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Kirkland Alert

## Department of Labor Finalizes Amendment to QPAM Exemption

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On April 3, 2024, the U.S. Department of Labor (the “DOL”) published its long-awaited final amendment (the “Final Amendment”) to Prohibited Transaction Class Exemption 84-14 (commonly referred to as the “QPAM Exemption”). While the Final Amendment does not include some of the more onerous changes included in the [proposed amendment](#) that was issued by the DOL in July 2022 (the “Proposed Amendment”), it raises the AUM and capitalization thresholds required to qualify as a “qualified professional asset manager” (“QPAM”), requires QPAMs to register with the DOL and broadens the existing disqualification provisions relating to certain criminal conduct engaged in by the QPAM or its affiliates.

The Final Amendment will go into effect on June 17, 2024.

### Summary of Changes to the Current QPAM Exemption

- *Notice Requirement.* Each manager that intends to rely on the QPAM Exemption must provide a one-time notice via e-mail to the DOL reporting the legal name of each entity that relies on the QPAM Exemption and any other name the QPAM may be operating under. Such notice must initially be provided within 90 calendar days of the QPAM’s reliance on the QPAM Exemption and within 90 calendar days of any changes to the QPAM’s legal or operating name(s) thereafter. If a QPAM inadvertently fails to provide such notice, it has an additional 90-day cure period to provide the notice, together with an explanation for its failure to provide the notice in a timely manner. The DOL intends to maintain a current listing of QPAMs on its website. An entity may be removed from the DOL’s list by notifying the DOL that it is no longer relying on the QPAM Exemption.
- *Financial Thresholds.* The Final Amendment increases the minimum AUM and capitalization requirements applicable to QPAMs. Effective as of the last day of the

QPAM's fiscal year ending in 2024, a registered investment adviser must have total client assets under management in excess of \$101,956,000 and shareholders' or partners' equity in excess of \$1,346,000. These amounts will be increased gradually to \$135,868,000 and \$2,040,000, respectively, by December 31, 2030. Thereafter, the DOL will make annual adjustments to these thresholds based on the Consumer Price Index by publication in the Federal Register. Similar increases also apply to banks, savings and loan associations and insurance companies that rely on the QPAM Exemption.

- *Independence.* While the QPAM Exemption has always required that each covered transaction be negotiated by the QPAM on an independent basis, the Final Amendment contains additional language restricting plan sponsors or other parties in interest from influencing the QPAM's investment decisions. In particular, the DOL warns that a QPAM may not be appointed or relied upon to "rubber stamp" transactions otherwise negotiated, proposed or approved by the plan sponsor or party in interest. The preamble to the Final Amendment clarifies, however, that this requirement is not intended to prevent a plan from routine monitoring of, discussions with or providing investment guidelines to its investment managers, including as part of the plan's oversight process.
- *Expanded Ineligibility Due to Criminal Misconduct.* The Final Amendment significantly expands the scope of activities that may render a manager ineligible to rely on the QPAM Exemption and the consequences of such ineligibility.

First, the Final Amendment retains the condition set forth in the current exemption that a QPAM will be ineligible to rely on the QPAM Exemption if such QPAM, certain affiliates or any owner of a five percent or more interest in the QPAM (each, an "Affiliated Person") has been convicted of certain enumerated crimes<sup>1</sup>, but also expands such list to explicitly cover foreign crimes that are substantially similar to the crimes listed in the current exemption ("Criminal Convictions").

Second, the Final Amendment provides that a QPAM will be ineligible to rely on the QPAM Exemption if the QPAM or an Affiliated Person participates in certain "Prohibited Misconduct". "Prohibited Misconduct" is deemed to occur, under the Final Amendment, when the QPAM or an Affiliated Person enters into a non-prosecution agreement (an "NPA") or a deferred prosecution agreement (a "DPA") with a U.S. federal or state prosecutor's office or regulatory agency and the underlying facts, if successfully convicted, would give rise to a Criminal Conviction. Prohibited Misconduct may also occur where the QPAM or an Affiliated Person is found or determined in a final judgment or court-approved settlement by a federal, state or civil court in a proceeding by the DOL, the Internal Revenue Service, certain other federal or state regulators or states attorneys (collectively, the "Enumerated

Regulators”) to have (i) engaged in a systematic pattern or practice of conduct, or intentionally engaged in conduct, that violates the QPAM Exemption in connection with otherwise non-exempt prohibited transactions; or (ii) provided materially misleading information to the Enumerated Regulators in connection with the conditions of the QPAM Exemption. An entity is deemed to “participate” in such Prohibited Misconduct if it actively participates in such misconduct, knowingly approves the misconduct or has knowledge of the misconduct and fails to take measures to stop it (including failing to report to the manager’s compliance persons). If a QPAM or an Affiliated Person engages in Prohibited Misconduct or enters into an agreement with a foreign government that is substantially equivalent to an NPA or a DPA with respect to which the underlying facts, if successfully convicted, would give rise to a Criminal Conviction, it must provide email notice to the DOL describing the Prohibited Misconduct (or the equivalent foreign NPA or DPA) and the name and contact information of the QPAM.

If a QPAM becomes ineligible to rely on the QPAM Exemption, the Final Amendment provides a one-year transition period (the “Transition Period”) and requires the QPAM to indemnify any losses incurred by clients that are ERISA plans or IRAs (collectively, “Plans”) as a result of the QPAM’s disqualification. The Transition Period is intended to help Plans mitigate potential adverse consequences, such as disruptions to investments and transition costs relating to changing managers. That these indemnity requirements apply only in the event of a QPAM’s disqualification is a significant change from the Proposed Amendment, which would have required all QPAMs to enter into or amend all management agreements with Plans to provide similar indemnification and withdrawal rights.

To be eligible to continue to rely on the QPAM Exemption for Plan clients that had pre-existing management agreements though the Transition Period, the QPAM must provide notice to the DOL and each of its affected Plan clients within 30 days of the ineligibility date regarding its ineligibility as a QPAM and the start of the Transition Period. Such notice must state that, during the Transition Period, the QPAM will (i) not restrict the ability of Plan clients to terminate or withdraw from its arrangements with the QPAM; (ii) not impose any fees, penalties or charges on Plan clients that withdraw or terminate from their arrangements with the QPAM, other than reasonable fees, disclosed in advance, that are specifically designed either to prevent generally recognized abusive investment practices or to ensure equitable treatment of investors in a pooled fund; (iii) indemnify and restore actual losses to Plan clients that are a direct result of a violation of law or breach of contract or other claims arising out of the QPAM’s ineligibility (which such losses specifically include losses and costs relating to unwinding transactions, transitioning to a new asset

manager and exposure to excise taxes); and (iv) not employ or knowingly engage with any individual that participated in the Criminal Conviction or Prohibited Misconduct, as applicable. The notice must also include a detailed, objective description of the facts and circumstances relating to the Criminal Conviction or Prohibited Misconduct so that each affected Plan client's fiduciary can prudently make determinations regarding hiring, monitoring, evaluating and retaining the QPAM in a non-QPAM capacity. Finally, the QPAM will be required to manage Plan assets prudently and loyally throughout the Transition Period.

If the QPAM does not comply with each of the above requirements, it will not be able to rely on the QPAM Exemption for transactions, including past transactions, effected during the Transition Period.

The QPAM may also seek individual exemptive relief from the DOL during the Transition Period if it anticipates that it will need to rely on the QPAM Exemption (or, more precisely, a similar individual exemption) beyond the one-year Transition Period. The DOL cautions that managers that may need relief beyond the Transition Period should engage with the DOL proactively and not wait for the Transition Period to expire before applying to the DOL for an individual exemption.

- *Recordkeeping.* QPAMs will be required to maintain records that demonstrate compliance with the QPAM Exemption for six years from the date of a covered transaction. Such records must be available for inspection by the DOL, any fiduciary of a plan invested in an investment fund managed by the QPAM any contributing employers whose employees are covered by a plan invested in an investment fund managed by the QPAM, and any participant or beneficiary of a plan invested in an investment fund managed by the QPAM.

## Next Steps for Managers Relying on the QPAM Exemption

Managers that rely on the QPAM Exemption should confirm that they can meet the Final Amendment's updated AUM and capitalization requirements and that, with respect to any arrangement where it acts as a QPAM, there are no practical concerns or limitations regarding its ability to independently exercise fiduciary judgment. These managers will also need to provide the DOL with the legal and operating names of each entity relying upon the exemption by September 15, 2024. Managers currently acting as QPAMs should also review their compliance procedures to ensure that they have sufficient processes in place with respect to actions that could give rise to ineligibility, including those of Affiliated Persons, and that they are satisfying the recordkeeping requirements of the Final Amendment.

Managers that may not be eligible to rely on the QPAM Exemption moving forward should consider whether they may be eligible to rely on other exemptive relief from prohibited transactions.

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1. The crimes are generally felonies involving fraud or dishonesty (e.g., embezzlement, bribery, forgery, etc.) [↔](#)

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## Related Services

Practices

- Investment Funds

## Suggested Reading

- 04 June 2024 - 07 June 2024 Sponsored Event SuperReturn International 2024
- 06 May 2024 - 07 May 2024 Sponsored Event SuperReturn CFO/COO North America

- 01 May 2024 Sponsored Event Sahar Global Summit's 6th Annual Secondaries & Co-Investments Investor Summit

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