The non-Plan parties are potentially subject to confiscatory excise taxes on prohibited transactions where no exemption is available, thus potentially leading to extreme nervousness when dealing with Plans, especially without the QPAM Exemption. We believe that the Department should be concerned with adverse impacts on manager choices and investment opportunities available to Plans, as we understand has recently been the case when it seemed to appear that major institutions were about to consider stopping writing covered swaps with Plans, resulting in what we understand was the expedited consideration of what eventually became a key Advisory Opinion.[7]

(Please note that we request below (immediately before the "Conclusion" section hereof) that we be permitted to testify at the upcoming hearing relating to the Proposed Amendments.)

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[5] Part I(b) precludes reliance on the QPAM Exemption for transactions described in certain other enumerated exemptions.
[6] Compare the QPAM Exemption with, e.g., PTCE 75-1, Pt. II (for securities) and PTCE 2006-16 (for securities lending) (both being examples of PTCEs for certain types of transactions); and PTCE 90-1 (for insurance company pooled separate accounts) and PTCE 91-38 (for bank collective investment funds) (both being examples of PTCEs for certain types of investment vehicles).
[7] Dep't Adv. Opn. 2013-01A (Feb. 7, 2013).

Certain Recommendations

We make a number of recommendations below, including the following:

- Rules governing misconduct
    - The Department should not include the new and additional grounds for foreclosing access to the relief afforded by the QPAM Exemption that it is proposing to add. If the Department nevertheless does proceed with any of the currently proposed additions, then (i) it should provide for improved administrative due-process protections (as compared with those in the Proposed Amendments) for the QPAM, (ii) if the Department decides to include DPAs (as defined below), it should nevertheless exclude NPAs (as defined below), (iii) if it decides to include DPAs or NPAs, foreign causes of action should not be included, and (iv) any inclusion of new categories of Prohibited Misconduct should be effective only prospectively.
    - The Department should not require QPAMs to amend their management agreements or require that QPAMs agree to new indemnification and indemnification-related rights. If the Department rejects the foregoing, any requirements along these lines become effective if and when a QPAM experiences a Section I(g) event, and the termination and indemnification-related provisions should not apply to breaches of contract or violations of law that are unrelated to the QPAM Exemption.
    - The Department should take this opportunity to modify Section I(g) so that, regarding non-U.S. convictions, Section I(g) covers only convictions of affiliates where the parties convicted can influence the QPAM's policies or have power or influence to compromise the QPAM's ERISA compliance, or where the crime otherwise involves the QPAM. Indeed, we would go farther and narrow the reach of Section I(g) regarding both U.S. and non-U.S. crimes, as we believe that such a modification would be appropriate as to all conviction, whether domestic or foreign.

  - As to the period triggered by purported misconduct under Section I(g), (i) the Department should permit an 18-month period instead of a "winding down" period in which the QPAM can operate in reliance on the QPAM Exemption while it seeks individual relief (if and to the extent that the investing Plans would want to continue to retain the QPAM in such circumstances), and (ii) the arguably pejorative "winding down" terminology for such period should be replaced with more neutral nomenclature, such as, for example, a "transition," "transitional" or "intermediate" period.

- The Department should not make any changes to Part I(c) of the QPAM Exemption in order to attempt to clarify the Department's position regarding the so-called "rent-a-QPAM" or "QPAM-for-a-day" situation. If contrary to our recommendation, the Department nevertheless seeks to make such changes, we would suggest that any proposal amend or supplement Part I(c) or otherwise make material changes to the manner in which various plan fiduciaries interact should be the subject of a separate, carefully crafted proposal on which the market would be permitted to comment, which would be made only after a regulatory impact analysis focused specifically on these matters.

- The Department should not impose a new registration requirement.

- The Department should conduct a new economic analysis that takes these points into consideration with additional opportunities for notice and comment prior to any adoption of any amendments to the QPAM Exemption.

DISCUSSION

I. Background

In releasing the proposal that eventually became the QPAM Exemption in 1982 (the "1982 Proposal"), the Department noted that it was attempting to "improve the administration of the prohibited transaction rules" because it "recognize[d] the general perception that in many instances the prohibited transaction rules continue to present complex problems of compliance for fiduciaries charged with responsibility for employee benefit plan assets." The Department also noted that it "believes that, as a general matter,

transactions entered into on behalf of plans with parties in interest are most likely to conform to ERISA's general fiduciary standards where the decision to enter into the transaction is made by an independent fiduciary."[8] The Department looked to Section 3(38) of ERISA, which lists the specific types of entities that Congress had allowed to serve as an "investment manager" under ERISA, and "recognize[d] that each of the categor[ies] is subject to Federal or State agencies." In addition, in providing for minimum assets-under-management and capitalization thresholds, the Department indicated that QPAMs must be "established institutions which are large enough to discourage the exercise of undue influence upon their decision-making processes by parties in interest."[9] We view these basic rules as generally promoting the goals of independence, experience and wherewithal of those managers that would be QPAMs.

Other key conditions of the QPAM Exemption contain safeguards that may be seen as centering around the independence of the QPAM's decision-making process, as follows:

- Section I(a) requires that neither the counterparty nor service provider party-in-interest with whom the QPAM decides to commit Plan assets in a given transaction, nor any of their respective affiliates (as defined), has the power to appoint or terminate the QPAM as manager of the Plan assets involved or the authority to negotiate the terms of the applicable management agreement;

- Section I(c) generally requires that the QPAM negotiate and approve the transaction in reliance effected in reliance of the QPAM Exemption, without any veto or other similar power in favor of any other party;

- Section I(d) requires the party in interest dealing with the Plan not to be the QPAM or a party related (under the QPAM Exemption) to the QPAM;

- Section I(e) precludes reliance on the QPAM Exemption with respect to Plans whose assets managed by the QPAM, together with the assets of certain related Plans also managed by the QPAM, constitute more than 20% of the total client assets managed by the QPAM; and

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[8] 47 Fed. Reg. 56,945, 56,946, (Dec. 21, 1982).
[9] 47 Fed. Reg. at 56,947.

- Section I(f) requires that the terms of the transaction be at least as favorable to the Plan as the terms generally available in arm's length transactions between unrelated parties.

In addition, Section I(g) provides that the QPAM cannot rely on the QPAM Exemption if it or its affiliates (as defined) have been convicted of various crimes that involve abuse, misuse of a position of trust, or felonies described in Section 411 of ERISA. In proposing the QPAM Exemption in 1982, the Department noted that a "QPAM and those who may be in a position to influence its policies, are expected to maintain a high degree of integrity."[10] The Department has indicated that the proposed changes to Section I(g) are the driving force behind the Proposed Amendments, stating in the Press Release associated with the Proposed Amendments that they would provide protection by "expanding the types of serious misconduct that disqualify plan asset managers from using the exemption, and by eliminating any doubt that foreign criminal convictions are disqualifying."[11]

II. Prohibited Misconduct

Section I(g) provides generally that, if a QPAM or affiliate thereof is or has been convicted of certain crimes, then for a period of 10 years the QPAM Exemption is not available as to that QPAM. Going back at least to the acquisition by American Express of the E.F. Hutton Group in 1988, the Department has appreciated that the failure to grant individual relief could have real and tangible disadvantages to Plans. In that instance, a loss of QPAM status to all members of the affiliated group because of an acquired entity's guilty plea to a covered criminal conviction would have resulted in Plans' inability to access "the full panoply of specialized investment advisory services demanded by employee benefit plans."[12]

In the Proposed Amendments, the Department has proposed to make a series of significantly expansive changes that would (i) increase the reach of Section I(g) generally regarding whether quasi-convictions would be disqualifying occurrences, (ii) add express

[10] *Id*.
[11] News Release, Department of Labor, US Department of Labor Proposes Amendment to Qualified Professional Asset Manager Exemption to Protect Benefit Plans, Participants, Beneficiaries (July 26, 2022), https://www.dol.gov/newsroom/releases/ebsa/ebsa20220726.
[12] PTIE granted to American Express Company & Affiliates, 59 Fed. Reg. 19,247 (Apr. 22, 1994).

rules relating to non-U.S. crimes and (iii) add a new class of disqualification criteria revolving around non-criminal "Prohibited Misconduct." In the preamble to the Proposed Amendments (the "Preamble"), the Department supported these changes by focusing on a desire to promote the integrity, care and undivided loyalty of the QPAM.

While we agree that integrity, care and loyalty are obviously important, we respectfully submit that these elements are already required by ERISA, and that there is no need to take the kind of extensive and expansive special steps that the Department is now proposing to take with respect to the provisions of Section I(g). In this regard we think it is important to remember that ERISA itself subjects fiduciaries to standards of behavior that have been referred to as "the highest known to law,"[13] and have been seen as requiring that Plan fiduciaries carry out their duties with an "an eye single" to the interests of plan participants and beneficiaries.[14] While the Department does acknowledge in the Preamble that ERISA is one of the "baseline[s]" with which QPAMs already are required to comply, the Department nevertheless suggests sweeping revisions to the QPAM Exemption's provision regarding criminal convictions.

We respectfully suggest that the Department may be proceeding here based on what we see as a fundamental misunderstanding of how QPAMs promote the availability of the QPAM Exemption. It has been reported that the Department has pointed to the purported touting by QPAMs of QPAM status as a gold standard of ERISA management:

> One of the things we have heard is that, even in situations where there's not a prohibited transaction, and the QPAM exemption or any other exemptive relief is not required, that in that circumstance, people put as a condition of their contracts that the entity they're contracting with is a QPAM. . . That is done in part, what we've been told, is because of this gold standard concept . . . I continue to have

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[13] See, e.g., Henry v. Champlain Enterprises, 334 F. Supp. 2d 252, 270-72 (N.D.N.Y. 2004), vacated and remanded, No. 07-0355-cv (2nd Cir. June 19, 2009), on remand, No. 01-CV-1681 (N.D.N.Y. May 21, 2010); see also *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d. Cir.), cert denied, 459 U.S. 1069 (1982); *Jones v. Am. Gen. Life & Accident Ins. Co.*, 370 F.3d 1065 (11th Cir. 2004), reh'g en banc denied, 116 Fed. Appx. 254 (2004); *ITPE Pension Fund v. Hall*, 334 F.3d 1011 (11th Cir. 2003); *Herman v. Nationsbank Trust Co.*, 126 F.3d 1354 (11th Cir. 1997).

[14] *Bierwirth*, 680 F.2d at 271.

> the fundamental question: What is the point of the gold standard if it doesn't have conditions?[15]

We submit that this perspective misconstrues the way in which QPAMs and the QPAM Exemption are perceived. We would suggest, based on our experience, that the QPAM *Exemption* is perceived as the gold standard of *exemptions*. In this regard, the QPAM Exemption has been relied upon for over four decades by managers for a significantly wide variety of transactions and has been the subject of greatly developed market practices and repeated interpretive guidance. The QPAM Exemption facilitates institutional investment managers' ability to direct Plan accounts into arrangements covered under transaction-specific exemptions as well as a whole host of other transactions which may not be so covered, including, as the Preamble notes, "complex transactions, such as when a QPAM designs a fund to replicate the return of certain commodities indices by investing in futures, structured notes, total return swaps, and other derivatives."[16]

In our experience, therefore, there is a tendency in the market for Plan fiduciaries to seek to retain QPAMs, not because the QPAM is somehow a better institution than the non-QPAM, but because the QPAM Exemption has such broad and developed utility. Furthermore, even if there are institutions that characterize themselves as superior because they are QPAMs, we would submit that such anecdotal behavior in the market does not justify the kind of substantial changes that the Department is now proposing. Thus, we would respectfully suggest that the Department not focus on the possibility that there may be QPAMs in the market that promote their QPAM status as somehow being indicative or a higher quality of service, and, at least as a general overall matter, not try to add extensive and expansive "integrity" provisions beyond those that are already in Section I(g) or otherwise fundamentally embedded in ERISA.

If the QPAM Exemption were to be amended as proposed, more QPAMs would be unable to use the QPAM Exemption, some QPAMs might leave the market and some managers might seek to use more cumbersome and broadly usable exemptions that have less interpretive and practical development. In that case, we fear that investment

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[15] Mejdrich, Kellie, "3 Issues To Watch In DOL's Transaction Waiver Proposal," *Law360* (Aug. 12, 2022); see also Croce, Brian, "DOL proposes update to QPAM exemption," Pensions & Investments (July 26, 2022).
[16] 87 Fed. Reg. at 45,206.

managers and other Plan fiduciaries might need to devote significantly more time and resources to avoiding nonexempt prohibited transactions and may also be put in the position of proceeding with less certainty as to compliance. As noted above, it is the time-tested QPAM Exemption, unlike many other exemptions, that provides for broad relief with conditions that are not generally tied to the type of transaction or service involved, without requiring the use of any particular form or type of investment vehicle.

We also note that the Department has separately made a proposal to revise the procedures under which applicants may seek prohibited transaction individual exemptions (the "PTIE Proposal"). The manner in which the QPAM Exemption will operate in practice after the QPAM Amendments are finalized, to the extent that QPAMs will be applying for individual relief under the amended QPAM Exemption, should be considered in light of the Department's finalization of the PTIE Proposal, especially if the PITE Proposal is ultimately finalized in a way that makes it more difficult for individual relief to be obtained.

A. Deferred Prosecution Agreements ("DPAs") and Non-Prosecution Agreements ("NPAs")

In Advisory Opinion 2013-05A (Nov. 1, 2013), the Department agreed that DPAs as described therein do not amount to a conviction for purposes of Section I(g). In the Proposed Amendments, the Department is proposing to include any conduct that forms the basis of a DPA-covered crime as disqualification triggers under Section 1(g). The Department is also proposing to include any conduct that forms the basis of an NPA-covered crime as disqualifying triggered under Section I(g).

Recommendations

- The Department should not expand the list of disqualification events to include DPAs and NPAs regarding covered crimes.
- If the Department does decide to expand the events to include such DPAs, it should nevertheless not include such NPAs.
- If the Department decides to include DPA or NPAs, foreign causes of action should not be included.

- If the Department includes DPAs or NPAs, it should only apply these triggers prospectively.

Detailed Discussion

There are non-ERISA reasons why an institution may agree to a DPA or NPA, some of which do not bear on what a trier of fact might determine on the merits. Even where an institution believes it has done no wrong and is confident that it would prevail on the merits in a court of law, there may be circumstances in which it may prefer such an arrangement. For example, the institution might not want to take the risk that it will fail to prevail. As another example, the institution might not want to expend the time and resources necessary to contest the allegations.

We see nothing that has transpired over time that justifies reopening the conclusion reached in Advisory Opinion 2013-05A with respect to DPAs. Indeed, we understand that concerns have been raised about the effect of expanding the reach of Section I(g) to DPAs on law-enforcement efforts by other U.S. agencies and even about possible extraterritorial impact on non-U.S. law enforcement. Regarding non-U.S. convictions in particular, because of the vagaries of and the Department's presumed lack of expertise regarding non-U.S. laws and practices, it may be especially important that there be no expansion to DPAs and NPAs; further discussion of these concerns is beyond the scope of this comment. In addition, in the case of NPAs, the Department's proposed expansion is arguably even more unwarranted than the proposal relating to DPAs, as, with NPAs, we understand that there is generally not even an admission of guilt.

B. Non-Criminal Misconduct

The Department has proposed to include as new categories of prohibited misconduct for Section I(g) purposes ("Prohibited Misconduct") (i) engaging in a systematic pattern or practice of violating the conditions of the QPAM Exemption with otherwise non-exempt prohibited transactions, (ii) intentionally violating the conditions of the QPAM Exemption in connection with otherwise non-exempt prohibited transactions; and (iii) providing materially misleading information to the Department in connection with the conditions of the QPAM Exemption.

Recommendations

- The Department should not include the foregoing additional classes of Prohibited Misconduct as new and additional grounds for foreclosing access to the relief afforded by the QPAM Exemption.
- If the Department nevertheless includes one or more of these additional classes of Prohibited Misconduct, then:
  - The timeframes to respond to allegations of Prohibited Misconduct and to be heard at a meeting with the Department should be increased to well beyond the timeframes in the Proposed Amendments, with the Department taking into account what presumably will be the comments of affected institutions and trade groups on this point in fixing the final timeframes.
  - The Department should otherwise assure that appropriate due process safeguards are implemented to protect QPAMs from arbitrary disqualification.
  - Any inclusion of new categories of prohibited misconduct should be effective only prospectively.
  - The provisions relating to mere participation in Prohibited Misconduct should be deleted.

Supporting Remarks

1. Inclusion of New Classes of Prohibited Misconduct, Generally

We believe that the proposed addition of new categories of "Prohibited Misconduct" in Section VI(s)(3), (4), and (5) raises a series of difficult issues. While we appreciate the Department's motivations to curb bad behavior, we believe the addition of these new grounds for disqualification fail to meet the Proposed Amendments' stated goal of providing "more clarity, protection and transitional support." Furthermore, the Department has not provided any empirical evidence of investment managers systematically intentionally violating or systematically violating the terms of the QPAM

Exemption. As a result, we question what benefit, if any, would be added with these provisions.

Perhaps more troubling is the move away from the certainty that the QPAM Exemption now provides by limiting the reach of the disqualification provision to criminal convictions. That seems to have been an intentional decision by the Department for clarity on the draconian foreclosing of access to the relief afforded by the QPAM Exemption for malfeasance. Our experience is that, where service providers face highly adverse contractual or other civil penalties, fines, terminations or other consequences for alleged intentional wrongdoing, the applicable standard often involves (and indeed under the QPAM Exemption presently involves) a criminal conviction so that there is external validation that the wrongdoing has occurred in a setting providing for the type of due process that is generally present where there is a criminal allegation, and so that the adverse consequences arise only after the certainty of an actual conviction. That way, mere allegations, and eventual determinations that lack full due process, are less likely to engender draconian harm to the services relationship, such as the kind of harm that would arise under the Proposed Amendments. Thus, we believe that the Department should not diverge from the certainty and clarity with which it proceeded in 1984 (and has thereafter proceeded) as to these points. These concerns arise again below in our discussion of due process, in the event that the Department ultimately decides to include non-criminal grounds for foreclosing access to the QPAM Exemption.

Thus, we believe including specific triggers such as "engaging in a systematic pattern or practice of violating the conditions of [the QPAM Exemption]" and "intentionally violating the conditions of [the QPAM Exemption]" fail to meet the Proposed Amendments' stated goal of providing "more clarity, protection and transitional support." We submit that by hypothesis these standards will be vague – certainly more so than a standard, like the present one, that requires a criminal conviction – and that an institution should not be at risk for losing its franchise as a result of the application thereof that does not involve the due-process requirements of applicable criminal law, especially where, in the market of ERISA fiduciaries, even mere administrative allegation could materially adversely affect, or even destroy the business, and especially where the future individual administrators at the Department of the these rules may or may not be focused on fairness, repercussions and other matters that current Department personnel might.

2. Timeframes Relating to Administrative Interpretations

Institutions' organizational structures can be varied and complex, and larger international financial institutions can have layers upon layers of entities, including those in non-U.S. locations where a host of pragmatic issues relating to communications and the provision and availability of information can arise (particularly given that the ultimate concerns here are basically U.S.-centric). Thus, the timeframes to respond to allegations of Prohibited Misconduct and to be heard at a meeting with the Department should be increased to well beyond the timeframes in the Proposed Amendments, with the Department taking into account what presumably will be the comments of affected institutions and trade groups on this point in fixing the final timeframes.

3. Retroactivity

Should the Department decide, notwithstanding our concerns expressed above and in further detail in this Section II, to include one or more of the proposed Prohibited Misconduct categories as disqualification triggers in any final modifications to the QPAM Exemption, we urge the Department to make it clear that such Prohibited Misconduct will only disqualify a QPAM on a prospective basis. It is axiomatic that retroactive application of changes in law are generally to be avoided.[17] If QPAMs become disqualified on a retroactive basis, it would mean that a significant number of transactions they entered into would be considered non-exempt prohibited transactions, and there could be significant costs and disruptions for Plans (and their fiduciaries) and QPAMs alike. This retroactivity point arises again in other contexts below.

4. Mere Participation

The Proposed Amendments would provide that the Department may issue a final Written Ineligibility Notice if, as a result of a new disqualifying trigger, the QPAM or covered affiliate "participates" in Prohibited Misconduct. "Participates" refers not only to active participation in Prohibited Misconduct, "but also to knowing approval of the conduct, or knowledge of such conduct without taking active steps to report such conduct, including reporting the conduct to the appropriate compliance personnel." We believe that provision is overbroad and could operate to put the Department in the

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[17] See, e.g., *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

undesired position of having the power to deprive a QPAM of access to the QPAM Exemption without a fully vetted administrative determination.

C. Foreign and Domestic Criminal Convictions

Currently, Section I(g) reaches convictions for all covered crimes by affiliates (as defined). An effect thereof has been to disqualify QPAMs from using the QPAM Exemption where the crimes committed may be quite remote from the business, operations and personnel of the QPAM. Historically, this issue repeatedly arose in the context of transactions involving acquisitions by financial institutions, and, more recently, in the context convictions of non-U.S. affiliates.

Regarding non-U.S. convictions, over the years there have been conflicting interpretative views associated about whether foreign criminal convictions are included as disqualifying events. In 2020, under the Trump Administration, the Department issued a letter to the Securities Industry and Financial Markets Association (the "2020 Letter") stating that it would not view a conviction under foreign law as a disqualifying event. However, in a follow-up supplement issued under the current Biden Administration, the 2020 Letter was essentially rejected because, according to the DOL, it was "issued through a flawed process and was based on a legal analysis that was inadequate to support abandoning the DOL's long standing position." With the Proposed Amendments, the Department now wishes to make clear in the QPAM Exemption itself that foreign crimes are included for purposes of Section I(g).

Recommendations

- The Department should take this opportunity to modify Section I(g) so that, regarding non-U.S. convictions, Section I(g) covers only convictions of affiliates where the parties convicted can influence the QPAM's policies or have power or influence to compromise the QPAM's ERISA compliance, or where the crime otherwise involves the QPAM.

- The Department should go still farther and narrow the reach of Section I(g) regarding both U.S. and non-U.S. crimes, as we believe that such a modification would be appropriate as to all convictions, whether domestic or foreign.

Supporting Remarks

Under the QPAM Exemption, QPAMs that have been convicted of enumerated crimes are not permitted to rely on the exemption for future transactions. The same holds true for affiliates that, as the Department has articulated in the Preamble, are "in a position to influence [the QPAM's] policies."[18]

The Department's approach regarding the Proposed Amendments, particularly regarding the possibility of more limited individual relief going forward, has arguably shone additional light on what we believe to be Section I(g)'s overbreadth regarding its application to affiliates. We recognize that the manner in which Section I(g) already now operates can be draconian, with an applicable conviction resulting in an automatic and immediate inability to use the QPAM Exemption. Historically, this otherwise stark and inflexible effect has been mitigated only by the Department's willingness, dating at least back to 1988,[19] to grant individual exemptions to soften the impact of a conviction across a QPAM's affiliated group. The effect of the Department's flexibility in this regard has facilitated the ability of Plans and Plan fiduciaries to continue the retention of managers that, by hypothesis, the fiduciaries have chosen to hire.

The Department's more recent exemptive activity regarding these matters has generally focused on non-U.S. affiliates of global institutions. We would suggest that situations involving foreign affiliates can highlight the lack of relevance of non-U.S. malfeasance to the operations and conduct of U.S. QPAMs, in light of the possible geographical, operational and organizational remoteness of the non-U.S. activity to the activities of the U.S. QPAM. We would suggest that the Department has not adequately considered factors such as these in its analysis. In addition, we believe that there could be difficulty regarding the basic question of whether any given foreign crime is a felony, or whether it is substantially equivalent to a felony under U.S. law. The Department will by necessity need to make determinations which we believe should not be presumptive, but instead should follow a thorough investigation.

On further reflection, however, it has become evident to us that these issues of remoteness are not confined to a comparison between non-U.S. entities and U.S. QPAMs. Thus, we believe that this issue can easily arise within the confines of the United States.

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[18] 87 Fed. Reg. at 45,205.
[19] PTIE granted to The Boston Co. Real Estate Counsel, Inc., 53 Fed. Reg. 38,803 (Oct. 3, 1988).

and would ask the Department to consider our recommendations regarding these matters not only as to foreign convictions, but also as to U.S. convictions.

Ultimately, the possible loss of QPAM status for transgressions that have nothing to do with the QPAM of its activities should not have the result of a loss of ability to use the QPAM Exemption, a result that has given rise to the above-noted need of the Department to consider individual relief to protect the interests of the Plans that are using or wish to use the applicable QPAMs (and the Plans' participants and beneficiaries). We believe that the QPAM Exemption would operate more smoothly, without sacrificing protection for Plans and their participants and beneficiaries, with a modification of Section I(g) that causes Section I(g) to be more homed in on crimes by affiliates where the parties convicted can influence the QPAM's policies or have power or influence to compromise the QPAM's ERISA compliance, or where the crime otherwise involves the QPAM.

The approach taken in PTCE 2020-02 is instructive here. PTCE 2020-02 calls for the identification of relevant entities and then further seeks to identify those that have ability to oversee or influence the QPAM. Indeed, in finalizing PTCE 2020-02, the Department noted, for example, that "[t]he definition of Controlled Group [i.e., those entities potentially triggering the disqualification] is narrowly tailored to cover only other investment advice fiduciaries that share significant ownership. This definition ensures that a Financial Institution would not become ineligible based on the actions of an entity engaged in unrelated services that happens to share a small amount of common ownership."

In light of the foregoing, we submit that the standards that we are recommending above would be appropriate here as a way of focusing on those misdeeds that, to quote the Department, would be most "relevant to a QPAM's ability to manage Plan assets with integrity, care, and undivided loyalty."[20]

D. New Required Provisions in Investment Management Agreements

The Proposed Amendments would condition relief on assuring that certain provisions are included in a written investment management agreement. In the context of existing mandates, the Proposed Amendments indicate that investment management

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[20] 87 Fed. Reg. at 45,209.

agreements would need to be amended not later than 60 days following the effectiveness of any final changes to the QPAM Exemption.

Specifically, the Proposed Amendments would require that in the management agreement the QPAM must include a statement that, in the event of a Criminal Conviction (or a Written Ineligibility Notice (described in proposed Section I(g)(3)(B)), and for at least a period of 10 years, the QPAM (i) agrees not to restrict a Plan's termination or withdrawal from its arrangement with the QPAM, (ii) will not impose any costs on Plans in connection with a termination or withdrawal, except for certain reasonable and pre-disclosed costs, (iii) agrees to indemnify the Plans for any damages that result from a violation of applicable law, a breach of contract or a claim arising out of the conduct that is the subject of a criminal conviction or Written Ineligibility Notice of the QPAM or an applicable affiliate thereof, and (iv) will not employ or knowingly engage any individual that participated in the conduct that is the subject of a criminal conviction or Written Ineligibility Notice regardless of whether the individual is separately convicted. Actual losses for purposes of the foregoing clause (iii) specifically include losses and costs arising from unwinding transactions and from transitioning Plan assets to an alternative asset manager, as well as costs associated with any exposure to excise taxes under Section 4975 of the Code as a result of a QPAM's inability to rely upon the relief in the QPAM Exemption.

Recommendations

- The Department should not require QPAMs to amend their management agreements or require that QPAMs agree to new indemnification and indemnification-related rights.
- If the Department rejects the foregoing suggestion, we would suggest that any requirements along these lines become effective if and when a QPAM experiences a Section I(g) event.
- Any consequences flowing from issues regarding a manager's improper use of the QPAM Exemption should take into account the materiality of the impropriety when viewed in relation to the role of the QPAM Exemption in the manager's investment activity for the Plan generally.

- Should the Department disagree with these recommendations and decide to require up-front amendments of existing investment management agreements, we believe that a 60-day period is unrealistically short. The period should be increased by the Department after taking into account what presumably will be the comments of affected institutions and trade groups on this point.

- In the event that termination and indemnification requirements along the lines currently proposed are adopted, these provisions should not cover breaches of contract or violations of law that are unrelated to the QPAM Exemption or more generally ERISA.

- In the event that termination and indemnification requirements along the lines currently proposed are adopted, the drafting should make clear that these provisions only apply with respect to transactions that require reliance on the QPAM Exemption. Thus, for example, the drafting should more clearly reflect that (i) a transaction that is exempt under another exemption, or that is not prohibited in the first instance, does not trigger remediation rights in the event of a failure of the conditions of the QPAM Exemption to be met, (ii) there is no requirement to provide any assurances or rights with respect to products or services not offered (A) to Plans or (B) in reliance on the QPAM Exemption, and (iii) more generally, the newly required provisions do not in any event give the investing Plan any rights or remedies with respect to Plan investments in entities managed by the manager that do not hold plan assets (with respect to which, ipso facto, the manager is not acting as a QPAM).

- Should the Department nevertheless disagree and include the proposed termination and indemnification provisions in Section I(g)(2)(C) and (D), clause (C) should be recrafted to assure that it only applies to claims successfully brought and violations of law and breaches of contract that arise directly from the covered misconduct, and clause (D) should be redrafted to assure that the restriction applies only to the QPAM's hiring of any individual charged and convicted in connection with the covered financial services crime.

Supporting Remarks

1. In General

The Department believes the mandatory investment management contractual provisions it proposes to mandate will provide a "prominent indication" to Plans that the QPAM will act with integrity.[21] We believe that a manager's presently required (as a part of the definition of "QPAM" in Section VI(a)) written acknowledgment of fiduciary status is a prominent enough indicator in and of itself.

The requirement that the QPAM agree not to restrict a Plan's ability to withdraw from an investment fund may raise separate challenges, especially for those that invest in illiquid assets like private equity or real estate funds. These may not only be operationally unworkable but may actually be counterproductive to Plans' investment returns. There may also be important and direct adverse consequences to non-Plan investors that would not only be unfair but could raise other legal and regulatory challenges that the Department should consider. In addition, Plans may need to be excluded from investing in such funds, causing them to lose out on investment opportunities available to other investors.

The Department's proposal to have QPAMs agree up front to a host of new termination and indemnification rights therefore seems to us to be an unnecessary overreach. ERISA does not generally require such protective provisions, and, for the reasons expressed above in Section II hereof,[22] we see no reason to add such requirement to the QPAM Exemption.

In addition, here in particular, the results can be administratively difficult and costly, and even dislocating to Plan clients, if these contractual provisions are required to be put in place even before a misconduct issue has arisen and even as to existing agreements. Thus, if the Department does continue to require that QPAMs agree to provisions like these, we believe that the requirement should only be effective if and when a disqualification event occurs. In addition, we submit that the extensive adverse

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[21] 87 Fed. Reg. at 45,216.
[22] See *supra* text accompanying notes 14-15.

consequences may be inappropriate and disproportionate for those managers that relatively infrequently utilize the QPAM Exemption.

2. Timing and Cost

The Proposed Amendments call for the implementation of the changes to investment management agreements within 60 days of finalizing a revised QPAM Exemption. We believe based on our experience that the Department vastly overestimates firms' ability to provide these amendments within that time. For example, in addition to maintaining separately managed account clients, many managers of pooled funds, sub-advisers and others providing discretionary management services under arrangements with undisclosed accounts through intermediaries on an aggregate basis, thus raising substantial administrative challenges for complying with a 60-day requirement.

We also believe that the Department underestimates the costs involved in amending investment management agreements. Based on our experience, QPAMs would need to tailor amendments to fit different clients and different situations. These vary not only based on the type of relationship (e.g., separate accounts, funds-of-one, collective investment trusts, other pooled investment vehicles) but among different strategies. In addition, the Department does not account for the costs in time and money that would be involved in engaging (and negotiating with) lawyers and associated client relations discussions to explain the nature of and reasons for such amendments. At a minimum, based on our experience, we believe it is unreasonable to believe that a manager can simply use a single form to amend every client agreement. Thus, we submit that the Department's belief that it would take "one hour of in-house legal professional time to update and supplement existent standard management agreements, and two minutes of clerical time to prepare and mail a one-page addition to the agreement to each client Plan" represents a substantial underestimation. We also believe that the Department is underestimating the impact on the market generally, by understating the amount of QPAMs in the market (many U.S.-registered investment advisers, trust companies and banks are QPAMs).

3. Indemnification and Withdrawal

We submit that the Proposed Exemption's requirement that the QPAM indemnify the Plan, including and specifically for unwind and transition costs, is unnecessary and

adds an unwarranted intrusion on the manner in which the QPAM negotiates its agreements with its Plan clients. For example, if there is a nonexempt prohibited transaction, a Plan fiduciary would already be under a duty under Section 409 of ERISA to restore losses. Non-QPAM managers do not have to agree to these provisions, some of which arguably go beyond what is required by ERISA; QPAMs should not have to do so, either.

The inclusion of a breach of contract appears to suffer from the same problem. The Proposed Amendments seem patently overbroad to the extent that they would apply to any breach or violation of law, whether related to the QPAM Exemption or even to ERISA. In a similar vein, the Proposed Amendments would require that a Plan be indemnified for any “claims arising out of the conduct that is the subject of” the disqualification event. But this protection could include claims that, for example, are dismissed.

Particularly in the context of pooled funds, where withdrawal rights are generally restricted to protect all investors in the fund (and in some cases, to protect against the adverse consequences of multiple simultaneous redemption requests), the imposition of the Proposed Amendments’ contractual provisions could be particularly harsh. Furthermore, in our experience, fund withdrawal provisions are typically tailored to the underlying investment strategy for the protection of investors and may even require consent. Requiring the manager to liquidate assets of the fund at suboptimal times to accommodate such automatic withdrawals as are contemplated by the Proposed Amendments could harm both investors withdrawing and remaining.

4. Additional Clarifications

We have some additional clarifying drafting suggestions, as set forth above in the list of recommendations above in this Section II(D).

E. “Winding-Down” Period

The Proposed Amendments would provide for a one-year “winding down” period in the event a QPAM’s disqualification. During the period, the QPAM could not enter into new investments on behalf of its client Plans in reliance on the QPAM Exemption.

Recommendations

- In all cases under Section I(g), the loss of the ability to rely on the QPAM Exemption should not be automatic and immediate. We have the following specific suggestions:
  - The Department should permit an (at least) 18-month period instead of a "winding down" period in which the QPAM can operate in reliance on the QPAM Exemption while it seeks individual relief (if and to the extent that the investing Plans would want to continue to retain the QPAM in such circumstances).
  - If the Department does not accept this recommendation in its entirety, and if in addition the Department decides to add non-criminal bases to the list of things that could prevent a QPAM from using the QPAM Exemption, then we suggest that the Department permit an (at least) 18-month period instead of a "winding down" period in which the QPAM can operate while it seeks individual relief (if and to the extent that the investing Plans would want to continue to retain the QPAM in such circumstances); provided that the QPAM would only be permitted to use the QPAM exemption during the period if the basis for disqualification is non-criminal in nature.
  - If the disqualified QPAM applies for an individual exemption that would permit it to continue to rely on the QPAM Exemption, the applicable period triggered under Section I(g) by purported misconduct should last at least until after the Department makes a final determination as to whether the application will be granted or denied.
- Individual relief under the QPAM Exemption should not refer back to the results of the last individual exemption.
- The time periods for a QPAM to respond to a warning of potential ineligibility and the Department's determination, as well as the limitation to one meeting with the Department, should be broadened and made extremely more flexible.

- The arguably pejorative "winding down" terminology for the period triggered under Section I(g) should be replaced with more neutral nomenclature, such as, for example, "transition," "transitional" or "intermediate" period.

Supporting Remarks

We recognize the currently draconian way in which Section I(g) operates, which is without any further action automatically to cause a QPAM to be able to use the QPAM Exemption in the event of a covered criminal conviction and appreciate the Department's proposal to soften this result by the use of a transition period. We have some suggestions, however, for ways to make the concept more balanced and less disruptive to all parties, without losing protection for, and indeed in a way that advances the interests of, the affected Plans.

In making our comments, in light of the fact that the Proposed Amendments would make no changes to the relationship between Sections I(g) and Section VI(i), we are proceeding on the basis that the rule of construction in Part VI(i) (which would be Part VI(_) under the Proposed Amendments), relating to continuing transactions, would continue to apply under the Proposed Amendments (so that, while a QPAM is managing Plan assets during the wind-down period, continuing transactions described in Section VI(i) (or Section VI(_) under the Proposed Amendments) would not become prohibited (i.e., nonexempt) new transactions (assuming no failure to satisfy Section I(e)). If we have somehow misconstrued the Department's intent in this regard, we would have significant additional cause for concern.

1. Continuing Management

QPAMs that become ineligible to rely on the exemption by reason of a Criminal Conviction or a Written Ineligibility Notice should be permitted to enter into new transactions during that period in reliance on the exemption. If the Department does not accept a suggestion of this type, then there could substantial opportunity costs as a result of lost investment opportunities. Where QPAMs have been engaged to carry out an investment strategy that requires it to continually make new investments, such an immediate stoppage could be particularly detrimental.

In addition, there could be a series of transactions where the transactions themselves may call for ongoing adjustments (such as in the case of swaps and other

derivatives). An inability dynamically to adjust these transactions could work to the detriment of Plans as well as the counterparties.

We also note that Plans regularly receive cash that must be invested, whether because of portfolio proceeds (dividends, interests, cash received on sale of assets, etc.) or other inflows occurring at the Plan level. Besides having deleterious economic impacts for Plan participants, uninvested cash for Plans can raise issues for Plans, Plan fiduciaries and the QPAM under Section 404 of ERISA. In the context of pooled funds, the Department's approach could bring the operation of the fund to a standstill.

While as indicated above in Section II(B) we disagree fundamentally that more amorphous non-criminal concepts of misconduct should result in an inability to use the QPAM Exemption, we recognize that the Department may ultimately decide to proceed with such an expansion of Section I(g). In that case, if the Department disagrees with what we say in the immediately-above foregoing paragraph, then it should still give consideration to allowing continued use of the QPAM Exemption in the case of a Written Ineligibility Notice as to non-criminal behavior, where it is not even clear at the outset that the QPAM has engaged in applicable misconduct.

2. Grace Period - in General

In all cases under Section I(g), the loss of the ability to rely on the QPAM Exemption should not be automatic and immediate. There should be some grace period in order to mitigate the extreme dislocation that comes with the loss of the ability of a QPAM to use the QPAM Exemption. The Department should permit an 18-month period instead of a "winding down" period in which the QPAM can operate in reliance on the QPAM Exemption while it seeks individual relief, if and to the extent that the investing Plans would want to continue to retain the QPAM in such circumstances). Because Plans would have notice (under the Proposed Amendments) of Prohibited Misconduct, Plan fiduciaries could make their own choices about whether and how to proceed with the QPAM during (and after) the applicable period of transition.

3. Length of Applicable Period

We think the Department underestimates the administrative implications of the new rules it is proposing and would suggest that the period triggered under Section I(g) by purported misconduct be a period of 18 months (or more). In addition, if the

disqualified QPAM applies for an individual exemption that would permit it to continue to rely on the QPAM Exemption, we recommend that applicable period triggered under Section I(g) by purported misconduct should last at least until after the Department makes a final determination as to whether the application will be granted or denied.

4. Notice and Assistance to Plans

We also appreciate that there may be cases in which a QPAM determines at the time of a Criminal Conviction or Written Notice of Ineligibility that it will not be able to rely on any such other exemptions with respect to existing discretionary mandates. In that case, we could understand the rationale of imposing conditions which compel the QPAM to assist Plans with the costs of transitions. To give effect to this, we believe it would be reasonable for the Department to impose (i) a condition that would require the QPAM to notify within a reasonable time following such disqualification all Plan clients for whom it reasonably expects it would need to rely on the QPAM Exemption and (ii) a separate condition indicating that should the QPAM fail to receive individual exemptive relief, it would be required to assist such Plans with the costs associated with any transition to other alternative managers.

5. Modeling on Other Recent Individual Relief

Our recommendation that individual relief under the QPAM Exemption should not have to conform to the most recently promulgated individual prohibited transaction relief is premised on a concern that, by referring back to the results of the last exemption, the QPAM Exemption, would effectively establish requirements for a particular QPAM that ignores the specific facts and circumstances surrounding that particular QPAM. The conditions that happened to have been incorporated into the most recent individual exemption as to a different QPAM altogether may or may not be appropriately tailored to a later situation (or, in fact, responsive to the later facts at all), and may or may not be optimally protective when projected into the later-arising situation.

As noted above in the Section II (immediately before the beginning of Section II(A)), the Department has separately made the PTIE Proposal. To the extent that the PTIE Proposal is ultimately finalized in a way that makes it more difficult for individual relief to be obtained, the approach in the QPAM Proposal relating to individual exemptions could operate in an even more onerous fashion as a practical matter.

6. Certain Other Matters Relating to Due Process

Where the Department seeks to disqualify a QPAM because of Prohibited Misconduct, it would be required under the Proposed Amendments to provide a written warning of potential ineligibility and provide the QPAM with only 20 days to respond and request a meeting, to be scheduled within 30 days of the QPAM's response. The QPAM would not be entitled to more than one meeting. Following the meeting or written response, the Department would make a final determination of whether the QPAM would be disqualified. We feel strongly feel that the Proposed Amendments' disqualification procedures do not provide adequate time for a QPAM to respond. A QPAM would be required to expend significant time and resources to gather information in response to a written ineligibility warning. This could be substantially more challenging where the alleged Prohibited Misconduct relates to a foreign affiliate under a DPA or NPA or one of the other new triggers. In the context of diversified international financial institutions, accessing, assessing, and marshalling all the relevant information to ascertain the nature of and validity of the claims under consideration may well simply not be attainable within the time frame contemplated.

7. Nomenclature

We also believe that the "winding down" terminology sets an unnecessarily pejorative tone that implies a result under which the QPAM can in no event be permitted to serve. We question what may be an underlying assumption of the Department that in each and every case a fiduciary will want to - or even should want to - fire a QPAM in the event of a disqualification event. We thus have made a number of alternative suggestions above.

8. Certain Drafting Suggestions

We make several drafting suggestions above in an attempt to help clarify what we believe to be the Department's intent regarding the drafting. These suggestions are intended to be non-controversial in spirit.

III. Changes to Section I(c) of the QPAM Exemption

Section I(c) requires that the QPAM (or in certain cases its designee) negotiate and approve the transaction on behalf of the Plan. Under this provision, the Department

has in the past resisted efforts by those who would seek to utilize a manager on a so-called "rent-a-QPAM" or "QPAM-for-a-day" basis (i.e., where, in general terms, the QPAM is hired in the context of a specific transaction). The Department now wishes to memorialize its desired approach in the text of the QPAM Exemption.

Recommendations

- The Department should not make any changes to Part I(c) of the QPAM Exemption in order to attempt to clarify the Department's position regarding the so-called "rent-a-QPAM" or "QPAM-for-a-day" situation.
- If contrary to our recommendation, the Department nevertheless seeks to make such changes, we would suggest that any proposal amend or supplement Part I(c) or otherwise to make material changes to the manner in which various plan fiduciaries interact should be the subject of a separate, carefully crafted proposal on which the market would be permitted to comment, which would be made only after a regulatory impact analysis focused specifically on these matters.

Supporting Remarks

The Department has long been of the view that QPAMs should not simply act as "mere independent approvers," but be intimately involved in the negotiation and approval of the transaction. We believe that this interpretation is widespread in the market and needs no clarification.

The Department is nevertheless proposing changes to Section I(c) that are ostensibly intended to clarify the Department's views on that provision regarding the "rent-a-QPAM"/"QPAM-for-a-day" situation. However, the changes that are being proposed, which we believe could implicate fundamental aspects of the rules under the QPAM Exemption relating to the QPAM's required role, go beyond mere clarification on narrow issues and could have broad and far-reaching impact. We believe that in making these proposals, the Department has inadvertently created opportunities for greater confusion and disruption than may have been intended, and that there is the possibility of unintended consequences that have not been addressed in the Department's existing regulatory impact analysis.

IV. Registration

The Proposed Amendments would add a requirement that each QPAM report the legal name of each business entity that relies on the QPAM Exemption (and any name under which the QPAM may be operating) in an email to the Department in order for the Department to be aware of the entities relying on the QPAM Exemption. The Department must also be notified of any changes to the legal name or operating name(s) of the QPAMs relying upon the QPAM Exemption. The Department has indicated that it intends to publish the list of entities relying on the QPAM Exemption on its publicly available website.

Recommendations

- The Department should not impose a new registration requirement.
- However, if the Department does impose a registration requirement, then the QPAMs should be given at least one year to comply with the requirement.
- If the new registration requirement becomes effective, the information should not be made publicly available, which could create a perception of an "approved" list of QPAMs.

Supporting Remarks

The registration requirements may contribute to, if not exacerbate any erroneous view in the market that QPAM status acts as some kind of Departmental seal of approval rather than, more correctly, that the QPAM Exemption is a preferred way of avoiding otherwise prohibited transactions.

Among other changes to Section I(g) of the QPAM Exemptions, the Proposed Amendments would require all QPAMs to notify the Department of their reliance on the exemption and report the legal and trade name of the QPAM. The notification would need to be updated if there are any changes to these names. In the Preamble, the Department stated that this requirement will ensure that the Department is "aware" of the

entities relying on the QPAM Exemption and that it intends to maintain a publicly available list of QPAMs on its website.[23]

We do not agree that this new proposed registration requirement, which is not customary in the context of the Department's exemptions, is appropriate or useful for Plans. We understand that the Department may have a potential interest in learning more about QPAMs. But this information should not come at the cost of adding administrative complexity, which would entail ongoing compliance attention, to an exemption that has functioned well over the years without requiring registration.

Should the Department nonetheless insist on mandating QPAM registration as a condition for relief under the QPAM Exemption, we urge it to be made available to the Department only. We believe that use of the QPAM Exemption should not create a false perception of a Departmental "approved list" (about which we would be concerned regardless of any disclaimers relating thereto by the Department). A published list sponsored by the Department could add to any anecdotal misperceptions about the QPAM Exemption's purpose and value, to which we allude above in Section II. [24].

V. Recordkeeping Requirements

The Proposed Amendments would require that QPAMs make available records demonstrating compliance with the QPAM Exemption to the Department, Internal Revenue Service ("IRS"), plan fiduciaries, any contributing employer and any employee organization whose members are covered by a Plan that engaged in an investment transaction pursuant to this exemption, participants and beneficiaries, and IRA owners. The Department explained in the Preamble that the purpose of the new condition would be able to "ensure the Department will be able to verify" compliance with the exemption conditions.[25]

[23] 87 Fed. Reg. at 45,208.
[24] See *supra* text accompanying notes 14-15.
[25] 87 Fed. Reg. at 45,214.

Recommendation

- The Department should not adopt new recordkeeping requirements.
- If the Department does adopt new recordkeeping requirements, then we request that the Department refine and impose the applicable requirements only after a thorough cost-benefit analysis that justifies the new requirements.

Supporting Remarks

The QPAM Exemption has been successfully applied without these provisions. QPAM status is largely fact-based and many of its requirements are objective in nature. While the Department understandably chose to include audit and recordkeeping requirements in connection with the management of affiliated Plans under Part V of the QPAM Exemption, it recognized at the time that no similar conditions was necessary more generally. We see no reason for the Department now to diverge from its existing and considered approach in this regard. Recordkeeping requirements, particularly for investment strategies that involve a very large number of transactions will be substantially expanded, and we would suggest that the Department may not have fully factored that expansion into its economic analysis.

VI. Increase of Minimum Thresholds of Assets Under Management and Capitalization

The Proposed Amendments would revise the definition of a QPAM by adding an adjustment for changes in the Consumer Price Index (the "CPI") to applicable minimum assets-under-management and capitalization requirements for certain types of QPAMs, and then raising the existing limitations to make up for unmade adjustments to compensate for the lack of adjustments in the QPAM Exemption since the initial adoption of the QPAM Exemption.

Recommendation

- In adding to the required level of assets under management and shareholders' or partners' or equity, the Department should not endeavor to make what amount to retroactive increases to levels that the Department has previously set without having incorporated CPI-related adjustments.

Supporting Remarks

The proposed increases may have a material impact on the market for both small and large managers. For small organizations, the sudden increases could simply force them out of the market. In addition, in our experience, there are large managers that struggle with the capitalization requirements (which involve a technical application of the accounting rules), and there are managers that might determine that they cannot or will not comply with the suddenly raised minimums. In addition, from the perspective of the fair administration of the rules, we do not believe that the Department should be attempting to implement what amount to retroactive CPI-related increases to a provision that the Department itself, both at inception and through subsequent amendments, did not see fit to include.

VII. Economic Analysis

We believe that the Department's economic analysis significantly underestimates the costs associated with the Proposed Amendments.

Recommendation

- The Department should conduct a new economic analysis that takes these points into consideration with additional opportunities for notice and comment prior to any adoption of any amendments to the QPAM Exemption.

Supporting Remarks

The Department's economic analysis should be reconsidered. We believe that the Proposed Amendments make several core cost assumptions that are significantly incorrect. We submit that the true costs to providers and indeed to Plans and their fiduciaries have not yet been adequately addressed by the Department. We believe that the following are examples of items that, in addition to those that are discussed above throughout this comment letter, may not have been adequately addressed to date:

- The Department fails to account for the costs and time it will take to amend trading agreements, derivatives clearing agreements, prime brokerage arrangements, loans and other credit agreements and documents associated with investments. The risk allocations and other compliance-related

considerations associated with these new provisions between QPAMs and these counterparties, service providers and intermediaries may involve substantial negotiations with respect to which the Department may not have adequately considered the cost and timing implications.

- The costs to Plans that will occur by reason of a mandatory "winding down" period and a departure from the Department's current approach of permitting QPAMs to continue to operate in reliance on the QPAM Exemption pending individual relief may well be understated. Ramifications could include costs associated with the QPAM's inability (and the counterparty's lack of desire, given possible excise-tax liabilities) to amend existing arrangements, imposing additional risk and volatility at the Plan level.

- We believe that it is unrealistic for the Department to assume that the costs for filing an individual exemption will be $25,000. We would expect that the legal expenses associated with QPAMs making such filings would exponentially higher than the Department's estimates, easily approaching or exceeding $100,000 depending on the case.

- We also question whether the Department has accurately factored into its analysis its own need to attend to requests for individual exemptions. The Department has devoted much in the way of time and resources to requests under Section I(g), and we are concerned that the drain on the Department's resources resulting from the adoption of the Proposed Amendments as proposed would not be lessened and indeed could even be increased.

We also note that in the Regulatory Impact Analysis portion of the Preamble the Department stated: "The Department estimated there are 616 potential QPAMs by approximating the total number of providers who in 2019 provided services of 'Investment Management' and 'Named Fiduciary' simultaneously to at least one plan, as reported in Schedule C of the 2019 Form 5500, and whose NAICS codes start with the 2-digit 52, which corresponds to Finance and Insurance Institutions." With apologies in advance if we are misunderstanding the Department's intent regarding the foregoing language, we question the reference to "named fiduciary" status, as QPAMs are commonly not named fiduciaries. More generally, we are concerned that the Department's methodology in determining the number of QPAMs and the number of

affected Plans may be significantly and demonstrably flawed, resulting in a substantial understatement regarding both. If there are many more QPAMs and affected Plans in the market, the Department's determinations regarding costs, market impact and related matters may by extension be likewise flawed.

ADDITIONAL REQUEST TO THE DEPARTMENT TO GIVE TESTIMONY

We respectfully request that Dechert be permitted to testify at the upcoming hearing on the Proposed Amendments, at which time Dechert may provide further insights based on our experience and perspective.

CONCLUSION

We appreciate the Department's desire to reexamine the QPAM Exemption as to a variety of considerations. However, taken in its various parts and as a whole, we believe the Proposed Amendments, if adopted as proposed, may well create increased uncertainty, raise costs and, in some respects, actually act counter to the interests of the very Plans and Plan fiduciaries sought to be protected. The QPAM Exemption has long been a critical tool that helps managers to manage Plan assets in the best interest of Plans. While the Department indisputably has a duty to protect the interests of Plans and their participants, we submit that the QPAM Exemption has stood the test of time, and that, in light of the protections already in the QPAM Exemption, together with the protections afforded by Sections 404 and 406 of ERISA, many of the changes now being proposed by the Department are either unnecessary or even counterproductive.

We also note our concern that, if some kind of modifications are not made to the Proposed Amendments in respect of the matters addressed by the above comments, and in particular those recommendations listed in the "Certain Recommendations" section that appears above towards the beginning of this comment letter, there could be (i) a real risk from the market by managers, resulting in Plans and Plan fiduciaries not be able to make the choice that, by hypothesis, they wish to make, as well as a reduced availability of investment opportunities, and (ii) a possible trending towards the use of exemptions that might not have the history, interpretations and market practice that the QPAM Exemption has. We believe that the dislocation in the market that could arise by virtue of the foregoing would be to the detriment of all market participants, including Plans and their fiduciaries, QPAMs and transaction counterparties.

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We appreciate this opportunity to comment on the important Proposed Amendments. If you would like to contact us about our testifying at the upcoming hearing or there is anything else you would like to discuss, please contact Andrew L. Oringer (1-212-698-3571) or Steven W. Rabitz (1-212-649-8785).

Very truly yours,