

NEW LAW MAKES IT MORE DIFFICULT FOR SMALLER INVESTMENT ADVISERS TO QUALIFY AS QPAMS

The U.S. Department of Labor (DOL) has adopted certain final amendments to the QPAM exemption from the ERISA prohibited transaction rules which, among other things, will make it more difficult for small firms to qualify as QPAMs. Under the existing QPAM rules, a registered investment adviser will qualify as a QPAM if it has \$50 million in assets under management as of the last day of its most recent fiscal year, and has \$750,000 in shareholders' equity or partner's equity as of the most recent balance sheet date. The amendment increases those amounts to require \$85 million in assets under management and \$1 million in equity. The new threshold dollar amounts will take effect as of the last day of the adviser's fiscal year beginning on or after August 23, 2005, which means December 31, 2006 for an adviser which has a calendar fiscal year. There is no grandfathering protection for advisers that have already qualified as QPAM's; all advisers who wish to remain QPAMs must meet the higher requirements as of the effective date.

The QPAM Exemption

ERISA prohibits certain transactions between an employee benefit plan and a party in interest with respect to the plan, unless an exemption to such transactions is available. Because ERISA defines "party in interest" very broadly, it may be difficult for an investment adviser to determine whether a transaction involves a party in interest. The QPAM exemption (Prohibited Transaction Class Exemption ("PTCE") 84-14) provides broad relief from the party in interest prohibited transaction rules for transactions negotiated and approved by a "qualified professional asset manager" or "QPAM." Note that the QPAM exemption does *not* apply with regard to ERISA's self-dealing prohibitions.

The QPAM Requirements as Amended

As amended, PTCE 84-14 provides that in order to qualify as a QPAM, a manager must (i) be an investment adviser registered under the Investment Advisers Act, (ii) have at least \$85 million under management as of the last day of its most recent fiscal year, and (iii) have at least \$1 million in shareholders' equity or partner's equity as of the most recent balance sheet date (or a guarantee by a parent entity with at least \$1 million in equity).

There are additional complex rules regarding the QPAM exemption, which have been amended as well. Most notably, the QPAM exemption does not apply to transactions between the QPAM and a party in interest that is "related" to the QPAM. The DOL amendment has simplified somewhat the determination as to when a QPAM is deemed to be "related" to a party in interest.

Finally, DOL has also issued a proposed amendment that would allow an entity to act as a QPAM for its own (in-house) plan assets providing that it meets certain requirements, including annual "exemption audits."

Advisers with questions about these matters should contact Peter Rosenblum, Jeff Collins, Lou Georgantas or Terry Martland in Foley Hoag's Investment Management Group at (617) 832-1000.