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Labor Department Proposes “QPAM” Changes

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The Employee Benefits Security Administration of the U.S. Department of Labor has released a proposed rule that would amend prohibited transaction class exemption 84-14 (“PTE 84-14”), a longstanding regulation governing financial institutions acting as qualified professional asset managers (or “QPAMs”) for IRAs or employer-provided retirement plans. The proposed rule is scheduled to be published in the Federal Register on July 27, 2022.

PTE 84-14, which allows QPAMs to cause a plan to engage in transactions in which a party in interest to the plan (e.g., a plan trustee) is participating in some manner, is considered by many financial institutions to be a practical necessity when managing ERISA plan assets. The Labor Department’s proposal, if finalized, would make several substantial changes.

Extension to Non-Prosecution and Deferred Prosecution Agreements

Currently, PTE 84-14 provides that a QPAM is ineligible to use the exemption for a period of 10 years if the QPAM or any of its affiliates (which includes any person or entity that owns 5% or more of the QPAM) is convicted of any of a range of specifically-enumerated crimes. The Department proposes to extend that prohibition to a broader range of events, including “any conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted a crime” that would have resulted in exclusion from PTE 84-14’s coverage. Under the proposed rule, a QPAM is also ineligible if it or an affiliate knew of such criminal conduct and did not “tak[e] active steps to prohibit” it.

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

Foreign Convictions Would Now Be Expressly Covered

The proposed rule would codify the Labor Department’s current view that disqualifying QPAM convictions include foreign convictions for offenses that are “substantially equivalent” to the disqualifying domestic criminal offenses listed in PTE 84-14. (PTE 84-14 currently does not mention foreign convictions.) The Department states that it will allow QPAMs to ask the Department whether a particular foreign offense would be disqualifying, but does not propose to formalize that process.

Mandatory One-Year Winding Down Period

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

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Mandatory Contracts with All Clients

Under the proposed rule, all QPAMs would be required to enter into agreements with clients containing certain mandatory provisions. Among other things, the QPAM would have to "agree[] to indemnify, hold harmless, and promptly restore actual losses to the client Plans for any damages that directly result to them from a violation of applicable laws, a breach of contract, or any claim arising out of the conduct that is the subject of a Criminal Conviction or Written Ineligibility Notice of the QPAM or an Affiliate."

This provision, which would effectively make any violation of ERISA subject to indemnification, may present issues similar to those in *Chamber of Commerce of U.S.A. v. U.S. Dep't of Labor*, 885 F.3d 360, 384–85 (5th Cir. 2018), where the U.S. Court of Appeals for the Fifth Circuit ruled that a written contract requirement in the Department's 2016 "Fiduciary Rule" impermissibly created a private cause of action.

Public Comment and Potential Litigation

Interested parties will have 60 days to comment from the date of the proposal's forthcoming publication in the Federal Register. Thorough, robust comments can have a significant impact on the eventual final rule, by drawing attention to problems with the proposal and by suggesting alternatives—and potentially, revisions to the QPAM regime as a whole—that the Department will be obligated to consider under the Administrative Procedure Act. Final QPAM amendments would ultimately be subject to review in court if concerned parties, or their representatives, believe the final rule is unjustifiably burdensome, restrictive, or fails to take proper account of comments received in the rulemaking.

The following Gibson Dunn attorneys assisted in preparing this client update: Eugene Scalia, Michael Collins, Martin A. Hewett, Andrew G.I. Kilberg, and Ryan C. Stewart.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's Administrative Law and Regulatory, Labor and Employment, White Collar Defense and Investigations, or Executive Compensation and Employee Benefits practice groups:

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