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A Pop Culture Guide to the Final Amendments to the QPAM Exemption Taking Effect on June 17, 2024

Employee Benefits & Executive Compensation on **June 6, 2024**

The DOL recently finalized amendments to the QPAM exemption that will considerably alter the exemption's conditions effective as of June 17, 2024 (for a detailed summary of the changes, please see our post here). There are a number of immediate action items for investment managers and ERISA plan fiduciaries under the revised exemption, so we are here to tell you that ***we feel the need, the need for speed*** (or maybe just that you may need to act quickly)! And what better way to remember these action items than to associate them with a few of our favorite pop culture references...

The first rule of QPAM club is, you do NOT talk about QPAM club! Well, actually, you have to tell the DOL

The final amendments require a QPAM to notify the DOL by email at QPAM@dol.gov that it is relying on the QPAM exemption as follows:

- a QPAM must report the legal name of each business entity relying on the exemption and any name under which the QPAM may be operating;
- the notice need only be provided once, unless the QPAM changes its legal or operating name; and
- the notice must be provided within 90 days of the QPAM's reliance on the exemption or a change to its legal or operating name. **Accordingly, investment managers that are relying on the exemption as of June 17, 2024, will need to submit the required notice to the DOL within 90 days thereafter. What you don't want to have here, is a failure to communicate!**

Nobody puts QPAM in a corner – but the DOL will be putting a list of QPAMs on its website

The DOL will publish a list of QPAMs on its website, so investment managers that are relying on the exemption (and ERISA plan fiduciaries who hire them) should ensure that all appropriate entities are listed on the DOL's website. However, if I can change, and you can change, everybody (even a QPAM) can change. So, if a QPAM is no longer relying on the exemption, it can say hasta la vista baby to the DOL and have its name removed from the list of QPAMs on the DOL's website.

Do or do not, there is no try

The final amendments become effective on June 17, 2024, but that doesn't mean you need to risk life and limb by volunteering as tribute! If investment managers and ERISA plan fiduciaries do their due diligence now, they can ensure that any entities that are intending to rely on the QPAM exemption will continue to be able to comply with the revised exemption conditions following the effective date or otherwise take action to remedy the situation.

QPAMs need 1.21 gigawatts??? Not quite, but the current QPAM equity/net worth and AUM thresholds are increasing soon

The final amendments increase the financial thresholds necessary for an entity to qualify as a QPAM over time, as follows:

- the equity capital or net worth threshold (as applicable) for a bank, a savings and loan association and an insurance company will increase from $1,000,000 to: (i) $1,570,300 as of 12/31/24, (ii) $2,140,600 as of 12/31/27, and (iii) $2,720,000 as of 12/31/30;
- the assets under management threshold for a registered investment adviser will increase from $85,000,000 to: (i) $101,956,000 as of 12/31/24, (ii) $118,912,000 as of 12/31/27, and (iii) $135,868,000 as of 12/31/30; and
- the shareholders' or partners' equity threshold for a registered investment adviser will increase from $1,000,000 to: (i) $1,346,000 as of 12/31/24, (ii) $1,694,000 as of 12/31/27, and (iii) $2,040,000 as of 12/31/30.

Thereafter, the threshold amounts will be subject to future annual inflation adjustments.

With great QPAM power, comes great QPAM recordkeeping responsibility

The final amendments require a QPAM to maintain records for six years demonstrating compliance with the exemption. In the preamble, the DOL noted that the extent to which transaction-by-transaction records are necessary depends on the facts and circumstances, and that this recordkeeping condition is focused on requiring the QPAM to retain records satisfactory to prove compliance with the applicable conditions for any section of the exemption the QPAM relied upon. The records must be maintained in a manner that is reasonably accessible at a QPAM's customary business location during normal business hours for examination by the DOL, the IRS, other federal or state regulators, any plan fiduciary, any contributing employer or employee organization whose members are covered by the plan, and any plan participant or beneficiary. However, a QPAM does not need to provide access to privileged trade secrets or privileged commercial or financial information of the QPAM.

Houston, we have a problem – domestic c and foreign criminal convictions and other prohibited misconduct could make a QPAM ineligible to rely on the exemption for 10 years

The final amendments provide that a QPAM will become ineligible to rely on the exemption for a period of 10 years if the QPAM, or various affiliates or 5% or more owners of the QPAM, are convicted of certain crimes—including foreign criminal convictions—or engage in new forms of "prohibited misconduct." If either applies, tough luck, the exemption will not be available for 10 years and, sorry, there is no crying in QPAM compliance.

My name is QPAM, you killed my exemption, prepare to enter a new one-year transition period

Any QPAM that becomes ineligible to rely on the exemption on account of a criminal conviction or participating in prohibited misconduct must provide a one-year "transition period" for then-existing plan clients to the extent the QPAM desires to be able to rely on the exemption during the transition period. During such one-year transition period, the QPAM must fully comply with the conditions of the exemption, it must ensure that it manages each plan's assets prudently and loyally, and it must comply with additional conditions, including notifying the DOL and each of its client plans stating:

- its failure to satisfy such condition of the exemption and the resulting initiation of the one-year transition period;

- that during the transition period the QPAM:
    - will not restrict the client plan's ability to terminate or withdraw from its arrangement with the QPAM;
    - will not impose fees, penalties, or charges on the client plan in connection with such termination or withdrawal (other than certain reasonable fees disclosed in advance that are designed to prevent abusive investment practices or to ensure equitable treatment of pooled fund investors);
    - will indemnify, hold harmless, and promptly restore actual losses to the client plan resulting therefrom (including the costs of unwinding transactions and transitioning to a new manager); and
    - will not employ or knowingly engage any individual that participated in the conduct that was the subject of the criminal conviction or the prohibited misconduct; and
- an objective description of the facts and circumstances upon which the criminal conviction or prohibited misconduct is based, written with sufficient detail to fully inform the client plan's fiduciary of the nature and severity of the conduct so that such fiduciary can satisfy its fiduciary duties of prudence and loyalty with respect to hiring, monitoring, evaluating, and retaining the QPAM in a non-QPAM capacity.

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The final amendments to the QPAM exemption are significant and will make compliance more onerous. However, before you start labeling the DOL a dark lord of the sith, the final amendments were much less onerous than the proposal, so perhaps compliance will not be a mission impossible.

Our advice is to carpe diem and may the QPAM exemption (and, of course, the force) be with you always. We are available to answer any questions you may have regarding compliance with the QPAM exemption or any other prohibited transaction exemptions.

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