QPAM AMENDMENTS IMPACT ON CITS: WHAT BANKS AND THEIR ADVISERS NEED TO KNOW

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Effective 17 June 2024, the US Department of Labor (DOL) adopted comprehensive amendments to Prohibited Transaction Exemption (PTE) 84-14, also known as the "QPAM exemption" (Exemption).[1] The Exemption is a prohibited transaction class exemption permitting an "investment fund," including a collective investment trust for employee benefit plans (CIT) subject to the Employee Retirement Income Security Act (ERISA), to engage in transactions with parties in interest of plans[2] whose assets are held in the investment fund "to the extent that the disposition of its assets . . . is subject to the discretionary authority of" a "qualified professional asset manager" (QPAM).[3]

Since its adoption 40 years ago, banks and trust companies maintaining CITs have relied on the Exemption to help navigate ERISA's broad and complex per se party-in-interest prohibited transaction restrictions.[4] These financial institutions regularly delegate day-to-day investment responsibilities to "sub-advisers," which themselves may be QPAMs. Some of the amendments, particularly the requirement that the QPAM retain "full fiduciary" and "sole" responsibility for transactions entered into in reliance on the Exemption (the Sole Responsibility Requirement), have generated issues and questions for banks, investment advisers, participating plans, and counterparties regarding the availability of the Exemption for CIT transactions.

Some commenters on the proposed amendments expressed concern regarding a "structural conundrum" facing banks and their advisers because neither the sponsoring bank nor the adviser would have sole authority, although both are ERISA fiduciaries and may need to rely on the Exemption. The DOL, however, did not provide specific guidance as to how to reconcile the Sole Responsibility Requirement with banking and securities law requirements that the bank retain ultimate authority with respect to CIT investments and transactions (the Bank Maintained Requirement). The DOL went only so far as to indicate that "parties that participate in arrangements that do not clearly identify which party has the ultimate responsibility and authority to engage in a particular transaction should not assume that the transaction is permitted by the QPAM Exemption."[5] In these cases, the DOL invited affected parties to seek an advisory opinion or request other guidance from the DOL regarding the availability of the exemption.[6]

This article analyzes the origins and purposes of the Sole Responsibility Requirement and how it applies in the context of arrangements between banks and investment advisers with respect to CITs. It suggests that, provided certain basic guidelines are followed, the Sole Responsibility Requirement can be reconciled and be consistent with the Bank Maintained Requirement. Consequently, banks and their advisers that adhere to certain basic guidelines consistent with the intent and purposes of the Exemption generally should be entitled to rely on the Exemption for transactions with parties in interest of plans participating in their CITs.

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THE SOLE RESPONSIBILITY REQUIREMENT

An essential premise of the Exemption is that relief from ERISA's prohibited transaction restrictions should be afforded only if negotiations, commitments, and investments of plan assets involved in a transaction are the sole responsibility of an independent QPAM.[7] The DOL reasoned that the potential for decisions regarding plan asset transactions inuring to the benefit of a party in interest, rather than the plan, would be increased if exemptive relief were provided in circumstances where the QPAM had less than ultimate discretion over acquisitions for an investment fund that it manages.[8] Section I(c) of the original Exemption reinforced this objective by requiring that the terms of transactions with parties in interest be negotiated by, or under the authority and general direction of, the QPAM and, further, that either the QPAM or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM makes the decision on behalf of the investment fund to enter into the transaction.[9]

In adopting amendments to the Exemption in 2024, the DOL stated that modifications to Section I(c) were appropriate "to ensure the Department's intent is understood by practitioners, QPAMs, and their client plans."[10] As amended, Section I(c) requires that:

> The terms of the transaction, commitments, and investment of fund assets, and any associated negotiations are determined by the QPAM (or under the authority and direction of the QPAM) which represents the interests of the Investment Fund. Either the QPAM, or (so long as the QPAM retains *full fiduciary responsibility* with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM, makes the decision on behalf of the Investment Fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement, or understanding designed to benefit a Party in Interest. In exercising its authority, the QPAM must ensure that any transaction, commitment, or investment of fund assets for which it is responsible is based on its own independent exercise of fiduciary judgment and free from any bias in favor of the interests of the plan sponsor or other parties in interest. The QPAM may not be appointed or relied upon to uncritically approve transactions, commitments, or investments negotiated, proposed, or approved by the plan sponsor, or other parties in interest. The prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purposes. 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 to the extent the QPAM would not have *sole responsibility* with respect to the transaction as required by this Section I(c). (emphasis added).

Not surprisingly, the Sole Responsibility Requirement (which originated in proposed amendments to the Exemption[11]) generated questions by banks that retain investment advisers to provide advice with respect to CIT investments. Commenters noted that banks, which themselves are QPAMs, regularly delegate day-to-day investment responsibilities to "sub-advisers," but they retain the ultimate authority with respect to CIT transactions in order to comply with the Bank Maintained Requirement. The commenters asserted that the Sole Responsibility Requirement would present a "structural conundrum" for banks and their advisers because neither the sponsoring

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bank nor the adviser would have sole authority, although both are ERISA fiduciaries and may need to rely on the Exemption. The DOL responded by indicating that:

> A QPAM may rely on the specific expertise of a prudently selected and monitored entity to assist the QPAM in prudently managing Plan assets. Therefore, a QPAM's delegation of certain investment-related responsibilities to a sub-adviser does not, by itself, violate Section I(c), as long as the QPAM retains sole authority with respect to planning, negotiating, and initiating the transactions covered by the QPAM Exemption. A QPAM should not "more readily" rely on a sub-adviser that has specialized expertise, in order to engage in a particular transaction, if the reliance means that the QPAM would not have *sole authority* with respect to planning, negotiating, and initiating the transaction.[12]

THE BANK MAINTAINED REQUIREMENT

As noted, the DOL was informed during the rulemaking process about arrangements under which a bank, while retaining "ultimate authority" with respect to CIT investments consistent with the Bank Maintained Requirement, may appoint an adviser to invest CIT assets on a "day-to-day basis." The DOL's comments above suggest that it operated under the assumption that the bank maintaining the CIT would qualify as a QPAM and seek to rely on the Exemption. It acknowledged that the bank "may rely" on the adviser's expertise, but at the same time it indicated, somewhat vaguely, that the bank should not "more readily rely" on the adviser if doing so would somehow diminish the bank/QPAM's authority over CIT transactions. Otherwise, it is not clear whether or to what extent the DOL considered specific details of these arrangements.

Current practices in today's marketplace to conform to the Bank Maintained Requirement vary, but all have their common origin in pronouncements of federal regulators, largely originating in the 1970s and 1980s, primarily including the Office of the Comptroller of the Currency (OCC), responsible for regulating CIT management and administration, and the US Securities and Exchange Commission (SEC), responsible for interpreting and enforcing statutory exemptions that permit CITs to operate without registration under the federal securities laws. The DOL also has interpreted the "maintained by a bank" concept in the context of PTE 91-38.

All of these regulators permit banks maintaining CITs to retain investment advisers, provided the bank continues to have and exercise a degree of responsibility with respect to CIT investments. A full description of the origin, evolution, and current interpretations of the Bank Maintained Requirement is beyond the scope of this article.[13] In short, OCC regulations generally require that the bank have "exclusive management" of a CIT, "except as a prudent person might delegate responsibilities to others"; the SEC asserts that applicable securities law exemptions require the bank to exercise "substantial investment responsibility" over its CITs; and the DOL has indicated generally that a bank that retains an investment adviser will be deemed to "maintain" a CIT for purposes of PTE 91-38 if the bank retains fiduciary responsibility and liability for the overall management and operation of the CIT.[14]

To conform to the Bank Maintained Requirement, banks typically document the bank's "ultimate," "final," or similar level of authority over CIT investments in the CIT's governing documents and the investment advisory agreement

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between bank and adviser. Banks also establish and carefully monitor their advisers' compliance with detailed written parameters and guidelines governing CIT investments (including, e.g., permitted and prohibited investments, diversification standards, brokerage practices, and the like). In practice, this means that, where necessary (e.g., the adviser recommends an investment that does not conform to the bank's guidelines), the bank may reject the recommendation and take other appropriate action, including choosing not to effect or permit the transaction. Where the bank maintains multiple CITs with differing investment objectives and strategies, which is typically the case, the bank may retain and monitor different advisers to assist with each CIT's investments. This puts a premium on the bank's responsibility and capability to oversee and supervise adviser activities. Finally, because advisers are retained for their expertise with respect to particular investments or investment strategies, the bank typically will approve or accept the adviser's recommendations or decisions, so long as they are consistent with the bank's guidelines.

Where practices vary significantly is in the degree of authority banks confer on their advisers. Some banks adhere to the traditional approach of retaining advisers to provide nondiscretionary advisory services out of concern that conferring investment discretion on their advisers may run afoul of the Bank Maintained Requirement. In these cases, the bank retains authority to accept or reject the adviser's "recommendations." Over time, other banks have taken the position that conferring investment discretion on their advisers, subject to prudent selection, monitoring, and oversight procedures, is consistent with the Bank Maintained Requirement. In this regard, it is clearly consistent with OCC regulations that expressly permit a bank to prudently delegate CIT responsibilities (including investment responsibilities) to others. In addition, banks that have delegated investment responsibilities to advisers have substantial duties under ERISA, as well as OCC regulations, to carefully monitor and supervise the advisers, including, where necessary, taking action to protect CIT participating plans (e.g., by modifying or reversing adviser-initiated investments or recommendations, by terminating or replacing the adviser). Accordingly, it appears these banks have ongoing legal responsibilities to exercise "substantial investment responsibility" over their CITs as required by SEC guidance. The bank's retention of ultimate responsibility for CIT investments, including those recommended or effected by an adviser, also appears to be consistent with the DOL's views on the Bank Maintained Requirement.

The choice of whether to confer investment discretion on the adviser also impacts the use and application of the Exemption: Where the adviser provides nondiscretionary advisory services, *the bank* typically will seek to act as a QPAM and rely on the Exemption for CIT transactions; where the adviser exercises investment discretion, *the adviser and potentially the bank* may seek to act as a QPAM and rely on the Exemption within the scope of its respective responsibilities.

A final key point is that banks and their advisers act independently, not only of any party in interest or other counterparty involved in CIT investments or transactions, but also sponsors and other fiduciaries of plans participating in the CIT.[15] Thus, in the words of Section I(c), as amended, the "terms of the transaction, commitments, and investment of fund assets, and any associated negotiations are determined by the QPAM (or under the authority and direction of the QPAM) which represents the interests of the Investment Fund"—and no one else.

In sum, bank-adviser CIT investment procedures may best be characterized as shared responsibility arrangements. Each party is an ERISA fiduciary with responsibilities defined by ERISA in the first instance, as well as the CIT's governing documents, including the investment advisory agreement between them. The adviser

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is responsible for recommending or making day-to-day investments in the normal course, subject to the bank's investment guidelines and oversight. The bank is responsible for establishing and maintaining the guidelines, monitoring the adviser's compliance with them, and exercising oversight over CIT investments. Consistent with regulatory mandates in the Bank Maintained Requirement, the bank retains ultimate responsibility for CIT investments, which, in practice, means the bank has the authority and, in some circumstances, the fiduciary duty, to disregard or override the adviser's recommendation or decision. Thus, both parties share a degree of responsibility for CIT investments. They carry out their duties separately but within the scope of predefined and documented decision-making procedures.

RECONCILING THE SOLE RESPONSIBILITY AND BANK MAINTAINED REQUIREMENTS

QPAM Independence

The requirement that a QPAM have "sole" responsibility or discretion over Exemption transactions should be read in context of the DOL's objectives in adopting Section I(c). As indicated by the title of the preamble discussion of Section I(c) in the 2024 amendments—"Involvement in Investment Decisions by a Party in Interest"[16]—the primary objective is to ensure that a QPAM acts independently of parties in interest engaging in transactions with investment funds the QPAM represents. Accordingly, Section I(c) provides that: (i) a transaction may not be "part of an agreement, arrangement, or understanding designed to benefit a Party in Interest"; (ii) the QPAM must ensure that any transaction is based on its own independent exercise of fiduciary judgment and "free from any bias in favor of the interests of the plan sponsor or other parties in interest"; and (iii) the Exemption provides no relief for any transaction "planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval."

The DOL's supplementary comments in the preamble reinforce the theme of QPAM independence, both from plan sponsors and from parties in interest: "Without an overarching compliance-focused approach to its asset management arrangement and Section I(c), the protective purposes of ensuring the QPAM's *independence* is undermined."[17] Moreover, Section I(c) is intended "to make clear that a QPAM must not permit a *Party in Interest to make decisions* regarding Plan investments under the QPAM's control."[18] Thus, a key objective of banks and their advisers is to ensure that both are and remain independent, and perform their respective responsibilities independently, of any party in interest engaging in transactions with their CITs.

In general, the determination of whether a fiduciary is "independent" of another party requires an examination of relevant facts and circumstances. The Exemption itself requires that the QPAM cannot be "related to"—defined broadly in comprehensive terms[19]—a party in interest with which an investment fund transacts.[20] Beyond this, the concept of fiduciary "independence" is addressed comprehensively in DOL regulations governing applications for individual prohibited transaction exemptions.[21] The regulations define the term "qualified independent fiduciary" as "any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is *independent of and unrelated* to any party in interest engaging in the exemption transaction (and its affiliates)."[22] Facts and circumstances relevant to the determination of whether a fiduciary is independent may include the amount of revenues the fiduciary derives from parties in interest engaging in the exemption

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transaction (and their affiliates) relative to the fiduciary's revenues from all sources[23] and "the extent to which the plan's counterparty in the transaction *participated in or influenced the selection of the fiduciary*."[24]

Identification of Decision-Maker

As described above, while the DOL acknowledged that a bank may rely on an adviser prudently selected and monitored to assist the bank in managing plan assets, it also asserted that the bank should not "more readily rely" on its adviser if doing so means the bank would not have sole authority with respect to the transaction.[25] However, if a bank retains an adviser having expertise and experience with particular types of CIT investments or investment strategies, it does so for the very purpose of taking advantage of the adviser's expertise. Thus, it is logical for such banks typically to accept—and rely on—the adviser's recommendations or decisions. Consistent with the Bank Maintained Requirement, the bank necessarily must exercise a degree of involvement in and oversight of the adviser's activities. Neither party has "sole" responsibility for CIT transactions; at the same time, however, each party has sole responsibility within its respective role mandated by regulation. Thus, while the adviser has "sole authority" to recommend or effect CIT transactions, the bank, consistent with its regulatory mandate of exercising "ultimate" responsibility over CIT investments, has "sole authority" to monitor, accept or reject, or, where applicable, effect CIT transactions. Importantly, in all circumstances, "sole authority" for planning, negotiating, and initiating transactions rests with parties *other than* a party in interest (including a plan sponsor) or other counterparty dealing with the CIT.

A reasonable surmise is the DOL's primary concern with shared responsibility CIT arrangements is that they may not clearly identify which party has primary or ultimate responsibility for particular transactions. The DOL previously considered an analogous situation in Advisory Opinion 80-73A (October 21, 1980) (AO-80-73A). In that case, a US-based bank (Applicant) proposed to act as a "named fiduciary" for ERISA plans for which other banks acted as directed trustees. The directed trustees would enter into an arrangement with the Applicant and certain foreign investment managers with respect to plan assets held by the directed trustees. The foreign managers would have the authority to direct plan investments that the Applicant would be instructed to settle. The Applicant would be obligated to review, prior to settlement, the prudence and advisability of investment transactions. If the Applicant found a transaction to be imprudent or inadvisable, it could "back out" or "reverse" the transaction. If other parties involved were unwilling to reverse the transaction, the Applicant would have the power to direct the sale of securities in question subsequent to settlement. In addition, the Applicant would be obligated to review the plan's portfolio on a monthly basis and to direct the sale of securities it considered inadvisable.

The Applicant requested an advisory opinion that the Applicant would be considered to exercise "management and control" of plan assets within the meaning of DOL regulations under ERISA § 404(b).[26] The DOL concluded that the Applicant would have management and control for purposes of the regulation and, consequently, the proposed arrangement "may be permissible" under ERISA § 404(b). However, the DOL declined to express a view "as to the prudence of an arrangement pursuant to which two separate fiduciaries are given *equal authority* to direct the disposition of the same plan assets *without prior consultation or coordination*." (emphasis added).

Although AO-80-73A addressed issues under ERISA § 404(b), the DOL's concerns with undefined fiduciary responsibility arrangements seem obvious and arguably are equally applicable to shared responsibility CIT arrangements. Accordingly, bank-adviser arrangements that are structured properly to address these concerns—e.g., through documentation expressly delineating separate (not necessarily equal) authority for bank and adviser

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with respect to CIT investments and providing procedures for coordination between them in appropriate circumstances[27]—should be sufficient to conform to the Sole Responsibility Requirement.

QPAMs and Guidelines

QPAMs are expected to act independently of parties in interest and plan sponsors. They are not, however, expected to do so in a vacuum. Thus, Section I(c) expressly permits a QPAM to provide guidelines to property managers authorized to enter into transactions with parties in interest on behalf of an investment fund. In addition, the DOL has stated that the Exemption is available where plan sponsors provide investment guidelines to the QPAM. In both cases, the QPAM must retain full fiduciary responsibility for the transaction and the transaction may not be part of an agreement, arrangement, or understanding designed to benefit a party in interest. Similarly, shared responsibility CIT arrangements contemplate guidelines provided by or to the QPAM subject to the same conditions.

Bank as QPAM

As described above, a bank may retain an adviser to provide nondiscretionary investment advisory services. In such cases, the adviser provides recommendations subject to approval or authorization of a bank. The bank typically accepts the recommendation and, where necessary, seeks to rely on the Exemption. This process shares key characteristics with arrangements under which property managers, acting under a QPAM's supervision, may make decisions for transactions covered by the Exemption. The DOL determined to allow arrangements with non-QPAM property managers in response to commenters who indicated that real property investments frequently require on-site management by property managers who may engage in numerous transactions with respect to particular properties. The commenters argued it would be difficult for a QPAM responsible for plan investments in real property to approve each transaction and, importantly for present purposes, the property managers typically act in accordance with detailed guidelines developed by the QPAM and are subject to review and monitoring by the QPAM.

Similarly, banks, particularly those maintaining several CITs with differing investment objectives and strategies, may retain different advisers recommending or engaging in numerous investment transactions involving a variety of asset types and investment strategies, including, but not limited to, real property. To conform to the Bank Maintained Requirement and fiduciary responsibilities under ERISA, banks establish and carefully supervise adviser compliance with detailed written parameters and guidelines governing CIT investments. There seems to be little substantive difference between the situation in which a property manager acting under a QPAM's supervision and guidelines may make decisions for an investment fund, as expressly permitted by Section I(c), and that in which an adviser makes investment recommendations under guidelines established by a bank acting as a QPAM for its CIT. Particularly when viewed in the context of the DOL's primary objective of ensuring a QPAM acts independently of any party in interest (or plan sponsor) and its guidance emphasizing the importance of identifying the decision-maker and the scope of its responsibilities when more than one fiduciary has responsibility, as described above, it seems logical to conclude that a bank that retains a nondiscretionary investment adviser that adheres to that guidance should be entitled to rely on the Exemption.

Adviser as QPAM

As also described above, a bank may retain an adviser to provide discretionary investment management services. In these cases, the adviser, subject to ongoing review and monitoring by the bank, makes investment decisions

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and, where necessary, may seek to rely on the Exemption. This process is not unlike that in which QPAMs act under guidelines established and monitored by plan sponsors (or their consultants). In this regard, the DOL has stated that the Exemption is available where the QPAM is subject to plan sponsor investment guidelines, so long as there is no arrangement for the QPAM to negotiate, or engage in, any specific transaction or to benefit any specific person.[28] Thus:

> The Department's intent and additional clarification regarding the proposed changes reemphasize that a Plan sponsor can provide investment guidelines to a QPAM. The natural corollary would be for Plan sponsors to revisit those investment guidelines at appropriate intervals. One of the Department's key points with the proposed changes to Section I(c) is that any direction from a Plan sponsor or other Party in Interest for a QPAM to engage in a particular transaction would be contrary to the intent of Section I(c). A Plan sponsor that utilizes multiple QPAMs, however, may interact with each manager as part of a larger overall investment strategy as long as the QPAMs retain the sole authority to engage in transactions in accordance with the strategy, and there is no direct or indirect arrangement for any QPAM to negotiate, or engage in, any specific transaction or to benefit any specific person.[29]

As is the case where a bank retains an adviser to provide nondiscretionary advisory services (and rely on the Exemption), there appears to be little substantive difference between the situation in which a plan sponsor provides guidelines to a QPAM and that in which a bank provides guidelines to an adviser making discretionary investment decisions. Here again, when considered in light of the DOL's primary objectives of ensuring a QPAM independence and identifying the decision-maker when more than one fiduciary has responsibility, it seems logical to conclude that parties in both situations that adhere to that guidance should be entitled to rely on the Exemption.

CONCLUSION

Banks and discretionary advisers that adhere to certain guidelines consistent with the protective objectives of Section I(c) should be entitled to rely on the Exemption for CIT transactions involving parties in interest of participating plans. There is no "one size fits all" approach that addresses all situations. As described above, banks use different approaches for retaining and monitoring advisers and conforming to the Bank Maintained Requirement. However, the guidelines described below, adapted and modified to fit the facts and circumstances of each CIT's structure, should serve as a good starting point for promoting compliance with the Exemption while at the same time adhering to the Bank Maintained Requirement.

Identify Decision-Maker

CIT documents and disclosures should clearly identify which party—bank or adviser—is authorized and responsible for making which decisions relating to CIT investments and transactions. This includes, among other things, informing independent fiduciaries of participating plans about the scope of the respective responsibilities of the bank and the adviser (as described below).

Define Scope of Responsibilities

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CIT documents and disclosures should clearly describe how the bank and the adviser bifurcate responsibility for CIT transactions. As described above, CIT documents might confirm, for example, that the adviser has sole responsibility to provide discretionary investment management services, while the bank has sole responsibility for establishing and monitoring adviser compliance with CIT investment guidelines.

Act in Accordance With Defined Responsibilities

The bank and the adviser should conduct their affairs consistent with their defined responsibilities. For example, if the adviser has responsibility for discretionary investment management, the adviser should be involved in trade-related matters, such as receiving and reviewing trade confirmations and reviewing and executing (possibly together with the bank) trade-related agreements, such as derivative and clearing agreements and futures commission merchant agreements.

Bank's Ultimate Authority/Responsibility

CIT documents should confirm the bank's ultimate authority and responsibility for CIT investments as and to the extent mandated by the Bank Maintained Requirement. This may include, where necessary or advisable in the bank's discretion, taking action to override an adviser's recommendation or decision.

No Benefit to Party in Interest

Banks and advisers should ensure that there is no agreement, arrangement, or understanding that any CIT transaction made in reliance on the Exemption is designed to benefit a party in interest (including a participating plan sponsor). This includes a transaction that has been planned, negotiated, or initiated by a party in interest, in whole or in part, and presented to the QPAM for approval. As the DOL reemphasized in the preamble to the Section I(c) amendments:

> The role of the QPAM under the terms of the exemption is not to act as a mere independent approver of transactions. Rather, the QPAM must have and exercise sole discretion over the commitments and investments of Plan assets and the related negotiations on behalf the Plan with respect to an Investment Fund . . . for the relief provided under the exemption to apply.[30]

Independence

Finally, and most importantly, both bank and adviser should ensure each of them is and at all times remains independent and acts independently of any party in interest dealing with the CIT. How this is done in practice will depend on the facts and circumstances of each situation. However, certain basic principles articulated by the DOL for ensuring independence, as described above, provide a good starting point.

FOOTNOTES

[1] Amendment to Prohibited Transaction Class Exemption 84–14 for Transactions Determined by Independent Qualified Professional Asset Managers (the QPAM Exemption), 89 Fed. Reg. 23090 (Apr. 3, 2024). The Exemption originally was adopted in 1984. *See* Class Exemption for Plan Asset Transactions Determined by

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Independent Qualified Professional Asset Managers, 49 Fed. Reg. 9494 (Mar. 13, 1984), as corrected at 50 Fed. Reg. 41430 (Oct. 10, 1985). Before the 2024 amendments, the Exemption was amended in 2002 (67 Fed. Reg. 9483 (Mar. 1)), 2005 (70 Fed. Reg. 49,305 (Aug. 23)), and 2010 (75 Fed. Reg. 38837 (July 6)).

[2] ERISA § 3(14) defines "parties in interest" to include: (i) the plan's sponsoring employer, (ii) any labor union whose members are covered by the plan, (iii) any fiduciary of the plan (e.g., trustee or investment manager), (iv) any person providing services to the plan (e.g., broker-dealer or custodian), and (v) certain persons affiliated with the foregoing.

[3] PTE 84-14, § VI(b).

[4] Other exemptions may be available for transactions between CITs and parties in interest. PTE 91-38, for example, includes, among other exemptions, a blanket exemption for transactions between a CIT and parties in interest of each investing ERISA plan whose interest in the fund does not exceed 10% of total CIT assets at the time of the transaction, as well as exemptions for transactions involving short-term investments funds and between CITs and certain service providers of participating plans. ERISA § 408(b)(17) also provides a broad exemption for transactions with service providers subject to certain conditions; however, open questions, such as a lack of guidance from the DOL regarding the definition of "adequate consideration" for purposes of ERISA § 408(b)(17), or other facts and circumstances, may cause parties to favor the Exemption. Moreover, party-in-interest counterparties often require plan fiduciaries to represent that the fiduciaries qualify as QPAMs and, in some cases, may require compliance with the Exemption.

[5] 89 Fed. Reg. at 23110.

[6] *Id*. The practicality of this approach is unclear, given that the DOL has issued only a handful of advisory opinions in recent years, not to mention the time and expense of seeking one.

[7] 49 Fed. Reg. at 9497.

[8] *Id*.

[9] PTE 84-14, § I(c) (2010).

[10] 89 Fed. Reg. at 23109.

[11] Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (the QPAM Exemption), 87 Fed. Reg. 45204 (July 22, 2022).

[12] 89 Fed. Reg. at 23110 (emphasis added). The "sole authority" requirement seems overly strict when viewed in light of other language providing that the Exemption applies "to the extent" that the disposition of investment fund assets is subject to the discretionary authority of a QPAM. PTE 84-14, § VI(b).

[13] The Bank Maintained Requirement is discussed extensively in W. Wade, "Bank-Sponsored Collective Investment Funds: Multi-Dimensional Regulation," published by the American Bankers Association (2015), at 117–44.

[14] *See, e.g.*, DOL Advisory Opinion 2006-07A (Aug. 15, 2006) (stating that a trust company subsidiary is authorized "to make investment recommendations and decisions in accordance with Fund guidelines" and CIT governing documents and applicable federal laws and regulations, including ERISA, provided the trust company remains "fully responsible under the relevant trust agreements for the management and operation of the Funds").

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[15] Plan sponsors or their designees make fiduciary decisions, based on disclosures provided by the bank, the plan's individual investment objectives and strategies, and other considerations, as to whether the plan should participate in, and when and if it should withdraw from, the CIT. Plan sponsors that choose to invest plan assets in a CIT appoint the bank maintaining the CIT as trustee and investment manager for the plan, but they otherwise have no involvement with or authority over the bank's selection and appointment of CIT advisers or over CIT investments recommended or made by those advisers.

[16] 89 Fed. Reg. at 23108.

[17] *Id*. (emphasis added).

[18] *Id*. (emphasis added).

[19] A QPAM is "related" to a party in interest if, as of the last day of its most recent calendar quarter: (i) the QPAM owns 10% or more of the party in interest, (ii) a person controlling or controlled by the QPAM owns 20% or more of the party in interest, (iii) the party in interest owns 10% or more of the QPAM, or (iv) a person controlling or controlled by the party in interest owns 20% or more of the QPAM. A party in interest also is related to the QPAM if (i) a person controlling, or controlled by, the party in interest has an ownership interest that is less than 20% but greater than 10% in the QPAM, and such person exercises control over the management or policies of the QPAM by reason of its ownership interest; or (ii) a person controlling, or controlled by, the QPAM has an ownership interest that is less than 20% but greater than 10% in the party in interest, and such person exercises control over the management or policies of the party in interest by reason of its ownership interest. Id. § VI(h).

[20] PTE 84-14, § I(d).

[21] 29 C.F.R. §§ 2570.30, et seq.

[22] *Id*. § 2570.31(j) (emphasis added).

[23] The DOL generally will not conclude that a fiduciary's independence is compromised solely based on the revenues it receives from parties in interest (and their affiliates) to the extent that the fiduciary neither receives nor is projected to receive more than 2% of its revenues within the current federal income tax year from such parties. *Id*.

[24] *Id*. (emphasis added).

[25] When it adopted the original exemption, the DOL expressed concern that, where the QPAM has less than ultimate discretion over acquisitions for a fund it manages, the potential for decision-making that would inure to the benefit of a party in interest would be increased. Consequently, the DOL was "unable to conclude that the retention of a veto or approval power by the plan sponsor or its designee would be consistent with the underlying concept of the QPAM exemption." 49 Fed. Reg. at 9496–97. Notably, however, the DOL did not equate CIT bank-adviser arrangements with such "veto or approval" arrangements, which were described as joint decision-making procedures whereby the sponsor of a plan investing in real estate retained the right to veto or approve each transaction negotiated by various investment managers so as to ensure consistency with the plan's investment objectives and proper diversification. It appears the DOL may have recognized that such arrangements are distinguishable from those in which a bank has authority to veto or approve CIT transactions in that the bank is a fiduciary presumably independent of any sponsor or other party in interest of a plan participating in the CIT.

[26] ERISA § 404(b) prohibits a plan fiduciary from maintaining the indicia of ownership of plan assets outside the

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jurisdiction of US district courts, except as authorized by DOL regulations. DOL regulations permit plan assets to be held outside US district court jurisdiction if such assets are under the "management and control" of a fiduciary organized under the laws of and having its principal place of business within the United States and meeting certain other requirements. 29 C.F.R. § 2550.404b-l(a)(2)(i). The regulations define "management and control" as the power to direct the acquisition or disposition through purchase, sale, pledging, or other means. Id. § 2550.404b-l(c).

[27] ERISA expressly contemplates allocation of responsibilities among multiple plan fiduciaries. *See, e.g.*, ERISA § 405(c)(1) (stating that a plan may provide for procedures for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries).

[28] 89 Fed. Reg. at 23108.

[29] *Id*. at 23110.

[30] *Id*. at 23109.

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