



Via Electronic Delivery

October 11, 2022

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption (87 Fed. Reg. 45,204-45,232, July 27, 2022))

To Whom It May Concern:

The U.S. Chamber of Commerce (Chamber) is responding to the Employee Benefit Security Administration's (EBSA) Proposed Amendment to the Prohibited Transaction Exemption (PTE) 84-14 (Proposed Amendment). The Proposed Amendment includes significant changes to the current PTE 84-14, which has been in place for nearly four decades, and these changes could have unintended negative impacts not only on asset managers, but also on plan sponsors and participants and beneficiaries.¹

The Proposed Amendment was published in the Federal Register on July 27, 2022. EBSA did not publish a Request for Information or otherwise solicit public comments on possible changes and impacts before publishing the Proposed Amendment. Because of this, the Proposed Amendment contains many provisions that are potentially harmful to plan sponsors by increasing the cost of contracting with a qualified professional asset manager (QPAM) or limiting access to them. As such, the best course of action would be to withdraw the Proposed Amendment and repropose only after community input.

However, if EBSA does not withdraw the Proposed Amendment, we suggest that it consider our comments. Our comments are based on the order the changes appear in the Proposed

¹ It is unclear why EBSA felt it necessary to update this exemption. Based on its own data, from 2013 to 2021, there were only 10 convictions, 6 of which were in 2016, and four years in which there were none. However, later in the preamble, EBSA justifies the Proposed Amendment by stating that since 2013, it has received an increasing number of individual exemption requests involving Section I(g) ineligibility as a result of criminal convictions occurring within the corporate family of large financial institutions, which does not appear to be accurate based on its own data. On the other hand, based on EBSA's estimates, as many as 8 QPAMs each year would become ineligible under the Proposed Amendment, which could cause severe disruption for plans.

Amendment, and the order in no way reflects the importance of a given issue.

Section I - General Exemption

Proposed Amendment: QPAM Discretion

The Proposed Amendment adds a new first sentence to subsection (c) to read as follows: “The terms of the transaction, commitments, and investment of fund assets and any associated negotiations on behalf of the Investment Funds are the sole responsibility of the QPAM.” It also adds a third and fourth sentence to subsection (c) to read as follows: “The prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purpose. 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 because the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c).”

EBSA Rationale

In the Proposed Amendment preamble, EBSA explains that this “language is intended to preclude, for example, transactions that are negotiated by an employer but later presented to the QPAM for approval.”² EBSA explains that this modification is consistent with its original intent in the 1984 grant notice when it stated that if the QPAM has “less than ultimate discretion over acquisitions for an investment fund that it manages, the potential for decision making with regard to plan assets that would inure to the benefit of a party in interest would be increased.”³ EBSA states that the Proposed Amendment aligns with the original 1982 proposal, although that proposal was not included in the final PTE, which has been in place for nearly 40 years.⁴

EBSA states that it believes a party in interest should not be involved in any aspect of a transaction aside from certain ministerial duties and oversight associated with plan transactions, such as providing general investment guidelines to the QPAM. EBSA also states the QPAM’s role is not to act as a mere independent transaction approver, but rather to exercise discretion over the commitments and investments of plan assets and the related negotiations with respect to a fund that is established primarily for investment purposes.

Proposed Amendment Impact

The actual impact of the Proposed Amendment could render the QPAM class

² 87 Fed. Reg. 45206 (July 27, 2022).

³ 87 Fed. Reg. 45213.

⁴ 87 Fed. Reg. 45213.

exemption meaningless for both common transactions and situations where a plan has a unique investment need. The Chamber is particularly concerned with the language that “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 because the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c).” Of equal concern is EBSA’s rationale that no party in interest should be involved in any aspect of a transaction (aside from certain ministerial duties and oversight associated with plan transactions) because this view ignores the realities of plan investments, especially in the annuity and derivatives world.

For example, financial services firms typically approach asset managers with potential investment opportunities, such as initial public offerings or new issues of fixed income securities. It is likely that a particular financial services firm will be a party in interest to at least some of the asset manager’s ERISA plan clients. This is also an issue for everyday interactions among managers and institutional sell-side desks and representatives, where a fixed income product or derivative trade may be initiated and negotiated by the dealer. If these types of customary interactions are viewed as initiated in whole or in part by a party in interest, the QPAM exemption would not be available, and the manager may be forced to exclude its ERISA plan clients from these types of beneficial investment opportunities.

It is also important to acknowledge that the QPAM exemption has existing protections for transactions involving the types of parties in interest that present increased risk of conflicts and improper influence over the QPAM’s decision-making. The exemption specifically excludes transactions with parties in interest (and their affiliates) that have authority to appoint or terminate the QPAM as manager of the plan assets involved in the transaction or negotiate terms of the plan’s management agreement with the QPAM. The exemption also excludes transactions with parties in interest that are related to the QPAM. Finally, the exemption offers no relief from transactions prohibited by ERISA section 406(b). These limitations already provide sufficient protection against the concerns EBSA raised in proposing the changes to Section I(c) of the exemption.

Chamber Recommendation

The Chamber recommends that the final PTE remove the following sentence: “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 because the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c).” We believe that a plan is fully protected by the concept in the new first sentence added to paragraph (c). However, that sentence should be modified to read that “The QPAM has the final, sole discretion regarding the terms of the transaction, commitments, and investment of fund assets.”

Proposed Amendment: Integrity

The Proposed Amendment adds a new subsection (g) entitled “Integrity.” Given that EBSA uses the term “integrity” 19 times in the preamble and Proposed Amendment, it appears EBSA is adding integrity as a standard in addition to the current fiduciary requirements under the Employee Retirement Income Security Act of 1974, as amended (ERISA).

EBSA Rationale

In the preamble, EBSA states that the “fundamental premise of Section I(g) is to require QPAMs to act with integrity. Therefore, the proposed amendment would require QPAMs to include certain standards of integrity required under the exemption in a written management agreement with its client Plans...”⁵

Proposed Amendment Impact

The term “integrity” is only used one time in the text of ERISA and that is in the context of selecting an independent dispute resolution entity under ERISA Section 716 relating to Preventing Surprise Medical Bills. The Proposed Amendment creates a new “integrity” standard to apply to QPAMs that does not exist under ERISA. It is unclear how requiring very broad indemnification and not allowing exit fees relates to having an acceptable standard of honesty and being firm in your moral principles, which is the definition of integrity. Instead, EBSA proposes to hold a QPAM to a higher standard, and it could lose its status based on a requirement outside of ERISA.

Chamber Recommendation

As discussed in more detail below, the Chamber is concerned with EBSA’s new “standards” of “integrity.” However, the Chamber is equally concerned with imposing a requirement that generally is not in ERISA on QPAMs, and therefore recommends deleting any reference to “integrity.” Because a QPAM is an ERISA fiduciary, there is no need to add an additional standard outside of the statutory text.

Proposed Amendment: Reporting to the EBSA

Paragraph (1) would require any QPAM that relies on the exemption to notify the Department via email of the legal name of each business entity relying on the exemption and any name the QPAM may be operating under. This only needs to be reported once unless there is a change to the legal name or operating name. EBSA intends to keep a list of all QPAMs on a publicly available website.

⁵ 87 Fed. Reg. 45208.

EBSA Rationale

EBSA states the reporting is necessary to ensure EBSA is aware of entities that rely on the QPAM Exemption, but it does not say why. EBSA also requests comments on whether it should request additional information, such as the CRD number of a registered investment adviser and whether banks, savings and loan associations, and insurance companies have similar identifying information they should be required to provide.

Proposed Amendment Impact

No other prohibited transaction exemption requires EBSA registration or a listing on a publicly available website. It is unclear why EBSA needs this information or what purpose it would serve. It also is unclear whether a failure to report all entities relying on the exemption would be included as “Prohibited Misconduct” under Section VI – Definitions and General Rules (s)(5). By requiring this reporting and making it publicly available, it could be perceived that any entity on the list is endorsed as an asset manager by EBSA.

Chamber Recommendation

The Chamber recommends deleting this requirement. However, if EBSA insists on keeping it, EBSA should explain why it needs this information and how it would be used. Also, this information should not be publicly available, nor should additional information be required. However, if EBSA believes plan sponsors need such information (other than the current ability simply to ask an asset manager), EBSA could establish a process for a plan sponsor to verify QPAM status with EBSA without making such information publicly available. Plan sponsors would not be required to utilize this, but may utilize it needed.

EBSA should clarify that inadvertent failure to register an entity or update an existing registration would not be considered “Prohibited Misconduct” or otherwise jeopardize a manager’s ability to rely on PTE 84-14. EBSA also should provide a way to cure any mistakes without jeopardizing the availability of the exemption for otherwise compliant transactions.

Proposed Amendment: Written Management Agreement

Paragraph (2) includes a new requirement to have a Written Management Agreement with each plan sponsor that must provide that in the event of a criminal conviction or a Written Notice of Ineligibility, for at least 10 years, the QPAM:

- Agrees not to restrict the plan from terminating or withdrawing from the arrangement;
- Will not impose any fees, penalties or charges on the plan in connection with the process of terminating or withdrawing from an investment fund the QPAM manages, except for reasonable fees disclosed in advance that are specifically designed to 1) prevent generally recognized abusive investment practices; or 2) ensure equitable

treatment of all investors in a pooled fund in the case of a withdrawal or termination may have adverse consequences for all other investors, if the fees are applied consistently to all investors;

- Agrees to indemnify, hold harmless and promptly restore actual losses to the plan for any damages that directly result from a violation of “applicable law,” a breach of contract or any claim arising out the conduct that is the subject of a criminal conviction or Written Notice of Ineligibility. Actual losses include loss and cost arising from unwinding transactions with third parties and from transitioning plan asset to an alternative manager and cost associated with any excise tax exposure.
- Will not employ or knowingly engage any individual that participated in the conduct that is subject of a criminate conviction or Written Ineligibility Notice.

EBSA Rationale

EBSA did not provide a rationale for including this requirement in the class exemption. It is possible that EBSA included the indemnity provision because many individual qualified professional asset manager exemptions require some type of indemnity were the QPAM to lose its individual exemption. The rationale behind this could be that because the QPAM lost its class exemption because of a “bad act,” EBSA wants extra assurance in issuing the individual exemption.

In the preamble, EBSA determined that the costs associated with adding a Written Management Agreement would only be to update existing management agreements by preparing a single standard form with identical language and then sending it to each client. EBSA assumes that the client would accept this without changes or further negotiation. EBSA estimates that it will take one hour of in-house legal professional time to update and supplement their 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.⁶

Proposed Amendment Impact

EBSA did not provide a rationale for why a condition of being a QPAM was to provide

⁶ EBSA based its estimate on in-house legal hourly wage of \$140.96. EBSA explains that the total compensation is based on mean hourly wages by occupation from the 2020 Occupational Employment Statistics and estimates of wages and salaries as a percentage of total compensation by occupation were obtained from the 2020 National Compensation Survey’s Employee Cost for Employee Compensation. It is also stated that estimates for overhead costs for services are imputed from the 2017 Service Annual Survey, and EBSA’s Office of Research and Analysis estimated overhead cost on an occupational basis by allocating total industry overhead cost to unique occupations using a matrix of detailed occupational employment for each NAICS industry. EBSA does not provide sufficient detail to allow an objective reader to replicate its results. It is notable that this amount is significantly less than the \$400 per hour amount that the Securities and Exchange Commission used in its estimates of similar professional unit costs for its Cybersecurity Risk Management proposed regulation (87 Fed. Reg. 16590, 16616, Table 5 (Mar. 23, 2022)).

broad, open-ended indemnity for a violation of applicable law (which is not defined), **including** loss and cost arising from unwinding transactions with third parties and from transitioning plan asset to an alternative manager and cost associated with any excise tax exposure.⁷ In placing this new requirement on all asset managers, it appears that EBSA assumes that all QPAMs eventually will commit a “bad act” that will cause them to lose their QPAM status.

The proposed language is overly broad, vague, and nearly impossible to quantify. First, what is the “applicable law” and how are damages assessed if it is unclear what the applicable law is? Secondly, is EBSA assuming that losing QPAM status is per se a breach of the contract between the parties? What claims does EBSA envision arising based on the conduct that is the subject of a criminal conviction or Written Notice of Ineligibility? The provision also does not require either the plan sponsor, other Party in Interest, or the QPAM to mitigate any damages.

Inevitably, the cost associated with being a QPAM would increase if forced to agree to unlimited indemnity. EBSA has acknowledged that it does not know the actual costs burdens these indemnity provisions would impose. Costs are varied depending on things such as the type of asset manager or why the class QPAM was lost. Based on experience, one Chamber member stated that the cost of a formal request for proposals for a new QPAM, not including attorney fees, could range between \$10,000 and \$50,000. Furthermore, legal review and negotiation of contractual documents with a new QPAM could range from 10 to 20 hours, depending on the structure of the investment fund. Another member stated that legal fees associated with replacing a QPAM that manages a particular asset class, such as large cap, would be between \$10,000 and \$20,000. However, it was noted that if the QPAM is managing a very bespoke or specialized strategy, there may very well not be a replacement, which often is the case for hedge fund strategies, where no two strategies are alike. Even assuming a replacement could be found, the cost for outside counsel would be closer to \$20,000 to \$40,000. The bigger issue, however, is the fact that these managers are not interchangeable, so losing the ability to hire a manager would be very problematic.

If actual losses include lost investment opportunities, as explained below, such losses are impossible to predict because there will always be different investment needs at different times. Inevitably, increasing the cost of being a QPAM would increase plan costs and limit choice because some asset manager may instead opt out serving ERISA plans. One member was particularly concerned that this could disproportionately affect boutique managers, which often have a higher proportion of minority and women-owned business enterprises.

With respect to the cost estimate and contract review process, the Chamber is

⁷ Under Section 4975(a) of the Internal Revenue Code, the excise tax is payable by “any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).” Because the QPAM is a disqualified person, it appears that the QPAM would already have liability for excise taxes relating to a non-exempt prohibited transaction entered into by the QPAM.

concerned that EBSA does not fully appreciate the difficulty in drafting and negotiating such an important item, especially given the vague language discussed above. It is very unlikely that one hour will be sufficient for in-house legal counsel to draft updated indemnity provisions, especially where it is unclear exactly what is being indemnified. Secondly, no plan sponsor would, or should, blindly accept a contract amendment from a service provider. To do so likely would be a breach of fiduciary duty.⁸ In addition, if a contract is reopened to negotiate this matter, it likely could trigger reopening other contract provisions, including the price of the services, which would increase the time and money spent on renegotiating the contract.⁹ In the preamble, EBSA notes that the requirements would become effective 60 days from the date the final PTE is published in the Federal Register. Practically, there is no way that the existing management agreements could be renegotiated within this 60-day period.

Chamber Recommendation

The Chamber recommends deleting the written agreement requirement. Instead, the final PTE could require that as a condition of being a QPAM, if QPAM status is lost, an asset manager:

- May not restrict the plan from terminating or withdrawing from the arrangement, except for illiquid plan asset funds that include disclosed and agreed-upon lock-ups designed to ensure equitable treatment of all investors (plus a continuing ability to rely on QPAM for such funds);
- Will not impose any fees, penalties or charges on the plan in connection with the process of terminating or withdrawing from an investment fund the QPAM manages, except for reasonable fees disclosed in advance that are specifically designed to 1) prevent generally recognized abusive investment practices; or 2) ensure equitable treatment of all investors in a pooled fund in the case of a withdrawal or termination may have adverse consequences for all other investors, if the fees are applied consistently to all investors;
- Will not employ or knowingly engage any individual that participated in the conduct that is subject of a criminal conviction or Written Ineligibility Notice.

⁸ For example, in its publication “Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan” EBSA states that “Make sure you understand the terms of any agreements or contracts you sign with service providers and the fees and expenses associated with the contracts. In particular, understand what obligations both you and the service provider have under the agreement and whether the fees and expenses to be charged to you and plan participants are reasonable in light of the services to be provided.” Furthermore, to be eligible for the prohibited transaction exemption under ERISA 408(b)(2) not only must the compensation to the service provider be reasonable, but the contract itself must be reasonable. As such, ERISA explicitly requires not only a review of the contract, but negotiations if the initial offer is not reasonable.

⁹ In other areas of the cost analysis, EBSA estimates the cost of outside legal counsel at \$494 per hour; however, the cost estimate for amending, reviewing and negotiating existing contracts does not include any estimate for outside legal counsel.

Any final PTE should not mandate indemnification (which will come at a higher price). Instead, as is the case today, the parties should be allowed to negotiate it.

If EBSA insists that these provisions should be part of the written management agreement, it should provide that the amendments must be done the later of one year from the effective date or the contract renewal date, if applicable.

Proposed Amendment: Ineligibility Date

The Proposed Amendment adds a new subsection (h) that defines the “Ineligibility Date” and provides a one-year wind-down period. During this period, the QPAM exemption applies to plans with which the QPAM had a pre-existing condition. In addition to other requirements, the QPAM may not engage in any new transactions after the Ineligibility Date in reliance on the exemption.

The QPAM also must provide notice within 30 days of the Ineligibility Date to EBSA and each client of its failure to satisfy the QPAM requirements and the initiation of the one-year wind down period that it will not restrict a plan’s ability to terminate or withdraw from the arrangement or impose fees, penalties or charges in connection from the withdrawal, it agrees to indemnify, hold harmless and promptly restore losses to the plan, and an objective description of the facts and circumstances up which the Criminal Conviction or Written Ineligibility Notice is based. EBSA states that a QPAM’s failure to satisfy the conditions of the winding-down period “would affect the availability of relief for all transactions covered by this exemption” which would “include relief for past transactions and any transaction continued during the one-year winding-down period.”¹⁰

EBSA Rationale

Although EBSA states it developed the one-year wind down period to protect plans and participants, EBSA also notes that the QPAM would be prohibited from engaging in new transactions in reliance on the QPAM Exemption for the existing clients during this period, even though EBSA notes that it is important in the transition from one QPAM to another not to cause harm or loss, including opportunity cost to the plan. EBSA acknowledged that it lacks sufficient data to estimate these costs associated with the winding-down period and requests comments regarding the costs.

Proposed Amendment Impact

The prohibition on entering into any new transactions in reliance on the QPAM Exemption during the winding down period effectively negates the winding down period. Based on member input, it can take anywhere from one to two years to transition to a new

¹⁰ 87 Fed. Reg. 45211.

QPAM. The possibility of retroactively losing relief for transactions entered into before a QPAM's Ineligibility Date is also inappropriate.

Chamber Recommendation

If EBSA wants this to be an actual, working wind down period, a QPAM should, subject to the plan sponsor's agreement, be allowed to continue functioning as a QPAM during the wind down period. Furthermore, at the plan sponsor's election, the wind down period may be extended an additional year. Finally, any loss of exemptive relief relating to the conditions of the wind down period should only be prospective.

Proposed Amendment: Individual Exemption

The Proposed Amendment adds a new subsection (k) that lays out the requirements for a QPAM to apply for an individual exemption. Among other requirements, the applicant must:

- Review recently granted exemptions "with the expectation that similar conditions will be required if the Department proposed and grants an exemption";
- Explain why the proposed variation is necessary and in the interest of and protective of affected plans and participants; and
- Provide detailed information quantifying the specific cost or harms in dollar amounts their client plans would suffer if the QPAM could not rely on the exemption after the winding down period, including the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would be available to plan sponsors on less advantageous terms.

EBSA notes an applicant should not construe EBSA's acceptance of an individual exemption as a guarantee that EBSA will grant an individual exemption.

EBSA Rationale

EBSA did not provide a rationale for the new subsection (k) or why it is seemingly contradictory that an asset manager must review all recently granted exemptions with the expectation that similar conditions would apply, but acceptance of other individual exemptions does not guarantee acceptance of another.

Proposed Amendment Impact

The new procedural requirements could have a substantive effect of reducing the number of individual exemption because it makes it more difficult and unpredictable to determine whether an exemption will be granted, which may discourage firms from applying for an individual exemption.

First, it is very difficult, if not impossible, to quantify “investment losses resulting from foregone investment opportunities” for a variety of reasons, including the type of investment manager, the ebbs and flows of investment needs and opportunities, and the costs or needs of a replacement manager.

The requirement that an asset manager review recently granted exemptions “with the expectation that similar conditions will be required if the Department proposed and grants an exemption” is directly contrary to EBSA’s comment in the preamble to the Proposed Amendment that an applicant should not construe EBSA’s acceptance of an individual exemption as a guarantee that EBSA will grant an individual exemption.¹¹

Chamber Recommendation

The Chamber recommends that EBSA delete the new subsection (k). At the very least, it should delete the requirement that the proposed individual exemption quantify the lost investment, and align the statement in the preamble that if an individual exemption is substantially similar to exemptions that have been granted, EBSA will grant the exemption.

Section VI – Definitions and General Rules

Proposed Amendment: Qualified Professional Asset Manager

In this section, EBSA proposes significantly to raise the dollar threshold for entities to qualify as QPAMs, adjusted annually for inflation.

EBSA Rationale

EBSA states the current thresholds may no longer provide significant protections for plans in the current financial marketplace.

Proposed Amendment Impact

The Proposed Amendment does not grandfather in any current QPAMs that may be below the proposed thresholds, and EBSA specifically states in the preamble that QPAMs that do not meet the new thresholds would no longer be able to rely on the exemption. This means that upon the effective date, plan sponsors who were relying on such entities may no longer do so, even though such entity did nothing to cause this.

¹¹ See Westar Energy, Inc. v. Federal Energy Regulatory Com'n, 473 F.3d 1239, 1241 (D.C. Cir. 2007) (“A fundamental norm of administrative procedures requires an agency to treat like cases alike.”)

Chamber Recommendations

Although we understand the rationale behind this change, the Chamber proposes that EBSA either grandfather in these entities as QPAMs or provide a meaningful wind down period of at least two years for plan sponsors to find alternative QPAMs.

Proposed Amendment: Prohibited Misconduct

The Proposed Amendment significantly expands the ways in which a QPAM could lose its QPAM class status. The Definition Section of the Proposed Amendment defines Criminal Convictions to include the current list of U.S. convictions and convictions “by a foreign court of competent jurisdiction as a result of a crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense” listed under the U.S. convictions.

The new subsection (s) that defines Prohibited Misconduct also includes:

- Conduct that is the basis for a non-prosecution or deferred prosecution agreement (NPA or DPA), for conduct that would meet any of the U.S. convictions;
- Any conduct that forms the basis of an agreement, however denominated by foreign law, that is substantially equivalent to an NPA or DPA;
- Engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or
- Providing materially misleading information to EBSA in connection with the conditions of the exemption.

EBSA Rationale

With respect to foreign convictions, EBSA states that it has a longstanding practice of considering individual exemption applications from QPAMs in connection with foreign convictions, and the proposed definition of Criminal Convictions would remove any doubt that the QPAM Exemption applies to foreign convictions that are substantially equivalent to the current U.S. federal or state crimes. Furthermore, EBSA states that “[g]iven that financial services institutions increasingly have a global reach, both in their affiliation and their investment strategies, transaction involving plan assets are increasingly likely to involve entities that reside and operate in foreign jurisdictions. An ineligibility provision that is limited to U.S. federal and state convictions would ignore these realities and provide insufficient protection for Plans investing through a QPAM’s international affiliates.”¹²

EBSA states that “Moreover, the Department continues to believe that criminal conviction for the types of crimes identified in the QPAM Exemption are relevant to a QPAM’s

¹² 87 Fed. Reg. 45208.

ability to manage Plan assets with integrity, care and undivided loyalty, regardless of whether the crime occurs in a domestic or foreign jurisdiction.”¹³ EBSA also states that an “affiliated entity’s criminal or other misconduct in a foreign jurisdiction is an important indicator of the integrity of the entire corporate organization and casts doubt on a QPAM’s ability to act in a manner that will properly protect plans and their participants and beneficiaries from the related damages, losses and other harm that often result from such criminal or other misconduct.”¹⁴

EBSA also states that it could not make its statutorily mandated determination that the exemption is in the interest of and protective of plans and participants unless it included foreign convictions. However, the EBSA requested comments on whether there are certain types or aspects of criminal behavior that deserve additional focus.

With respect to “Prohibited Misconduct,” EBSA states it was necessary to include this because it believes that QPAMs “that repeatedly engage in criminal conduct or other egregious misconduct in connection with compliance with the conditions of the exemption do not display the requisite standards of integrity to rely on the relief provided in the exemption.”¹⁵ EBSA requests comments on whether the definition of “Prohibited Misconduct” is “appropriately tailored to target the types of conduct that implicates integrity issues that should affect a QPAM’s eligibility to use the exemption... and what additional or alternative elements may be warranted.”¹⁶ EBSA also requests whether it should consider particular factors such as the elements of the crime and nature of the tribunal or investigating entity in making such determination.

Proposed Amendment Impact

As reflected in its own analysis, these proposed changes likely would result in many more QPAMs losing their class status than under the current exemption. This would be increased by including all foreign crimes, even those completely unrelated to a manager’s handling of U.S. based ERISA assets or other retirement related assets or those committed by a relatively small affiliate relative to the overall size of the QPAM. Although EBSA may view this as positive, from the plan sponsor’s view, this could add significant disruption, especially where the plan sponsor has a long-standing relationship with the QPAM or where it meets a specialized need, and the foreign conviction is completely unrelated to the retirement side business or has a relatively small impact on the business overall.

Furthermore, with respect to NPAs and DPAs, including them as Prohibited Misconduct for QPAM status could discourage firms from entering into such agreements because by doing so, in addition to the other agency requirements that a manager must follow

¹³ 87 Fed. Reg. 45208-09.

¹⁴ 87 Fed. Reg. 45222.

¹⁵ 87 Fed. Reg. 45209.

¹⁶ Id.

under the terms of an NPA or DPA, EBSA automatically would revoke their QPAM status without an actual conviction, which appears to lack a semblance of due process with respect to whether a manager is capable of operating as a QPAM. It also is unclear whether an NPA or DPA within the past 10 years would disqualify a QPAM. These concerns are equally, if not more, applicable with respect to foreign NPAs or DPAs or their equivalent.

As noted above, EBSA's reliance on the integrity standard for its rationale behind the Prohibited Misconduct definition seemingly applies a standard to QPAMs outside ERISA's statutory text.

Chamber Recommendation

With respect to foreign convictions, EBSA should require a QPAM to notify a plan of the conviction, and then allow the plan sponsor to decide whether to continue the relationship. This should not per se be Prohibited Misconduct. Alternatively, EBSA should limit foreign crime convictions to convictions that directly relate to a firm's retirement asset business. Furthermore, EBSA should be concerned that certain jurisdiction's judicial system may not contain a high standard of due process, and such should be taken into consideration. EBSA should also be concerned that a foreign conviction may not be the equivalent of those in the U.S.

EBSA should not include NPAs or DPAs as Prohibited Misconduct that automatically disqualifies a QPAM. Similar to our proposal on foreign crimes, the QPAM should be required to inform plan sponsors of such agreements. The plan sponsor can then decide whether to maintain its relationship with the asset manager.

If EBSA decides to keep the last two of the Prohibited Misconduct provisions (i.e., systematic violations and materially misleading information), EBSA should provide examples of such Prohibited Misconduct so that firms are not later caught off guard upon receiving an Ineligibility Notice.

Proposed Amendment: Record Maintenance

The Proposed Amendment includes a new subsection (t) that requires the QPAM to maintain the records necessary to enable certain people to determine whether the conditions for the exemption have been met with respect to a transaction for a period of six years from the date of the transaction in a manner that is reasonably accessible for examination. By implication, EBSA also notes that the QPAM will be subject to penalties under ERISA Section 502(i) and excise taxes under Internal Revenue Code Section 4975(a) for not maintaining these records.

The following people are allowed access to these records:

- Any EBSA or IRS employee or another state or federal regulator;
- Any plan fiduciary invested in an Investment Fund managed by the QPAM;
- Any contributing employer and any employee organization whose members are covered by a plan invested in an Investment Fund managed by the QPAM; or
- Any participant or beneficiary of a plan invested in an Investment Fund managed by the QPAM.

If the QPAM refuses to provide the information, the QPAM must provide a written notice to the person of the reason for the refusal, and the Department may request such information by the close of the 30th day following the request.

Failure to maintain the records will result in a loss of the QPAM exemptive relief, but only for the transaction for which the records are missing.

EBSA Rationale

EBSA's rationale is to ensure evidence of compliance is available for review and to make the QPAM Exemption consistent with other exemptions that generally impose a recordkeeping requirement on parties relying on an exemption to ensure they will be able to demonstrate compliance. With respect to the refusal to provide information, EBSA notes that after the notice is sent, the person requesting the information may contact EBSA if the person believes that it would be useful for the EBSA to collect the information.

EBSA assumes that QPAMs already maintain the required records as part of their regular business practice, and the new requirement would impose a five-minute burden per QPAM.

Proposed Amendment Impact

Because the record maintenance requirement is unclear, it would likely take much more time than 5 minutes per transaction not only to maintain the records, but first to determine what records should be maintained, by whom and how. Furthermore, given how vague the requirement is, depending on who within EBSA is reviewing a transaction, a QPAM could lose the exemption based on a subjective review of a transaction. Finally, this requirement easily could lead to more litigation and questioning from plaintiffs' lawyers who may apply hindsight judgement on transactions because of the requirement that the QPAM provide such documents to participants and beneficiaries, even though it is unclear of what use such information would be to a participant or beneficiary.

Chamber Recommendation

If EBSA insists on keeping this requirement, it should be revised to provide that a QPAMs must only retain records reflecting policies and procedures required to comply with

the exemption. Furthermore, a finding that a QPAM did not maintain all documents should not be considered Prohibited Misconduct, and, instead, the QPAM should be instructed on how to better maintain such documents. Finally, the only entities that need access to such documents are EBSA and IRS officials and plan fiduciaries who hired the QPAM.

Conclusion

The Chamber appreciates the opportunity to comment on the Proposed Amendment. We look forward to working with EBSA on improving the Proposed Amendment to better serve all involved, including plan sponsors and participants.

Sincerely,

Chantel Sheaks

Chantel Sheaks
Vice President, Retirement Policy
U.S. Chamber of Commerce